HOW TO COUNT TO THIRTY-FOUR: THE CONSTITUTIONAL CASE FOR A CONSTITUTIONAL CONVENTION

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INTRODUCTION

Thirty-four is a magic number. A mathematician might explain that thirty-four is the smallest whole number greater than two-thirds of fifty. A political scientist, or a first grader, might explain that fifty has been the number of states in the United States since 1959. A constitutional law professor would note that thirty-four—the smallest whole number greater than two-thirds of fifty—is therefore the number of state legislatures that, under Article V of the Constitution, must have asked Congress to call a convention in order to trigger Congress's constitutional duty to call such a convention.

The basics are familiar to all: Article V provides that amendments to the Constitution may be proposed either by two-thirds vote of both houses of Congress or by "a Convention for proposing Amendments."[1] The latter method was designed as an alternative permitting the people to circumvent possible congressional intransigence in proposing needed constitutional reforms—perhaps including such things as reforms limiting national government power, something that Congress as an institution might not be inclined to propose. The former method has been employed, successfully, twenty-seven times—the significance of the twenty-seventh such occasion will become impor-

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1. U.S. CONST. art. V.

tant to a proposition I advance later in this Essay.[2] The latter method—the convention route—has never successfully been employed.

Yet.

Article V provides that, "on the Application of the Legislatures of two thirds of the several States," Congress "*shall*" call such a convention.[3] The obligation of Congress to call a convention, once the legislatures of two thirds of the states have asked for one, is constitutionally *mandatory*; it is not committed to Congress's discretionary judgment. Congress has no choice in the matter. It has a nondiscretionary ministerial duty to call a constitutional convention when the magic number has been reached. This raises some truly fascinating collateral constitutional questions: May a federal court *order* Congress to call a convention if Congress refuses to do so, and who would have standing to bring such an extraordinary lawsuit? Where and when would such a convention meet and what rules would govern its proceedings? Does Congress have any legislative power in this regard, incidental to its duty simply to call a convention?

These questions have ready answers, and I will address them, however briefly, at the end of this Essay. But I want to focus here on the most important, logically prior, issue: *Under precisely what circumstances does Congress have a duty to call a constitutional convention?*

In this Essay, I take up the question of "How to Count to Thirty-four"—constitutionally—so as to trigger the obligation of Congress under Article V to call a constitutional convention for considering amendments. *Thirty-four what?* What counts as a valid constitutional convention application? What happens when a state has submitted multiple convention applications, some valid and some invalid? *Thirty-four when?* Can constitutional convention applications be cumulated over time? *Thirty-four says who?* Who judges whether a particular convention application is valid and what the counting rules are?

The big question of when Congress has a duty to call a constitutional convention can be broken down into several smaller ones, each one intriguing and important in its own right (and providing the organizational structure for this Essay):

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2. *See infra* Part IV.

3. U.S. CONST. art. V (emphasis added).

First: The "Limited" Convention Question. Can there be such a thing as a "limited" constitutional convention – that is, a convention limited to the consideration and proposal of amendments only of a certain prescribed text or on a certain prescribed subject? The answer is *no*, as I will explain presently. Though, as I will also explain, less turns on this than may meet the eye, because everyone agrees that there certainly may be a general, unrestricted amendment-subject convention.

Second: How Should One "Count," and Cumulate, Subject-Specific Applications? If a constitutional convention may not properly be limited in what it chooses to propose, what is one to make of state legislatures' convention applications that specify a particular subject for amendments? Are they valid or invalid? Can they count toward the number needed for a constitutionally proper, general convention? Interestingly, this question arises even if a convention *could* be limited: Everybody acknowledges that a convention may be unrestricted. (It is only the notion of a limited convention that is constitutionally questionable.) Thus, subject-specific applications might well count toward the two-thirds of states needed to apply for a "general" convention, whether or not they could validly count toward a limited convention. The answer here is that some such applications count as valid applications for a general constitutional convention and some of them do not count. It all depends, naturally enough, on what the applications actually say.

Third: The Question of Multiple Applications. Granting that some subject-specific applications for conventions are invalid (or valid only toward the total needed for a limited constitutional convention, if such a thing were possible), what is one to make of multiple state applications, some of which are invalid and some of which are not? The answer, I submit, again depends on what the applications say. Some invalid applications operate to rescind all prior valid applications. But most would leave prior valid applications in place.

Fourth: The Question of Cumulation over Time. Can valid, unrepealed applications for an unrestricted constitutional convention be cumulated over time and across subjects? The answer to this question is a simple, straightforward *yes*. And that is where the interesting case of the Twenty-seventh Amendment, concerning congressional pay raises, comes into

play.[4] That amendment was proposed in 1789 and ratified in 1992. If the Twenty-seventh Amendment is valid—and I believe it is—it is because an amendment proposal, if not rescinded or extinguished, can live on until ratified. There is no reason a state's constitutional convention application, if not rescinded or extinguished, cannot do likewise.

The answers to these four questions about the meaning and application of Article V as a matter of law suggest a fifth, punchline question of fact: *Has anyone ever taken the trouble to gather all the constitutional convention applications, look at them all, apply the appropriate counting rules, add them up, and see what the answer is?* The answer is *yes:* I did so, with the help of an intrepid research assistant, when I was a young pup of a law professor, and published the results in 1993 in a widely-ignored article in the Yale Law Journal.[5] I returned to the issue again in the fall of 2010 and, with the help of a small cadre of research assistants and librarians at the University of St. Thomas School of Law, updated the 1993 research conclusions. Others have done their own counts, but with lots of errors, duplications, and omissions, and often applying manifestly unsound counting rules. So, applying the appropriate counting rules, have enough states submitted applications for an unrestricted convention so as to trigger Congress's constitutional obligation to call one? I will save my dramatic, earth-shaking, heart-pounding, keep-you-on-the-edge-of-your-seat conclusions for the end of this Essay.

I. QUESTION ONE: CAN THERE BE SUCH A THING AS A LIMITED CONSTITUTIONAL CONVENTION?

A repeated infatuation of would-be constitutional reformers is the idea that a constitutional convention could be convened to consider one specific topic or proposal—perhaps even specific language—*only*. The convention could deliberate on proposals only concerning a certain topic, or perhaps could not deliberate at all but merely serve as a pass-through for proposing language for a specific amendment agreed to in advance by identically worded state applications for a convention. The object seems to be that the "Convention for proposing Amend-

4. U.S. Const. amend. XXVII.

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

ments" not be enabled to propose much of anything of its own accord, but be tightly limited by constraints imposed by the applications submitted by state legislatures.

Much has been written on the subject of whether such an arrangement is consistent with the text, structure, logic, and historical intention of Article V. (I entered the fray eighteen years ago.)[6] I believe the correct answer is that Article V does not contemplate "limited" constitutional conventions, in the sense that limitations on what the convention is allowed to propose may be imposed from outside the convention either by the Congress in calling the convention or by the state legislatures that have applied for one.

I will be brief on this point, both because that ground has been so thoroughly plowed and because—in the end—the point ends up being of surprisingly little direct relevance to my overall proposition. For even if Article V permits externally "limited" conventions for proposing amendments, it certainly also permits unlimited conventions. Thus, the real issue, as we shall see, ends up being whether an application that might appear to contemplate a convention devoted to a particular topic might nonetheless *also* count toward the total needed for a general, unlimited convention. (There are not enough state applications for a limited convention on any particular topic or proposal to meet Article V's threshold for calling such a convention, even if that were one possible correct counting rule for Congress to employ in deciding whether it was obliged to call a convention.) Still, the question of whether Article V permits limited constitutional conventions remains an interesting one, and its answer (or potential range of answers) might supply a background principle against which to construe state applications identifying a particular topic for amendments. (Then again, as we shall see, it might end up not being much help in this regard either.)[7]

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6. *Id.* at 733–43. Important articles in this genre include Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Walter E. Dellinger, *The Recurring question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979); and William Van Alstyne, *The Limited Constitutional Convention—the Recurring Answer*, 1979 DUKE L.J. 985.

7. *See infra* Part III.

To compress the argument tightly: The text of Article V refers to "a Convention for proposing Amendments."[8] The most natural, straightforward sense of this language is that a convention for proposing amendments is a convention for proposing such amendments as the convention deems proper to propose.[9] "Convention" had a familiar—one is tempted to say "conventional"—public meaning in 1787. It referred to a deliberative political body representing the people, as it were, "out-of-doors."[10] Representatives or delegates to such a convention might well operate to some extent pursuant to "instructions" of the people thus represented, but a convention was not a pass-through or a cipher, but rather an agency—a deliberative political body.

The text of Article V is not a knockout argument. It does not say, in express terms, "the convention shall have discretion to propose the amendments it thinks best." But one would hardly expect it to have said so; it is implicit in what a convention *is*, and so almost literally it would have gone without saying. And the most natural sense of the language certainly does not support the opposite reading, one permitting extrinsic limitation on the work of the convention.

Moreover, where Article V contemplates "checks" on the work of an amendment-proposing convention, it says so explicitly: Congress, not the convention, is given the power to prescribe the mode of ratification (state legislatures or state ratifying conventions) and three-fourths of the states must ratify for an amendment to become valid as part of the Constitution.[11] (An Article V convention thus cannot do certain wild and crazy things that the Philadelphia Convention of 1787 did—choose its own method of ratification and number of ratifying states, in contravention of the rules of the existing politi-

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8. U.S. CONST. art. V.

9. *See* Paulsen, *supra* note 5, at 738 ("The most straightforward reading of the constitutional text concerning what the convention *is*—'a Convention for proposing Amendments'—strongly suggests that it must be, in the words of Professor Black, "'a convention for proposing such amendments as that convention decides to propose.'" Indeed, this is fundamental to a constitutional convention, which is, in legal theory, an assembly of the People entitled to act on behalf of the whole." (quoting Black, *supra* note 6, at 199)).

10. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 320–22 (1969).

11. *See* U.S. CONST. art. V; *see also* Paulsen, *supra* note 5, at 738–39.

cal order. Or, at least, it cannot *constitutionally* do such a thing.[12]) The text of Article V thus specifies limitations on what a convention can do and prescribes exactly what checks which outside bodies exercise on the convention's work. And control of the substance of the convention's proposals is not one of those limitations or outside-control checks.[13] The language of the text thus creates a fairly strong presumption that a convention may propose what it likes—not quite a knock-out punch, perhaps, but certainly a good, strong opening jab.

The structure and internal logic of Article V tends to confirm the natural sense of the language in this regard. The convention-proposal route is obviously designed to be (and, as we shall see, was specifically intended to be) an alternative to the congressional-proposal route, permitting the people to go around their congressional representatives and propose amendments without involving Congress. It would seem odd, then, for Congress to have broader discretion in choosing what amendments to propose than a convention would have. The power to propose being parallel, it seems more consistent with the internal logic of the text that the scope of judgment afforded by that power be parallel as well. It would seem even more odd for Congress to possess a supervisory power, in connection with calling such a convention, to enforce limitations on what the convention could propose and what Congress would therefore transmit to the states for ratification. The

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12. *But cf.* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Professor Amar's argument is that the Constitution's text may be amended by methods not specified by Article V. *Id.* at 1044. Whatever the merit of this interesting contention as a matter of political theory, it is not a sound proposition *about the meaning of Article V*.

13. It follows that those theorists who posit some limitation on the *substance* of what amendments a convention—even a "general" one—might propose are also wrong. *See* Paulsen, *supra* note 5, at 687 n.27 (collecting and refuting assorted strange theories asserting that certain constitutional amendments would be wrong, inappropriate, or bad amendments—and therefore "unconstitutional" constitutional amendments for the People to adopt). Where Article V contemplates a substantive limitation on how the Constitution may be amended, it says so. U.S. CONST. art. V (purporting to forbid amendments, before 1808, affecting the Slave Importation Proviso of Article I, Section 9 and, for all time, depriving a State of its "equal Suffrage in the Senate"). For better or worse, this does mean that any Article V convention *could* be (in popular parlance) a "runaway" convention, in the sense that it could propose, as far as Article V is concerned, practically anything it wished, including ripping up the Constitution and throwing it away, (except for retaining states' equal suffrage in the Senate).

whole point of an alternative amendment-proposal mechanism seems to be (textually, and, as we shall see, as confirmed by the historical evidence) to cut Congress "out of the loop," so to speak, of the convention-proposal method. Heaven forbid that Congress could refuse to transmit an amendment proposed by the convention on the premise or pretext that the proposal went beyond the commission of the convention! *Congress*—not the convention—was designed by the text to be the "pass-through" body, with no deliberative role. Congress is obliged to pass along whatever the convention proposes to the states for possible ratification. Congress may choose ratification by state legislatures or by state ratifying conventions, but is given no other enforcement or discretionary power. Indeed, as noted, the existence of this choice-of-ratification-method power of Congress tends to negate any inference that Congress is to possess any broader power over an Article V convention's *independent* proposal power.

This position also is supported by both the specific drafting history of Article V and some fairly notorious historical experience concerning the power that might be exercised by a "Convention" assembled to deliberate concerning possible reforms to an existing constitutional regime. Some of this evidence might even be thought of as direct evidence of the contemporaneous meaning of the phrase "Convention for proposing Amendments." What evidence there is of the Philadelphia convention's intentions concerning the convention-proposal method—both statements made concerning this power and inferences that might be deduced from textual changes in the drafting process—better supports the view that a convention is an independent constitutional agency with deliberative, substantive proposal-making powers.[14] It is an intervening body, and not a mere cipher for transmitting specific proposals submitted by states. The latter approach was considered and not adopted in the text of Article V.[15] There is evidence of some concern as to how states even could otherwise agree among themselves as to what to propose as an amendment, without having an actual, physical meeting—a *convening* of a group of some sort—to hammer out

14. Walter Dellinger has marshaled the historical evidence persuasively. *See* Dellinger, *supra* note 6; *see also* Paulsen, *supra* note 5, at 739–40.

15. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 555–59, 629–30 (Max Farrand ed., 1911).

language. We could do such yammering and hammering today, without physically meeting as such—by conference call, email, or Twitter—but we should not anachronistically project onto the Framers' eighteenth-century world an understanding of possibilities that they would not have considered practicable, and use that modern understanding to undermine historical evidence of the understanding the Framers actually did have at the time as to the meaning of the provision we are interpreting. What the Framers meant by "a Convention for proposing Amendments" was a get-together that would actually *get together* and do some proposing. The Framers settled on the convention method precisely to provide the means for people from various states to assemble and settle upon desired language, negotiate terms, and agree to possible packages of proposals.

It is also hard to understand—here is another structural-textual argument, embedded within the historical argument—why the drafters of Article V would have required only two-thirds of states to apply for a convention but require three-fourths of states to ratify the convention's proposals if the convention were merely to be a pass-through. Why not, in that case, just make an amendment valid upon the proposal of an agreed-upon text by three-fourths of the states? What does a convention add? The historical evidence suggests that the Framers thought about this and settled on a non-pass-through convention as an intervening body. Such intervention implies, very strongly, full deliberative powers.[16]

Another historical point: Did the men drafting Article V, sitting around the tables, drinking beer in Philadelphia in 1787,[17] have an understanding of what a "convention" was empowered to propose? Is it possible to infer such an understanding? And is it proper to read Article V's use of the term "Convention for proposing Amendments" in light of that probable understanding of "convention" *by the convention* at Philadelphia—and by those looking at its work product?

I think so. Although I am wary about over-reading evidence of original intention and would never permit such evidence to

16. *See* Paulsen, *supra* note 5, at 737–43 (collecting and discussing authorities and historical evidence).

17. There is powerful, persuasive evidence that the Framers of the Constitution sat around tables and drank beer. *See* RICHARD R. BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 75–78, 354 (2009).

contradict, rather than illuminate, actual adopted constitutional language, it seems safe to deduce that the Framers of Article V's language had an understanding of constitutional conventions that included deliberation, choice, and the ability to propose whatever they liked—leaving to ratification by the people (acting through other deliberative bodies) *the* all-important choice to accept or reject such proposals.[18]

Certainly any ratifying convention looking at the original Constitution's inclusion of a convention-proposal method for amendments would have had a perfect understanding of just how far a convention might go in proposing change. They could see it in the action of the convention proposing the document on which they were deliberating. It would be strange, both textually and historically, for the people who adopted the Constitution to have had an understanding that a convention for proposing amendments could be rendered a completely toothless cipher exercising no power to consider and propose amendments emanating from its own discussions.[19]

Finally, simple pragmatic considerations support the straightforward arguments from text, structure, and historical evidence of original understanding. Imagine, as those who imagine the possibility of a limited convention are forced to imagine, what would count as a "match" sufficient to trigger a call for a limited convention. Would every application need to be identical? Would each application need to specify identical proposed amendment language? If so, would Congress have power to re-

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18. *See* THE FEDERALIST NO. 40, at 252–53 (James Madison) (Clinton Rossiter ed., 1961) (defending the propriety and necessity of the 1787 Philadelphia constitutional convention having proposed an entirely new constitution, emphasizing the inherently "advisory and recommendatory" role of a proposing convention, and invoking the ultimate right of the people to "abolish or alter their governments" and the ultimate authority of the people as sufficient to "blot out antecedent errors and irregularities" (internal citation omitted)).

19. In addition, history shows that James Madison was concerned in late 1788 and early 1789 that if Congress were asked to call a constitutional convention to consider amendments in the nature of a bill of rights, it would be *required* to call such a convention and that the convention would have the power to propose *anything it liked*, including massive revisions of the Constitution as it had emerged from Philadelphia. Letter from James Madison to Philip Mazzei (Dec. 10, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 316 (Gaillard Hunt ed., 1904) ("The object of the Anti-Federalists is to bring about another general Convention, which would either agree on nothing, as would be agreeable to some, and throw everything into confusion, or expunge from the Constitution parts which are held by its friends to be essential to it.").

fuse to submit for state ratification a nonconforming proposal, thus rendering the convention a cipher, problematic for the reasons discussed? Or would a general description of subject matter be sufficient to create a match triggering a convention? If so, what is a sufficient match of subject matter(s)? Would a request for a "balanced budget" amendment convention match with a request for a convention to consider a "limiting the size of the federal government budget as a percentage of GDP" amendment? Would it match with a "presidential line-item veto" amendment proposal? Would term-limits amendment proposals have to match the terms of how other term limit amendment proposals would limit terms? Is Congress really to be the judge of all this under an amendment method designed to get around congressional control over the amendment process? Really?

These are not, I suppose, absolutely insuperable interpretive difficulties. Even in the counting rules I propose, Congress needs to do a certain amount of reading, construing, and counting—permitting, in the nature of things, the possibility of some congressional game-playing. But the sheer amount, and kind, of game-playing that a subject-matching rule would create is yet another nail in the coffin of the limited-convention view.

The better answer to Question One, then, is that neither Congress nor the States constitutionally may limit the substantive proposals of any Article V convention that is called to meet or the procedures that such a convention employs in its deliberations, beyond the minimal necessary launching steps of specifying a time and place for the meeting and perhaps setting initial default rules of procedure and representation that the convention can modify at will.[20]

Now, this strikes fear into the hearts of many so-called conservatives (including perhaps some of the folks attending the Federalist Society National Lawyers Convention at which this Essay was first presented in the form of a short talk). Some conservative, pin-striped, buttoned-down, starched-shirt, cufflinked Federalist Society types find this a truly horrifying proposition. *Omigosh! We the People, today, deliberating on pro-*

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20. *See generally* Michael Stokes Paulsen, *The Next Constitutional Convention: Rules for Congress and the Courts*, *in* MALCOLM R. WILKEY, IS IT TIME FOR A SECOND CONSTITUTIONAL CONVENTION? (Roger Clegg ed., 1995). I discuss a few of these points at the end of this Essay.

posals to change our Constitution!? Submitting such proposals to be considered for ratification by the legislatures or ratifying conventions of three fourths of the states!? Madness! The sky is falling! Help!

Calm down; stop running to the exits. A constitutional convention, unlimited in the topics it may propose, is not the same as the sky falling. There is no more reason to fear a "runaway convention" than to fear a "runaway Congress" in this regard—and perhaps a good deal less to fear in the former than in the latter. Moreover, I submit that this fear is a constitutionally unworthy one. It is, in the end, an objection to Article V of the Constitution. There is no such thing as a "runaway" convention because, constitutionally, there is nothing for a convention to run *away from*.[21]

There is nothing necessarily wrong with objecting *to Article V*, of course, and one of the potentially fruitful amendments to the Constitution that an Article V convention might propose is an amendment to Article V itself. But it is certainly no valid constitutional objection to an Article V convention for proposing amendments that it might in fact propose changes to the Constitution, which is of course exactly what the Constitution contemplates by providing for this mechanism for constitutional change. And besides: a convention has a power to *propose only*. Three-fourths of the states (either legislatures or ratifying conventions) must ratify whatever a convention proposes. This is a formidable barrier—one might plausibly argue that it makes amending the Constitution rather *too* difficult—and one that conservatives and liberals alike should regard as an entirely sufficient check on the work-product of a convention.

II. QUESTION TWO: WHAT TO MAKE OF STATE APPLICATIONSFOR A LIMITED CONVENTION

If there cannot constitutionally be such a thing as a limited Article V convention, what is one to make of those great many constitutional convention applications that appear to ask for one? The simple answer is that it all depends on what the applications

21. *See* Paulsen, *supra* note 5, at 742 ("In that sense, any federal constitutional convention is necessarily a 'runaway' convention."); *id*. at 742 n.222 ("Or, as Charles Black has put it, 'no convention can be called that has anything to run away from.'" (quoting Black, *supra* note 6, at 199)).

themselves *actually say*. Not all that mention a specific subject matter ask for a convention *limited* to that subject matter. A great many simply recite a subject matter purpose—a reason, a desired agenda—and do not purport to condition the application on a convention being confined to that topic only. These state applications are best construed as valid applications for a general, unrestricted Article V convention. (They might also count toward the total needed for a limited convention—if there could be such a thing—but, if not worded restrictively, that would not affect their validity as applications counting toward the total needed for an unlimited convention; they might count toward the number needed to satisfy either counting rule.)

Some applications *are* conditional. They say that the state wants an Article V convention *only if* the convention is explicitly limited to one specified topic and no others. Such applications are invalid; they ask for something unconstitutional. Or, put another way, they should not be counted as valid applications for a general constitutional convention.[22]

In a sense, then, the Great Limited-Versus-Unlimited Debate is almost beside the point. If a limited convention were permitted by Article V, one would count a "we-want-a-limited-convention-only" application only toward the total needed for such a convention. If, in any event, an unrestricted convention is permitted by Article V—and of course it is—one should count all valid, unrepealed applications that are not conditioned on the convention being limited to a single topic toward the total needed for such an unrestricted convention. And one should, of course, add together applications mentioning different topics of

22. *See, e.g.*, H.R.J. Res. 1053, 37th Leg., 2d Sess. (Okla. 1980) ("The Oklahoma Legislature respectfully makes application to the Congress of the United States, pursuant to Article V of the United States Constitution, to call a convention for the sole and exclusive purpose of deliberating, drafting and proposing a right-to-life amendment to the Constitution of the United States . . . ."); S.J. Res. 8, 101st Leg., 1st Sess. (Ind. 1979) ("The General Assembly of the State of Indiana makes application to the Congress of the United States for a convention to be called under Article V of the Constitution of the United States for the specific and exclusive purpose of proposing an amendment to the Constitution to the effect that, in the absence of a national emergency, the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year.").

interest to the different applying states. They all count as valid applications for a general constitutional convention.[23]

The key consideration, therefore—the only consideration, really—is *what the application says*. If an application is conditioned on the convention being limited to a single subject, don't count it. If an application does not contain such a condition or limitation, count it.[24]

III. QUESTION THREE: WHAT TO MAKE OF MULTIPLE APPLICATIONS BY A SINGLE STATE?

What happens if a state has submitted *some valid* general convention applications and *some invalid* "limited-only" applications? The obvious starting point is that, each considered on its own, the valid ones are valid and the invalid ones are invalid. The real question concerns the legal effect of an otherwise invalid "limited-only" convention application on an earlier-enacted, otherwise-valid "general" convention application. There are three possible interpretive choices.[25]

Door #1: In theory, one might find the subject-matter condition *invalid but severable* and count the application toward the total needed for a general convention. But surely this is an implausible, unfaithful reading of an application specifically and explicitly conditioned on the convention being limited. It flies in the face of the obvious intention of the state submitting the

23. For a typical example of an application for a general convention that recites a subject matter purpose but does not condition the application on the convention being limited to such a subject matter, see H.R. Con. Res. 2001, 34th Leg., 2d Sess. (Ariz. 1980) ("Pursuant to Article V of the Constitution of the United States, the Legislature of the State of Arizona petitions the Congress of the United States to call a convention for the purpose of proposing an amendment to the Constitution of the United States to prohibit the Congress, the President, and any agent or agency of the federal government, from withholding or withdrawing . . . any federal funds from any state as a means of requiring a state to implement federal policies . . . .").

24. In the end, I think that there is neither need nor justification for a construe-to-conform-to-the-Constitution's-actual-counting-rule rule. As I have explained in earlier writing, any such interpretive "push" is probably unjustified because states may have been uncertain, or confused, about the proper counting rule. *See* Paulsen, *supra* note 5, at 746.

25. For a more detailed explanation, see *id.* at 749–56.

application, as displayed in the language explicitly conditioning the application on the limitation.[26]

Door #2 makes more sense: the subject-matter condition is *invalid and not severable*, rendering the convention application a complete legal nullity; one cannot count it and so it simply disappears, legally speaking. ("*Poof!*") In such a case, one would then look to any other applications the state had submitted and see if any of those earlier applications count as valid applications for a general convention. Door #2 is looking good. Before settling on this choice, however, a third possibility merits consideration.

Door #3: One might plausibly take the position that a state application conditioned on the convention being limited is *invalid as a convention application* but *valid as a repealer* of earlier, unrestricted applications—that a state's adoption of a "limited-only" application displays an intention thereby to rescind any earlier "general" application. Although this option is a theoretical possibility—there are a few true examples of limited-only applications that seem best read in this way[27]—as a general interpretive principle it is hard to sustain. Repeals by implication are generally disfavored, and (as I have explained in earlier writing on this topic) there is no necessary, logical incompatibility between a state applying at one time for a limited-only convention on one topic and at a different time for an unlimited convention: A state may be uncertain as to which counting rule is actually correct, and might want to count toward the magic number no matter the counting rule applied. It might want a limited convention if a limited convention is possible, and it might want a general convention if a limited one is not an available option. Combined with the presumption against implied repeals and the availability and use of far clearer language by which to express such an intention, Door #3 loses—at least as a general rule.

Once again, at the heart of the determination must be what a state's convention application *says*. It is possible that a state

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26. *See id.* at 750, 751 n.250. Some who have purported to "count" convention applications have used this obviously defective counting rule. *See id*. at 751 n.250.

27. Here is a perfect example: Utah's 1987 application proclaims not only that the state's application is conditioned on the convention being limited to a particular subject but also that "the state of Utah is not to be counted in a convention call for any other purpose except as limited" by that application. S.J. Res. 8, 47th Leg., Gen. Sess. (Utah 1987). For discussion, see Paulsen, *supra* note 5, at 754 n.258.

might apply for a limited-only convention with language making clear that it wishes to shut its light "off" for any other purpose. It is not hard to come up with the language and, as noted, a few states have done exactly this, which tends to reinforce the conclusion that Door #2 is otherwise the preferred alternative.[28]

The answer to Question Three is therefore "Door #2"—that applications for a "limited" convention only are invalid under Article V's true counting rules but should not ordinarily be construed as repealing prior, valid applications.

What if there are a large number of invalid applications, stretching over a number of years, and then, continuing to proceed backwards chronologically, a valid application a number of years before all those subsequent invalid ones? The same analysis applies. The invalid applications do not typically repeal the valid ones. Might that mean that a state's light could be "on" for a general constitutional convention based on a rather old—but never repealed or rescinded—valid application, notwithstanding a substantial number of subsequent invalid ones in the intervening years? The answer is *yes*—unless a convention application expires after a certain number of years (or later applications in terms repeal the prior valid application).

IV. QUESTION FOUR: CAN CONSTITUTIONAL APPLICATIONS BE CUMULATED OVER TIME AND ACROSS SUBJECT?

This brings us to the question of cumulation over time and across subject: Assuming that an application reciting a subject matter agenda, but not conditioned on the convention being so limited, counts; and assuming that subsequent invalid applications do not count as repealing such an application for a convention; and assuming that such applications for general conventions could state any of a number of subject matter interests, is there any reason to think that we should not count even fairly old convention applications on diverse subjects in the total needed to reach the magic number of thirty-four?

The question of cumulation across subject is easy: if the subject matter is not stated as conditioning the application, it is just a statement of subject matter interest and agenda. The very idea of a general convention is that everything is on the table;

28. *See* Paulsen, *supra* note 5, at 754 n.258.

states bringing their own particular interests and deliberating together is altogether expected.

The question of cumulation over time should not be thought any more troubling. Unless an application itself contains a sunset, there is no reason to assume that a state legislative enactment of this form—and that is what a state constitutional convention application is—dissolves after some (unspecified) period of years. Laws live until killed, as a general rule. If a convention *had actually occurred*—the magic number having been reached, the convention called, and the delegates having met, deliberated, and adjourned—that might extinguish all extant applications. One might even make an argument that if Congress had proposed an amendment of the sort specified by the state's application, that might extinguish a state's application. I would be inclined to disagree with such a conclusion, however: What counts as a congressionally-proposed amendment conforming to the state's subject matter desire? What if the amendment was a poor substitute for the state's true desire? What if the amendment was not ratified? And after all, what the state asked for was a convention, not a congressional proposal.[29]

But absent such a circumstance—no repeal by the applying state, no intervening convention, not even the proposal by Congress and adoption of an amendment identical or similar to that which spurred a state's interest in having a convention—there is simply no legitimate legal reason for treating a state's convention application as having somehow "expired" of its own force or as a matter of federal constitutional law.

Remember the Twenty-Seventh Amendment, the Congressional Pay Amendment? Proposed in 1789, it did not cross the magic three-fourths finish line for state ratifications until 1992, when Michigan—which did not exist as a state in 1789—became the thirty-eighth state to ratify. Although some unrigorous thinkers asserted that the proposal had died, and could not be ratified, the correct answer is that the amendment proposal remained legally operative as a proposal, eligible for ratification, because it had never been repealed by the authority with the power to enact it. Article V imposes no time limits on amendment proposals, and the proposal itself, unlike some others, did not contain one. The Congressional Pay Amendment thus re-

29. *See id.*

mained alive and open for states to ratify. The legal argument for the validity of the Twenty-seventh Amendment, and the implications for understanding Article V generally, were set forth in a brilliant law review article that appeared in *The Yale Law Journal* eighteen years ago, shortly after the amendment received its scale-tipping thirty-eighth ratification.[30]

There is no sound reason for treating convention-application over time differently from amendment-ratification over time, under Article V. Article V provides that Congress "shall" call a convention for proposing amendments "on the Application of the Legislatures of two thirds of the several States."[31] No time deadline here. *When* two-thirds of the states are in the condition of applying for a convention, Congress "shall" call one. It follows that, if two-thirds of the states' lights are "on" for a convention under the counting rules set forth above, it does not matter how long some of those lights have been on, how many times they may have been flicked on and off and back on, how dim they have grown, or what color or wattage they are. *Whenever* the magic number of thirty-four has been reached, Congress must call an Article V convention.

The answer to Question Four is thus that state convention applications may be cumulated over time and across subject.

* * * *

To reprise briefly: Article V contemplates only unrestricted conventions for proposing amendments. State applications conditioned on the convention being limited to a certain topic only are invalid for this constitutional purpose. However, state applications reciting a subject matter purpose but not conditioned on the convention being limited constitute valid applications for a general constitutional convention. "Limited-only" applications do not logically and necessarily repeal the latter—repeals by implication are disfavored; there is no logical inconsistency or incompatibility between a subsequently-adopted "limited" application and an earlier-adopted "general" one; and there are certainly better, clearer ways of expressing an intention to adopt a general repeal if one is intended. If a state

30. If I say so myself. Paulsen, *supra* note 5.

31. U.S. CONST. art. V.

wishes to turn its light "off," it simply has to say so. If it wishes to have its light "on" if and only if the convention can be limited to a specific purpose, it can say that, too. Absent such a turn-off, extant state convention applications may be cumulated over time and across topics or agendas. Convention applications do not die of their own force; it takes something to kill them. And Article V does not prescribe a time deadline for convention applications.

That is how you count to thirty-four.

Now of course, it would have helped greatly if some intrepid young constitutional scholar had at some point set forth in comprehensive detail exactly what the true answer is to the question of limited-versus-unlimited Article V conventions and what the proper rules are for construing the legal effect of invalid applications on prior valid applications. Then, all of this would have been crystal clear to any state with legislators capable of reading. They could simply rely on such brilliant legal scholarship and conform their conduct accordingly. If only someone could set forth, perfectly, a "General Theory of Article V" of the Constitution, all would become clear! States wishing a limited-only convention would realize that this was a false hope and would stop adopting and submitting such applications. States wishing to make clear that they did not want a general convention could adopt and submit to Congress resolutions repealing, rescinding, or retracting their prior applications reciting subject matter purposes or agendas but not containing words of limitation on the application itself—they could turn their lights unambiguously "off." States wishing to adopt, or maintain, the condition of applying for a general constitutional convention could act with relative clarity to express their desires, confident of the legal effect of their enactments. If only someone had written such an article![32]

Which brings me to the dramatic, concluding question:

V. ADDING THEM UP: HOW MANY STATES' LIGHTS ARE "ON" FOR A CONSTITUTIONAL CONVENTION?

As noted at the outset, I first applied this analysis in 1993, to the nearly 400 constitutional convention applications that had

32. Did you really need to look? *See* Paulsen, *supra* note 5.

been submitted up to that date. At that time, I concluded that 45 States' lights were "on" for a general Article V constitutional convention, and that Congress was under a constitutional duty to call such a convention. I called for Congress to fulfill its duty and immediately call a convention.[33]

It is the dream—usually the delusion—of law professors that their scholarship will have some meaningful consequence for the real world. Alas, it is usually the destiny of inspired, inspirational law review articles by young professors to be widely, roundly, and universally ignored. I was realistic in this respect. (I am surely delusional in others.) I did not sit around expectantly waiting for my research to capture the public and legal imagination and start a wildfire of demands for Congress to call a constitutional convention. And so, when I returned to update my research seventeen years later, I was curious to see if my conclusions still held true. I was not expecting to find much of great interest—perhaps a few fresh state calls for a convention to consider a balanced budget amendment, a term limits amendment, or a flag-burning amendment.

Imagine my surprise, then, when I discovered, to a mixture of delight, confusion, and chagrin, that (possibly in part as a response to my 1993 article?!), state after state had been *turning their lights "off"*—deliberately, unambiguously, categorically, emphatically, and almost feverishly. Since 1993, by my count, twelve states have explicitly rescinded any and all of their prior convention applications: Arizona, Georgia, Idaho, Montana, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.[34] Is it really possible that someone in these (mostly "red") states had actually been reading *The Yale Law Journal* and, horrified at the prospect of a general Article V constitutional convention, created an anti-Paulsen wildfire?[35]

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33. *See id.* at 733–61.

34. The Appendix to this article sets forth the references for each of these states' rescission resolutions, and a state-by-state analysis of the current status of every state.

35. An interesting question is presented by the fact that Congress once was, but at present would not be, under a constitutional duty to call a constitutional convention. Is there a remedy for this entirely historical constitutional violation? I tend to think not: Congress *was* in violation of its constitutional duties. Assuming a court could have ordered a remedy directed to Congress (a proposition fraught with difficulties, but I believe ultimately an allowable course of action), nobody

A number of these blanket rescissions recite, in identical language in their "whereas" clauses, how some former Supreme Court Justices and "many other leading constitutional scholars" had concluded that any Article V convention would necessarily be unlimited in what it could propose. In response, the rescissions generally continue, the state wishes to make abundantly clear that it hereby withdraws any and all such applications because it most definitely does not want such a convention to take place.[36] One very recent rescission comes from the (timid) state of Tennessee. Its language is fairly typical, though not a precise clone, of language employed by several states in the past several years:

> BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDRED SIXTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE SENATE CONCURRING, that the Tennessee general assembly does hereby rescind, repeal, cancel, void, nullify, and supersede, to the same effect as if they had never been passed, any and all prior applications by the general assembly to the Congress of the United States of America to call a convention to propose amendments to the Constitution of the United States of America, pursuant to the terms of Article V thereof, regardless of when and regardless of whether such applications were for a more limited convention to propose one or more amendments regarding one or more specific subjects and purposes or for a general convention to propose an unlimited number of amendments upon an unlimited number of subjects.[37]

Is that clear and categorical enough for you?

The bottom line: *Thirty-three states are currently in a condition of validly applying for a "general" Article V convention—just one*

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brought such a lawsuit and no such relief was entered. Unlike a state's scale-tipping *ratification* of a proposed constitutional amendment, which makes the amendment part of the Constitution—and therefore it no longer can be rescinded—a scale-tipping *convention application* does not instantly result in a convention, but only in the legal duty of Congress to call one. But if the duty is not honored, and not enforced by any valid judicial order, nothing happens as a result of the applications. It therefore remains open for a state to turn its light "off." The question of whether Congress is *now* under a constitutional duty to call a convention is a question of the current status of state applications for a general constitutional convention.

36. Arizona's blanket rescission is representative of several others containing essentially identical language and is quoted in full below in the appendix.

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

state short of the total needed to trigger Congress's obligation to call such a convention.[38] This is perhaps a less exciting conclusion than I had hoped. Coming at a time when the movement for constitutional reform is perceived as great—on the heels of the Tea Party movement and the electoral landslide of 2010—one might have thought, hoped, or dreamed that now, finally, the time had come when an Article V convention might have fully captured the public imagination and supplied the political atmosphere in which this legal analysis would take root and bloom into an actual constitutional convention. Instead, state by state rescissions of prior convention calls—a dozen of them in the last decade—have pushed the number of states applying for a convention just below the tipping point.

But in some ways, the conclusion that the nation is on the cusp of having enough states in a condition of calling for a constitutional convention—but just shy of thirty-four—may be even more exciting. The decision effectively lies in the hands of a dozen or so states who appear to be fully aware of the true constitutional situation presented by Article V's counting rules, have recently acted on that understanding, and have witnessed active Tea Party movements and recent electoral changes in the control of state legislatures in the direction of more reform-minded positions with more daring and aggressive leadership. All it would take to trigger Congress's duty to call a constitutional convention would be for one such reform-minded state—Alaska? Arizona? Georgia? South Carolina? North Dakota? South Dakota? Tennessee? Wyoming?—to switch its light back into the "on" position and the game would be on.

EPILOGUE: SOME "CONVENTIONAL" QUESTIONS

If that were to happen, we then finally would need to resolve certain ancillary constitutional questions. Suppose Congress refuses to call the convention as required. (One house might call for a convention and the other house fail to do so—a distinct possibility in the circumstance of divided government.[39])

38. *See infra* app.

39. Another interesting question is whether Congress's enactment calling for a convention is subject to presentment and possible presidential veto under Article I, Section 7—another divided-government possibility. My inclination is to say that such an enactment is a "resolution, order, or vote" governed by the requirements of

May Congress be *compelled*—that is, by the courts—to call an Article V convention or would such a lawsuit be deemed a nonjusticiable "political question"? Could the courts call a convention themselves? I addressed this question at some length in 1993, and my conclusion remains the same. A party with standing—a State whose convention application has been denied its legally obligatory Article V operative effect[40]—could bring a suit to compel enforcement of Congress's duty and a court ought not to deem such a suit a nonjusticiable political question: the legal duty is clear; the decision is not committed to Congress's discretion, but is a mandatory ministerial duty; and there is no absence of manageable standards.[41] To be sure, there is precedent to the contrary—obscure, confusing, ultimately wrong—but it is certainly distinguishable.[42] Although the prospect of courts literally ordering Congress to enact some piece of legislation is bracing, there is notable precedent for the proposition that courts may at least award the kinder, gentler remedy of a declaratory judgment and there is the political expectation that such a judicial decree would be honored.[43]

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bicameralism and presentment, and open to the prospect of veto. *See* Paulsen, *supra* note 5, at 730–31. *But see* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 379 (1798) (holding that the President has no role in the Article V amendment process).

40. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007).

41. *See* Paulsen, *supra* note 5, at 757 & n.266. On the mandatory duty to call a convention, see THE FEDERALIST NO. 85, *supra* note 18, at 526 (Alexander Hamilton) ("By the fifth article of the plan, the congress will be *obliged* 'on the application of the legislatures of two thirds of the states' . . . to call a convention . . . . The words of this article are peremptory. The congress '*shall* call a convention.' Nothing in the particular is left to the discretion of that body."); Letter from James Madison to George Eve (Jan. 2, 1789), *in* 5 THE WRITINGS OF JAMES MADISON 321 (Gaillard Hunt ed., 1904) ("If 2/3 of the States apply for [a convention], Congress cannot refuse to call it . . . ."). For a more detailed discussion of my conclusions, see Paulsen, *supra* note 5, at 757 & n.266.

42. *See* Paulsen, *supra* note 5, at 756–61. The "political question" case closest to the situation described in the text is *Coleman v. Miller*, 307 U.S. 433 (1939), in which the Court held either nonjusticiable or substantively within Congress's power to decide the validity of Kansas's ratification of the proposed Child Labor Amendment as a matter of Kansas's legislative procedures. The opinions were split and the reasoning is unclear.

43. *E.g.,* Powell v. McCormack, 395 U.S. 486 (1969) (declaratory judgment holding that exclusion of elected representative from his seat was not validly within Congress's constitutional prerogative and finding that declaratory relief likely was a sufficient remedy, rendering it unnecessary to consider direct injunctive relief). Important cases of political officials' compliance with controversial judicial decrees affecting political power include not only *Powell* but *Bush v. Gore*, 531 U.S.

Does Article V, or the Necessary and Proper Clause,[44] give Congress power to prescribe the representation rules or procedural rules for an Article V convention? If so, only as an initial or default rule. Congress cannot control the work of the convention; accordingly, any rules Congress creates must remain subject to the convention's reversal or revision. Congress may issue the invitation to the party—name a time and a place—and Congress's invitation must extend to delegates from every state.[45] But beyond that, it gets tricky.

We have a pretty good precedent. The Philadelphia Convention of 1787, as its first item of business, quickly and unanimously agreed on a presiding officer, George Washington (nominated by the host state of Pennsylvania), appointed a small committee to come up with procedural rules, and then adjourned for the weekend.[46] They met again the next week, presiding officer and procedures in place, and it was off to the races.[47] A modern Article V convention could work essentially the same way.

I therefore close with a simple set of suggestions as to how Congress could fulfill its duty to launch an Article V convention, and also fulfill its duty to then gracefully step out of the way. First, choose a nice central location and a convenient time for the first meeting. Might I suggest Minneapolis in the early summer, before the mosquitoes arrive? It is in the middle of the country, an airport hub city, has good convention facilities, nice summer weather, and beautiful lakes. The loom of impending bitterly cold winter weather would tend to impose a natural, implicit, unmonitored, unimposed time limitation on the length of the convention. Everyone would get cold and want to go home.

An unobjectionable default representation rule would allot delegates based on a state's electoral votes. The Philadelphia Convention followed the representation rule of the then-existing constitutional regime, of one-state, one-vote. My suggested de-

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98 (2000), *United States v. Nixon*, 418 U.S. 683 (1974), and the reapportionment cases, *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

44. U.S. CONST. art. I, § 8, cl. 18.

45. *See* Paulsen, *supra* note 5, at 757 n.267. *See generally* Paulsen, *supra* note 20.

46. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 2 (Max Farrand ed., 1911).

47. *Id*. at 7–10, 15–16.

fault rule would follow the representation rule of the current constitutional regime. Once the convention has begun, it could change its representation rules—and must have the freedom to do so—but I suspect that the default representation rule would tend to stick. It is a reasonable one that roughly reflects population, but also takes account of federalism and gives some measure of independent weight to the states as states.

What about a (temporary) presiding officer? For this role, the best idea I can think of is to find some reasonably responsible, eminent law professor, preferably from the host state, who is familiar with the relevant Article V constitutional issues. This latter-day George Washington could set the convention on course, oversee the selection of a permanent presiding officer, and then, like Washington relinquishing his command at the end of the Revolutionary War and riding home to Mount Vernon, take his leave and depart for his summer cabin in northern Minnesota.

Let me know if you have trouble coming up with a name.