

CAUTION AND THE CONSTITUTION: SHOULD THERE BE AN ARTICLE V CONVENTION FOR PROPOSING AMENDMENTS?

*William A. Woodruff*¹

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1. BA University of Alabama (1970); JD (Magna Cum Laude) University of South Carolina School of Law (1978); US Army Judge Advocate Generals' Corps (retired); Professor of Law *Emeritus*, Campbell University School of Law, Raleigh, NC. I am grateful for the editorial assistance of Libby Scheurman, (Cumberland School of Law JD candidate '24).

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ABSTRACT

Advocates of convening a convention for proposing amendments to the Constitution are pursuing a sophisticated campaign to convince state legislatures to petition Congress to call a convention under Article V of the Constitution. They believe the only way to restrain government spending, limit expanding federal power, and limit federal terms of office is to invoke Article V and amend the Constitution. Specifically, they seek to require Congress to call a convention to draft, debate, and approve proposed amendments to further their policy goals. Though the convention mode of amending the Constitution has never been invoked, those urging states to pursue this method predict the only amendments to come out of a convention would be ones consistent with their political philosophy and policy preferences. Opponents fear that once convened, a convention may produce proposed amendments that do not align with their preferred policy goals and may cause more harm than good. This article suggests that state legislators who are asked to vote to petition Congress for a convention should examine the historical record surrounding the adoption of the convention method in Article V, review the knowns and unknowns of the convention mode of amending the Constitution, and consider current political realities before supporting the movement to call a convention for proposing amendments.

I. INTRODUCTION: THE ARTICLE V CONTROVERSY

“Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious

circumstance, I should tremble for the result of a Second”²

Those were the words of James Madison, the Father of the Constitution, when asked if a convention should be convened to consider amending the Constitution to add a bill of rights. While the Bill of Rights was ultimately proposed by Congress and ratified by the states, the question Madison was responding to was not whether amendments were needed but what method of amending should be pursued.³ His warning about the risks of the convention method of amending the Constitution should give pause to even the most ardent supporter of an Article V convention.

Advocates of the current campaign to convene an Article V convention urge state legislatures to petition Congress to initiate a constitutional process that has never been used in our nation’s history.⁴ They predict, with certainty, that the only amendments to come out of a convention would align with their political philosophy and policy preferences.⁵ But nothing about this campaign or its prospective results are certain. The name of the proposed event, its participants, its agenda, and possible outcomes

2. *James Madison letter to G. L. Turberville, Nov. 2, 1788*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0243> (last visited May 7, 2022).

3. *George L. Turberville letter to James Madison, Oct. 20, 1788*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-11-02-0224> (last visited May 2, 2022).

4. CONG. RSCH. SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION*, 941–42 (Johnny H. Killian, et. al.) (Jun. 28, 2002) <https://www.govinfo.gov/content/pkg/CDOC-108sdoc17/pdf/CDOC-108sdoc17.pdf> (noting that the convention method of amending the Constitution had never been successfully invoked).

5. Not all proponents of an Article V convention support the same amendments. The American Legislative Exchange Council (ALEC) focuses its efforts on a convention limited to a balanced budget amendment. *Compact for America: A Balanced Budget Amendment*, ALEC, <https://alec.org/model-policy/resolution-to-effectuate-the-compact-for-america/> (last visited Apr. 28, 2022). At the other end of the spectrum, ArticleV.org believes the threshold for calling an Article V convention has been met and the convention should consider any and all amendments and “May the Best Amendments Win.” *About Us*, ARTICLEV, <https://articlev.org/about-us> (last visited Apr. 28, 2022). Falling somewhere in the middle, The Convention of the States Action project favors amendments that curtail federal spending, impose term limits on elected officials, and otherwise limit federal power. CONVENTION OF STATES ACTION, <https://conventionofstates.com/files/model-convention-of-states-application/download> (last visited Apr. 28, 2022).

are far from clear.

Some proponents of an Article V convention believe the only way to restrain government spending, limit expanding federal power, and limit federal terms of office, is to invoke Article V and amend the Constitution.⁶ Specifically, they seek to require Congress to call a convention to draft, debate, and approve proposed amendments to further their policy goals.⁷ Opponents fear that once convened, a convention may produce proposed amendments that do not align with expected policy goals and may cause more harm than no convention at all.⁸

One proponent, the Convention of States Action (CoSA), has launched a high-profile campaign to convince state legislatures that what they call a “convention of the states” can be limited to three broad topics.⁹ They have provided a model application that calls for a convention “limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.”¹⁰ By limiting the application to certain topics, CoSA claims there is no danger of the convention producing anything but the power-limiting amendments they favor.¹¹

Opponents, CoSA claims, are spreading “myths” and joining

6. See, e.g., CONVENTION OF STATES ACTION, ARTICLE V CONVENTION OF STATES POCKET GUIDE, 5–9, https://cosaction-prod.s3.amazonaws.com/public/pocket_guide_digital.pdf (last visited May 9, 2022).

7. *Id.*

8. See, e.g., Steve Byas, *Constitutional Convention is Not the Solution to Big Government*, EPOCH TIMES (Feb. 24, 2021), https://www.theepochtimes.com/constitutional-convention-is-not-the-solution-to-big-government_3706827.html.

9. CONVENTION OF STATES ACTION, APPLICATION FOR A CONVENTION OF THE STATES UNDER ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES, <https://conventionofstates.com/files/model-convention-of-states-application/download> (last visited Apr. 28, 2022).

10. *Id.*

11. See, e.g., CONVENTION OF STATES ACTION, *supra* note 6, at 19 (“A Convention of States can only propose amendments that fit within the topic of the applications adopted by the state legislatures. So, for example, a Convention that is called to limit the power of the federal government could not propose an amendment to reduce our rights and expand federal power.”).

forces with progressives to oppose an Article V convention.¹² Other organizations have joined the fray urging state legislatures to petition Congress to call a convention to consider their preferred topics.¹³ State legislators who are asked to support these campaigns by voting to petition Congress for an Article V convention must carefully consider whether the promises of the proponents are reliable and whether the unknowns create risks that outweigh any benefits.

This article examines the constitutional claims, political considerations, and practical implications of invoking an unprecedented Article V event.¹⁴ Part II briefly reviews the historical context that led the Founders to include Article V in the Constitution. Part III identifies what we know about an Article V convention based on the text of the Constitution and the historical record. Part IV explores some of the ambiguities and unknowns that surround the convention method of proposing amendments and addresses various theories, opinions, and arguments proponents have offered to provide answers. Part V surveys some of the current political dynamics that would likely affect a convention for proposing amendments. Part VI analyzes James Madison's concerns about the convention method as revealed in his November 1788 letter to George Turberville and applies those concerns to the current political environment. Part VII concludes that convening an Article V convention is fraught with unknown and unknowable consequences. Accordingly, state legislators asked to vote in favor of applying for a convention for proposing

12. Rita Dunaway, *Five Myths About An Article V Convention*, CONVENTION OF STATES ACTION (July 17, 2017), <https://conventionofstates.com/files/article-13-five-myths-about-an-article-v-convention/download>.

13. Wolf-PAC is promoting a convention to address "corruption" in government by an amendment overruling the Supreme Court decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). WOLF-PAC, <https://wolf-pac.com> (last visited Apr. 26, 2022). Compact for America favors a balanced budget amendment. COMPACT FOR AMERICA, <https://www.compactforamerica.org/balanced-budget-compact-project> (last visited Apr. 26, 2022).

14. One advocacy group refers to an Article V convention as a "Convention of the States" (CoS). Some opponents refer to it as a Constitutional Convention (Con-Con). Neither of these labels are found in the Constitution. Since Article V calls the process a "convention for proposing amendments" (CPA), this paper will use that phrase or "Article V convention" to define what the discussion is about. U.S. CONST. art. V.

amendments should think long and hard before embarking upon an unprecedented experiment that could radically alter the Constitution—that for over 230 years had made the United States a “shining city upon a hill.”¹⁵

II. CONSTITUTIONAL HISTORY AND CONTEXT

A. *Founders Foresaw the Need for Amendments*

After declaring independence from Great Britain in 1776, the thirteen colonies drafted and ratified the Articles of Confederation to formalize their cooperative arrangement and to give structure to the new nation.¹⁶ The Articles preserved the autonomy of the states and granted the central government limited powers to conduct foreign affairs, provide for the common defense, and receive money from the states to fund those enterprises.¹⁷

It soon became apparent that the central government, while adequate to successfully prosecute the Revolutionary War when all thirteen states were aligned in the goal to separate from England, was not adequate to address the myriad of issues facing the new nation in peace. Protectionist attitudes within the states resulted in discriminatory regulations that stymied commerce and cooperation.¹⁸ Under the Articles of Confederation, Congress had no authority to address those issues.¹⁹

In January 1786, the Virginia legislature appointed delegates to meet with representatives of the other states “to examine the relative situations and trade of the said States, to consider how far an uniform System in their Commercial regulations may be

15. Ronald Reagan, *Farewell Address: Shining City Upon A Hill*, YOUTUBE <https://youtu.be/c32G868tor0> (last visited May 10, 2022).

16. *Articles of Confederation (1777)*, NAT'L ARCHIVES <https://www.archives.gov/milestone-documents/articles-of-confederation> (last visited May 10, 2022).

17. *Id.* art. II (state sovereignty); *id.* arts. VI, IX (foreign affairs); *id.* art. VIII (funding).

18. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, *supra* note 4, at XIV.

19. *Identifying Defects in the Constitution*, LIBR. OF CONG. <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/to-form-a-more-perfect-union/identifying-defects-in-the-constitution/> (last visited May 21, 2022).

necessary to their common Interest and their permanent Harmony, and to report to the several States such an act relative to this great Object as, when unanimously ratified by them will enable the United States in Congress assembled effectually to provide for the same.”²⁰ The Virginia delegation proposed the delegates convene in Annapolis, Maryland, on the first Monday in September, 1786.²¹ Only twelve delegates from five states attended and the convention was unable to solve the problems that prompted its call.²² The only “official” work of the convention was a resolution calling for a national convention to address the weaknesses of the Articles of Confederation.²³ This resolution served as the impetus for the Philadelphia Convention of 1787.

Responding to the recommendation of the Annapolis Convention, seven of the thirteen states passed resolutions calling for a convention. On February 21, 1787, Congress passed a resolution calling for a convention “for the sole and express purpose of revising the Articles of Confederation.”²⁴ The remaining five states joined after Congress issued its resolution.²⁵

New York, Massachusetts, and Connecticut sent their delegates to Philadelphia for the “sole and express purpose of revising the Articles of Confederation,” the same limitation

20. *Resolution Authorizing a Commission to Examine Trade Regulations*, 21 Jan. 1786, NAT'L ARCHIVES <https://founders.archives.gov/documents/Madison/01-08-02-0247> (last visited May 21, 2022).

21. *James Madison letter to Thomas Jefferson*, Mar. 18, 1786, NAT'L ARCHIVES <https://founders.archives.gov/documents/Madison/01-08-02-0268> (last visited Nov. 30, 2022).

22. ANNAPOLIS CONVENTION, *Address of the Annapolis Convention*, Sept. 14, 1786, NAT'L ARCHIVES <https://founders.archives.gov/documents/Hamilton/01-03-02-0556> (last visited May 21, 2022).

23. *Id.*

24. Virginia, New Jersey, Pennsylvania, North Carolina, New Hampshire, Delaware, and Georgia all passed resolutions calling for a convention to address the shortcomings of the government of the Union under the Articles of Confederation before Congress issued its call. New York, South Carolina, Massachusetts Connecticut, and Maryland issued their own resolutions supporting the convention after Congress acted. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 559–86 (M. Farrand rev. ed. 1911), <https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-3vols> (last visited May 22, 2022) [hereinafter *Farrand Records*].

25. Rhode Island did not send delegates to the Philadelphia Convention but subsequently ratified the Constitution. *Id.* at 565.

expressed by Congress in its February 21, 1787, resolution.²⁶ The remaining states adopted language similar to the Virginia resolution calling for a convention to “render the Foederal Constitution adequate to the exigencies of the Union.”²⁷

The lack of a uniform purpose in the various resolutions led some delegates to believe they only had the power to revise the Articles of Confederation and not to create a new form of government.²⁸ Others believed their power was not so constrained. The New York delegation illustrates the divergent views of the delegates as to the scope of the convention’s power. Alexander Hamilton, John Lansing, Jr., and Robert Yates were commissioned by the New York legislature to represent New York at the Convention.²⁹ When it became apparent the convention was working toward a new constitution and not merely amending the Articles of Confederation, Lansing and Yates objected. They left the Convention and did not participate or sign the Constitution.³⁰ That left Hamilton as the only New York delegate. Because the

26. 3 Farrand *Records*, *supra* note 24, at 579–80 (Resolution of Congress and New York); *id.* at 584–85 (Massachusetts); *id.* at 585 (Connecticut).

27. *Id.* at 560; *id.* at 563 (New Jersey: “render the Constitution of the Federal Government adequate to the exigencies thereof.”); *id.* at 565 (Pennsylvania: “revising the federal Constitution for the purpose of making such Alterations and amendments as the exigencies of our Public Affairs require.”); *id.* at 567 (North Carolina: “for the purpose of revising the Foederal Constitution.”); *id.* at 572 (New Hampshire: “render the federal Constitution adequate to the exigencies of the Union.”); *id.* at 574 (Delaware: “revising the Federal Constitution, and adding thereto such further Provisions, as may render the same more adequate to the Exigencies of the Union.”); *id.* at 577 (Georgia: “render the Federal Constitution adequate to the exigencies of the Union.”); *id.* at 581 (South Carolina: “render the Foederal Constitution entirely adequate to the actual Situation and future good Government of the confederated States.”); *id.* at 586 (Maryland: “render the Foederal Constitution adequate to the exigencies of the Union.”).

28. Only 39 of the 55 delegates signed the Constitution at Philadelphia. Some, like Yates and Lansing of New York had returned home when the convention decided to pursue a new form of government rather than just amend the Articles of Confederation. Others remained and participated but objected to portions of the document and refused to sign despite Benjamin Franklin’s attempt to secure unanimity by not formally approving the document but merely attesting to the document as the result of the convention. *The Founding Fathers: New York*, NAT’L ARCHIVES <https://www.archives.gov/founding-docs/founding-fathers-new-york#lansing> (last visited June 22, 2022).

29. 3 Farrand *Records*, *supra* note 24 at 579–81.

30. *Id.* at 245–47.

New York resolution sending delegates required a quorum of two to cast the state's vote, New York did not vote on the various proposals as they arose after Lansing and Yates left. Hamilton, however, supported the Constitution and signed the document as a witness to the proceedings.³¹

It is beyond the scope of this article to resolve the debate over the scope of the delegates' authority and whether they exceeded their authority in proposing a new constitution instead of just revising the Articles of Confederation.³² The incontrovertible fact is the delegates who attended and participated decided the convention's scope and crafted the Constitution without supervision, oversight, or control by either Congress or the state legislatures. The Convention adopted a rule of secrecy that precluded disclosure of the business of the Convention without approval of the Convention.³³ Thus, ongoing coordination and

31. Technically, a vote of the states to approve the Constitution by the Convention was not taken. To avoid what he feared might be a divisive and counterproductive measure, Benjamin Franklin made a motion to forego a state-by-state approval of the document and asked the delegates to sign the Constitution as witnesses to what the Convention produced. That allowed delegates like Hamilton who favored the Constitution but lacked authority to cast a vote for New York, to sign. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 641–48 (M. Farrand rev. ed. 1911) available at <https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-3vols>.

32. The issue of whether the Constitution was “legally” proposed by the Philadelphia Convention of 1787 is basically moot. In the first significant decision in its history, the Supreme Court held in *Chisholm v. Georgia*, 2 U.S. 419 (1793) that the Constitution abrogated states' claims of sovereign immunity and states could be sued in federal court by citizens of other states. Had there been a serious question of whether the Constitution was proposed and ratified legally, the Court would have needed to resolve that question before ruling on the claims before it. *Chisholm v. Georgia*, 2 U.S. 419 (1793) was abrogated when the XI Amendment was ratified in 1795. Ten years later the Court decided arguably the most important case in its history, *Marbury v. Madison*, 5 U.S. 137 (1803), and held that the federal courts had the constitutional power to review and strike down laws and executive actions that violate the Constitution. The “legality” of the Constitution itself was not questioned.

33. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 15 (M. Farrand rev. ed. 1911) available at <https://oll.libertyfund.org/title/farrand-the-records-of-the-federal-convention-of-1787-3vols>. The historical record reveals that there may have been some leaks over the course of the convention, but there is no evidence of detailed supervision, management, control, or direction provided by either Congress or state legislatures. See, e.g., 3 Farrand Records, *supra* note 24 at 48–49; 54–55; 66; 72–74; 76–77; 80 (correspondence between delegates and

direction from state legislatures or Congress was foreclosed.

B. The Article V Compromise

1. Overview

The Founders wisely believed that future events and experiences under a new form of government would require amendments to meet unforeseen exigencies.³⁴ They did not want to repeat the mistakes of the Articles of Confederation and its unwieldy amendment process.³⁵ Article V, as finally adopted by the Convention and ratified by the states, provides for two methods of amending the Constitution:

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 of the other Mode of Ratification may be proposed by Congress³⁶

The language of Article V is clear but sparse: First, Congress may approve a proposed amendment by a two-thirds vote of both the House and the Senate and send it to the states for ratification. When three-fourths of the states ratify it by vote of the legislature

non-delegates).

34. For a historical overview of the work of the Constitutional Convention of 1787 that drafted Article V and a discussion of a number of the issues surrounding how a convention for proposing amendments might work, see Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355 (1979). See also Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 As A Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1709–23 (2012) (summarizing the proceedings of the Philadelphia Convention of 1787); Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197 (1994) (detailing the debates surrounding and ultimate adoption of Article V).

35. ARTICLES OF CONFEDERATION 1781, art. XIII (revisions required the unanimous approval of the states).

36. U.S. CONST. art. V.

or by a state convention, whichever method Congress specifies, the amendment becomes part of the Constitution with full force and effect. This method has been used successfully to amend the Constitution twenty-seven times.³⁷

The second method, giving rise to the current controversy, requires two-thirds of the states' legislatures to submit an "application" to Congress to call a "convention for proposing amendments."³⁸ The resulting convention would meet, draft, debate, deliberate, and potentially produce an amendment or amendments. Those amendments would then be sent to the states for ratification by three-fourths of either the legislatures of the states or by three-fourths of the state conventions, depending upon the method specified by Congress. Upon ratification, the amendment(s) would become part of the Constitution with full force and effect. To date, though many applications from states have been submitted over the years, the convention for proposing amendments (CPA) method has never been invoked.³⁹

2. The Path to Article V

The inclusion of the convention method in Article V was intended to address the concerns of the anti-federalists that an oppressive national government would not be inclined to amend the Constitution to rein in the government's expanding and oppressive powers.⁴⁰ Edmund Randolph of Virginia proposed the initial idea that "provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary, and

37. https://www.senate.gov/reference/reference_index_subjects/Constitution_vrd.htm (last visited Mar. 29, 2022). Over the course of 200 years approximately 11,800 amendments have been introduced in Congress. <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm> (last visited May 11, 2022). Of those, only 33 have garnered the two-thirds super majority needed to go to the states for ratification. <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/> (last visited May 11, 2022).

38. U.S. CONST. art. V.

39. For one organization's count of the various applications submitted over the years, see <http://www.foavc.org/StateApplications/Numeric.htm> (last visited Apr. 10, 2022) (claiming Congress has received sufficient applications over the two centuries since the Constitution was ratified to call 11 conventions.).

40. Voegler, *supra* note 34 at 361.

that the assent of the National Legislature ought not to be required thereto.”⁴¹

Though some members of the convention questioned the need for a provision allowing amendments or allowing amendments without the consent of Congress, George Mason spoke in favor of the idea:

The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust them to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account.⁴²

The convention discussed the issue on June 11, 1787, and approved a resolution providing for an amendment process to be included in the new Constitution.⁴³ On August 6, 1787, the Committee of Detail offered the first full draft of the Constitution. That draft included Article XIX, which addressed the amendment issue by providing, “[o]n 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.”⁴⁴ Note this draft did not include provisions for Congress to initiate the amendment process.

The draft of Article XIX came up for discussion again on August 30, 1787. Gouverneur Morris of Pennsylvania suggested that Congress should have the power to call a convention to propose amendments whenever it found it necessary. Morris’s suggestion was not adopted, and the Convention unanimously approved the draft of Article XIX.⁴⁵

But the discussion was not over. On September 10, 1787, Elbridge Gerry of Massachusetts, concerned that two-thirds of the states could convene a convention and a majority of delegates could propose an amendment that would invalidate provisions of

41. 3 Farrand, *Records, supra* note 24 at 120.

42. 1 Farrand, *Records, supra* note 33 at 202–03.

43. *Id.* at 237.

44. 2 Farrand, *Records, supra* note 31 at 188.

45. *Id.* at 468.

state constitutions, moved to reconsider Article XIX.⁴⁶ Alexander Hamilton seconded Gerry's motion, agreed with Gerry's concerns, and added that since the national legislature would likely be the first to recognize problems arising under the Constitution, it should have a role in the amendment process.⁴⁷

James Madison supported the motion to reconsider and voiced a concern that is part of the current debate: Mr. Madison remarked on the vagueness of the terms 'call a Convention for the purpose' as sufficient reason for reconsidering the article. How was a Convention to be formed? By what rule Decide? What the force of its act?⁴⁸

The motion for reconsideration passed by a vote of nine to one.⁴⁹ A motion to amend Article XIX was offered, but Madison moved to postpone consideration of that amendment and offered his own substitute for Article XIX:

The Legislature of the U—S— whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S:⁵⁰

Madison's proposal was adopted, and the matter went to the Committee of Style and Revision for inclusion in the second draft of the Constitution.⁵¹ Madison's proposal gave the responsibility of proposing amendments to Congress. Congress could propose amendments "whenever two-thirds of both Houses shall deem necessary," or when "two-thirds of the Legislatures of the several states" applied for an amendment. Under Madison's view, the

46. *Id.* at 557–58.

47. *Id.*

48. *Id.* at 558.

49. *Id.*

50. *Id.* at 559.

51. *Id.* at 559 (John Rutledge of South Carolina offered an amendment to Madison's proposal that would protect the interests of slave-holding states until 1808. That amendment was also adopted.)

state legislatures would coordinate and submit to Congress a specific amendment which Congress would then be obligated to forward for ratification. There was no mention of a convention for proposing amendments, a convention of the states, or any other assembly acting between the state legislatures and Congress. The only convention envisioned is a ratification convention should Congress elect that method for ratification.

In the second draft of the Constitution, the Committee of Style and Revision included Madison's amendment provision as Article V—but the debate was not yet over.

On September 15, 1787, Article V was once again the topic of discussion. Roger Sherman of Connecticut expressed concerns that three-fourths of the states could conspire to abolish some states outright or to deny them equal representation in the Senate. If slave interests could be protected by precluding amendments that could potentially harm slave states, Sherman argued, Article V should also protect the sovereignty of states and their representation in the Senate.⁵²

George Mason, Madison's fellow Virginia delegate, did not share Madison's confidence that Congress was in the best position to decide when and what sort of amendments may be necessary. Mason believed Congress would act in its own interests, with no path around it for the people to propose amendments. From his perspective, a corrupt Congress could obstruct proposed amendments submitted by two-thirds of the states' legislatures.⁵³

Supporting Mason's objections, Gouverneur Morris and Elbridge Gerry offered an amendment to Article V to require Congress to call a convention upon application of two-thirds of the states' legislatures instead of receiving a proposed amendment from the state legislatures and sending it for ratification.⁵⁴ To Madison, whether Congress received an amendment from the states or applications for a convention was six of one and half a dozen of another. He did, however, note again the difficulties, ambiguities, and unknowns of calling a convention for proposing

52. *Id.* at 629.

53. *See id.*

54. *See id.*

amendments.⁵⁵ The Convention approved this draft of Article V and the previously unheard of “convention for proposing amendments” became a part of the Constitution.⁵⁶

The dual mode amendment process was the compromise that satisfied both those who feared an oppressive national government would be reluctant to propose amendments that would curtail its own power, and those who believed that the national legislature was probably in the best position to recognize and address problems arising under the new structure. The inclusion of the dual mode amendment process of Article V was a positive feature and was viewed as a reason for ratification.⁵⁷

Since ratification of the Constitution, the Congress-proposed route of amending has been used successfully twenty-seven

55. *Id.* at 629–30 (“Mr. Madison 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 call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum which in Constitutional regulations ought to be as much as possible avoided.”). See 2 FARRAND RECORDS, *supra* note 31, at 558 for Madison’s initial reservations about a convention for proposing amendments. Professor Robert Natelson, an advocate of an Article V convention and a prolific legal commentator on the Constitution, generally, and Article V, specifically, believes Madison’s doubts and concerns were probably addressed by other delegates just not recorded in the admittedly incomplete records of the Convention of 1787. Robert G. Natelson, *Is the Constitution’s Convention for Proposing Amendments A “Mystery”? Overlooked Evidence in the Narrative of Uncertainty*, 104 MARQ. L. REV. 1, 13 (2020) (citing Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 THE WRITINGS OF JAMES MADISON 398 (Galliard Hunt ed., 1910)). The cited letter reads, “Should the provisions of the Constitution as here reviewed be found not to secure the Gov.& rights of the States ag’t usurpations & abuses on the part of the U.S. the final resort within the purview of the Const. lies in an amendment of the Const. according to a process applicable by the States.” 9 THE WRITINGS OF JAMES MADISON 398 (Galliard Hunt ed., 1910). Madison’s letter to Everett states the obvious: the Constitution contains an amendment provision that can be initiated by the states, and it is a “final resort” when the Constitution fails to secure the form of government and the rights of the states against abuses by the federal government. It offers no evidence that Madison changed his views on the advisability of a convention for proposing amendments. At most, it acknowledges that Article V is part of the Constitution and a convention for proposing amendments should only be used as a “final resort.”

56. U.S. CONST. art. V.

57. Voegler, *supra* note 34 at 365; Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1, 13–26 (2016).

times.⁵⁸ The convention option has never been employed, though many applications from the states have been submitted over the years.⁵⁹ That does not mean, however, the option has had no effect. Pressure from states submitting applications for a CPA over the years has prompted Congress to propose amendments under its authority.⁶⁰

III. WHAT WE KNOW ABOUT AN ARTICLE V CONVENTION

A. *Unique Constitutional Status*

The debate over Article V was prompted by a desire to create an amendment process that was not as difficult as the Articles of Confederation and not so easy that amendments would be commonplace.⁶¹ Changes to the Articles of Confederation could only be proposed by Congress, and any changes had to be agreed upon by every state of the Union.⁶²

The dual method of proposing amendments gives both Congress and the states the ability to propose amendments. Upon the application of two-thirds of the states, Congress must call a convention. If a convention proposes amendments, Congress specifies the mode of ratification the states must use. Neither the

58. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, *supra* note 4, at 940.

59. See Michael Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509 (2010) (detailing numerous issues and uncertainties surrounding the convention method to explain why it has never been used and suggesting changes to Article V that would even the playing field between Congress and the states regarding the amendment process).

60. Applications from state legislatures to call a CPA to propose an amendment to provide for the direct election of senators likely prompted Congress to propose the XVII Amendment and send it to the states for ratification. Jonathan Stahl, *The controversy over the direct election of Senators*, NAT'L CONST. CENTER (Apr. 8, 2016), <https://constitutioncenter.org/blog/the-controversy-over-the-direct-election-of-senators#:~:text=As%20more%20and%20more%20states,on%20April%208th%2C%201913> (last visited Apr. 10, 2022).

61. See Voegler *supra*, note 34 at 365.

62. ARTICLES OF CONFEDERATION of 1777, art. XIII (“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.”).

duties or powers of Congress regarding the convention mode nor the congressionally proposed amendment mode are contained in Article I, Section Eight, of the Constitution where the legislative powers are listed. Article V carves out the amendment process as separate and unique from the general legislative function of Congress.⁶³

The Founders could have included a provision in Article I, Section Eight, empowering Congress to propose amendments and to call a convention for that purpose upon the application of two-thirds of the states. Instead, to highlight the uniqueness as well as the importance of the amendment process, they addressed it in a separate article.

They also indicated the uniqueness by creating a new and unheard-of method of proposing amendments: a “convention for proposing amendments.”⁶⁴ They could have specified a “convention of the states” for proposing amendments.⁶⁵ Instead, they created a new assembly, one whose only function was to propose amendments to the Constitution of the United States. A “convention for proposing amendments” did not exist in law or practice prior to the ratification of the Constitution.

James Madison expressed concern when the concept of a convention was first proposed in the draft of Article XIX.⁶⁶ Madison supported a motion to reconsider “the vagueness of the terms, ‘call a Convention for the purpose.’”⁶⁷ Madison questioned, “[h]ow was a Convention to be formed? [B]y what rule decide? [W]hat the force if its acts?”⁶⁸

The motion to reconsider passed, and the language of Article V was adopted without clarifying the “vagueness” surrounding the

63. Compare U.S. CONST. art. I (general legislative powers of Congress) with U.S. CONST. art. V (amendment process).

64. U.S. CONST. art. V.

65. But see Robert G. Natelson, *Article V: A Handbook for State Lawmakers*, 4, ALEC https://alec.org/wp-content/uploads/2016/06/2016-Article-V_FINAL_WEB.pdf (“The Constitution does not explain the role, composition or procedures for a convention for proposing amendments. This was not because the matter was unclear. It was because it was too clear to need explanation. Everyone knew that a convention for proposing amendments was a convention of the states.”).

66. 2 Farrand *Records*, *supra* note 31, at 558.

67. *Id.*

68. *Id.*

convention process that concerned Madison.⁶⁹ While Madison supported the final version of Article V and the rest of the Constitution, the historical record does not reveal how, or if, his concerns over the vagueness and ambiguity surrounding a convention for proposing amendments were addressed.

Prof. Robert Natelson, an advocate for an Article V convention and perhaps the most prolific legal commentator on Article V, dismisses Madison and present-day opponents' concerns over these unanswered questions: "The Constitution does not explain the role, composition or procedures for a convention for proposing amendments. This was not because the matter was unclear. It was because it was too clear to need explanation. Everyone knew that a convention for proposing amendments was a convention of the states."⁷⁰

Obviously, James Madison did not know that a convention for proposing amendments was a convention of the states. If anyone should have known that fact, it was Madison. Conventions were well known to Madison. He represented Orange County, Virginia, at the Virginia Constitution Convention.⁷¹ He served in the Virginia legislature.⁷² He was a Virginia delegate to the Continental Congress.⁷³ Madison suggested the states meet in convention in Annapolis and discuss changes to the Articles of Confederation to make them more efficient in governing the United States.⁷⁴ And, of course, he was a delegate to the Philadelphia Convention of 1787.⁷⁵ Madison knew conventions better than any modern legal scholar. Yet, when the first draft of the Constitution included a convention for proposing amendments, Madison recognized it as a new entity and raised concerns over "[h]ow was a Convention to be formed? [B]y what rule decide?

69. *Id.* at 559.

70. Natelson, *supra* note 65.

71. *James Madison - Biography, Founding Father & Presidency*, HISTORY, <http://history.com/topics/us-presidents/james-madison> (last visited May 23, 2022).

72. *Id.*

73. *Id.*

74. Louis Ottenberg, *A Fortunate Fiasco: The Annapolis Convention of 1786*, 45 A.B.A.J. 834, 836 (1959) <https://www.jstor.org/stable/25720900> (last visited May 23, 2022).

75. 3 Farrand *Records*, *supra* note 24, at 558.

[W]hat the force of its act?”⁷⁶

Contrary to Natelson’s claim that “everyone knew” an Article V convention was synonymous with a convention of the states, James Madison did not know. Because the convention for proposing amendments is a unique creation of the Constitution, concerns over how the convention process would work, including the selection of delegates, the procedures it would follow, and a host of other questions did not begin with modern-day opponents. They began in 1787 when the idea of proposing amendments by a convention was first raised.

The substance of Article V as adopted was a compromise between those who favored a strong central government and those who feared a strong central government would abuse its authority.⁷⁷ It is likely that, in furtherance of the spirit of compromise, the Framers purposely selected the unique concept of a “convention for proposing amendments” instead of “convention of the states,” with all its ancillary regulations, procedures, and familiarity precisely because the term of choice was suitably vague and ambiguous, and left the details to be decided by the convention itself.

The decision of the Framers to create a new entity with the power to propose amendments to the Constitution indicates an intentional ambiguity, perhaps to avoid additional debate between the federalist and anti-federalist factions and smooth the road to ratification. A “convention of the states” might have been a familiar concept to the Framers, but if that is what they had in mind, the failure of the Framers to use that familiar term in Article V is remarkable and difficult to explain. It also assumes the Framers coined a new phrase to describe a well-known and familiar concept without any explanation or clarification.

It is also without debate that there are no pre-established rules or procedures that a convention for proposing amendments must follow. Like any deliberative or legislative body, the convention is free to establish its own procedures.⁷⁸

76. 2 Farrand *Records*, *supra* note 31, at 558.

77. Voegler, *supra* note 34, at 355–56.

78. Natelson, *supra* note 55, at 45 (“The convention establishes its own rules, elects its own officers, and decides whether to propose amendments.”).

Natelson claims a convention to propose amendments to the Constitution likely would follow procedures and practices of conventions of states that took place early in America's history.⁷⁹ These regional conventions included such practices as a one-state, one-vote rule, and parliamentary procedures for conducting business.⁸⁰

These early conventions, however, were interstate conventions dealing with issues of concern to the participating states. They were not Article V conventions, and they are not binding on an Article V convention for proposing amendments to the U.S. Constitution.⁸¹ While an Article V convention might choose to adopt some or all the procedural and parliamentary rules followed by non-Article V conventions, there is no constitutional requirement that it must. Ultimately, it is the convention itself that decides upon the rules it will follow.⁸²

The drafters of the Constitution knew the difference between a "national" convention, one that represents the people, and a "federal" convention, one that represents the states.⁸³ James Madison explained how Article V blended those concepts:

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, *in the authoritative mode*

79. Robert G. Natelson, *Curing Federal Dysfunction by Constitutional Amendment: A Primer 1*, INDEP. INST. (Nov. 2014) http://articlevinfocenter.com/files/2014/12/IB_B_2014_a.pdf.

80. Natelson, *supra* note 55, at 37.

81. The Convention of the States Action project has prepared a suggested set of procedural rules to govern an Article V convention. See *generally Convention for Proposing Amendments—Proposed Rules*, 1–4, CONVENTION OF STATES ACTION <http://conventionofstates.com/files/proposed-convention-rules/download>. It would, of course, be up to the convention itself to adopt the rules; there is no outside authority to impose such rules on an Article V convention.

82. See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615, 684 (2013).

83. See THE FEDERALIST NO. 39, at 171-73 (James Madison) (Penn. State Univ. ed., 2001).

*of introducing amendments, it is neither wholly federal nor wholly national.*⁸⁴

If the Framers intended a “convention for proposing amendments” to be a “federal” convention, like a “convention of the states,” under the management of the state legislatures, surely they would have said so. And Madison would not have expressed his concerns over the vagueness of this new creation.

Instead, they created a new body, a “convention for proposing amendments,” without further explanation. The argument that an Article V convention for proposing amendments is synonymous with a convention of the states assumes that the Framers were constrained by a binary perspective requiring discrete elements of the Constitution to fall into one category or the other. A Constitution that is “neither wholly federal nor wholly national,” however, can create components that are hybrids.⁸⁵ The Article V convention does not have to be all one or the other. It can be “federal” meaning the state legislatures apply for a convention and select the delegates. It can be “national” meaning that once selected, the delegates represent the people and are not subservient to the political leaders, power brokers, and party bosses in the state legislature.⁸⁶

While there is debate over whether an Article V convention is a “convention of the states” or a unique assembly created by the Constitution, there is no debate over the fact that an Article V convention for proposing amendments would be a deliberative body.⁸⁷ This means that the convention would draft, debate, deliberate, and decide whether to propose one or more amendments. Neither Congress nor the states can dictate the convention—only consider a specifically worded amendment and

84. *Id.* at 173 (emphasis added).

85. *Id.*

86. As discussed *infra* notes 224–233 and accompanying text, the debate over whether an Article V convention for proposing amendments is a convention of the states, as Natelson and others understand that term, does not remove the concerns that opponents have over the risks and unknowns that still exist even if the convention of the states model is fully implemented.

87. Voegler, *supra* note 34, at 366 (“[A]n Article V convention must be some sort of deliberative body.”); Natelson, *supra* note 82, at 688 (“[A]n amendments convention is deliberative . . .”).

vote it “up or down.”⁸⁸ Much like Congress when it proposes an amendment, a convention would exercise a legislative function and conduct its business like a legislative body.

B. Power of Congress

Article V plainly states once Congress receives applications for a convention from two-thirds of the states, it “shall call a convention for proposing amendments.”⁸⁹ During the ratification debates, Alexander Hamilton explained this was a “peremptory” obligation on Congress.⁹⁰ Once the requisite number of applications are received, Congress must call the convention.⁹¹ The “call” would, most likely, set the date and place of the convention and the time allowed for completion of the amendment process. I say “most likely” because we have never had an Article V convention for proposing amendments.⁹² There are no binding precedents and no enabling legislation to reliably guide the process.⁹³

Some proponents believe the call of the convention could limit the scope to the topics or subject matter of the applications.⁹⁴ Other commentators disagree and believe Article V only contemplates the calling of an unlimited convention where

88. Natelson, *supra* note 82, at 688–89 (2013) (“[W]hen a legislature attempts in its application to compel the convention to vote up or down on prescribed language, it is not utilizing the application power in a valid way.”).

89. U.S. CONST. art. V.

90. THE FEDERALIST NO. 85, 399 (Alexander Hamilton) (Penn State Univ. ed. 2001).

91. *Id.*

92. <https://constitutioncenter.org/interactive-constitution/interpretation/article-v/interps/277> (last visited Mar. 28, 2022).

93. In 1971, Sen. Sam Ervin of North Carolina introduced legislation that would have regulated the CPA process in detail. 117 Cong. Rec. 453 (1971). The bill did not pass. For a critique of the Sen. Ervin’s bill, see Charles Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L. J. 189, 202-03 (1972). See also, THOMAS H. NEALE, CONG. RES. SERV., R42589, THE ARTICLE V CONVENTION: CONTEMPORARY ISSUES FOR CONGRESS (2016) (reviewing congressional roles and responsibility under Article V).

94. Robert. G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 715-32 (2011) (arguing that historical records of the founding era establish that states’ application for an Article V convention could specify a particular topic or subject).

delegates could propose amendments without limits on topic or subject matter.⁹⁵

Article V gives Congress the power to specify the mode of ratification of any amendments a convention may propose.⁹⁶ Congress may specify ratification by the states' legislatures or by conventions in each state. In either case, three-fourths of the states must ratify any amendment using the mode specified by Congress before it becomes part of the Constitution.⁹⁷

C. Power of the States

Just as Congress' powers over the convention method of proposing amendments are few, so are the states' powers. The text of Article V gives the legislatures of the states the power to apply to Congress for a convention for proposing amendments.⁹⁸ Article

95. See, e.g., *White Paper on Article V General Convention of States*, AMERICAN CONSTITUTION FOUNDATION, 7 (Jun. 15, 2018) ("While there remains some debate regarding what kind of Article V convention Congress can call, the existing evidence favors a general convention. Current efforts to trigger a convention limited by subject are not supported by the evidence, have contributed to a failure to achieve the necessary number of applications for a subject-limited convention, and have empowered opposition groups to further damage the Article V movement."). <http://caavc.net/wp-content/uploads/2019/01/WhitePaperonArticleVGeneralConventionofStates.pdf>; Charles L. Black, Jr., *Amending the Constitution: A Letter to A Congressman*, 82 YALE L.J. 189, 202–03 (1972) (arguing that history of Article V applications by the several states between the ratification of the Constitution and the Civil War reveals that the states themselves thought an Article V convention could not be subject matter limited. The relative contemporaneity between the ratification and the submission of these applications, he argues, is compelling evidence of the understanding of the scope issue of a CPA); Michael Leachman & David A. Super, *States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (2017), <https://www.cbpp.org/sites/default/files/atoms/files/7-16-14sfp.pdf> ("There is no guarantee that a convention could be limited to a particular set of . . . issues. . .").

96. U.S. CONST. art. V ("[W]hen 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. . .").

97. Of the 27 amendments added to the Constitution, only the XXI Amendment, which repealed the XVIII Amendment, was ratified by state conventions. Robert P. George and David A. J. Richards, *The Twenty-First Amendment* NAT'L CONSTITUTION CTR., 2 <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xxi/interps/151>

98. U.S. CONST. art. V.

V does not dictate any form or template for what an application must contain. It does not address whether the application can limit the scope of a convention or make the application conditional on the occurrence or non-occurrence of other events.⁹⁹ Nor does it specify a time limit for which the application remains valid or whether the state can rescind an application before the three-fourths threshold is reached.

Though the language of Article V does not address it, many commentators agree that once a convention is called, the states would select their delegates by whatever method they desire.¹⁰⁰ In some states the legislatures may select the delegates; in others, they may be selected by the citizens in a referendum. Article V does not specify how many delegates a state may send to a convention for proposing amendments or what, if any, controls or limits a state may place on the authority of its delegates.¹⁰¹

Finally, we know that once a convention is called and proposes amendments, the states have the power to accept or reject the amendment(s) through the method specified by Congress for ratification. If Congress, for example, specifies ratification by the legislatures, the state is not free to ratify it by popular referendum, though a referendum may be held as an advisory mechanism for the legislature.¹⁰²

99. *Id.* (“[O]n the application of the legislatures of two thirds of the several states, [Congress] shall call a convention for proposing amendments. . . .”). Over the years, many bills have been introduced in Congress to regulate the convention for proposing amendments process. *See* NEALE, *supra* note 93, 19–20 (2016) (summarizing proposed legislation to regulate the Article V convention process.). Typically, those bills provided for the number of delegates and the voting procedures of the convention based on population apportionment. *Id.* None of those bills passed. *Id.*

100. *See, e.g.*, Natelson, *supra* note 55, at 45 (“Each state selects a delegation of commissioners in the manner the state legislature (or its designee) determines.”); Voegler, *supra* note 34, at 382 (“Accepting the viewpoint that each state has one vote at an Article V convention on all matters, it follows that each state should be allowed to select its delegates, in any manner it chooses.”). *But see* Eric Berger, *Delegate Selection, Representation Problems, and the Difficulties of an Article V Convention*, SCHOLARS STRATEGY NETWORK, (Dec. 10, 2019) <https://scholars.org/contribution/delegate-selection-representation-problems-and-difficulties-article-v-convention> (last visited June 23, 2022) (“It is not clear who would select the delegates to a convention.”).

101. U.S. CONST. art. V.

102. *Id.* *Hawke v. Smith*, 253 U.S. 221, 229–30 (1920).

IV. WHAT WE DON'T KNOW ABOUT AN ARTICLE V CONVENTION

The Article V convention process is, on its face, straightforward. Looking beyond the text of Article V, however, straightforwardness disappears rapidly and unknowns increase dramatically. The ambiguity that lurks behind the text of Article V is what concerned Madison.¹⁰³ The questions include how to count to thirty-four and the two-thirds number of states needed to petition for a convention for proposing amendments. Must all the applications be identical regarding subject matter or topic to limit the scope of the convention? Can states withdraw a previously submitted application? How long is an application valid? What authority, if any, do states have over the management of the convention and the control of delegates?¹⁰⁴

A. *How to count to Thirty-Four*

Article V conditions a convention for proposing amendments upon the “[a]pplication of the [l]egislatures of two thirds of the several [s]tates.”¹⁰⁵ Applying that requirement to the fifty states of the Union means at least thirty-four states must apply for a convention to meet the constitutional threshold.

The math is easy enough, but other questions remain. Must all thirty-four of the applications be identical? If not, can Congress aggregate applications based on similarity to reach thirty-four?

103. See *supra* notes 48–57 and accompanying text for a discussion of Madison’s concerns over the vagueness and ambiguity that surround a convention for proposing amendments.

104. Raising, much less resolving, all the unknowns surrounding the convention method is beyond the scope of a single article. We may not know what we don’t know until 34 states submit applications that Congress deems sufficient to trigger its obligation under Article V and calls a convention. Various commentators have, however, identified a host of questions surrounding the convention mode of proposing amendments. See, e.g., Berger, *supra* note 100; David A. Super, *A Dangerous Adventure: No Safeguards Would Protect Basic Liberties from an Article V Convention*, AMER. CONST. SOC. (Oct. 2021) <https://www.acslaw.org/wp-content/uploads/2021/10/Super-IB-Final3615.pdf> (last visited June 23, 2022); THOMAS H. NEALE, CONG. RES. SERV. R44435, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CURRENT DEVELOPMENTS, (Nov. 15, 2017) <https://crsreports.congress.gov> (last visited June 23, 2022); NEALE, *supra* note 93.

105. U.S. CONST. art. V.

How similar must applications be to allow Congress to aggregate? Can the states condition their applications on the occurrence or nonoccurrence of some event? Do applications expire after a period of time? Can states rescind applications before the threshold number is reached? Who keeps track of the applications and announces when the requisite number have been submitted?

Article V does not begin to address these questions. One might think this was a “poison pill” inserted into the amendment process to frustrate the use of the convention method and for all practical purposes leave Congress as the body with exclusive authority to propose amendments. Congress has known for over 230 years that a convention must be called if two-thirds of the states submitted applications. To this day, however, Congress has not set up a uniform, transparent, and accurate method of receiving, inspecting, cataloguing, counting, and preserving the hundreds of applications submitted over the last two centuries.¹⁰⁶

Private organizations, primarily those who advocate for a convention, have tried to find and catalogue the applications submitted over the years. By one organization’s count, we have reached the threshold at least 11 times.¹⁰⁷

106. Under the Rules of the House of Representatives, which are adopted by each session of Congress, *see, e.g.*, H.R. Res. 8, 117th Cong. (2021), <https://www.congress.gov/bills/117/congress/house-resolution/8> (establishing the 117th House Rules by modifying and adopting the 116th House’s Rules) (last visited May 12, 2022), state applications for an Article V convention are considered to be “memorials” and are forwarded to the Clerk of the House and recorded on the Clerk’s website. Rules of the House of Representatives, R. XII, at 25 <https://rules.house.gov/sites/democrats.rules.house.gov/files/117-House-Rules-Clerk.pdf> (last visited May 12, 2022). The publicly accessible website collects applications and rescissions of applications forwarded by the states from 1960 to the present. Links on the website contain the states’ resolutions and the correspondence forwarding the resolution to the Clerk for posting. <https://clerk.house.gov/selectedmemorial> (last visited May 12, 2022). The Clerk’s website does not provide a cumulative total, does not group or categorize the various applications, and does not aggregate applications by subject matter or topic. Nor does the website’s filter or search function facilitate searching the various applications for similar topics, subjects, or phrasing. If Congress is keeping track of how close we are to reaching the threshold for calling a convention for proposing amendments it is not apparent from the publicly available data on an official government website.

107. FRIENDS OF THE ARTICLE V CONVENTION, http://www.foavc.org/Pages/Page_Two.htm (last visited May 12, 2022); ARTICLE V LIBRARY, <http://article5library.org> (last visited Sept. 1, 2022).

The absence of an “official” count kept by Congress, however, does give advocates of a convention the ability to apply their own aggregation standards to disparate applications and conduct their own count. Sometimes those organizations change the way they count to get closer to their goal. It is the constitutional version of “new math.”¹⁰⁸

With the debate among proponents of an Article V convention over whether applications can be limited or whether Article V only contemplates a general convention, whether non-identical applications can be aggregated by subject matter, whether a state can rescind an application before the threshold is reached and a convention called, and Congress’ refusal to reveal how it believes those issues should be resolved, makes it apparent that we do not know how to count to thirty four.

B. *How the Convention Would Operate*

Advocates of an Article V convention are convinced that well-recognized rules and traditions of parliamentary procedure would guide a convention’s work.¹⁰⁹ That is possible in a general sense, but there are unique aspects to an Article V convention that general rules of procedure and order may not address.

Some proponents have argued an Article V convention would conduct its business with a “one-state one-vote” rule comparable to non-Article V regional conventions of states occurring in the 1700s and as practiced by the Philadelphia Convention of 1787, as opposed to apportioning votes based on population.¹¹⁰ While the one-state-one-vote rule seems fair and rather benign, it does

108. *State Article V Convention Applications By Amendment Subject*, FRIENDS OF THE ARTICLE V CONVENTION, http://www.foavc.org/StateApplications/Amendment_Subject.htm (last visited May 12, 2022). In counting and cataloguing applications, for example, the Friends of the Article V Convention organization rejects the notion that states can rescind an application once submitted. FRIENDS OF THE ARTICLE V CONVENTION, http://www.foavc.org/Pages/Page_Six_D.htm (last visited May 12, 2022).

109. Robert Natelson, *Simulation Shows What An Amendments Convention Would Be Like*, ARTICLE V INFORMATION CENTER (Sept. 1, 2022), <https://articlevinfocenter.com/article-v-process/#:~:text=Each%20state%20legislature%20decides%20how,a%20rule%20to%20the%20>.

110. *Id.*

present some problems.

If, for example, an Article V convention adopted a one-state-one-vote practice and majority rule, twenty six of the least populous states, representing less than twenty percent of the population of the country, could propose amendments that would be sent to all the states for ratification.¹¹¹ To some, this might be a feature while others would consider it a flaw. The point is the Constitution does not give Congress or the states specific authority to set the procedural rules of an Article V convention.¹¹²

If you want to know how a CPA would proceed, what topics it would consider, what amendments would be brought to the floor for consideration, the voting procedures required for a convention to propose a specific amendment and the results of the convention's business, you will have to wait until a future convention completes its work. No one, regardless of their academic credentials, publishing credits, professional websites, glossy brochures, media appearances, or celebrity endorsements can honestly guarantee how a CPA would conduct its business.

Nor can anyone say with reasonable certainty what topics would be considered, what amendments would be voted on, and what the results would be. Opinions, theories, and arguments are not definitive answers because we have never travelled into this *terra incognita* before and the Constitution does not provide a detailed map.

The convention may draw upon familiar sources such as *Mason's Manual of Legislative Procedure*, *Roberts' Rules of Order*, or other parliamentary procedural guides.¹¹³ In that process, the

111. *Population of the US States and principle US territories*, NATIONS ONLINE (Apr. 28, 2022), <https://www.nationsonline.org/oneworld/US-states-population.htm>.

112. The requirement that three fourths of the states ratify any proposed amendment would make it likely that an amendment that could only garner the support of the smallest states of the Union at the convention would never be ratified. The point is, however, that even something as benign as a one-state-one-vote rule could be exploited to frustrate legitimate goals and interests resulting in wasted time, effort, and resources.

113. The Philadelphia Convention of 1787 relied upon practices and procedures developed in England's Parliament and modified them as appropriate to govern the conduct of the convention. Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1633–

convention may decide for itself to limit the scope of the amendments it will consider, or like the Constitutional Convention of 1787, reject any limitation “recommended” by Congress.

The only thing clear is this: Theories, opinions, speculations, and arguments abound, but there are no definitive answers or enforcements mechanisms for governing the operation of a CPA.

1. Whether the Scope Can Be Limited

In recent years, the Convention of the States Action group has been urging state legislatures to apply for a convention limited to proposing amendments that would “impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.”¹¹⁴ To date, they report that nineteen states have submitted applications.¹¹⁵

Even if all applications were identical and contemporaneous, they would not determine with certainty what an Article V CPA might do. Between delegates on the left and right of the political spectrum, favor-trading, deal-making, and political power plays likely would influence the final product.

Would an amendment to limit government spending by imposing limits on funding for federal law enforcement agencies make it to the floor if it were combined with limits on wasteful government spending? And how would an amendment fare if it prohibited government subsidies for abortion while codifying *Roe v. Wade*?

We have considerable experience with amendments to the U.S. Constitution. Amendments have added something totally new to the Constitution, refined or clarified an original part, or changed something that was there from the beginning.¹¹⁶ We have even

36 (2012).

114. *Model Convention of States Application*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/files/model-convention-of-states-application/download> (last visited May 7, 2022).

115. *Victory! South Carolina 19th State Legislature to Join Convention of States*, CONVENTION OF STATES ACTION (Mar. 27, 2022) <https://conventionofstates.com/news/victory-south-carolina-19th-state-to-join-convention-of-states>.

116. See U.S. CONST. amends. I–X (The Bill of Rights, proposed in 1789 and

had an amendment to repeal an amendment.¹¹⁷ Some commentators suggest the word “amendments” in Article V would limit the scope of possible changes to only those that serve a “perfecting” role and does not envision fundamental change.¹¹⁸ “Perfecting,” of course, is in the eye of the beholder. Authors of the various proposed constitutions published by the National Constitution Center would, no doubt, all contend their documents “perfect” the existing Constitution.¹¹⁹

Horse trading, deal-making, compromises, and pragmatic coalitions between different factions could radically change the Constitution without changing the basic form of government like the Philadelphia Convention did.¹²⁰ Proponents of an Article V convention dismiss this concern as a “myth.”¹²¹ But in an era of rapid social and political change, it is foolish and naïve to think that an Article V convention will do exactly what advocates claim it will.

The Philadelphia Convention of 1787 itself casts considerable doubt on the notion that the scope of a future Article V Convention could be effectively limited by Congress, the States, or any institution outside of the convention itself.

On February 21, 1787, Congress reluctantly gave in to

ratified in 1791, added the first ten Amendments to the new Constitution.); U.S. CONST. amend. XVI (The XVI Amendment, ratified in 1913, gave Congress the power to levy taxes on income. Neither the specific protections of the Bill of Rights nor the power to tax income were contained in the Constitution as ratified in 1789); U.S. CONST. amend. XI (The XI Amendment limited the scope of the phrase “judicial power of the United States” in Article III to specifically preclude suits in federal court against a state by citizens of another state or foreign country); U.S. CONST. amend. XII (Similarly, the XII Amendment changed the electoral college procedures of Article II, § 1); U.S. CONST. amend. XVII (The XVII Amendment changed Article I, § 3, to provide for the direct election of senators rather than their appointment by the legislatures of the several states).

117. U.S. CONST. amend. XXI (The XVIII Amendment imposing prohibition was ratified in 1919 and was repealed by the XXI Amendment in 1933).

118. Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 300–01 (1989).

119. See *infra* note 226–28 and accompanying text.

120. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, *supra* note 4, at XVI–III.

121. See Michael J. Farris, *Can We Trust the Constitution? Answering the “Runaway Convention” Myth*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/files/can-we-trust-the-constitution/download>.

increasing calls for a convention to address perceived flaws in the Articles of Confederation. Instead of giving those calling for a convention *carte blanche*, Congress limited the scope of the convention's authority to "revising" the existing Articles of Confederation.¹²² This limitation, however, did not stop the convention from scrapping the Articles of Confederation and proposing an entirely new constitution.

Under the Articles of Confederation, any changes had to be ratified by all the states.¹²³ But the Philadelphia Convention of 1787 declared, "[T]he ratification of the conventions of nine states, shall be sufficient for the Establishment of this Constitution" ¹²⁴ Not only did the Convention provide for ratification of the Constitution by only two-thirds of the states instead of the unanimity required by the Articles of Confederation, but it also made initial ratification easier than the three-fourths required under Article V to ratify any subsequent amendments.¹²⁵

The ratification process adopted by the Convention of 1787 also ignored the requirement under the Articles of Confederation that ratification of any amendments had to be approved by the legislatures of the states. Article VII of the Constitution called for ratification by state conventions.¹²⁶ Thus, a convention limited in scope by Congress to revising the Articles of Confederation

122. 3 Farrand *Records supra* note 24 at 13–14.

123. ARTICLES OF CONFEDERATION of 1777, art. XIII ("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.").

124. U.S. CONST. art. VII.

125. *Compare* U.S. CONST. art. VII ("The Ratification of the Conventions of nine states, shall be sufficient for the Establishment of this Constitution"); *with* ARTICLES OF CONFEDERATION of 1777, art. XIII ("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.") and U.S. CONST. art. V ("[An amendment] 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. . . .").

126. *Compare* ARTICLES OF CONFEDERATION of 1777, art. XIII ("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.") *with* U.S. CONST. art. VII ("The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.").

scrapped the Articles of Confederation, produced an entirely new constitution, ignored the ratification standards in the Articles of Confederation, and lowered the ratification threshold from unanimity to two-thirds.

Some proponents of an Article V convention argue that the Convention of 1787 was called by the states, not Congress, had authority to propose a completely new form of government, and since all thirteen states ultimately ratified the results the technical requirements of the Articles of Confederation were satisfied.¹²⁷ They further argue the limitation on “revising” the Articles of Confederation was just a recommendation of Congress and not a legal constraint on the scope of the convention’s jurisdiction.¹²⁸ The authority of the delegates, they argue, came from their respective state legislatures, not from Congress, and the delegates acted within the broad authority conferred upon them by their respective states.¹²⁹

Should states include limitations on the delegates’ authority one would hope the delegates would respect that limitation. Voters also hope their preferred candidates would keep their campaign promises upon assuming office after being elected. But the landscape of American political history is littered with unfulfilled campaign promises. Whether relying on candidates to keep their promises or delegates to a CPA to act within their authority, hope does not guarantee anything.

Once the convention convenes, the delegates to the convention would set the agenda and the scope of the convention’s proceedings. Expressed limitations, whether contained in the applications to Congress to call a convention or included in the Congressional call itself would be subject to the political horse-trading, deal-making, and vote-trading that is common in deliberative bodies performing legislative functions.

The Constitution does not say Congress can control or limit the scope of any amendments the convention may consider.

127. Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARV. J. L. & PUB. POL’Y. 63, 141 (2017).

128. *Id.* at 67–80.

129. *Id.* at 80–86.

Furthermore, Article V does not say state legislatures have the power to limit or condition their applications in any way. Arguments to the contrary are just that, arguments. Like hope, arguments are not guarantees.

Proponents of a CPA, on both sides of the political spectrum, are divided on just about everything. The Convention of the States Project argues that any CPA will be limited to considering only those amendments that are within the subject matter of the applications of the states.¹³⁰ The Friends of Article V Convention (FOAVC), another proponent of a CPA, argues that once the threshold of thirty-four applications is reached, Congress must call the convention but cannot limit its scope. In fact, the Friends of the Article V Convention argues there are already enough applications to call for a convention.¹³¹

In 2016, the Compact for America organization, which promotes a balanced budget amendment, prepared a complicated policy brief suggesting ways to “aggregate” different types of state applications to reach the requirements of Article V.¹³² With such diametrically opposed views among proponents of a CPA, even on basic matters such as how to count to thirty-four states, opponents are rightly concerned about the unpredictability of a convention of opposing factions.

The CoSA campaign is largely aimed at conservative red state legislators, but in other venues, Mark Meckler, the President of the Convention of the States Action project, has suggested blue states, such as California, New York, and New Jersey, would gain the “power to decide.”¹³³ Meckler is correct in saying blue states

130. Dunaway, *supra* note 12.

131. Bill Walker, *Congress Owes Us Eleven Conventions!!!*, FRIENDS OF THE ARTICLE V CONVENTION, http://www.foavc.org/Pages/Page_Two.htm (Apr. 9, 2017).

132. Compact for America to Fix the National Debt, *Compact for a Balanced Budget's Balanced Budget Amendment: Section-by-Section*, https://www.compactforamerica.org/_files/ugd/e48202_cd6638f038db4bafbdb220e2d2e1abbb.pdf (last visited May 7, 2022); Jeffrey A. Kimble, *Acknowledging the Elephant in the Room: The Congressional Obstacle to the Balanced Budget Amendment Task Force's Effort to Achieve a Convention Call*, (Jan. 25, 2016) https://www.compactforamerica.org/_files/ugd/e48202_f127027c82734a108bbf6e6520100812.pdf.

133. Valerie Richardson, *Convention of states movement gains steam with*

would have the power to decide just like red states. But it is misleading at best to urge legislatures to apply for a convention by assuring them that only amendments that red state legislatures would approve of would come out of a convention.

The basic rule most likely to be established would be Politics 101: Whoever has the most votes, wins. The precise language of any proposed amendment would be determined by compromises and political deal-making. Delegates with diverse political philosophies, not convention advocates or legal academics, would decide the outcome.

2. Whether State Legislatures Can Control Delegates

While some argue that the delegates would be subject to control by the political authorities in the respective states, the Constitution does not say that.¹³⁴ The notion that “states,” and not the people, would be the real parties of interest in an Article V convention subordinates the delegates to the control of the elected political leadership in the states, subjecting them to the political pressures, lobbying, and influence of special interest groups that exist in legislative chambers around the country.

The argument delegates are subject to control by the state political powers is inconsistent with the language of Article V. The convention, not the fifty state legislatures that sent delegates, is the entity created by Article V. The states’ role is to petition Congress for a convention. Once thirty-four applications are received, Congress issues the call, and the delegates are selected, neither Congress nor the states have any further role to play until the convention completes its work. At that point, any proposed amendments go directly to the states for ratification. They do not go to Congress for its approval or to the state legislatures for their approval before the ratification process gets underway.

Some advocates of an Article V convention point to the

challenge to Washington’s power, WASH. TIMES (Feb. 23, 2022) (“The question is, who has the power to decide? The goal is to give California the power to decide, and Illinois and New Jersey and New York, the same with Texas and Louisiana and Arkansas. So, it’s really not a partisan thing.”) available at <https://www.washingtontimes.com/news/2022/feb/23/convention-states-movement-gains-steam-challenge-w/> (last visited May 7, 2022).

134. Dunaway, *supra* note 12.

Philadelphia Convention of 1787 as an assurance that delegates would obey any limits placed upon them by their state political establishment. Of the twelve states sending delegates to Philadelphia, only three: New York, Connecticut, and Massachusetts, sent delegates “[F]or the sole and express purpose of revising the Articles of Confederation. . . .”¹³⁵ The other nine states generally followed the Virginia resolution and commissioned their delegates “to join with [the delegates of other states] . . . in devising and discussing all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate to the exigencies of the Union.”¹³⁶

Michael Farris, an advocate for an Article V convention, reviewed the historical record and concluded, “[o]ne thing is clear about all twelve states: every legislature acted on the premise that it was the body that would decide what authority it would give its own delegates.”¹³⁷ The states, he argues, sent delegates to Philadelphia to create a “federal constitution” to govern the new Union.

Farris concludes the Convention of 1787 was called by the states with the purpose of drafting a federal constitution to establish a new structure of government, and the delegates dutifully obeyed their commissions from their respective state legislatures.¹³⁸ Whether restraints imposed by state legislatures would be effective in controlling delegates to an Article V convention requires a closer examination of those delegates to the Convention of 1787, who were so restrained.

Two delegates from New York, John Lansing, Jr., and Robert Yates, left the Convention early and returned home because it was apparent to them the agenda of the convention was creating a new form of government and not revising the Articles of Confederation.¹³⁹ Alexander Hamilton, however, was working under the same

135. 3 Farrand *Records*, *supra* note 24, at 579 (New York), 584 (Massachusetts), 585 (Connecticut).

136. *Id.* at 559 (Virginia), 563 (New Jersey), 565 (Pennsylvania), 567 (North Carolina), 572 (New Hampshire), 574 (Delaware), 577 (Georgia), 581 (South Carolina), 586 (Maryland).

137. Farris, *supra* note 127, at 80.

138. *Id.* at 85–86.

139. 1 Farrand *Records*, *supra* note 33 at 536.

power-restricting limits as Yates and Lansing. He remained in Philadelphia, was a member of the Committee of Style that drafted the Constitution, signed the Constitution on September 17, 1787, and was active in seeking ratification.¹⁴⁰ Apparently, Hamilton did not feel constrained by the limitations placed on him by the New York legislature's resolution.

Massachusetts also limited its delegates to revising the Articles of Confederation.¹⁴¹ Of the four delegates, Elbridge Gerry was the only one who refused to sign the Constitution and, arguably, abided by the limits placed on delegates by the Massachusetts legislature.¹⁴² But even Gerry participated fully in the debates and drafting of the Constitution.¹⁴³ Caleb Strong was absent on the final day and was not available to sign, but strongly supported ratification.¹⁴⁴ Nathan Gorham and Rufus King affixed their signature to the Constitution.¹⁴⁵ Like Hamilton, Gorham and King apparently did not consider themselves bound by any restrictions imposed by the Massachusetts legislature. Strong's vigorous support of ratification indicates he was of the same mind.¹⁴⁶

The Connecticut resolution sending delegates to Philadelphia also limited the delegates to "revising the Articles of Confederation."¹⁴⁷ William S. Johnson and Roger Sherman both disregarded any limits on their work and signed the

140. *Alexander Hamilton*, NAT'L ARCHIVES & RECS. ADMIN., <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/marrynewyork.html> (last visited May 24, 2022).

141. 3 *Farrand Records*, *supra* note 24 at 584–85.

142. Greg Bradsher, *A Founding Father in Dissent: Elbridge Gerry Helped Inspire Bill of Rights in His Opposition to the Constitution*, PROLOGUE MAG., (2006).

143. *Id.* 2 *Farrand Records*, *supra* note 31 at 635–36.

144. CONST. CENTER <https://constitutioncenter.org/learn/educational-resources/founding-fathers/massachusetts> (last visited May 24, 2022).

145. *Id.*

146. A fifth delegate from Massachusetts, Francis Dana, was ill and unable to participate. He did, however, support the final product and was a member of the Massachusetts ratification convention. *Historical Highlights: Francis Dana*, HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1700s/1743-Francis-Dana/> (last visited May 22, 2022).

147. 3 *Farrand Records*, *supra* note 24 at 585.

Constitution.¹⁴⁸ Oliver Ellsworth was absent on the final day and did not sign, but strongly supported ratification.¹⁴⁹ Thus, none of the Connecticut delegates paid heed to the limits imposed by the Connecticut legislature.¹⁵⁰ Ellsworth later claimed that he, along with Hamilton, Gorham, James Wilson of Pennsylvania, Rutledge of South Carolina, and Madison were the principle drafters of the Constitution.¹⁵¹ Of the six men credited by Ellsworth who played significant roles in crafting the Constitution, three of them—Hamilton, Gorham, and Ellsworth himself—disregarded the limits imposed on them by their respective state legislatures.

In the final analysis, of the ten delegates sent to Philadelphia with the limited task of revising the Articles of Confederation, seven ignored the limitations, participated in the drafting of a new form of government, and supported ratification.¹⁵² When seventy percent of the delegates with scope-limiting restrictions placed on them by the sending states ignore those restrictions, it does not inspire confidence that delegates to an Article V convention would consider themselves bound, either.

An Article V convention is a unique creation of the Constitution; a deliberative body that, discusses, debates, deliberates, and ultimately decides whether to propose one or more amendments. Other than specifying the states' role in applying for a convention for "proposing amendments" and then undertaking the ratification process specified by Congress, the text of Article V does not give elected officials of the states a supervisory role over the work of the convention. Recall that: "*We the People . . . [not We the Several States] do ordain and establish the Constitution for the United States of America.*"¹⁵³

148. CONST. CENTER <https://constitutioncenter.org/learn/educational-resources/founding-fathers/connecticut/> (last visited May 22, 2022).

149. *Id.*

150. Erastus Wolcott was also selected as a delegate from Connecticut but declined to serve.

151. 3 Farrand *Records*, *supra* note 24 at 400.

152. If Gerry's participation in the debates and drafting of the Constitution are taken into consideration, eight out of ten, arguably, were not constrained by restrictions imposed by their respective state legislatures.

153. U.S. CONST. pmbl. *See also* Dillon v. Gloss, 256 U.S. 368, 374 (1921) ("The plain meaning of . . . [Article V] is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through

The counter argument is that the delegates are, indeed, agents of the state legislatures and are subject to the states' instructions and supervision.¹⁵⁴ This may be one reason why some proponents of an Article V convention insist on referring to the convention as a "convention of the states."¹⁵⁵ That label assumes their argument that the states would control proceedings, and bring all their ideas, opinions, and theories of how the states might exercise control of a convention into play.

Further complicating whether and to what degree state legislatures can control the delegates to an Article V convention is the nature of a convention. Even proponents of an Article V convention agree that a convention would be a deliberative body charged under the Constitution with drafting, debating, and deciding on proposed amendments.¹⁵⁶ The more state legislatures attempt to control the details of the convention, the scope of delegates' authority, and the language of proposed amendments, the less deliberative the convention becomes.

Calling an Article V convention a "convention of the states," a label not found in Article V, and then concluding state legislatures can control the scope and details of the convention's work, is a

representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.").

154. The American Legislative Exchange Council's model statute includes a provision that delegates to an Article V convention take an oath to obey the instructions of the state legislature and subjects the delegates to criminal and/or civil penalties if they fail to follow those directions. *No Runaway Article V Convention Act*, ALEC <https://alec.org/model-policy/resolution-for-limitations-on-authority-of-state-delegates-to-a-convention-for-proposing-amendments-under-article-v-of-the-us-constitution/> (last visited July 4, 2022). *See also*, H.R. Con. Res. 4, Reg. Sess. (La. 2018) (providing for selecting and controlling delegates to an Article V convention) available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1099612> (last visited July 4, 2022); *see also* S. Con. Res. 4, 101th Gen. Assemb. Reg. Sess. (Mo. May) (applying for an Article V convention limited to certain topics and providing for recall of delegates who disobey instructions from the legislature) available at <https://www.senate.mo.gov/21info/pdf-bill/tat/SCR4.pdf> (last visited July 4, 2022); H.R. Con. Res. 2010, 1st Reg. Sess. (Ariz. 2017) (applying for an Article V convention and including instructions that delegates must vote in favor of 12 year limit on congressional terms) available at <https://www.azleg.gov/legtext/53leg/1R/laws/hcr2010.htm> (last visited July 4, 2022).

155. ARTICLE V CONVENTION OF STATES POCKET GUIDE, *supra* note 6, 18–20.

156. *See supra* notes 87–88 and accompanying text.

classic example of the logical fallacy of begging the question. The scope, degree, or even existence of any power of control over the work of the convention by the states is not specified in Article V, has never been definitively decided, and will remain unknown unless an actual convention convenes and completes its work.

C. Whether the Courts Will Settle Disputes

Proponents of an Article V convention downplay concerns over unanswered questions by claiming that federal courts can be counted on to resolve disputes, presumably in their favor. They note that over the years federal courts have been willing to hear cases raising other aspects of the application of Article V and would adjudicate disputes surrounding a convention for proposing amendments, as well.¹⁵⁷

This claim requires consideration of two basic questions: (1) Would a federal court have jurisdiction to hear a claim arising in the Article V convention context? and (2) Is it appropriate to turn to federal courts if they are perceived to be part of the abusive federal power problem that would justify calling a convention to propose amendments?

1. Jurisdiction

Article III of the Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.”¹⁵⁸ To invoke the jurisdiction of a federal court, plaintiffs bear the burden of establishing that they have standing to sue the defendant,¹⁵⁹ the case is ripe for judicial resolution,¹⁶⁰ events have not transpired so that the

157. Robert G. Natelson, *THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS*, § 3.5 (Apis Books, 2020).

158. U.S. CONST. art. III, § 2, cl. 1.

159. *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (“As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.”).

160. *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580 (1985) (“[R]ipeness is peculiarly a question of timing [and] its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.”) (internal citations omitted).

dispute is moot,¹⁶¹ the parties are not seeking an advisory opinion,¹⁶² and the subject matter of the lawsuit does not involve a “political question” committed to a coordinate branch of government.¹⁶³ When all of these requirements are satisfied the claim is justiciable and the matter is within the constitutional limits on federal jurisdiction.

In the context of an Article V convention for proposing amendments, each of these jurisdictional hurdles must be cleared before a federal court can hear the case. Sometimes these jurisdictional hurdles are met, and the court can hear the case and decide the issue. But not all the time.

a. Justiciable Cases

Professor Natelson claims, “Article V questions are freely justiciable.”¹⁶⁴ As primary authority for his sweeping claim of justiciability, Natelson cites *In re Opinion of the Justices*, a 1933 North Carolina Supreme Court advisory opinion.¹⁶⁵ The question

161. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (“[O]ur impotence ‘to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.’”) (internal citations omitted).

162. *Id.* (“Early in its history, this Court held that it had no power to issue advisory opinions.”) (internal citations omitted); Letter from John Jay to George Washington (1793) (declining to provide an advisory opinion to a July, 18, 1793, letter from Secretary of State Thomas Jefferson seeking the Court’s advice on whether and to what extent treaties and international law applied to foreign warships using American ports) available at https://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html (last visited May 30, 2022); *Alabama State Fed’n of Lab., Loc. Union No. 103, United Bhd. of Carpenters & Joiners of Am. v. McAdory*, 325 U.S. 450, 461–462 (1945) (collecting cases prohibiting advisory opinions).

163. The “political question” doctrine prohibits federal courts from deciding matters that are properly within the constitutional authority of the coordinate branches of government. *Baker v. Carr*, 369 U.S. 186 (1962). Compare *Powell v. McCormack*, 395 U.S. 486 (1969) (holding whether Congress had power to exclude a duly elected Congressman who concededly met the qualifications of U.S. CONST. art. I, § 2, cl. 2, was justiciable and was not a “political question”), with *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding claims of partisan gerrymandering were nonjusticiable political questions). See also *Coleman v. Miller*, 307 U.S. 433 (1939) (holding that the timeliness of Kansas’ ratification of a proposed child labor amendment was a nonjusticiable political question).

164. Natelson, *supra* note 157, n.62 and accompanying text.

165. *In re Opinions of the Justices*, 172 S.E. 474 (N.C. 1933).

presented to the court by the North Carolina legislature was which of two proposed bills on convening a state convention to consider ratifying the proposed Twenty-first Amendment was valid under the North Carolina constitution.¹⁶⁶

After advising the legislature on which of the proposed methods of convening a ratifying convention was appropriate, the court noted, “[w]hether or not a proposed Amendment to the Constitution of the United States has been submitted by Congress and ratified in accordance with the provisions of Article 5 of the said Constitution, must necessarily be determined finally by the Supreme Court of the United States.”¹⁶⁷

Apparently, Natelson’s citation of this case for the proposition that Article V issues are “freely justiciable” comes from the comment about the Supreme Court having final authority to determine whether a proposed amendment is properly ratified.¹⁶⁸ His reliance is misplaced for several reasons. First, the comment is *dicta*, not the holding of the court, and not responsive to the question submitted by the legislature. Second, the comment is devoid of any analysis of the justiciability issues that would arise under Article V. Third, the North Carolina Supreme Court is not the final arbiter of federal court jurisdiction. Simply put, an analysis-free gratuitous comment concerning federal jurisdiction in a state court’s advisory opinion interpreting a state constitutional provision is not authority for the proposition that “Article V questions are freely justiciable.”

Natelson also cites *Dyer v. Blair*¹⁶⁹ to support his “freely justiciable” claim.¹⁷⁰ *Dyer* involved whether the Kansas constitution required a three-fifths majority of the state legislature to ratify the Equal Rights Amendment or whether the legislature was free to establish its own rules for voting on constitutional amendments.¹⁷¹

166. *Id.*

167. *Id.* at 476, 479.

168. Natelson, *supra* note 157, n.62 and accompanying text (Apis Books, 2020).

169. *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975).

170. Natelson, *supra* note 157, n.62 and accompanying text (Apis Books, 2020).

171. *Blair*, 390 F. Supp. 1291.

The court held the state constitution could not impose restraints on the legislature when the legislature was performing the federal function of ratifying a proposed amendment to the U.S. Constitution.¹⁷² Importantly, the court also found that interpreting the text of Article V was not a “political question” because resolving the issue merely required the court to interpret the term “ratify” in Article V.¹⁷³ It did not require a decision on an issue that the text of the Constitution specifically committed to the political branches.¹⁷⁴

Dyer supports Natelson’s claim better than *In re Opinion of the Justices*, but it does not hold that all Article V issues are “freely justiciable.”

Justiciability involves more than the political question doctrine, and *Dyer* itself reveals how other important justiciability factors apply in an Article V setting. The case was originally filed before the 78th session of the Kansas legislature had begun the ratification process and sought a declaratory judgment that the provision of the Kansas constitution requiring a three-fifths vote was unconstitutional.¹⁷⁵ The court dismissed the complaint as not ripe for judicial review¹⁷⁶. The case was nonjusticiable because events had not occurred, i.e., the vote of the legislature, to properly frame the controversy and place it within the scope of the federal court’s Article III jurisdiction.¹⁷⁷

In addition to the ripeness issue that stalled consideration of the initial complaint in *Dyer*, the mootness prong of the justiciability issue also affected judicial review of Article V questions. In *Idaho v. Freeman*, a case also relied upon by Natelson, the State of Idaho, the leadership of the Idaho legislature, the State of Arizona, and legislators from the state of Washington sued the Administrator of the General Services Administration asking the court to declare that Idaho’s rescission of its ratification of the Equal Rights Amendment was valid and

172. *Id.* at 1308.

173. *Id.* at 1301–02.

174. *Id.*

175. *Dyer v. Blair*, 390 F. Supp. 1287 (N.D. Ill. 1974).

176. *Id.* at 1297.

177. *Id.*

that Congress' extension of the ERA ratification deadline was invalid.¹⁷⁸

The federal district court found the plaintiffs had standing, the matter was ripe for adjudication, and the case was not barred by the political question doctrine.¹⁷⁹ The court then considered the merits of the case, found for the plaintiffs, and declared Idaho's rescission of its ratification prior to three-fourths of the states ratifying the amendment was valid and Congress' extension of the deadline was null and void.¹⁸⁰

Defendants filed a petition for *certiorari* before judgment in the Supreme Court seeking expedited review. The Court stayed the district court's judgment but declined expedited review on the merits.¹⁸¹ Before the case could be decided by the Supreme Court, the extension of the deadline to ratify the ERA expired, and the defendants moved the Supreme Court to dismiss the case as moot.¹⁸² The Court granted the defendants' motion, vacated the judgment below, and remanded the case to the district court with instructions to dismiss the case as moot.¹⁸³

Under Supreme Court precedent, the vacatur of the district court's judgment and remand with instructions to dismiss as moot prevents the lower court's decision from imposing any legal consequences on the parties.¹⁸⁴ The vacated judgment, therefore, has no binding effect on the parties or other courts.¹⁸⁵

The Court's finding of mootness based on the expiration of the extended deadline could be argued to be a decision on the merits of the validity of the deadline and support for the claim that such matters are justiciable. Alternatively, one might view the Court's action as deferring to Congress' authority to dictate the Article V ratification process, which the Court declined to second guess. What is not subject to debate is the vacatur of the lower court's

178. *Idaho v. Freeman*, 529 F. Supp. 1107, 1113–14 (D. Idaho 1981), *vacated sub nom.* *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

179. *Id.* at 1121, 1123, 1146.

180. *Freeman*, 529 F. Supp. at 1155.

181. *Nat'l Org. for Women v. Idaho*, 455 U.S. 918 (1982).

182. *Id.*

183. *Id.*

184. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

185. *Id.*

decision and dismissal of the case as moot precludes relying upon *Idaho v. Freeman* as legal authority that Article V issues are “freely justiciable.”

b. Nonjusticiable Cases

More recent litigation over the ratification of the Equal Rights Amendment illustrates how justiciability factors, other than the political question doctrine, can arise in the Article V context. In *Equal Means Equal v. Ferreiro*, two non-profit organizations and an individual plaintiff sued the Archivist of the United States seeking an order declaring the ERA had been duly ratified.¹⁸⁶ The plaintiffs also requested a writ of *mandamus* requiring the Archivist to publish the ERA as the Twenty-Eighth Amendment to the Constitution, and an injunction preventing the Archivist from removing any previously reported ratifications by the states.¹⁸⁷

The plaintiffs’ theory of the case was that the seven-year ratification deadline imposed by Congress and the subsequent extension of that deadline were both unconstitutional because they were not part of the text of the ERA itself.¹⁸⁸ They claimed that the pre-deadline rescissions of ratifications by Nebraska, Idaho, Tennessee, Kentucky, and South Dakota were “null and void.”¹⁸⁹ They also argued the post-deadline ratifications by Virginia, Illinois, and Nevada meant the ratification threshold of Article V had been met.¹⁹⁰

In support of their *mandamus* claim, plaintiffs alleged that the Archivist had no discretion to refuse to certify and publish the ERA once the threshold for ratification was met.¹⁹¹ Therefore, the Archivist’s failure to perform this ministerial duty “resulted in states’ failure to prepare for the time when the ERA . . . [would] become enforceable, which . . . [would be] two years after its ratification, by ‘examin[ing] and repair[ing] laws, regulations, and

186. *Equal Means Equal v. Ferreiro*, 3 F.4th 24 (1st Cir. 2021)

187. *Id.* at 27.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

policies, to remove all sex discriminatory features.”¹⁹²

The district court dismissed the complaint for lack of standing, one of the justiciability criteria under Article III.¹⁹³ The plaintiffs filed a petition for a writ of *certiorari* before judgment, which the Supreme Court denied.¹⁹⁴

After the Supreme Court declined to hear the case, the plaintiffs pursued their appeal in the First Circuit. In affirming the district court’s dismissal, the First Circuit found that the organizational plaintiffs lacked a concrete and particularized injury fairly traceable to the defendant’s conduct that could be redressed by the relief requested.¹⁹⁵

Similarly, the court found the plaintiffs’ novel claim—that the female members of the organizations would suffer discrimination because states would not be required to protect women from sex-based violence under hate crime laws if the ERA did not become part of the Constitution—was too far removed from the statutory recording duties of the Archivist to satisfy the standing requirement of Article III.¹⁹⁶

The same lack of connection between the conduct of the defendant and the injury to the organizational plaintiffs proved fatal to the individual plaintiff’s claim as well. The individual plaintiff, Katherine Weitbrecht, claimed she had been a victim of a sex-based assault that was not prosecuted as a hate crime.¹⁹⁷ She argued that without the Archivist recording the ERA, she would not have the protection of hate crime statutes and would be at an increased risk of sex-based harm compared to men.¹⁹⁸ The court found these allegations meritless. The court held:

But neither these aspects of the complaint nor any other purport to address how any causal link between the risk of such harm that Weitbrecht in particular faces and the Archivist’s failure to

192. *Id.*

193. *Equal Means Equal v. Ferriero*, 478 F. Supp. 3d 105 (D. Mass.), *cert. denied*, 141 S. Ct. 611 (2020), and *aff’d*, 3 F.4th 24 (1st Cir. 2021).

194. *Equal Means Equal v. Ferriero*, 141 S. Ct. 611 (2020) (denying petition for *certiorari* prior to judgment).

195. *Equal Means Equal*, 3 F.4th at 27–28.

196. *Id.* at 28.

197. *Id.* at 29.

198. *Id.*

publish the ERA differs from the causal link between the risk of such harm that the organizations' members generally face as women and that failure. The complaint thus fails plausibly to allege standing as to Weitbrecht just as it fails to do as to those members more generally.¹⁹⁹

The plaintiffs' inability to show a particularized injury caused by the defendant's conduct and redressable by the court was fatal to the justiciability of their cause. While the underlying claims of the plaintiff dealt with the ratification process under Article V and not a convention for proposing amendments, the case clearly illustrates the justiciability issues that could arise in the Article V context.

In an apparent attempt to avoid the justiciability pitfalls that precluded judicial review of the plaintiffs' claims in *Equal Means Equal v. Ferreiro*, the three states that voted to ratify the ERA after the extended deadline expired—Virginia, Illinois, and Nevada—sued the Archivist seeking a writ of *mandamus* to require the Archivist to certify and publish the ERA as a ratified amendment to the Constitution.²⁰⁰

Virginia, Illinois, and Nevada, like the plaintiffs in *Equal Means Equal*, claimed the ratification deadline imposed by Congress was invalid because it was not in the text of the amendment.²⁰¹ They also argued that states could not rescind an earlier ratification, and with the ratification resolutions of the plaintiff states, the ERA achieved the thirty-eight-state threshold to become part of the Constitution.²⁰²

The district court found that judicial resolution of the validity of the extended deadline was not barred by the political question doctrine, but the plaintiffs lacked standing to press their claims against the Archivist and dismissed the action.²⁰³

Plaintiffs could not establish standing because the duty of the Archivist to certify and publish an amendment after ratification

199. *Id.*

200. *Commonwealth v. Ferreiro*, 525 F. Supp. 3d 36, 43 (D.D.C. 2021).

201. *Id.*

202. *Id.* at 55.

203. *Id.* at 45.

has no legal effect on ratification itself.²⁰⁴ Ratification occurs when three-fourths of the states ratify the proposed amendment according to the method imposed by Congress.²⁰⁵ Article V does not delay the effect of ratification until the Archivist certifies and publishes the results of the states' consideration.²⁰⁶ Thus, the defendant's refusal to certify and publish the ERA did not cause any injury to the plaintiffs, and a judicial order to require certification and publication would not redress plaintiffs' claimed injuries.²⁰⁷ The lack of standing was fatal to plaintiffs' claim and required dismissal of the case as nonjusticiable.²⁰⁸

Even though the plaintiffs' lack of standing disposed of the case, the district judge also addressed the Archivist's argument that the case presented a nonjusticiable political question.²⁰⁹ The court, however, found adjudicating the validity of the deadline was not barred by the political question doctrine.²¹⁰ "Interpreting Article V's use of the terms 'propose' and 'ratification' to determine the effect of a proposed amendment's deadline requires nothing more than applying 'familiar principles of constitutional interpretation' to 'textual, structural, and historical evidence.'"²¹¹ This did not require the court to intrude upon matters textually committed to another branch or to resolve an issue where there were no judicially discoverable and manageable standards.²¹²

The judge's incidental finding in *Virginia v. Ferriero*, that the political question doctrine did not bar judicial review of the plaintiffs' claims, does not mean the political question doctrine will not arise in other Article V cases. The Supreme Court held in *Coleman v. Miller* that the political question doctrine barred judicial consideration of whether Kansas' ratification resolution of

204. *Id.* at 47.

205. *Id.*

206. *Id.*

207. *Id.* at 47–49.

208. *Id.*

209. *See id.* at 49–54.

210. *Id.*

211. *Id.* at 52.

212. *Id.* Plaintiffs have filed an appeal with the District of Columbia Circuit, and oral argument was held on Sept. 28, 2022. Virginia withdrew as a party leaving Illinois and Nevada as the plaintiffs in the pending appeal. *Virginia v. Ferriero*, No. 21-5096, Doc. No. 1936684 (D.C. Cir. Feb. 25, 2022).

a proposed child labor amendment, thirteen years after Congress first proposed it, was valid.²¹³ Whether the political question doctrine bars judicial review in an Article V convention context will depend upon a detailed analysis of the issues if a lawsuit challenging some aspect of the convention's work is filed. It is one of the unknowns.

The ripeness issues that demanded dismissal of the initial complaint in *Dyer*, the standing issues presented by *Ferreiro*, the mootness question that arose in *Freeman*, and the political question doctrine that precluded judicial review in *Coleman* all indicate that justiciability issues are alive and well in Article V litigation. Some courts have found the issues justiciable and reached the merits of Article V cases, but the fact remains that justiciability is an ever-present question.²¹⁴ None of the cases that found Article V issues justiciable have dealt with the respective roles of Congress, the states, and convention delegates in the context of an Article V convention for proposing amendments.

To illustrate the conundrum that the justiciability factors create, assume a convention for proposing amendments produces an amendment that arguably exceeds some limitation on the scope of its authority imposed by either the state legislatures in their applications or Congress in its call of the convention. After taking a final vote, the convention sends the proposed amendment to the states for ratification. Its constitutional function has been completed and it dissolves. Who would be a proper defendant in a lawsuit challenging the proposed amendment as exceeding the scope of authority of the convention?

213. *Coleman v. Miller*, 307 U.S. 433 (1939).

214. *See, e.g.*, *Dillon v. Gloss*, 256 U.S. 368 (1921) (upholding 7-year ratification window imposed by Congress); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (presentment of a proposed amendment to the President not required). *See also* *I.N.S. v. Chadha*, 462 U.S. 919, 955–56 n.21 (1983) (citing *Hollingsworth* and stating that presentment is not required for constitutional amendments); *Hawke v. Smith*, 253 U.S. 221, 227 (1920) (same). Compare Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 886–901 (1980) (judicial review available), and Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 414–16 (1983) (judicial review available), with Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 435–36 (judicial review limited).

Until the convention produces a proposed amendment, the case would not be ripe for review.²¹⁵ After the proposed amendment is adopted and sent to the states for ratification, the convention's work is finished. It is not a permanent feature of the federal system. When it proposes an amendment for ratification, it has completed its task and ceases to exist as a legal entity. The convention has no continuing authority over the ratification process and would not be subject to the jurisdiction of the federal courts.²¹⁶

Perhaps a suit to enjoin state legislatures or state conventions from ratifying the allegedly *ultra vires* proposed amendment might be filed, but at least thirteen states would have to be named as defendants to make sure there were not enough states to ratify the amendment.²¹⁷ Any conceivable scenario to enforce a limitation on the scope of a convention's power to propose amendments, whether filed before the convention finished its work or after producing a proposed amendment, would be complicated by the justiciability factors discussed above. The outcome, of course, would be unknown until the case is filed and litigated.

215. See, e.g., *Dyer v. Blair*, 390 F. Supp. 1287 (N.D. Ill. 1974).

216. Since the convention ceases to exist as a legal entity after finishing its work, there is no defendant to sue. Furthermore, the "injury" sustained by the plaintiffs in the hypothetical is very likely to be a general interest in the orderly and proper conduct of business by federal entities and not the particularized, direct, and palpable injury required to establish standing. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) 'actual or imminent,' and not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (internal citations omitted).

217. The Eleventh Amendment and the doctrine of sovereign immunity generally preclude suits against states in federal court. *Whole Women's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). A suit brought by a state against other states would be within the original jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2. However, the justiciability requirements of U.S. CONST., art. III, apply even to suits between states. See *California v. Texas*, 141 S. Ct. 2104, 2120 (2021) (plaintiffs lacked standing).

Whether a case involving an Article V convention is justiciable would depend upon an analysis of the same factors that determine whether any civil lawsuit presents a case or controversy under Article III: ripeness, mootness, standing, whether the plaintiffs seek an advisory opinion, and whether the matter presents a political question unsuitable for judicial resolution. Those questions will remain unanswered until a specific plaintiff files a lawsuit naming a specific defendant and alleging defendant's conduct caused a particularized injury that a judicial remedy can redress.

Merely because some Article V cases have cleared justiciability hurdles does not mean that every lawsuit involving Article V, especially those that may arise in the context of a convention for proposing amendments, would be justiciable. When advocates for an Article V convention claim that Article V issues are "freely justiciable" they are misinformed, naïve, or obfuscating the complexities of federal jurisdiction.

2. Appropriateness

The thorny legal issue of justiciability aside, relying on federal courts to resolve questions surrounding the power and control of convention delegates by Congress or the states flies in the face of the very purpose of the convention method of proposing amendments. Article V contains the convention method of proposing amendments is to provide an amendment option for use when the states and the federal government are at odds over the scope of federal power.²¹⁸ But if federal courts can resolve the uncertainties surrounding an Article V convention, that would put the federal government, through the Article III judiciary, back in the driver's seat. According to the Convention of States Action campaign, federal courts are part of the problem.²¹⁹

One must wonder why those who claim an Article V convention is "the only way to rein in our activist judiciary"²²⁰

218. See Voegler, *supra* note 34 at 366.

219. ARTICLE V CONVENTION OF STATES POCKET GUIDE, *supra* note 6, 1–9 ("The federal judiciary supports Congress and the White House in their ever-escalating attack upon the jurisdiction of the 50 states.").

220. *Id.* at 26.

would rely upon the same “activist judiciary” to resolve disputes over the process, procedures, and operations of an Article V convention called to place restraints on the judiciary.

State legislators being lobbied to vote in favor of applying for a convention for proposing amendments must critically evaluate the claims of Article V advocates that federal courts would be available to resolve disputes. Whether a federal court has jurisdiction to hear a case arising in the convention context would depend upon the specific facts presented and the complexities and nuances of Article III’s case or controversy requirement.

Despite claims to the contrary, it is not a foregone conclusion that all Article V convention issues would be “freely justiciable.” When coupled with the inconsistent claim that “activist” federal courts are part of the problem, state legislators must understand federal courts may not be the safeguard from untoward consequences that advocates claim them to be.

D. Whether Ratification Will Prevent Radical Revisions

With no recognized supervisory authority or constitutionally established procedures to ensure the convention considers only the topics in the states’ applications, however Congress aggregates them, opponents are reasonably concerned that what comes out of a convention may bear little resemblance to their policy goals going in. Proponents dismiss such concerns, claiming that for a proposed amendment to become effective it must be ratified by thirty-eight of the states, and there is no chance that a radical amendment or amendments would ever be ratified.

The “ratification safeguard” argument is problematic for several reasons. First, it acknowledges that a convention could, indeed, propose a radical amendment that departs significantly from the policy goals of the states applying for a convention.

Second, some Article V proponents confidently promise that since most states are controlled by Republicans, “rogue” amendments would never be ratified by the required three-fourths of the states. But to state what should be obvious, political dynamics change in unpredictable ways.

The time lag necessarily associated with getting two-thirds of the states to submit applications for a CPA, the convening of the

convention, and the time needed to process the work of the convention and propose amendments would overlap any number of election cycles. This means that the political make-up of the state legislatures that started the process may be radically different than the political make-up of those bodies when the time comes to select the delegates or ratify the work of the CPA.

Potential change in political philosophy of the state legislatures injects another unknown into the entire process and should give anyone pause before voting to spend limited time, effort, and resources on an Article V convention to propose amendments.

Third, the “ratification safeguard” argument reveals the likelihood that any convention would be a waste of time and could not produce a proposed amendment that could clear the ratification hurdle. In our equally divided nation, it is highly unlikely that a majority of the states at a convention could craft an amendment that three-fourths of the states would ever ratify. The political divide is too stark and positions too entrenched to believe that such a high bar for ratification can be reached. By arguing that one should not worry about radical proposals becoming part of the Constitution due to the high bar of ratification, proponents are acknowledging that a convention for proposing amendments will not be able to propose amendments to achieve their policy goals in the first place.

In the final analysis, by arguing the ratification safeguard will prevent radical amendments from ever becoming part of the Constitution, proponents are admitting that the entire enterprise could be a nullity. If the best that could happen is a convention that would be unable to fashion an amendment that could be ratified by three-fourths of the states, then the entire process will have been a colossal waste of time, energy, and resources.

Conservative opponents believe the time, energy, and resources given to a CPA would be better used to elect local, state, and federal candidates who will apply the Constitution as written. If they cannot do that, what makes them think they can select, commission, and send delegates to a CPA that will exercise the discipline required to produce principled conservative amendments that will also pass the ratification threshold?

V. THE PROBLEM OF POLITICS

A. *Guilt or Virtue by Association*

Conservative advocates of an Article V convention promote their cause by claiming their opponents have aligned themselves with progressives who also oppose a CPA. Mark Meckler, president of the Convention of States Action, wrote in a recent op-ed that conservatives who oppose an Article V convention have been “suckered” by left-wing organizations such as Common Cause, state chapters of Planned Parenthood, the AFL-CIO, a host of progressive organizations funded by George Soros, and even Hillary Clinton.²²¹

The reverse side of this marketing coin is the CoSA’s list of respected conservatives who support Meckler’s cause.²²² All are entitled to their opinions, but they would have no more power to control the outcome of a CPA than Meckler and other professional advocates would.

Some progressive organizations such as Occupy Wall Street (OWS) and WolfPAC have been ardent proponents of an Article V Convention because they hope it would propose a constitutional amendment to reverse the *Citizens United v. FEC* Supreme Court decision and promote their ideas. Progressive advocates of an Article V convention would hope for a ban on private contributions to politicians and provide for public financing of campaigns, single-payer national health care, ending corporate tax loopholes, and other progressive causes.²²³

Whether a convention for proposing amendments is a good

221. Mark Meckler, *If the leftists who so vehemently oppose an Article V Convention of the States believed they could ‘rig’ it, it’s news to them*, THE FEDERALIST (Feb. 23, 2022), <https://thefederalist.com/2022/02/23/if-leftists-could-rig-a-convention-of-the-states-why-do-they-oppose-it/>.

222. *Endorsements*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/endorsements> (last visited Mar. 29, 2022).

223. Nikolas Kozloff, *Occupy Wall Street: If South Americans Can Reform their Constitutions, They Why Not Us?*, THE HUFFINGTON POST (Dec. 21, 2011), https://www.huffpost.com/entry/occupy-wall-street-constitutional-reform_b_1022577 (last visited Mar. 29, 2022); see also *The Solution*, WOLF-PAC, https://wolf-pac.com/the_solution/ (last visited May 24, 2022) (promoting an election integrity amendment).

idea or a bad idea turns on how one balances the risks and benefits, not on who does or does not support it. The logical fallacy of appeal to authority cuts both ways and avoids an objective analysis of the pros and cons of calling for an Article V convention.

B. Unintended Consequences

The stated purpose of an Article V convention is to propose amendments, but the final wording of any given amendment cannot be known until it is approved by the convention. Furthermore, how any proposed amendment would be interpreted in the real world would not be known until it is ratified and applied to specific events, perhaps years later. Of course, this is true whether an amendment is proposed by Congress or by a CPA. But proponents of a CPA have created the impression that a convention proposing amendments will solve the problems they have identified as the most pressing without consideration of unintended consequences.

Convention of States Action promises that an Article V convention would only consider amendments within the scope of issues specified in the application language. Proponents of a CPA acknowledge states cannot limit a convention to the precise language of an amendment contained in the states' application for a convention, but claim that limiting the states' application for a convention to certain topics will produce amendments that further their policy goals.²²⁴ They fail to appreciate, however, that once a convention is underway and delegates engage in the give and take of debate and deliberations, the final wording of a proposed amendment could vary from any pre-convention proposal that advocates may prefer.

Consider the three issues proposed in applications promoted

224. Robert G. Natelson, *The State-Application-and-Convention Method of Amending the Constitution: The Founding Era Vision*, 28 T.M. COOLEY L. REV. 9, 16 (2011) ("To this conclusion, [that states can limit the scope of the convention] I add one caveat, however: the convention was to be a deliberative body. The design was not for states to dictate particular language in the application, thereby requiring the convention to vote merely 'yes' or 'no.' Rather, the applications were to identify areas of concern or amendments designed to accomplish particular purposes, leaving it to the convention to discuss, draft, and propose them.").

by Convention of States Action: fiscal restraints on the federal government, limits on the power and jurisdiction of the federal government, and limits on terms of office for federal officials and members of Congress.²²⁵

All these topics could be addressed in radically different ways. A balanced budget amendment, for example, could place a fiscal restraint on the government. But Congress could achieve a balanced budget by increasing revenue through higher taxes rather than through reduced spending. Or it may reduce expenditures by defunding federal law enforcement agencies. The amendment, however, would be one within the general scope of even a limited convention called to address fiscal restraints on the federal government.

Similarly, an amendment providing for election of the president and vice president by popular vote using ranked-choice voting would eliminate the Electoral College and the involvement of Congress in opening and certifying the votes of the College. It would, therefore, limit “the power and jurisdiction of the federal government.”²²⁶ That may not be what the proponents of limiting government power and jurisdiction may want, but it might be what they get even if a convention is limited by the topic of the states’ applications.

A proposed amendment expanding the Equal Protection clause to include gender identity would limit the power of government to regulate those areas.²²⁷ It would, arguably, fall under the limited federal power topic in a state’s application for a convention.

The First Amendment to the proposed Progressive

225. *Application for a Convention of The States Under Article V of The Constitution of The United States*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/files/model-convention-of-states-application/download> (last visited May 9, 2022).

226. *Compare* U.S. CONST. amend. XII (President of the Senate opens and counts the votes of the Electoral College in the presence of the House and Senate and giving House power to select the president if no candidate has a majority of electoral votes), *with* Caroline Frederickson et. al., *The Progressive Constitution*, NAT’L CONST. CENTER, at 13, https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf (providing for popular election of president and vice president) (last visited May 24, 2022).

227. *Id.* at 21.

Constitution provides, “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”²²⁸ This language protects individuals’ religious manifestations and specifically limits government power to regulate that freedom. But it also brings it within a category of amendments that limit federal power and jurisdiction.

Similarly, the Eighth Amendment to the Progressive Constitution forbids both state and federal governments from imposing “punishment by death, for a term of life, or equivalent terms of imprisonment.”²²⁹ It places a limit on federal power. While this language may not be the sort of limitation on federal power that the Convention of the States proponents envision, a vote of the delegates of just twenty-six states at a CPA would be sufficient to send it to the states for ratification.

The recent Senate vote to codify a right to abortion provides another example. The bill, essentially, prevented any governmental restrictions or regulation of abortion.²³⁰ It was a bill that limited government power. As such, it would be a possibility even at a convention limited to proposing amendments that limited government power.

As a deliberative body, a CPA would act much like a legislature in drafting, debating, and approving proposed amendments. The history of the Affordable Care Act (Obamacare) provides a case study in how an Article V convention could produce unintended consequences even if it purports to only consider amendments concerning limited subjects or topics.

In 2009, the House passed HR 3590, a bill to provide tax relief to military first time homeowners, and sent it to the Senate.²³¹ Senate Democrats amended the House bill by deleting everything except the bill number and inserting the text of the Affordable

228. *Id.* at 17.

229. *Id.* at 19. *See also, id.* at 21 (forbidding government from discriminating based on “sex, sexual orientation, performance of sexual or gender identity, sexual preference, or pregnancy, childbirth, and all attendant conditions, including the decision to become pregnant or terminate a pregnancy.”).

230. S. 4132, 117th Cong. (2022).

231. H.R. 3590, 11th Cong. (2009).

Care Act. The “amended” bill, which looked nothing like the House-approved bill, and which addressed an entirely different subject, passed the Senate 60-39 and was sent back to the House where it passed 219-212. President Obama signed the bill into law.²³²

One might argue that the amendment of HR 3590 in the Senate did not address the same topic or subject and offers no insight into how an Article V convention might create a proposed amendment unrelated to any scope limitation imposed by the states in their applications. Such an argument would be convincing only to the willfully blind or the hopefully naïve.

The original HR 3590 dealt with, among other things, tax credits for first time military home buyers. The Senate amendment dealt with, among other things, tax penalties for failure to buy health insurance. They were both tax bills.²³³ Thus, they dealt with the same subject matter or topic. In the context of a CPA purportedly limited to a particular topic or subject, it is easy to see how quickly the unintended consequences can result.

It is precisely that sort of sleight of hand, interpretative linguistics, and legislative shenanigans that raise legitimate concerns among convention opponents, even if one adopts the argument that a CPA could be limited to certain topics or subjects. Claiming that only amendments within the topic of the states’ application for a convention would be considered is no guarantee that specific policy preferences will be proposed or adopted.

C. Politicians Politicking

Article V does not specify how delegates would be chosen. Because the states would be petitioning for the convention, it is logical to assume that the states would choose their delegates. They may be appointed by the legislature, elected by referendum, or in some other fashion as determined by the states’ political

232. 111 CONG. REC. H3590 (daily ed. Nov. 19, 2009) (statement of Mr. Reid), <https://www.congress.gov/congressional-record/2009/11/19/senate-section/article/S11607-3> (last visited Mar. 29, 2022).

233. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding that the individual mandate was an exercise of Congress’ taxing power under art. I, § 8, cl. 1).

powers. Article V, however, does not address that issue, and some believe Congress may attempt to exert its influence on delegate selection.²³⁴

Regardless of how the delegates would be selected, it is likely they would have different views about how the convention should proceed, the scope of its authority, the degree to which the convention should be bound by historical practices of non-Article V conventions, and myriad other matters. With society's current emphasis on diversity, inclusion, and equity, it is naïve to think delegates to an Article V convention, however they are selected, would not represent the various categories of race, ethnicity, gender identity, sexual orientation, religious perspectives, and national origin that make up American society. Assuming these diverse delegates would be united in political philosophy and proposing amendments consistent with a conservative view of limited federal power ignores reality.

The political divide between the various states discredits the belief that only red-state conservatives would take part in an Article V convention.²³⁵ Instead, the unprecedented event would be a mix of political philosophies and agendas as divided as the nation itself.

Some delegates may reflect the views of authors such as Ibrahim X. Kendi, who has had enormous influence in discussions of America's constitutional legacy, and believes, "Americans

234. Super, *supra* note 104 ("In today's take-no-prisoners political environment, it is naïve to imagine that Congress would passively allow the formation of a convention whose delegates were unlikely to reflect its wishes.").

235. The Convention of States Action held a mock Article V convention in Williamsburg, VA, in September 2016. *Convention of States Historic Simulation*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/cos-simulation> (last visited Oct. 26, 2022). The convention passed several amendments limiting federal power, restraining government spending, and limiting terms of federal officials. While delegates from every state participated, they were volunteers, "mainly conservative," with a "few Democrats." *How a Mock Convention is Helping Fuel a Movement to Change the Constitution*, PUB. INTEGRITY (July 30, 2018), <https://publicintegrity.org/politics/state-politics/how-a-mock-convention-is-helping-fuel-a-movement-to-change-the-constitution/>. Though CoSA hailed the results as an example of how a convention should operate and what sort of amendments it would produce, the delegates attending were a homogeneous group and did not represent the broad range of political thought and philosophy that would be present at an actual convention where delegates would be selected under today's political environment. *Id.*

should pass an anti-racist amendment to the U.S. Constitution that enshrines two guiding anti-racist principals: Racial inequity is evidence of racist policy, and the different racial groups are equals.”²³⁶

State delegations also might include those who share the views of *The Nation* justice correspondent and columnist and MSNBC legal commentator Elie Mystal, who recently claimed in an interview, “[t]he Constitution is kind of trash; it was written by slavers and colonists and white people willing to make deals with slavers and colonists.”²³⁷ Mystal added, the Constitution “was written without the consent of black and brown people in this country and without the consent of women in this country. . . . The very least we can do is ignore what those slavers and colonists and misogynists thought and interpret the Constitution in a way that makes sense for our modern world.”²³⁸

Mystal is not alone in harboring hostility toward the Founding Fathers and their contribution to our constitutional system of government. In the summer of 2020, there were many incidents of protestors tearing down or vandalizing statues of the Founding Fathers such as George Washington and Thomas Jefferson, as well as Civil War era icons like Frederick Douglass.²³⁹ Advocates of an Article V convention cannot guarantee individuals who share those views will not be delegates.

On the other side of the aisle, conservatives might be more

236. Ibram X. Kendi, *Pass an Anti-racist Constitutional Amendment*, POLITICO, <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/> (last visited June 3, 2022).

237. The View, *Elie Mystal Shares the Reasons Behind His Book Allow Me to Retort*, YOUTUBE 1:37–1:38, 1:44–1:50, (Mar. 4, 2022), <https://www.youtube.com/watch?v=wJpfYVZ0ZCA>.

238. *Id.* 2:25–2:33.

239. David Williams, *Protesters Tore Down a George Washington Statue and Set a Fire on Its Head*, CNN (June 19, 2020, 1:06 PM), <https://www.cnn.com/2020/06/19/us/portland-george-washington-statue-toppled-trnd/index.html>; Joshua Caplan, *Thomas Jefferson Statue Torn Down at Portland High School*, BREIBART (June 26, 2020), <https://www.breitbart.com/politics/2020/06/15/thomas-jefferson-statue-torn-down-at-portland-high-school/>; Thomas Catenacci, *Statue of Black Abolitionist Frederick Douglass Torn Down, Dragged to Nearby River*, DAILY CALLER, (Jul. 6, 2020, 12:37 PM), <https://dailycaller.com/2020/07/06/statue-black-abolitionist-slave-frederick-douglass-toppled>.

interested in amending the Constitution to impose term limits on senators and representatives much like the Twentieth Amendment imposed on the President.²⁴⁰ It is hard to fathom how delegates with such diverse political and philosophical views could participate in the same convention, and propose any amendment that would be ratified by three-fourths of the states.

It is fair to assume that delegates, whatever their political philosophy, would have some knowledge, experience, and practice in the world of legislative affairs, and they would bring that knowledge, experience, and practice to bear in resolving differing views on issues noted above. In other words, they will be politicians used to making deals, horse-trading, and sometimes agreeing to peculiar compromises to move the agenda forward.

VI. MADISON'S PRESCIENT WARNING

As noted at the outset, the controversy over convening a convention to consider amendments to the Constitution is not new.²⁴¹ Nor have the dangers and difficulties identified by James Madison been mitigated over the years. In fact, time, cultural acrimony, and political divisiveness have only exacerbated problems and elevated potential risks.

Madison's letter to Turberville provides a powerful summary of the complications, risks, unknowns, and dangers that proponents of an Article V convention ignore. In the fall of 1788 when Turberville wrote to Madison seeking his advice, the Constitution had been ratified by eleven of the thirteen states.²⁴² In the ratification process, however, those opposed to a strong federal government raised concerns about the absence of specific protections of individual liberty and state autonomy in the text of the document.²⁴³ Turberville's letter sought Madison's opinion of

240. See, e.g., Sen. Cruz, *Colleagues Reintroduce Constitutional Amendment Imposing Congressional Term Limits*, (May 6, 2022), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-colleagues-reintroduce-constitutional-amendment-imposing-congressional-term-limits>; See also, S. REP. NO. 108-334 (2004) (proposed amendment to prohibit desecration of the American flag) (last visited May 6, 2022).

241. See *supra* text accompanying notes 2-3.

242. *Infra* note 257.

243. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS &

the advisability of a convention for proposing amendments to consider the concerns of the Anti-federalists.²⁴⁴

In his reply to Turberville, Madison acknowledged that the Constitution drafted by the Philadelphia Convention was not perfect and could be improved by certain amendments acceptable by all. But there was disagreement over other proposed amendments:

I am not of the number if there be any such, who think the Constitution, lately adopted, a faultless work. On the contrary there are amendments which I wished it to have received before it issued from the place in which it was formed. These amendments I still think ought to be made according to the apparent sense of America; and some of them at least I presume will be made. There are others, concerning which doubts are entertained by many, and which have both advocates and opponents on each side of the main question²⁴⁵

Madison's opinion that the Constitution was not without fault was premised on the absence of provisions protecting individual rights. While that issue was addressed with the ratification of the first ten amendments, which Madison, as a Virginia Congressman, introduced in the House of Representatives, today's controversy is fueled by decades of Supreme Court opinions interpreting the Constitution and actions by the executive and legislative branches over the years that have, in the minds of some, departed from the principles and limits the Constitution placed upon federal power and jurisdiction.

It is still true today that there are "advocates and opponents" on all sides of questions about whether and what type of amendments are needed. Just as in Madison's day, we still have divergent views on whether the problems that face the nation should be solved by amending the Constitution, passing new laws, repealing existing laws, expanding federal agencies, eliminating some federal agencies, by increasing discernment of the voters on election day, or some combination of these options. The debate over whether the Constitution should be amended has existed since the

INTERPRETATION, *supra* note 4.

244. Letter From George Lee Turberville to James Madison, *supra* note 3.

245. Letter From James Madison to George Lee Turberville, *supra* note 2.

Philadelphia Convention approved it on September 17, 1787.

Madison was of the view that if amendments were necessary to correct flaws in the Constitution, “[T]he only question is which of the two modes provided be most eligible for the discussion and adoption of them.”²⁴⁶ This is still true today.

Madison believed the convention method is fraught with risks of danger and division that would do more harm than good.²⁴⁷ In his letter to Turberville he outlined three fundamental objections to a convention to propose amendments that are pertinent to the current debate.²⁴⁸

First, Madison believed that potential disagreements over the convention method would worsen divisions and disagreement regardless of the merits of any given amendment:

It will add to the difference among the states on the merits another and an unnecessary difference concerning the mode. There are amendments which in themselves will probably be agreed to by all the states, and certainly by the requisite proportion of them. If they be contended for in the mode of a convention, there are unquestionably a number of states who will be so averse and apprehensive as to the mode, that they will reject the merits rather than agree to the mode. A convention therefore does not appear to be the most convenient or probable channel for getting to the object.²⁴⁹

246. *Id.* The two modes of amendment are the congressionally proposed amendments and the convention-proposed amendments. U.S. CONST. art. V. Some commentators argue that a third method, a full-throated constitutional convention along the lines of the Philadelphia Convention of 1787 is still available if all the states agree and unanimously ratify any amendments or revisions proposed by such a convention. *See infra* note 257 and accompanying text.

247. Letter From James Madison to George Lee Turberville, *supra* note 2.

248. In his letter to Turberville, Madison also expressed concern that another convention so soon after the Philadelphia Convention would be seen by European countries that the fledgling Union was struggling and not stable. The passage of two centuries and the emergence of the United States as a world power diminishes this concern somewhat. *See* Madison letter, *supra* note 2 (“It is not unworthy of consideration that the prospect of a second Convention would be viewed by all Europe as a dark and threatening Cloud hanging over the Constitution just established, and perhaps over the Union itself; and wd. therefore suspend at least the advantages this great event has promised us on that side.”).

249. *Id.*

Madison recognized that the convention method was a gamble. Implicit in this warning is that once convened, the convention could not be restricted, limited, or otherwise constrained to consider only amendments that “will probably be agreed to by all the states.”²⁵⁰ The convention, a deliberative body, would be free to draft, debate, and discuss varying amendments to achieve a product the body would adopt. Even if the convention limited itself to a specific topic, the range of ideas to address that topic would be so broad that, according to Madison, some states would be “so averse and apprehensive as to the mode” that they would rather not have the amendment than risk the unknowns of a convention.²⁵¹ As noted above, the Affordable Care Act provides a sobering example of an amendment departing radically from an initial proposal but still dealing with the same subject or topic.²⁵² If the convention could be limited from the outset to considering only those specific amendments to which all would assent, Madison would have no reason to think there would be dispute or division over the mode so significant it would make the entire effort worthless. Those today who are “averse and apprehensive as to the mode” share Madison’s view of the dangers of convening an Article V convention.²⁵³

Madison’s second objection recognized the difficulty of convening an Article V convention as compared to Congress proposing amendments:

A convention cannot be called without the unanimous consent of the parties who are to be bound by it, if first principles are to be recurred to; or without the previous application of $\frac{2}{3}$ of the State legislatures, if the forms of the Constitution are to be pursued. The difficulties in either of these cases must evidently be much greater than will attend the origination of amendments in Congress, which may be done at the instance of a single state legislature, or even without a single instruction on the subject.²⁵⁴

250. *Id.*

251. *Id.*

252. *Supra* notes 232-33 and accompanying text.

253. Letter From James Madison to George Lee Turberville, *supra* note 2.

254. *Id.*

Here, Madison addressed the practical difficulties of convening a convention. His point was that it would be more efficient and expedient for the people and their states' representatives to pressure Congress to propose constitutional amendments instead of invoking the convention mode. After all, senators and representatives were elected to Congress to represent the people of their respective states. During their campaigns they, no doubt, promised to listen to their constituents and represent their interests in Washington. There is nothing stopping individuals, organizations, or even state legislatures from meeting with their congressional delegations and urging them to introduce a proposed amendment in Congress. They can do that without the need to secure the cooperation of thirty-three other states. Any member of Congress can propose a constitutional amendment. If approved by two-thirds of the House and Senate, it goes to the states for ratification.

If the proposed amendments are ones that enjoy consensus support and can pass the ratification hurdle, it is far more efficient and prudent to follow the congressional route than the convention mode with its inherent difficulties and unknowns.

Under Article V, the CPA is the deliberative body that would draft, debate, and decide what, if any, amendments it would propose. Under the congressional method, Congress is the deliberative body that would draft, debate, and decide what, if any, amendments are proposed. The delegates to the CPA, like the members of Congress, are representatives of the people of their respective states. There is no oversight, control, limitation, or micromanagement of Congress when it drafts, debates, and decides on proposed amendments and there should be no outside oversight, control, limitation, or micromanagement over a CPA called to perform the same function. If state legislatures could control the convention and the delegates, Madison's efficiency objection would not make much sense and the symmetry and balance between the convention method and congressional method of proposing amendments would be upset.²⁵⁵

255. THE FEDERALIST NO. 43 (James Madison) (“[The two modes of proposing amendments in Article V] . . . equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out

Madison's third objection reinforced his belief that the convention method of proposing amendments was susceptible to the political passions of the delegates:

If a general convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and support as well as to amend the system; it would consequently give greater agitation to the public mind; an election to it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of the flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts, but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a Second, meeting in the present temper of America and under all the disadvantages I have mentioned.²⁵⁶

This criticism of the convention method also reveals Madison's concern that neither state legislatures nor congressional resolutions could effectively control the scope and proceedings of a convention once it convened. The delegates themselves would be the ultimate authority. Accordingly, the character, experience, philosophy, and partisan leanings of those delegates would determine the course of the convention. If either the states or Congress could effectively manage the convention and limit or control its proceedings, the "violent partisans," "heterogeneous characters," and "individuals of insidious views" would be neutralized and unable to disrupt or direct the convention toward their own nefarious goals.

Advocates of a CPA argue that Madison is referring to a "plenipotentiary" convention, like the Philadelphia Convention of

by the experience on one side, or on the other.").

256. Letter From James Madison to George Lee Turberville, *supra* note 2.

1787, and not to an Article V convention.²⁵⁷ Their argument is that in addition to an Article V convention there was at the time Madison wrote the option of convening a constitutional convention that would not be bound by the Constitution. This is the same explanation they give for why the Philadelphia Convention of 1787 was not bound by the Articles of Confederation and was not a “runaway” convention.²⁵⁸

This argument overlooks several important factors. First, and most important, delegates to a “plenipotentiary” convention would, most likely, be selected by the same process at the state level as delegates to an Article V convention. Thus, the character, experience, political philosophy, and partisan leanings of the delegates, the subject Madison was specifically warning about, would be the same whether it was a plenipotentiary convention or an Article V convention.

Second, earlier in his letter, Madison referred to the “two modes” of amending the Constitution, the congressionally proposed method and the convention method.²⁵⁹ He further identifies two types of conventions, “[a] convention cannot be called without the unanimous consent of the parties who are to be bound by it, if first principles are to be recurred to; or without the

257. See, e.g., Greg Abbott, *supra* note 57, at 37–38 (arguing that the “general convention” referred to by Madison was, like the Philadelphia Convention, one with plenary authority to establish a new form of government while an Article V convention is limited to proposing amendments to the existing Constitution); Natelson, *supra* note 224, at 15–16 (describing an Article V convention as a “limited” convention and contrasting it with a “plenipotentiary” convention which would have unlimited authority); *The Madison Letter*, FRIENDS OF ARTICLE V CONVENTION, http://www.foavc.org/Pages/Page_Six_F.htm (arguing Madison was referring to a general constitutional convention and not an Article V convention) (last visited May 7, 2022). The claim that Madison was referring to convention like the Philadelphia Convention and not an Article V convention is not without historical support. While the Constitution was ratified on June 21, 1788, when New Hampshire became the ninth state to ratify it, it did not become effective until March 4, 1789, after presidential electors were chosen and selected George Washington as the first president. Thus, when Madison wrote Turberville in November 1788, the Articles of Confederation, not the Constitution was the governing charter of the country. *The Day the Constitution was Ratified*, NAT'L CONST. CENTER, (June 21, 2021) <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>.

258. *Id.*

259. Letter From James Madison to George Lee Turberville, *supra* note 2.

previous application of 2/3 of the State legislatures, if the forms of the Constitution are to be pursued.”²⁶⁰ A convention under “first principles” is a constitutional convention requiring the consent of all parties if its result are to be binding. For example, the Philadelphia Convention of 1787. A convention under the “forms of the Constitution” refers to an Article V convention for proposing amendments.

In the letter, however, Madison does not distinguish between the pros and cons of two types of conventions other than pointing out the agreement required for the results to be binding and the number needed to convene under Article V. He is comparing a convention process to a congressionally proposed amendment process. He is not addressing whether an Article V convention can be controlled, limited, restricted, or otherwise managed by either the states or Congress. In Madison’s view the delegates to a convention, either a “plenipotentiary” convention or an Article V convention for proposing amendments, are the wild cards that create risks not present when Congress proposes amendments.

Third, a “general convention,” the term Madison used when describing the delegates who would attend, is a convention in which all states would take part. An Article V convention would be one in which all states would participate, a general convention.²⁶¹ Madison is not addressing whether Congress or the states could limit or restrict the scope of a convention’s authority. His concerns apply to any convention in which all states have a right to participate. In fact, he assumes that limitations cannot be placed on a general convention. That is why he specifically warned Turberville of the type of delegates and the divergent agendas that would hinder the efforts to add a bill of rights if the convention method was pursued. In his view the risks far outweighed the

260. *Id.*

261. Robert G. Natelson, *Counting to Two Thirds: How Close are We to a Convention for Proposing Amendments to the Constitution?*, 19 FED. SOC. REV. 51, 52–53 (2018) (“A general convention is a conclave to which states from all regions of the country are invited--as opposed to a partial or regional gathering. A convention for proposing amendments is necessarily general, but may be limited or unlimited as to topic.”); Natelson, *supra* note 82, at 680 (“The phrase ‘Convention for Proposing Amendments’ denoted a *general convention*. To be ‘general’ it was not necessary that every state participate. . . .”) (emphasis in original).

benefits.

Efforts by proponents of a CPA to ignore Madison's concerns by suggesting Madison was referring to an unlimited general constitutional convention and not an Article V convention are disingenuous. The text and context of the letter reveal that Madison's point was a general convention, whether a constitutional convention like the Philadelphia Convention or an Article V convention, was not advisable. Proponents' dismissal of Madison's concerns and refusal to apply them to an Article V convention are transparent attempts to avoid addressing the substance of Madison's concerns.²⁶²

Madison's far-sighted warning detailed the risks, dangers, and divisiveness that a convention for proposing amendments would create. And it came from one who, only a year earlier, had been a key leader in the Philadelphia Convention of 1787, which "assembled under every propitious" circumstance and produced the Constitution that has guided us for over 230 years.²⁶³

With remarkable foresight, Madison expressed concern that a convention's goal, laudatory as it may be, could be frustrated by the "most violent partisans on both sides, . . . the most heterogeneous characters, . . . [and] individuals of insidious views."²⁶⁴ As a result, the convention process would "flame which has already too much heated men of all parties. . . . [and would present] a dangerous opportunity of sapping the very foundations of the fabric. . . . [and] it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony to terminate in the general good."²⁶⁵

262. See, e.g., Robert G. Natelson, *James Madison and the Constitution's "Convention for Proposing Amendments"*, 45 AKRON L. REV. 431, 443–45 (2012) (discussing Madison's letter to Turberville but not applying it to an Article V convention); NATELSON, *supra* note 157, at § 3.4, n.59 (same); Natelson, *supra* note 92, at 728 (citing Madison's letter to Turberville for the proposition that instead of an Article V convention, the states could convene a convention requiring unanimity among the states instead of three-fourths to ratify amendments or change the structure of the Constitution but without addressing Madison's warnings about the operation of a convention); Natelson, *supra* note 261, at 52–53 (same).

263. Letter From James Madison to George Lee Turberville, *supra* note 2.

264. *Id.*

265. *Id.*

These disturbing words from a man intimately familiar with the workings of a convention should make us all “tremble for the result of . . . [a convention for proposing amendments].”²⁶⁶

Not surprisingly, advocates of an Article V convention tend to ignore Madison’s explicit and chilling warnings about the dynamics of a convention. Nor do they address Madison’s concerns about the vague and ambiguous phrase “convention for proposing amendments.”²⁶⁷ Instead, they limit his concerns to the very narrow and specific events and political factions of the day and avoid any application of his concerns to modern problems. Even though acknowledging that it was “unclear” whether Madison was limiting his comments to a plenipotentiary convention like the Philadelphia convention, Natelson, who claims to be “the nation’s most published active scholar on the U.S. Constitution’s amendment procedure,” fails to consider how Madison’s concerns apply to an Article V convention.²⁶⁸

VII. CONCLUSION

While legal academics are free to draw their own conclusions from the historical record, state legislators voting on whether to apply to Congress for an Article V convention must consider alternative interpretations of the historical record and accept academic writing for what it is, the opinion of an academic. Law professors (including this author), historians, and other academicians cannot guarantee their opinions will prevail when the gavel drops at a convention. Nor can they assume Madison’s warnings about convention dynamics will not apply to a modern Article V convention.

The bottom line issue in the current controversy is whether to accept the warnings and concerns of one who has been there and done that or the platitudes, rosy predictions, and promises of modern advocates who did not participate in the Convention of 1787, did not debate the substance of Article V, and can offer no assurance that Madison’s concerns were unfounded then or have

266. *Id.*

267. 2 Farrand *Records*, *supra* note 31, at 558; 639–40.

268. Natelson, *supra* note 262, at 443–45.

been mitigated by the passage of time.