

## COMMENTS

### STRUCTURAL ANALYSIS OF ARTICLE V: THE CONSTITUTIONALITY OF A LIMITED CONVENTION TO PROPOSE AMENDMENTS

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#### INTRODUCTION

Conventions have been a feature of American governance dating at least as far back as the seventeenth century. Most conventions prior to the Philadelphia Convention were limited in scope to address discrete subjects. The Framers and Ratifiers not only understood how these conventions functioned, but also in many cases personally took part in them. When debating proposals for what would become Article V, the Framers insisted on, and unanimously consented to the addition of, a convention of states, along with Congress, as the two alternative mechanisms for proposing amendments to the Constitution.<sup>1</sup> They did so partly out of concern that permitting Congress alone to propose amendments would block even beneficial amendments simply because they also reduce congressional power. This fear has become reality today. The convention method of proposing amendments has been all but rendered nugatory. Having never been used, its prospect sparks concern of a runaway convention that might precipitate a constitutional crisis. The structural benefits of the bifurcated proposal system

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<sup>1</sup> The relevant text of Article V reads as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

have therefore not been realized. A convention that is limited in scope to a specified subject matter, which is precisely what states submit their applications to convene, mitigates this concern of unpredictable change and makes this method viable for proposing amendments that may limit congressional power. The text, the history, and, most powerfully, the structure of Article V illustrate that a limited convention is constitutional and can reinvigorate the federalist nature of Article V by reinstating the intended balance of federal and state power in proposing amendments and effectuating constitutional change.

### I. THE NEED FOR AN AMENDMENT PROVISION

The Articles of Confederation suffered from a number of flaws,<sup>2</sup> chief among which was that its fundamentally unworkable amendment provision prevented even manifestly apparent defects from being rectified.<sup>3</sup> Indeed, it was never successfully used.<sup>4</sup> Amendment required both congressional agreement and *unanimous* ratification by state legislatures.<sup>5</sup> This system gave each state a veto over any amendment.<sup>6</sup> It served as an effective bar to amendment and led to the defeat of a number of attempts to institute features that would become foundational under the Constitution, prominently including powers of Congress to collect import duties, regulate commerce, and exercise coercive power over the states in the event of non-compliance

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<sup>2</sup> See James Madison, *Vices of the Political System of Government in the United States* (1787), in 9 THE PAPERS OF JAMES MADISON 348–58 (Angela Kreider et al. eds., 2018) (noting that these flaws included, *inter alia*: states’ failures to abide by constitutional requirements and federal authority, states’ violating the rights of one another, and a general inability to act in concert for the common good).

<sup>3</sup> See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 285 (2006) (“[I]t quickly became apparent to the delegates that the Confederation document’s biggest—and indeed fatal—flaw was its practical unamendability”); RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 337 (2009) (noting that the “lack of a workable method for amendment” was among the fatal defects of the Articles of Confederation).

<sup>4</sup> KATHLEEN O. POTTER, *THE FEDERALIST’S VISION OF POPULAR SOVEREIGNTY IN THE NEW AMERICAN REPUBLIC* 92 (2002).

<sup>5</sup> ARTICLES OF CONFEDERATION of 1781, art. XIII (“[Amendments must] be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.”).

<sup>6</sup> See POTTER, *supra* note 4, at 93 (explaining that Rhode Island’s decision to not even send delegates to the Convention illustrates how untenable the unanimity requirement was given that even bringing each state together to consider constitutional amendments, let alone agreeing upon them, was prohibitively difficult).

with Congressional directives.<sup>7</sup> This shortcoming was exacerbated by Congress's own consistent failure to agree upon proposed amendments in the first place.<sup>8</sup> The infeasibility of amendment under the Articles both necessitated going beyond the task of amending that regime to form a government anew and placed the need to provide a mechanism for amending the Constitution in a position of prominence at the Philadelphia Convention.<sup>9</sup>

The delegates resolved to provide an easier mode of amendment than that established by the Articles.<sup>10</sup> As Hamilton described, “[i]t had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the Articles of Confederation.”<sup>11</sup> The Framers were cognizant of the fact that allowing the Constitution to be too readily amended would produce instability;<sup>12</sup> however, the delegates also recognized that requiring unanimous consent of the state legislatures was too restrictive.<sup>13</sup> The experience under the Articles

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<sup>7</sup> *Attempts to Revise the Articles of Confederation*, CTR. FOR THE STUDY OF THE AM. CONSTITUTION, <https://csac.history.wisc.edu/document-collections/confederation-period/attempts-to-revise/> (last visited Nov. 5, 2019).

<sup>8</sup> See RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 27 (1988) (noting that the initial draft of what would become Article V of the Constitution excluded Congress because of its “failure to propose amendments in the immediately preceding years”).

<sup>9</sup> See, e.g., AMAR, *supra* note 3, at 285–92 (noting that “the amendment issues defined the first and most fundamental item of business to be addressed at Philadelphia”; the delegates could not abide by the Articles because of its rigid and untenable amendment provision, and this paradox illustrated the necessity of including a viable amendment procedure in the Constitution to avoid having to exceed the powers accorded by a governing document in the future); DARREN PATRICK GUERRA, PERFECTING THE CONSTITUTION: THE CASE FOR THE ARTICLE V AMENDMENT PROCESS 69 (2013) (“The debate over the scope of the Convention’s authority and the mode of ratification are clearly related to the issue of amendment in that they all seek to define the manner in which the sovereign authority of the people should be exercised for the purposes of founding a constitution.”).

<sup>10</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557–58 (Max Farrand ed., 1911) [hereinafter FARRAND].

<sup>11</sup> *Id.*; see also CAPLAN, *supra* note 8, at 20 (noting that Hamilton had long been motivated by the ineffectiveness of the Articles to fundamentally alter them, having recommended “calling immediately a convention of all the states . . . vested with plenipotentiary authority” to amend the Articles and create a “solid coercive union” as early as 1780).

<sup>12</sup> See THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961) (emphasizing that the amendment provision “guards . . . against that extreme facility, which would render the Constitution too mutable”).

<sup>13</sup> See, e.g., THE FEDERALIST NO. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961) (assailing “the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth”).

inculcated the idea that amendments “will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.”<sup>14</sup> Because the difficulty inherent in drafting and ratifying an agreeable constitution made clear that the document would not be without error,<sup>15</sup> the benefit of experience coupled with a functional means of making future alterations was essential to the viability of this constitutional experiment.<sup>16</sup>

In addition to aiming to provide long-term stability to the Constitution, Article V proved critical to the Constitution’s adoption and ratification.<sup>17</sup> The Articles had failed to produce an effective federal government, revisions of the Constitution would be needed, and it was better to adopt this Constitution and work within that framework than to resign to failure.<sup>18</sup> The feasible prospect of amendment, precipitated at the proposal stage at the federal or state level, provided a basis to accept the perceived defects that necessarily result from the compromise at play in a convention, and

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<sup>14</sup> 1 FARRAND, *supra* note 10, at 203.

<sup>15</sup> *See id.* at 122 (“The novelty and difficulty of the experiment requires periodical revision.”).

<sup>16</sup> *See, e.g., id.* at 439 (emphasizing that “should there be any defects, they will trust a future convention with the power of making further amendments”); THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961) (“That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided.”); THE FEDERALIST NO. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961) (noting that the “novelty of the undertaking” of drafting a constitution means that the convention can only aspire to avoid errors of the past and provide for a means of correcting errors that will be unveiled in time under the new Constitution).

<sup>17</sup> AMAR, *supra* note 3, at 286 (“During the ratification period, the kinetic interplay between the old article XIII and the new Article V helped propel the Constitution forward, as Federalists cleverly urged skeptics to ratify an admittedly imperfect Philadelphia document and then work to amend it.”); *see also* GUERRA, *supra* note 9, at 75–93 (tracing the role that Article V played in the ratification debates, state by state, to illustrate how the presence of a workable amendment mechanism with both state and federal proposal powers allayed concerns with the Constitution by emphasizing that flaws could be later altered as needed); THOMAS E. BRENNAN, THE ARTICLE V AMENDATORY CONSTITUTIONAL CONVENTION: KEEPING THE REPUBLIC IN THE TWENTY-FIRST CENTURY 5 (2014) (stating that Article V “was a pivotal point in the debates leading up to the ratification of the 1787 Constitution”).

<sup>18</sup> *See, e.g.,* 1 FARRAND, *supra* note 10, at 202–03 (“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 . . .”); *see also id.* at 532 (“The condition of the U. States requires that something should be immediately done. It will be better that a defective plan should be adopted, than that none should be recommended. [Bedford] saw no reason why defects might not be supplied by meetings 10, 15 or 20 years hence.”).

warranted ratifying the Constitution.<sup>19</sup> The importance of this argument in garnering support for the Constitution is evidenced by the appeal contained in the last essay of *The Federalist*; imperfect as the document may be, experience and time will bring the Constitution toward perfection through amendment.<sup>20</sup>

## II. DRAFTING ARTICLE V AND THE ROLE OF STATES IN PROPOSING AMENDMENTS

Determining the appropriate role for Congress in amending the Constitution was at the forefront of the initial debate over drafting the amendment provision at the Convention.<sup>21</sup> What would become Article V originated as the thirteenth of fifteen proposals laid out in the Virginia Plan.<sup>22</sup> This version provided that the Constitution should be amended whenever necessary, and that the consent of Congress was not required.<sup>23</sup> The delegates shared conflicting opinions on whether or not Congress should be so excluded.<sup>24</sup> This exclusion was motivated by the failure of Congress to propose needed amendments under the Articles;<sup>25</sup> nevertheless, some delegates doubted the “propriety of making the consent of [Congress] unnecessary.”<sup>26</sup> George Mason forcefully responded that it would be

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<sup>19</sup> See 2 FARRAND, *supra* note 10, at 558 (“It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System.”).

<sup>20</sup> POTTER, *supra* note 4, at 91–92 (quoting THE FEDERALIST NO. 85 (Alexander Hamilton) (“[T]he judgments of many must unite in this work [of amending errors]: Experience must guide their labor; Time must bring it to perfection; And the Feeling of inconveniences must correct the mistakes which they inevitably fall unto, in their first trials and experiments.”)).

<sup>21</sup> See, e.g., BEEMAN, *supra* note 3, at 338 (expressing Hamilton’s concern that state legislatures would only amend the Constitution “to increase their own powers,” and hence the need for Congress to also be empowered to call for a convention); 1 FARRAND, *supra* note 10, at 202–03 (recording debate around adopting resolution allowing the Constitution to be amended without consent of national legislature); 2 FARRAND, *supra* note 10, at 468 (noting a suggestion that Congress “should be left at liberty to call a Convention, whenever they please”).

<sup>22</sup> 1 FARRAND, *supra* note 10, at 121.

<sup>23</sup> *Id.* (stating “that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the National Legislature”).

<sup>24</sup> *Id.* at 121–22 (showing two delegates argue about the propriety of amending the Constitution without the assent of Congress).

<sup>25</sup> CAPLAN, *supra* note 8, at 27.

<sup>26</sup> 1 FARRAND, *supra* note 10, at 202.

“improper to require the consent of [Congress], because they may abuse their power, and refuse their consent on that very account.”<sup>27</sup> The discussion was tabled to await redrafting that would take into account these disparate positions.<sup>28</sup>

The Committee of Detail’s draft of what would become Article V provided for a convention called by two-thirds of state legislatures, absent any requirement of Congressional assent.<sup>29</sup> Alexander Hamilton objected to the decision to allow states alone to propose amendments.<sup>30</sup> He began his argument with the premise that this amendment provision was designed to enable an easier method of amending defects than was permitted under the Articles.<sup>31</sup> Much like George Mason feared that requiring the assent of Congress would result only in amendment proposals that steered clear of limiting Congressional power,<sup>32</sup> Hamilton argued that states, should they alone be empowered to amend the Constitution, would do so only to augment their own power vis-à-vis Congress.<sup>33</sup> The exercise of proposal power by Congress, Hamilton argued, is not to be feared because it is constrained by the people having the ultimate say;<sup>34</sup> Congress’s role is merely to call a convention of the states at which amendments will be proposed.<sup>35</sup>

Roger Sherman’s suggestion of an alternative method of proposing amendments via Congress—subject to the approval of the states—was intended to bridge the gap between the Committee of Detail’s draft and

<sup>27</sup> *Id.* at 203.

<sup>28</sup> *Id.*

<sup>29</sup> 2 FARRAND, *supra* note 10, at 159 (“This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose.”).

<sup>30</sup> *Id.* at 558 (arguing that Congress may be better able to discern and correct constitutional defects and should therefore have the ability to initiate the amendment process).

<sup>31</sup> *Id.* at 557 (“It had been wished by many . . . that an easier mode for introducing amendments had been provided by the articles of Confederation.”).

<sup>32</sup> *Id.* at 629 (“As the proposing of amendments is . . . to depend . . . on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as [Mason] verily believed would be the case.”).

<sup>33</sup> *Id.* at 558 (“The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also be empowered, whenever two thirds of each branch should concur to call a Convention . . .”).

<sup>34</sup> *Id.* (“There could be no danger in giving this power, as the people would finally decide in the case.”).

<sup>35</sup> *Id.* (“The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, an ought also to be empowered, whenever two thirds of each branch should concur to call a Convention . . .”).

Hamilton's perceived defects.<sup>36</sup> James Wilson proffered the addition of "two-thirds" before the several states.<sup>37</sup> This motion was initially defeated, but was then approved once Wilson changed two-thirds to three-fourths.<sup>38</sup> This change gave rise to Article V's bifurcated proposal system, under which either two-thirds of the states or two-thirds of both Houses of Congress initiate the amendment process.<sup>39</sup> Its dual nature accounts for the concern that the self-interest of either group could prevent popularly supported change where such amendment would curtail the power of the proposing entity.

Madison put forth a draft that included these agreed upon changes but that nevertheless maintained an outsized role for Congress.<sup>40</sup> His proposal provided that either Congress or state legislatures could initiate the amendment process, but in either case, Congress would propose the amendments.<sup>41</sup> This intentional creation of a role for a convention of the states<sup>42</sup> only in ratifying, but not in proposing, reflected Madison's concern

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<sup>36</sup> *Id.* ("Mr. Sherman moved to add to the article 'or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States.'").

<sup>37</sup> *Id.* ("Mr. Wilson moved to insert 'two thirds of' before the words 'several States'").

<sup>38</sup> *Id.* at 558–59 ("Mr. Wilson then moved to insert 'three fourths of' before 'the several St[at]e[s]' which was agreed to . . .").

<sup>39</sup> U.S. CONST. art. V.

<sup>40</sup> 2 FARRAND, *supra* note 10, at 559 ("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 part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S.").

<sup>41</sup> *Id.*

<sup>42</sup> The phrase "convention of the states" is used to describe the convention prescribed by Article V throughout this Comment. Its use dates back to the Pennsylvania General Assembly in 1789 referring to an Article V "convention of the states." MINUTES OF THE GEN. ASSEMBLY OF PA., 58–61 (Mar. 24, 1789). It has been used by the Supreme Court as early as 1831. *Smith v. Union Bank*, 30 U.S. (5 Pet.) 518, 528 (1831). The phrase had also been used in the United States prior to the Philadelphia Convention such as in a letter to Gouverneur Morris from Henry Knox in 1783, where Knox asked that Morris help call such a convention to address governmental defects. 1 JARED SPARKS, LIFE OF GOUVERNEUR MORRIS 256 (1832). Its historied role in political philosophy is illustrated by analogous phrasing used by Thomas Hobbes at least as early as 1642. THOMAS HOBBS, PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY 103 (Howard Warrender ed., Oxford Univ. Press 1983) (1651) (stating that citizens "may call a new convention of estates").

that a second convention might undermine the progress made at the Philadelphia Convention.<sup>43</sup>

The primacy of Congress's role of proposing amendments drew strong objection from a number of delegates.<sup>44</sup> George Mason deemed the proposal mechanism in Madison's draft susceptible to abuse, writing in the margin of his copy of the proposal that "should [Congress] prove ever so oppressive, the whole people of America can't make, or even propose alterations to [the Constitution]; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people."<sup>45</sup> Mason argued that because either method of amending was dependent on Congress, beneficial amendments would never be proposed in the event that Congress should amass and seek to retain exceptional power for itself.<sup>46</sup> Gouverneur Morris and Elbridge Gerry shared this concern, proposing to resolve it by requiring a convention of the states on the application of two-thirds of the state legislatures.<sup>47</sup> This change was accepted without noted objection.<sup>48</sup> Even Madison, despite his fear of a second convention, "saw no objection however against providing for a Convention for the purpose of amendments."<sup>49</sup> This compromise produced Article V's current method of proposal either by Congress or by a convention of the states.<sup>50</sup>

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<sup>43</sup> See BEEMAN, *supra* note 3, at 339 ("Madison hoped at all costs to avoid the calling of additional constitutional conventions, for he feared that such conventions might well undo the work they were doing in Philadelphia."); see also 2 FARRAND, *supra* note 10, at 632 (relaying Charles Pinckney's statement that "[c]onventions are serious things, and ought not to be repeated[.]").

<sup>44</sup> See 2 FARRAND, *supra* note 10, at 629–31 (recording delegates' concerns about the proposed amendment process).

<sup>45</sup> *Id.* at 629 n.8.

<sup>46</sup> *Id.* at 629 ("[This] plan of amending the Constitution [is] exceptionable [and] dangerous. As the proposing of amendments is in both modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.").

<sup>47</sup> *Id.* ("Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of 2/3 of the Sts.").

<sup>48</sup> *Id.* at 630 ("The motion of Mr. Govr Morris and Mr. Gerry was agreed to . . .").

<sup>49</sup> CAPLAN, *supra* note 8, at 29.

<sup>50</sup> U.S. CONST. art. V ("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 . . .").



## III. THE PROSPECT OF A LIMITED CONVENTION OF STATES

Despite the ultimate insistence on maintaining a role for the states in proposing amendments at the Philadelphia Convention, a convention of the states has never been used to amend the Constitution.<sup>51</sup> State legislatures nevertheless have applied, and continue to apply, for such a convention to propose amendments.<sup>52</sup> Applications by state legislatures in the early republic are credited with having prompted Congress to propose what would become known as the Bill of Rights<sup>53</sup> out of a concern that, had it not, it would have been compelled to call a convention of states upon the submission of enough applications.<sup>54</sup> There have been well over four-hundred applications for a convention of states in the ensuing time,<sup>55</sup> yielding no conventions and applying minimal influence. One reason these applications have failed to produce a convention is that applications have identified a variety of limited and specific topics.<sup>56</sup> States also periodically

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<sup>51</sup> See, e.g., BRENNAN, *supra* note 17, at 8–9 (emphasizing that although there have been in excess of 11,000 amendments introduced by Congress, never once has an amendment been proposed by the states to be submitted for ratification).

<sup>52</sup> See *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES <http://clerk.house.gov/legislative/memorials.aspx> (last visited Nov. 5, 2019) (showing that applications were submitted to Congress as recently as September of 2019).

<sup>53</sup> Use of the phrase “Bill of Rights” to designate the first ten amendments did not emerge until the twentieth century. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 459–67 (2010).

<sup>54</sup> See, e.g., AMAR, *supra* note 3, at 290 (“[A convention’s] mere potential availability might suffice to pry needed amendment proposals from a Congress desirous of maintaining control over the amendment agenda . . . this is precisely what happened with the Bill of Rights, which the First Congress drafted largely to silence cries for a new convention.”); CAPLAN, *supra* note 8, at 32–40 (noting that the submission of the Bill of Rights to the states for ratification quelled the “pressure for another constitutional convention”); Michael Stokes Paulson, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *YALE L.J.* 677, 740–41 (1993) (“Congress proposed a Bill of Rights . . . but if it had not done so . . . Congress might well have been obliged to call a convention in response to a sufficient number of formal state applications.”).

<sup>55</sup> See Paulson, *supra* note 54, at 736 (“There have been nearly four hundred convention applications submitted by the fifty states over the past 205 years.”); *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/legislative/memorials.aspx> (last visited Nov. 5, 2019) (listing the forty-five additional applications submitted in the intervening twenty-seven years to present day that Paulson could not take into account).

<sup>56</sup> See *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES <http://clerk.house.gov/legislative/memorials.aspx> (follow the state hyperlinks) (last visited Nov. 5, 2019) (illustrating the variety of topics for which applications are submitted).

rescind applications.<sup>57</sup> The result has been that the required two-thirds of states have never had pending applications for the same subject to call a convention.<sup>58</sup> Today, there are more than 100 outstanding applications submitted to Congress by state legislatures pursuant to Article V.<sup>59</sup> Limited conventions to propose balanced budget amendments or congressional term limit amendments are prominently and consistently featured.<sup>60</sup>

The ongoing submission of applications for a convention of states to take up specific amendments raises the critical question of whether a convention of states can be limited by subject matter. This question analytically consists of two parts. The first is whether applications for a limited convention of states are valid under Article V. The second is whether amendments proposed by a limited convention that go beyond the scope of the applications can be validly ratified and take on legal effect. The answer to this inquiry into limited conventions is important because the chief concern animating opposition to a convention of the states is that such a convention will take radical steps to amend the Constitution in unpredictable ways or, at a minimum, will produce results that differ from the expectations of the states that applied for the convention in the first place.<sup>61</sup> The text, history, and structure of Article V illustrate that a limited convention comports with

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<sup>57</sup> *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES <http://clerk.house.gov/legislative/memorials.aspx> (last visited Nov. 5, 2019) (showing states' rescinded applications).

<sup>58</sup> See Paulson, *supra* note 54, at 735–36 (explaining that states have asked that a “convention be called to address specific topics, such as balanced budgets, reapportionment, school prayer, busing, and abortion,” but that the assumption has been that applications for different limited conventions cannot be aggregated to reach the required thirty-four states needed to call a convention); *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES <http://clerk.house.gov/legislative/memorials.aspx> (follow the state hyperlinks) (last visited Nov. 5, 2019) (showing states' applications for a convention on differing topics).

<sup>59</sup> See *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES <http://clerk.house.gov/legislative/memorials.aspx> (last visited Nov. 5, 2019) (listing 145 applications along with 24 rescissions submitted by state legislatures).

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198–99 (1972) (emphasizing that a convention of states is inherently an unlimited convention that can produce unpredictable and dangerous results); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 CONST. COMMENT. 53, 55–56 (2012) (“The most important reason why the convention method does not work is the fear of a runaway convention.”).

Article V,<sup>62</sup> and that amendments proposed that exceeded those limitations do not validly amend the Constitution.<sup>63</sup>

A. *The Textual Basis for a Limited Convention*

The relevant text does not constrain conventions to those with plenary power to propose amendments of any kind. Article V states that Congress, “on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . .”<sup>64</sup> The text speaks broadly of a “Convention for proposing,” not limiting it to a plenary convention of the states.<sup>65</sup> Plenary in this context means the power to make substantial structural shifts in the Constitution as opposed to being limited to a discrete subject-matter or topic. The word “convention” is best understood in the context of 1787, during which time the Framers and Ratifiers were personally familiar with limited conventions of varying scopes.<sup>66</sup> Conventions’ scopes were ordinarily limited by their call.<sup>67</sup> For example, the

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<sup>62</sup> Numerous scholars argue for a far more capacious understanding of Article V than posited here. Michael B. Rappaport argues that a limited convention may not only be limited to subject matter, as contended here, but also to specifically worded amendments. Rappaport, *supra* note 61, at 72 (“[A] convention [limited to a specifically worded amendment] meets the definition of a proposing convention, because it has the power to offer an amendment for adoption by the states.”). Akhil Reed Amar argues that Article V does not set the outer bounds of constitutional amendments, rather it sets a floor in addition to which a majority of the people can amend the Constitution without abiding by the processes laid out in Article V. Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside of Article V*, 55 U. CHI. L. REV. 1043, 1054–55 (1988) (“[A]lthough Article V is best read as the exclusive mode of governmental amendment *absent participation by the People*, it should not be understood as binding the People themselves . . . .”) (emphasis in original).

<sup>63</sup> One author takes a slightly different perspective, arguing that Congress does not have to put up for ratification any proposal that exceeds the scope of the application; legal scrutiny to such an amendment should deem it unconstitutional, but sufficiently long-standing practice in accordance with such an amendment nevertheless “can attain [for it] a secure place in the Constitution by virtue of public acquiescence.” CAPLAN, *supra* note 8, at x (1988).

<sup>64</sup> U.S. CONST. art. V.

<sup>65</sup> See Rappaport, *supra* note 61, at 64–65 (arguing that the text is sufficiently broad to include both limited and unlimited conventions; a limited call from Congress would confine the states to the prescribed scope because the convention’s power is derived from Congress, and the text obligates Congress to call a convention upon application by two-thirds of the state-legislatures, meaning that such request for a limited convention is constitutionally required).

<sup>66</sup> See, e.g., CAPLAN, *supra* note 8, at x (noting that “one reason article V is so terse is because the salient features of conventions were generally well understood.”).

<sup>67</sup> See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 629 (2013) (“The usual role of a multi-state convention was as a problem-solving task force, so the call necessarily specified the issue or issues to be addressed.”).

Annapolis Convention that preceded the Philadelphia Convention was limited to proposals pertaining to commerce.<sup>68</sup>

State constitutions enacted at the time of the Philadelphia Convention provide further evidence that Article V does not prohibit limited conventions. The most notable such state constitution was Georgia's, which called for conventions limited to determining whether to adopt proposals set forth by counties that petitioned for such changes.<sup>69</sup> The expansive language of Article V in conjunction with the contextual meaning of the word "convention" provides a strong textual basis for construing Article V to provide for both limited and unlimited conventions of the states.

By 1786 there was a long and consequential history of the role of conventions in the political system that formed the backdrop to the text of Article V.<sup>70</sup> Prior to the American experience, Scotland regularly called conventions of estates at least as early as the sixteenth century, which were called outside of Parliament's control to respond to given emergencies as they arose.<sup>71</sup> In the century prior to the Philadelphia Convention, there were at least thirty-two multi-state or multi-colony conventions, eleven of which occurred between 1776 and 1786.<sup>72</sup> A convention was an assembly, similarly structured to a legislature but distinguishable on the ground that a convention serves a more specific purpose than a legislature does.<sup>73</sup> Noah Webster highlighted this distinction in 1788 by stating that a convention "is no more than a Legislature chosen for *one particular purpose* of supremacy;

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<sup>68</sup> See CAPLAN, *supra* note 8, at 22–23 (describing that "the Virginia legislature adopted a resolution . . . for a convention to survey trade issues affecting the country as a whole, with a view to alterations in the Articles that would enhance Congress's power to regulate Commerce."); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 CONSTITUTIONAL COMMENTARY 53, 68 (2012) ("The Annapolis Convention, which had preceded the Philadelphia Convention, was also a limited convention. . . . [T]he convention would propose measures relating to commerce.").

<sup>69</sup> See Michael B. Rappaport, *supra* note 61, at 68 ("[T]he best interpretation of [Article LXIII of Georgia's constitution] is that it limits conventions to deciding whether to adopt the alterations recommended by the petitioning counties.").

<sup>70</sup> See CAPLAN, *supra* note 8, at ix ("Now an exotic institution, the convention was a tradition already over a century old when it became part of the Constitution with article V.").

<sup>71</sup> See, e.g., MOWBRAY MORRIS, CLAVERHOUSE 158 (1887) (speaking of the need to "leave Edinburgh and to call a Convention of Estates at Stirling").

<sup>72</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615, 620 (2013).

<sup>73</sup> Robert G. Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers* 6 (Independence Inst., Working Paper No. IP-6-2012, 2012), <https://i2i.org/wp-content/uploads/II-Paper-III-Rules.pdf>.

whereas an ordinary Legislature is competent to *all* purposes of supremacy.<sup>74</sup> Both the Framers and the Ratifiers had extensive exposure to and had participated in prior conventions, including but not limited to the following delegates at the Philadelphia Convention: Roger Sherman, John Dickinson, Oliver Ellsworth, John Rutledge, James Madison, Alexander Hamilton, Elbridge Gerry, and Edmund Randolph.<sup>75</sup> These figures played a pivotal role in drafting Article V.<sup>76</sup>

The use of conventions as features of the amendment process prescribed by state constitutions similarly informed the understanding of Article V's text.<sup>77</sup> In the aftermath of Lexington and Concord, Congress recommended to the assemblies and conventions of the colonies that they adopt their own state governments.<sup>78</sup> Eleven of the thirteen colonies created new governments in accordance with Congress's declaration, while Connecticut and Rhode Island resolved to remain bound by their colonial charters.<sup>79</sup> These eleven states provided the first state constitutions that served as imperfect templates for the drafting of the Constitution at the Philadelphia Convention.<sup>80</sup> Of the eight state constitutions that provided for amendment, five included an option for amendment by convention, and three<sup>81</sup> permitted amendment by the legislature alone.<sup>82</sup> Georgia's amendment provision bears the greatest similarity to Article V in that it provided for counties to

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<sup>74</sup> NOAH WEBSTER, *On Government*, in A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS ON MORAL, HISTORICAL, POLITICAL, AND LITERARY SUBJECTS 54–55 (Boston, Thomas & Andrews 1790) (ebook), <http://www.gutenberg.org/files/44416/44416-h/44416-h.htm#Pg049>.

<sup>75</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615, 681 (2013).

<sup>76</sup> See *supra* Parts I–II (detailing the roles played by key figures in shaping Article V).

<sup>77</sup> See *id.* at 622 (drawing a causal link between at least one state constitution and a draft of Article V).

<sup>78</sup> CAPLAN, *supra* note 8, at 9 (“Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, . . . to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”).

<sup>79</sup> *Id.* at 10.

<sup>80</sup> See AMAR, *supra* note 3, at 287–290 (noting that with respect to drafting Article V in particular, the flaws among the state constitutions were sought to be remedied by the draft, with notable successes).

<sup>81</sup> The states were Delaware, Maryland, and South Carolina, and each included provisions that made amendments more difficult to implement than by mere majority vote. CAPLAN, *supra* note 8, at 14. This higher bar preserved the supremacy of the constitutions as higher than ordinary law.

<sup>82</sup> CAPLAN, *supra* note 8, at 14.

petition for a convention to propose amendments on specified subjects,<sup>83</sup> though interpretations of how it was to function differ, which is further complicated by the fact that it was never used.<sup>84</sup> This provision may even have provided the “immediate inspiration” for permitting states to apply to Congress to call a convention for proposing amendments in Article V,<sup>85</sup> which is noteworthy because there the assembly was tasked with calling a convention with the limited scope of “specifying the alterations to be made.”<sup>86</sup>

The multi-state or multi-colony conventions that predated the Philadelphia Convention were commonly limited in scope. In fact, the Massachusetts Convention of 1779–1780 was the first constitutional convention with a truly unlimited scope.<sup>87</sup> Defense-oriented conventions, and those pertaining to dealings with the Indian tribes were common prior to the Philadelphia Convention.<sup>88</sup> The Providence Convention of 1776–1777 exemplifies a relatively narrowly limited convention, called to confer on the subjects of paper currency and public credit.<sup>89</sup> Given the history of limited conventions to which the Framers were accustomed, the “Convention for proposing Amendments” does not compel the narrow interpretation that a convention of states can only be of an unlimited nature.

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<sup>83</sup> GA. CONST. OF 1777, art. LXIII (“No alteration shall be made in this constitution without petitions from a majority of the counties . . . at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made . . .”).

<sup>84</sup> Compare AMAR, *supra* note 3, at 288 (“Georgia’s constitution of 1777 aimed to cure the problem [of legislative self-dealing] by enabling citizens to petition for a special convention that would propose amendments.”) with Michael B. Rappaport, *supra* note 61, at 68 (“[T]he best interpretation of [Article LXIII of Georgia’s Constitution] is that it limits conventions to deciding whether to adopt the alterations recommended by the petitioning counties.”).

<sup>85</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 622 (2013) (describing article LXIII of Georgia’s Constitution as seemingly having provided the “immediate inspiration for the application procedure” in Article V).

<sup>86</sup> GA. CONST. OF 1777 art. LXIII.

<sup>87</sup> CAPLAN, *supra* note 8, at 13 (noting that after successive drafts of a constitution had been rejected by the existing governing body, the legislature elected delegates to a constitutional convention to be ratified by the towns).

<sup>88</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 627 (2013). See generally HARRY M. WARD, UNITE OR DIE: INTERCOLONY RELATIONS 1690–1763, at 52 (1971) (detailing the extensive history of war conventions in the era prior to the Philadelphia Convention).

<sup>89</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 640 (2013).

Charles Black is among the leading scholars who contend that an Article V convention may only be unlimited, which he argues would render any application for a convention without plenary scope invalid under Article V.<sup>90</sup> This argument is constructed without citing any convention prior to the Philadelphia Convention and without reference to any state constitution's amendment provision.<sup>91</sup> Black does cite ten applications for a convention to Congress between 1790 and the Civil War, noting that of the ten, nine were unlimited.<sup>92</sup> Black then asserts that the "theory of the convention limited by the tenor of the state petitions is nothing but a child of the twentieth century."<sup>93</sup>

However, the history of conventions prior to the Philadelphia Convention illustrates that they were frequently limited by subject matter. Georgia's constitution, which is structurally analogous to the initial iterations of Article V,<sup>94</sup> also provides for a limited convention.<sup>95</sup> It simply is not the case that the notion of a limited convention first arose in the twentieth century.<sup>96</sup> Nor can the text of Article V's call for a "Convention for proposing amendments" be dispositive or even indicative of the fact that a convention necessarily has plenary power to propose amendments, as Black claims.<sup>97</sup> This wording in Article V merely distinguishes a convention at which amendments may be proposed from a convention for trade, for proposing statutes, for defense, or for proposing treaties.<sup>98</sup> James Madison articulated his vision for a limited convention of the states at the Virginia Ratifying Convention in response to Patrick Henry's contention that Congress had too central a role in proposing amendments, stating that the "committee will see that there is another mode provided . . . besides that

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<sup>90</sup> Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 196–204 (1972).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 202.

<sup>93</sup> *Id.* at 203 (emphasis omitted).

<sup>94</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615, 622 (2013).

<sup>95</sup> GA. CONST. OF 1777, art. LXIII ("No alteration shall be made in this constitution without petitions from a majority of the counties . . . at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made . . .").

<sup>96</sup> See generally, CAPLAN, *supra* note 8, at 3–16, 95–101 (detailing the history of conventions in the United States, along with English antecedents, illustrating the wide array of limited purposes for which conventions were historically called).

<sup>97</sup> Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 203 (1972).

<sup>98</sup> CAPLAN, *supra* note 8, at 99.

which originates with Congress [whereby] conventions which shall be so called will have their deliberations confined to a few points.”<sup>99</sup> A textual analysis of Article V, coupled with historical evidence from before, during, and after the Philadelphia Convention, does not support the claim that a convention, if limited, is unconstitutional.

*B. The Structural Basis for a Limited Convention*

Interpreting Article V to prohibit anything but an unlimited convention runs directly counter to its structure. Article V’s bifurcated state- and Congress-initiated proposal mechanism reflects the federalist principles underpinning the Constitution that is “neither wholly National nor wholly Federal.”<sup>100</sup> This structure was specifically altered to prevent Congress from possessing the sole authority to propose amendments,<sup>101</sup> preserving a critical and structurally equal role for the states in proposing amendments.<sup>102</sup> Following George Mason’s critique of relying solely on Congress for proposing amendments, which was the structure provided by Madison’s draft,<sup>103</sup> the delegates agreed without objection to include a provision enabling a convention to propose amendments without requiring the consent of Congress.<sup>104</sup> Mason powerfully stated with respect to Madison’s draft of Article V that:

By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can’t make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people.<sup>105</sup>

The history of amendment since the Philadelphia Convention suggests that this feared inability to amend the Constitution in ways that run counter

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<sup>99</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 101–02 (Jonathan Elliot ed. 1836).

<sup>100</sup> THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

<sup>101</sup> See 2 FARRAND, *supra* note 10, at 557, 559, 629–32; see also AMAR, *supra* note 3, 290 (arguing that “in order to prevent a self-dealing Congress from simply bottling up needed reforms that might limit its own powers, Article V offered an alternative amendment-proposal system that would not depend on congressional will.”).

<sup>102</sup> THE FEDERALIST NO. 43 (James Madison) (emphasizing that the states and the federal government are situated on equal terms to identify constitutional defects and to propose amendments).

<sup>103</sup> 2 FARRAND, *supra* note 10, at 559.

<sup>104</sup> See *id.* at 629–32.

<sup>105</sup> See *id.* at 629 n.8.



to the self-interest and policy perspectives of Congress has been realized.<sup>106</sup> Again, in spite of hundreds of applications having been submitted to call a convention of states, no such convention has ever been called. This outcome illustrates that the equal function of Congress and the states embodied by Article V has not translated to constitutional practice, instead according Congress what amounts to a veto on any amendment.<sup>107</sup> The effect is much the same as that prescribed by Madison's draft that was soundly rejected by the delegates,<sup>108</sup> under which states could induce Congress to act, but only Congress could actually propose amendments to the Constitution.<sup>109</sup> Similarly, the absence of the role of states in proposing amendments diminishes the efficacy of the amendment system by practically barring the proposal of amendments that would limit the power of Congress either vis-à-vis the states or vis-à-vis the other branches of the federal government, even when those amendments may be beneficial and receive broad public support.<sup>110</sup>

The prospect of a convention of the states can affect the amendment process by inducing Congress to act to preempt a convention. This function nevertheless falls far short of the parity between the states and Congress reflected by the dual proposal methods of Article V.<sup>111</sup> The prospect of a convention was an important impetus motivating the ratification of the Bill

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<sup>106</sup> See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 U. VA. L. REV. 1509, 1512 (2010) (stating that “only those [amendments] that reflect the congressional preferences have had a realistic chance of passing.”).

<sup>107</sup> See *id.* at 1567 (noting that Congress is unlikely to act in a manner that “would deprive it of the effective veto over the amendment process that it currently enjoys”); see also Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 622 (2013) (noting that “the [initial] draft [of Article V] was changed to insert the convention for proposing amendments to enable the states to propose amendments without a substantive veto by Congress.”).

<sup>108</sup> 2 FARRAND, *supra* note 10, at 629–32.

<sup>109</sup> *Id.* at 559.

<sup>110</sup> See, e.g., Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 U. VA. L. REV. 1509, 1513 (2010) (suggesting that had Congress not possessed an effective veto over amendments, numerous popular amendments that diminish the power of Congress might well have been ratified, such as a line-item veto, congressional term limits, or a balanced budget requirement); BRENNAN, *supra* note 17, at 17 (“Congress will, under no circumstances, cooperate in the calling of a convention that might propose amendments deleterious to their privileges, powers and benefits.”).

<sup>111</sup> See, e.g., THE FEDERALIST NO. 43, at 275 (James Madison) (Clinton Rossiter ed., 1961) (stating that Article V “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other”).

of Rights.<sup>112</sup> In a modern context, such pressure exerts less force on Congress because today there is far greater fear of a runaway convention than there was in the immediate aftermath of the Philadelphia Convention.<sup>113</sup> Those dissatisfied with the product of the Philadelphia Convention sought far more fundamental changes to the Constitution than, for example, those calling for a balanced budget amendment or Congressional term limits today.<sup>114</sup> Even though only New York and Virginia filed applications for a convention, the proliferation of Anti-Federalists who sought a convention to fundamentally change the constitutional system was sufficient to induce Congress to act because the Bill of Rights affirmed individual rights but did not diminish the essential powers possessed by the federal government, making it a worthwhile risk-mitigating concession.<sup>115</sup> Today, the risks of unpredictable change feared by those skeptical of a convention of states are more likely to outweigh the interests of the less foundational amendments proposed. The threat of convention therefore carries less weight, and half of the proposal mechanism under Article V is left doing very little work.

The hesitance on the part of a number of the Framers regarding the prospect of a second convention lends further support to the structural argument that Article V conventions need not be unlimited. In response to

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<sup>112</sup> See, e.g., AMAR, *supra* note 3, at 317 (emphasizing that the prospect of a convention applied pressure on those weighing ratification); Michael Stokes Paulson, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 741 n.215 (1993) (explaining that Madison was induced to lobby for a Bill of Rights to obviate the need states may have perceived to apply for a convention that Congress could not deny); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 37 (Jonathan Elliot ed. 1836) (“[What if, when faced with the prospect of amendment, Members of Congress] interrupt it from motives of self-interest. What then? We will resist, did my friend say? conveying an idea of force. Who shall dare to resist the people? No, we will assemble in Convention; wholly recall our delegated powers, or reform them so as to prevent such abuse; and punish those servants who have perverted powers, designed for our happiness, to their own emolument.”) (emphasis added).

<sup>113</sup> See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 U. VA. L. REV. 1509, 1535 (2010) (arguing that “the early years under the Constitution are atypical, because at that time many state legislators were not scared of a runaway convention, but instead hoped a convention would significantly revise the Constitution.”).

<sup>114</sup> See CAPLAN, *supra* note 8, at vii (noting that even when thirty-two of the thirty-four states needed to cause Congress to call a convention had applied for a convention to propose a balanced budget amendment, Congress was not sufficiently threatened to propose such an amendment); Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 U. VA. L. REV. 1509, 1535 (2010).

<sup>115</sup> CAPLAN, *supra* note 8, at 39.

dissatisfied Framers' calls for a second convention,<sup>116</sup> Charles Pinckney retorted that “[n]othing but confusion and contrariety could spring from the experiment,” emphasizing that conventions “ought not be repeated.”<sup>117</sup> James Madison similarly feared the prospect of a second convention, concerned that it would wreak havoc on the work achieved at the Philadelphia Convention.<sup>118</sup> He “saw no objection however against providing for a Convention for the purpose of amendments,”<sup>119</sup> speaking of conventions as “confined to a few points.”<sup>120</sup> Given these concerns, taking the position that a convention can only have plenary power, that is the power to make substantial structural shifts in the Constitution as opposed to being limited to a discrete subject-matter, means that the Framers limited state-initiated proposals to the type of convention most likely to realize exactly their expressed concerns. A limited convention avoids these uncertainties and instability and, had the Framers conceived of exclusively unlimited conventions, the unanimous support for the addition of the convention clause in Article V is difficult to reconcile with the stated concerns of a second convention. The prospect of a limited convention resolves that discrepancy.

This failure to comport with the structure of Article V can be remedied by embracing a limited convention of the states. Given the concern of a runaway convention, coupled with the fear that an unlimited convention—even if called to perform one specific task such as imposing Congressional term limits—could result in the proposal of amendments that achieve something different entirely, it is very difficult to reach the thirty-four

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<sup>116</sup> See, e.g., 2 FARRAND, *supra* note 10, at 632 (quoting Edmund Randolph as saying “A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it.”); 2 FARRAND, *supra* note 10, at 479 (noting that absent changes to the constitution, George Mason’s “wish would then be to bring the whole subject before another general Convention”).

<sup>117</sup> 2 FARRAND, *supra* note 10, at 632 (“He descanted on the consequences of calling forth the deliberations & amendments of the different States on the subject of Government at large. Nothing but confusion & contrariety could spring from the experiment. The States will never agree in their plans—And the Deputies to a second Convention coming together under the discordant impressions of their Constituents, will never agree. Conventions are serious things, and ought not to be repeated[.]”).

<sup>118</sup> See, e.g., BEEMAN, *supra* note 3, at 339 (noting that Madison “hoped at all costs to avoid the calling of additional constitutional conventions, for he feared that such conventions might well undo the work they were doing in Philadelphia”).

<sup>119</sup> CAPLAN, *supra* note 8, at 29.

<sup>120</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 102 (Jonathan Elliot ed. 1836).

applications from state legislatures required to call a convention of the states. The experience of the states, where calls for unlimited conventions have led to the defeat of proposals to amend,<sup>121</sup> and where limited conventions been introduced to allay concerns of unpredictable and sweeping amendments and have operated within the scope of their mandates,<sup>122</sup> lends further credence to the viability of this approach on the federal level. Calling a convention limited to a specific subject matter—such as was prescribed by the call for the Providence Convention of 1776–1777, restricting the relevant subjects to paper money and public credit—alleviates the concern of a runaway convention.<sup>123</sup> Article V compels Congress to call a convention upon receipt of applications from two-thirds of the states.<sup>124</sup> That convention is in turn limited to the call from Congress, meaning that proposals that go beyond that authority, even if ratified, would not be valid amendments to the Constitution.<sup>125</sup> Consequently, proposals from two-thirds of the states for a convention limited to one, or a number of specified subjects, prevent the harm that could ensue from a runaway convention producing undesirable and potentially expansive fundamental constitutional change.

The concern of a runaway convention is substantially mitigated by a second structural feature of Article V: the result of an amendment proposed by either of the prescribed means is still subject to ratification by three-fourths of the states.<sup>126</sup> Moreover, Congress itself chooses whether state

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<sup>121</sup> See G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-first Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1085 (2005) (noting that referenda for unlimited conventions were defeated due to fear of excessively broad change in New York and Rhode Island).

<sup>122</sup> See *id.* (“To counter these and other sorts of opposition [predicated on the idea that an unlimited convention is a Pandora’s Box to be feared] to constitutional conventions, states developed the limited constitutional convention, which limits the range of matters to be considered . . .”).

<sup>123</sup> Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 640 (2013).

<sup>124</sup> U.S. CONST. art. V (“The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . .”).

<sup>125</sup> See, e.g., Michael B. Rappaport, *supra* note 61, at 56–57 (2012) (“If the convention were to violate the limitations in the call—if it were to propose an amendment that was not within the scope of its authority—then that proposal would be unconstitutional.”).

<sup>126</sup> U.S. CONST. art. V (“[A proposed 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, or by Conventions in three fourths thereof . . .”).

legislatures or conventions ratify.<sup>127</sup> This independent ratification requirement was instituted to “guard against a despotic federal convention that might try to crown itself king,” which is a critical feature in that this substantial limitation renders the convention of states “a more credible weapon” that can be wielded even by those who wish only to invoke the prospect of a convention to induce Congressional action.<sup>128</sup> This structural limitation means that whatever the concern of those fearing a convention of the states that sought to institute dramatic change that outpaced popular will, a considerable thirty-eight states would still need to ratify each amendment to accord those changes binding constitutional effect.

The types of amendments most commonly proposed today do not corroborate the argument that a runaway convention would result. A balanced budget amendment and an amendment to impose Congressional term limits are the most frequent subjects in applications submitted by state legislatures to Congress.<sup>129</sup> Neither of these proposals rise to the level of concern stated by skeptics of a convention of the states, such as by illimitably “making wholesale changes to our Constitution and Bill of Rights,”<sup>130</sup> even if the infeasibility of thirty-eight states ratifying such unpredictable largescale amendments to the Constitution were disregarded *arguendo*.

These two commonly proposed amendments also fall squarely within the contours of the convention method conceptualized by the Framers by preventing Congress from blocking amendments that could reduce its power.<sup>131</sup> The rationale underpinning the shift away from Madison’s draft

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<sup>127</sup> *Id.* (“[A proposal may become an amendment] when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .”).

<sup>128</sup> AMAR, *supra* note 3, at 290.

<sup>129</sup> See *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/legislative/memorials.aspx> (last visited Nov. 5, 2019).

<sup>130</sup> Arthur Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1, 2 (1983) (“There is nothing in Article V that prevents a convention from making wholesale changes to our Constitution and Bill of Rights.”); see also Michael Stokes Paulson, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 742 (1993) (“[A convention could] propose radically new government arrangements and greatly enlarged—or diminished—individual rights.”); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 431 (1983) (“[The convention method in Article V] represents a domestication of the right to revolution.”).

<sup>131</sup> See, e.g., 2 FARRAND, *supra* note 10, at 629 (citing George Mason’s argument that an amendment provision that relies solely on Congress for proposals is “exceptionable & dangerous,” inducing the change to include a convention of the states as a proposal method under Article V); AMAR, *supra*

that enabled only Congress to propose amendments was that it would not do so if its power would be thereby limited vis-à-vis the states or another branch of the federal government.<sup>132</sup> Congressional term limits and a balanced budget amendment do just that. A balanced budget amendment tethers congressional spending to money brought in. Term limits set discrete timelines for Members of Congress after which point they can no longer continue in those positions. Irrespective of the merit of these amendments, their effect of limiting congressional power makes it highly unlikely that two-thirds of Congress would agree to propose them. States are more convinced of their merit.<sup>133</sup> Even where thirty-two of the requisite thirty-four states filed applications for a convention to propose a balanced budget amendment no such proposal resulted.<sup>134</sup> This fact illustrates that popular will is not sufficient to induce Congress to propose an amendment that would reduce Congressional power. These proposals are unlikely to produce a runaway convention, and also neatly comport with Article V and particularly with the structural function of allowing either Congress or a convention of the states to propose an amendment.

#### CONCLUSION

Calls for an Article V convention of the states are met by detractors with grave concern about the prospect of a runaway convention. The separation between the conventions where amendments are proposed versus the subsequent ratification process guards against such an issue. Calling a limited convention, geared to propose amendments with regard to a specific issue, such as congressional term limits, radically diminishes any such concern. Opponents often resort to the claim that Article V prohibits limited conventions to present an Article V convention as inherently dangerous. However, an examination of the text, history, and structure of Article V

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note 3, at 290 (explaining that one virtue of Article V is that the dual proposal mechanism prevents Congress from blocking “needed reforms that might limit its own powers”).

<sup>132</sup> 2 FARRAND, *supra* note 10, at 203 (“It would be improper to require the consent of [Congress], because they may abuse their power, and refuse their consent on that very account.”).

<sup>133</sup> See, e.g., *House Documents*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/legislative/memorials.aspx> (last visited Nov. 5, 2019) (illustrating that throughout the past half-century dozens of applications from states have been separately submitted requesting a convention to propose these amendments, with such applications continuing at least through 2017).

<sup>134</sup> CAPLAN, *supra* note 8, at 39–40.

reveals that a convention need not be plenary to be constitutional under Article V. This reading fits with the dual concerns of the Framers of fearing an additional full-blown constitutional convention on one hand, and ensuring the provision of a viable mechanism for permitting the states to amend the Constitution on the other. The role of the states in proposing amendments prevents congressional self-dealing from stifling proposals that would limit congressional power irrespective of the merit of those amendments. The consistent flow of applications from state legislatures for the purpose of calling a limited convention of the states is both constitutional under Article V and well-suited to vindicate the federalist character embedded in Article V.

