Article V Convention: A Brief Review of Legal Sources (*they all agree*)

and why otherwise trustworthy people often get it wrong

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> *"Critics of the convention method have argued that it is an untried process and, therefore, must be dangerous. They argue that a convention could 'run away' beyond its mandate, rewrite the entire Constitution, and even repeal the Bill of Rights. Such charges are not only unfounded, but they also show a strong distrust of democracy and a fear of the voter's judgment. Although the claims that a convention will repeal the Bill of Rights, or other similar behavior, are groundless, their constant repetition gives people qualms. Thus, this issue deserves detailed analysis." - Ronald Rotunda, author of the prominent Treatise on Constitutional Law.*[1]

100% of peer reviewed sources agree: the idea that a limited convention call could result in an amendment on a different topic would be like NASA failing to put a man on the moon by accidentally landing him safely on Mars. What follows is a very brief summary of this research, showing first the theoretical basis for the limitation and then a selection of the practical tools to enforce it. Unfortunately, the echo chamber of Article V Convention opponents has been so loud for so long that it is now easy for even those who are ordinarily reliable to have preconceived notions of the so called "risks" of a convention. Once this notion is established, it becomes easy, even with the best of intentions, to believe sources without checking or to ignore context behind quotations. Confirmation bias is part of human nature. This paper summarizes the three types of sources most commonly used for well meaning but mistaken research.

I. Theoretical grounding of the limitations on the convention process:

A. The Equality Argument:

"The 'equality argument' takes it as a given that Congress is free to propose single amendments limited to a single topic… . If the states are equally able to initiate the amendment process, the states should be equally able to limit the subject matter of proposed amendments. The structure and history of Article V fully support the basic premise of the equality [argument]."[2]

B. The Consensus Argument:

"The text of Article V demonstrates that a substantial national consensus must be present in order to adopt a constitutional amendment. The necessity for a consensus is underscored by the requirement of a two-thirds vote in each House of Congress or applications for a convention from two-thirds of the state legislatures to initiate an amendment, and by the requirement of ratification by three-fourths of the states. From the language of Article V we are led to the conclusion that there must be a consensus among the state legislatures as to the subject matter of a convention before Congress is required to call one. To read Article V as requiring such agreement helps assure that an alteration of the Constitution proposed today has relation

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[1] Ronald D. Rotunda and Stephen J. Safranek, *An Essay on Term Limits and a Call for a Constitutional Convention*, 80 Marq. L. Rev. 227 at 230 (1996); See also 2 Rotunda & Nowak, *Treatise on Constitutional Law* §10.10(b)(iii-iv) (5th ed. 2012) (Rotunda Treatise).

[2] Stephen J. Markman, *Report to the Attorney General, Limited Constitutional Conventions under Article V of the United States Constitution*, U.S. D.O.J. Off. of Legal Policy (1987), p. 5 (1987 DOJ Report); *See also*, *Constitutional Convention—Limitation of Power to Propose Amendments to the Constitution*, 3 U.S. Op. Off. Legal Counsel 390 at 404 (1979), (1979 DOJ Report 1) (Quoting James Madison), American Bar Association, Special Constitutional Convention Study Subcommittee, *Amendment of the Constitution by the Convention Method Under Article V*, (1974) (ABA Report), pp. 1, 11-17.

to the sentiment and felt needs of today."[3]

C. The Argument by Practice:

"The argument by practice points out that the state legislatures have consistently been interpreting Article V as permitting limited conventions and that the U.S. Senate has twice unanimously passed a Constitutional Convention Procedures Act that contained the same interpretation. Article V has a plain meaning that is cognizable by elected officials at both the state and national levels, representing diverse parts of the country, carried out over a long period of time."[4]

II. A partial selection of practical tools to enforce limitations on the convention:

A. Tools of the States:

Ratification by 38 States is the last and strongest check on the Amendment process:

"The ratification process itself is thus the States' means of enforcing a subject-matter limit on a convention. If the States determine that the convention exceeded its scope, they can refuse to ratify the proposed amendments."[5]

States have direct control over their delegates:

States have bound delegates to conventions under the Constitution since the 1787-1789 Article VII Ratification Conventions.[6] Nearly all states had some instruction procedure in the 1933 Article V Ratification Convention for the 21st amendment, with Alabama, Arkansas, Oregon, and West Virginia all required under the law that delegates vote in accordance with their instructions.[7] "But it was left to Arizona to cap the climax in this respect by providing that 'delegates elected upon a platform or nomination petition statement as for or against ratification must vote at such convention in accordance with such platform or nomination petition statement, and upon failure to do so will be guilty of a misdemeanor, his vote not considered, and his office deemed vacant.' "[8] This same procedure was unanimously upheld by the Supreme Court for electors in 2020.[9]

B. Tools of the Delegates:

Formulation of the Language by 50 States are a Check on the 34 Calling the Convention:

"If the determination of necessity for change is made by the states, the concrete proposal for change must be formulated by a convention. If the determination of necessity is made by the Congress, the concrete proposal

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[3] ABA Report, p. 11; See also 1987 DOJ Report, p. 20; U.S. Congressional Research Service (CRS), *The Article V Convention to Propose Constitutional Amendments: Current Developments* (*Current Developments*) (R44435; Nov. 15, 2017), by Thomas Neale, p20; *Constitutional Convention—Limitation of Power to Propose Amendments to the Constitution*, 3 U.S. Op. Off. Legal Counsel 16 at 18 (1979), (1979 DOJ Report 2) "Unless the applications deal with the same issue, it would seem that the fundamental prerequisite of calling a convention, i.e., the existence of a national consensus that a constitutional change is desirable, is not satisfied. It is generally agreed that States may call for a general revision of the Constitution, but short of such a general undertaking, we think it would circumvent one of the central principles of the amendment process to allow the combining of calls on issues as disparate as reapportionment, abortion, or budgetary restraint, no one of which was deemed by two-thirds of the States as worthy of consideration."

[4] 1987 DOJ Report, p. 28; See also Russell L. Caplan, *Constitutional Brinksmanship: Amending The Constitution By National Convention* 95–101 (1988) (Constitutional Brinksmanship).

[5] James K. Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 Harv. J.L. & Pub. 1005, 1020 (2007). (Rogers) Nearly every article on the subject also references ratification as the ultimate safeguard.

[6] *Ratification, The People Debate the Constitution, 1787-1788*, Pauline Maier, (2010), pp. 145-7. See *Id.* at pp. 129, 134-7, 145-72, 156, 160, 203-4, 209, 218-9, 221, 233, 235-6, 240, 244, 314-5, 406, 410 (Delegates to Article VII Conventions to ratify the Constitution were bound by constituent instructions in Connecticut, Virginia, New Hampshire, Massachusetts, and North Carolina.) *See also* Black's Law Dictionary (10th ed. 2014) (Defines "instructed delegate" but not "instructed representative.")

[7] Everett Brown, Ratification of the Twenty-First Amendment to the Constitution of the United States (1938) p. 518

[8] *Id.*

[9] *Chiafalo v. Washington*, 591 U.S. ___ (2020)

must also be formulated by the Congress. However, even though the 'initiation stage' and the 'formulation stage' are linked in this fashion, the two stages are distinct activities, as evidenced by their division in the state-initiated amendment process."[10]

C. Tools of Congress:

Limited Discretion in Power to Call the Convention:

"We believe that, as a necessary incident of the power to call, Congress has the power initially to determine whether the conditions which give rise to its duty have been satisfied. Once a determination is made that the conditions are present, Congress' duty is clear–it 'shall' call a convention."[11]

Powers Incident to Choice of Mode of Ratification:

"Congress [has] the power to select the method of ratification and the Supreme Court has made clear that this power carries with it the power to adopt reasonable regulations with respect to the ratification process."[12] "[Congressional] Convention planning proposals generally included… a concurrent resolution of disapproval… of a proposed amendment [either for] a departure from the policy issue for which the convention had been called [or] failure to follow procedures prescribed in the authorizing legislation."[13]

D. Tools of the Courts:

Courts can and will enforce limitations on delegates to a convention:

The Florida State Constitution provides that every twenty years, a Convention shall meet with "authority to propose constitutional amendments where that authority is limited to dealing with taxation or the state budgetary process."[14]. The Convention delegates interpreted their mandate to include "the power to propose constitutional amendments regarding state revenue expenditures because expenditures are encompassed within the state budgetary process... ."[15] The Florida Supreme Court disagreed, ruling that the Convention "exceeded its authority in proposing these two amendments. Accordingly, ... [t]he Secretary of State and all persons and entities acting under his direction [we]re... enjoined from placing [those] proposed Amendments… on the November 2008 general election ballot."[16]

Courts can and will enforce the constitutional duties of Congress:

Adam Clayton Powell was re-elected to the House of Representatives in 1966 following a scandal.[17] The House voted to refuse to seat him and he sued, contending that the House lacked "authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[18] "The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that a district court may declare the rights of any interested party whether or not further relief is or could be sought."[19] Before the case concluded, Mr. Powell won his next election and was given his seat and so there was no claim left to make against the House of Representatives, but the Court issued a declaratory judgement that Congress had no right to deny his seat and therefore the House Clerk must act as though Congress had done its constitutional duty and issue his salary.[20]

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[10] 1987 DOJ Report, n.6.

[11] ABA Report, p. 17. See also CRS, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress* (*Contemporary Issues*) (R42589; Mar. 29, 2016), by Thomas Neale, p. 6-9.

[12] ABA Report, p. 38.

[13] CRS Contemporary Issues, pp. 21-2. (For additional checks from Congress, see generally the full report.)

[14] *Ford v Browning* 992 So.2d 132 at 138 (Florida 2008)

[15] *Id.*

[16] *Id.* at 141.

[17] *Powell v. McCormack*, 395 U.S. 486 (1969).

[18] *Id.* at 522.

[19] *Id.* at 517.

[20] *Id.* at 550.

III. Common Sources of Erroneous Information that Appear Credible:

A coalition of groups that opposed the balanced budget amendment from the Eagle Forum and John Birch Society on the right to Common Cause and the AFL-CIO on the left have been spreading fear about the Article V process since the 1980s.[21] So when Common Cause asked many of their allies to sign on to a letter opposing the convention effort today, it was not a hard sell, especially for the groups like the Sierra Club who do not study this kind of issue.[22] Other groups, like the ACLU, support Citizens United and so are happy to sign on to oppose any effort to overturn it.[23] With talking points that have circulated amongst these otherwise great organizations, as well as pressure to follow their allies, it has been difficult to get many of these groups to even recognize the fact that Common Cause' letter cites no research and blatantly misrepresents some basic facts.[24]

Far too much faith is placed in op-eds:
The Common Cause letter cites multiple op-eds, but no peer reviewed sources. Many Constitutional Scholars have written such pieces, but not one that has ever published on this issue. For example, one professor who is an expert in other areas of Constitutional law sat down to write "a simple newspaper op-ed" and he "didn't expect to get anyone so excited about this relatively peaceful topic."[25] He asked a law librarian for help "tracking down a few law review articles (if they exist) that zero in on whether a United States Constitutional Convention can be limited to a single topic," but still made significant basic errors because while he is an expert in some areas of the Constitution, he is not an expert in Article V.[26] For example, the professor relied on a letter published but never peer reviewed by Civil Rights scholar Charles Black.[27] The professor was unaware that Mr. Black's comments were motivated by his opposition to one particular amendment and his commentary was very different in his published statements before and after that fight.[28]

At a recent Senate hearing in Washington, 250 volunteers came out to show support and we presented the peer reviewed research as laid out above.[29] The Wolf-PAC resolution passed the committee unanimously. But when the op-ed from a respected scholar like the aforementioned Professor was circulated at the last minute,

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[21] Samuel Fieldman, The Fraud Behind Article V Opposition, (Oct. 5, 2017) (Includes links to official statements of the AFL-CIO and John Birch Society in support of the coalition Citizens to Protect the Constitution, which was an umbrella group formed to oppose the Balanced Budget Amendment in 1979. Members of the board of advisors included Laurence Tribe and Arthur Goldberg.

[22] Jay Riestenberg, Common Cause, *U.S. Constitution Threatened as Article V Convention Movement Nears Success* (Common Cause Letter) (2019)

[23] David Cole, *Taking Trump to Court (with David Cole), Stay Tuned with Preet Bharara* (Feb. 15, 2018) (Starting at 14 minutes) (Explaining that though many in the ACLU personally oppose Citizens United, they are required by the Board of Directors to take a position in support of the case.) As one member of the ACLU who has testified in opposition to Wolf-PAC told me via e-mail: "For better or for worse, as an advocate for an organization that does take a position on this issue, if it does come up I will be taking the organizational stance and will represent it."

[24] *Common Cause Letter* (Citing sources who have supported convention efforts either generally or specifically for certain purposes as though they opposed, including Antonin Scalia and Laurence Tribe, scholars who wrote political statements due to opposition to a particular convention effort, such as Warren Burger and Arthur Goldberg, and op-ed writers who do not study Article V including the law professor whose op-ed process is described herein but who is not named here. Not a single peer reviewed article was cited.); *But see, eg. Wolf-PAC's detailed explanation of the views of Antonin Scalia.*

[25] Statements made in e-mails sent to Wolf-PAC. Available upon request.

[26] *Id*.

[27] *Id.; See* Black, Charles L. Jr., *Amendment by National Constitutional Convention: A Letter to a Senator,* 32 Okla. L. Rev. 626 (1979).

[28] Black, *Proposed Constitutional Amendments: They Would Return Us to Confederacy,* 49 A.B.A. J. 637 at 638 (1963) (defending the democratic nature of the convention); Black, *Reflections on Teaching and Working in Constitutional Law,* 66 Or. L. Rev. 1 at 8-9 (1987) (Affirming only his least controversial opinion on Article V.)

[29] *People Power Wins In The Washington Senate*, The Young Turks, Feb. 28, 2019

even intelligent legislators who should know better made the far too common mistake of confusing the opinion from someone they trust with actual research and no vote was held on the Senate Floor.[30]

Unfortunately, organizations one would expect to do more research often fall victim to the same mistakes as op-ed writers in the absence of peer review. The Brennan Center signed on the Common Cause letter, but has no research on the subject on their website or experts on the topic on staff, only a few blog posts by a single writer.[31] When asked for a source that backs up his claims, he named "Constitutional Brinksmanship", cited above. Neither he, nor the organization, responded to an e-mail showing numerous direct refutations of his argument from that book.

It is commendable when these mistakes are recognized and corrected, such as when the chair of the Hawaii State Democratic Party opposed the resolution in 2017, but after hearing out Wolf-PAC and doing more research, returned the following year to testify in support.[32]

Politically motivated statements by genuine experts are wrongly treated as peer reviewed research:
In addition to Mr. Black's letter, opposition groups also frequently cite a letter by former Chief Justice Warren Burger as though it were a scholarly article.[33] In light of the fact that there are no other comments about the Article V Convention in Justice Burger's extensive writings and recorded comments on the Constitution and its creation, little weight should be given to this brief letter supposedly written to Phyllis Schlafly of the Eagle Forum at a time when the two served together on a commission under President Reagan.[34]

Blatant misrepresentations originating with The Eagle Forum have found their way into more mainstream sources. One of their propaganda pieces cites New York Ratifying Convention delegates John Jay and Alexander Hamilton as being opposed to an Article V Convention.[35] In fact, John Jay, with help from Alexander Hamilton, wrote the New York Circular Letter that called for the first use of Article V Convention calls, to get the amendments demanded by so many State Conventions.[36] The piece quotes Madison's opposition to this effort, but the opposition was only because he believed that fundamental changes to how Congress functions, as many of the States had requested, should not be made before Congress has a chance to function at all.[37] Madison responded to the pressure from Jay and Hamilton by proposing the Bill of Rights himself. Madison later went on to support other Convention calls, writing:

> "Should the provisions of the Constitution as here reviewed, be found not to secure the Government and rights of the States, against usurpations and abuses on the part of the United States, the final resort within the purview of the Constitution, lies in an amendment of the Constitution, according to a process applicable by the States."[38]

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[30] Information based on behind the scenes communications with legislators.
[31] See op-eds and blogposts of Wilfred U. Codrington III, who did not respond to my e-mail demonstrating that his own sources refute his claims.
[32] Testimony of Tim Vandeveer in Hawaii Hearing
[33] Donald T. Critchlow, Phyllis Schlafly and Grassroots Conservatism: A Woman's Crusade (2005) pp. 284-5, 398
[34] *Id*.
[35] Brilliant Men, Citizens Against an Article V Convention (The organization appears to be a blog consisting of 1 post, in 2016). See also, Testimony on Hawaii S.C.R. 76 (Mar. 27, 2018) p.31-2 (Common Cause, Hawaii citing many of these same sources.)
[36] John P. Kaminski, Garpere J. Saldadino, Richard Leffler, Charles H. Schoenleber, *Documentary History of the Ratification of the Constitution* (DHRC), v. 23 pp. 2339-40, Wisconsin Historical Society Press, 2009
[37] *Constitutional Brinksmanship*, pp. 39-40
[38] James Madison, 31 North American Review 537, 542 (1830); *Constitutional Brinksmanship*, pp. 46-52 (Explaining how Madison worked behind the scenes to get John C. Calhoun to propose nullification as an Article V Convention because he opposed nullification and knew that such an unpopular proposal would fail to achieve the necessary support to be proposed and ratified by this method, which was correct.) See also, Madison, *Report on Virginia Resolution of 1799* (1800) ("It is no less certain, that other means might have been employed, which are strictly within the limits of the constitution. The legislatures of the states might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or they might have represented to their

Scholars are often quoted out of context:
Modern scholars, too, are taken out of context so frequently that it is now easy to find credible sources misrepresenting them. Professor Tribe has often been quoted out of context by opponents of the use of the Article V Convention process.[39] In fact, Professor Tribe opposed the use of the process to obtain a balanced budget amendment. But as he made clear in 2011, he believes that restoring free and fair elections is an issue for which the convention process may be appropriate.[40] He also answered a question by Wolf-PAC founder Cenk Uygur about the open questions by stating that Congress can propose basic regulations over the Convention process, but cannot abuse this power to alter the ability of the States to seek the amendment for which they called.[41] And finally, he said that he "would object very much to someone who said that because [he doesn't] know the answer to all of the questions about an Article V Convention [he] would oppose ever having one and that is why [he's] made very clear that [he doesn't] take that view."[42]

IV. Conclusion:

This paper is only a small sampling of the research on the subject. It is telling that the higher the quality of the source, the more definitively it came to the conclusion that a convention can be limited and that all peer reviewed sources agree that a limited purpose convention call cannot lead to an amendment on another subject.[43] The first truly thorough study was the ABA Report cited above. That report was written by a committee that "consisted of two Federal judges,… [three] law school deans [including John Feerick of Fordham University who presented the testimony],... two former presidents of State constitutional conventions,... a former Deputy Attorney General of the United States, [and] the assistance of a judge… in the District of Columbia…. The committee met for 2 years, met often, to study the questions associated with this particular article of the Constitution. [They] were aided in [their] study by a dozen law students from six or seven law schools. Those law school students put together several volumes of work papers on these issues before the committee."[44] In presenting the conclusion of this exhaustive report in 1979, Dean Feerick said:

> "It was the view of our committee that if two-thirds of the States called for a National Constitutional Convention, limited to a particular subject matter, that that Constitutional Convention had to be called by the Congress and that Constitutional Convention had no more authority than to deal with the subject matter giving rise to the call for a convention.
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> In other words, it was our conclusion that legislation could limit a Constitutional Convention to a particular subject matter. We felt that the State legislatures that have the power under article V to call for a Constitutional Convention, could exercise a limited amount of its authority and call for a limited-purpose convention, and we felt that if two-thirds of the States concurred in a particular limited way, that Congress' duty under article V was clear, and that was to call such a limited convention." - John D. Feerick, Dean of Fordham University, Law School[45]

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respective senators in Congress, their wish, that two thirds thereof would propose an explanatory amendment to the constitution; or two thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a convention for the same object."); *Constitutional Brinskmanship*, pp. 41-42) (Madison called for all methods, including the Article V Convention, to overturn the Alien & Sedition Acts.)

[39] Common Cause Letter.

[40] Harvard Law School (2011, October 6). Conference on the Constitutional Convention: Legal Panel.

[41] *Id.*

[42] *Id.*

[43] *Compare*, Dr. Steven Novella, *Interpreting Medical Literature*, Science Based Medicine (Oct. 22, 2008)

[44] *Testimony of John D. Feerick, Constitutional Convention Procedures, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate*, 96th Cong., 1st Sess. (1979) (p. 50) (Professor Feerick did not count himself among the Law School Deans at the time. He served as Dean of Fordham Law School from 1982 until 2002, after the testimony cited.)

[45] *Id.*