

# LEGAL MEMORANDUM

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## Consideration of a Convention to Propose Amendments Under Article V of the U.S. Constitution

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### Abstract

*Under Article V of Constitution, Congress, upon application of two-thirds of the states, must call a convention for proposing amendments. Proponents argue that an Article V convention, completely bypassing Congress, the President, the courts, and the federal bureaucracy, would give the states and the people a more direct role in determining how much power the federal government should have and whether some of its existing power should be returned to the states and the people. The process specified in Article V raises many questions that require careful consideration: how such a convention would work, what types of amendments it might produce, and whether some of those amendments would successfully rein in the federal government and reinvigorate federalism. With or without such a convention, however, it remains vitally important that we continue to maintain an overriding focus on holding Congress, the President, and, by extension, federal agencies accountable for the decisions they make today.*

Many Americans worry about the ever-increasing size, scope, and reach of the federal government. They point out that it spends beyond its means and for the most part operates outside of the strictures of the Constitution. They also point to various rulings by the Supreme Court of the United States that have effectively changed the structure and character of the Constitution without formally changing the text and, in the process, have facilitated the dramatic expansion of federal power at the expense of the states, the people, and civil society.<sup>1</sup> This has been exacerbated by the dramatic expansion of the administrative state (facilitated in part by Congress's excessive delegation of its own legislative power to executive

### KEY POINTS

- Under Article V of the Constitution, constitutional amendments may be proposed by two-thirds of the House of Representatives and the Senate or by a convention called by Congress on the application of two-thirds of the states.
- The text of Article V provides a limited role for Congress (calling the convention), no role for the Supreme Court, and no role for the President.
- Article V was designed to strike a balance between those who might wish to treat the Constitution as if it were a mere piece of legislation that could be amended easily and often and those who would wish to make it virtually impossible to amend our founding charter regardless of the perceived need to do so.
- Above all, Article V ensures through the ratification process that amendments have substantial support among the people by requiring ratification of the proposed amendment by three-fourths of the states before it could take effect.

This paper, in its entirety, can be found at <http://report.heritage.org/lm174>

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branch agencies<sup>2</sup>), coupled with the extreme deference that the Court has shown to those agencies,<sup>3</sup> something that the Framers of the Constitution would likely have found unimaginable.<sup>4</sup>

After more than a century of vast expansion of the federal government's functions and the vesting of broad authority in large numbers of agencies of a federal administrative state, there seems to be little room left for the principle of federalism that respects the traditional role of the states in our federal system and little meaning left to the Tenth Amendment's guarantee that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

A number of Americans view Congress as intransigent (especially when it comes to proposing constitutional amendments that would rein in its power to tax and spend without limit or to limit the reelection of incumbent Senators or Representatives) and the Supreme Court as having strayed from the text of the Constitution. Many of them conclude that the American people need to go around Congress and convince state legislatures to initiate the process under Article V of the Constitution, which forces Congress, upon application of two-thirds of the states, to call a convention for proposing amendments.<sup>5</sup> The text of Article V provides a limited role for Congress (calling the convention), no role for the Supreme Court, and no role for the President.<sup>6</sup>

Article V proponents argue that such structural problems, resulting in a form of federal tyranny, can be remedied best (and perhaps only) through an Article V convention, which would give the states and the people a more direct role in determining just how much power the federal government should have and whether some of its existing power should be returned to the states and the people. Article V, they contend, would enable the states to convene for the purpose of proposing and considering amendments among themselves, completely bypassing Congress, the President, the courts, and the federal bureaucracy.

The process specified in Article V for a convention to propose amendments raises many questions that require careful consideration. Questions arise concerning how such a convention would work, what types of amendments it might produce, and whether some of the proposed amendments would successfully rein in the federal government and reinvigorate federalism.

## Amending the Constitution

In 1833, in his *Commentaries on the Constitution of the United States*, Supreme Court Justice Joseph Story stressed the importance of having a process to amend the nation's charter:

It is obvious, that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.<sup>7</sup>

Article V, which outlines the mechanism for amending the Constitution, provides two different ways in which constitutional amendments may be proposed: (1) by two-thirds of the House of Representatives and the Senate or (2) by a convention called by Congress on the application of two-thirds of the states. Specifically, Article V states that:

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,<sup>8</sup> 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,<sup>9</sup> or

by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress ....

The Constitution of the United States has been amended 27 times.<sup>10</sup> A convention of the states for proposing amendments has never been convened. Thus far, all 27 amendments originated in Congress and were subsequently sent to the states for ratification.

Over the years, many states have submitted applications for Congress to call an Article V convention on a variety of topics.<sup>11</sup> Although an Article V constitutional convention<sup>12</sup> has never been called, the states have come close to amassing applications from two-thirds of the states, and on those occasions, the mere threat of being forced to call a convention appears to have prompted Congress to act.

- In 1912, for example, the states were one application shy of forcing Congress to call a convention to consider an amendment requiring the direct election of Senators. In response, Congress passed the Seventeenth Amendment and sent it to the states for ratification.<sup>13</sup>
- Similarly, the states came within two applications of requiring Congress to call a convention to consider a balanced budget amendment when Congress passed the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985,<sup>14</sup> significant parts of which were subsequently declared unconstitutional by the Supreme Court.<sup>15</sup>

External pressure from the states has not always worked, though. In the 1960s, 33 states (one short of the requisite two-thirds) applied for a convention to address legislative apportionment issues,<sup>16</sup> but Congress did not propose an amendment.<sup>17</sup>

### **Article V and the Constitutional Convention**

Addressing Article V, James Madison explained in *Federalist* No. 43:

It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover,

equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.<sup>18</sup>

In other words, Article V was designed to strike a balance by effecting a compromise between those who might wish to treat the Constitution as if it were a mere piece of legislation that could be amended easily and often and those who would wish to make it virtually impossible to amend our founding charter regardless of the circumstances and perceived need to do so. Above all, Article V ensures through the ratification process that amendments have substantial support among the people by requiring ratification of the proposed amendment by three-fourths of the states (38 at present) before it could take effect.

Article V was first introduced at the Constitutional Convention in Philadelphia on May 29, 1787, as part of the Virginia Plan,<sup>19</sup> which provided that the “Articles of Union” should be amended “whenever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto.”<sup>20</sup> This provision was referred to in the Convention’s Committee of Detail, which revised the draft to state that “[t]his 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>21</sup> It was subsequently revised when some, especially Alexander Hamilton, objected that this would give the states too much power over Congress.<sup>22</sup>

A compromise, first proposed by James Madison and eventually adopted with only slight modification,<sup>23</sup> was the dual method for proposing amendments, including a mechanism in which Congress would be required to call a convention to propose amendments once two-thirds of the states filed an application requesting it. This would reduce the ability of Congress to block amendments that two-thirds of the states desired; as Alexander Hamilton noted in *Federalist* No. 85, “[t]he Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body.” He added, “[w]e may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.”<sup>24</sup> Virginia delegate George Mason was

particularly adamant on this point, believing that any procedure that required congressional approval of amendments would be improper “because they may abuse their power, and refuse their consent on that very account.”<sup>25</sup>

### **Some Current Proposals to Convene a Constitutional Convention**

Numerous participants in our nation’s public life have urged the states to apply to Congress to call a convention for proposing amendments and have suggested pursuing particular amendments. For example, in *The Liberty Amendments: Restoring the American Republic*, prominent conservative Mark Levin expresses enthusiastic support for an Article V convention and recommends 10 amendments aimed at reducing the power of the federal government. They include imposing term limits; repealing the Seventeenth Amendment, which provided for the direct election of U.S. Senators; and allowing state legislatures to bypass Congress and amend the Constitution by a two-thirds majority.

Levin, who candidly admits that he was once skeptical of the wisdom of calling for an Article V convention, explains why he now believes the states should force Congress to call such a convention:

The state convention process bypasses the intractable architects of this calamity, who have obstructed and sabotaged all other routes to constitutional adherence. It is a bottom-up, grassroots initiative that empowers the citizenry, organizing in neighborhoods and communities, and working through the state legislatures, to stem federal domination, reverse course, and escape ruin.<sup>26</sup>

It is important to emphasize, of course, that there are wish lists of constitutional amendments from people across the political spectrum. In his book *Six Amendments: How and Why We Should Change the Constitution*,<sup>27</sup> retired Supreme Court Justice John Paul Stevens proposes six constitutional amendments, including one that would overrule the Supreme Court’s decision in *District of Columbia v. Heller*,<sup>28</sup> which recognized an individual right under the Second Amendment for law-abiding citizens to keep and bear arms; a second that would overrule the Court’s decision in *Printz v. United States*<sup>29</sup> and enable the federal government

to order state officials to carry out federal duties; a third that would overturn the Court’s decision in *Citizens United v. Federal Election Commission*<sup>30</sup> and allow Congress and the states to circumscribe the First Amendment by setting strict limits on the amount of money that candidates or their supporters can spend on pure political speech during election campaigns; and a fourth that would abolish capital punishment.

One organization—Wolf PAC—seeks to overturn *Citizens United* and has called for “a limited amendments convention for the purpose of proposing a Free and Fair Elections Amendment to the United States Constitution.”<sup>31</sup> According to its website, four state legislatures (California, Illinois, New Jersey, and Vermont) have already applied for this kind of convention.<sup>32</sup>

Eleven states comprising 165 electoral votes, seeking in effect to negate the Electoral College provided for in the Constitution,<sup>33</sup> have agreed in principle to abide by the National Popular Vote plan, under which states would agree to pledge their electoral votes to the ticket that wins the popular vote around the country. The plan would be “activated” once the number of states totaling 270 electoral votes signed on to the plan.<sup>34</sup>

Among conservatives and libertarians, the most prominent proposals include those of the Balanced Budget Amendment Task Force, the Convention of the States Project, and the Compact for America.<sup>35</sup>

The Balanced Budget Amendment Task Force is a grassroots-driven organization that is seeking to have states apply to Congress to call a convention to consider a balanced budget amendment. The task force has drafted model state applications and legislation designed to limit the delegates’ authority to consideration of an amendment to balance the federal budget. According to the group’s website, 27 of the required number of 34 states have submitted balanced budget amendment applications.<sup>36</sup>

In 2014, a group called Citizens for Self-Governance began its “Convention of the States” project,<sup>37</sup> which urges states to apply to Congress to call a convention to draft amendments that will limit federal power and address what they identify as “four major abuses perpetrated by the federal government”: the spending and debt crisis, the regulatory crisis, congressional attacks on state sovereignty, and the federal takeover of the decision-making process.<sup>38</sup> Although the group has

not proposed specific language for a constitutional amendment, its members support amendments that would balance the budget, redefine the General Welfare and Commerce Clauses of the Constitution, prohibit the use of international treaties and international law to govern domestic law, impose term limits on Members of Congress and Supreme Court justices, place an upper limit on federal taxation, and require the sunset of all existing federal taxes and a supermajority vote to replace them with new, fairer taxes.

The group has produced a model resolution for state legislators to use when applying for a convention. Thus far, this resolution, which was recently endorsed by the American Legislative Exchange Council, has been passed by five states (Tennessee, Florida, Georgia, Alaska, and Alabama) and is being considered by several others.<sup>39</sup>

Compact for America<sup>40</sup> urges states to enter into a binding interstate “compact” in which they would legally obligate themselves to support the calling of a convention for the sole purpose of having delegates cast a straight up-or-down vote on a pre-drafted balanced budget amendment.<sup>41</sup> This amendment seeks to limit federal spending by:

1. Requiring that total federal outlays not exceed total receipts unless excess outlays are financed through authorized borrowing under the established debt limit;
2. Establishing the debt limit at 105 percent of the outstanding debt at the time of the amendment’s ratification;
3. Prohibiting any increase in the federal debt limit unless a majority of the states approve it;
4. Requiring the President to designate specific expenditures for impoundment when outstanding debt exceeds 98 percent of the debt limit; and
5. Requiring two-thirds approval in both houses of Congress to raise or implement new taxes (although no such approval is necessary if a new end user sales tax is implemented that would replace “every existing income tax levied by the government of the United States” or if an existing exemption, deduction, or credit is reduced or eliminated).<sup>42</sup>

In addition to the text of the proposed balanced budget amendment, the compact sets forth the rules that would govern delegate selection and the convention itself (down to the precise location and date). Significantly, the compact would not take effect until joined by 38 states (not coincidentally, the same number needed for ratification), a provision that is intended essentially to make inevitable the results of the convention and ratification process, rendering them mere formalities.

Thus far, four states (Georgia, Alaska, Mississippi, and North Dakota) have joined the compact. By its own terms, the compact expires seven years “after the first State passes legislation enacting, adopting and agreeing to be bound by this Compact,” which, according to the organization’s website, will be April 12, 2021.

### **Can an Article V Convention Be Limited?**

Many open questions remain about the process of amending the Constitution by means of an Article V convention. Such questions include:

- Must the applications from the state legislatures match each other verbatim (a task that would have been difficult to accomplish at the time of the framing of the Constitution when the state of technology made communications among the states slow and ponderous)?<sup>43</sup> If not, how much commonality among applications is necessary, and how is the existence of sufficient commonality determined?
- After receiving the requisite number of applications from state legislatures, can Congress call “a Convention for proposing Amendments” that is limited to consideration of a particular pre-drafted amendment,<sup>44</sup> issue, or subject area, or would such a convention have to be open to consideration of other issues and amendments that some of the delegates might wish to propose once they have convened, thereby creating the risk of a “runaway convention”?
- Can Congress assess the validity of a state legislature’s application by, for instance, refusing to recognize an application to consider a particular amendment if Congress believes that a limited convention is not allowed?

- Are state legislature applications perpetually open once made, or can a state legislature limit the period of time for which the application remains effective?
- Can a state legislature rescind an application that it previously made?<sup>45</sup>
- Is Congress compelled to call an Article V convention if it concludes that applications for a limited convention are improper?
- Can Congress determine the number and method for selecting delegates to such a convention or the rules of procedure and voting rules at the convention?<sup>46</sup>
- Can states place enforceable limits on the authority of their delegates to the convention?<sup>47</sup>
- Can Congress place limits on where, when, how, and how long such a convention should be held, or would such matters be left to the delegates or the states themselves?<sup>48</sup>
- If the delegates at a convention passed an amendment that Congress deemed beyond the scope of the convention, could Congress refuse to forward the non-conforming amendment to the states for ratification?
- Would the answers to any of these questions be subject to review and enforcement by federal or state courts? If so, could the courts consider such matters in lawsuits filed as events unfold, or must consideration of any such lawsuits await the conclusion of an Article V convention or the final outcome of any subsequent ratification process?

There are no easy or definitive answers to any of these questions, and serious scholars have offered differing views.<sup>49</sup> There is little doubt that some states and scholars have been reluctant to propose an Article V convention, both because of the fear of a “runaway convention” in which the delegates deviate from the purposes for which the convention was sought by the requisite number of state legislatures and propose alternative, perhaps ill-advised amendments relating to other issues or because of the fear that the legal uncertainties surrounding

any convention of the states would likely result in a series of time-consuming, lengthy lawsuits that could result in the entire endeavor being undone.

Some prominent scholars contend that a “Convention for *proposing* Amendments” is just that—a convention to propose amendments, any amendments, for the convention delegates to consider—and that it cannot be limited to a particular, pre-drafted amendment or to a limited subject matter. Professor Michael Stokes Paulsen of the University of St. Thomas School of Law, for instance, argues that this understanding is in keeping with the commonly understood meaning of “convention” at the time the Constitution was ratified: a deliberative political body, which, by implication, cannot be constrained in its deliberations. Moreover, Paulsen contends, it would be quite odd to argue that Congress could decline to send to the states for ratification any amendment it deemed beyond the scope of the convention since the whole point of creating the constitutional convention mechanism was to reduce the role of Congress in the state-initiated amendment process.<sup>50</sup>

Although some scholars disagree with this characterization,<sup>51</sup> it is worth remembering that the delegates to the Philadelphia convention who drafted Article V had responded to a call by the Confederation Congress for a convention to consider whatever *amendments to the Articles of Confederation* they might deem necessary,<sup>52</sup> which they exceeded, only to see their actions subsequently approved by the nation through the ratification process.

Other scholars contend that a limited convention would be constitutional and that if the states applied for a convention limited to a particular subject or pre-drafted amendment, Congress would be required to call such a convention, and the convention would be obliged to consider only that particular subject matter or amendment.<sup>53</sup>

Some scholars argue that “a Convention for proposing Amendments” can be fairly interpreted to encompass either an unlimited convention or a limited one and that if Congress is obligated to call a convention upon receipt of the requisite number of applications, then it is perfectly reasonable that Congress should be obligated to call a convention that conforms to any limitations contained in all of those applications. Others have noted that the initial draft of Article V by the Committee of Detail provided that “[t]his Constitution ought to be amended whenever such Amendment shall become necessary; and

on the application of the Legislatures of two-thirds of the States of the Union, the Legislature of the United States shall call a Convention for that purpose”<sup>54</sup> and that the inclusion of the phrase “for that purpose” indicates that the drafter intended for states to have the ability to call for a limited convention to address particular subjects rather than to review the Constitution in its entirety.<sup>55</sup>

Still others have argued that the historical evidence from the time of the Framers was that conventions served a variety of purposes—some limited and some plenary—and did not have a fixed purpose and that the structure of Article V implies an equivalence between the two triggering mechanisms: Congress’s power to propose amendments is limited to those amendments that two-thirds of both houses of Congress deem necessary, and the same is true for the states’ power, which is limited to those amendments that two-thirds of the states deem necessary.<sup>56</sup>

## Conclusion

Many questions surrounding Article V of the Constitution merit thorough and careful consideration. Although James Madison did not object at the Philadelphia Convention to including an amendments convention in Article V, he warned “that difficulties might arise as to the form, the quorum etc. which in constitutional regulations ought to be as much as possible avoided.”<sup>57</sup> Michael Stern, former Senior Counsel to the U.S. House of Representatives and a strong proponent of the Article V convention process, has stated that “[i]t must be acknowledged...that the *purely legal* issue of whether an Article V Convention may be limited cannot be definitely resolved. Constitutional scholars have long debated the question, and it is widely recognized to be a quintessentially open one.”<sup>58</sup>

These questions loom large over the current calls of some advocates and state legislatures for such a convention and might well lead to attempts to frustrate the will of states that call for a limited convention by those who oppose the concept of a limited convention, want to use the convention to consider other subjects, or do not like the results of such a convention. Such challenges could take various forms including lawsuits that could take years and lead to unpredictable results. This is not an argument against proceeding with a constitutional convention—after all, the Bill of Rights emerged at a time when no procedures or customs existed for

implementing Article V—so much as it is an observation that those who are pursuing a call for a convention to consider a particular amendment or subject area they favor must recognize the risk that a convention might consider and yield amendments that they dislike on other subjects.

An Article V convention might propose an amendment to restore or expand the liberties of the American people, but it also could propose an amendment that diminishes the liberties of the American people, or of some of the people. While it is no doubt true that the ratification process itself, requiring support from three-fourths of the states (38 at present), decreases the likelihood of some radical proposal ultimately becoming part of our Constitution, it is worth recalling that 27 of the 33 proposed amendments that have been sent to the states for ratification achieved the requisite number, and that was before the age of the Internet and social media-driven campaigns that can dramatically increase public pressure on those who are considering such an amendment and reduce the time devoted to thoughtful reflection.

Some argue that the risks of an Article V convention in the face of legal uncertainty are simply too great. Professor Gerald Gunther, a prominent constitutional law scholar, for instance, has warned that the road “promises controversy and confusion and confrontation at every turn.”<sup>59</sup> Michael Stern, on the other hand, argues that:

It can scarcely be denied that the limited powers granted to the Congress in Article I of the Constitution have not proved to be a meaningful check on the expansion of federal power. The Article V Convention, if available as intended to check the “encroachments of the national authority,” would mitigate this risk.<sup>60</sup>

Some day we may get the answers to some of the difficult and open questions about the state-initiated Article V process. If proponents of calling an Article V Convention succeed, that day may be coming soon. Regardless of the particular merits of the proposals<sup>61</sup> and whether these efforts ultimately result in a convention to propose amendments to the Constitution, getting people engaged in a robust discussion of important issues regarding self-governance and the proper role of the federal and state governments in the lives of the American people is a constructive and positive development.

The possibility of an Article V convention of the states has a great deal of appeal to many. With such a convention or without one, however, it remains vitally important that we continue to maintain an overriding focus on holding Congress and the President and, by extension, federal agencies accountable for the decisions they make today.

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## Endnotes

1. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Commerce Clause, which permits Congress “To regulate Commerce with foreign nations, and among the several States, and with Indian Tribes,” enabled Congress to regulate the activities of a farmer who was growing wheat on his own land to feed his animals); *United States v. Butler*, 297 U.S. 1 (1936) (expanding the General Welfare Clause by giving Congress essentially unlimited discretion to determine what is included in the “general welfare”); *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding the use of eminent domain to transfer property from a private owner to a private developer by concluding that the benefits to a community from economic development qualify as a “public use” under the Takings Clause). See also John Eastman, *Restoring the General to the General Welfare Clause*, 4 CHAPMAN L. REV. 63 (2001) (explaining the unwarranted expansion of the General Welfare Clause and the need to restore the clause to its original meaning); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 University of Chicago L. Rev. 101 (Winter 2001).
2. The Supreme Court has held that Congress can delegate to executive branch agencies the ability “to fill up the details” so long as Congress provides an “intelligible principle” in the underlying statute to guide those agencies. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.” So long as “Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”). With two notable exceptions in 1935, see *Panama Refining Co., v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court has upheld every delegation to a regulatory agency, even in cases where congressional guidance has been virtually nonexistent or at best nebulous. For example, as the Supreme Court noted in *Rapanos v. United States*, 547 U.S. 715, 722 (2006), over the past three decades, there has been an “immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.” The Environmental Protection Agency and the U.S. Army Corps of Engineers have jurisdiction over “the waters of the United States,” and they have claimed that that authority extends to virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow.” Other examples of broad delegations would include 42 U.S.C. § 6921(a) & (b), which grants the EPA broad authority to characterize and list “hazardous materials,” and 29 U.S.C. § 655(b), which empowers the Department of Labor to establish national occupational health and safety standards.
3. See *Chevron U.S.A., Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that courts should defer to agency interpretations of statutes unless they are unreasonable); *Auer v. Robbins*, 519 U.S. 452 (1997) (holding that an agency’s interpretation of its own regulations is entitled to *Chevron* deference); *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (holding that “an agency’s interpretation of a statutory ambiguity about the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*”).
4. See Article I of the Constitution, which vests “All legislative power herein granted” in Congress. John Locke and Charles de Montesquieu, two highly influential philosophers who were widely read at the time of the Constitutional Convention, would no doubt have been shocked at the current state of affairs in which Congress delegates lawmaking authority to executive branch agencies charged with enforcing those laws. See John Locke, *The Second Treatise of Government*, chap. 11, §141 (New York: Barnes & Noble, 2004) (“The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others.”); Charles de Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, Basia C. Miller, & Harold S. Stone, eds., part 2, book 2, chapter 6 (Cambridge: Cambridge University Press, 2009) (“When legislative power is united with executive power in a single person or in a simple body of magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically ...”). See also THE FEDERALIST No. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.”), available at [http://avalon.law.yale.edu/18th\\_century/fed47.asp](http://avalon.law.yale.edu/18th_century/fed47.asp).
5. Professor Robert G. Natelson, one of the leading authorities on Article V and a strong proponent of calling an Article V convention, has prepared an extensive guide for lawyers and lawmakers who are thinking about getting involved in the process of preparing an application calling for an Article V convention. Robert G. Natelson, *State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters*, available at <http://constitution.i2i.org/files/2014/11/Compendium-3.01.pdf>.
6. Moreover, Article V envisions no role for the President. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (The Eleventh Amendment was properly adopted without any participation by the President.).
7. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1821 (1833). The Articles of Confederation, which preceded the Constitution, provided that any amendments required approval from the unicameral national legislature and unanimity among the 13 states that existed at that time, a practical impossibility. ARTICLES OF CONFEDERATION art. XIII (1781) (“And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterward confirmed by the legislatures of every State.”).
8. At present, this would require an application from the legislatures of 34 states.
9. At present, this would require ratification by 38 states.

10. Six additional amendments were proposed by Congress but have not achieved ratification by the states. Those amendments deal with (1) the number of Representatives (proposed in 1789); (2) loss of citizenship for accepting a title of nobility or emoluments from a foreign power (proposed in 1810); (3) prohibiting constitutional amendments to give Congress power to abolish or interfere with state “domestic institutions” (proposed in 1861); (4) giving Congress the power to regulate child labor (proposed in 1924); (5) prohibiting discrimination on the basis of gender (proposed in 1972); and (6) treating the District of Columbia as if it were a state for purposes of representation in Congress, the Electoral College, and ratifying amendments to the Constitution (proposed in 1978). See, e.g., *The Constitution: Failed Amendments*, LEXIS NEXIS, available at [http://www.lexisnexis.com/constitution/amendments\\_failed.asp](http://www.lexisnexis.com/constitution/amendments_failed.asp); Kristen Bergman, *Six: A Look at Failed Constitutional Amendments*, CON SOURCE, available at <http://blog.consource.org/post/73421268753/six-a-look-at-failed-constitutional-amendments>. This does not, of course, include those times when the Supreme Court of the United States, under the guise of interpreting the Constitution, has effectively amended it, a process that some have argued obviates the need for interest groups to undertake the far more laborious process of seeking a formal amendment to our nation’s charter. See, e.g., *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting) (“Just over a century ago, Arizona became the second State in the Union to ratify the Seventeenth Amendment. That Amendment transferred power to choose United States Senators from ‘the Legislature’ of each State, Art. I, §3, to ‘the people thereof.’ The Amendment resulted from an arduous, decades-long campaign in which reformers across the country worked hard to garner approval from Congress and three-quarters of the States. [¶] What chumps! Didn’t they realize that all they had to do was interpret the constitutional term ‘the Legislature’ to mean ‘the people’? The Court today performs just such a magic trick with the Elections Clause.”).
11. South Carolina attorney and Article V researcher Robert Biggerstaff maintains an Article V Library, an online resource that keeps track of every Article V application filed by any state (as well as any rescissions by those states), which can be searched by state, year, or subject, available at <http://www.article5library.org/>.
12. Many commentators use the terms “convention of the states” and “constitutional convention” interchangeably, and they are used interchangeably throughout this Legal Memorandum. It is worth noting, however, that some object to using the phrases interchangeably, contending that a “convention of the states” is the more appropriate term, both because it would literally entail a convention attended by appointed state delegates who would be casting votes on behalf of their respective states and because those delegates would be proposing amendments to the existing Constitution, not a wholesale replacement of the Constitution.
13. See, e.g., Ronald D. Rotunda & Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 MARQ. L. REV. 227, 233–34 (1996); Dwight W. Connely, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 ARIZ. L. REV. 1011, 1015–16, n.49 (1980).
14. See James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1009–10 (2007).
15. *Bowsher v. Synar*, 478 U.S. 714 (1986).
16. Specifically, the petitioning states sought to overturn the Supreme Court’s one-man, one-vote decisions in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964).
17. See Rogers, *supra* note 14, at 1009.
18. THE FEDERALIST No. 43 (James Madison), available at [http://avalon.law.yale.edu/18th\\_century/fed43.asp](http://avalon.law.yale.edu/18th_century/fed43.asp).
19. See Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765, 767 (2011); Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 360–61 (1979).
20. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (Max Farrand ed., 1911), available at [http://lf-oll.s3.amazonaws.com/titles/1057/0544-01\\_Bk.pdf](http://lf-oll.s3.amazonaws.com/titles/1057/0544-01_Bk.pdf).
21. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 159 (Max Farrand ed., 1911), available at [http://lf-oll.s3.amazonaws.com/titles/1786/0544-02\\_Bk.pdf](http://lf-oll.s3.amazonaws.com/titles/1786/0544-02_Bk.pdf).
22. *Id.* at 557–58.
23. As originally introduced by Madison, the compromise would have given Congress the ability to block as well as propose amendments, but this was removed after Virginia delegate George Mason objected that such a process would be “exceptional and dangerous” and that “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.” *Id.* at 629.
24. THE FEDERALIST No. 85 (Alexander Hamilton), available at [http://avalon.law.yale.edu/18th\\_century/fed85.asp](http://avalon.law.yale.edu/18th_century/fed85.asp).
25. OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, LIMITED CONSTITUTIONAL INTERVENTIONS UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION 7 (Sept. 10, 1987).
26. MARK R. LEVIN, THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC (2013).
27. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).
28. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
29. *Printz v. United States*, 521 U.S. 898 (1997).
30. *Citizens United v. FEC*, 558 U.S. 310 (2010). At least three states have already filed applications to convene a convention to do just that. See Byron DeLear, *Illinois Is 3rd State Seeking Amendments Convention for Free and Fair Elections*, EXAMINER.COM (Dec. 4, 2014), available at <http://www.examiner.com/article/illinois-is-3rd-state-seeking-amendments-convention-for-free-and-fair-elections>.

31. See *State Legislative Resolution to Restore Free and Fair Elections in the United States*, available at [https://docs.google.com/document/d/16k\\_iwdwxJIAAZKeYCOJ\\_S1Za82U\\_XevCp6wwPXklcBU/edit](https://docs.google.com/document/d/16k_iwdwxJIAAZKeYCOJ_S1Za82U_XevCp6wwPXklcBU/edit). WOLF PAC is registered as a political action committee with the Federal Election Commission (#C00485102).
32. See WOLF PAC, available at <http://www.wolf-pac.com/>.
33. See U.S. CONST., art. II, sec. 1, cl. 3 (“The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.”). The method for choosing the Vice President was subsequently changed once the Twelfth Amendment was ratified in 1804.
34. For a critique of the National Popular Vote plan, see Hans A. von Spakovsky, *Destroying the Electoral College: The Anti-Federalist National Popular Vote Scheme*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 73 (Oct. 27, 2011), available at <http://www.heritage.org/research/reports/2011/10/destroying-the-electoral-college-the-anti-federalist-national-popular-vote-scheme>.
35. There are many other Article V campaigns, including a movement to impose a single subject rule on Congress (see *Single Subject Amendment*, available at <http://singlesubjectamendment.com/>); a movement to impose congressional term limits (see *U.S. Term Limits*, available at <https://www.termlimits.org/>); the Act 2 Movement, which seeks to promote, among other things, term limits, campaign finance reform, and a fourth branch of government called the “Democracy Branch” to oversee the three existing branches of government (see <http://www.act2movement.org/>); the American Opportunity Project, which urges states to pass state laws that try to pressure Congress into proposing a Regulation Freedom Amendment (see <http://www.americanopportunityproject.org/regulation-freedom-amendment/>); and the Assembly of State Legislatures, which has met several times to discuss the potential rules that would govern a Convention of the States (see <http://www.assemblystatelegislatures.com/>). Some prominent politicians also have called for a convention of the states. See, e.g., Edgar Walters, *Abbott Calls on States to Amend U.S. Constitution*, TEXAS TRIBUNE (Jan. 8, 2016), available at <http://www.texastribune.org/2016/01/08/abbott-calls-states-amend-us-constitution/>; Thomas Sowell, *Conventions of States Would Empower the People*, WND (Jan. 11, 2016), available at <http://www.wnd.com/2016/01/convention-of-states-would-empower-the-people/>.
36. See *Balanced Budget Amendment Task Force*, available at <http://www.bba4usa.org/>; Scott Rogers, *Active Article V Balanced Budget Amendment Applications*, BALANCED BUDGET AMENDMENT TASK FORCE (Aug. 19, 2013), available at <http://nebula.wsimg.com/05a95e351c38793b394d764384c583e3?AccessKeyId=499EF5BCFD5720FCE35C&disposition=0&alloworigin=1>.
37. The project is headed by Michael Farris, founding president of Patrick Henry College and the Home School Legal Defense Association.
38. *Convention of States*, available at <http://www.conventionofstates.com/problem>.
39. Convention of States Project, *American Legislative Exchange Council Unanimously Votes to Adopt Convention of States Resolution Language*, PR NEWSWIRE (Sept. 15, 2015), available at <http://www.prnewswire.com/news-releases/american-legislative-exchange-council-unanimously-votes-to-adopt-convention-of-states-resolution-language-300143178.html>; Joel Ebert, *Tennessee Adopts Resolution for Convention of States*, THE TENNESSEAN (Feb. 4, 2016), available at <http://www.tennessean.com/story/news/politics/2016/02/04/house-approves-call-convention-states/79816402/>.
40. The president and executive director of Compact for America is Nick Dranias, who is also a research fellow at the Heartland Institute and former constitutional policy director at the Goldwater Institute. The website for Compact for America is available at <http://www.compactforamerica.org/>.
41. The compact purports to tie the hands of any delegates to such a convention in a number of ways including setting forth limitations on the authority of any delegates, requiring delegates to take an oath in which they agree to be bound by those limitations, providing that any delegates who violate their oath can be recalled or replaced, providing that any delegate who violates any provision of the compact immediately forfeits his or her appointment, and providing that member states refuse to participate in any convention that does not adhere strictly to the rules laid out in the compact. In that regard, it is worth noting that Article I, Section 10, Clause 1 of the Constitution provides that “No State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State ... .” Dranias has argued, however, that this “consent” requirement should not prove to be an impediment. See Nick Dranias, *Introducing “Article V 2.0”: The Compact for a Balanced Budget*, HEARTLAND INST. POLICY STUDY No. 134 (July 2014) at 9-10 (“The Supreme Court has held for nearly 200 years that congressional consent to interstate compacts can be given expressly or implicitly, either before or after the underlying agreement is reached. Moreover, under equally longstanding precedent, a binding interstate compact can be constitutionally formed without congressional consent so long as the compact does not infringe on the federal government’s delegated powers. [¶] Nothing in the Compact for a Balanced Budget infringes on any federally delegated power, because conditional enactments and express provisions ensure all requisite congressional action in the Article V amendment process would be secured before any compact provision predicated on such action became operative.”) (footnotes omitted).

42. The precise language of the proposed amendment is available at [http://media.wix.com/ugd/e48202\\_0468889115a94eeda2b0a9104f8989e6.pdf](http://media.wix.com/ugd/e48202_0468889115a94eeda2b0a9104f8989e6.pdf). Heritage scholars have written about the principles that they believe should govern consideration of any constitutional amendment to balance the budget. See David S. Addington & J. D. Foster, *Balanced Budget Amendment: Cut Spending Later, Cut Spending Now*, HERITAGE FOUNDATION WEBMEMO No. 3208 (Mar. 31, 2011), available at <http://www.heritage.org/Research/Reports/2011/03/Balanced-Budget-Amendment-Cut-Spending-Later-Cut-Spending-Now>.
43. It is worth noting that in a 1993 report, the House Judiciary Committee concluded that “[t]he applications need not be exact copies of each other. On the contrary, most commentators suggest that Congress should be generous in its interpretation. . . . Applying too strict a standard could be viewed as an attempt to prevent the States from exercising their option under Article V.” U.S. Congress, House, Committee on the Judiciary, *Is There a Constitutional Convention in Our Future?* 103rd Cong., 1st sess., committee print, serial no. 1 (Washington: GPO, 1993) at 7. It is also difficult to imagine that the Founding Fathers would have envisioned that all such petitions be identical, given the extreme limitations of communications and travel among the states that existed in the 18th century.
44. For differing views on this subject of whether states can propose a specific amendment in their application, thereby limiting the convention to consideration of that amendment, cf. Nick Dranias, *Article V Conventions and the Tenth Amendment Go Hand-in-Hand* (“ . . . the reference is plainly to ‘states’ as states using the convention process to propose the amendments they desired. There is no way to assume the truth of the Founders’ representations about Article V without also assuming that the sovereign powers of the states—those guaranteed by the Tenth Amendment—would have a role in directing the convention mode of proposing amendments under Article V. . . . ‘Application’ is conferred by Article V on state legislatures. Rather, the ‘Application’ power is presumed to exist. As such, reference to the ‘Application’ is a clear textual point of entry for state control based on reserved legislative power. The Tenth Amendment’s guarantee of the reserved powers of the states is, therefore, critically important to understanding and enforcing Article V as it applies to the convention mode of proposing amendments.”), available at [http://www.americanthinker.com/articles/2015/12/article\\_v\\_conventions\\_and\\_the\\_tenth\\_amendment\\_go\\_handinhand.html](http://www.americanthinker.com/articles/2015/12/article_v_conventions_and_the_tenth_amendment_go_handinhand.html), with Robert G. Natelson, *How the Judiciary’s Decisions Shed Light on the Federal Amendments Convention*, WASH. POST (Dec. 10, 2015) (“Article V bestows its authority on named assemblies per se, not on any government or branch of government. . . . Within its prescribed scope, each assembly is free to exercise the discretion an assembly of that kind historically has enjoyed. Hence, the courts hold that it is improper for a voter initiative to attempt to force a member of Congress to propose a particular amendment or a state legislature to apply or to ratify. Similarly, it would be improper for an applying state legislature to try to turn a proposing convention into a ratifying convention by limiting it to an up-or-down vote on predetermined wording. (This last conclusion is controversial in some quarters, but I believe it is unavoidable.)”), available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/10/how-the-judiciarys-decisions-shed-light-on-the-federal-amendments-convention/>; Robert G. Natelson, *The Constitution’s Article V, Not the 10th Amendment, Gives State Legislatures Their Power in the Amendment Process*, AM. THINKER (Dec. 18, 2015), available at [http://www.americanthinker.com/articles/2015/12/the-constitutions\\_article\\_v\\_not\\_the\\_10th\\_amendment\\_gives\\_state\\_legislatures\\_their\\_power\\_in\\_the\\_amendment\\_process.html](http://www.americanthinker.com/articles/2015/12/the-constitutions_article_v_not_the_10th_amendment_gives_state_legislatures_their_power_in_the_amendment_process.html).
45. It has been suggested that if applications are perpetual and cannot be rescinded, then arguably the 34-state threshold has already been reached with respect to calling a convention to consider a balanced budget amendment. See THOMAS H. NEALE, CONG. RESEARCH SERV., R42589, *THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS*, 7-9 (2014).
46. For an example of proposed rules for a Convention for Proposing Amendments, which were prepared by Professor Robert Natelson for the Convention of the States Project, see [http://www.conventionofstates.com/proposed\\_rules](http://www.conventionofstates.com/proposed_rules).
47. In *Proposing Constitutional Amendments by a Convention of the States: A Handbook for State Lawmakers*, Professor Robert Natelson argues that the convention “must have a certain amount of deliberative freedom,” citing a number of court decisions supporting this proposition. See <http://nebula.wsimg.com/cdf52ef12208c4de9514086b185d132f?AccessKeyId=499EF5BCFD5720FCE35C&disposition=0&alloworigin=1> at 38 n.16. In *Convention of States: A Compendium for Lawyers and Legislative Drafters*, Natelson maintains that attempts to control “the structure of the legislature’s applications, how it selects its commissioners, and when they may recall them” are unenforceable, although states could impose civil or criminal penalties on commissioners/delegates who exceed their authority. See <http://constitution.i2i.org/files/2014/04/Compendium-2.2.pdf> at 50.
48. It seems doubtful that the Framers of the Constitution would have envisioned that Congress could set rules limiting the subject matter of applications or regulating conventions, since this would be inconsistent with the goal of providing the states with a mechanism for bypassing Congress when it comes to proposing amendments. It is clear under Article V, however, that when submitting a proposed amendment to the states for ratification, Congress gets to choose the mode of ratification (by state conventions, which was used for the Twenty-First Amendment repealing Prohibition, or by the legislature, which has been used every other time). See also *United States v. Sprague*, 282 U.S. 716 (1931) (Regarding a claim that a particular type of proposed amendment must be submitted for ratification by conventions, “[t]his Court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress.”); *Hawke v. Smith*, 253 U.S. 221 (1920) (The state cannot reserve to the people of the state the authority to ratify proposed amendments to the U.S. Constitution by referendum, as Article V specifies ratification by legislature or convention, and the legislature’s ratification authority derives from the U.S. Constitution, not state law). Additionally, the Supreme Court held in *Dillon v. Gloss*, 256 U.S. 368 (1921), that Congress can set reasonable time limits for ratification by the states. See also *Coleman v. Miller*, 307 U.S. 433, 454 (1939) (“Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the

- courts.”). *But see* Memorandum Opinion for the Counsel to the President on the Congressional Pay Amendment from Timothy E. Flanigan, Acting Assist. Att’y Gen., U.S. Dep’t of Justice, Office of Legal Counsel (Nov. 2 1992) (concluding that ratification of the Twenty-Seventh Amendment, which had taken over two centuries, was valid, and rejecting dicta in *Dillon* and *Coleman* concerning ratification within a “reasonable time” as “not authoritative” and “unsound”), available at <http://www.justice.gov/olc/congress.17.htm>.
49. Cf. RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 119 (1988) (arguing that the selection of delegates would be up to each state); Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 964 (1963) (arguing that Congress has the power under Article V and the Necessary and Proper Clause to regulate the mode of selecting delegates to a convention and voting rules at the convention). For a variety of other views on this subject, see *A Constitutional Convention: How Well Would It Work?*, 8 AM. ENTERPRISE INST. (1979) (presenting the views of Walter Berns, Gerald Gunther, Antonin Scalia, and Paul Bator).
  50. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 737–43 (1993); Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837 (2011). See also Charles L. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972); Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623, 1624 (1979); Francis H. Heller, *Limiting a Constitutional Convention: The States Precedents*, 3 CARDOZO L. REV. 563 (1982).
  51. For the views of one prominent scholar who disagrees with the widely held view that the 1787 Philadelphia Convention was a “runaway convention,” see Robert G. Natelson, *The Constitutional Convention Did Not Exceed Its Power and the Constitution Is Not “Unconstitutional,”* INDEPENDENCE INST. (June 2013), available at <http://constitution.i2i.org/2013/06/02/the-constitutional-convention-did-not-exceed-its-power-and-the-constitution-is-not-%E2%80%9Cunconstitutional%E2%80%9D/>.
  52. See Resolution of the Continental Congress of February 21, 1787 (“Whereas there is provision in the Articles of Confederation & perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several States; And whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such convention appearing to be the most probable mean of establishing in these states a firm national government. [¶] Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.”) (emphasis added), Journals of the Continental Congress, Vol. 38 (manuscript), Library of Congress, available at [http://avalon.law.yale.edu/18th\\_century/const04.asp](http://avalon.law.yale.edu/18th_century/const04.asp). Under the Articles of Confederation, such amendments would have to be approved by all 13 state legislatures before entering into effect, not three-quarters of the states as set forth in the subsequent Constitution.
  53. See William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1305 (1978); Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011); Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONSTITUTIONAL COMMENTARY 53 (2012); Michael B. Rappaport, *The National Convention Constitutional Amendment Method: Defects, Federalism Implications, and Reform*, 96 VA. L. REV. 1509 (2010).
  54. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 159 (Max Farrand ed., 1911).
  55. Special Constitutional Convention Study Committee, A.B.A., Amendment of the Constitution by the Convention Method Under Article V 12–15 (1974).
  56. Stern, *supra* note 19, at 772–74; Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615 (2013); Robert G. Natelson, *How Past American Conventions Inspired the Constitution’s ‘Convention for Proposing Amendments,’* WASH. POST (Dec. 7, 2015), available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/11/how-the-convention-for-proposing-amendments-became-the-subject-of-popular-mythology/>.
  57. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 629–30 (Max Farrand ed., 1911).
  58. Stern, *supra* note 19, at 778 (emphasis in original).
  59. See, e.g., Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 25 (1979).
  60. Stern, *supra* note 19, at 782.
  61. Some scholars, for example, have questioned whether the states would truly welcome the return of some authority if such a transfer were unaccompanied by federal funds in the form of block grants. See, e.g., Michael S. Greve, *Federalism and the Constitution: Competition Versus Cartels*, MERCATUS CENTER, GEORGE MASON UNIVERSITY (May 2015) at 12 (“hundreds of federal ‘conditional funding’ programs support, from general taxes, services that states would decline to provide under competitive conditions for fear that taxed citizens or firms might head for the exits. Countless federal workplace, employment, and safety standards suppress state competition for mobile labor and capital. It is a fateful mistake to view those programs as federal regimentation or impositions on states; for the most part, they respond to genuine state demand.”). Proponents of amendments may also need to take into account the possibility that a future Supreme Court could dilute or even eradicate any number of sound amendments, just as the Court has done to key provisions of the existing Constitution. See *supra* note 1.
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