

103 Yale L.J. 677

Yale Law Journal

December, 1993

Michael Stokes Paulsen <sup>d</sup>

Copyright (c) 1993 by The Yale Law Journal Company, Inc.; Michael Stokes Paulsen

## A GENERAL THEORY OF ARTICLE V: THE CONSTITUTIONAL LESSONS OF THE TWENTY-SEVENTH AMENDMENT

### CONTENTS

I.	INTRODUCTION	678
II.	THE PROBLEMS WITH THE LEADING THEORIES	684
	A. <i>The 'Contemporaneous Consensus' Model: The Arguments of Dillon v. Gloss</i>	684
	1. <i>A False Start: Succeeding Steps in a Single Endeavor</i>	689
	2. <i>An Implied Time Limitation in the Desire To Amend?</i>	690
	3. <i>Aggregating the Will of the People: Snapshot Sovereignty Versus Formal Rules</i>	691
	4. <i>The Argument from Absurd Consequences: The Twenty-seventh Amendment's Lingering Companions</i>	696
	B. <i>The 'Contract' Model</i>	705
	C. <i>The 'Congressional Power/Political Question' Approach</i>	706
	1. <i>Coleman v. Miller as Bad History: The Fourteenth Amendment 'Precedent'</i>	707
	2. <i>Coleman v. Miller as Bad Law: The Political Question Doctrine and Its Substantive Variant</i>	713
	3. <i>Coleman v. Miller in the Hands of Advocates: A Doctrine for All Occasions</i>	718
III.	A GENERAL THEORY OF ARTICLE V	721
IV.	CUMULATING APPLICATIONS ACROSS TIME AND SUBJECT: A CALL FOR A CONVENTION	733
	A. <i>Formulating the Counting Rules</i>	735
	1. <i>Limited Versus Unlimited Conventions-Article V's Background Rules</i>	737
	2. <i>Interpreting Convention Applications: The Essential Irrelevance of the Limited/Unlimited Convention Debate</i>	743
	3. <i>The Legal Effect of an Invalid Application</i>	749
	B. <i>Taking the Convention Possibility Seriously</i>	756
V.	CONCLUSION	761
	APPENDIX	764

#### \*678 I. INTRODUCTION

No law, varying the compensation for the services of Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

#### -The Twenty-seventh Amendment

This one kind of sneaked up on everybody. On May 7, 1992, Michigan became the thirty-eighth state to ratify as an amendment to the Constitution the above language drafted by James Madison and proposed by the First Congress in 1789 to be part of the original Bill of Rights. The proposal gathered only six state ratifications in the period during

which the first ten amendments were ratified. It lay dormant-and presumed dead-for the better part of two centuries, interrupted only by Ohio's lone ratification in 1873. In 1982, Gregory Watson, then a twenty-year-old college student at the University of Texas, wrote a term paper arguing that the amendment could, and should, still be ratified. He got a "C."<sup>1</sup> Watson then began something of a one-man campaign to revive the amendment, writing letters to state legislators across the nation on his IBM Selectric typewriter from his home in Austin. Scholars of the amendment process treated the notion that the Congressional Pay Amendment proposal might yet be ratified as quaint and cute. Yet anger and frustration with perceived congressional self-dealing in the form of middle-of-the-night, rush-out-of-town pay raises spurred a wave of state ratifications-perhaps intended mostly as symbolic-during the 1980's. The amendment got its final push from public outrage over the congressional check \*679 bouncing scandal and the Senate's "midnight pay raise" of 1991: five states ratified it in May of 1992.<sup>2</sup> As the thirty-eighth state ratification, Michigan's vote provided the constitutionally required approval of three-fourths of the state legislatures sufficient to make the proposal effective as a constitutional amendment. With that vote, the Twenty-seventh Amendment became, finally, part of the Supreme Law of the Land.

Or did it? Michigan's ratification caught Congress, and a number of respected legal commentators, completely by surprise. Although this amendment had not been taken seriously for nearly two hundred years, a serious question was immediately presented as to the amendment's validity. No ratification process had ever taken as long-202 years-as this one had. Prior to the Twenty-seventh Amendment, the longest it had taken to ratify an amendment proposed by Congress was just under four years.<sup>3</sup> Michigan did not *exist* as a state when the First Congress submitted the pay amendment to the states.

Had the amendment long since become a dead letter, incapable of ratification, as Duke Law Professor Walter Dellinger confidently declared?<sup>4</sup> If so, at what point did the proposal die and what aspect of Article V of the Constitution (which sets forth the procedures governing the amendment process) tells us the constitutional cause of death? Or is the amendment valid, but only because the 102d Congress so concluded in a declaratory resolution, on the theory that the amendment ratification process presents a "political question" within the exclusive power and prerogative of Congress (apparently today's Congress) to judge? A large number of Senators and Representatives, and the Congressional Research Service endorsed this theory, based in part on the work of Harvard Law Professor Laurence Tribe and others in defense of the purported extension of the ratification deadline for the unsuccessful Equal Rights Amendment in the late 1970's and early 1980's. But while approval and disapproval resolutions whirled around Capitol Hill in reaction to the Congressional Pay Amendment, Professor Tribe appeared to change his mind: the amendment is valid and Congress' opinion is immaterial, Tribe announced in a *Wall Street Journal* op-ed piece, with little elaboration. Tribe did not attempt to reconcile this position with his previously announced, ERA-era theory of plenary congressional power.<sup>5</sup>

\*680 The National Archivist, the executive branch official charged by statute with the duty of certifying the amendment's ratification and publishing its official text,<sup>6</sup> apparently thought the views of Congress immaterial. Acting one day before the House was scheduled to debate a "sense of Congress" resolution asserting the amendment's validity-and acting on the legal advice of executive branch attorneys in the Department of Justice<sup>7</sup>-the Archivist certified the amendment as part of the Constitution. The Archivist did not state his justification, but the Justice Department later made clear the executive branch's simple reasoning: the formal proposal by a two-thirds majority of both houses of Congress and the formal ratifications of thirty-eight state legislatures is sufficient to make the amendment valid as law, no matter how far spaced out over time. There is no requirement of contemporaneous ratification, and there is no requirement of congressional approval.

Who is right? There quickly came to be general agreement that the Twenty-seventh Amendment had become law.<sup>8</sup> Or, if there was not such agreement, there was an absence of political will on the part of Congress to contest this emerging consensus (at least until after the 1992 elections): Congress quickly voted to "accept" the amendment, by votes of 99-0

in the Senate and 414-3 in the House.<sup>9</sup> Yet nobody seems to agree on *why* the Twenty-seventh Amendment should be regarded as valid and *who* gets to make that determination—the courts, Congress, or the Executive. It may be quite some time before Congress dares to challenge the validity of the amendment by voting itself a midterm or retroactive pay raise. In the absence of such a challenge there is unlikely to be any appropriate occasion for judicial resolution of the specific issue of the amendment's validity (unless, that is, Congress contrives to create a test case by voting itself a midterm pay *cut* in a nominal amount).<sup>10</sup> There is thus a good chance that the Twenty-seventh \*681 Amendment will become part of the Constitution as a functional matter, and a part of our permanent constitutional culture that Congress dares not question, without its validity being formally adjudicated by any court—at least not in the foreseeable future.

Over the long haul, the greater significance of the Twenty-seventh Amendment is likely to be in the lessons learned (or not learned) for the future about the constitutional issues presented by the amendment process. These lessons likely will not be taught by the Supreme Court (which has performed badly on such issues in the few instances when it has considered them in the past) but probably must be learned from the academic and political debate surrounding this highly unusual constitutional amendment. How long can a proposed amendment be allowed to linger before being declared dead? Or does a proposed amendment live forever? Can Congress withdraw a proposed amendment? If so, by what vote (a simple majority of both houses, two-thirds of both houses, or one-third plus one within one house)? Can states rescind their earlier ratifications? How do the answers to these questions affect the interpretation of that part of Article V having to do with applications for a second national constitutional convention? Can such applications also be cumulated over time? If so, are there sufficient outstanding applications to oblige Congress to call a convention?

All of these questions have logical, principled, and persuasive answers. Unfortunately, neither the Supreme Court nor present scholarship provides them. In Part II of this Article, I consider several leading theoretical approaches to the amendment process: the “contemporaneous consensus” theory, embraced by Supreme Court dictum in a 1921 case and apparently accepted in part by Professor Dellinger;<sup>11</sup> the “congressional power/political \*682 question” theory, somewhat supported by a confusing Supreme Court plurality opinion in 1939, developed and defended from time to time by Professor Tribe, and embraced in various forms by backers of the ERA extension in the late 1970's, including the Carter administration Justice Department; and a “contract” model suggested by Grover Rees, the leading scholarly critic of the ERA extension. Each of these approaches is, in some important respect, flawed as a matter of textual interpretation, descriptive accuracy, or constitutional logic.

In Part III, I propose, as an alternative approach that is more faithful to the text of Article V and the political theory of the Constitution, a more formalist<sup>12</sup> model of *concurrent legislation* by congressional supermajorities and a supermajority of state legislatures (or ratifying conventions). The passage by Congress of a proposed constitutional amendment, and the approval of an amendment proposal by a state's legislature or ratifying convention, should each be understood as a species of legislative enactment. Each body has enacted a “statute,” albeit a statute of a specialized kind, the operative force of which depends upon a sufficient number of *other* bodies enacting the same statute. Like ordinary statutes, an act of Congress proposing a constitutional amendment, and an act of a state legislature (or ratifying convention) approving the proposal, do not automatically expire with time, unless their terms so provide. Absent a “sunset provision,” laws do not cease to operate as valid laws because of the passage of time. Unlike ordinary statutes, however, the congressional enactment proposing an amendment, and the thirty-eight state enactments ratifying the amendment, must all be *concurrently in effect*—that is, adopted and not subsequently repealed—or else Article V's formal rule of recognition for constitutional amendments is not satisfied. Theoretically, a proposed constitutional amendment remains an effective act of Congress even if no state has ratified it. It does not have the legal status or force of a constitutional provision (because Article V's rule of recognition has not been satisfied), but it still has the force of law as a *proposed* constitutional amendment. It is a proposal that remains outstanding, waiting for thirty-eight concurrent state ratifications to give it the status of a constitutional amendment.

\*683 Such was the case with the Twenty-seventh Amendment, which stood as a congressional enactment without constitutional consequence for over two hundred years, until Michigan's ratification in May 1992. If the Twenty-seventh Amendment is valid—and I submit that it is—I hope to demonstrate that it can only be valid because the amendment process of Article V fits the concurrent legislation model that I develop below. And, conversely, if the model is invalid, then so is the Twenty-seventh Amendment. While the question of the Twenty-seventh Amendment's validity is my point of departure for seeking to develop a general working theory of the amendment process, in the end, the general theory drives the inquiry into the amendment's validity, not the other way around. In short, the concurrent legislation model is the only principled theory of Article V that can explain the validity of the Twenty-seventh Amendment in a way that does justice to the constitutional text, not merely to the particular case.

An equally important consequence of the concurrent legislation model is that Congress may *rescind* or *repeal* its earlier legislative enactment proposing an amendment to the states (as long as thirty-eight state legislatures have not concurrently ratified it), as well as provide a “sunset” for its enactment in the form of a deadline for ratification. Similarly, a state legislature may rescind or repeal its earlier ratifications, as long as thirty-seven other states have not submitted their formal ratifications. A proposed amendment thus need not remain alive forever, capable of being ratified long after the reasons for its proposal have disappeared, *if* Congress repeals it by the same two-thirds majorities required to have passed the proposal. And states need not be stuck with ratifications of amendments they later regard as improvident *if* they take affirmative legislative action to revoke their ratifications.<sup>13</sup> But if Congress' proposing enactment specifies no deadline, an amendment proposal does not die on its own with the passage of time. Nor, in such a case, may Congress in effect rescind an amendment proposal *after* three-fourths of the states have ratified it, under the guise of judging (after the fact) the timeliness of state ratifications. By the same token, if Congress' proposing enactment *does* contain a deadline, a subsequent Congress may not decree that state ratifications after that time deadline has passed be counted as valid for purposes of the original proposal (as Congress purported to do with the Equal Rights Amendment in the late 1970's). Ratifications after the original deadline are legislative acts not concurrent with the period for which the original proposal was legally in effect; and a congressional extension of a deadline is a new federal legislative enactment not concurrent with state legislative enactments ratifying a proposal governed by a different deadline.<sup>14</sup>

\*684 Finally, Part IV of this Article considers the important implications of the concurrent legislation model for the convention method of proposing amendments. Article V requires Congress to call a convention “on the Application of the Legislatures of two thirds of the several States.” If state convention applications (like state ratifications of proposed amendments) may be cumulated over time, and if applications reciting a “purpose” for which a state seeks a convention are not understood as intended to limit the substance of amendments that may be proposed by such a convention, then the concurrent legislation model suggests the somewhat startling conclusion that Congress is currently obliged by Article V to call a constitutional convention, unlimited in the subjects it may consider for proposed amendments.<sup>15</sup>

The concurrent legislation approach is not without its difficulties. Chief among these is that it produces results that, while faithful to the text and formal logic of Article V, may seem counterintuitive and unexpected. This was the reaction many had to the adoption of the Twenty-seventh Amendment, more than two centuries after its proposal by Congress. It is also the reaction that many are likely to have to the suggestion that Congress is obliged to call a constitutional convention. But that is, in a sense, exactly the point: the mere unexpectedness (to some) of the results produced by a legal theory provides no basis for rejecting that theory if it is otherwise sound. We must revise our preconceptions concerning what outcomes the Constitution permits in light of careful analysis of constitutional text, structure, and history; we must not revise constitutional analysis to suit our preconceived notions of what are “acceptable” or expected results. And that, perhaps more than anything else, is the most important constitutional lesson of the Twenty-seventh Amendment.

## II. THE PROBLEMS WITH THE LEADING THEORIES

### A. The “Contemporaneous Consensus” Model: The Arguments of *Dillon v. Gloss*

The idea that an amendment proposed over two hundred years ago can be ratified today does, at first blush, seem to stretch things a bit. The initial reaction of congressional leaders like House Speaker Tom Foley, Representative Don Edwards (chair of the House Judiciary Subcommittee on Civil and Constitutional Rights) and West Virginia Senator Robert Byrd was to question the amendment's validity.<sup>16</sup> These politicians' reactions were \*685 understandable; institutional self-interest probably served to reinforce instinctive first reaction.<sup>17</sup> Somewhat more surprising was the manner in which several legal scholars breezily joined in the politicians' initial reaction. Duke University's Walter Dellinger confidently proclaimed that it was “perfectly clear this amendment died for lack of action.” Two hundred and two years, Dellinger assured, “is not a close call. Sometime in the past two centuries this became a dead letter.”<sup>18</sup> Professor A.E. Dick Howard of the University of Virginia was reported as saying, “I just can't imagine that Madison and the others who were there would say ‘It doesn't matter how long it takes to ratify.’ I think they would consider it foolish.”<sup>19</sup> Yale Law School Professor Paul Gewirtz also asserted that there is an “implicit time limit” on all amendments.<sup>20</sup>

The key premise on the road to the “dead letter” or “implicit time limit” conclusion is the assertion that a “contemporaneous consensus” at (or around) the time of proposal and ratification (and a relatively short period of time between those two events) is a condition of a constitutional amendment's \*686 validity. This idea of “contemporaneous consensus” has its origins in a 1921 Supreme Court case, *Dillon v. Gloss*,<sup>21</sup> that is as colorful as it is questionable. *Dillon* involved a convicted bootlegger's last-ditch challenge to the validity of the Eighteenth Amendment's authorization of Prohibition. The Eighteenth Amendment, adopted in 1919, was the first amendment to include within its text a time limit for ratification of seven years, a practice that has since become fairly customary (in part to avoid questions like those presented by the Twenty-seventh Amendment).<sup>22</sup> Mr. Dillon, seeking a writ of habeas corpus, argued that the inclusion of *any* time limit rendered proposed amendments invalid. The argument was fairly implausible on a number of grounds. Seven years certainly seems *long* enough to admit of due “deliberation” by the states (a concern advanced by Dillon's counsel).<sup>23</sup> Even if the deadline were invalid, the proper result would seem to be to sever the deadline from the rest of the amendment proposal. And since a sufficient number of states ratified within seven years, the deletion of a deadline would seem irrelevant from that standpoint as well. Nonetheless, the point had been one of some contention in the Congress proposing the amendment,<sup>24</sup> and Dillon apparently had no better arguments left.<sup>25</sup>

The Supreme Court's actual holding in *Dillon*, that Congress has power to include a time limit as part of an amendment proposal, is unexceptionable:

Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt.... It is not questioned that seven years, the period fixed in this instance, was \*687 reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.<sup>26</sup>

This conclusion seems obviously correct. Even if Article V's silence were interpreted to *forbid* the placing of maximum time limits on amendments (an extreme and unwarranted conclusion), an amendment with a time limit could be understood as working both the substantive change that is the subject of the amendment (i.e., Prohibition) and a substantive sunset (“in the event more than seven years have elapsed, ignore this amendment”) which has the practical effect of adding to the minimum requirements set out by Article V. A proposed constitutional amendment, after all, can say just about anything Congress desires.<sup>27</sup> Clearly, then, the absence of any constitutional rule in Article V forbidding time limits for ratification gives Congress, as the proposer of the amendment, free rein in this regard.<sup>28</sup>

\*688 But the Court in *Dillon* did not simply uphold congressional power to create a time limit. Rather, in the course of defending Congress' decision, the Court took the occasion to set forth its view that a "reasonable" time limit may in fact be constitutionally required. The Court upheld "the power of Congress, *keeping within reasonable limits*, to fix a definite period for the ratification."<sup>29</sup> The Court's discussion of the need for contemporaneous consensus is dictum, but it is important (and controversial) dictum:

That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed....

We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary.... We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.<sup>30</sup>

It is tempting to jump ahead of the argument and note the Supreme Court's refusal to enforce *Dillon's* dictum eighteen years later in *Coleman v. Miller*.<sup>31</sup> But he who lives by authority dies by it. While the Court in *Coleman* correctly refused to embrace the broader implications of the analysis in *Dillon*, *Coleman's* supposed solution to the Article V puzzle is, as I discuss below, even more flawed than *Dillon's*.<sup>32</sup> Better, then, to address on their own terms the arguments that the *Dillon* Court thought strongly suggest a requirement of ratification within some reasonable time as the only fair inference from Article V.

\*689 1. *A False Start: Succeeding Steps in a Single Endeavor*

Begin with *Dillon's* initial argument for contemporaneity:

First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.<sup>33</sup>

Although this argument sounds plausible, it largely restates intuition. As a legal argument, it is imprecise. Proposal and ratification are indeed successive steps, but by separate legislative bodies representing separate sovereignties or agencies of the people. Contrary to the *Dillon* dictum, the legislative acts of Congress and of the state of Michigan *are*, in an important sense, "unrelated." At least, the sense in which they are "succeeding steps in a single endeavor" is very much different from the sense in which action by the U.S. House of Representatives, the Senate, and the President are successive steps in a single endeavor.<sup>34</sup> Individual Congresses expire every two years. Bills passed by only one house have no legal significance. To become laws, they must be passed by both houses and not vetoed by the President within the same term of Congress. But actions taken collectively by Congress and the President—bills validly enacted into laws—live until repealed. So too with the enactments of state legislatures. If, as I develop below, Article V requires the existence of *concurrent enactments* by *separate legislatures* representing separate political communities, the fact that such enactments are successive steps in a single endeavor does not logically imply a requirement of closeness in time in the same way that the successive steps of different actors within the legislative process of a single sovereign (House-Senate-President) must be close in time. In the latter instance, the rules governing the legislative process (constitutional rules in the case of federal legislation) necessarily entail a time limitation. But in the case of amendment proposals, nothing in Article V imposes such a requirement. The *Dillon* Court's first argument is thus entirely question-begging; its "natural inference"

is a natural *intuition* but not a logical necessity by any stretch of the imagination. The text of Article V does not prescribe closeness in time and there may be sound reasons to reject first intuitions and decline to read such a requirement into Article V's silence. *Dillon's* first argument only suggests the question; it does not satisfactorily answer it.<sup>35</sup>

**\*690** 2. *An Implied Time Limitation in the Desire To Amend?*

The Court's second argument is even more question-begging:

Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently.<sup>36</sup>

This “reasonable” implication does not follow from the factual premise. That an amendment is thought *necessary* does not mean that states must ratify it *immediately* or not at all; the factual premise of necessity could just as well justify allowing the ratification process to take as long as the perceived need for the amendment proposal remained.<sup>37</sup> Indeed, the perceived need for an amendment might even *increase* over time as a problem becomes more and more acute.

This, of course, aptly describes what happened with the Twenty-seventh Amendment. When the First Congress proposed it, Madison viewed the Congressional Pay Amendment as a precaution, and as a reassurance to Anti-Federalists wary of a distant, elitist, national establishment with broad powers to tax and spend in a self-serving manner.<sup>38</sup> But at the time of its proposal, the amendment's purpose was thought largely symbolic, for surely, Madison thought, this was the least likely of possible abuses.<sup>39</sup> Only six state legislatures ratified the amendment at the same time as the rest of the proposed Bill of Rights.<sup>40</sup> When Congress in fact enacted its first pay increase in 1816 **\*691** and declined to defer the increase until after the next election, there was a strong, adverse public reaction. But that reaction was expressed through the more convenient and immediate device of the congressional ballot box: congressional incumbents were turned out in record numbers.<sup>41</sup> At least one state legislature denounced the congressional pay raise,<sup>42</sup> but no new states ratified the Congressional Pay Amendment. Ohio's 1873 ratification was the sole break in a nearly two-century slumber before Wyoming's 1978 ratification.<sup>43</sup> The rush of ratifications came in the 1980's and 1990's as voters became more and more incensed with congressional pay raise shenanigans exceeding Madison's worst fears and prophecies.<sup>44</sup>

The history of the Twenty-seventh Amendment challenges *Dillon's* assumption that, if an amendment is deemed important, states necessarily will approve it sooner rather than later.<sup>45</sup> At most, the Court's point will *sometimes* have merit as a policy proposition: to the extent amendments are proposed out of a sense of current urgency, a relatively short ratification deadline prevents untimely or accidental adoption of an anachronistic amendment addressing yesterday's problems. But *Dillon's* holding, as opposed to its dictum, is that imposition of such deadlines is a power *of Congress*, not that Article V requires any deadline as a matter of constitutional law.<sup>46</sup> The lesson of the Twenty-seventh Amendment is that ancient amendment proposals are not necessarily policy anachronisms.

3. *Aggregating the Will of the People: Snapshot Sovereignty Versus Formal Rules*

*Dillon's* third argument for a “contemporaneous consensus” requirement is its strongest:

**\*692** Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently

contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.<sup>47</sup>

The strength of this argument lies in its invocation of “the approbation of the people” and “the will of the people.” Ideas of popular sovereignty permeate the Constitution and our political culture. Article V provides a regularized procedure for those extraordinary occasions on which We the People reassert our quasi-revolutionary right to alter or abolish the form of government under which we live.<sup>48</sup> Our constitutional mythology has it that such occasions should be rare, that they should require overwhelming popular agreement, and—at least implicitly—that they should be *occasions*, not long, drawn-out processes.<sup>49</sup> To permit ratification over a period of two centuries is to erode, if not erase, the ideal of overwhelming popular agreement. Madison and the other members of the First Congress are long dead, as are the ratifying legislatures of the first six states to approve the Twenty-seventh Amendment.<sup>50</sup> There is no assurance that the Twenty-seventh Amendment ever commanded, *at any one time*, popular assent corresponding to the support of two-thirds of the members of both houses of Congress and three-fourths of the state legislatures.

This argument is rhetorically compelling—the only real punch in *Dillon's* dictum—but it suffers from two important flaws. First, the appealing principles of popular sovereignty and contemporaneous consensus are not congruent with the actual constitutional provisions setting forth the amendment process. And \*693 here is where Article V's formal character—and consequently the need for a formalist reading of Article V—becomes extremely important. One of the standard tricks in the constitutional lawyer's bag of interpretive devices is to take the words of a text, abstract a general principle, transform the principle (rather than the text) into the applicable rule of law, and then proceed to re-read the text as if it embodied that principle rather than any broader or narrower understanding that the words of the text suggest. Such an approach is pure sleight of hand. The provisions of a legal text may be taken as standing for a more general principle only to the extent that the text so provides. It is the rule provided for in the text, not the “principle” for which the rule is thought to stand, that is law.<sup>51</sup>

This distinction may be more difficult to sustain with constitutional texts written at a high level of generality (such as “privileges or immunities of citizens”<sup>52</sup>) or texts that appear to embody some natural law principle (such as the Ninth Amendment<sup>53</sup>). But it is not at all difficult to sustain this distinction with respect to a text, like Article V, that is concerned with formalities and procedures. Article V sets forth rules of procedure and rules of recognition for the amendment process. To a substantial degree, those rules seem aimed at producing amendments only where there is a substantial consensus at two different levels of government: two-thirds majorities in Congress and requisite majorities of three-fourths of the state legislatures. But it is *that rule*—two-thirds plus three-fourths—that must be satisfied, not the probable explanation for or purpose behind the rule. The Framers might have chosen to adopt a *standard* like “contemporaneous consensus” (and designated a decisionmaker who would determine whether and when that standard was satisfied), but that is not the way they wrote their text. Rather, they opted for a collection of bright-line rules that do not necessarily correspond to a contemporaneity standard. Put another way, there is no basis in the text of Article V for *Dillon's* suggestion that a “contemporaneous consensus” must exist before an amendment otherwise satisfying the formal requisites of Article V may become a part of the Constitution. Article V does not specify a ratification deadline, leaving it to the Congress (or constitutional convention) \*694 proposing the amendment to specify any such limitation. Under Article V, an amendment is valid “when ratified”; no time period is specified, and there is no basis for inventing one where Congress has declined to impose one.<sup>54</sup>

The second major problem with inferring a contemporaneity requirement is that there is no basis for knowing where to draw the time line. The text of Article V obviously draws no such line, leaving the interpreter exposed to the charge of simply “making up” the law in an essentially arbitrary, standardless way. Professor Dellinger finesses this point with



the expedient that, wherever the line is drawn, 202 years is on the wrong side of it. Writing in the aftermath of the ERA ratification extension controversy, Dellinger asserted that

it does not follow that the line-drawing problems are insurmountable. The amendments proposed in 1789, 1810, and 1861 raise no problems: they simply died. A court troubled by the existence of amendments proposed over a hundred years ago could invoke a doctrine of desuetude and declare the amendments dead. No such need, however, is likely to arise.<sup>55</sup>

So much for professorial prophecy. So confident was Dellinger that the issue would never arise that he did not explain on what principle, or at what point, an amendment proposal dies for lack of action. Nonetheless, he was certain that 202 years is too long.<sup>56</sup> So too, apparently, is 182 years or 131 years.<sup>57</sup> \*695 But *when exactly* does contemporaneity end and desuetude begin? Is a ten-year-old proposal too long? Twenty? Forty? As the Court asked in *Coleman v. Miller*, “w here are to be found the criteria for such a judicial determination?”<sup>58</sup> A principled conclusion of law must rest on principled reasoning. To say that a line exists in the Article V sand, that it cannot be drawn with precision, but “I know it when I see it,” calls into question (and properly subjects to ridicule) the validity of the entire line-drawing process.<sup>59</sup> Article V’s text draws no such line, and the difficulties in discerning one demonstrate the intrinsic illegitimacy of the task.

Ironically, Professor Dellinger makes the case for this formalist position as well as anyone, only to reverse field and embrace an exception that swallows his otherwise sound formal rule (and swallows the Twenty-seventh Amendment as well):

The Court [in *Coleman v. Miller*] may also have been concerned with the problems inherent in judicial line-drawing. If a twelve-year, eight-month period between congressional proposal and state ratification is not too long, what about a fourteen-year, four-month period? ...

I believe that the Court could have reached a defensible determination on the merits that the Kansas ratification [of the Child Labor Amendment] was not time barred. The text of article V places no time limit on ratifications, but if Congress wishes to limit the time within which an amendment may be considered, it may do so by placing a limit within the text of the proposed amendment. When Congress does not act in this fashion, the time for ratification is simply not limited by article V.<sup>60</sup>

It is Professor Dellinger’s statement of the general rule that is correct—the time for ratification is not limited by Article V. It is his implication of an exception to that rule that cannot be reconciled with the general principle stated.

Finally, it is not clear why the requisite “consensus” may not be measured across generations in the first place. Popular sovereignty—the consent of the people to their form of government—can be transmitted over time. That is the fundamental premise of our system of the rule of laws, and of the Constitution as an ongoing compact connecting our generation to that of the Framers. No \*696 one alive today voted for the Constitution or the Bill of Rights. But this fact does not, for example, deprive the First Amendment of the status of law. Popular sovereignty in our system is something more than a present snapshot of public opinion; it is the will of the people as expressed *through the mechanisms established for its measurement and aggregation*. That is why the First Amendment remains valid, and consistent with popular sovereignty; it is because it has not been repealed by the recognized mechanisms for expressing so fundamental a change in the sovereign will of the People, not because it would necessarily command majority support in some hypothetical referendum.

Similarly, we have numerous statutes that are one hundred or two hundred years old. They too remain valid whether or not Congress would adopt them afresh today. Age alone does not repeal consent. Indeed, it seems to be the case with our Constitution that age creates veneration that can buttress flagging popular approval. Under our system, “the approbation of the people” (to return to *Dillon's* argument) is *expressed through laws*-laws created via carefully devised formal procedures. So too, with the amendment process, “the approbation of the people” is measured by the satisfaction of or failure to satisfy the formal, mathematical conditions of Article V, not by some freefloating judicial calculus of popular approval to supplement or detract from those conditions.

#### 4. *The Argument from Absurd Consequences: The Twenty-seventh Amendment's Lingering Companions*

*Dillon's* final argument for contemporaneous consensus is another logical fallacy-an argument from unimaginable results. That a court-created contemporaneity condition

is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago-two in 1789, one in 1810 and one in 1861-are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.<sup>61</sup>

Of course, it is *exactly* that “quite untenable” view, to which “few would be able to subscribe,” that commanded the support of the Senate by vote of 99-0, of the House by 414-3, and of the Department of Justice's lawyers.<sup>62</sup>

\*697 *Dillon's* argument here is essentially that the consequences of the competing view are too ludicrous to be taken seriously, that the results are too absurd to permit, even (one must suppose) if there is no other legal flaw with the approach. The argument from absurd consequences is superficially attractive, but, like *Dillon's* other arguments, lacks analytic rigor. In the first place, it is not at all clear that the result should be regarded as “absurd.” The idea that the Congressional Pay Amendment could become law does not seem ludicrous largely because it does not feel at all anachronistic. But even if it were anachronistic-seeming, that fact should not kill the proposal as a formal matter. Rather, it would be a reason for states to decline to ratify the proposal.

Let us look at the amendment proposals that remain extant under the contra-*Dillon* view (including one that has been proposed since *Dillon*). Some *do* seem anachronistic, or at least quaint. Others would merely ratify an existing state of affairs (brought about in the interim by statute or by judicial decision). Only one is even arguably a dangerous, horrible proposal that, if adopted, would do great damage to the republic (and for that reason it would certainly never be ratified today). And, as I argue below, Congress can and should rescind it-and probably already has.

In the quaint or anachronistic category falls the Twenty-seventh Amendment's unadopted companion from 1789, a proposal that would have altered the size and representation ratio of the House of Representatives to create, over time, a larger total number of representatives-a minimum of one hundred and eventually two hundred representatives.<sup>63</sup> The Representation Amendment was the first proposal of what became the Bill of Rights; the Pay Raise Amendment was the second; and our First Amendment was third.<sup>64</sup> The minimum size requirements of the Representation Amendment have, as a practical matter, long been overtaken by events-the House presently has 435 members. Nonetheless, states might still sensibly adopt the amendment to guard against the (remote) possibility that Congress could vote to reduce the number of Representatives to fifty (one per state)-assuming that such an outcome is still thought undesirable. The

changed maximum (from no more \*698 than one representative per 30,000 people to no more than one per 50,000)<sup>65</sup> would not affect the size of the House today.<sup>66</sup>

An amendment proposed in 1810 also seems anachronistic. It would strip the citizenship of, and disqualify from holding any state or federal government office, any citizen of the United States who accepts any title of nobility from a foreign government or who, without the consent of Congress, accepts any emolument from a foreign government.<sup>67</sup> Again, however, as long as the amendment only applied prospectively, its adoption would be no particular cause for alarm. Few titles of nobility are granted these days.<sup>68</sup> The biggest consequence would be that larger stakes-constitutionally mandated penalties-would attend the already difficult task of determining the scope and application of the Constitution's existing prohibition on receipt of emoluments from foreign powers.<sup>69</sup>

The post-*Dillon* proposal is the Child Labor Amendment. It provided that "Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age."<sup>70</sup> The Child Labor Amendment was manifestly intended to "overrule" the Supreme Court's decisions in *Hammer v. Dagenhart*<sup>71</sup> and the *Child Labor Tax Case*,<sup>72</sup> which invalidated congressional attempts to regulate child labor under the commerce and taxing powers respectively.<sup>73</sup> Today, however, the amendment would merely place in the constitutional text what has already been accomplished by subsequent judicial decisions.<sup>74</sup>

None of these proposed amendments-the Representation Amendment, the Titles of Nobility Amendment, the Child Labor Amendment-would, if adopted, produce "unimaginable" or significantly untoward results. At most, \*699 they would result in some awkwardness or redundancy, addressing problems no longer of pressing concern (at least not as of the time of this writing).

The troublesome-and potentially dangerous-proposal is the 1861 pre-Civil War "Corwin Amendment," a slavery proposal named after its House sponsor.<sup>75</sup> It reads: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."<sup>76</sup> The amendment had been passed by Congress two days before Lincoln took office and eventually gathered two ratifications.<sup>77</sup> Had it been adopted, the Corwin Amendment would have become the thirteenth amendment. (Ironically, it is our actual Thirteenth Amendment that forbids slavery or involuntary servitude of any kind.)<sup>78</sup>

Is the Corwin Amendment still alive and capable of being ratified (however unlikely that is to occur)? This is a disturbing proposition because of the amendment's apparent pro-slavery substantive content.<sup>79</sup> The question is also an exceedingly difficult one. As a logical matter, there is no necessary reason why the adoption of an amendment inconsistent with an unratified earlier proposal rescinds the earlier proposal. This is not because an amendment proposal may never be "repealed" by Congress. Indeed, I will argue below that Congress may rescind an amendment proposal any time it likes before three-fourths of the states have ratified it.<sup>80</sup> Rather, it is because the proposal of an amendment inconsistent with an earlier proposal does not necessarily reflect an intention to repeal the earlier proposal.

\*700 The point is made clear once it is realized that Congress could submit two different amendment proposals to the states on the same topic. Consider one not too far-fetched hypothetical: Congress, uncertain whether a Balanced Budget Amendment should grant or withhold taxpayer standing to sue (and consequently vest or deny practical enforcement authority in the courts), compromises and submits two versions to the States, deeming either one acceptable as far as it is concerned. A similar situation might occur with different anti-abortion amendments to overrule *Roe v. Wade*-a passive overruling version stating that "this Constitution does not grant a right to abortion" and, alternatively, one affirmatively

protecting a constitutional “right to life.” Indeed, Congress might, for practical or political reasons, propose both of the above *and* a third proposal-logically inconsistent with the others-that would write the rule of *Roe* into the constitutional text. (A variation on any of the above scenarios might have Congress proposing an amendment to head off a comparable, but more far-reaching proposal from a constitutional convention.) The short point is that the proposal of ostensibly contradictory amendments is not necessarily irrational. The mere act of proposing an amendment does not logically require the conclusion that Congress also intended to repeal a prior amendment proposal with which the new proposal is in tension.

In such a case of competing amendment proposals, the states would, as Russell Caplan notes, “have the option of ratifying both, either, or none.”<sup>81</sup> The real difficulty would arise if a sufficient number of states ratified each of two competing proposals. Caplan regards this as “extremely unlikely” (perhaps another reckless prophecy) but notes that, in any event, “the courts probably have the competence to decide whether both can stand as harmonious provisions in the same Constitution.”<sup>82</sup> The task would be a familiar one. Congress regularly enacts statutes whose application to particular cases requires a reconciliation of multiple commands in tension, if not outright contradiction, with one another. Even in the Framers' days, reconciling competing provisions was a familiar interpretive problem, with familiar tools for addressing it.<sup>83</sup>

**\*701** Some attempted harmonizations of dueling amendments would be unproblematic. If the two hypothetical anti-abortion amendments were both adopted, the Constitution would protect a right to life and would also (somewhat redundantly, depending on how the parameters of the right were defined) negate any claimed right to abortion. Such conscious constitutional redundancy poses no greater problem than adopting the Child Labor Amendment. But in the Balanced Budget Amendment hypothetical above, it would be difficult, if not impossible, to reconcile two adopted amendments that, respectively, granted and denied judicial enforcement power. Similarly, competing right-to-life and right-to-abortion amendments would be irreconcilable. Courts might have to fall back on the rule of construction that later-enacted provisions prevail over earlier-enacted ones.<sup>84</sup> Significantly, that would mean that even the *adoption* of the earlier-adopted amendment *does not* automatically kill the competing proposal (the one lagging behind in ratifications), unless that competing proposal contains an explicit or clearly implicit “self-destruct” proviso (i.e., “This amendment shall be inoperative if, prior to its adoption, [the competitor amendment] shall have been adopted”), or the first-adopted amendment contains an explicit or clearly implicit “opponent-destruct” proviso (i.e., “Adoption of this amendment shall terminate the proposal of [competitor amendment]”).

Absent such provisos, in a contest of amendments, as in baseball, there may be something of an advantage in going to bat last. The “visiting” team can never be assured of having scored enough runs (ratifications) in the top of the inning to clinch a victory. It must also keep the “home” team from scoring enough runs (ratifications) to overcome its lead and thereby repeal its apparent victory. Unlike baseball, however, fifty ratifications for the first-amendment-up team, followed by thirty-eight ratifications for the last-amendment-up team, results in the last amendment winning. The object for supporters of the top-of-the-inning proposal must be to secure sufficient ratifications and thereby *politically*, though not legally, thwart the movement for the competing amendment. At worst, this is the present status of the dueling slavery amendments. Our Thirteenth Amendment has carried the day, with the *practical* consequence that the Corwin proposal is dead. Realistically, the prospect of that amendment being ratified is exceedingly slight.

There are strong arguments that the Corwin proposal is dead, even under an approach that generally concedes indefinite life to amendment proposals that lack a time limit. First, the “last-amendment-up wins” scenario perhaps should be regarded as so irrational, so unlikely to have been intended by the Congress(es) and/or convention(s) proposing the competing amendments, that **\*702** such proposals should *always* be understood as containing implicit self-destruct or opponent-destruct provisos. According to this view, either the Corwin proposal contained an implicit sunset triggered by the adoption of a logically inconsistent amendment, or, more plausibly, the proposed Thirteenth Amendment contained an implicit third section providing that adoption of that amendment terminated the Corwin proposal.

On the face of the two texts, this reading is obviously something of a stretch. But in the unique context of the Corwin proposal, it may not be an unjustified stretch. Consider what the Corwin text contemplates. It purports to make itself unamendable and therefore permanently to forbid amendments like our Thirteenth Amendment. Adoption of exactly that “forbidden” amendment really does explode the sense of the Corwin proposal. After the ratification of the Thirteenth Amendment, ratification of the Corwin proposal would, as noted earlier, no longer accomplish the legal effect plainly contemplated by the Corwin Amendment at the time it was proposed. It would no longer entrench slavery against federal interference, but would merely forbid future (unnecessary) anti-slavery amendments.<sup>85</sup> In short, adoption of the Thirteenth Amendment makes hash of the Corwin proposal.

Contrast this situation with competing amendment proposals where the last-amendment-up can still retain its original sense if ratified. A later right-to-life amendment would logically repeal an earlier right-to-abortion amendment and establish in its place a constitutional right to life. Adoption of the amendment would accomplish the legal effect of the original sense of the proposal. Not so with the dueling slavery amendments: once one has been adopted, the other cannot be adopted in its original sense. If the Corwin Amendment were adopted first, adoption of the Thirteenth Amendment would apparently have been “unconstitutional” (if that makes any sense). And if the Thirteenth Amendment is adopted first, the original sense of the Corwin Amendment is destroyed. It therefore makes considerable sense to say that both proposed amendments logically contained tacit “opponent-destruct” provisions.

This analysis suggests an alternative possible argument against the continued vitality of the Corwin Amendment, one focusing not on the legal effect of *ratification* of the Thirteenth Amendment, but on Congress' act of *proposing* it. Just because it is logically possible for Congress to send out contradictory amendment proposals does not mean that that is the best reading of what Congress in fact did. Assuming that Congress may repeal, or rescind, earlier amendment proposals (a proposition I defend below),<sup>86</sup> the question becomes the legal effect of the later amendment proposal on the earlier one—the later act of Congress on the earlier act of Congress. According to this \*703 view, if Congress' proposal of the Thirteenth Amendment (by two-third majorities of both houses of Congress)<sup>87</sup> was also, in legal effect, a repeal of the Corwin Amendment proposal, that was all that was needed to kill Corwin. The actual adoption of the Thirteenth Amendment by virtue of state ratifications merely placed redundant nails in Corwin's coffin.

While repeals by implication are generally disfavored, if *ever* the proposal by Congress of an amendment were thought impliedly to repeal an earlier amendment proposal, the repeal of the Corwin proposal by the Thirteenth Amendment's proposed national ban on slavery would seem to be such a case. First, bear in mind the peculiar logical destruction of the Corwin proposal's original sense by the Thirteenth Amendment. Combine that destruction with the dramatically changed historical circumstances of 1861 and 1865 and it becomes impossible to believe that the Congress proposing our Thirteenth Amendment did not understand that act as simultaneously withdrawing the Corwin Amendment, or would not have explicitly voted to rescind the Corwin Amendment had the lawmakers thought it necessary to do so. Taken in historical context, Congress' action in proposing the Thirteenth Amendment unmistakably meant that, so far as it was concerned, the Corwin Amendment was no longer on the table. This is plainly *not* a case of Congress seeking to straddle an issue by deliberately submitting inconsistent amendment proposals and leaving the issue up to the states. The Congress that proposed the Thirteenth Amendment wished to make clear that, upon its adoption, slavery was to be regarded as permanently defeated—the ball game was *over*. It would therefore seem the better conclusion that, either as a consequence of the Thirteenth Amendment's adoption or merely its proposal, Corwin is dead.<sup>88</sup>

\*704 The short point of all this is that recognition of the potential eternal life of amendment proposals does not necessarily lead to the “absurd result” that the Corwin proposal is still alive. (It *does* require the conclusion that the Representation Amendment, the Titles of Nobility Amendment, and the Child Labor Amendment are still alive.) Nonetheless, the issue of the Corwin proposal's status is not free from doubt, and even the bare possibility that it might be construed as alive and capable of adoption might be thought scary stuff—the most plausible support for *Dillon's* assertion

that it would be unthinkable to regard unratified amendment proposals, submitted without a deadline, as still alive and kicking.<sup>89</sup> But this should be a lot less unthinkable if Congress retains the power, under Article V, to withdraw an amendment proposal previously submitted to the states, any time before the thirty-eighth ratification. The real cause for concern would arise if an amendment proposal had eternal life as a proposal *and could never be recalled* by the proposing authority, but could be permanently defeated *only* by the extremely difficult route of *adoption* of another constitutional amendment.

As will be developed below,<sup>90</sup> one need not accept such an extreme view of the amendment process in order to reject “contemporaneous consensus” and accept the Twenty-seventh Amendment. Article V is best construed as providing that Congress has the power to rescind an amendment proposal by the same vote required to make a proposal—two-thirds of both houses.<sup>91</sup> It is only by virtue of Congress’ *failure to repeal* an amendment proposal—an act over which today’s Congress, acting with sufficiently large majorities, has complete control—that it remains alive. If the concurrent legislation model is sound, then the prospect of absurd or untoward results is avoided entirely by the power of Congress to repeal a proposal that has outlived its usefulness. Like the rest of *Dillon’s* arguments, the argument from absurd consequences does not provide a persuasive justification for reading into Article V a nebulous requirement of “contemporaneous consensus.”

#### \*705 B. The “Contract” Model

In an important article attacking the validity of Congress’ purported extension of the ratification deadline for the proposed Equal Rights Amendment, former Texas Law School Professor Grover J. Rees advanced a “contract” model of the Article V amendment process—an “analogy between proposal and ratification of a constitutional amendment and an offer and acceptance.”<sup>92</sup> Rees does not rely on historical or textual evidence, but instead on his

belie[f that] the framers left Article V brief ... because they did not regard as particularly difficult the matter of determining when contracting parties have agreed upon something. The rules of offer and acceptance are well-developed ‘neutral principles’ for discerning those matters, if any, to which parties have agreed.<sup>93</sup>

The contract model is really just a sophisticated variation on the contemporaneous consensus theme, as Rees appears to recognize, relying on *Dillon* for the proposition that “consensus, and not a series of formalities, is the essence of the amending process.”<sup>94</sup> The contract model is simply another way of stating that there must be contemporaneous agreement or consensus—a meeting of the minds, so to speak—by two-thirds of both houses of Congress and three-fourths of the state legislatures. As such, the contract model is subject to the same objections as the crude contemporaneous consensus idea propounded in *Dillon*: namely, that Article V is a “series of formalities”; that the supposed requirement of contemporaneous consensus is not in the text; and that any attempt to invent such a requirement creates insuperable line-drawing difficulties that expose such a requirement as pure judicial invention.

The one refinement made by the contract model is Rees’ hope that “[t]he rules of offer and acceptance” supply “well-developed ‘neutral principles’” for the line-drawing process of determining the time boundaries for when a consensus is sufficiently “contemporaneous.” But it is illusory to think that offer-and-acceptance principles supply any bright lines that can make the consensus theory seem more law-like.<sup>95</sup> General principles of contract law \*706 hold that an offer expires (i) when its terms so provide, or (ii) after a “reasonable” time in the absence of express terms, with reasonableness being inferred from all the circumstances, the course of dealing of the parties, and/or any commercial understanding of reasonableness within the industry.<sup>96</sup> We are dealing with amendments lacking the express terms described by (i), and the free-standing “reasonableness” standard of (ii) is *exactly* what *Dillon’s* dictum provides: ratification must come “within some reasonable time after the proposal.”<sup>97</sup> And it is hard to tell what constitutes the relevant circumstances or

trade practices defining reasonableness—the average length of amendment ratifications? the longest length provided for by Congress? the longest length implicitly approved by Supreme Court dictum? Each possibility brings to the fore the core problem with the contract model and its contemporaneous consensus cousin: the lack of any basis in the text for fixing a standard for measuring contemporaneity (or “reasonableness”).

In short, Rees' “contract” theory is but a variation on the theme of *Dillon*, claiming no stronger basis in constitutional text or history than the arguments advanced above for a “contemporaneous consensus” model. While much of Rees' critique of the ERA extension is on target (and consistent with the model of the amendment process I propose below), the overall theory he posits as a way of understanding the amendment process offers little improvement over *Dillon*.

### C. The “Congressional Power/Political Question” Approach

The drawbacks of the *Dillon* dictum were not long lost on the Supreme Court. But in reaction to *Dillon*, the Court (or at least fragments of it) developed another atextual “solution” to the Article V puzzle: the absence of a principled basis for inferring a contemporaneity standard does not necessarily mean that there should not be such a standard, but merely that there are no “judicially discoverable and manageable standards” for determining what the contemporaneity standard should be, rendering the issue a political question for Congress' exclusive determination. Under this view, the answer to Article V's riddles is that Congress has plenary power over the amendment process and may decide for itself whether an amendment's ratification reflects a “contemporaneous consensus.” It may employ whatever criteria for contemporaneity it likes; it may choose them in advance or after the fact; and its decision is subject to no constitutional challenge.

This, in its essence, is the “congressional power” or “political question” approach to Article V. Incredibly, it is the approach suggested by the opinions (none commanding a majority) in the Supreme Court's most recent Article V **\*707** precedent. It was the approach urged, in some version or another, by most defenders of the ERA ratification extension. And it is the theory to which Congress backpedaled in voting to “accept” the Twenty-seventh Amendment.

There are numerous problems with this theory, including the absence of any Supreme Court majority opinion that embraces any particular version of it. But its most important flaw is the slick slide from conceptualizing Article V issues as “political questions” that are *nonjusticiable* because of the *absence* of standards by which to judge them, to viewing such issues as *substantively* committed to Congress' plenary power, employing *any standard it chooses*. Defenders of the “political question/congressional power” approach to the amendment process frequently glide between the two positions in something of a constitutional shell game, conflating two theoretically distinct positions.

What's more, *neither* position is correct: it is wrong to conclude that the question of whether Article V contains an implicit time limit is nonjusticiable for lack of “judicially discoverable and manageable standards” for deciding it.<sup>98</sup> As argued above, a straightforward reading of Article V decides the issue: there is no constitutional time limit. And it is doubly wrong to conclude that the question is substantively committed to Congress' sole discretion. For again, nothing in the text of Article V remotely suggests such a substantive commitment.

#### 1. *Coleman v. Miller as Bad History: The Fourteenth Amendment “Precedent”*

The appropriate place to start is with *Coleman v. Miller*,<sup>99</sup> the 1939 Supreme Court case dealing with the amendment process that launched the modern political question doctrine outside the Guarantee Clause context.<sup>100</sup> *Coleman* involved a challenge to the validity of Kansas' purported ratification of the Child Labor Amendment, proposed by Congress in 1924 but never ratified (yet). Like the Congressional Pay Amendment, the Child Labor **\*708** Amendment was slow to gain state ratifications at the time of its proposal, only later to enjoy a resurgence of support (though not so many years later as the Congressional Pay Amendment). Just six states ratified between 1924 and 1931.<sup>101</sup> The New Deal reinvigorated support for the amendment and twenty-two more states ratified between 1933 and 1937, including

Kansas, which had earlier passed a resolution of rejection.<sup>102</sup> At the time *Coleman* came before the U.S. Supreme Court, there were twenty-eight ratifications, eight short of the thirty-six needed at that time; and eight of these ratifications were from states that previously had passed resolutions of rejection. To make matters more interesting, Kansas' vote to ratify was a squeaker: the Kansas Senate divided evenly, twenty in favor and twenty opposed, with the deciding vote cast by the Lieutenant Governor in favor of ratification.<sup>103</sup> Disgruntled legislators (twenty-one members of the Kansas Senate, including the twenty negative votes plus one other member, plus three members of the Kansas House) brought an original mandamus action in the Supreme Court of Kansas, seeking to restrain the Secretary of the Senate and other legislative officers from endorsing the resolution and the Secretary of State from authenticating it and delivering it to the Governor. Three basic objections were raised to the validity of the state's ratification: (i) the length of time between Congress' proposal and the state's ratification (thirteen years) was not "reasonable" under *Dillon*; (ii) Kansas could not ratify an amendment it had previously and explicitly rejected; and (iii) the Lieutenant Governor had no right to cast the deciding vote in the Senate, as he was not, strictly speaking, a member of the state legislature. The Kansas Supreme Court denied the writ and the U.S. Supreme Court granted certiorari.

The opinion of Chief Justice Hughes purports to be the opinion "of the Court," but it is clear from a quick counting of heads that it garnered the votes of only three Justices-Chief Justice Hughes, Justice Stone, and Justice Reed. Hughes' opinion makes a passable argument that the Court had jurisdiction to hear the legislators' appeal, given the state court's recognition of their standing and resolution of the case on the merits.<sup>104</sup> Combined with the views of the two *dissenters* (Justices Butler and McReynolds), who would have reached the \*709 merits and invalidated Kansas' ratification as untimely, there apparently was a majority in favor of this conclusion.<sup>105</sup>

But upon reaching the merits, Hughes' analysis fails miserably. Hughes first addressed the question of whether a state can ratify an amendment it has previously rejected. He placed great emphasis on the peculiar experience with the Fourteenth Amendment, where the issue of the efficacy of a state's rescission of a prior ratification presented-at least for a few days<sup>106</sup>-a serious question as to whether the amendment had become law.

In order to understand the opinions in *Coleman*, it is necessary to know some of the peculiar details of the Fourteenth Amendment's ratification. In January 1868, resolutions were introduced in both houses of Congress declaring that the amendment had been adopted by the requisite number of states.<sup>107</sup> Backers of the resolutions apparently excluded from their count of the number of states in the Union (the *denominator* of the three-fourths fraction) certain Southern states that had rejected the proposal, on the theory that such states were unreconstructed (a fact apparently evidenced in part by their refusal to ratify the Fourteenth Amendment) and thus had no lawful role in the amendment process.<sup>108</sup> The position that the states of the Confederacy had left the Union-and therefore did not exist as states unless and until Congress voted to readmit them-was never accepted by the administrations of Presidents Lincoln and Johnson, who insisted that states could *not* leave the Union.<sup>109</sup> While Congress was considering these resolutions, Ohio and New Jersey voted to rescind their ratifications, in January and March of 1868, respectively.<sup>110</sup>

\*710 By July 9, 1868, a number of new ratifications had been received, including several from Southern states that had previously rejected the amendment but that subsequently voted to ratify (and thereby be readmitted to representation in Congress) after Congress had installed new governments in those states.<sup>111</sup> Counting *all* states in the denominator (to make 37), it appeared that 29 states, one more than the necessary three-fourths, had ratified the amendment-*if* New Jersey's and Ohio's original 'yeas' still counted. Congress voted a resolution asking Secretary of State Seward to communicate a list of ratifying states.<sup>112</sup> Seward filed his report and subsequently, on July 20, 1868, issued a proclamation reciting the ratification by twenty-nine States and conditionally certifying the amendment as part of the Constitution, *if*-and Seward conceded it to be "a matter of doubt and uncertainty"-the ratifying resolutions of Ohio and New Jersey were still valid, notwithstanding their subsequent attempted withdrawal of ratification.<sup>113</sup> The next day,



July 21, Congress adopted a concurrent resolution reciting that three-fourths of the states had ratified, declaring the Fourteenth Amendment adopted, and stating that the amendment should be “promulgated” by Secretary Seward.<sup>114</sup> Sometime that same day, Georgia (which had previously rejected the amendment) transmitted notice of its ratification to the Speaker of the House in a private telegram, which was read into the record. The House, however, which already had before it the Senate-passed resolution, did not base its action on Georgia's apparent ratification, and Georgia is not listed among the ratifying states noted in the July 21 resolution.<sup>115</sup>

\*711 On July 28, a week later, Seward issued another proclamation declaring (without condition) the adoption of the Fourteenth Amendment.<sup>116</sup> Seward noted Georgia's ratification (formally received the previous day) and also noted (without comment) that Ohio and New Jersey had passed resolutions withdrawing their consent.<sup>117</sup> Since Georgia made 28 states-more than three-fourths, not counting Ohio and New Jersey-the question of the validity of the rescission resolutions was unimportant.<sup>118</sup>

Chief Justice Hughes's opinion in *Coleman* draws some peculiar-and quite wrong-lessons from this history. “Thus,” Hughes wrote, “the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.”<sup>119</sup> The point is historically accurate with respect to prior rejections, but only Congress can be said to have acted on the assumption that attempted *withdrawal* is invalid. The most that can be said with respect to Secretary of State Seward was that he was uncertain.<sup>120</sup> Even more curiously, Hughes did not conclude that these determinations constituted \*712 controlling “precedent” on the *merits* of the particular issues involved-the effect of prior rejections and attempted rescissions-but rather drew the more far-reaching and rather remarkable conclusion that the Fourteenth Amendment experience constituted controlling precedent on the *power* of the political branches finally to resolve those questions or, more precisely, the *lack of power* of the judicial branch to interfere with such determinations. The key paragraph of the Hughes opinion in *Coleman* is as follows:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.<sup>121</sup>

How many things are wrong with this picture? First, there is no reason to regard the Seward-Congress colloquy as “historic precedent” that amendment issues are nonjusticiable simply because they might also be appropriate for congressional or executive determination *in the first instance*. The fact that somebody first acts to promulgate an amendment says nothing about whether somebody else may exercise constitutional authority to declare it invalid. Every action of the political branches is an assertion of constitutional power and, to that extent, an interpretation of the Constitution; that does not foreclose judicial review in any other circumstance or render the issues involved “political questions” not subject to judicial review. Second, if the views of Seward and Congress in 1868 count as precedent, they should be precedent as to the merits of the specific issues there addressed, not for the proposition that the decision is committed to the political branches-still less to *Congress* in particular. Neither Congress in its proclamations nor Seward in his made any such grandiose assertion. Third, if this was historic precedent it did not have a very long subsequent history of being treated *as* precedent. No subsequent amendment (until Congress' decision in 1992 to “accept” the Twenty-seventh) has been “promulgated” by congressional proclamation.<sup>122</sup> Fourth, *Coleman*'s suggestion that amendment issues are nonjusticiable was contrary to more than a half-dozen *judicial* precedents, that, like *Dillon*, adjudicated the merits of some Article V constitutional challenge to the validity of the amendment.<sup>123</sup>

\*713 2. *Coleman v. Miller as Bad Law: The Political Question Doctrine and Its Substantive Variant*

Not surprisingly, the Court's bad history produced some very bad law. Hughes' formulation of the "political question" doctrine is hopelessly jumbled. It is worth taking a moment to sort out the strands that Hughes tangles.

The political question doctrine is understood today to involve three distinct inquiries: first, whether there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; second, whether there is a "lack of judicially discoverable and manageable standards for resolving" an issue; and third, a series of quasi-prudential considerations of deference to the political branches and avoidance of judicial policymaking.<sup>124</sup> The first inquiry—"textual commitment" to another branch-itself involves a question of constitutional interpretation to determine whether the Constitution makes such a commitment.<sup>125</sup> Decisions based on this branch of the "political question" doctrine are probably best understood not as true "nonjusticiability" holdings but as decisions on the merits that the challenged actions of the political branches were within the scope of constitutional authority committed to them. As such, this branch of the political question doctrine is a cipher. The case has in reality been decided on the merits.<sup>126</sup> The second inquiry—"absence of judicially discoverable and manageable standards"-differs significantly from the first in that it argues not that the Constitution is clear (in assigning authority with respect to an issue) but that it is so *unclear* that courts have no standard for deciding whether given government action is lawful or not. This too may be understood as, in a sense, a decision on the merits: the default rule in unclear cases is that the Constitution supplies no rule of law that invalidates the challenged action. The remainder of the "political question" doctrine is the only part that constitutes a true doctrine of nonjusticiability-that is, the Constitution supplies a rule of law that the action of the political branches violates, but the courts will decline to enforce that rule.<sup>127</sup>

\*714 Hughes' opinion is a model of unclarity as to which of these reasons supports his position, using different arguments at different times. The validity of Kansas' ratification starts off being "a political question pertaining to the political departments," presumably including the Executive, but quickly becomes a matter of "the ultimate authority in the Congress," apparently alone.<sup>128</sup> This is because of Congress' "control over the promulgation of the adoption of the amendment." This sounds like a "textual commitment" argument. Indeed, "ultimate authority in the Congress" sounds not like a holding that amendment ratification issues are nonjusticiable, but like a substantive judgment about the meaning of Article V.<sup>129</sup>

Justice Black's concurring opinion for four Justices<sup>130</sup> picks up on this theme, arguing that "Congress has sole and complete control over the amending process, subject to no judicial review" and that Congress has "exclusive power over the amending process."<sup>131</sup> Black does not invoke the "political question" doctrine at all. Instead, he appears to be making an argument based solely on the text of Article V-an argument about Article V's meaning, not its justiciability. But no matter how the argument is styled-as involving a nonjusticiable "political question" because textually committed to Congress' exclusive discretion (the Hughes approach) or as a straight question of constitutional interpretation (the Black position)-the argument is just plain wrong. There is simply nothing in the text of Article V that commits resolution of issues arising therein exclusively to Congress, that eschews judicial review of amendment process issues, or that in any other way suggests that such an important provision of the Constitution-controlling the process of change of our nation's fundamental law-should be understood to mean whatever \*715 Congress says it means.<sup>132</sup> Black's *Coleman* concurrence is a most strange opinion indeed for a judge usually thought of as a textualist.

Nor, as the Hughes opinion maintains, does the Fourteenth Amendment situation serve as a legitimate precedent for finding a textual commitment of "[congressional] control over the promulgation of the adoption of the amendment."<sup>133</sup> "Promulgation" would seem to be an executive act, and is (and was) so provided by statute.<sup>134</sup> Seward does not appear to have made his July 28 promulgation *because* of Congress' July 21 determination, but because Georgia's ratification

rendered the dispute over Ohio and New Jersey moot. His July 20 promulgation was a *conditional executive* certification. Congress at that time had only asked for a report. Moreover, if the Fourteenth Amendment's confusing process were really a precedent concerning congressional power to judge whether an amendment has been ratified, then that precedent has been violated in the course of adopting every subsequent amendment.<sup>135</sup> Finally, under *Dillon* (in its actual holding, not its questionable dictum), no certification by *either* the Executive or by Congress is required as a constitutional matter. An amendment becomes law by virtue of the scale-tipping state ratification, not any subsequent congressional promulgation or executive branch certification.<sup>136</sup> The executive branch certification serves merely a statutory record-keeping function.

The second strand of the political question doctrine-absence of judicially discoverable and manageable standards for resolving an issue-appears later in Chief Justice Hughes' opinion and forms the more plausible argument for finding that Congress has, by default, the power to judge the validity of state ratifications. Hughes was considering the second question presented in *Coleman*: whether Kansas' ratification had lost its vitality because of the passage of time. Hughes noted the Court's dictum in *Dillon* (and the fact that it was only dictum<sup>137</sup>) but noted further that “it does not follow that, \*716 whenever Congress has not exercised that power to prescribe a time limit, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications.”<sup>138</sup> “Where are to be found the criteria for such a judicial determination?” Hughes asked. “None are to be found in the Constitution or statute.”<sup>139</sup>

But Hughes then infers from the absence of such criteria a de facto congressional power to decide whether there should be a time limitation-even after the fact:

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.<sup>140</sup>

But it simply does not follow from Congress' power to prescribe a time limit *as part of the proposal* that it may also judge the validity of ratifications by imposing a time limit *after the fact*.

A more plausible way of putting such an argument might be that *Dillon* was correct in saying that Article V itself contains an implicit time limit on ratifications. That is, the *principle* of time-limitation is sound in theory; and while it may be true that there is no principled basis for a *court* to draw any particular line, *Congress* is competent to draw such a line based on political and policy factors that courts may not consider. The problem with even this formulation is that the text supplies no stronger basis for Congress to draw an arbitrary time-line after the fact than for the courts. If Congress votes to defeat as time-barred an otherwise valid amendment-by definition, one for which the Constitution's text supplies no legal rule establishing its invalidity-by what right has Congress acted? As noted before with respect to “textual commitment,” Article V simply does not grant Congress power to judge the validity of state ratifications but clearly delimits Congress' role in the amendment process to *proposing* amendments and specifying their mode of \*717 ratification.<sup>141</sup> Nothing in Article V suggests any further role. Nor does the Necessary and Proper Clause grant such a power, since it cannot be “necessary and proper” to Article V for Congress to take action that renders invalid that which Article V says is valid.

In short, only if it can be said that the determination of an amendment's ratification has been *textually committed* to Congress does Congress have a power to create post hoc standards for judging the validity of state ratifications.

None of the opinions in *Coleman* labelling Article V questions “political” relies on “prudential” considerations. In the end, however, that is probably the best explanation for the result. The Child Labor Amendment was designed to overrule the Supreme Court's decisions in *Hammer v. Dagenhart*<sup>142</sup> and the *Child Labor Tax Case*<sup>143</sup>—decisions that were highly controversial at the time. It might have looked unseemly for the Court to intervene in a dispute over an amendment repudiating the Court's own decisions, especially if the result hindered adoption of the amendment. This was former Justice Lewis Powell's take on *Coleman*. He considered it problematic for the Court to “oversee the very constitutional process used to reverse its decisions” and thought it “entirely appropriate for the Judicial Branch of Government to step aside” in such circumstances.<sup>144</sup> One can fairly debate whether such judicial “abstention” is ever legitimate.<sup>145</sup> But it clearly cannot be justified when the proposed amendment goes Congress' ox, not the Court's (as is the case with the Twenty-seventh Amendment). If anything, such concerns cut in the opposite direction when an amendment limits Congress' power—suggesting that such issues should be found not to be “congressionable.”

In any event, the least defensible position would seem to be one of plenary congressional power, whether accomplished through the political question doctrine or as a matter of substantive interpretation of Article V. Because no opinion in *Coleman* commanded a majority of the Court in support of any rationale, it cannot be claimed that the Supreme Court has actually adopted this position. (And, for the reasons set forth above, it should not.) *Coleman* may simply not be authoritative at all. Nonetheless, the Hughes “political question” position can be read as a narrower formulation of the Black “plenary \*718 congressional power” position and thus plausibly can be thought to state the holding of the case. Consequently, *Coleman*—the Hughes opinion uncomfortably combined with the Black opinion—has come to be regarded as standing for the proposition that legal issues presented by the amendment process (or at least the issues of prior rejection and attempted rescission) are political questions that are *practically* and perhaps even *substantively* committed to Congress' exclusive determination.

### 3. *Coleman v. Miller in the Hands of Advocates: A Doctrine for All Occasions*

The shifting rhetoric of the Court, the imprecision of the doctrines, and the division in the opinions breeds confusion, and has spawned a variety of *Coleman*-esque theories of Article V. Some rely on straight “political question” theory, some on Black's theory of plenary congressional power as a substantive matter, and some slide gracefully between the two views. Professor Laurence Tribe of Harvard, the leading advocate of a *Coleman*-esque approach to Article V, capitalizes on the opacity of the *Coleman* rationales to produce a chameleon-like theory of broad congressional power over the amendment process. The chief virtue of the theory is its flexibility<sup>146</sup>—one might say its manipulability. Sometimes Tribe's position looks like Black's plenary congressional power approach; sometimes Tribe's position looks like the Hughes political question approach; and sometimes it embraces language in *Dillon* speaking of Congress' broad power over “matters of detail” in the amendment process.<sup>147</sup> However formulated, the end result is always the same: Congress has broad power over the amendment process.

With all due respect, Professor Tribe's position appears to change with the political winds. One can plot the variations in his position as a function of the substantive amendment proposals over time. Tribe was a supporter of the proposed Equal Rights Amendment and testified in favor of the constitutionality of the extension of the time deadline for ratification. His theory then was that *Coleman* authorized Congress to determine the timeliness issue “at the most logical moment,” which he asserted was *after* states have submitted their purported ratifications. This implied that Congress had the power to vote to extend a deadline any time before expiration of the original deadline, for as long as it wished, as many times as it wished, and by a simple majority (rather than two-thirds) vote.<sup>148</sup> Moreover, Tribe maintained that states had no power to rescind their earlier ratifications, even if they objected to the extension of time.<sup>149</sup> All of this, Tribe argued, flowed from *Coleman*: \*719 “The authority of Congress plainly encompasses any rational means of ascertaining that the people

of three-fourths of the states have expressed a sufficiently contemporaneous approval of a proposed amendment.”<sup>150</sup> *Coleman*, according to Tribe, “suggests that it would be for Congress rather than for the courts to decide the question of reasonableness .... It is up to this Congress to decide what is a reasonable period.”<sup>151</sup>

By 1983, Tribe had backed off a good distance, writing in the *Harvard Law Review* that “[t]he proposition that Congress enjoys ‘sole and complete control over the amending process, subject to no judicial review’-a view actually expressed by four Justices in *Coleman v. Miller*-is a straw man if ever there was one.”<sup>152</sup> “Could anyone really believe,” asked Tribe, without a trace of irony, “that a court would feel bound to treat the Equal Rights Amendment (ERA) as part of the Constitution if Congress determined that the thirty-five states that had ratified the amendment as of July 1, 1982, constituted the ‘three fourths’ of fifty required by Article V?”<sup>153</sup> Of course federal courts have a role in policing the boundaries of the amendment process, Tribe argued, but that “is not to say *where* federal courts should set those limits.”<sup>154</sup> In rather stark contrast to his ERA-era position, Tribe wrote:

I do not suggest that the ‘legitimacy’ of the system would crumble if, for example, the federal judiciary were to rebuff as invalidly ratified a human life amendment that had been narrowly rescinded by a ratifying state at the very moment the thirty-eighth state added its “yes” vote or that had received its final ratification during a congressionally decreed extension of the time initially set for ratification.<sup>155</sup>

Tribe allowed only that it might be “unwise[]” for courts to so hold.<sup>156</sup>

The distinct shift in positions seems to reflect a shift in the political climate between 1978 and 1983-when the ERA was off the table and an anti-abortion Human Life Amendment and a School Prayer Amendment were the leading objects of congressional debate and Republicans controlled the Presidency and the Senate. Tribe's position in that political climate was that the judiciary should still defer to Congress-somewhat-but that there could be no absolute rule of deference. Moreover, the judiciary need not defer completely even as to the *substance* of proposed amendments. Though Tribe in the end would still regard the substance of amendments as a political \*720 question not for courts, he strongly implies that the question of how well a given amendment would “fit” within the rest of the Constitution should serve as a constitutional limit on what kinds of amendments may be adopted-and he found a Human Life Amendment and a Balanced Budget Amendment not to fit.<sup>157</sup>

In the end, Tribe (in 1983) took a position on the “political question/congressional power” approach of *Coleman* that is flexible but unclear: “In each case, courts should ask themselves how seriously an adjudication on the merits of a challenge to some aspect of an amendment's ratification or rejection would threaten the unique role of the amendment process ....”<sup>158</sup>

In the spring of 1992 the political climate was once again changed. There was no longer much likelihood that Congress would pass a Human Life Amendment or a School Prayer Amendment. But the electorate's disgust with Congress was palpable. In this context, Tribe wrote in support of the validity of the Congressional Pay Amendment, irrespective of any validating congressional action. Only the barest traces of his *Coleman*-esque position in support of the ERA ratification extension remained:

Congress does have an ongoing role in the amendment process under Article V and the Necessary and Proper Clause of Article I: It can choose the “Mode of Ratification” for each amendment it proposes; it may include ratification deadlines in each, as it has since 1919; and it might even be able to make midcourse adjustments by adding time limits to still pending amendments that lacked them originally. *But this makes it all the less necessary to give Congress a decisive post-hoc role in evaluating constitutional ratifications.* It is

not Congress's role to declare Michigan's 1992 ratification of the 27th amendment too recent or Maryland's 1789 ratification too ancient.<sup>159</sup>

Tribe's most recent position is his best. The retreat from *Coleman* might charitably be taken as a maturing of Tribe's views over time. But this very fact highlights how "useful" *Coleman*'s various theories can be when employed on selective occasions. The Equal Rights Amendment ratification extension debate is a prime example of *Coleman*'s manipulability and capacity to mislead.<sup>160</sup> The "political question/congressional power" model of the amendment process is the worst of all worlds. It has no basis in the text of the Constitution and \*721 purports to transfer all authority over amendment questions to the branch of government that can least be expected to decide them on a principled basis. Taken seriously, the position is absurd and dangerous: Congress *could* (contrary to Tribe's assertion that this is a straw man) declare the ERA valid today, notwithstanding that an insufficient number of states ratified it. But the model is *not* taken seriously, even by its sometime advocates. Rather, it is a doctrine of convenience that serves to rationalize results reached for some other reason. Its principle of "deference" is as broad or as narrow as its advocates wish to make it, depending on the particular case. As such, it is an even more unsound approach than the "contemporaneous consensus" approach of *Dillon v. Gloss*.

\*\*\*\*\*

A more general answer is needed to Article V's questions than the episodic and incoherent decisions of the Supreme Court in *Dillon* and *Coleman* can provide. The "contemporaneous consensus" idea of *Dillon* ignores the formalism of Article V and imports into that article an atextual and standardless condition. Variations on the contemporaneity theme—such as an analogy to contract law—unavoidably share the same defect. And the idea, suggested by the various opinions in *Coleman*, that Article V authorizes Congress (but not the courts) to import such an additional criterion into the amendment process, and make itself the judge, after the fact, of whether ratification has occurred, is simply unsupportable as a matter of substantive constitutional interpretation or the political question doctrine. It is time to banish *Dillon*'s dictum and *Coleman*'s confusion from constitutional jurisprudence. A new approach is needed.

### III. A GENERAL THEORY OF ARTICLE V

If Article V is not (necessarily) about "contemporaneous consensus," is also not a contract-like system of offer and acceptance, and is definitely not a blank check for Congress, how should its formal requirements be understood? One answer is that one does not need a "theory" of Article V at all; the article is a statement of formal, procedural requirements, compliance with which (and nothing more) suffices to make an amendment. That answer is correct, so far as it goes. But arid formalism has little explanatory power, and provides no clues for resolving the many interstitial issues left by Article V's broad-brush sketch.<sup>161</sup>

\*722 The Justice Department Memorandum, for example, finds only that the Twenty-seventh Amendment has been adopted.<sup>162</sup> But by failing to provide any systematic theory of Article V, the Justice Department Memorandum leaves all the difficult questions unanswered: Given that Article V contains no time limit, must an amendment proposal that itself lacks one be forever capable of ratification? Or may Congress rescind a proposal? If so, by what vote? May states rescind their ratifications (prior to the thirty-eighth ratification)? If so, what principled theory explains why they may do so? While the text of Article V may affirm the validity of the Twenty-seventh Amendment, it does not precisely address these further questions. It would seem incumbent on any theory of *why* the Twenty-seventh Amendment has become law to prove its usefulness by at least attempting to answer these questions.

The model that best accounts for the formal requirements of Article V, and that explains the amendment process in terms that both the founding generation and ours would find intelligible, is to regard Article V's amendment process as involving the combined, but separate, *legislative enactments* of specified supermajorities of Congress, and of state legislatures, resulting in their *concurrent approval* of an identical proposal. There are two key features of this model that distinguish it from the theories discussed and criticized above. First, the actions taken by Congress and by state legislatures in voting for any particular amendment language must be understood as *ordinary legislative enactments* of those bodies (with supermajority requirements for Congress),<sup>163</sup> made in accordance with each body's usual processes and subject to the usual understanding of how legislation is made. Second, these legislative enactments are the acts of *separate* lawmaking bodies, each enactment having its own autonomous status as "law" made by that body. Standing alone, of course, these enactments—these "laws"—have no formal consequence, but that does not mean they lack juridical status as laws. Article V states a rule of recognition for when the aggregation of these separate legislative enactments produce a constitutional amendment. Combining these two features, an amendment results, once and for all,<sup>164</sup> whenever there *concurrently exists* a valid, *unrepealed* enactment of Congress proposing an amendment and the valid, *unrepealed* enactments of thirty-eight state legislatures ratifying that proposal. Article V thus requires not \*723 contemporaneous consensus, but the existence of concurrent enactments. A good way of describing Article V's requirements is "concurrent legislation" adopted by Congress (by two-thirds supermajorities) and separately adopted by three-fourths of the state legislatures.<sup>165</sup>

The concurrent legislation model has more explanatory power and poses fewer textual and practical problems than any competing theory. Take the case of the Twenty-seventh Amendment. The amendment became valid with the ratification of Michigan as the scale-tipping thirty-eighth state, but not because of any contemporaneous consensus (which may or may not exist) or because of Congress' subsequent endorsement. Rather, the amendment is valid simply because Congress never rescinded its 1789 enactment proposing the amendment and no state rescinded its ratification of the amendment before the scale-tipping thirty-eighth ratification added the amendment to the Constitution.

The contemporaneous consensus and contract models probably cannot explain the Twenty-seventh Amendment, unless what constitutes a "reasonable" time frame for contemporaneity is stretched so far as to render the theory meaningless, or unless the contemporaneous consensus needed has nothing to do with when state ratifications occur, but looks solely to a present (that is, 1992) consensus measured in terms of raw popular opinion. (Compliance with Article V's formal requisites might or might not be deemed necessary.) The practical dilemma for such theories is between jettisoning the Twenty-seventh Amendment and adopting a view of the contemporaneity requirement so flexible or so bizarre as to abandon any pretense at "reasonableness." And whichever horn of the dilemma is chosen, there is still the inconvenient problem of conforming the theory to Article V and finding *any* basis in the text for an implicit time limitation or for choosing what that limit is.

The congressional power theory can justify the Twenty-seventh Amendment's validity (though not the Archivist's action in certifying the amendment *before* any congressional vote), but only because that theory rationalizes *anything* Congress does concerning the amendment process. Plenary congressional power over the amendment process simply cannot be squared with the text of Article V or with basic principles of limited constitutional government. Moreover, since Congress voted yes, the explanatory power of this theory is untested. Only if Congress had voted no would an issue arise as to whether Congress' or the Archivist's view is controlling. Only the concurrent legislation model can explain the Twenty-\*724 seventh Amendment without reading new requirements into (or existing ones out of) the text of Article V.

The reading-in of these extratextual limitations or conditions with respect to the amendment process is probably motivated by the fear of formalist absurdities: unless a requirement of contemporaneity or of congressional control is imposed on Article V's formal requirements, an amendment proposal could last forever. In one sense, the Twenty-seventh Amendment already represents this absurdity—ratification of a 202-year-old proposal. But if such a period is absurdly long as a matter of first principles, it surely does not become less so by Congress' vote to accept the amendment

as ratified.<sup>166</sup> The fact that few appear willing to abandon the problems of *Coleman* in favor of the problems of pure *Dillon*-ism suggests that it is not so much the length of a proposal's life, but the permanent inability to kill it, that has led the Court and commentators to search beyond the text. The real concern with a textualist approach to Article V seems to be its implication that Congress is powerless to kill a proposal that has become archaic, or even dangerous. It does seem strange to say that a proposed amendment never dies but, "Terminator"-like, lives on until it has completed its mission, no matter how many times it appears to have been "killed" by the states, and that only an overtaking amendment ("Terminator II"?) retracting the prior amendment could stop the original proposal.<sup>167</sup>

The concurrent legislation theory avoids the specter of the Eternal Amendment Proposal in a manner that is fully consistent with the text of Article V. An important feature of the theory is the power of Congress, and of ratifying state legislatures, to repeal or rescind legislative action on behalf of an amendment up until the point of the scale-tipping ratification that makes the proposal law. This prevents amendment proposals from becoming one-way juggernauts that even a present, contemporary consensus cannot stop (short of adoption of a legally awkward and problematic "overtaking amendment"). \*725 Thus, Congress could have "repealed" the Congressional Pay Amendment proposal any time during the past two centuries, up until the day that Michigan's ratification provided the necessary three-fourths. And Congress could, if it chose, repeal the other extant amendment proposals (and explicitly confirm the implied repeal of the Corwin Amendment). In the absence of such a repeal, however, the legislative enactment-like any other legislative enactment lacking a "sunset" provision-remains in effect indefinitely.<sup>168</sup>

These complementary features-the ability to repeal prior enactments and the perpetuity of enactments unless either repealed or subject to expiration by their own terms-are characteristic of all forms of legislation. If congressional resolutions proposing, and state legislative resolutions ratifying, amendment language are properly thought of as species of legislative acts (statutes being another species of the same genus), then repealability and potential perpetuity are two attendant consequences. The general rule is that a legislative enactment is repealable by the same authority that produced it, absent the creation of a vested right or status protected against plenary repeal by some independent legal norm-for example, the requirement that government (sometimes) proceed by "purchase" when a change in the law works a "taking" of a vested property interest<sup>169</sup> or, a closer analogy to the amendment process, legislation under Article IV providing for the admission of a territory into the Union as a state.<sup>170</sup>

The Constitution recognizes no such vested economic, status, or political interest in the continuation of an amendment *proposal* or any single ratification \*726 of that *proposal*. Only when the magic number of state ratifications occurs does any interest legally "vest," preventing simple legislative repeals. At that point, the constitutive action of the whole has, by virtue of Article V's rule of recognition, become more than the sum of its individual parts. At that point, repeal, revocation, rescission, and-the most extreme manifestations-nullification and secession, are unlawful.<sup>171</sup> But *before that point*, there is nothing in the nature of congressional proposal legislation or state ratification legislation that creates vested legal interests; they are separate legislative acts of separate legislative bodies, each with autonomous power over its own enactment. Each part can repeal its contribution toward the creation of a whole until the whole has been finally created.<sup>172</sup>

Importantly, however, if Congress repeals or amends its legislation proposing an amendment-the issue presented by the ERA ratification extension controversy-it is the *new, amended* legislation that must be concurrently adopted by state legislatures. Phrased in terms of the concurrent legislation model, Congress' initial proposal of the ERA had a "sunset" provision of seven years. *That* proposal was not adopted by thirty-eight legislatures within the period of time prescribed by Congress' initial enactment. While Congress is free to amend, modify, or revoke its earlier enactment, the prior ratifications of thirty-odd state legislatures correspond to the earlier, *unchanged* proposal and are not (legislatively) concurrent with the revised one. Any change in the terms of the original amendment proposal logically invalidates the ratifications of states that had voted for the earlier version. By changing the terms of the earlier amendment proposal-by



adopting *new* legislation-Congress in effect proposes an entirely new constitutional amendment (albeit largely identical in substance), requiring the states to start all over again with new ratifications.<sup>173</sup>

**\*727** This model of the amendment process is also the one that best accords with the most straightforward reading of the text of Article V. That does not mean that no other interpretation of Article V might not also be (superficially) consistent with the text. At least on its face, an alternative formalist reading is possible under which Congress has proposing power but not rescinding power: Article V literally gives Congress only the power to “propose” amendments; nothing is said about a corresponding power to rescind proposals. But as between these two possible formalist readings, the concurrent legislation approach seems clearly the better one, for two reasons.

First, Article V gives Congress a substantive *legislative power* to propose amendments. That power is most naturally understood as making Congress master of the amendment proposal process (outside the convention mode). The *power* of amendment proposal thus embraces both the power to propose and (by the same two-thirds majorities)<sup>174</sup> to withdraw an unadopted proposal. (Here, the contract analogy makes a certain amount of sense. The power to make an offer implies, perhaps even entails, a corresponding power to revoke the offer prior to acceptance.) All of Congress' other legislative powers entail a repeal power, though not stated in terms. This is because legislative power to act is generally understood to embrace a correlative power to repeal acts made, except where vested rights created by the first act would be destroyed by the second.<sup>175</sup> At the very least, that should be the presumption, absent a particularly strong textual argument to the contrary.

Here, the word “propose” (and the negative implications thought to flow from its penumbra of further silence) bears the entire weight of the no-repeals argument. The word will not bear the weight. In context, the word “propose” serves to distinguish Congress' power *merely to propose* amendments from a power to *enact* them on its own, not from a power to rescind proposals. To read “propose” as meaning “propose but not rescind” is to stretch the necessary meaning of the word without justification. Without such a justification, the alternative formalist reading is not persuasive.

Second, in addition to straining the most natural sense of the text, the no-repeals view places enormous strain on common sense in a way that the concurrent legislation model, despite its sometimes counterintuitive results, does not. The idea that legal enactments can have (potential) perpetual life is, as discussed above, a standard and conventional idea in law. But the idea of legal enactments that cannot be repealed by the authority making them is, **\*728** outside of exceptional cases, so contrary to the usual legal rules that it creates enormous pressure to read into the text an implied time-limit on amendment proposals, or an implied power of Congress to judge timeliness after the last state ratification. Both such approaches, as we have seen, seriously distort the text of Article V. One could resist such pressures and insist-not quite absurdly, but straining credulity-that, by golly, amendment proposals *do* live forever; that this accords with the idea that amendments are extraordinary measures not lightly to be proposed; and that there is always the last resort of a constitutional amendment revoking the amendment proposal.<sup>176</sup> But that reading borders so nearly on the absurd (or at least aberrant) that it should be disfavored unless the words clearly require it-and they do not. The better reading is that the power to rescind an amendment proposal is fairly implicit in the power to enact an amendment proposal.<sup>177</sup>

It is also reasonable to infer (though again the answer is not clear on the face of the text) that the vote required to rescind an amendment proposal parallels the vote needed to enact it-two-thirds majorities of both houses. While the Constitution does not always work in such symmetrical fashion, it should here. Unlike the difference between the appointment and removal powers, and the treaty-making and treaty-terminating powers (where, in each case, the former event in each pair is a shared power and the latter the prerogative of a single branch<sup>178</sup>), here the same authority possesses both the **\*729** creating and destroying power with respect to the amendment proposal. Absent a persuasive reason to conclude otherwise, it would seem that a congressional act repealing an act requiring a two-thirds majority should require a two-thirds majority.<sup>179</sup>

The propriety of the two-thirds majority rule for repeal of amendment proposals becomes clearer upon consideration of the logical alternatives-(i) a simple majority vote of both houses or (ii) the vote of one-third of one house plus one member. The latter alternative is premised on the intuition that if two-thirds of both chambers is needed for passage of an amendment proposal, the proposal could have been thwarted by one-third plus one of the members of only one house. But it does not follow that a vote to *repeal* such an enactment after it has been enacted (action that probably would be taken only by a *subsequent* Congress) need only meet the formal requirements of what would have been necessary to defeat it in the first instance. If that were the case, Congress could repeal ordinary legislation by a majority vote of one house, circumventing the bicameralism and presentment requirements of the Constitution. Obviously, this is not the case.<sup>180</sup> Legislation once enacted can only be repealed by the usual lawmaking process. In the single case where an amendment overturned an earlier one (the Twenty-first Amendment, repealing the Eighteenth), the process comported with Article V. It seems difficult to argue that the repeal of a constitutional amendment can be accomplished by the votes of one-fourth plus one of the state legislatures. It seems similarly implausible that simple majorities in Congress and among the states can repeal an existing amendment. In short, consideration of the alternatives tends to confirm that, absent some contrary rule specified or implied by another provision of the text, the default rule is that *the kind and quality of legal authority necessary to retract a measure is the same as that necessary to enact it*. This suggests that Congress alone may rescind an amendment proposal, but that two-thirds of each house must support such a measure.

The real question is whether the amendment process should be treated as involving the concurrent, but independent, “legislative” acts of two different sets of sovereigns in the first place, or instead as a single legislative act \*730 involving separate bodies.<sup>181</sup> If the latter were the case, the appropriate legal analogy might be the transmission of a bill passed by one house of Congress to the other, or the transmission by Congress of an enrolled bill to the President. These acts are not regarded as rescindable.<sup>182</sup>

But there is a distinction between the making of legislation by a single sovereign and the making of a constitutional amendment under Article V. Proposals of the Senate or House expire if not acted on by the other within that term of the Congress. An enrolled bill either becomes law, is vetoed, or dies through lack of presidential signature (when Congress has by its adjournment prevented the bill's return) within ten days of passage by both houses and presentment to the President. In each case, a proposal has limited life by virtue of the term of the proposing body. Unless a constitutional amendment proposed by Congress expires with that term of Congress-giving the states two years, or likely far less time, to ratify-the analogy does not hold.<sup>183</sup> That leaves one of two possibilities for this approach-that amendment proposals are totally unrescindable (the “Terminator” scenario) or that amendment proposals expire after some “reasonable” time (the *Dillon* dictum). The problems with both of these alternatives strongly suggest that the concurrent legislation model is the better one.

A final possible objection to the concurrent legislation approach is that it conflicts with Supreme Court precedent. That it does. But it is difficult to see why that is much of an objection. *Of course* the concurrent legislation model is inconsistent with several Supreme Court opinions interpreting Article V, most notably the dictum in *Dillon* and the plurality opinion(s) in *Coleman*. For the reasons explained at length earlier, such inconsistency does not suggest a deficiency in the model, but in the Court's analysis.

Two other Supreme Court precedents are in tension with the concurrent legislation model, but these cases also do not warrant rejection of the model. *Hollingsworth v. Virginia*<sup>184</sup> held that the President has no role in the amendment process. While this would seem contrary to Article I, Section 7's command that “every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)” be presented to the President for his approval or veto, the fact that the two-thirds majority requirement for congressional proposal of amendments is the same supermajority required to override a presidential veto means that essentially nothing

turns on this long-standing \*731 technical departure from a strict legislation model. The better approach, however, would be that such congressional proposals be presented to the President.

*Hawke v. Smith*<sup>185</sup> is somewhat more troubling. In *Hawke*, the Court held invalid an Ohio constitutional provision conditioning its legislature's ratification of proposed federal constitutional amendments on approval in a subsequent popular referendum. The Court reasoned that the word "legislatures" in Article V excluded the possibility of a state conditioning its legislative process on the result of a referendum.<sup>186</sup> Indeed, the opinion in *Hawke* contains language that apparently rejects the thesis of this Article: "Ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."<sup>187</sup>

The result in *Hawke* can, with some difficulty, be accommodated to the concurrent legislation model. State "legislative" power need not imply the absence of a federal constitutional requirement that such power be exercised by the legislature only. On balance, however, the better answer probably is simply to recognize that *Hawke* was wrongly decided. The decision places more weight on the word "legislatures" than the word will bear. The point of Article V's alternative ratification mechanisms seems to have been to permit Congress to circumvent state legislatures and appeal directly to the people of the states, not to forbid greater popular participation, in accord with a state's understanding of its own legislative process, where Congress chooses legislative ratification.<sup>188</sup>

Within broad bounds, then, a state should be free to determine, as a matter of its own law, the procedures governing its own legislative processes (such as a rule that the lieutenant governor breaks tie votes in the upper house—one of the issues presented in *Coleman*), and this freedom should extend to amendment ratification issues. This may include requirements that all or some legislative enactments not take effect unless approved by the governor, by a popular referendum, or by supermajorities of its legislative chambers<sup>189</sup>—or perhaps even by a state ratifying convention. In addition, a state might validly condition its ratification on a *substantive* condition subsequent, for example, that Congress receive the required number of ratifications before a certain date. Thus, a state may "sunset" its own ratification, whether Congress has placed a time limit on the proposal or not. Indeed, a state's ratification legislation \*732 might validly contain any limitation or proviso not barred by Article V's requirements—and there are very few.<sup>190</sup>

Of course, the state's transmission of its ratification should be one that federal authorities may take at face value. As a matter of Article V, a ratification instrument should be treated as valid according to its terms. (The Court so held just two years after *Hawke*, in *Leser v. Garnett*.<sup>191</sup>) It is thus the responsibility of state authorities to enforce any state law *procedural* condition subsequent prior to transmittal (for it will thereafter have no effect as a matter of federal law). Any *substantive* condition subsequent must appear in the instrument of ratification itself, not secreted away in legislative history.<sup>192</sup>

\*\*\*\*\*

The concurrent legislation model thus answers a good many of Article V's riddles in a way that is more consistent with constitutional text and structure than any other theory to date. While perhaps not perfect, it offers a principled explanation of *why* amendment proposals have potentially unlimited life, how it is that Congress may rescind such proposals, and why states may repeal their ratifications or attach procedural and substantive conditions to their ratifications. Much the same analysis would apply to the ratification of amendments proposed by a constitutional convention, though certain consequences flow from the fact that the proposing authority is different. First, the power of a convention to rescind a proposed amendment would appear to expire with the end of the convention. Second, there is a substantial question whether *Congress* would have power to repeal (by two-thirds of both houses?) an amendment proposed by a convention. The better answer, as suggested by the discussion in the next Section, is that the Framers saw

conventions as a way of circumventing, and thus circumscribing, Congress. It would appear contrary to that intention to permit Congress to repeal a convention's proposal. \*733 The power to repeal an amendment proposal should exist only in the same body that proposed it.<sup>193</sup>

But these last questions, concerning the convention-proposal method, are difficult. To date, of course, there has never been a convention called pursuant to Article V. Consequently, these issues have never arisen in practice. Perhaps they are academic curiosities. But if the concurrent legislation model is taken seriously as a *general* theory of Article V-applicable to the processes by which states apply for a constitutional convention as well as the processes by which proposed amendments are ratified-these questions may not be so academic after all.

#### IV. CUMULATING APPLICATIONS ACROSS TIME AND SUBJECT: A CALL FOR A CONVENTION

If the concurrent legislation theory is an appropriate way of understanding the formal requirements of Article V with respect to amendments proposed by Congress, how (if at all) does that theory relate to Article V's alternative method of proposing amendments-a constitutional convention called by Congress in response to the applications of two-thirds of the state legislatures? Does the "legislation" theory apply there, too, and, if not, can this theory be a satisfactory approach to Article V? If the theory does apply, does it suggest that, just as state ratifications may be cumulated over the course of two hundred years, so may convention applications by state legislatures?

The convention method poses difficult and important questions for the model I have proposed. But the convention method poses difficult questions for *any* approach to Article V. A great number of prestigious constitutional scholars have found the convention method inscrutable, raising seemingly unsolvable riddles.<sup>194</sup> One is tempted to answer the above questions by \*734 drawing a convenient line: the two amendment proposal methods are, however related, sufficiently distinct in character and in the theoretical problems they present that they need not be treated under a single theoretical rubric. Just as a general theory of the Free Speech Clause need not transpose neatly into a theory of the Free Exercise Clause, the concurrent legislation model is sufficient for its purposes if it clarifies understanding of the Article V process with respect to congressionally proposed amendments-the only method employed to date. The problems of the convention method are a world of their own, to be left for another day.

But that answer is too easy. While the two proposal methods may be seen as separate alternatives bearing no necessary relation to one another, Article V does not readily divide into a "congressional proposal" clause and a "convention proposal" clause, subject to different analytic methods. Both methods present the same two textual features-cumulation of the separate actions of separate states, and the lack of any provision specifying time limitations within which that cumulation must occur. A theory of the amendment process applicable to congressional proposals should at least take a stab at explaining the convention process, even if only to explain how distinctions between the two processes justify different rules. The throwaway line, that a convention has never been employed and is unlikely to present more than interesting but purely theoretical issues, sounds too much like Professor Dellinger's confident assertion in 1983 that the issue of the Congressional Pay Amendment's amenability to ratification after two centuries was "[not] likely to arise."<sup>195</sup> Moreover, it *does* seem likely that the issue will arise, in light of the acceptance of the Twenty-seventh Amendment, with its long period of ratification. Now more than ever, people may press the point: if an amendment may be ratified over the course of centuries-if a requirement of contemporaneity may not be read into Article V-why may not convention applications similarly be cumulated over decades?

\*735 The constitutional lessons of the Twenty-seventh Amendment are therefore perhaps of most immediate importance for the constitutional convention side of Article V. Moreover, the implications of the concurrent legislation model are rather remarkable and suggest a startling conclusion: *Congress is probably under a current obligation to call a constitutional convention.*

### A. Formulating the Counting Rules

The first step toward this conclusion is, as suggested, that convention applications, like amendment ratifications, may be cumulated over time. This would seem to follow from a straightforward application of the principles validating the Twenty-seventh Amendment: if unrepealed state ratifications of amendment proposals may be cumulated over time, unrepealed state convention applications should similarly be capable of being cumulated over time.<sup>196</sup> An application for a constitutional convention is, like a ratification of a proposed amendment, a species of legislation—a state legislative enactment with federal constitutional consequences. Such applications may be rescinded later or modified by the enacting state, but so long as they remain unrepealed they retain their full legal force. Applying the formal principles of the concurrent legislation model, it follows that when two-thirds of the states *concurrently have in place* such legislation, Congress is obliged to call a convention.<sup>197</sup>

The real question is whether, to permit cumulation, the applications for a constitutional convention all have to say approximately the same thing. The \*736 twentieth-century practice (but, interestingly, not the practice in the first century under our Constitution<sup>198</sup>) has been for states making application for a convention to include a statement of at least the general subject matter on which an amendment is sought. A good many such applications have been submitted asking that a convention be called to address specific topics, such as balanced budgets, reapportionment, school prayer, busing, and abortion.<sup>199</sup> The assumption that appears to have animated subject-specific campaigns for conventions is that a sufficient number of applications *on that subject* would obligate Congress to call a convention (though, as discussed presently, there has been a good deal of debate over the ability to limit the subject matter the constitutional convention may consider). To date, a two-thirds majority of states has never called for a convention on any particular subject, so even assuming that such applications could be cumulated over time, the magic number (thirty-four) has never been reached.<sup>200</sup> But *if* applications may be cumulated over time *and if* applications addressing disparate subjects can be added together to form a sufficient number of applications for a *general* constitutional convention (i.e., one not limited to amendments on a certain subject matter), then it is entirely possible that Congress is at present required to call a general convention.

Two additional factors make the question even more complex. First, many states have submitted numerous applications on multiple subjects over many years. There have been nearly four hundred convention applications submitted by the fifty states over the past 205 years. Since each state can count no more than once toward the two-thirds majority required for convening any particular convention, difficult questions are presented concerning the legal effect of various state applications in light of successive applications. Second, the states have been submitting these applications in the absence of any consensus as to whether a constitutional convention may or may not be “limited” to a specific \*737 subject and the legal effect of subject-matter limitations (or of statements of purpose) contained in such applications. State convention applications thus pose a thorny problem of interpreting legal signals enacted where there is uncertainty over how those signals are to be understood and aggregated. Thus, whether or not Congress is obliged to call a constitutional convention turns on a complex inquiry into (i) the proper Article V rule concerning when an application is valid, (ii) how the states' various applications for a convention should be interpreted (and whether they satisfy this rule), and (iii) the legal effect of an invalid application on a state's earlier, valid applications. For purposes of clarity, it is important to consider each inquiry separately.

#### 1. Limited Versus Unlimited Conventions—Article V's Background Rules

Can there be such a thing as a “limited” constitutional convention? May a state limit its application to a specific proposal or subject matter? Professors Charles Black and Walter Dellinger have (separately) answered “no” to both of these questions, arguing that any convention must be plenary and that a state application for anything other than a general convention consequently is no application at all; such applications all count as “zeros” in the two-thirds tally. Thus, even

if applications concerning disparate subjects otherwise could be cumulated to create the necessary two-thirds of states, there is still an insufficient number of applications because all of the subject-specific applications are invalid.<sup>201</sup>

On the other hand, Professor William Van Alstyne and others have argued that a convention *may* be limited to a single subject and that Congress has the power to reject any nonconforming amendment coming out of such a convention.<sup>202</sup> The implicit consequence of this view is that applications \*738 reciting different desired amendment topics should be separately cumulated; Congress is under no obligation to call a convention unless there are at least thirty-four applications proposing an amendment on the same subject (though the difficulty of determining what counts as a “match” remains).<sup>203</sup> The “political question/congressional power” approach pretends to cut through all of these issues by leaving everything up to Congress. But even if Congress is the ultimate decisionmaker, the question of the appropriate standard for Congress to employ in making its count remains.

I submit that the question of whether a convention can be “limited” is distinct from the question of whether an application that recites a proposed subject matter can be valid. Moreover, the answers to the two questions are different. As to the first: there can be no such thing as a “limited” constitutional convention. A constitutional convention, once called, is a free agency. Even if called for a specific purpose, and even if Congress purports to limit its mandate to proposing (or not proposing) amendments reflecting that purpose, the convention may propose what it likes-and Congress is bound to submit its proposals for ratification.<sup>204</sup> 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.”<sup>205</sup> 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.<sup>206</sup>

The text of Article V creates only two checks on the convention: the need for three-fourths of the states to ratify its work before the amendments become part of the Constitution, and Congress' control over whether the ratification method is by state legislatures or state ratifying conventions. The text supplies no basis for inferring a power, on the part of either Congress or applying state legislatures, alone or in concert, to limit what the convention may consider. If anything, the two textual checks of state ratification and congressional control \*739 over the mode of ratification tend to negate any inference of a further power of Congress or the states over the *proposing* power of the convention.<sup>207</sup>

Finally, the *structure* of the Article V text supports an inference that the convention must have plenary power to propose amendments on whatever subjects it deems appropriate. The convention-proposal method is worded in parallel with the congressional-proposal method, implying an equivalence of their proposing powers: “The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid ... when ratified ....” There is no limitation on what amendments Congress may propose to the states. Since the convention method is a substitute for the congressional method, it presumably has an equivalent scope of authority and can no more be subject to limitation than Congress.<sup>208</sup>

Professor Dellinger's work buttresses this textual argument with an historical and structural one: evidence of the original intention of the convention method of Article V, drawn from the records of the (first) constitutional convention and the ratification debates, indicates that the convention method of Article V was intended to *avoid* reliance on Congress. If states could call for a limited convention, Congress would be placed in the position of prescribing and enforcing (through refusal to submit the convention's products) limitations on the work of the convention, giving Congress a major role inconsistent with the convention method's intended purpose.<sup>209</sup> On the other hand, if that problem were avoided by state applications specifying a particular text as a limitation on the work of the committee, the amendment proposing

power would have been relocated to the states and the work of the convention rendered a cipher or sham.<sup>210</sup> Dellinger concludes:

**\*740** The proceedings [at Philadelphia] suggest that the framers did not want to permit enactment of amendments by a process of state proposal followed by state ratification without the substantive involvement of a national forum. Permitting the states to limit the subject matter of a constitutional convention would be inconsistent with this aim. If the state legislatures could not only control the text of the proposed amendment, but also limit the convention to that subject, effective proposal power would have been shifted to the state legislatures. If the states could confine the convention to a subject, but not to a specific amendment, and the applying legislatures suggested different limitations, then Congress would be forced to define and enforce limits on the convention. Such action would conflict with a different aim of the drafters: the desire to create a mode of proposing amendments in which Congress played no significant role. In order to satisfy the various objectives of the framers, a convention must be free to define for itself the subject matter it will address; the state legislatures may call for such a convention, but they should not be permitted to control it.<sup>211</sup>

Finally, the best early evidence of “contemporaneous understanding,” as revealed by early practice, suggests that the founding generation understood conventions to be plenary. Certainly that must have been the assumption after the Philadelphia Convention of 1787 that drafted Article V, as the men at Philadelphia were widely thought to have exceeded the scope of their authority and the states ratified their handiwork.<sup>212</sup> Moreover, several ratifying states included proposed amendments with their ratification (to be considered either by Congress or by a second convention). Though some issues appeared in many state proposals (especially with respect to freedom of the press, religious freedom, and the right to a jury trial in civil cases),<sup>213</sup> overall the suggested amendments were fairly disparate.<sup>214</sup> Congress proposed a Bill of Rights **\*741** containing the more popular amendments, but if it had not done so, contemporary thinking suggests that Congress might well have been obliged to call a convention in response to a sufficient number of formal state applications, and that a second convention would have had full power to undo the work of the first.<sup>215</sup>

Professor Van Alstyne lucidly sets forth all of these arguments—and an additional one that the contrary view raises “[e]ndless (and endlessly intractable)” practical problems of judging convention applications and limiting the work of the convention<sup>216</sup>—only to reject them. In light of the forcefulness of his presentation and his concession that there is “*much* going for” the general convention view,<sup>217</sup> Van Alstyne’s reason for rejecting these arguments seems most inadequate. Van Alstyne’s view is premised on his general sense, gathered from his reading of the historical records of the Philadelphia convention, *The Federalist*, the ratification debates, and early congressional discussions, *considered as a whole*,<sup>218</sup> that all involved parties understood the Constitution to be something of an experiment and that the need for “particular repairs might well arise almost at once.”<sup>219</sup> Thus,

a generous construction of what suffices to present a valid application by a state, for consideration of a particular subject or of a particular amendment in convention, is far more responsive to the anticipated uses of Article V than a demanding construction that all but eliminates its use in response to specific, limited state dissatisfactions.<sup>220</sup>

**\*742** The problem with Van Alstyne’s view is that the premise, even assuming it to be correct, does not warrant the conclusion. Even if it was intended that it be relatively easy for the states to force Congress to call *a convention* in response to some particular event or concern, it does not follow that the convention *must* therefore be limited to consideration of

the particular concern that led the states to seek it. It is equally plausible to conclude from Van Alstyne's premise that there should be no subject-specific counting rule; that all applications should be regarded as general unless specifically conditioned; that state applications expressing different subject matter concerns should be added together to satisfy the two-thirds requirement; and that if states wish to limit the work of the convention to the specific subject or subjects that animated their applications, their delegations may do so at the convention.<sup>221</sup>

In sum, the best arguments concerning the text, structure, history, and political theory of Article V's convention provisions all cohere to suggest that there can be no such thing as a "limited" constitutional convention. Those who dread a "runaway" convention thus misapprehend the very nature of a constitutional convention, which is inherently illimitable in what it may propose. In that sense, any federal constitutional convention is necessarily a "runaway" convention.<sup>222</sup> Certainly, the Philadelphia Convention of 1787 fits this characterization. The delegates pressed the outer limits of their authority in proposing not simply amendments to the Articles of Confederation, but an entirely new frame of government. A constitutional convention today would have no less power to run away from existing structures and practices and propose radically new government arrangements and greatly enlarged-or diminished-individual rights.

But it does not follow from Congress' inability to limit the work of a constitutional convention that a state application specifying a subject-matter purpose for its convention application might not still be a valid application for a general convention. Professor Black's approach glides too easily from the one question-how is the language of Article V to be construed with respect \*743 to the question of limited conventions?-to the other-how is the language of *state applications* to be construed with respect to whether they purport to be conditioned on limiting the subject of the convention?<sup>223</sup>

These are two entirely different questions.<sup>224</sup> Indeed, even if one accepts the Van Alstyne position on "limited" conventions, it does not follow that subject-specific state applications should be understood as requests for conventions that are prohibited from considering other topics. Black's approach collapses two distinct questions into one: it assumes that the answer to the second question follows inevitably from the answer to the first. But matters are not that simple.

## 2. *Interpreting Convention Applications: The Essential Irrelevance of the Limited/Unlimited Convention Debate*

The first question in interpreting any state convention application is whether the application is truly conditioned on limiting the convention's \*744 deliberations (in the extreme case, to a certain proposed text).<sup>225</sup> There are countless examples of such explicitly conditional applications-in fact, they have become stylish in the past twenty years or so. The most frequent formulations of this type request a convention for the "sole and exclusive purpose" of considering amendments on subject X.<sup>226</sup> Other applications are even more explicit, going on to state that the application shall "be deemed null and void, rescinded and of no effect in the event that such convention not be limited to such specific and exclusive purpose."<sup>227</sup>

If an application is thus conditioned on limiting the convention's agenda, and if Article V prohibits limited conventions, then the condition is invalid and with it the entire application.<sup>228</sup> (Alternatively, even if "limited" conventions were permissible, such applications would "count" only toward the total needed for a convention *thus limited*; they do not count toward the number needed for a *general* application.) Crucially, however, a convention application \*745 specifying a *purpose* of the application is not the same as one specifying a *condition* of the application and has dramatically different legal consequences. A state might ask for a constitutional convention "to consider" or "for the purpose of proposing" a Balanced Budget Amendment without thereby making its application conditional on the convention actually being so limited. Thus, the application is, in legal effect, an application for a *general* constitutional convention, in which the applying state's present priority or proposed agenda is consideration of a Balanced Budget Amendment.<sup>229</sup>



Two fairly representative examples illustrate the point. Arizona's 1980 application addresses the use of federal funds to coerce state government action:

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 ....<sup>230</sup>

Similarly, Connecticut's most recent convention application provides:

That pursuant to the provisions of [article V of the Constitution of the United States](#), the Legislature of the State of Connecticut applies to the Congress to call a convention *for the purposes of* proposing an amendment to the Constitution of the United States preventing the taxation of the income of the residents of one State by another State ....<sup>231</sup>

The best—the most straightforward, the least premised on any particular view of [Article V](#)—reading of such applications is that they are not *conditioned* on the work of the convention being limited to a certain subject matter or text. They simply state the specific concern that has led the state to apply for a convention.<sup>232</sup>

**\*746** I believe the question of how such convention application language should be interpreted is one that may be answered without regard to how [Article V](#) is interpreted. Even if [Article V](#) permits “limited” conventions, a state application “for the purpose of proposing a Balanced Budget Amendment” does not specify a subject-matter limitation on the work of the convention. Even under a “limited” convention regime, such language should not count toward applications for a convention call “limited” to that subject, because the language contains words of purpose only, not of limitation.

That is not to say that [Article V](#) is wholly irrelevant in construing state applications. One might well argue that ambiguously worded applications should be construed to fit within [Article V](#)'s actual counting rule, on the premise that the legislature intended its application to have legal effect. Thus, the fact that [Article V](#) does not permit limitations on the work of the convention might provide an additional, reinforcing argument for construing applications reciting a “purpose” as applications for a general convention. Conversely, were [Article V](#) construed to permit limited conventions, that might furnish a plausible argument for construing subject-matter “purpose” applications as applications for a limited convention (though such a construction would still be problematic because it would require a distortion of the natural reading of the language).

The real difficulty with reliance on any background rule of recognition contained in [Article V](#) as a basis for interpreting convention applications is that the states have enacted their applications under conditions of substantial uncertainty as to what that rule of recognition in fact *is*. While Louisiana's recent declaration that “the best legal minds” have determined that a convention cannot be limited is doubtless flattering to Professors Black and Dellinger,<sup>233</sup> it cannot be said that their views have commanded universal assent. The argument over “limited” constitutional conventions rages on and no precedent answers the question authoritatively. There is, in short, no settled baseline rule. Given pervasive disagreement, and thus uncertainty, over the constitutionality of limited conventions and the validity of limited or conditional applications, state applications containing subject-specific language are something of a shot in the dark.

Since there can be little justifiable reliance in the presence of such uncertainty, or any legitimate “expectations,” it is preferable to construe the \*747 language of convention applications in their most natural sense, without any assumption of a baseline rule one way or the other. If anything, the only “push” that the Article V interpretive debate can give on the point of interpretation of applications is to create the possibility that a state might rationally engage in a “straddle”—that is, craft a convention application (or a series of applications) so as to fit within *whichever* rule of recognition is ultimately decided to be correct. For example, faced with uncertainty as to whether a convention may be limited (and only same-subject applications cumulated) or must be general, a state might deliberately enact an application “for the purpose of” a Balanced Budget Amendment if it was indifferent to whether the convention be limited or general and wished its application to count no matter which rule of recognition is correct. Even more likely, a state might well adopt multiple different convention applications on different subjects, or simply use different language, in order to cover the different possible Article V counting rules.<sup>234</sup> In any event, no matter what Article V's counting rule, it does not follow either as a matter of textual interpretation or as a matter of logic that a subject-matter purpose recited in a convention application should be regarded as a statement that the application is not to be counted unless a convention is limited to consideration of that subject alone.

Professor Dellinger's position on the question of the effect of the Article V debate on interpretation of the applications themselves seems somewhat odd.<sup>235</sup> Dellinger first makes a powerful and persuasive case that a convention cannot be limited. He then recognizes that “nothing in the argument against the limitation of subject matter in the work of the convention suggests that states may not validly recommend that a convention deal with a single subject, or that it consider a draft text of an amendment, so long as the applications do not assume that the applying state legislatures or Congress can limit the convention's agenda.”<sup>236</sup> But, strangely, this leads Dellinger to adopt a “clear statement” rule for interpreting convention applications that runs in the opposite direction of his interpretation of Article V—that applications mentioning a subject-matter proposal or purpose not be treated as general applications unless it is “clear that the suggested limit is only a recommendation”<sup>237</sup>—on the premise that there is (or was in 1979) a “widespread assumption” that Dellinger's position is incorrect and that states may have acted on that erroneous assumption.<sup>238</sup> “Before summoning a convention,” Dellinger concludes, “Congress ought to be confident that those \*748 who applied for the convention did so with a proper understanding of the convention's authority.”<sup>239</sup>

Dellinger's point admittedly has some intuitive appeal. In fact, the appeal is so strong that I will later endorse a very limited version of it—that Congress may stay a convention call at least for a brief period in order to give states a chance to rescind or clarify the status of their convention applications in light of a proper understanding of Article V's rule of recognition.<sup>240</sup> In principle, however, Dellinger's position is flawed in several respects.

First, there seems to be no textual or historical justification for adopting a clear statement rule of any kind. Second, even were such a rule of construction warranted, it would require a canon of considerable weight to overcome the plain language of applications stating only a purpose. Such language is certainly not in equipoise, but strongly favors a reading (absent any canon) of *not* imposing a condition on the work of the convention. Third, as implied above, a clear statement rule logically should point in the same direction as the Constitution. If Dellinger is correct that conventions cannot be limited, one would think that the proper canon would be to avoid a construction that renders state applications a nullity (if such a construction is fairly possible).<sup>241</sup> Fourth, Dellinger at this point seems to assume that the Article V choice is between a rule that conventions must be general and a rule that conventions *must* be limited—and that state applications are seeking to fit within either a “general only” or a “limited only” rule. But not even the most ardent defenders of limited conventions contend that a convention *cannot* be general. There is simply no *a priori* reason to presume that language expressing a purpose reflects a preference for a limited convention, even within a regime that admits of limited conventions, so long as that regime also admits of general conventions. As noted above, if any presumption is warranted, it is that the state *does not know* what the rule of recognition is, and may well have chosen “purpose” language to straddle the possibilities.

Finally, and perhaps most importantly, Dellinger's approach is inconsistent with the formalism of [Article V](#).<sup>242</sup> Strictly speaking, what *counts* is the [Article V](#) legal effect of the language adopted by state applications, not what \*749 states might have “had in mind” when they adopted such language. The arguments made by an increasing number of scholars and jurists against reliance on legislative history<sup>243</sup> would seem to apply with special force to interpreting convention applications, where the need for uniformity, in judging multiple applications by multiple sovereigns, translates into a practical necessity to avoid inquiry into secret or hidden state-law principles of interpretation or legislative history. Thus, it would be practically impossible for anybody to be “confident” that “those who applied for the convention did so with a proper understanding of the convention's authority.”<sup>244</sup>

In short, there is no persuasive reason to read words of purpose as if they were words of limitation. A convention application phrased without explicit conditions is an application for a general convention—“a Convention for proposing Amendments.”

### 3. *The Legal Effect of an Invalid Application*

Once it is determined whether any particular application states a subject-matter condition (and thus should not be counted toward a general convention call) or merely states a subject-matter purpose or agenda (and thus counts toward a general convention), the question becomes what legal effect multiple applications have on each other. Specifically, what is the effect of subsequent *invalid* (because containing an impermissible limitation) applications on an earlier, valid application for a general convention? As noted above, each state can count only once toward a general convention call. To put the matter colloquially, each state's light is either “on” or “off” for a convention call, and [Article V](#) requires that two-thirds of the states' lights be “on” for a general convention to be called. How do you decide whether a state's light is on or off for a general convention?

Presumably, later-enacted convention applications of a state supersede earlier-enacted applications of that state, to the extent that they are inconsistent with one another. It is therefore appropriate to work backwards from a state's most recently enacted convention application, and determine its status as a \*750 potential general convention application (does it indicate that the state's light is “on” for a general convention or is it an application for the “sole and exclusive” purpose of a limited convention?). If the most recently enacted convention application is properly regarded as general, that state's light is on and the inquiry ends there. Count that state toward the two-thirds needed for a general convention.<sup>245</sup>

But if the most recently enacted application is conditional—as a majority of the states' most recent applications are—the inquiry must proceed to another step: what is the legal effect of this (invalid) condition on whether a state's light is “on” or “off” for a general convention? There are three logical possibilities, each with different consequences if that interpretive “door” is chosen:

Door #1: The condition is invalid but *severable* from the application, so that what remains is a general application. The state's light is therefore ON. (The “severability” option.)

Door #2: The condition is invalid and not severable, with the legal consequence that the application is a complete *nullity*; it is as if that application had never been submitted to Congress. Whether that state's light is on or off depends on interpretation of the next earlier convention application. (The “legal nullity” option.)

Door #3: The condition is invalid and not severable, with the legal consequence that the application is *ineffective* as counting toward the two-thirds requirement, but the application is still legally effective in the sense that it operates to *repeal* any *earlier* valid application by that state. The state's light is therefore OFF for a general convention. (The “repealer” option.)

Door #1 intuitively seems the least plausible. How (as Professor Black has asked) can an application for the “sole and exclusive” purpose of a convention limited to a specific subject be deemed an application for a general convention?<sup>246</sup> Generally accepted principles of severability confirm this intuition.<sup>247</sup> Severability asks not whether the legislature would have enacted the rest of the bill absent the invalid provision (a question that public choice theory reveals is unanswerable),<sup>248</sup> but whether, shorn of the invalid \*751 provision, the rest of the law can stand alone and operate in a manner consistent with (apparent) legislative intent.<sup>249</sup> Treating a “sole and exclusive” application—an application that imposes a *condition* on the validity of the application—as a general application would be manifestly contrary to legislative intent. Door #1 is clearly the wrong choice.<sup>250</sup>

Door #2 seems at first the most natural approach: an application with an invalid condition is just plain invalid; it has no effect whatsoever. It is as if the legislature never enacted that application.<sup>251</sup> There are, however, two reasonable objections to this view, the first formalist and the other intuitive.

The formalist objection is that when a court finds a statute “unconstitutional” it does not literally “strike it down” in the sense of wiping it from the statute books. Rather, a holding of unconstitutionality means only that the court will *refuse to give effect* to that statute (or particular provision thereof) in a proceeding before it.<sup>252</sup> But that would not necessarily mean that the statute has *no* legal consequences. It remains a possibility that the statute could have repealed—rendered ineffective—some other statute, and nothing in the holding of unconstitutionality necessarily voids that result. It is this formalist approach that gives rise to the possibility set forth above as Door #3. The weakness in this objection is that a convention application that contains an invalid condition, under the proper [Article V](#) rule of recognition, is not actually “unconstitutional.” What *would be* unconstitutional is an act of \*752 Congress purporting to limit the work of a constitutional convention. An invalid condition simply renders the application *invalid*, and it is difficult to argue that a convention application is invalid for some purposes but valid for others. At the very least, the argument would require some fairly clear indication of the respective, and distinct, purposes of the enactment. Door #2 at least remains in consideration on this score.

The second, intuitive, objection to Door #2 is that it produces some unintended consequences. The upshot of a conclusion that a convention application for the “sole and exclusive purpose” of considering, say, a Balanced Budget Amendment is simply wiped off the books is that it requires resort to the next earlier state convention application to determine whether a state's light is “on” or “off” for a general convention.<sup>253</sup> Where a state has enacted a series of “sole and exclusive” applications on different subjects, a good number of the most recent ones might be declared invalid and resort made to the fourth- or fifth-most-recently enacted application (sometimes going back scores of years). Thus, a rather dated application, cast in language of purpose rather than condition, may become the basis for concluding that a state's light is “on” for a general convention—*notwithstanding* numerous subsequent applications that appear premised on a limited convention view.<sup>254</sup>

Such a conclusion is unsettling, but in exactly the same way that it is unsettling that the Twenty-seventh Amendment can be ratified after all these years, with so much having happened in the interim. If the argument above for \*753 the validity of the Twenty-seventh Amendment is sound, notwithstanding its somewhat counterintuitive result, then application of

the same basic principles to convention applications cannot be dismissed simply because it produces unexpected results. Door #2 remains alive-and presumptively correct, unless Door #3 provides a superior interpretation.<sup>255</sup>

The arguments in favor of Door #3 (the application is invalid as a convention application, but operative as a repeal of prior applications) are essentially the arguments against Door #2-the logical possibility of an intended repealer of previous, general convention applications, coupled with the somewhat unnatural feel of a result that would permit such older applications to remain alive when subsequent applications have been declared dead. It can be argued that a conditional application intuitively repeals a general application. Door #3 thus offers an appealing escape hatch.<sup>256</sup> But in addition to the answers given to these objections in the preceding paragraphs, there are several weighty objections to Door #3 in its own right.

First, in legislation generally (and it should be no less the case with legislation applying for a convention), repeals by implication are disfavored. Unless an intention affirmatively to repeal a prior enactment is clear on the face of the text or a *necessary* inference from the text as a whole, later enactments should be read as consistent with earlier enactments to the extent it is fairly possible to do so.<sup>257</sup> Indeed, on close examination, only one of the \*754 “sole and exclusive” applications contains language that can be fairly read as repealing prior applications.<sup>258</sup> Second, this argument is reinforced by the fact that where states have intended to repeal prior applications-either one in particular, or all of them, as Louisiana did in 1992-there has been no problem with expressing such a desire clearly.<sup>259</sup> If a state truly intended by a subsequent convention application to repeal an earlier one, it is not difficult to come up with the appropriate words. Silence would not seem a particularly apt way to express such an important intent.<sup>260</sup>

Third, and most importantly, there is an altogether reasonable construction (in fact, I believe it to be the best construction) of the “sole and exclusive” applications in their relation to prior applications in which the later application need not be understood as repealing the earlier one(s). Consider a hypothetical situation: California enacts three convention applications on three different subjects, all on the same day, and transmits them to Congress at the same time. Each application asks for a convention “limited in the subject it may consider and amendments it may propose” to consideration of, respectively, a Balanced Budget Amendment, a Term Limits Amendment, and a Flag Burning Amendment. Does any one of these applications repeal the others? Obviously not-at least not *necessarily*. A state might well submit multiple “sole and exclusive” applications on the assumption that each can stand validly and count toward a limited convention on each of those subjects. California is saying, in effect, “count application X toward the number needed for a limited convention concerned with a Balanced Budget Amendment (assuming that is \*755 the appropriate counting rule), count application Y toward the number needed for a Term Limits convention, and count application Z toward a Flag Burning convention,” while not intending that any one of X, Y, or Z render the others invalid.<sup>261</sup>

It is of no moment that there cannot be such limited conventions. That is not the issue here. The issue is whether the use of “sole and exclusive” language necessarily denotes an intention to repeal another application of that state. As the example makes clear, it plainly does not. Nor would it matter if California transmitted application X in 1991, Y in 1992, and Z in 1993. The language of Z does not necessarily imply that X and Y are rescinded. And the answer is again the same if the earlier enacted applications do not contain a subject-matter condition or limitation; there is no necessary intention to repeal a general application “W” by enacting a conditional application. California could well be saying, “count application W toward the number needed for a general convention, and count X, Y, and Z toward the number needed for limited conventions on the subjects mentioned therein.” The only *necessary* conclusion from “sole and exclusive” language is that a state is saying “our light is on for purpose Z (assuming that is permissible).” That is in no way equivalent to saying “our light is on for purpose Z and off for every other purpose.”

What's more, it seems more likely that a state would actually intend the former than the latter, for reasons discussed above concerning a state's possible intention to “straddle.” If a state is uncertain what Article V's rule of recognition is,

it might well submit numerous applications, on numerous subjects, and employing different wordings, in order to cover all the bases. Only if a state had a specific intent that its earlier applications should *not* count would such an approach be irrational (especially since there are clear ways of expressing such an intent).<sup>262</sup>

It would therefore seem that Door #3-reading subsequent “limited” applications as implied repeals of earlier general applications-is incorrect. \*756 Indeed, this conclusion follows even if it were assumed that limited conventions are permissible. An application for a *permitted* limited convention would still be saying “count this application toward a limited convention,” but need not be saying “repeal any and all outstanding applications.” Consequently, Door #3, while plausible and in some respects appealing, in my view is a less defensible interpretive option than Door #2. Door #2 is the correct choice.<sup>263</sup>

Having examined each necessary step of a “decision tree” for construing state convention applications, it is time to look at the consequences of this approach. If the standards that I have set forth as the best method for interpreting convention applications are followed as the applicable rules of decision-if applications stating a subject-matter purpose are valid, may be cumulated with other such applications stating different subjects, may be cumulated over time, and are not repealed by implication by subsequent (invalid) applications for a limited convention-then Congress is obliged to call a constitutional convention and has been for some time. There are, at present, forty-five states with their lights “on” for a general convention-eleven more than are needed to trigger Congress' duty to call a convention.<sup>264</sup>

#### B. Taking the Convention Possibility Seriously

But seriously, is Congress really obliged to call a constitutional convention? There are a few possible escape hatches from the above analysis, some potentially sound, others manifestly unsound.

The unsound ones come in some form of the suggestion that Congress is the judge of its own obligations and may simply decide that a convention is not a very good idea and refuse to call one. That such a position is contrary to the text of Article V should be obvious. The mandatory language of Article V is inescapable: upon application of the requisite number of states, Congress “*shall* call a Convention for proposing Amendments.”<sup>265</sup> And contemporaneous explication of this language makes clear that the words were \*757 understood to mean just what they seem to say.<sup>266</sup> Clearly, *on the merits*, the duty of Congress to call a convention is nondiscretionary. Article V makes clear that Congress does *not* have “plenary power” over whether to call a convention.

But even though Congress is in fact legally obliged to call a convention, is there anyone to enforce the obligation? Are courts prohibited from enforcing the obligation by the “political question” doctrine? As should be clear from my earlier discussion of the political question doctrine and *Coleman v. Miller*, I believe the answer is that the courts may-indeed, must-declare and enforce as law, in any actual case or controversy in which the question is necessarily presented, any and all substantive rules contained in the Constitution. Here, there is *no question* that Congress' duty, where it arises, is mandatory. There is therefore no basis for arguing that resolution of Article V has been textually committed to Congress' exclusive determination. This is a classic instance of a clear constitutional command that happens to be *directed to-not “committed to the discretion of”*-a particular branch.

Nor is there any lack of discernible standards, derivable from the constitutional text, that a court might apply. This Article has set forth such standards. One might disagree as to what those standards are, but it can hardly be said that deriving a rule is an impracticable exercise for courts. There is a clear standard for judicial decision and application; it simply requires a judgment holding that Congress is obliged to call a convention.<sup>267</sup> In short, \*758 if the issue of Congress' duty to call a convention is a nonjusticiable political question, so is practically every issue of congressional power. Finally, it should not be forgotten that even were the issue found nonjusticiable, that would not mean that

Congress legitimately possessed the power to decline to call a convention required by [Article V](#); it would only mean that nobody could prevent Congress from acting unconstitutionally.

A more weighty justiciability problem is the difficulty, and possible impropriety, of fashioning judicial relief. Yet the power of the courts to order actors in the political branches to take affirmative steps is by now familiar. *Marbury v. Madison* asserted the power in principle, and a wealth of landmark cases have involved precisely such judicial relief.<sup>268</sup> Especially where (as here) the duty of the political branches is regarded as *ministerial*-that is, nondiscretionary-there is no justiciability bar to relief.<sup>269</sup> Perhaps as a matter of equitable discretion, a court should not itself call for a convention in the event of Congress' default. But there is no Article III *bar* to their doing so and the experience of reapportionment suggests that such broad-reaching remedial authority is not inconceivable. Moreover, in our contemporary political culture a simple judicial declaration probably would be sufficient and would not go unheeded.<sup>270</sup> Thus, a party with standing (probably a state)<sup>271</sup> could bring a suit for declaratory and injunctive relief to require Congress to convoke a convention and the courts could grant such relief.<sup>272</sup>

The only escape hatch with possible merit is that Congress might stay its call for a convention for a short period of time to enable states to clarify their intentions with respect to the calling of a constitutional convention, in light of Congress' acceptance of the interpretation of [Article V](#) set forth above. The courts might validly exercise equitable discretion and decline to interfere with such action by Congress, so long as Congress proceeds "with all deliberate speed."<sup>273</sup> To the extent the conclusions of this Article are unexpected, it is \*759 reasonable for Congress to give states some chance to rescind their present convention calls. If, prior to actually calling a convention, enough states have revoked their prior applications, a court would no longer be in a position to grant declaratory or injunctive relief. Unlike amendment ratification, where the scale-tipping ratification makes an amendment proposal part of the Constitution (it is valid "when ratified" by the sufficient number), the scale-tipping convention application does not convene the convention, but only triggers a congressional duty. While that duty is obligatory, it is probably best characterized as a good faith duty to investigate and ascertain whether the constitutional requisites for calling a convention have indeed been satisfied, and only then to convene a convention within a reasonable time period. Congress, no less than the lower courts in the school segregation cases, needs time in which to make its judgment and time to carry it out. (Obviously, Congress is not obliged to call a convention to begin meeting the day after it discovers a sufficient number of applications, especially if there is some question as to the validity of those applications under [Article V](#)'s rule of recognition.) The "right" that corresponds to Congress' "duty" upon receipt of the scale-tipping convention application does not have the same kind and quality of "vestedness" as do legal rights created by a scale-tipping ratification of a proposed amendment (which immediately becomes *law*).<sup>274</sup> Thus, [Article V](#) probably permits the scale to be un-tipped, and a court order prevented, as long as Congress has not called the convention. The courts can enforce the congressional duty-and close the escape hatch-only as long as there remain extant a sufficient number of valid applications.<sup>275</sup> But if Congress takes no action, and enough states do not promptly rescind their applications, a suit brought by a proper party should produce a judicial decision directing Congress to call a constitutional convention, unrestricted in its subject matter.

Some states might take advantage of an opportunity to rescind their applications-to turn their lights "off" for a general convention. The prospect of an unrestricted constitutional convention strikes fear in the hearts of many. Former Justice William Brennan, regarded in some circles as a populist jurist, has called the prospect of a general convention of the People with plenary power to propose constitutional change "the most awful thing in the \*760 world."<sup>276</sup> Louisiana took much the same position in an intriguing 1992 resolution rescinding any and all of that state's prior convention calls:

Whereas, the Legislature of the state of Louisiana, acting with the best intentions, has previously made application to the Congress of the United States of America for the calling of a constitutional convention for the limited purpose of proposing certain amendments to the Constitution of the United States of America; and

Whereas, the best legal minds in the nation today are in general agreement that a convention, notwithstanding whatever limitation might be placed upon it by the call of said convention, would have within the scope of its authority the complete redrafting of the Constitution of the United States of America, thereby creating a great danger of [sic] the well-established rights of our people and to the constitutional principles under which we are presently governed ....

....

Therefore, be it *Resolved* That the Legislature of Louisiana does hereby rescind any and all previous applications to the Congress of the United States made by the Legislature of the state of Louisiana pursuant to [Article V of the Constitution of the United States of America](#) for the calling of a constitutional convention for any purpose, limited or general.<sup>277</sup>

Recognition of the formal legal consequences of convention applications might well lead to a number of Louisiana-style blanket rescissions. This is arguably a salutary consequence of accepting [Article V](#)'s formalism. A state that knows the rules of the game, and as a consequence desires not to play, can make its position clear without difficulty. [Article V](#) should be interpreted in a way that readily permits a state to conform its actual desires to the actual rules.

But even if Congress could *not* stay the calling of a convention to give states a chance to rescind their applications, and instead were to issue a call for an immediate convention, fears of a general convention seem greatly exaggerated and inappropriate. The power of the convention delegates to limit their *own* agenda at the convention (a power over which the applying states might well exercise considerable control by selecting delegates committed to enforcing a limitation on the agenda), combined with the power of the states to decline to ratify any unwanted amendment the convention proposes, should be regarded as a complete answer to fears that the convention will generate popularly unacceptable results. In the end, the fear of what a general convention might do (and three-fourths of the states ratify) is a fear of what might happen when the People act even in part without the filter of their representatives. It is, in short, an elitist fear of popular sovereignty, as applied to the most fundamental of "political questions": according to what principles \*761 are the people to govern themselves? It may be an understandable fear, but it is unworthy of our Constitution and of We the People who adopted it.

## V. CONCLUSION

The Twenty-seventh Amendment offers many lessons for our understanding of [Article V](#), chief of which are the virtues-and sometimes the surprising consequences-of formalism. Formalism is especially appropriate for interpreting a provision that consists entirely of mechanical procedures for a specialized lawmaking process. While [Article V](#) may have been designed to further certain values thought to be important in constitution-amending-such as the values of stability and predictability in the fundamental law of the nation, and the requirement of a large and diverse supermajority "consensus" of the people (as represented by states) before such stability and predictability may be disturbed-those values are reflected in [Article V](#) only to the extent they are furthered by its specific formal rules. To read [Article V](#) as standing only for a set of amorphous constitutional "values" to be balanced by Congress or the courts, rather than a set of formal procedures binding on Congress and the courts, is to undermine the very values of stability, predictability, and clarity of consensus that [Article V](#) is thought to further.



The present “law” of [Article V](#) is a hopelessly confused morass, precisely because of the Supreme Court's inconsistent attempts to read [Article V](#) as signifying some value, rather than as stating rules of procedure. As a consequence, nearly every one of the Court's major [Article V](#) precedents is vulnerable in some important respect. Each case points out the flaws in prior cases while committing its own errors. *Dillon v. Gloss* wrongly asserted (in dictum) an additional requirement of a “contemporaneous consensus” in support of an amendment ratified in accordance with all of [Article V](#)'s textual requirements. *Coleman v. Miller* (apparently) interred *Dillon's* dictum, but substituted a menu of mistakes of its own (none commanding the votes of a majority of Justices)-treating questions of law concerning the meaning of [Article V](#) as either nonjusticiable “political questions” or as issues substantively committed to Congress' exclusive discretion. Either view contradicts generations of earlier judicial precedents deciding precisely such [Article V](#) issues (though often deciding them incorrectly) and implausibly requires acceptance of the power of Congress to amend the amending process at will, unchecked.

Ordinarily, a general theory of a provision of the Constitution, such as the concurrent legislation model that I have defended here with respect to [Article V](#), that requires repudiation of nearly every Supreme Court precedent on the topic, should be treated with great suspicion. Here, however, it is the Court's episodic, erratic precedents, nearly all of which require as a logical premise a point emphatically rejected by another precedent, that should be treated with \*762 suspicion. The leading theories of the amendment process each seize on a different aspect of the case law for their foundation, and often ignore contradictory cases or weaknesses in the Court's reasoning. It is difficult to avoid forming the impression that each different theory is crafted for the occasion of different substantive amendment proposals.

Ordinarily, too, there might be reliance interests that counsel against adopting new models or understandings of constitutional provisions. A change in the interpretation of legal rules can upset expectations of parties who relied on a previous governing interpretation. But here again, for [Article V](#) there is no clear set of interpretive rules on which any party reasonably could have relied. *Dillon's* “contemporaneous consensus” requirement was pure dictum, rejected by a majority of Justices in *Coleman*. *Coleman's* “political question” approach does not set forth a set of interpretive rules but merely specifies that Congress may be the interpreter, guided by whatever rules (if any) its members choose to apply on an after-the-fact, case-by-case basis. Certainly in voting to “accept” the Twenty-seventh Amendment, Congress set forth no clear rules explaining how to interpret [Article V](#). Neither Congress nor the Court has provided any guidance for the future.

One of the most important virtues of formalism in general, and the concurrent legislation model of [Article V](#) in particular, is that it provides a clear set of background legal rules against which the relevant legal actors (here, Congress and the states) may operate with full knowledge of the legal consequences of their actions. As one commentator has stated, “[o]nce you know the rules, you can work around them, and quite often achieve your substantive goals without any constitutional monkey business.”<sup>278</sup> A Congress that wishes to avoid the possibility that its amendment proposal might be ratified decades or centuries later can prevent such a result by placing a time limitation in the amendment proposal (either in the text of the amendment itself or in the resolution transmitting the proposal to the states). A state wishing to limit the period of effectiveness of its ratification may similarly state this in its instrument of ratification. Congress may also rescind, by two-thirds majorities of both houses, its prior amendment proposals, and states may rescind their ratifications (prior to the amendment's adoption as part of the Constitution by the thirty-eighth ratification). States wishing to apply (or not to apply) for a constitutional convention may readily accomplish their intentions, once they have a clear understanding of the rules of the game.

Such an understanding is not provided by current [Article V](#) law. Yet perhaps nowhere else in constitutional law is such an understanding so \*763 important. As Professor Dellinger has stated (prior to the adoption of the Twenty-seventh Amendment), “a satisfactory amendment process demands, at a minimum, that the rules for the adoption of an amendment be clearly understood.”<sup>279</sup> The concurrent legislation model provides formal clarity and consistency

with the [Article V](#) text, a minimum requirement for any interpretation of [Article V](#). No other theory put forward by the Supreme Court or by academic theorists can make this claim.

The concurrent legislation model also has greater explanatory power than any other theory of [Article V](#) advanced to date. Adherence to a straightforward and fairly literal reading of [Article V](#) is the only methodology that can provide a principled justification for the Twenty-seventh Amendment as part of our Constitution. If that amendment is valid, then the contemporaneous consensus and contract models *must* be wrong. Congress' rush to endorse the amendment theoretically keeps the plenary congressional power theory alive, but it is virtually impossible to take the congressional power theory seriously as a principled explanation for the amendment process generally. The concurrent legislation theory advanced here requires modification or repudiation of some Supreme Court cases not already rejected by subsequent cases, but it is the only principled theory that can both explain the Twenty-seventh Amendment as a valid part of the Constitution and offer principled (if perhaps surprising) answers to [Article V](#)'s related puzzles.

The fears sometimes expressed about giving [Article V](#) its natural reading are fears that, despite [Article V](#)'s very difficult gauntlet of formal hurdles and abundance of procedural checks, the amendment process will be *too easy* and too much out of the hands of Congress or the courts—that is, too much in the hands of the People themselves. This is especially true of the specter of a second constitutional convention. But that is exactly why the Constitution does not place the amendment process *exclusively* under the control of politicians and judges. The People are the ultimate source of all legitimate government power and can be trusted with the mechanisms they have been bequeathed for altering or abolishing their form of government, with or without the consent of those who presently govern them. Certainly the People can be entrusted with the management of the amendment process as written by the Framers, and not be forced to accept some revision written for the benefit of their overlords.

#### Footnotes

<sup>d</sup> Associate Professor of Law, University of Minnesota Law School. I owe a tremendous debt of gratitude to my research assistant, Dale Caldwell ('94) for his tireless work in finding and compiling the texts of the literally hundreds of state applications for a constitutional convention that have been submitted in the history of our nation. Citations for these applications are collected in the Appendix. I would also like to thank Akhil Amar, Dale Caldwell, Dan Farber, John Harrison, Sandy Levinson, Mark Movsesian, John Nagle, William Van Alstyne and the participants at the University of Minnesota faculty workshop for their helpful comments and suggestions on earlier drafts of this Article. Of course, none of these persons should be held responsible for what I say.

<sup>1</sup> *The Man Who Would Not Quit*, PEOPLE WKLY., June 1, 1992, at 72.

<sup>2</sup> Richard L. Berke, *1789 Amendment Is Ratified but Now the Debate Begins*, N.Y. TIMES, May 8, 1992, at A1; Robert Vitale, *Illinois Finishes 40th in Amendment Race*, CHI. TRIB., May 13, 1992, § 2, at 4.

<sup>3</sup> The Twenty-second Amendment (limiting the President to two terms in office) was proposed on March 21, 1947, and was ratified by the requisite number of states on March 1, 1951. Proposal and Ratification of [U.S. Const. amend. XXII](#), U.S.C. 1xiii (1988). The Sixteenth Amendment (authorizing a federal income tax) also took nearly four years to ratify; it was proposed on July 12, 1909, and was ratified on February 25, 1913. Proposal and Ratification of [U.S. Const. amend. XVI](#), U.S.C. 1xi (1988).

<sup>4</sup> Berke, *supra* note 2, at A21; *see also infra* note 16.

<sup>5</sup> Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15. Professor Tribe's various positions on congressional power over the amendment process are discussed *infra* text accompanying notes 146-57.

<sup>6</sup> [1 U.S.C. § 106b \(1988\)](#) provides:  
Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the

same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

7 The views of the Department of Justice were later set forth in a detailed opinion prepared by the Office of Legal Counsel. Memorandum for C. Boyden Gray, Counsel to the President, from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel (Nov. 2, 1992) [hereinafter OLC Opinion] (setting forth the analysis underlying legal advice given earlier). The Office of Legal Counsel opinion was made public near the end of the Bush Administration. 16 Op. Off. Legal Counsel 102 (1992) (preliminary print).

8 There have been a few skeptics, however. *See, e.g.*, William Van Alstyne, *What Do You Think About the Twenty-seventh Amendment?*, 10 CONST. COMMENTARY 9 (1993); *see also infra* text accompanying notes 18-20 (noting immediate skeptical reactions of several scholars).

9 138 CONG. REC. S6948 (daily ed. May 20, 1992) (Senate vote); 138 CONG. REC. H3505 (daily ed. May 20, 1992) (House vote).

10 It is unlikely that the courts would recognize “congressional standing” to bring a lawsuit for a declaratory judgment on the amendment’s validity or on each branch’s respective powers over the amendment process. The courts require legislation in conflict with the amendment’s text to create a “case or controversy” under Article III. *See, e.g.*, *Barnes v. Kline*, 759 F.2d 21, 28 (D.C. Cir. 1985) (stating in dicta that congressional standing is improper where “Congress is asking for an advisory judicial opinion on a hypothetical question of constitutional law”), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *cf. Goldwater v. Carter*, 444 U.S. 996, 997 (1986) (Powell, J., concurring in the judgment) (expressing the view that interbranch disputes are justiciable only when “each branch has taken action asserting its constitutional authority” and “the political branches [have] reach[ed] a constitutional impasse”). Nonetheless, since the amendment prohibits laws “varying” congressional compensation from taking effect without an intervening election, a test case could be created by Congress voting itself an immediate midterm or retroactive pay cut. Such a statute would enable a member of Congress to bring a “real” lawsuit for his or her higher salary.

There has already been one lawsuit challenging the constitutionality of government action as a violation of the Twenty-seventh Amendment. In *Boehner v. Anderson*, 809 F. Supp. 138 (D.D.C. 1992), the court rejected a challenge to the constitutionality of pay raises provided by the Ethics Reform Act of 1989, *Pub. L. 101-194, 103 Stat. 1716* (1989). The court noted that the pay raises took effect after an election had intervened, thus complying with the requirements of the Twenty-seventh Amendment, 809 F. Supp. at 142, and questioned whether the amendment would in any event have retroactive effect to legislation enacted before the amendment was ratified. *Id.* at 142 n.3. Though one of the amici apparently raised the issue of the amendment’s validity, none of the parties did, and the court declined to address it. *Id.* at 139.

11 As discussed *infra* text accompanying notes 55-60, Dellinger’s acceptance of this theory—at least in “extreme” cases—is curiously inconsistent with his generally formalist reading of Article V, which otherwise has considerable merit. *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

12 By “formalist” I mean here (and throughout this Article) an approach to constitutional interpretation that accords primacy to considerations of constitutional text and structure and to the inferences that may be drawn from them, even where such considerations might suggest specific results beyond the contemplation (or even contrary to the subjective expectations) of the text’s framers, or results that seem (to some) undesirable as a policy matter. For a good, short explanation of formalism, see Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 859-61 (1990); *cf.* Michael S. Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s “Justice Accused,”* 7 J.L. & RELIGION 33, 49-63 (1989). The approach to Article V set forth in this Article relies on a formalist methodology, but also seeks to go beyond bare formalism in providing an explanatory model that accounts in a coherent, principled fashion for the results produced by formalism and suggests answers to problems presented by the constitutional text that a formalist approach alone cannot provide. *See infra* Part III, text accompanying notes 161-93.

13 *See infra* text accompanying notes 168-70.

14 The ERA extension was legally invalid under this theory. *See infra* note 173 and accompanying text.

15 For a recent article reaching the same conclusion with respect to Congress’ obligation to call a convention, but on far different (and seriously flawed) reasoning, see Bruce M. Van Sickle & Lynn M. Boughey, *A Lawful and Peaceful Revolution: Article*

*V and Congress' Present Duty To Call a Convention for Proposing Amendments*, 14 HAMLIN L. REV. 1, 46-56 (1990). Van Sickle and Boughey's thesis is addressed *infra* at notes 223 and 250.

16 See Bill McAllister, *Revolutionary Idea Haunts Hill: 39 States Back Pay Curb, but Was 202 Years of Debate Enough?*, WASH. POST, May 8, 1992, at A1 [hereinafter McAllister, *Revolutionary Idea*] (reporting statement of Speaker Foley questioning validity of Twenty-seventh Amendment); Bill McAllister, *Madison's Remedy May Ignite Hill Pay Dispute: Congressional COLAs Are Focus of Controversy as 27th Amendment Is Formally Proclaimed*, WASH. POST, May 19, 1992, at A17 [hereinafter McAllister, *Madison's Remedy*] (reporting that Rep. Edwards had decided to cancel planned hearings on validity of Twenty-seventh Amendment and that Edwards, along with Speaker Foley “had contended that ‘precedent and good sense require the states' approval of an amendment to be contemporaneous,’ not spread over two centuries”); Paul Horwitz, *Archivist Will OK Madison's Amendment*, ROLL CALL, May 14, 1992 (reporting that Rep. Edwards had expressed doubts that amendment met contemporaneity requirements and had introduced a bill calling for the eight states that ratified before 1983 to hold new votes).

17 It is unclear whether the congressional leadership's quick about-face was prompted so much by persuasive legal argument as by assessment of the political consequences of being seen as opposed to an amendment limiting Congress' ability to vote itself pay raises, in an election year marked by extraordinary hostility toward Congress. See, e.g., 138 CONG. REC. S6830 (daily ed. May 19, 1992) (statement of Sen. Byrd expressing his view that the Twenty-seventh Amendment should be approved by Congress, notwithstanding his general view that “[i]n most circumstances ... a lapse of this length would be too great to sustain ratification of an amendment”); McAllister, *Madison's Remedy*, *supra* note 16, at A17 (reporting that Rep. Edwards cancelled his planned hearings on validity of Twenty-seventh Amendment because, as explained by an aide, “‘No one up here has time for academic exercises.’”).

The year 1992 set a postwar record for retirements in the House of Representatives (65) and a forty-four year record in total House turnover (110). John R. Crawford, *The New Class: More Diverse, Less Lawyerly, Younger, House Freshman Profiles*, CONG. Q. WKLY. REP. SPECIAL REP., Nov. 7, 1992, at 7, 21 (supp. to vol. 50, no. 44). The Senate also has a large turnover of twelve members. *Id.* at 13. It was in the midst of this turbulent political atmosphere that Congress considered the validity of the Twenty-seventh Amendment. The Senate decided to “accept” the amendment by a vote of 99-0. 138 CONG. REC. S6948 (daily ed. May 20, 1992). The House decided to “accept” the amendment by a vote of 414-3. 138 CONG. REC. H3505 (daily ed. May 20, 1992). It would seem unlikely that only three members of Congress either disagreed with the assertion that an amendment may be valid notwithstanding a two-century delay in ratification or thought that Congress has power to validate or refuse to validate such a constitutional amendment but should not approve the Twenty-seventh Amendment. Surely, political pressures account for the enormity of the vote in favor of the resolution approving the amendment.

18 McAllister, *Revolutionary Idea*, *supra* note 16, at A1.

19 Paul Horwitz, *Foley Seeks Legal Advice After 39th State Ratifies 27th Amendment*, ROLL CALL, May 11, 1992. Noted political scientist Norman Ornstein of the American Enterprise Institute was of the same view: “‘I can't imagine that the Archivist would take the whole list of petitions, including those where everybody in the state (who voted) is dead, and declare it contemporaneous' ....” *Id.*

20 Richard L. Berke, *More Amendments Lurk in the Mists of History*, N.Y. TIMES, May 24, 1992, § 4, at 2.

21 256 U.S. 368 (1921).

22 The Nineteenth Amendment contained no time limit on the period of ratification, but the Twentieth, Twenty-first (repealing the Eighteenth Amendment) and Twenty-second Amendments each contained a time limitation in the text of the amendment itself. 41 Stat. 362 (1919) (Nineteenth); 47 Stat. 745 (1932) (Twentieth); 47 Stat. 1625 (1933) (Twenty-first); 61 Stat. 959 (1947) (Twenty-second). The Twenty-third, Twenty-fourth, Twenty-fifth, and Twenty-sixth Amendments all contained time limitations in the congressional resolutions proposing the amendments, but not in the text of the amendments themselves. 74 Stat. 1057 (1960) (Twenty-third); 76 Stat. 1259 (1962) (Twenty-fourth); 79 Stat. 1327 (1965) (Twenty-fifth); 85 Stat. 825 (1971) (Twenty-sixth). The original congressional resolution proposing the Equal Rights Amendment also contained a seven-year time limitation, but followed the pattern of not placing that time limitation in the proposed amendment itself. 86 Stat. 1523 (1972).

23 256 U.S. at 369.

- 24 *Id.* at 373 & n.1 (citing congressional debates). Several Senators and Representatives commented on the need to impose some time limitation on the proposed amendment because it was common ground that *the Constitution did not itself impose any limitation*. See, e.g., 55 CONG. REC. 5649 (1917) (statement of Sen. Borah) (“The fundamental law of the land does say very plainly, that it places no limitation upon the time when or within which [a proposed amendment] must be ratified.”); *id.* at 5652 (statement of Sen. Cummins) (“I am in favor of supplying what is manifestly a defect in our Constitution and providing some limit of time ....”); *id.* at 5556 (statement of Sen. Ashurst) (two of the first twelve proposed amendments “are still pending.... and have been for 128 years”). The Justice Department opinion collects other such statements. OLC Opinion, *supra* note 7, at 4-5.
- 25 Dillon had raised other issues that were decided against his position in the *National Prohibition Cases*, 253 U.S. 350 (1920). *Dillon*, 256 U.S. at 370. The Eighteenth Amendment was subjected to numerous judicial challenges by the alcohol industry. Dillon's case raised two issues remaining after *National Prohibition*: the validity of the time limit, and the date on which the amendment (and thus implementing legislation) became operative, if valid.
- 26 256 U.S. at 375-76.
- 27 An amendment cannot, however, deprive states of their equal representation in the Senate, absent their consent. U.S. CONST. art. V (“Provided that ... no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”). Professor Akhil Amar makes an intriguing argument that the Senate proviso (as well as the now-moot slave importation proviso) of Article V is a limitation on the subject matter of amendments produced by the Article V amendment process but that Article V is not the exclusive means by which the Constitution may be amended. Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1066-72 (1988) [hereinafter Amar, *Philadelphia Revisited*]. Amar's thesis is discussed *infra* at note 48. This Article is addressed to the Article V amendment process and not to the question of asserted extratextual means of constitutional amendment. Professor Amar apparently agrees that the Senate proviso constitutes a limitation on the substance of amendments that may be adopted through Article V's mechanisms. Professor Amar and a few other scholars appear to deny that the Senate proviso is the *only* (remaining) constitutional limit on the substance of amendment proposals. Akhil R. Amar, *Amendment Process (Outside Article V)*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 15, 16 (Leonard W. Levy ed., 1986 & Supp. 1992) [hereinafter Amar, *Amendment Process*] (distinguishing between “true constitutional amendments” and “constitutional repudiations” of core elements of American constitutionalism); Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended?)*, 8 CONST. COMMENTARY 409, 416 (1991) (listing scholars holding this view); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991) (arguing that an amendment to overturn the Court's flag burning decisions would violate natural law/Ninth Amendment limitations on Article V amendment power); see also Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 438-39 (1983) (suggesting that some substantive amendments would not “fit” the Constitution, but deeming such questions nonjusticiable).
- 28 It might be objected that Congress surely does not have power to attach an unreasonably *short* time period for ratification, say, one week, or to prescribe that a given proposal may only take effect upon a unanimous vote of all 50 state legislatures. But so far as Article V's formal requirements are concerned, there is no reason why Congress may not set whatever time period it likes. Congress is the master of its legislation proposing an amendment. So long as the conditions Congress imposes do not *contravene* a rule supplied by Article V (for example, by providing that an amendment is valid upon ratification of two-thirds, rather than three-fourths, of state legislatures), such *additional* conditions or provisos are valid. A one-week ratification deadline may be unreasonable and render an amendment proposal illusory, but it is not forbidden by anything in Article V. A requirement of 50-state ratification goes well beyond what Article V requires, but Article V does not forbid such an additional condition. Similarly, a state legislature (or ratifying convention) considering a proposed amendment could provide that its *ratification* expired automatically in seven years (or, for that matter, seven weeks) if an insufficient number of other states had not ratified it in the meantime; that is, a state can impose any condition on its ratification that does not contravene a rule supplied by Article V. See *infra* text accompanying notes 188-90 (arguing that states have power to condition or rescind their ratifications under concurrent legislation model). It would seem necessary, however, that the occurrence of that condition be easily determinable (such as whether a sufficient number of other states have ratified within a certain time period). States should not be permitted to impose ratification conditions that require the executive branch (the Archivist) or the courts to plow through state law

arcana in order to determine the [Article V](#) consequences of a state's ratification legislation. *See infra* text accompanying notes 191-92 (arguing that the [Article V](#) effect of state ratifications must be capable of being determined on face of ratification).

29 [256 U.S. at 375-76](#) (emphasis added).

30 *Id.* at 373-74.

31 [307 U.S. 433 \(1939\)](#). As discussed below, *Coleman* can be read not as repudiating the substantive rule suggested by the Court's dictum in *Dillon* but only as holding that judges ought not to enforce that substantive rule because such questions of the amendment process are nonjusticiable "political questions." *See infra* text accompanying notes 95-143.

32 *See infra* text accompanying notes 95-143.

33 [256 U.S. at 374-75](#).

34 *See infra* text accompanying notes 181-83 (defending concurrent legislation model against model that would treat amendment proposal and ratification as akin to process within bicameral legislature).

35 The Justice Department reached the same conclusion. "[*Dillon's* first] argument simply assumes its conclusion—that the process is to be short rather than lengthy." OLC Opinion, *supra* note 7, at 10.

36 *Dillon*, [256 U.S. at 375](#).

37 This appears to have been the sense behind efforts to extend Congress' original deadline for ratification of the proposed Equal Rights Amendment. *See generally Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) [hereinafter *Senate Hearings*]; *Equal Rights Amendment Extension: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977-78).

38 *See generally* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1139-42, 1145-46 (1991).

39 *See* 1 ANNALS OF CONG. 457 (Joseph Gales & William W. Seaton eds., 1834). Madison stated:  
There are several minor cases ... in which I wish also to see some alteration take place. That article which leaves it in the power of the Legislature to ascertain its own emolument, is one to which I allude. I do not believe this is a power which, in the ordinary course of Government, is likely to be abused. Perhaps of all the powers granted, it is least likely to abuse; but there is a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their pockets; there is a seeming indecorum in such power, which leads me to propose a change.

40 Amar, *supra* note 38, at 1145. The Congressional Pay Amendment was submitted to the states as the second of a package of twelve proposed amendments, the third through twelfth of which became our Bill of Rights. Professor Amar hypothesizes that the Congressional Pay Amendment did not receive the requisite approval along with the Bill of Rights because these amendments were not submitted to special ratifying conventions; rather, they were submitted to state legislatures, which were more likely to be sympathetic to their federal legislative counterparts on the issue of legislative salaries. (The first proposal, concerning the size of the House of Representatives, did not receive the requisite number of ratifications at the time it was originally submitted to the states and has not to date received the requisite number of ratifications. That proposed amendment is discussed briefly *infra* at notes 63-66 and accompanying text.)

41 Amar, *supra* note 38, at 1146.

42 *See* 4 JOHN B. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES 361 (1927) (Rhode Island).

43 Ohio's ratification was a direct response to another Congress that raised its own pay in the so-called "Salary Grab" Act of 1873. *See* RICHARD B. BERNSTEIN, AMENDING AMERICA 243-44 (1993).

44 The dates of state ratifications of the Twenty-seventh Amendment are set forth at 138 CONG. REC. S6831 (daily ed. May 19, 1992) and in an appendix to the OLC Opinion, *supra* note 7, at A3-A10. For a general discussion of the 1991 "midnight pay raise" and other congressional pay hikes in the last fifteen years, see, e.g., Berke, *supra* note 2; Vitale, *supra* note 2.

- 45 The same point can be made, though somewhat less strongly, with respect to the proposed (and still unratified) Child Labor Amendment. The amendment was first proposed by Congress in 1924 but succeeded in gathering only a few state ratifications. Interest in the amendment was reinvigorated by the Great Depression and the New Deal. The Child Labor Amendment is discussed in more detail *infra* text accompanying notes 70-74.
- 46 256 U.S. at 376; *see also* [Coleman v. Miller](#), 307 U.S. 433, 453-54 (1939) (opinion of Hughes, C.J.) (declaring that courts lack authority to impose time limitation on an amendment proposal where Congress has not provided one).
- 47 256 U.S. at 375.
- 48 Indeed, one constitutional theorist has gone so far as to argue that constitutional and preconstitutional notions of popular sovereignty demand that [Article V](#) not be read as the *exclusive* means by which the Constitution may be amended, but that the Constitution also can be amended by a simple majority of the polity acting through a deliberative, popular referendum. Amar, *Philadelphia Revisited*, *supra* note 27, at 1044. Acceptance of Amar's thesis is not at all necessary to the argument in this Article. My argument is that compliance with the formal requirements of [Article V](#) is legally *sufficient* to amend the Constitution, so that contemporaneous consensus is not, strictly speaking, necessary. Amar's argument is that compliance with the formal requirements of [Article V](#) is *not necessary* to amend the Constitution, but that contemporaneous consensus, as reflected through deliberative majority assent in a nationwide popular referendum, is legally sufficient.
- 49 Professor Bruce Ackerman has advanced the notion that the Constitution may be amended outside [Article V](#) procedures during “constitutional moments” when normal politics are displaced by higher lawmaking and the three branches of government act, in effect, to amend the text of the Constitution. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57 (1984). But, for Ackerman, such “moments” can embrace whole political eras, such as the New Deal. (Apparently, fifteen years is as a moment for Bruce Ackerman.) Ackerman's theory thus requires neither contemporaneity (in the *Dillon* sense) nor compliance with [Article V](#)'s formal procedures for constitutional amendment. For trenchant criticism of Ackerman's thesis as a normative account of constitutional amendment, see Amar, *Philadelphia Revisited*, *supra* note 27, at 1090-96.
- 50 *Cf.* Horwitz, *supra* note 16 (noting Rep. Edwards' proposal that the first eight states to ratify the Congressional Pay Amendment—including Ohio (1873) and Wyoming (1978)—vote again).
- 51 *See* [American Jewish Congress v. City of Chicago](#), 827 F.2d 120, 137-39 (7th Cir. 1987) (Easterbrook, J., dissenting); *see also* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 346 (1986) (arguing that it is improper to “confuse[] the Framers' objectives ... with the more limited means ... used to achieve those objectives” in the constitutional text).
- 52 U.S. CONST. amend. XIV, § 1. *But cf.* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that Privileges or Immunities Clause had a settled, determinate meaning at time of its adoption).
- 53 U.S. CONST. amend. IX. *Compare* Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1989) (adopting a “natural rights” interpretation of Ninth Amendment) *with* Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990) (arguing that Framers did not intend Ninth Amendment to embody unwritten natural or fundamental rights). For a general discussion of interpretive problems presented by natural law texts, see Paulsen, *supra* note 12, at 38-46, 52-63.
- 54 When the Framers wanted a time limitation to govern certain activity, they knew how to say so. [Article V](#) contains one time-related restriction on amendment proposals: no amendment affecting slave importation was permitted “prior to the Year One thousand eight hundred and eight.” The Constitution specifies that representatives be elected every second year, U.S. CONST. art. I, § 2, that a census be taken every ten years following the first census, in order to determine representation, *id.*, that neither House of Congress may adjourn for longer than three days without the consent of the other, *id.* art. I, § 5, and that the President has ten days (not counting Sundays) during which to sign or veto a bill, *id.* art. I, § 7. Similarly, the Twentieth Amendment specifies the exact date of the year on which the terms of the President and of Senators and Representatives end and their successors' begin. U.S. CONST. amend. XX, § 1. *See also* OLC Opinion, *supra* note 7, at 3 (drawing similar conclusions from presence of definite time limitations in Constitution).

It is theoretically possible that Congress, in adopting an amendment proposal, might have intended an implicit time limitation *as part of that proposal*. In other words, a requirement of ratification within some reasonable period of time might exist, not as a matter of interpreting [Article V](#), but as a matter of interpreting the proposed amendment. The big problem with this approach is finding such a limitation in the proposed amendment. For example, nothing in the text of the Congressional Pay Amendment provides for such a time limitation. If the first Congress intended such a limitation, it did not express that intent in the language of its proposal. In addition, none of the “legislative history” of Congress’ proposal of the Twenty-seventh Amendment provides a basis for inferring such an implicit sunset provision within that proposal. The problems of unenacted legislative intent—problems that have been the subject of so much recent academic and judicial discussion—would seem especially acute in this context. How is a ratifying state to know whether it is operating under an “implicit” time deadline or to have any idea of the length of such a deadline? Viewed from the perspective of the ratifying states, the idea that an unstated, uncommunicated, implicit sunset is contained in an amendment proposal imposes an impossible and unreasonable burden.

55 Dellinger, *supra* note 11, at 425.

56 McAllister, *Revolutionary Idea*, *supra* note 16, at A1 (quoting Dellinger’s opinion that Congressional Pay Amendment is “a dead letter” and that issue of the amendment’s validity “is not a close call”).

57 Dellinger, *supra* note 11, at 425 (arguing that 1810 Titles of Nobility Amendment proposal and 1861 Corwin Amendment proposal to entrench slavery have died). These two amendment proposals are discussed presently. *See infra* text accompanying notes 67-91.

58 307 U.S. at 453. As discussed below, the *Coleman* Court’s answer, that the issue was a “political question” committed to Congress’ post hoc discretion, is also textually and practically impossible. *See infra* Section II.C.

59 *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (suggesting such an approach for deciding what is obscene).

60 Dellinger, *supra* note 11, at 425.

61 256 U.S. at 375.

62 *See* discussion *supra* note 17 and text accompanying note 9 (Congress); *supra* note 7 and accompanying text (Department of Justice).

63 The full text of the proposed amendment is as follows:

After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.  
2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 321-22 (Washington, D.C., Dep’t of State 1894).

64 *See generally* Amar, *supra* note 38, at 1137-46.

65 The former figure is set forth in [Article I, Section 2 of the Constitution](#).

66 Richard Bernstein mistakenly asserts that, were this amendment adopted, it “would mandate a House of more than 5,000 members—rather than the present 435.” BERNSTEIN, *supra* note 43, at 46. In fact, the Representation Amendment would impose a *maximum* number of Representatives based on population size, not a minimum. The minimum would be fixed at 200. Congress would retain authority to regulate the actual number, provided it is greater than 200 and less than the maximum of one per 50,000 in population—leaving Congress with plenty of room to retain its present number of Representatives.

67 Res. 2, 11th Cong., 2d Sess., 2 Stat. 613 (1810).

68 *But see* Nadine Brozan, *Chronicle*, N.Y. TIMES, Dec. 1, 1993, at B5 (reporting that Queen Elizabeth II has made George Bush a Knight Grand Cross of the Most Honorable Order of the Bath).



- 69 U.S. CONST. art. I, § 9 (“And no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”). Because of the 1810 amendment proposal's penalties, and the broader class of persons to whom it would apply (all citizens and not merely federal officeholders), the substantial Emoluments Clause jurisprudence that exists within legal departments of the executive branch (but that, by its nature, rarely gives rise to litigated cases) would come into more public view.
- 70 H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924).
- 71 247 U.S. 251 (1918).
- 72 259 U.S. 20 (1922).
- 73 Both the House and Senate considered proposed time limits, after the fashion of the Prohibition Amendment, but rejected them. *See* 65 CONG. REC. 7288-89, 7293-94 (1924) (House); 65 CONG. REC. 10,141 (1924) (Senate).
- 74 *See United States v. Darby*, 312 U.S. 100, 116-17 (1941) (overruling *Hammer v. Dagenhart*).
- 75 Rep. Thomas Corwin of Ohio sponsored the amendment.
- 76 J. Res. 13, 36th Cong., 2d Sess., 12 Stat. 251 (1861).
- 77 BERNSTEIN, *supra* note 43, at 90-92; RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 55 (1988); ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 34, 60 n.5 (1978). Caplan reports three ratifications. Both Bernstein and Grimes count only Ohio and Maryland. An Illinois constitutional convention voted to ratify the Corwin Amendment, but its purported ratification is of dubious validity because it did not conform with the mode of ratification specified by Congress in proposing the amendment.
- 78 U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).
- 79 It should be noted, however, that if the meaning of the amendment is judged by its text, rather than by historical evidence of the intentions of those proposing it, the Corwin Amendment merely prohibits prospectively the *enactment* of new constitutional amendments giving Congress power to abolish slavery. The abolition of slavery has, of course, already been accomplished by our Thirteenth Amendment. The Corwin Amendment, by its terms, is not a slavery-entrenching amendment but a status-quo-entrenching amendment; and the legal status quo today is that slavery is prohibited. Ratification of the Corwin Amendment thus would not necessarily have the effect of repealing the Thirteenth Amendment, only of prohibiting the adoption of new amendments giving Congress the power to do by statute what the Thirteenth Amendment does by constitutional command. *See also infra* text accompanying notes 82-86.
- As a status-quo-entrenching amendment, the Corwin Amendment creates a peculiar paradox: a (purportedly) unamendable amendment. But why may the supposed “unamendable” character of the amendment, if adopted, not be altered by a subsequent amendment? On the problems of purportedly unamendable constitutional provisions (including the Senate proviso of [Article V](#)), see Amar, *Philadelphia Revisited*, *supra* note 27, at 1066-71.
- 80 *See infra* text accompanying notes 167-70.
- 81 CAPLAN, *supra* note 77, at 129 (describing situation where Congress and a federal constitutional convention “propose rival amendments on the same subject”). In support of this conclusion, Caplan notes Madison's remarks to the Confederation Congress concerning a suggestion that two versions of the Philadelphia constitution be submitted, one with and one without amendments. Madison thought this could be done, but was unwise as a matter of policy. *See id.*
- 82 *Id.*
- 83 *See, e.g.*, THE FEDERALIST NO. 78 at 396 (Alexander Hamilton) (Garry Wills ed., 1982):
- This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither

of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done. Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first.

84 *Id. But cf. Allen v. McCurry*, 449 U.S. 90, 99 (1980) (noting the canon disfavoring repeals by implication).

85 *See supra* note 79.

86 *See infra* text accompanying notes 167-80.

87 *See infra* text accompanying notes 180-81 (defending two-thirds vote requirement for repeal of an amendment proposal).

88 An argument can be made that the Thirteenth Amendment is not a *complete* logical negation of the Corwin Amendment and that it is possible to give effect to both amendments simultaneously. The Thirteenth Amendment's prohibition on slavery and involuntary servitude is arguably underinclusive relative to the text of the Corwin Amendment, which prohibits federal interference with systems of labor more generally ("persons held to labor or service by the laws of [a] state") or, even more generally, with state "domestic institutions." Theoretically, the Corwin Amendment might prevent Congress from passing civil rights statutes concerning employment or invalidate the National Labor Relations Act, even if it could no longer entrench slavery.

The weakness of these arguments is that the phrases "domestic institutions" and "persons held to labor or service by the laws of said state" were well-recognized terms of art. They were code words-pernicious euphemisms-for slavery. The original Constitution contained the same basic formulation in the Fugitive Slave Clause: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." U.S. CONST. art. IV, § 2. If the proposal of the Thirteenth Amendment did not repeal the Corwin Amendment proposal, then neither did the adoption of the Thirteenth Amendment's ban on slavery repeal the Fugitive Slave Clause-an absolutely absurd conclusion. The words of the Corwin Amendment, like the words of the Fugitive Slave Clause, *mean* "slavery" and the Thirteenth Amendment plainly means "not slavery." As such, the proposal by Congress of the Thirteenth Amendment is not an *implied* repeal at all, but an *express* repeal-a repeal in terms as well as in necessary effect-of the Corwin Amendment. The language of the two proposals thus highlights the importance of reading the words of texts in context: the meaning of a provision must be its original meaning, lest anachronism-or, here, euphemism-refract proper textual analysis. *See generally* Paulsen, *supra* note 12, at 54-58.

Congress' failure to adopt a proposed resolution in 1864 to formally repeal the Corwin Amendment, see CAPLAN, *supra* note 77, at 128 (discussing Senator Anthony's proposed resolution and its brief and inconclusive history), also does not provide persuasive evidence against repeal because the reasons for Congress' failure to act on the resolution to rescind cannot be known with certainty. *Cf. Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction ....") (citations omitted); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.... Congressional inaction cannot amend a duly enacted statute.>"). Moreover, the proposal of the Thirteenth Amendment came the next year-1865-and, on the above analysis, it would have been reasonable for legislators to assume that the prohibition of slavery more than adequately did the job of repealing the Corwin proposal. Nonetheless, the best outcome is for Congress to remove all doubt by taking up Senator Anthony's suggestion and formally repudiating the Corwin proposal.

89 256 U.S. at 375.

90 *See infra* text accompanying notes 167-72.

91 *See infra* text accompanying notes 180-81 (defending the two-thirds vote requirement).

92 Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 880 n.20 (1980).

93 *Id.* at 880-81 n.20.

- 94 *Id.* at 880 n.20; *see also id.* at 878 (“first premise” that Constitution “cannot be amended except by consensus”) (citing THE FEDERALIST No. 85 (Hamilton) (three-fourths of states must be “united in the desire of a particular amendment”)); *id.* at 878 n.10 (suggesting that 10-year period of ratification might be “stale” and fail to satisfy requirements of contemporaneous consensus); *id.* at 881-82 (speaking of “consensus requirement of Article V”).
- 95 I do not mean by this to disparage the entire field of contract law as a common-law subject. Rather, I only mean that a common-law style of reasoning is inappropriate for analyzing Article V, which is in the nature of a *code*.
- 96 E. ALLAN FARNSWORTH, CONTRACTS § 3.19 (2d ed. 1990)
- 97 256 U.S. at 375.
- 98 *See Baker v. Carr*, 369 U.S. 186, 217 (1962).
- 99 307 U.S. 433 (1939).
- 100 I set to one side *Marbury's* introduction of the term “political question,” which referred to genuine political questions in the sense of *policy* questions on which the Constitution supplies no legal rule and therefore leaves things to the policy discretion of the legislative and executive branches. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66, 170 (1803). The granddaddy of political question cases (in the sense that term has acquired), *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), presented the issue of which of two groups constituted the lawful state government of Rhode Island. The Court's holding that the decision was one for the political branches is better regarded as a substantive constitutional holding, not a true invocation of the political question doctrine. *See* Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 607-09 (1976). A series of cases between 1912 and 1939, beginning with *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), all dealt with the political question doctrine in the context of challenges under the Guarantee Clause of Article IV to nontraditional state lawmaking procedures. *See* Henkin, *supra*, at 609 n.35. While decided on true “political question” grounds, it is questionable whether that rationale survived the Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962).
- 101 *Coleman*, 307 U.S. at 473 (appendix to opinion of Butler, J., dissenting). The six states were Arkansas, Arizona, California, Wisconsin, Montana, and Colorado.
- 102 *See id.*
- 103 *Id.* at 436.
- 104 The opinion does not embrace the broadest of modern theories of legislative standing, that individual legislators have standing to challenge in court the decisions of the legislature simply because they were outvoted. *Cf. Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987). The legislative standing recognized by the Kansas and U.S. Supreme Courts was that of a chamber (the Kansas Senate) as a whole. If correct on the merits, the legislators' claim represents the interests not of individual legislators but of the body as a whole in preventing its votes from being improperly reported and legislation being given effect that was not passed.
- 105 Four Justices (Roberts, Douglas, Black, and Frankfurter) believed the case nonjusticiable and expressed that view in an opinion by Justice Frankfurter. 307 U.S. at 460. The same four nonetheless expressed views on the merits supporting affirmance (discussed presently) in an opinion by Justice Black. *Id.* at 456. Justice Frankfurter's opinion is identified neither as a concurrence nor as a dissent but merely as the “Opinion of Mr. Justice Frankfurter.” This avoids the problem that it is a “dissent” on standing by Justices who went on to “concur” in the result once they had lost the battle on standing.
- 106 The ratification by Georgia on July 21, 1868, rendered the issue academic. *See infra* text accompanying notes 111-15; *cf. CAPLAN*, *supra* note 77, at 110.
- 107 CONG. GLOBE, 40th Cong., 2d Sess. 453, 475 (1868) (introducing Senate and House resolutions). Russell Caplan inaccurately reports that Congress adopted these resolutions in January of 1868. Caplan, *supra* note 77, at 109-10. A resolution declaring the Fourteenth Amendment valid was adopted by Congress on July 21, 1868. 15 Stat. app. at 709-10 (1868); *see* CONG. GLOBE, 40th Cong., 2d Sess. 4295-96 (1868).

- 108 For a good contemporaneous explanation of the Reconstruction Republicans' theory that the power of amendment proposal and ratification lay exclusively with the "organized constitutional States of this Union, maintaining their relations to the Federal Government, and represented in the Congress of the United States," see CONG. GLOBE, 39th Cong., 2d Sess. 500-05 (1867) (statement of Rep. Bingham).
- 109 See, e.g., ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 178-79 (1988); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 698-700 (1988); GARRY WILLS, LINCOLN AT GETTYSBURG 121-47 (1992). See generally J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951). The leading judicial discussion of this issue is that of Chief Justice Salmon P. Chase, Lincoln's Secretary of the Treasury, writing for the Court in [Texas v. White](#), 74 U.S. (7 Wall.) 700 (1868).
- 110 See CONG. GLOBE, 40th Cong., 2d Sess. 890 (1868) (setting forth text of Ohio rescission resolution of Jan. 15, 1868). The House adopted a resolution refusing to print in the *Congressional Globe* New Jersey's resolution of rescission, presented that morning by Representative Haight, and expressing the view of the House that a state legislature has no power to withdraw its ratification. *Id.* at 2225-26. While it appears that New Jersey's resolution was before the House in late March, it evidently was not transmitted to the Secretary of State until April; Secretary Seward ascribed an April date to New Jersey's resolution. 15 Stat. app. at 710 (1868).
- 111 14 Stat. 428 (1867); [Coleman](#), 307 U.S. at 448; see 15 Stat. app. at 710 (1868) (noting the 1868 ratifications of Georgia, North Carolina, South Carolina, Arkansas, Florida, Louisiana, and Alabama). Georgia's ratification was not officially received until July 27, 1868.
- 112 CONG. GLOBE, 40th Cong., 2d Sess. 3857 (1868).
- 113 15 Stat. app. at 706, 707 (1868). Professor Ackerman misleadingly states that Seward's July 20, 1868, report expresses doubts about the ratification of the amendment "on two scores"—first, the New Jersey and Ohio rescissions and second, the subsequent ratifications of the new Reconstruction governments in Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama. Bruce Ackerman, [Constitutional Politics/Constitutional Law](#), 99 YALE L.J. 453, 502 n.102 (1989). In fact, Seward's proclamation expresses doubt only on the former score. Ackerman is clearly reaching when he says that Seward expressed doubt about the validity of the new Southern ratifications by virtue of the fact that Seward compiled them "in a separate paragraph" explaining that those states had previously rejected the amendment but that the new legislatures had transmitted ratifications. Seward's treatment is fully as consistent with affirmation of the validity of such ratifications as with expressing doubts about them. Where the July 20 proclamation expresses doubts, it does so in express terms—and only with respect to the New Jersey and Ohio rescissions.
- 114 15 Stat. app. at 709-10 (1868).
- 115 CONG. GLOBE, 40th Cong., 2d Sess. 4296 (1868). Russell Caplan's discussion is somewhat misleading on this point, implying that Congress passed the concurrent resolution in response to Georgia's application. Caplan, *supra* note 77, at 109-10. In fact, there is no record that the Senate knew of Georgia's ratification. In the House, a motion was made to add Georgia to the list of ratifying states, but withdrawn in response to an objection that a private telegram did not constitute valid official notice.
- 116 15 Stat. app. at 710-11 (1868).
- 117 *Id.* at 710.
- 118 New York attempted to rescind its ratification in January 1870, long after the scale-tipping ratification had occurred (whether New Jersey and Ohio are counted or not) and the amendment clearly had become law. Caplan, *supra* note 77, at 110. There would seem to be no doubt that a state cannot validly withdraw ratification of an amendment after the amendment has become law. Similarly, a state could not purport to "reserve" to itself the right to withdraw as a condition of its ratification; such a "ratification" would be of no effect since it would not match the terms of the proposal. (New York had tried such a device before, with respect to ratification of the original Constitution. See *infra* notes 171 and 190, and accompanying text.) The difficult question with respect to the Ohio and New Jersey rescissions was whether the amendment had already become law—requiring determination of the question of whether Congress could exclude from the count states it considered

unreconstructed into the Union. Seward's initial "conditional certification" approach deftly skirted this point of contention between the administration and Congress.

119 307 U.S. at 449.

120 Professors Farber and Sherry maintain that Seward's proclamations "demonstrat[e] that he was puzzled about whether the amendment had or had not been ratified" and that his final proclamation on July 28 was "based ... on the [July 21] congressional resolution rather than on his own judgment that ratification had been achieved." DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 323 (1990); *see also* Ackerman, *supra* note 113, at 502 (making similar judgment). Seward was indeed uncertain about the legal validity of rescission, which is why his July 20 certification was conditional. But Seward probably did not base his final certification of July 28 on the congressional resolution. That resolution (which Seward duly notes) recited the same state ratifications that Seward had deemed sufficient only for conditional certification on July 20. The change from doubt to certainty was much more likely based on Georgia's intervening ratification, which is not contained in the congressional resolution and is noted with subtle but distinct emphasis in the wording of Seward's July 28 proclamation.

Indeed, it is not even absolutely clear that *Congress* believed that rescission was invalid. True, the July 21 resolution recites New Jersey's and Ohio's ratifications. But as noted above, the view of many Republicans in Congress was that nonratifying southern states need not be counted at all-in either the numerator or denominator of the three-fourths ratio-but only the "loyal" states plus those former "rebel" states that had voted to ratify the amendment. *See supra* note 108 and accompanying text. Under this view, the four states of the old Confederacy that had not ratified-Virginia, Georgia, Mississippi, and Texas-were to be excluded from the count. The amendment therefore had received either 27 or 29 ratifications out of 33 (not 37) "eligible" states-more than three-fourths whether New Jersey and Ohio counted or not. The inclusion of New Jersey and Ohio might have been added "for good measure" and not necessarily because a majority of Congress concluded that rescission was invalid.

121 307 U.S. at 450.

122 *See* OLC Opinion, *supra* note 7, at 25; Dellinger, *supra* note 11, at 400.

123 *United States v. Sprague*, 282 U.S. 716 (1931); *Leser v. Garnett*, 258 U.S. 130 (1922); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke v. Smith*, 253 U.S. 231 (1920) (*Hawke II*); *Hawke v. Smith*, 253 U.S. 221 (1920) (*Hawke I*); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

124 *Baker v. Carr*, 369 U.S. 186, 217 (1962); *accord* *Nixon v. United States*, 113 S. Ct. 732, 735 (1993); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990); *INS v. Chadha*, 462 U.S. 919, 941 (1983); *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969).

125 *Nixon*, 113 S. Ct. at 735 ("But the courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed."); *see also* *Powell*, 395 U.S. at 519; *Baker*, 369 U.S. at 217.

126 *Cf.* Henkin, *supra* note 100, at 607-14 (arguing that certain decisions attributed to political question doctrine are actually substantive holdings in favor of government's challenged action). The Court's decision last Term in *Nixon v. United States*, 113 S. Ct. 732 (1993) fits this description.

127 The reasons given by the standard formulation include "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217; *accord* *Powell*, 395 U.S. at 518-19; *Chadha*, 462 U.S. at 941; *Munoz-Flores*, 495 U.S. at 389-90. One can reasonably question-and several scholars have-whether such an extreme doctrine of generalized judicial restraint makes sense. Henkin, *supra* note 100. *See generally* CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* § 14 (4th ed. 1983) (collecting and discussing cases and authorities).

128 *Coleman*, 307 U.S. at 450.

- 129 Professor Louis Henkin has argued that *Coleman* is not really a “political question” case, but a substantive interpretation of [Article V](#), purporting to find within its language a rule of plenary congressional power over the amendment process. Henkin, *supra* note 100, at 613-14. Henkin's view is criticized by Grover Rees. Rees, *supra* note 92, at 888 n.52.
- 130 The initial point of disagreement between the Hughes Three and the Black Four is the legislative standing issue (addressed separately in “Opinion of Mr. Justice Frankfurter” for the same four Justices). The Black concurrence exists merely to state views on the merits that the four Justices joining that opinion think should not be reached. It is therefore somewhat ironic that Black warns against giving “an advisory opinion, given wholly without constitutional authority.” *Coleman*, 307 U.S. at 460. The jurisprudentially proper result in *Coleman*, given the alignment of the Justices, should have been to dismiss the case for want of jurisdiction-four Justices finding no standing and three Justices finding standing but the lack of a justiciable controversy on “political question” grounds.
- 131 *Id.* at 459 (Black, J., concurring).
- 132 Other commentators agree. *See* Rees, *supra* note 92, at 888 n.52 (“Black asserted that ‘Congress has sole and complete control over the amending process, subject to no judicial review,’ basing his assertion solely on [Article V](#). [Article V](#), however, contains no language implying this ‘textual commitment’ of judicial power to Congress.”) (citation omitted); *id.* at 889 (“[N]ot a single word in [Article V](#) or elsewhere in the Constitution suggests a ‘textually demonstrable commitment’ to Congress of the power to make unreviewable judgments concerning questions of law arising in the amendment process.”); *accord* Dellinger, *supra* note 11, at 398-400; *cf.* Amar, *Philadelphia Revisited*, *supra* note 27 (arguing that [Article V](#) should be understood as set of *limitations* on Congress, not as empowerment and certainly not as exclusive empowerment).
- 133 307 U.S. at 450.
- 134 1 U.S.C. § 106b (1988) (quoted *supra* note 6) (imposing duty of publishing an amendment on Archivist of United States). The predecessor statute assigned the duty to the Secretary of State. Act of April 20, 1818, ch. 80, 3 Stat. 439.
- 135 The Justice Department Memorandum collects examples, notably the Fifteenth Amendment, and concludes that “[i]f only to avoid this absurd conclusion [that every amendment subsequent to the Fourteenth Amendment has been illegally certified], we must reject the assertion that only Congress may promulgate an amendment.” OLC Opinion, *supra* note 7, at 25; *see id.* at 24-25.
- 136 *Dillon*, 256 U.S. at 376-77.
- 137 *Coleman*, 307 U.S. at 452-53.
- 138 *Id.*
- 139 *Id.* at 453. As noted above, this criticism of *Dillon* is sound. *See supra* text accompanying notes 56-59.
- 140 *Coleman*, 307 U.S. at 454.
- 141 In addition, Congress has the duty to call a constitutional convention when two-thirds of the states have asked for one. U.S. CONST. art. V; *see* discussion *infra* Part IV.
- 142 247 U.S. 251 (1918).
- 143 259 U.S. 20 (1922).
- 144 *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring in the judgment). Echoes of Powell's emphasis on “prudential concerns” can be heard in Justice Souter's separate concurring opinion in the most recent political question case. *Nixon v. United States*, 113 S. Ct. 732, 747 (1993) (Souter, J., concurring in the judgment).
- 145 Professors Dellinger and Tribe have so debated. *Compare* Dellinger, *supra* note 11, at 414-16 *with* Tribe, *supra* note 27, at 435-36. Dellinger emphasizes that not all amendments are designed to overrule actions of the *courts*. A more categorical argument would be that there is no more justification for judicial abdication in this context than in interpreting statutes “overruling” the Court's prior statutory interpretation cases.

- 146 Tribe, *supra* note 27, at 434.
- 147 *Dillon*, 256 U.S. at 375-76.
- 148 *Senate Hearings*, *supra* note 37, at 245.
- 149 *Id.* at 249-51.
- 150 *Id.* at 249.
- 151 *Id.* at 239.
- 152 Tribe, *supra* note 27, at 433 (footnote omitted).
- 153 *Id.*
- 154 *Id.* at 434 (emphasis added).
- 155 *Id.* at 437 (footnotes omitted).
- 156 *Id.*
- 157 *Id.* at 441 n.38.
- 158 *Id.* at 445.
- 159 Tribe, *supra* note 5 at A15 (emphasis added).
- 160 *Coleman* was the favorite authority of other advocates of the ERA ratification extension as well, including the Carter administration Justice Department. *See, e.g.*, Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (June 27, 1978), *reprinted in Senate Hearings*, *supra* note 37, at 80-99. For a powerful and persuasive critique of the ERA ratification extension position, see generally Rees, *supra* note 92.
- 161 *See generally* Amar, *Amendment Process*, *supra* note 27. *See also* sources cited *infra* note 194.
- 162 OLC Opinion, *supra* note 7, at 25.
- 163 The congressional supermajority qualification creates a difficulty for the concurrent legislation theory, because questions inevitably arise about what vote should be sufficient to repeal or rescind a congressional amendment proposal. *See infra* text accompanying notes 177-81.
- 164 Unless repealed by another constitutional amendment. *See, e.g.*, U.S. CONST. amend. XXI (repealing Eighteenth Amendment). The point of the “once and for all” formulation in the text is that once the set of concurrent conditions is satisfied, subsequent revocation by Congress of its proposal or by a state of its ratification is ineffective; the amendment has come into existence and only a new Article V amendment can repeal it.
- 165 Of course, Article V provides that the proposing entity may be a national convention called by Congress upon the application of two-thirds of the state legislatures and (irrespective of the proposing entity) that the ratifying entities may be either state legislatures or state conventions. These alternatives, less frequently used in practice, present slight complications for the concurrent legislation model. Such issues are addressed presently. *See infra* note 176 and accompanying text. For purposes of presentation, I begin with the most familiar situation: proposal by Congress and ratification by state legislatures.
- 166 Moreover, the apparent “absurdity” of formalism, in terms of the results it would permit, is nothing compared to the results that the plenary congressional power model would permit: Congress could vote to accept or reject the Congressional Pay Amendment, and the result would be final. Moreover, Congress could vote to deem ratified an amendment never proposed to the states, or refuse to promulgate an amendment that was so ratified.
- 167 The “Terminator” allusion refers to two science fiction movies that provide a peculiarly apt analogy. For the uninitiated: in THE TERMINATOR (Carolco 1984), a robotic-humanoid from the future (Arnold Schwarzenegger) is sent back through

time to assassinate the future mother (Linda Hamilton) of the man who is to become the leader of the resistance to a massive government-computer conspiracy that has nearly destroyed human civilization in the year 2029. This “Terminator” has a single mission, is virtually indestructible using conventional 1984 technology, and does not stop until he has completed his mission (wreaking incredible havoc in his wake). There is no way to alter his programming or to revoke his murderous instructions. Once set in motion, the Terminator will get his mark.

In *TERMINATOR II: JUDGMENT DAY* (Carloco 1991), an improved Terminator model (yet more “unstoppable” than the first) is sent back through time to kill Hamilton and her young son (the future resistance leader). Again, there is no way to pull back the Terminator once he has been set in motion. The only hope to defeat him is for the “good guys” to send back a reprogrammed “good” Terminator from the future (Schwarzenegger again) to overtake the bad Terminator and protect Hamilton and the boy.

168 The underlying vision of lawmaking in our constitutional system is one that assumes the perpetuity of legislative enactments (or at least the capability for perpetuity), and the ability of one generation to “bind” another by its ordinances unless the subsequent generation repeals them. This traditional conception of law has come under attack in some quarters. Notions of “desuetude” (such as Professor Dellinger’s) have always had some appeal. For example, Dean Guido Calabresi of the Yale Law School has suggested that courts should have a general “common law” power to strike down or modify statutes that in the judges’ view have become archaic. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). It is probably only natural that legal academics who have become accustomed to the notion of a free-floating judicial power to “update” constitutions or statutes should conclude that a constitutional amendment proposal may become archaic and “die” so as legally to *prevent* subsequent ratification, even if the proposal has no time limit and is never rescinded by Congress. Add the “consensus” instinct to loose conceptions of laws as waxing and waning, and the conclusion of desuetude becomes understandable. But the idea that a congressional proposal for a constitutional amendment, or an enacted statute, can “die” without being repealed or rescinded is manifestly contrary to the whole idea of the rule of law as understood by the founding generation (and by most good lawyers today, as well). While Thomas Jefferson had the idea that constitutions and other laws should expire every 19 years or so (roughly a “half-generation”) unless readopted by the people, Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* 5 *THE WRITINGS OF THOMAS JEFFERSON* 115, 121 (Paul L. Ford ed., 1895), the Framers rejected this idiosyncratic view in favor of a more stable and traditional conception of law as something that continues from generation to generation until repealed.

For a discussion of the validity of very old but unrepealed laws, see text accompanying notes 60-61.

169 See *U.S. CONST. amend. V* (Takings Clause); see also *U.S. CONST. art. I, § 10, cl. 1* (Contracts Clause). For the Supreme Court’s most recent foray into the takings area, see *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

170 See *U.S. CONST. art. IV, § 3*. For an excellent discussion of the legal issues presented by the Territory Clause, see Lawson, *supra* note 12.

171 See Rees, *supra* note 92, at 929 n.264. See generally Akhil R. Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1451-66 (1987). The argument against the lawfulness of secession exactly parallels James Madison’s point concerning a suggestion that New York ratify the Constitution while reserving the right to withdraw from the Union if a bill of rights was not forthcoming. Madison wrote that because “[c]ompacts must be reciprocal ... [t]he Constitution requires an adoption in toto and forever.” Letter of James Madison to Alexander Hamilton (July 20, 1788) in 11 *THE PAPERS OF JAMES MADISON* 189 (R.A. Rutland ed., 1983); see Rees, *supra* note 92, at 929 n.264. Madison is best read here as stating that for a state ratification to have legal effect (either as a scale-tipping ratification under the applicable rule of recognition or in terms of effectively bringing a state into a constitutional union existing by virtue of other states’ ratifications), it must not contain a condition subsequent. It follows that a state’s ratification of the Constitution can never validly contain an implied or claimed right of subsequent rescission or secession. But as Rees points out, this does not mean that a state may not rescind a ratification *before* it has the legal effect of tipping the scales or of changing the legal status of the state. *Id.*

172 Thus, state rescissions of earlier ratifications of the Equal Rights Amendment were valid rescissions. For a case reaching this result, see *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot sub nom. National Organization of Women v. Idaho*, 459 U.S. 809 (1982). Similarly, Ohio and New Jersey validly rescinded their ratifications of the Fourteenth Amendment in early 1868 and should not have been included in the number of states voting affirmatively (though, as noted above, the issue was rendered academic by the ratifications of other states). See *supra* text accompanying notes 108-19.



- 173 The argument against the validity of the ERA extension has been well made by others, especially Grover Rees. *See* Rees, *supra* note 92. Rees' basic argument is very similar to mine on this point. *See id.* at 879-82. While, as noted *supra* at text accompanying notes 92-97, Rees favors a "contract" theory of the amending process—a variant of contemporaneous consensus—his attack on the ERA extension rests on ideas of formalism and the rule of law consistent with the concurrent legislation model.
- 174 This requirement is discussed presently. *See infra* text accompanying notes 178-81.
- 175 *See* *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass ...."); *see also supra* text accompanying notes 170-72.
- 176 Indeed, I believe that the problem of eternal amendment proposals is largely unavoidable where the proposing body is a constitutional convention, because a convention is not a continuing body. There are several possible answers to this problem, none of which is entirely satisfactory. The first is that, having identified the problem, any future constitutional convention can avoid it (should it choose to do so) by putting a sunset on any of its proposals. That does not answer the question of what happens if it declines to do so. A second possibility is that a second or subsequent convention can rescind an amendment proposed by an earlier convention. But unlike subsequent incarnations of "Congress," different constitutional conventions seem like different legal authorities. The third possibility is that Congress might, by two-thirds votes of both Houses, repeal an amendment proposed by a convention. As discussed below, however, the convention method of amendment proposal was designed in large part to provide an alternative method of amendment that avoided any substantive role for Congress. *See infra* text accompanying notes 209-10. The final possibility is that convention-proposed amendments really are "Terminator" amendments; there really is no authority that may retract them once they are launched and the convention has adjourned. While this possibility may cast some doubt on my suggestion that a "Terminator" reading of congressionally proposed amendments should be strongly disfavored, I believe the two situations are distinguishable. Convention proposals and congressional proposals involve two very different types of "legislatures." The Eternal Amendment Problem may be a reason to prefer the congressional proposal method over the convention proposal method, but it is not a sufficient reason to reject the concurrent legislation model as a general theory applicable to both procedures. The theory, not surprisingly, implies different results for two such dissimilar proposing bodies.
- 177 Moreover, unlike the contemporary consensus and congressional power models, such an inference fills an interstice in the text in a manner *consistent* with the text as a whole, rather than creating an entirely new paradigm that displaces the text.
- 178 Appointment of executive officers requires Senate "advice and consent" but the President can remove (most) such officers without Senate advice and consent. *Myers v. United States*, 272 U.S. 52 (1926). *But cf.* *Morrison v. Olson*, 487 U.S. 654 (1988). Treaty formation requires the concurrence of two-thirds of the Senate but treaty termination is probably best regarded as an executive act. *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979) (per curiam).
- 179 Though not itself an argument that disproves the no-repeals view, if repealability is understood to require two-thirds majorities of both Houses, the model coheres nicely with the mathematical logic of Article V's formal counting rules. Suppose for a moment that the no-repeals view is correct and that an amendment proposal may be killed only by an overtaking constitutional amendment (the Terminator scenario). Adoption of such an amendment requires (i) two-thirds majorities of both Houses of Congress and (ii) ratifications by three-fourths of the states. But this is the same procedure needed to repeal a *ratified* proposal (i.e., an adopted amendment). Intuitively, repeal of an unratified proposal should be possible on a lesser showing than that needed to repeal a ratified proposal. Even under the Terminator scenario, one would be tempted to argue that something short of three-fourths ratification should be sufficient to adopt a measure whose sole function is to block ratification of an earlier proposal. (Some might suggest a *one-fourth plus one* rule for Terminator amendments.) But once that concession is made in principle, the clearest line to draw is that the initial proposal was *not* ratified and that ratification should not be necessary for the repeal—leaving as the sole requirement that two-thirds majorities of Congress vote to repeal.
- 180 *See* *INS v. Chadha*, 462 U.S. 919 (1983).
- 181 Russell Caplan appears to subscribe to the latter view. *See* CAPLAN, *supra* note 77, at 128-29.
- 182 *See* Rees, *supra* note 92, at 880 n.20.

- 183 Indeed, a term-of-the-proposing-Congress limit is the most plausible “implied” time limit one could read into [Article V](#), except for the evident difficulties this presents both with the convention method of proposal and with the length of time which many amendments in fact have taken to be ratified. Under such a view, the entire Bill of Rights, for example, would be invalid, because it was not ratified until 1791, during the *Second Congress*.
- 184 3 U.S. (3 Dall.) 378 (1798).
- 185 253 U.S. 221 (1920).
- 186 *Id.* at 231; see also *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (following *Hawke*).
- 187 *Hawke*, 253 U.S. at 229.
- 188 See *infra* text accompanying note 209-11.
- 189 See *Dyer v. Blair*, 390 F. Supp. 1291, 1306 (N.D. Ill. 1975) (three-judge court) (Stevens, J.) (recognizing validity of state law supermajority requirement).
- 190 A state could not, for example, purport to reserve a right to withdraw its ratification even *after* a three-fourths majority has been reached. Such a condition would violate [Article V](#)'s rule of recognition that an amendment becomes law when ratified. Accordingly, such a purported ratification could not be counted toward the three-fourths needed. See *supra* note 171 (discussing James Madison's similar argument against New York's proposed ratification of the Constitution subject to a right to withdraw such ratification).
- 191 *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (holding that official notice from state legislatures to U.S. Secretary of State of state's ratification of proposed amendment is conclusive as to state ratification and, when certified by proclamation, is binding on courts); see also *Field v. Clark*, 143 U.S. 649, 669-73 (1892) (holding that authenticity of bill signed by Speaker of House and President of Senate, approved by President, and deposited with Department of State, is unimpeachable).
- 192 Similarly, as noted earlier, if Congress intends to impose a condition on its amendment proposal (such as a time limitation), it must do so in a manner that the states can readily discern, by placing such a condition in the text of the proposed amendment or the proposal resolution that Congress adopts and transmits to the states. See *supra* note 54.
- 193 See *supra* note 176 and accompanying text.
- 194 The list of scholars who have wrestled with the conundrums posed by [Article V](#)'s convention provisions reads like a Who's Who of constitutional law: Bruce Ackerman, Akhil Amar, Charles Black, Walter Dellinger, Gerald Gunther, Laurence Tribe, and William Van Alstyne. Bruce Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8; Amar, *Philadelphia Revisited*, *supra* note 27, at 1093 n.178 (finding desire for precise rules concerning amendment process under [Article V](#) “misguided” because [Article V](#) “is far less specific than it first seems.... Can states call for a limited convention? How does Congress call a convention? Does the President have a presentment role? What voting rule must a convention follow? What apportionment ratio? Who sets the rules as to selection of delegates? and so on.”); Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 964 (1963) (“[n]either text nor history give any real help”); Walter E. Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 YALE L.J. 1623 (1979); Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 3 (1979) (decrying movement for ostensibly limited convention to propose Balanced Budget Amendment as “constitutional roulette,” “a stumbling toward a constitutional convention that more resembles blindman's bluff than serious attention to deliberate revision of our basic law”); Laurence H. Tribe, *Issues Raised by Requesting Congress To Call a Constitutional Convention To Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 638 (1979) (stating that [Article V](#) convention provisions present “many critical questions” that are “completely open” and lack any “authoritative answer”); 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; see also Congressional Research Service, *Constitutional Conventions: Political and Legal Questions*, CRS Issue Brief (updated Dec. 17, 1990) [hereinafter *CRS Memorandum*] (setting forth 19 “unanswered questions” with respect to issues concerning constitutional conventions under [Article V](#)). For further discussion of the questions and uncertainties surrounding the convention method of amendment, see Arthur E. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME L. REV. 659 (1964); Symposium, *The Article V Convention Process*, 66 MICH. L. REV. 837 (1968) (including articles by Everett McKinley

Dirksen, Sam J. Ervin, Jr., Paul G. Kauper, Ralph M. Carson, Robert G. Dixon, Jr., Arthur Earl Bonfield, and Clifton McCleskey); David Castro, Comment, *A Constitutional Convention: Scouting Article Five's Undiscovered Country*, 134 U. PA. L. REV. 939 (1986); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972); Note, *Good Intentions, New Inventions, and Article V Constitutional Conventions*, 58 TEX. L. REV. 131 (1979). There has also been proposed legislation concerning these subjects, but such legislation has never been enacted into law. See *CRS Memorandum, supra*, at 7 (discussing features of Sen. Orrin Hatch's proposed "Constitutional Convention Implementation Act of 1989"); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972) [hereinafter Black, *A Letter to a Congressman*] (criticizing proposal by Sen. Sam Ervin that passed Senate in 1971 dealing with procedures to be followed on state applications for constitutional convention pursuant to Article V).

195 Dellinger, *supra* note 11, at 425.

196 I address below, *infra* text accompanying note 255, the question of whether a convention application might ever be considered "moot" as a result of congressional proposal, or state ratification, of an amendment addressed to the concerns that prompted the application.

197 Professor William Van Alstyne appears to make the same mistake in the convention application context that his Duke colleague, Walter Dellinger, makes in the ratification context—reading into Article V an implicit time limitation not supported by the words of the article itself. Van Alstyne, *supra* note 194, at 1305 (suggesting that applications must come within "reasonable number of years (*e.g.*, seven)"); see also CAPLAN, *supra* note 77, at 110-12 (concluding that Congress has power to impose a time limit on convention applications). Professor Van Alstyne also believes that applications addressed to different subject-matter concerns must not be added together, Van Alstyne, *supra* note 194, at 1300, 1305, a point with which I take issue below, see *infra* text accompanying notes 201-24.

While Van Alstyne does not make the argument, there is a slightly better case for a contemporaneity requirement with respect to convention applications than with respect to ratifications of proposed amendments. Article V's language with respect to ratifications provides that an amendment is valid "when ratified." But its language with respect to applications provides that Congress shall call a convention "on the Application" of two-thirds of the states. The word "Application" is singular, which could be taken to connote a single, unified act. Also, the grammar is not parallel to the "when ratified" language: it is not "when two-thirds of the states have applied" but "on the Application of."

This distinction in language, however, seems too slim a foundation on which to build an entirely different structure for cumulating convention applications than for cumulating ratifications. The word "Application," followed by the two-thirds requirement, does not itself justify a contemporaneity requirement. The language is equally capable of being read as requiring concurrent (unrepealed) enactments of two-thirds of the states requesting a convention, without a time limitation. Moreover, inferring a contemporaneity requirement poses all of the same insuperable line-drawing problems that plague such a requirement in the ratification context.

198 See Dellinger, *supra* note 194, at 1623-24.

199 The Appendix sets forth, state by state, citations to 399 convention applications—all of those submitted since the adoption of the Constitution for which there are available records.

200 If applications conditioned on the convention being limited to a certain subject are permissible, and such applications are separately cumulated, there is almost a sufficient number of applications for a balanced budget convention. Presently, 30 states (four short of the required two-thirds majority) have presented, and not rescinded, some sort of balanced budget convention application. If the rescinding states are counted as not having rescinded (an improper result under the approach of this Article), there are two more applications for a total of 32. This figure is overly large, however. The various applications are differently worded, with some specifying a particular text (and limiting the convention to consideration of that text), some limiting the convention only to that subject, and some merely stating the desire for a balanced budget amendment in the form of a purpose of the application. On the assumption that a limited convention is permitted by Article V, it is unclear whether such nonconforming applications could be cumulated, since they each purport to impose a limitation of different scope.

As the argument in the text will develop, however, Article V does not permit Congress or the applying states to limit the agenda of a constitutional convention. The applications in the first two categories (which are conditioned on such a limitation) are thus invalid. Those in the last category should be counted as valid (*i.e.*, general) applications, to the extent not rescinded or repealed by later applications. See generally *infra* text accompanying notes 225-45.

- 201 See Black, *Letter to a Congressman*, *supra* note 194, at 198-200; Dellinger, *supra* note 194, at 1633-36. Professor Black's article is in the form of a letter to the Chairman of the House Judiciary Committee, responding to proposed legislation specifying procedures for calling a constitutional convention. The legislation assumed that a convention could be validly limited to a single subject—a proposition which Professor Black vehemently rejected. The Senate Report argued that a convention must be capable of being limited or else convention applications on different subjects could be added together to form a sufficient number to require calling a convention—a possibility apparently considered so plainly absurd as to merit no further consideration. See Black, *Letter to a Congressman*, *supra* note 194, at 198 (citing SENATE JUDICIARY COMM., FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. NO. 336, 92d Cong., 1st Sess. 7 (1971)). Professor Black responded that the Senate's argument was “evidently fallacious” because [i]f the view that the convention is illimitable is right ... then in the case stated, none of the applications which the Report puts on parade would have called for the thing the Constitution names, properly construed. None, therefore, would be effective; none would create any congressional obligation. Thirty-four times zero is zero.
- Id.* There is a third possibility that both the Senate Report and Professor Black overlook: that a convention must be general; that there are a sufficient number of state applications that are subject-specific but that do not purport to limit the work of the convention to that subject only; and that these applications are valid and may be added together.
- 202 See Van Alstyne, *supra* note 194, at 1305-06. See generally CAPLAN, *supra* note 77, at 138-58. No one appears to take the position—quite untenable as a matter of Article V text, history, or practice—that a constitutional convention *must* be limited to a single subject. Article V at the very least *permits* a general convention.
- 203 See Van Alstyne, *supra* note 194, at 1299-1300; Dellinger, *supra* note 194, at 1633-36; see also *supra* note 200.
- 204 For reasons explained below, my ultimate conclusion that Congress is obliged to call a constitutional convention follows even if Article V permits limited conventions. See *infra* text accompanying notes 227-33 and text accompanying note 263. I state the argument against a “limited convention” here primarily for purposes of clarity and because I believe it is correct.
- 205 Black, *Letter to a Congressman*, *supra* note 194, at 199. The illimitability of the work of a constitutional convention is also implicit in the writings of Professor Amar. See generally Amar, *Philadelphia Revisited*, *supra* note 27.
- 206 See generally Amar, *Philadelphia Revisited*, *supra* note 27; cf. Ackerman, *supra* note 49, at 1055-58.
- 207 Cf. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring). Justice Kennedy made a similar argument with respect to the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, which divides the appointment power into two separate spheres: the President's power to ‘nominate’ and the Senate's power to give or withhold its ‘Advice and Consent.’ No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.
- Id.* at 483. See generally John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633 (1993). So too, Article V's convention method has no role for Congress in the process of proposing the amendments that will be considered by whatever ratifying body Congress directs. To infer such a role would be contrary to the whole scheme of Article V's distinction between the congressional method of amendment proposal and the convention method.
- 208 See Van Alstyne, *supra* note 194, at 1297 (ascribing this argument to Charles Black).
- 209 Dellinger, *supra* note 194, at 1634-35; see also Van Alstyne, *supra* note 194, at 1303 (concluding that historical evidence indicates that “Congress was supposed to be a mere clerk of the process convoking state-called conventions”). See generally Van Sickle & Boughey, *supra* note 15, at 5-36 (setting forth a narrative “legislative history” of Article V).
- 210 Dellinger, *supra* note 194, at 1631-33.
- 211 *Id.* at 1630-31. A related policy argument for not reading Article V to permit congressional control over the content of convention proposals is that such conventions are most likely to be called where the proposed amendments to be discussed are ones to which Congress is likely to be hostile as a matter of institutional predilection and, consequently, would not propose—even in the face of overwhelming popular support for such amendments. The present debate over limiting the number of congressional terms, or years of service, appears to be one such issue. See generally Roderick M. Hills, *A Defense of State*

*Constitutional Limits on Federal Congressional Terms*, 53 PITT. L. REV. 97 (1991). Historically, the push for direct election of Senators is such an example. *See id.* at 108.

Dellinger's historical evidence also buttresses the criticism offered earlier in this Article of the "political question/plenary congressional power" approach of *Coleman* and Professor Tribe. Such an approach flatly contradicts the original intent and understanding of [Article V](#) conventions. If the two "sides" of [Article V](#) are of a piece, this further undermines the argument that Congress has plenary control over the amendment process in terms of judging ratifications. Dellinger makes this point more explicitly, in Dellinger, *supra* note 11, at 399.

212 *See generally* Ackerman, *supra* note 49; Amar, *Philadelphia Revisited*, *supra* note 27. James Madison vigorously defended the convention against the charge that the Framers had exceeded their mandate. *See* THE FEDERALIST No. 40, at 195-202 (James Madison) (Garry Wills ed., 1982).

213 Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981).

214 *Compare, e.g.*, Virginia's proposals, 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657-63 (Jonathan Elliot ed., 1987) with Massachusetts', 2 *id.* at 176-78.

215 This evidently formed part of James Madison's motivations for introducing and pushing for congressional proposal of a bill of rights. As he wrote:

The Congress who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger it. A Convention, on the other hand, meeting in the present ferment of parties, and containing perhaps insidious characters from different parts of America, would at least spread a general alarm, and be but too likely to turn everything into confusion and uncertainty. It is to be observed however that the question concerning a General Convention, will not belong to the federal Legislature. If two-thirds of the States apply for one, Congress cannot refuse to call it; if not, the other mode of amendments must be pursued.

Letter from James Madison to George Eve (Jan. 2, 1789), in 5 THE WRITINGS OF JAMES MADISON 321 (Gaillard Hunt ed., 1904); *see also* Letter from James Madison to Phillip Mazzei (Dec. 10, 1788), in 5 THE WRITINGS OF JAMES MADISON, *supra*, at 316 ("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.").

216 Van Alstyne, *supra* note 194, at 1299-1300.

217 *Id.* at 1300.

218 *Id.* at 1296-1302.

219 *Id.* at 1302.

220 *Id.* at 1303; *see id.* at 1305 (more likely that "foreseeable object" of convention method would be to respond to "a particular event, an untoward happening, itself seen as a departure from, or as a suddenly exposed oversight within, the Constitution"). Professor Van Alstyne's subsequent writing makes essentially the same point. The prospect that any convention must be general, he argues, would act as a "deliberate discouragement" to state applications seeking only narrow, specific reforms. William Van Alstyne, *The Limited Constitutional Convention-The Recurring Answer*, 1979 DUKE L.J. 985, 992. But it begs the question-in-chief to say that the general-convention-only view is a "peculiar (and hostile) construction of [Article V](#)." *Id.* at 992. The prospect of a general convention is a "discouragement" to application only if one has the unreasonable fear that a convention with the *power* to propose radical changes would necessarily do so (especially when applying states have limited purposes in mind and given that three-fourths of the states still would be needed to ratify any proposals). *See infra* text accompanying notes 277-78.

221 Earlier in his 1978 article, Van Alstyne appears to recognize this, in the course of commenting on the argument that conventions must be general. "[S]tate legislative resolutions inconsistent with a convention understood to have unqualified proposing authority are not to be counted. (*This ... point is consistent, however, with a state legislative resolution calling for a convention even while expressing a statement of subjects which that state deems sufficient to warrant the call.*)" Van Alstyne, *supra* note 194, at 1300 (emphasis added). I rely heavily on exactly this distinction in explaining how state applications are to be interpreted.

*See infra* text accompanying notes 225-44. But this distinction seems to decisively refute Van Alstyne's induction from the historical record as a whole.

222 Or, as Charles Black has put it, “no convention can be called that has anything to run away from.” Black, *Letter to a Congressman*, *supra* note 194, at 199.

223 Bruce Van Sickle and Lynn Boughey make an equal and opposite error. *See* Van Sickle & Boughey, *supra* note 15, at 46-56. They believe, like Professor Black, that a constitutional convention may not be limited in subject matter. They do not make Black's mistake of assuming that all state convention applications that mention a specific subject matter are therefore invalid. Rather, they mistakenly assume that all state convention applications are *valid*, apparently ignoring the fact that many such applications are expressly conditioned on the limitation on the subjects the convention may consider. While Van Sickle and Boughey ultimately reach the same conclusion I do—that Congress is obliged to call a convention—their analysis is clearly wrong. *See infra* note 250.

224 Both questions, I submit, are questions of *federal* law. How [Article V](#) should be interpreted is plainly a federal question. The question of how convention applications are to be interpreted is more difficult to characterize. While a state's convention application is a species of state legislative enactment, the *Article V* effect of a convention application would seem to be a question of federal law, subject to a uniform rule. This seems correct for two related reasons.

First, federal law necessarily governs at least one aspect of interpretation of state applications: whether a state has actually *applied* to Congress. Congress cannot be expected to guess whether a state desires a convention. It must rely on what the state has told it. The text of [Article V](#) requires “*application*” for a convention. This in turn suggests a uniform federal-law rule of judging the [Article V](#) validity of a state convention application based on the text of that application. Congress (and any court reviewing Congress' action) must be able to determine whether a state is applying for a convention by examining what that state has transmitted to Congress. Congress cannot be expected to divine whether or not a state wishes a convention based on secret state-law-derived intentions not expressed to it in the form of an application for a convention. *See supra* text accompanying notes 191-92 (expressing a similar rule with respect to state ratifications subject to conditions). Relatedly, as a matter of federal law, a state application is valid when, on its face, it appears to have been submitted by competent authority of the state. *Leser v. Garnett*, 258 U.S. 130 (1922); *cf. Field v. Clark*, 143 U.S. 649, 669-73 (1892).

Second, the sheer impracticality of requiring Congress, the body charged with the duty of calling the convention, to divine the unstated, uncommunicated intentions of state legislatures (perhaps as contained in legislative history) makes imperative a system of uniform principles governing the construction of state applications. The problems inherent in using legislative history to illuminate the meaning of enactments (and of divining the meaning of state law by researching state court interpretations) are multiplied fiftyfold in the convention application context. Such an inquiry would be a procedural and practical nightmare. Of course, some opponents of the use of legislative history to alter statutory meaning might think it appropriate to punish Congress by making it engage in such an interpretive enterprise on a massive scale, in the hope that Congress would then repudiate such a method of statutory interpretation for its own enactments. *See infra* note 243.

225 Some might question whether a convention application can contain any sort of condition at all. Under the concurrent legislation model, however, just as a state ratification can be conditional (such as a time limit on its validity), so too a state convention application might be conditional. Some conditions are wholly unproblematic. For example, a state's application might provide that it expires after a period of years. Other conditions may appear more troubling—such as a condition that other states' applications contain certain language of purported limitation of the agenda of the convention—but may not necessarily be invalid.

For example, suppose Wisconsin conditions a convention application on a commitment by a certain number of other applying states to direct their convention delegations to consider only balanced budget amendment proposals. (And Wisconsin need not choose the same number of states as are required to force a convention call: it might choose a simple majority of 26, on the premise that a simple majority of state delegations could control the convention's agenda; it might choose a four-fifths supermajority, as a super-precaution against backsliding by some delegations.) Wisconsin's application should then be counted toward the two-thirds requirement only if the conditions of its application are satisfied: if Wisconsin's designated number of states contain the conditional language in their applications, count Wisconsin in. But here is the key distinction: this does *not* mean that the convention, once called, must honor the wishes of Wisconsin and its friends. The conditions apply only to the application, not to the work of the convention. (A state might desire to bind fellow states politically or morally even if it cannot bind them legally.)

The point may be clarified by considering a slight variation: Minnesota's convention application is made conditional on the *product* of the convention being limited to some form of balanced budget proposal. As the discussion in the text on “limited” conventions should have made clear, this is an unenforceable condition. But the difference in result between the hypothetical applications of Wisconsin and Minnesota defines the point: there is a difference between conditions that ask other states to make a commitment (albeit unenforceable) to a substantive limit on the work of the convention and a condition demanding that the work of the convention be in fact limited.

226 See, e.g., Okla. H.R.J. Res. 1053, *reprinted in* 126 CONG. REC. 8972 (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 ....”); see also Ind. S.J. Res. 8, *reprinted in* 125 CONG. REC. 9188 (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.”).

227 See, e.g., Colo. J. Mem. No. 1, *reprinted in* 125 CONG. REC. 2109 (1978) (balanced budget application).

228 I consider presently the question of whether such an invalid condition is “severable” from the application as a whole and conclude that it is not. See *infra* text accompanying notes 246-50.

229 The same conclusion results if an application's statement of “purpose” is understood to refer to the convention, not the application, i.e., the state applies for a convention the purpose of which, in the state's contemplation, is to propose a Balanced Budget Amendment. Absent words of exclusivity (such as “sole” or “exclusive”) modifying the statement of purpose, the application should be understood as requesting a general convention. The calling of a convention for one purpose is not *inconsistent* with that convention's consideration of additional subjects.

230 Ariz. H.R. Con. Res. 2001, *reprinted in* 126 CONG. REC. 11,389 (1980) (emphasis added).

231 Conn. S.J. Res. 9, *reprinted in* 104 CONG. REC. 8085-86 (1958) (emphasis added).

232 A reference to a specific subject for which an amendment is desired does not necessarily suggest an intention or understanding on the part of the applying state that the convention would be limited to that subject. Statements of subject-matter purpose may well further important political objectives of the state, such as recruiting the support of other states for a convention or pressuring Congress to propose an amendment on that specific subject to “head off” a convention. (A number of convention applications specify that the application is no longer in effect if Congress proposes such an amendment, *cf.*, e.g., 135 CONG. REC. S3233 (daily ed. Apr. 4, 1989) (South Dakota). Moreover, states may well rescind their outstanding applications if their desired amendments have subsequently been proposed by Congress.

This argument is reinforced by the fact that there is far clearer language, readily at hand and used by other states on many occasions, by which a state could make its application expressly conditioned on the convention being a limited one. Where states intend to condition their application on the calling of a limited convention, they know how to say so. See *supra* note 226.

233 See *infra* text accompanying note 277.

234 See *infra* text accompanying note 262 (using similar notion to explain how invalid applications should be understood to affect legal validity of prior valid applications).

235 Dellinger, *supra* note 194, at 1636-38.

236 *Id.* at 1636

237 *Id.*

238 *Id.* at 1637.

239 *Id.*

- 240 See *infra* text accompanying notes 273-75.
- 241 Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it.”). As a general matter, statutes also are construed, if at all possible, so that each word, phrase, or provision is given effect, see 2A JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 119 (Norman J. Singer ed., 5th ed. 1992); see also *Connecticut Nat’l Bank v. Germain*, 112 S. Ct. 1146 (1992). Additionally, statutes are construed in a manner that accords with applicable constitutional rules. See, e.g., *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465-66 (1989).
- 242 Dellinger has defended Article V formalism (at least to a point) on other occasions. See Dellinger, *supra* note 11, at 418 (“Attention to ... formalities is more likely to provide clear answers than is a search for the result that best advances an imputed ‘policy’ of ‘contemporaneous consensus.’”).
- 243 Justice Scalia and Judge Easterbrook have advanced powerful critiques of the use of legislative history as a tool of statutory interpretation, on the grounds that such evidence of legislative intent is formally irrelevant and, as a practical matter, unrepresentative, unreliable, and manipulable. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”); *In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir. 1989) (Easterbrook, J.) (stating that where text and legislative history conflict, text must prevail); *Hirschey v. Federal Energy Regulatory Comm’n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (noting that legislative history is unreliable tool even for determining legislators’ intentions because it is frequently manufactured by staffers and interest groups); see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.
- 244 Dellinger, *supra* note 194, at 1637.
- 245 Theoretically, language in the texts of earlier applications might alter how the most recently enacted application would otherwise be construed. In none of the states, however, do the prior applications actually have such an effect. Accordingly, I put this possibility to one side in setting forth the relevant rules of interpretation.
- 246 Black, *Letter to a Congressman*, *supra* note 194, at 200.
- 247 Severability theory deals with the validity of the remainder of a statute when one part is found invalid (e.g., unconstitutional). For a thorough discussion of the problem of severability generally, see John C. Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).
- 248 For an introduction to the concepts of public choice, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).
- 249 See generally Nagle, *supra* note 247. See, e.g., *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987) (finding that the “more relevant inquiry in evaluating severability is whether the statute [absent the severed provision(s)] will function in a manner consistent with the intent of Congress”) (emphasis omitted). The *Alaska Airlines* formulation of the doctrine does not specify whether the relevant “legislative intent” should be divined solely from the text of the statute as enacted (including the invalid provision) or whether legislative history should be consulted. *Alaska Airlines* indicates the latter, but the recent debate over the use of legislative history in statutory interpretation generally suggests that *Alaska Airlines*’ answer may not be conclusive. See *supra* note 243 (collecting criticisms of reliance on legislative history generally).
- 250 The approach of Van Sickle & Boughey, *supra* note 15, at 46-56, is thus badly flawed. Van Sickle and Boughey reach the same specific conclusion as I do with respect to the current obligation of Congress to call a constitutional convention, but their reasoning is wholly insupportable. Essentially, they adopt the naive “Door #1” approach. They agree that a convention cannot be limited to a specific subject, but completely ignore (or are ignorant of) the important textual differences among the hundreds of state applications for a constitutional convention. They either do not know that there are a large number of applications that state a subject-matter limitation on the work of the convention as an express *condition* of the application



or fail to recognize the necessary legal significance of such an express condition. *See supra* text accompanying notes 223-32. Instead, they simply assert that “an application is an application,” *id.* at 47, and treat even express limiting conditions as if they were severable. *See id.* at 56 (“In our view, any attempt by a state to limit the convention, or the application, to only one issue cannot be given legal substance, and that portion of the application is invalid, leaving the application itself intact.”). This analysis is manifestly unsound.

251 This seems to have been Professor Black's view: “The State that asks for a convention on bussing alone is not expressing anything about its views on the desirability of an unlimited convention.... If, as I contend, the latter is what [Article V](#) means, then the State has taken no action at all under [Article V](#), and has put Congress under no obligation.” Black, *Letter to a Congressman*, *supra* note 194, at 200 (footnote omitted). It is unclear, however, whether Black considered the possibility of Door #3.

252 This, of course, is the original reasoning of [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137 (1803). According to this view, overruling a decision that declared a law unconstitutional means that the invalidated statute springs back to life, as long as the legislature has not repealed it in the interim.

253 This principle is consistent with the general rule for statutory interpretation. Where a later statute that repeals an earlier statute is declared invalid (in total), the earlier statute becomes operative again. *See SUTHERLAND*, *supra* note 241, § 23.31. (Another way of putting this is that the “repealer” provision in the later statute was found to be nonseverable from the statute as a whole.) This is also the common law rule (the “English rule”) with respect to the effect of a subsequent invalid will on a prior will that would have been repealed but for the invalidity of the subsequent will. *See generally* WILLIAM M. MCGOVERN JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 5.3 (1988).

254 South Dakota furnishes an example. Applications submitted in 1993, 1989, 1986, 1979, 1977, and 1971 all ask for Congress to call a convention for the “specific and exclusive” purpose of considering amendments on coercive use of federal funds, term limits, line item veto, balanced budget, abortion prohibition, and revenue sharing, respectively. Each application is invalid because it purports to limit the substantive agenda of the convention but, plainly, none of the later applications “repeals” the preceding ones. It is therefore necessary to repair to the next previous convention application—a 1965 application “for the purpose of” proposing an amendment overturning the Supreme Court's reapportionment decisions. That application states South Dakota's purpose only, and is not cast as a condition on the substantive proposals that a convention could consider. Under the “Door #2” approach, the 1965 application remains a valid call for a general convention, notwithstanding six subsequent invalid calls for a limited convention. *See Appendix* at 783-84.

North Carolina provides another interesting case. Three invalid applications for limited conventions, submitted in 1979, 1965, and 1949, make it necessary to go all the way back to a 1907 application to determine whether North Carolina's light is “on” for a general convention. That application, while reciting the state's desire for an amendment concerning direct election of Senators, also recites that “other amendments ... are by many intelligent persons considered desirable and necessary,” and therefore requests a general convention “for the purpose of proposing amendments.” Under the “Door #2” approach, North Carolina's light remains “on” for a general convention by virtue of the 1907 application, notwithstanding the three subsequent invalid applications. *See Appendix* at 780.

255 While an application does not expire simply because of its age, there is a stronger argument that such an application may have been “mooted” by the adoption of essentially the same amendment for which a convention was sought. It seems strange, to say the least, to think that Virginia's and New York's pre-Bill of Rights convention applications could still be regarded as valid. But if an application is stated in purposive rather than conditional terms, it theoretically is not mooted by accomplishment of that purpose, because its language does not purport to limit the agenda of the convention called for, notwithstanding the evaporation of that state's original purpose. Moreover, there can be no certainty that an amendment on the same subject is fully satisfactory to the applying state, and it might still desire a convention in order to revise the amendment adopted. To assume that the application is vitiated would permit Congress to defeat a convention call by proposing an inadequate, palliating amendment on the same subject—one that might well differ in important respects from the product that a convention would have produced. *Cf. supra* text accompanying notes 78-84 (setting forth “competing amendment proposal” scenario). Maine provides an illustration. Maine's most recent valid, unrepealed application for a convention, submitted in 1911, recited as its purpose the proposal of an amendment providing for the direct election of U.S. Senators—a result fully accomplished by the adoption of the Seventeenth Amendment in 1913. But Maine's application does not purport to be conditioned on what a convention might do; it is a statement of purposes only. While Maine might not have requested a convention once its specific desired amendment was adopted, its application does not provide (as some other subject-specific applications have)

that adoption of its desired amendment by other means terminates its application. In legal effect, Maine's 1911 application remains valid. *See* Appendix at 774; *see also* Appendix at 775 (Michigan's 1943 application “for the purpose of” proposing an amendment limiting presidential terms is not vitiated by proposal of the Twenty-second Amendment); *id.* at 775-76 (Minnesota's applications for a convention to propose direct election of U.S. Senators not vitiated by adoption of the Seventeenth Amendment); *id.* at 771-72 (alternative analysis for Iowa's convention application status).

- 256 If Door #3 provides the operative rule, there is an insufficient number of states (10) requesting a general convention, and Congress is under no obligation to call one.
- 257 *See* *Allen v. McCurry*, 449 U.S. 90, 99 (1980) (“repeals by implication are disfavored”); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978) (“intention of the legislature to repeal must be clear and manifest”) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).
- 258 The one exception to the rule is Utah's most recent convention application. 133 CONG. REC. S5486 (daily ed. Apr. 24, 1987). That application is conditioned on the convention being limited to a particular subject, and further provides that “the state of Utah is not to be counted in a convention call for any other purpose except as limited” by that application. This language is best understood as turning “off” the state's light for any purpose other than a “limited” convention. *See* Appendix at 786. The usual situation contrasts sharply with the situation presented by the Thirteenth Amendment and the proposed Corwin Amendment, discussed above. *See supra* text accompanying notes 75-88. The Thirteenth Amendment is both a logical and linguistic negation of the Corwin Amendment proposal in a way that a “sole and exclusive” convention application is not logically contrary to an earlier, general “for the purpose of” application. Moreover, as I suggest later, there is a plausible explanation for why a state might sensibly enact both forms of convention applications. No such explanation can harmonize the Thirteenth Amendment's prohibition of slavery and the Corwin Amendment's proposed prohibition on federal interference with slavery.
- 259 Louisiana's 1992 “blanket” repeal of its earlier applications is excerpted in the text, *infra* text accompanying note 277. For an example of a state resolution repealing a convention application reciting a specific subject-matter purpose, see 98 CONG. REC. 742 (1952) (setting forth text of Arkansas legislature's rescission of an earlier request for convention for purpose of setting cap on percentage rates for federal income tax). Unlike Louisiana, however, Arkansas' light is “on” for a general convention by virtue of subsequent applications.
- 260 In addition, there is a direct analogy to state rescissions of ratifications of proposed amendments. Again, where a rescission is intended, it has been clearly expressed and without difficulty. *See, e.g., Idaho v. Freeman*, 529 F. Supp. 1107, 1113-14 & n.5 (D. Idaho 1981), *vacated and remanded sub nom. National Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982) (setting forth text of Idaho's resolution rescinding its earlier ratification of Equal Rights Amendment); CONG. GLOBE, 40th Cong., 2d Sess. 890 (1868) (setting forth text of Ohio's resolution rescinding its earlier ratification of Fourteenth Amendment).
- 261 South Dakota's numerous recent applications, *see supra* note 254, provide a good “real-world” example of this hypothetical.
- 262 A different question may be presented by a subsequent application that employs (invalid) “sole and exclusive” conditional language with respect to a proposed amendment subject that was previously the subject of a (valid) “for the purpose of” application. A stronger argument can be made in such a context that the second application on the same subject was intended to supersede the first, to the extent of any inconsistency. Several states, for example, have submitted multiple “balanced budget” applications. But even in this context, the implication of an intended repeal is by no means a necessary (or even a particularly strong) one. A state that wishes to have a constitutional convention in which a Balanced Budget Amendment is on the agenda, and that is unsure of the [Article V](#) rule of recognition or what applications conditioned on a subject-matter limitation must say, might well “straddle” the possibilities by adopting multiple balanced budget applications—each differently worded so as to fit within a different possible rule of recognition—without intending a later application to repeal an earlier one. Equally likely, a state might continue to submit applications on a particular subject for political purposes—to send a message to Congress, to reaffirm its desire for amendments, or to recruit the support of other states in a convention drive.
- 263 I should note, however, that nothing in the rest of the concurrent legislation model for *understanding Article V* necessitates agreement with my methodology for *interpreting convention applications*. They are, strictly speaking, separate arguments. While I believe both are correct, the latter is “severable” from the former: one may accept the concurrent legislation model

and still question whether my method for counting general convention applications is valid. As the text suggests, there is at least a colorable case for choosing Door #3, even though I believe that choice to be incorrect for the reasons stated.

264 The Appendix sets forth the detailed analysis of each state's applications that supports this conclusion. Only Alaska, Hawaii, Louisiana, Rhode Island, and Utah do not have in existence some valid (i.e., not conditional), unrepealed application for a convention. "Door #1" would produce 48 valid applications. As alluded to above, "Door #3" would produce only 10. *See supra* note 256.

265 U.S. CONST. art. V (emphasis added); *cf.* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1162-65 (1992) (discussing importance of mandatory "shall" language to debates over interpretation of Article II and Article III).

266 *See* THE FEDERALIST No. 85, at 448 (Alexander Hamilton) (Garry Wills ed., 1982) (responding to objection that federal government could prevent amendments to Constitution: "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 are peremptory. The congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body."); Letter from James Madison to George Eve, *supra* note 215 ("If 2/3 of the States apply for [a convention], Congress cannot refuse to call it ...."). Professors Dellinger and Van Alstyne agree on this point. Dellinger, *supra* note 194, at 1634-35; Van Alstyne, *supra* note 194, at 1303 ("Congress was supposed to be mere clerk of the process convoking state-called conventions.").

267 More difficult issues are presented by questions concerning the precise timing and form of Congress' convention call and issues concerning the representation rules for such a convention. Such issues may be "nonjusticiable" in the sense that Article V supplies no hard-and-fast rule that would invalidate Congress' decisions on these matters. A formal treatment of these issues of convention procedure is beyond the scope of this Article, but my tentative views are as follows: Congress must call for a convention if two-thirds of the states have applied for one, but it may postpone the call for a brief period in order to permit states to clarify their application status. *See infra* text accompanying notes 273-75. In short, Congress is under a good faith duty to determine whether a convention is called for, but is permitted a reasonable period of time in which to make that determination. In any event, Congress has some discretion in fixing the time and place of the convention (at least as an initial matter). Because the Constitution does not supply a rule, Congress may select any reasonable system of representation it desires, at least as an initial default rule subject to the convention's change, including one-state-one-vote, proportional representation (whether or not along state lines), or some mixture (such as each state being permitted to send delegates equal in number to the total of its U.S. Senators and Representatives).

But the fact that Congress may as a practical matter have a measure of power over such details of the convention call (or, alternatively, that such issues may be deemed "nonjusticiable") does not mean that Congress has plenary power over *all* issues concerning Article V. That some Article V issues might be deemed political questions (because of the absence of a governing rule or standard in Article V) does not mean that Congress has complete discretion where Article V *does* provide a governing rule.

268 Some of the most famous are *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Powell v. McCormack*, 395 U.S. 486 (1969); and *United States v. Nixon*, 418 U.S. 683 (1974).

269 *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838) (holding that courts may direct executive branch officers to perform nondiscretionary, ministerial duties); *cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

270 Consider, for example, President Richard Nixon's decision to turn over the tapes in the aftermath of Watergate. *United States v. Nixon*, 418 U.S. 683 (1974).

271 Individual citizens and state legislators probably do not have standing, because no private interest is created by the presence or absence of a convention (which, after all, can only make proposals).

272 I leave to one side as beyond the scope of this Article the interesting peripheral questions of whether such a suit would be a suit against "the United States" or against congressional officers, whether any doctrine of sovereign immunity would be applicable, and whether, if the suit were brought by a state, the action would fall within the original jurisdiction of the Supreme Court. I am concerned here primarily with the question of the applicable rule of decision on the merits of such a suit.

- 273 *Brown II*, 349 U.S. at 301; cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In *Northern Pipeline*, the Court struck down as a violation of Article III the Bankruptcy Act of 1978 and with it, the entire cadre of federal bankruptcy courts. *Id.* at 87. The Court stayed its judgment, however, to “afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.” *Id.* at 88.
- 274 This is one of the actual holdings (as opposed to dicta) of *Dillon v. Gloss*, 256 U.S. 368, 376-77 (1921).
- 275 This answer, however, is far from clear. There is a sense in which the constitutional obligation-legally enforceable through a lawsuit-arises at the moment that the requisite number of applications exists. There might therefore be a serious theoretical objection to a state's purporting to rescind its application *after* the scale-tipping application. On the other hand, if a sufficient number of states had rescinded their applications, all that a court could decree is that Congress was constitutionally obliged to call a convention at some point in the past-but no longer is. This would be a pure advisory opinion. The issue would have been mooted by the rescinding states.
- 276 CAPLAN, *supra* note 77, at viii n.1 (quoting Justice Brennan).
- 277 La. Legis. Con. Res. 218, reprinted in 138 CONG. REC. S529 (1992).
- 278 Lawson, *supra* note 12, at 909 (applying formalist methodology to interpretation of Territory Clause); cf. *United States v. Finley*, 490 U.S. 545, 556 (1989) (applying similar principle to statutory interpretation) (“Whatever we say regarding ... [interpretation of] a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”).
- 279 Dellinger, *supra* note 11, at 387. The Justice Department Memorandum, in explaining the validity of the Twenty-seventh Amendment, made the same point:  
The amendment procedure, in order to function effectively, must provide a clear rule that is capable of mechanical application, without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process.... The very functioning of the government would be clouded if Article V, which governs the fundamental process of constitutional change, consisted of “open-ended” principles without fixed application.  
OLC Opinion, *supra* note 7, at 113.

## \*764 APPENDIX

This Appendix contains a narrative summary of the convention application status of each state, according to the analysis set forth in this Article. In addition, the citations for every application are provided, on a state-by-state basis. Under the analysis set forth in Part IV of this Article, forty-five states are currently in a condition of application to Congress to call a constitutional convention.

The applications were initially compiled from secondary sources containing lists or partial lists of convention applications (most frequently organized by subject matter, rather than state). These lists were then updated and completed by computer search. The existence (or nonexistence) and proper texts of each application were verified by searching the entire *Congressional Record* volume of the year or years referenced for a purported application by a secondary source, and by cross-checking with the session laws or other statutory compilations of the fifty states. The complete texts of all 399 applications were assembled, citations verified, errors corrected, and duplications deleted. (The texts of all the applications are on file with the author.) It should be noted that many of the citations provided in other secondary sources are inaccurate, referencing page numbers in the *Congressional Record* where the applications are not in fact present, treating as distinct applications those which are duplicates recorded in more than one place in the *Congressional Record*, omitting numerous applications, and counting as applications resolutions that do not in fact purport to apply for a constitutional convention. Many of these secondary sources appear uncritically to repeat lists provided by other (inaccurate) secondary sources.

Compiling the convention applications was made more difficult by the surprising absence of any systematic, accurate compilation of convention applications or, apparently, any procedure for doing so. The *Congressional Record* is not systematically organized in this regard. Indices reference convention applications wherever mentioned—be it the receipt of a new application, or a reference to it by some Representative or Senator. The *Congressional Record* contains no means for specifically identifying original applications as opposed to duplicative references. Nor does the *Congressional Record* appear to provide for a manner of attesting to the existence of an application other than by the decision of some member to insert it in the record. Likewise, it appears that none of the government entities that might be expected to have maintained a comprehensive and up-to-date record of convention applications—the Congressional Research Service, the National Archives, the Department of Justice, the Senate and House Judiciary Committees—in fact maintains such a record. Nor do many of the states keep compilations of their federal constitutional convention applications.

I believe that this is the first *complete, accurate* compilation and analysis of the states' applications for a federal constitutional convention. Unfortunately, the lack of any systematic and reliable method for collecting and compiling applications makes it impossible to be absolutely confident of the completeness of this compilation. If an application was never entered into the *Congressional Record* at any time (such entry is not required and the actual entries follow no consistent pattern over time), it would be virtually impossible to learn of its existence. If anyone has information concerning “missing” applications, the author would be grateful to learn of them. The fact that there has never been any “official” compilation of convention applications underscores the need for Congress to provide by statute for an orderly process of transmittal, recording, and compilation of convention applications.

Preparation of this Appendix would have been impossible without the heroic research efforts of my research assistant, Dale Caldwell. While I should be blamed for any errors it contains, he deserves much praise for the basic research.

\*\*\*\*\*

Where an application text is recorded in the *Congressional Record* in a different year than the application originally was submitted by a state, the *Congressional Record* date is placed in parentheses and the state session laws date is placed in brackets. An asterisk (\*) indicates that a given application is not cited in the *Congressional Record*. A cross (†) indicates that the text of an application could not be found.

#### **\*765 ALABAMA**

Alabama's light is “on” for a constitutional convention. The two most recent applications seek a convention for the “specific and exclusive purpose” or “sole and exclusive purpose” of proposing, respectively, an amendment replacing lifetime federal judicial appointments with election for six-year terms, 127 CONG. REC. 21,684 (1981), and prohibiting abortion, 126 CONG. REC. 10,650 (1980). Both applications are invalid. The next previous application asks Congress to propose a balanced budget amendment and “alternatively” seeks a convention for that “specific and exclusive” purpose. 125 CONG. REC. 2108-09 (1979). Whether or not such an “in the alternative” application is permissible, the subject-matter condition renders the application invalid. In any event, this application was repealed by subsequent resolution. 135 CONG. REC. H5485 (daily ed. Sept. 7, 1989). The next previous application requests a convention for the “specific and exclusive” purpose of proposing an amendment prohibiting deficit spending, 121 CONG. REC. 28,347 (1975), and is likewise invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment concerning revenue sharing, but does not in terms condition the application on a subject-matter limitation on the convention. 113 CONG. REC. 10,117-18 (1967). This application constitutes a valid, unrepealed application for a general constitutional convention.

#### ***Citation***

127 CONG. REC. 21,684 (1981)

#### ***Subject(s) Mentioned***

Selection and tenure of federal judges

126 CONG. REC. 10,650 (1980)	Right to life
125 CONG. REC. 2108-09 (1979) [1976], <i>repealed by 135 CONG. REC. H5484</i> (daily ed. Sept. 7, 1989)	Balanced budget
121 CONG. REC. 28,347 (1975)	Balanced budget
113 CONG. REC. 10,117-18 (1967)	Revenue sharing
111 CONG. REC. 3722 (1965); <i>see also 112 CONG. REC. 200-01 (1966)</i>	Apportionment
109 CONG. REC. 5250 (1963)	Establish Court of the Union
105 CONG. REC. 3220 (1959)	Federal preemption of state law
103 CONG. REC. 10,863 (1957)	Selection and tenure of federal judges
89 CONG. REC. 7523-24 (1943), <i>repealed by 91 CONG. REC. 6631-32 (1945)</i>	Federal taxing power
23 SENATE J. 194-95 (1833), <i>reprinted in S. Doc. No. 78,</i> <i>71st Cong., 2d Sess. 24 (1930)</i>	Tariffs

**ALASKA**

Alaska's light is "off" for a constitutional convention. Alaska's only genuine application seeks a convention for consideration of a balanced budget amendment and specifically provides "that this application and request shall no longer be of any force or effect if the convention is not limited to the exclusive purpose specified by this resolution." 128 CONG. REC. 5643 (1982).

<i>Citation</i>	<i>Subject(s) Mentioned</i>
128 CONG. REC. 5643 (1982)	Balanced budget

**ARIZONA**

Arizona's light is "on" for a constitutional convention. Arizona's most recent application seeks a convention for the "sole and exclusive purpose" of considering a proposed amendment giving the President a line-item veto. 130 CONG. REC. 14,956 (1984). This application is invalid. The next previous application requests a convention "for the purpose of" proposing an amendment prohibiting the coercive use of federal funds to impose mandates on the states, but does not in terms condition the application on limiting the convention to this subject only. 126 CONG. REC. 11,389 (1980). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
130 CONG. REC. 14,956 (1984)	Line-item veto
126 CONG. REC. 11,389 (1980)	Coercive use of federal funds
125 CONG. REC. 12,287 (1979)	Repeal Sixteenth Amendment and other purposes
125 CONG. REC. 2109 (1979)	Balanced budget
123 CONG. REC. 18,873-74 (1977)	Balanced budget
118 CONG. REC. 11,445 (1972)	School prayer
111 CONG. REC. 3061 (1965)	Apportionment

**\*766 ARKANSAS**

Arkansas's light is "on" for a constitutional convention. Arkansas's most recent resolution mentioning a constitutional convention calls on Congress to propose a balanced budget amendment and asks "alternatively" for a convention for the "specific and exclusive purpose" of proposing such an amendment. Whether or not the "alternative" nature of this application would otherwise constitute a valid application, the subject-matter condition renders it invalid. 125 CONG. REC. 4372 (1979). Arkansas's next previous application seeks a constitutional convention for the purpose of proposing an amendment protecting the right to life of unborn children and limited to the "sole purpose" of considering such an amendment. 123 CONG. REC. 15,808-09 (1977). This application is also invalid. Arkansas's next previous application

seeks a constitutional convention “for the purpose of” proposing an amendment limiting the federal debt, but does not in terms condition the application on a subject-matter limitation on the convention. 121 CONG. REC. 11,218 (1975). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 4372 (1979)	Balanced budget
123 CONG. REC. 15,808-09 (1977)	Right to life
121 CONG. REC. 11,218 (1975)	Federal debt limit
111 CONG. REC. 1670 (1965)	Apportionment
109 CONG. REC. 2768 (1963)	Revision of Article Five
109 CONG. REC. 2768-69 (1963)	Establish Court of the Union
109 CONG. REC. 2769 (1963)	Apportionment
109 CONG. REC. 2769 (1963)	Presidential electors
107 CONG. REC. 2154 (1961)	Supreme Court decisions
105 CONG. REC. 4398 (1959)	Validity of Fourteenth Amendment
98 CONG. REC. 742 (1952) [1943], <i>repealed by</i> 91 CONG. REC. 1209 (1945)	Federal taxing power
1911 Ark. Acts 1338-39*	Direct election of Senators
1903 Ark. Acts 485-86*	Direct election of Senators
45 CONG. REC. 7113 (1910) [1901]	Direct election of Senators

## CALIFORNIA

California's light is “on” for a constitutional convention. California's most recent application seeks a convention “for the purpose of” proposing an amendment requiring federal taxes on motor vehicles, fuels, and equipment to be appropriated to the states for their exclusive use in construction and maintenance of highways, but does not in terms condition the application on a subject-matter limitation on the convention. 98 CONG. REC. 4003-04 (1952). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
98 CONG. REC. 4003-04 (1952)	Proceeds of federal taxes on fuel
95 CONG. REC. 4568-69 (1949)	World federal government
79 CONG. REC. 10,814 (1935)	Taxation of securities
79 CONG. REC. 10,814 (1935)	Federal labor regulations
47 CONG. REC. 2000 (1911) (text at 1911 Cal. Stat. 2183-84)	Direct election of Senators

## \*767 COLORADO

Colorado's light is “on” for a constitutional convention. Colorado's most recent application seeks a “limited constitutional convention” for the “specific and exclusive purpose” of proposing an amendment prohibiting the federal government from reducing the federally financed proportion of any activity or service required of the states by federal law. 138 CONG. REC. S9064 (daily ed. June 26, 1992). This application is invalid. The next previous application seeks a convention for the “specific and exclusive purpose” of proposing an amendment prohibiting deficit spending. 125 CONG. REC. 2109 (1978). This application is also invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment permitting state apportionment of state representatives other than solely on the basis of population, but does not in terms condition the application on a subject-matter limitation on the convention. 113 CONG. REC. 18,007 (1967) (text at 1967 Colo. Sess. Laws 1099). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
138 CONG. REC. S9064	Funding of federally mandated state programs

(daily ed. June 26, 1992)	
125 CONG. REC. 2109 (1978)	Balanced budget
113 CONG. REC. 18,007 (1967)	Apportionment
(text at 1967 Colo. Sess. Laws 1099)	
111 CONG. REC. 2294 (1965)	Apportionment
109 CONG. REC. 7060 (1963)	Federal taxing power
109 CONG. REC. 6659 (1963)	Presidential electors
45 CONG. REC. 7113 (1910) [1901]	General/Direct election of Senators

## CONNECTICUT

Connecticut's light is "on" for a constitutional convention. The most recent application seeks a convention "for the purposes of" proposing an amendment preventing one state from taxing the income of residents of another state, but does not in terms condition the application on a subject-matter limitation on the convention. 104 CONG. REC. 8085-86 (1958). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
104 CONG. REC. 8085-86 (1958)	State taxing power over nonresidents
95 CONG. REC. 7689 (1949)	World federal government

## DELAWARE

Delaware's light is "on" for a constitutional convention. Delaware's most recent application seeks a convention "to propose" a right-to-life amendment, but does not in terms condition the application on a subject-matter limitation on the convention. 124 CONG. REC. 19,683 (1978). This constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
124 CONG. REC. 19,683 (1978) <sup>59</sup>	Right to life
124 CONG. REC. 2193 (1978)	Selection and tenure of federal judges
122 CONG. REC. 4329 (1976)	Balanced budget
117 CONG. REC. 2500 (1971)	Revenue sharing
89 CONG. REC. 4017 (1943)	Federal taxing power
41 CONG. REC. 3011 (1907)	Anti-polygamy

### Footnotes

‡ The 'memorial' reported at 127 CONG. REC. 3481 (1981) concerning a right-to-life amendment (but setting forth no text) appears to be a redundant reference to the 1978 application. The Delaware Legislative Research Department reports that the state enacted no constitutional convention applications after 1978.

## \*768 FLORIDA

Though the question is not free from doubt, the better conclusion is that Florida's flickering light is "on" for a constitutional convention. Florida's most recent resolution urges Congress to propose a balanced budget amendment but specifically provides that

this memorial supersedes all previous memorials applying to the Congress of the United States to call a convention to propose an amendment to the Constitution of the United States to require a balanced federal budget, including Senate Memorial No. 234 and House Memorial No. 2801, both passed in 1976, and that such previous memorials are hereby revoked and withdrawn.



134 CONG. REC. 15,364 (1988). This resolution repeals Florida's 1976 application for a convention for the "sole purpose" of proposing a balanced budget amendment. (That application would have been invalid in any event.) The question is whether this resolution repeals applications for a convention that do not recite a balanced budget amendment as a desired subject-matter of the convention. Given the proposition that *applications* for a convention "to propose" an amendment on a specific subject should not be construed as words of limitation on subjects that may be considered by the convention, it could be argued that a repealing provision employing similar language should similarly be understood as repealing more than just applications that recite that subject-matter purpose. Given the specific references to previous applications seeking a "limited" convention only on the balanced budget, however, it is more natural to read the repealing provision as rescinding those applications only. This is consistent with an intention on the part of the state that its previous application concerning a balanced budget not count toward the total thought to be needed for a balanced budget "limited" convention, either because of doubts about the validity of the "limited" convention concept or because it felt that the subject was most appropriately addressed by Congress. (This inference seems especially appropriate in view of the absence of any applications reciting a balanced budget amendment as a purpose other than the ones specifically cited. The word "including" thus appears to be surplusage.)

Assuming this conclusion to be sound, the next previous unrepealed application seeks a convention "for the sole and exclusive purpose" of proposing an amendment providing that the Senate choose its own presiding officer. 118 CONG. REC. 11,444 (1972). This application is invalid. The next previous application seeks a convention "for the sole and exclusive purpose" of proposing an amendment mandating federal revenue sharing. 117 CONG. REC. 2589-90 (1971). This application is also invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment concerning revenue sharing, but does not in terms condition the application on a subject-matter limitation on the convention. 115 CONG. REC. 24,116 (1969). This application constitutes a valid application for a general constitutional convention, and should not be understood to have been repealed by the 1988 resolution repealing Florida's applications for a "limited" balanced budget convention.

#### ***Citation***

125 CONG. REC. 2109-10 (1979),  
*repealed by* 134 CONG. REC. 15,364 (1988)  
 118 CONG. REC. 11,444 (1972)  
 117 CONG. REC. 2589-90 (1971)  
 115 CONG. REC. 24,116 (1969)  
 109 CONG. REC. 2071-72 (1963)  
 109 CONG. REC. 2072 (1963)  
 103 CONG. REC. 12,787 (1957)  
 97 CONG. REC. 5155-56 (1951)  
 95 CONG. REC. 7000 (1949)  
 91 CONG. REC. 4965 (1945)  
 89 CONG. REC. 5690 (1943)

#### ***Subject(s) Mentioned***

Balanced budget  
 Replace Vice-President as head of Senate  
 Revenue sharing  
 Revenue sharing  
 Establish Court of the Union  
 Revision of Article V  
 Supreme Court decisions  
 Federal taxing power  
 World federal government  
 Treaty making  
 World federal government

## **GEORGIA**

Georgia's light is "on" for a constitutional convention. Georgia's most recent application seeks a convention for the "specific and exclusive purpose" of proposing an amendment to authorize the criminal prohibition of flag desecration. 137 CONG. REC. S4454 (daily ed. Apr. 16, 1991). This application is invalid. The next previous application seeks a convention for the "sole and exclusive purpose" of proposing a right-to-life amendment. 125 CONG. REC. 4372 (1979). This application is invalid. The next previous application seeks a convention for the "specific and exclusive purpose" of proposing a balanced budget \*769 amendment. 122 CONG. REC. 2740 (1976). This application is also invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 1965

Ga. Laws 507-08. This application constitutes a valid, unrepealed application for a general constitutional convention. The absence of this application from the *Congressional Record* might be taken to raise a question concerning whether this application was transmitted to Congress. Resolving the doubt against the validity of the application, the next previous application seeks a convention “for the purpose of” proposing an amendment concerning state control of public education, but does not in terms condition the application on a subject-matter limitation on the work of the convention. 111 CONG. REC. 5817 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

137 CONG. REC. S4454  
(daily ed. Apr. 16, 1991)  
125 CONG. REC. 4372 (1979)  
122 CONG. REC. 2740 (1976)  
1965 Ga. Laws 507-08\*  
111 CONG. REC. 5817 (1965)  
107 CONG. REC. 4715 (1961)  
105 CONG. REC. 2793 (1959)  
101 CONG. REC. 1532 (1955)  
98 CONG. REC. 1057 (1952)  
98 CONG. REC. 1057 (1952)  
23 SENATE J. 65 (1832),  
*reprinted in S. Doc. 78, 71st*  
*Cong., 2d Sess. 25 (1930)*

**Subject(s) Mentioned**

Flag desecration  
  
Right to life  
Balanced budget  
Apportionment  
State control of public education  
Supreme Court decisions  
State control of public education  
State control of public education  
Treaty making  
Repeal of Sixteenth Amendment  
General

**HAWAII**

Hawaii's light is “off” for a constitutional convention. Hawaii has submitted no convention applications.

**IDAHO**

Idaho's light is “on” for a constitutional convention. Idaho's most recent application seeks a convention for the “specific and exclusive purpose” of proposing a right-to-life amendment, which application “shall be deemed null and void, rescinded and of no effect in the event that such convention not be limited to such specific and exclusive purpose.” 126 CONG. REC. 6172 (1980). This application is invalid. Idaho's next previous resolution calls on Congress to propose a balanced budget amendment and, “alternatively,” requests a convention for that specific and exclusive purpose, to be regarded as null and void if such convention is not so limited. 125 CONG. REC. 3657 (1979). Regardless of whether such an “in the alternative” application is permissible, the application is invalid. The next previous application requests a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 1437-38 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

126 CONG. REC. 6172 (1980)  
125 CONG. REC. 3657 (1979)  
111 CONG. REC. 1437-38 (1965)  
109 CONG. REC. 3855 (1963)  
109 CONG. REC. 2281 (1963)  
1963 Idaho Sess. Laws 1181-82\*  
103 CONG. REC. 4831-32 (1957)  
69 CONG. REC. 455 (1927)  
45 CONG. REC. 7113-14 (1910) [1901]

**Subject(s) Mentioned**

Right to life  
Balance budget  
Apportionment  
National debt limit  
Apportionment  
Revision of Article V  
Revision of Article V  
Taxation of securities  
Direct election of President and Senators

**\*770 ILLINOIS**

Illinois's light is “on” for a constitutional convention. Illinois's two most recent applications for a convention were enacted and submitted by the “Seventy-fifth General Assembly of the State of Illinois” (the state senate concurring therein). One of these applications seeks a convention “to propose” an amendment altering the way presidential electors are selected and allocated within states, but does not in terms condition the application on a subject-matter limitation on the convention. 113 CONG. REC. 20,893 (1967). The other seeks a convention “for the purpose of submitting” an amendment concerning state legislative apportionment. It also does not in terms condition the application on a subject-matter limitation. 113 CONG. REC. 8004 (1967). A 1969 resolution of the Illinois legislature “withdraws the petition made by the Seventy-fifth General Assembly of the State of Illinois to the Congress of the United States to call a Constitutional Convention.” 115 CONG. REC. 24,111 (1969). This repealing resolution does not specify which of the two relevant 1967 resolutions was meant to be repealed. The language, however, plainly contemplates the repeal of a single application. If so, whichever application is not repealed constitutes a valid application for a general constitutional convention. Alternatively, if the 1969 repeal resolution is understood as repealing both 1967 applications, the next previous application seeks a convention “for the purpose of proposing” an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 19,379 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

113 CONG. REC. 20,893 (1967)  
 113 CONG. REC. 8004 (1967),  
*repealed by* 115 CONG. REC. 24,111 (1969)  
 [see explanation above]  
 111 CONG. REC. 19,379 (1965)  
 111 CONG. REC. 14,144 (1965)  
 109 CONG. REC. 3788 (1963)  
 99 CONG. REC. 9864 (1953)  
 89 CONG. REC. 2516-17 (1943)  
 98 CONG. REC. 742-43 (1952) [1943],  
*repealed by* 98 CONG. REC.  
 742-43 (1952) [1943]  
 50 CONG. REC. 120-21 (1913)  
 47 CONG. REC. 1298 (1911)  
 1909 Ill. Laws 495\*  
 42 CONG. REC. 164 (1907)  
 45 CONG. REC. 7114 (1910) [1903]  
 1861 Ill. Laws 281-82\*

***Subject(s) Mentioned***

Presidential electors  
 Apportionment  
  
 Apportionment  
 Revenue sharing  
 Revision of Article V  
 Revision of Article V  
 Limit presidential tenure  
 Federal taxing power  
  
 Anti-polygamy  
 Antitrust  
 Direct election of Senators  
 Direct election of Senators  
 Direct election of Senators/General  
 General

**INDIANA**

Indiana's light is “on” for a constitutional convention. Indiana's most recent application seeks a convention for the “specific and exclusive purpose” of proposing a balanced budget amendment. 125 CONG. REC. 9188 (1979). This application is invalid. It is unclear which application should be regarded as the “next previous” one, though the result is the same in any event. A 1976 resolution seeks a convention “for the purpose of proposing” a balanced budget amendment, but does not in terms condition the application on a subject-matter limitation on the convention. 122 CONG. REC. 931 (1976). This application constitutes a valid, unrepealed application for a general constitutional convention. A 1974 application seeks a convention “for the purpose of” proposing a right-to-life amendment, but does not in terms condition the application on a subject-matter limitation on the convention. 120 CONG. REC. 14 (1974). This resolution was re-transmitted in 1977, apparently on the premise that it had not been transmitted in 1973-74. 123 CONG. REC. 4797 (1977) (resolution reaffirming 1973 application); Ind. Sen. Res. 7 (Jan. 21, 1977). This application also constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 9188 (1979)	Balanced budget
122 CONG. REC. 931 (1976)	Balanced budget
120 CONG. REC. 14 (1974) [1973],	Right to Life
123 CONG. REC. 4797 (1977)	
113 CONG. REC. 6384 (1967)	Apportionment/Presidential and Vice-Presidential selection
103 CONG. REC. 6475-76 (1957)	Balanced budget
103 CONG. REC. 6474-75 (1957)	Federal taxing power
103 CONG. REC. 6473-74 (1957)	Apportionment
103 CONG. REC. 6472-73 (1957)	Treaty making
103 CONG. REC. 6471-72 (1957)	Revision of Article V
98 CONG. REC. 1056-57 (1952)	Federal taxing power
45 CONG. REC. 7114 (1910) [1907]	Direct election of Senators/General
CONG. GLOBE, 36th Cong., Special Sess. 1465-66 (1861)	General

### \*771 IOWA

Iowa's light is "on" for a constitutional convention. Iowa's most recent resolution, adopted in 1979, requests that Congress propose a balanced budget amendment and, alternatively, if the Congress has not proposed such an amendment as of July 1, 1980, seeks a convention "for the specific and exclusive purpose" of proposing such an amendment. 125 CONG. REC. 15,227 (1979). This application is invalid, not because of the "alternatively" formulation (which has clearly been triggered), but because it states an invalid condition on the work of the convention. The next previous application seeks a convention for the "sole and exclusive purpose" of proposing an amendment mandating federal revenue sharing. 118 CONG. REC. 6501-02 (1972). This application is invalid. The next previous application asks Congress to propose an amendment concerning state legislative apportionment or, "in the alternative," to call a convention "for the purpose of proposing" such an amendment. 115 CONG. REC. 12,249 (1969). This language does not constitute a limitation on the work of a convention as a condition of the application. However, it is not clear whether the "in the alternative" formulation turns Iowa's light "on" for a constitutional convention subject to a sunset if Congress has previously proposed the requested amendment or makes Iowa's application subject to a condition precedent the occurrence or nonoccurrence of which is subject to no time deadline. The better reading is probably that the application, while inartfully drafted (compare Iowa's 1943 application, 89 CONG. REC. 2728, discussed below), constitutes a valid, unrepealed application for a general constitutional convention, subject to defeasance if Congress has previously proposed the requested amendment.

Even if the 1969 application is invalid, Iowa's light is "on" for a constitutional convention. Iowa's next previous application seeks a constitutional convention for the purpose of limiting the federal taxing power but specifically states its intention that such a convention be limited only to consideration of the specific text proposed in Iowa's application, and identical applications by other states constituting two-thirds of the states. 97 CONG. REC. 3939-40 (1951). This application is invalid. The next previous application requests a convention "for the purpose of" proposing an amendment limiting the President to two terms in office "unless, in lieu thereof, the Congress, in its wisdom, shall elect to submit to the several States a proposed amendment to the said Constitution, providing for the said limiting of the tenure of office of any President of the United States ...." 89 CONG. REC. 2728 (1943). This otherwise valid application expired in accordance with the terms of this condition subsequent, upon congressional proposal of the Twenty-second Amendment. The next previous application requests a convention "for the purpose of" proposing an amendment limiting the federal taxing power, 87 CONG. REC. 3172 (1941), but this application was rescinded in 1945. 91 CONG. REC. 2383-84 (1945). The next previous application seeks a convention "for proposing amendments to the Constitution of the United States." 44 CONG. REC. 1620 (1909). The resolution states Iowa's concern that Congress has not proposed an amendment providing for the direct election of Senators and Iowa's interest in such an amendment, but does not in any way condition its application. This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 15,227 (1979)	Balanced budget
118 CONG. REC. 6501-02 (1972)	Revenue sharing
115 CONG. REC. 12,249 (1969)	Apportionment
97 CONG. REC. 3939-40 (1951)	Federal taxing power
89 CONG. REC. 2728 (1943)	Limit presidential tenure
87 CONG. REC. 3172 (1941), <i>repealed by</i> 91 CONG. REC. 2383-84 (1945)	Federal taxing power
44 CONG. REC. 1620 (1909)	Direct election of Senators/General
42 CONG. REC. 204-05 (1907)	Direct election of Senators/General
38 CONG. REC. 4959 (1904)	Direct election of Senators/General

**\*772 KANSAS**

Kansas' light is "on" for a constitutional convention. Kansas's most recent application seeks a constitutional convention "for the sole and exclusive purpose" of proposing a balanced budget amendment, unless Congress has already proposed such an amendment. 125 CONG. REC. 2110 (1979). This application is invalid. The four previous applications, 111 CONG. REC. 3061-62 (1965) (apportionment), 109 CONG. REC. 7287-88 (1963) (electoral college), 109 CONG. REC. 2769 (1963) (revision of [Article V](#)), and 109 CONG. REC. 2769 (1963) (apportionment), were all rescinded in 1970. 116 CONG. REC. 11,548 (1970). The 1970 rescinding resolution states in its "whereas" clauses the legislature's belief that the desired amendments might be proposed "without the necessity of calling a constitutional convention which might relegate to itself the power to rewrite the Constitution of the United States" but it does not purport to rescind any applications other than the four specifically noted. The next previous, unrepealed application seeks a convention "for the purpose of" limiting the federal taxing power, but does not in terms condition the application on a subject-matter limitation on the convention. 97 CONG. REC. 2936 (1951). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 2110 (1979) [1978]	Balanced budget
111 CONG. REC. 3061-62 (1965), <i>repealed by</i> 116 CONG. REC. 11,548 (1970)	Apportionment
109 CONG. REC. 7287-88 (1963), <i>repealed by</i> 116 CONG. REC. 11,548 (1970)	Presidential electors
109 CONG. REC. 2769 (1963), <i>repealed by</i> 116 CONG. REC. 11,548 (1970)	Revision of Article V
109 CONG. REC. 2769 (1963), <i>repealed by</i> 116 CONG. REC. 11,548 (1970)	Apportionment
97 CONG. REC. 2936 (1951)	Federal taxing power
45 CONG. REC. 7115 (1910) [1909]	Direct election of Senators/General
41 CONG. REC. 2929 (1907)	Direct election of Senators/General
39 CONG. REC. 3466 (1905)	Direct election of Senators

**KENTUCKY**

Kentucky's light is "on" for a constitutional convention. Kentucky's most recent application seeks a convention "for the sole purpose" of proposing a right-to-life amendment. 124 CONG. REC. 9697 (1978) (text at 1978 Ky. Acts 1401-02). This application is invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment prohibiting compulsory school reassignment (busing), but does not in terms condition the application on a subject-matter limitation on the convention. 121 CONG. REC. 27,821 (1975). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
124 CONG. REC. 9697 (1978) (text at 1978 Ky. Acts 1401-02)	Right to life
121 CONG. REC. 27,821 (1975)	School assignment
120 CONG. REC. 4594-95 (1974)	Right to life
111 CONG. REC. 26,073-74 (1965)	Apportionment
90 CONG. REC. 4040-41 (1944), <i>repealed by</i> 97 CONG. REC. 10,973 (1951)	Federal taxing power
45 CONG. REC. 7115 (1910) [1902]	Direct election of Senators
CONG. GLOBE, 36th Cong., 2d Sess. 751 (1861)	General

**\*773 LOUISIANA**

Louisiana's light is "off" for a constitutional convention, by virtue of a 1992 resolution rescinding "any and all previous applications" for a constitutional convention "for any purpose, limited or general." 138 CONG. REC. S529 (daily ed. Jan. 28, 1992).

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 19,108 (1979), <sup>†</sup> <i>repealed by</i> 138 CONG. REC. S529	Federal regulations and rules (daily ed. Jan. 28, 1992)
125 CONG. REC. 19,470-71 (1979), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Balanced budget
125 CONG. REC. 2110 (1979), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Balanced budget
122 CONG. REC. 23,550 (1976), <sup>†</sup> <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Right to life
121 CONG. REC. 25,312 (1975), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Balanced budget
117 CONG. REC. 19,801-02 (1971), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Revenue sharing
116 CONG. REC. 22,906 (1970), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Taxation of bonds
116 CONG. REC. 21,369 (1970), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Sedition laws
116 CONG. REC. 5499 (1970), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	School assignment
111 CONG. REC. 12,110 (1965), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Apportionment
111 CONG. REC. 164-65 (1965), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	State control of education
106 CONG. REC. 14, 401 (1960), <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Repeal Sixteenth Amendment
106 CONG. REC. 14,315 (1960), <sup>†</sup> <i>repealed by</i> 138 CONG. REC. S529	[text unavailable]

(daily ed. Jan. 28, 1992) 99 CONG. REC. 320-01 (1950), <i>repealed by</i> 100 CONG. REC. 9420 (1950)	Federal taxing power
60 CONG. REC. 31 (1920), <sup>†</sup> <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Revision of Article V
45 CONG. REC. 7115 (1910) [1907], <i>repealed by</i> 138 CONG. REC. S529 (daily ed. Jan. 28, 1992)	Direct election of Senators

**\*774 MAINE**

Maine's light is “on” for a constitutional convention. Maine's most recent application seeks a convention for the purpose of proposing an amendment limiting the federal taxing power, but explicitly limits the work of the convention to consideration of this topic only. 97 CONG. REC. 6033-34 (1951). This application is invalid. The next previous application seeks a convention “for the sole purpose of” proposing amendments authorizing the United States to negotiate treaties for a world government. 95 CONG. REC. 4348 (1949); Me. Legis. Doc. No. 425, 94th Legis. (Feb. 8, 1949). This application is invalid. The next previous application, concerning limitations on the federal taxing power, 87 CONG. REC. 3370-71 (1941), was repealed in 1953. 99 CONG. REC. 4311 (1953). The next previous application seeks a convention “for the purpose of proposing” an amendment concerning direct election of Senators, but does not in terms condition the application on a subject-matter limitation on the convention. 46 CONG. REC. 4280 (1911). This application constitutes a valid, unrepealed application for a general constitutional convention, not vitiated by accomplishment of the purpose cited.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
97 CONG. REC. 6033-34 (1951)	Federal taxing power
95 CONG. REC. 4348 (1949) (text at Me. Legis. Doc. No. 425, 94th Legis. (Feb. 8, 1949))	World federal government
87 CONG. REC. 3370-71 (1941), <i>repealed by</i> 99 CONG. REC. 4311 (1953)	Federal taxing power
46 CONG. REC. 4280 (1911)	Direct election of Senators

**MARYLAND**

Maryland's light is “on” for a constitutional convention. Maryland's most recent application asks Congress to propose a balanced budget amendment and “further and alternatively” seeks a constitutional convention “for the specific and exclusive purpose” of proposing such an amendment. 123 CONG. REC. 2545 (1977). Whether or not the “further and alternatively” formulation would constitute a valid application for a convention, the subject-matter condition renders the application invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 5820 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
123 CONG. REC. 2545 (1977)	Balanced budget
111 CONG. REC. 5820 (1965)	Apportionment
84 CONG. REC. 3320 (1939)	Federal taxing power

**MASSACHUSETTS**

Massachusetts's light is “on” for a constitutional convention. Massachusetts's most recent application seeks a convention “for the purpose of proposing” a right-to-life amendment, but does not in terms condition the application on a subject-

matter limitation on the convention. 123 CONG. REC. 22,002 (1977). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
123 CONG. REC. 22,002 (1977)	Right to life
122 CONG. REC. 9735 (1976)	School assignment
120 CONG. REC. 7687 (1974)	Funding private schools
120 CONG. REC. 12,562 (1974) <sup>†</sup>	School assignment
119 CONG. REC. 12,408-09 (1973)	Funding private schools
117 CONG. REC. 30,905 (1971)	Funding private schools
117 CONG. REC. 5052 (1971)	Revenue sharing
110 CONG. REC. 9875 (1964)	Pensions for the elderly
110 CONG. REC. 7484 (1964)	School prayer
87 CONG. REC. 3812-13 (1941), <i>repealed by</i> 98 CONG. REC. 4641 (1952)	Federal taxing power
75 CONG. REC. 45 (1931)	Repeal Eighteenth Amendment

### **\*775 MICHIGAN**

Michigan's light is "on" for a constitutional convention. Michigan's most recent application seeks a convention for the purpose of proposing an amendment prohibiting compulsory school reassignment (busing) on the basis of race, religion, or national origin, but is by its terms conditioned on the convention being limited solely to consideration of a specific proposed amendment text. 117 CONG. REC. 41,598-99 (1971). This application is invalid. Michigan's next previous application seeks a convention "for proposing" an amendment altering the amendment process, but is by its terms predicated on the convention being limited to consideration of the subjects stated in the application. 102 CONG. REC. 72,404 (1956). This application is invalid. The next previous application seeks a convention for the purpose of proposing an amendment limiting the federal taxing power, but is by its terms conditioned on the convention being limited solely to consideration of a specific proposed amendment text. 95 CONG. REC. 5628-29 (1949). This application is invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment limiting presidential terms, but does not in terms condition the application on a subject-matter limitation on the convention nor does it provide that the application terminates upon congressional proposal of an amendment of similar content. 89 CONG. REC. 2944 (1943). The statements in the subsequent (1949, 1956, and 1971) applications strongly assert the power of the states to limit the scope of a constitutional convention by the terms of their convention applications. While those applications are clearly for "limited" conventions only, they do not by their terms purport to repeal prior applications not so limited. The 1943 application is stated in purposive terms only, without language of condition or limitation. That application therefore constitutes a valid, unrepealed application for a general constitutional convention. In any event, the next previous application seeks a convention "for the purpose of proposing" an amendment limiting the federal taxing power, but does not in terms condition the application on a subject-matter limitation on the work of the convention. 87 CONG. REC. 8904 (1941). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
117 CONG. REC. 41,598-99 (1971)	School assignment
102 CONG. REC. 72,404 (1956)	Revision of Article V
95 CONG. REC. 5628-29 (1949)	Federal taxing power
89 CONG. REC. 2944 (1943)	Limit presidential tenure
87 CONG. REC. 8904 (1941)	Federal taxing power
50 CONG. REC. 2290 (1913)	Anti-polygamy
45 CONG. REC. 7116 (1910) [1908]	Direct election of Senators
35 CONG. REC. 117 (1901)	Direct election of Senators



**MINNESOTA**

Minnesota's light is "on" for a constitutional convention. Minnesota's most recent application seeks a convention "for the single purpose" of proposing an amendment concerning state legislative apportionment. 111 CONG. REC. 10,673 (1965). Though the question is not free from doubt, this language is probably best construed as a limitation or condition on the subjects a convention may consider. The application is therefore invalid. Minnesota's next previous application seeks a convention "to propose" an amendment providing for direct election of Senators, but does not in terms condition the application on a \*776 subject-matter limitation on the convention nor does it provide for termination of the application upon congressional proposal of a similar amendment. 1911 Minn. Laws 595. This application constitutes a valid, unrepealed application for a general constitutional convention. The absence of this application from the *Congressional Record* might be taken to raise a question concerning whether this application was transmitted to Congress. The next previous application raises the same question. 1909 Minn. Laws 719. Resolving the doubt against the validity of these applications, Minnesota's next previous application asks Congress to call a convention "to propose" an amendment concerning the direct election of U.S. Senators, but does not in terms condition such application on a subject-matter limitation on the work of the convention. 34 CONG. REC. 2560 (1901). This application constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

111 CONG. REC. 10,673 (1965)  
 1911 Minn. Laws 595\*  
 1909 Minn. Laws 719\*  
 34 CONG. REC. 2560 (1901)

***Subject(s) Mentioned***

Apportionment  
 Direct election of Senators  
 Anti-polygamy  
 Direct election of Senators

**MISSISSIPPI**

Mississippi's light is "on" for a constitutional convention. Mississippi submitted two convention applications in 1979. One was for the "sole purpose of proposing an amendment to the United States Constitution, which amendment shall be substantially as follows ... [concerning the right to life]." 125 CONG. REC. 3196 (1979). This application is invalid. The other 1979 application seeks a convention "for the proposing of" a balanced budget amendment and specifying a particular text. That application provides that it shall constitute "a continuing application ... until at least two-thirds (2/3) of the legislatures of the several states have made similar applications" but terminates if Congress proposes an identical amendment. 125 CONG. REC. 2111-12 (1979). Though the question is not free from doubt, this application is best read as not conditioning the application on a limitation of the subjects that may be considered by the convention, nor on the submission of same-subject applications by other states, but merely as stating a condition subsequent on which the application (toward a general convention) terminates. It therefore constitutes a valid, unrepealed, unconditional application for a general constitutional convention.

In any event, Mississippi's light is "on" by virtue of prior applications. The text of the next previous application seeks a convention "for the proposing of" a balanced budget amendment, but does not in terms condition the application on a subject-matter limitation on the convention. 121 CONG. REC. 12,175-76 (1975). That application constitutes a valid application for a general convention not repealed by any subsequent act of the state.

***Citation***

125 CONG. REC. 3196 (1979)  
 125 CONG. REC. 2111-12 (1979)  
 121 CONG. REC. 12,175-76 (1975)  
 119 CONG. REC. 8689 (1973)  
 119 CONG. REC. 8089 (1973)  
 116 CONG. REC. 6097 (1970)  
 111 CONG. REC. 15,770 (1965)

***Subject(s) Mentioned***

Right to life  
 Balanced budget  
 Balanced budget  
 School prayer  
 School assignment  
 School assignment  
 Control communism

111 CONG. REC. 15,769 (1965)	State control of public education
111 CONG. REC. 15,769 (1965)	Apportionment
86 CONG. REC. 6025 (1940)	Federal taxing power

## MISSOURI

Missouri's light is "on" for a constitutional convention. Missouri's most recent application seeks a convention for the "specific and exclusive purpose" of proposing an amendment prohibiting the Supreme Court and any inferior federal court from ordering state or local tax increases, in the event that Congress has not proposed such an amendment by January 1, 1994. 139 CONG. REC. S8228 (daily ed. June 29, 1993). This application is invalid. The next previous seeks a convention for the "sole and exclusive purpose" of considering a balanced budget amendment, in the event that Congress has not proposed one by January 1, 1984. 129 CONG. REC. 20,352 (1983). This application is invalid. The next previous \*777 application seeks a convention "for the purpose of proposing" a right-to-life amendment, but does not in terms condition the application on a subject-matter limitation on the convention. 121 CONG. REC. 12,867 (1975). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
139 CONG. REC. S8228 (daily ed. June 29, 1993)	Judicial authority
129 CONG. REC. 20,352 (1983)	Balanced budget
121 CONG. REC. 12,867 (1975)	Right to life
111 CONG. REC. 3304-05 (1965)	Apportionment
109 CONG. REC. 5868 (1963)	Revision of Article V
109 CONG. REC. 5968 (1963)	Apportionment
50 CONG. REC. 1796 (1913)	Constitutionality of state enactments
45 CONG. REC. 7116 (1910) [1907]	General
40 CONG. REC. 138 (1905)	Direct election of Senators
1903 Mo. Laws 279-80*	Direct election of Senators
1901 Mo. Laws 268*	Direct election of Senators

## MONTANA

Montana's light is "on" for a constitutional convention. Montana's most recent application seeks a convention "for the purpose of" proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 2777 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
111 CONG. REC. 2777 (1965)	Apportionment
109 CONG. REC. 4469 (1963)	Presidential electors
109 CONG. REC. 3854 (1963)	Apportionment
1947 Mont. Laws 796-97*	Limit presidential tenure
47 CONG. REC. 98-99 (1911)	Anti-polygamy
46 CONG. REC. 2411 (1911) [1910]	Direct election of Senators/General
42 CONG. REC. 712 (1908)	Direct election of Senators
45 CONG. REC. 7116 (1910) [1907]	Direct election of Senators
39 CONG. REC. 2447 (1905)	Direct election of Senators
35 CONG. REC. 208 (1901)	Direct election of Senators

## NEBRASKA

Nebraska's light is "on" for a constitutional convention. Nebraska's most recent application asks Congress to propose a balanced budget amendment and "alternatively" petitions for a convention for the "specific and exclusive purpose" of proposing such an amendment. 125 CONG. REC. 2112 (1979). Whether or not the "in-the-alternative" formulation constitutes an actual application, that application is invalid because of its limitation on the subjects that may be

considered by the convention. The next previous application seeks a convention for the “sole purpose” of proposing a right-to-life amendment. 124 CONG. REC. 12,215 (1978). This application is invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 24,723 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

125 CONG. REC. 2112 (1979)  
 124 CONG. REC. 12,215 (1978)  
 111 CONG. REC. 24,723 (1965)  
 111 CONG. REC. 19,775 (1965)  
 95 CONG. REC. 7893-94 (1949),  
*repealed by* 99 CONG. REC. 6163 (1953)  
 47 CONG. REC. 99 (1911)  
 1907 Neb. Laws 583-84\*  
 45 CONG. REC. 7116-17 (1910) [1903]  
 35 CONG. REC. 1779 (1902)†  
 1893 Neb. Laws 466-67\*

**Subject(s) Mentioned**

Balanced budget  
 Right to life  
 Apportionment  
 Presidential electors  
 Federal taxing power  
  
 Anti-polygamy  
 Direct election of Senators/General  
 Direct election of Senators  
 Direct election of Senators  
 Direct election of Senators

**\*778 NEVADA**

Nevada's light is “on” for a constitutional convention. Nevada's most recent application seeks a convention “limited to proposing” a balanced budget amendment. 126 CONG. REC. 1104-05 (1980). This application is invalid. Nevada's next previous application seeks a convention “for the purpose of” proposing a balanced budget amendment. This application also “proposes that the legislatures of each of the several states apply to the Congress to call a constitutional convention for the exclusive purpose stated in this resolution.” 125 CONG. REC. 2112 (1979). This application is extremely ambiguous. That part of the resolution directed to *Congress* does not in terms limit or condition the application. That part of the resolution directed to *other states* calls on *those states* to seek a convention that would be limited to the “purpose stated in this resolution.” A strong argument can be made that Nevada's statement of “purpose” should be read as exclusive in light of its call for other states to seek a convention for “the exclusive purpose” of considering a balanced budget amendment. Though the question is close and difficult, the better answer probably is that Nevada's 1979 balanced budget application is not itself conditioned on a limitation on the subjects that may be considered by the convention, nor on other states having submitted applications that seek a balanced budget amendment, but is a valid application for a general constitutional convention. This conclusion is somewhat reinforced by consideration of another application submitted by Nevada that same year, seeking a convention “limited to” proposing a right-to-life amendment and expressly conditioning its request “upon the Congress of the United States' establishing appropriate restrictions limiting the subject matter of a convention called pursuant to this resolution to the restriction of abortion” and stating that “if the Congress fails so to limit the subject matter, this resolution has no effect and must be considered a nullity.” 125 CONG. REC. 16,350 (1979). This application is invalid because it seeks a limited convention. Significantly, however, it suggests that where the Nevada legislature of that year intended to condition a convention application on a subject-matter limitation on the convention, it knew how to say so in plain and unequivocal terms.

Even if the 1979 balanced budget application is not regarded as an application for a general convention, Nevada's light is still “on” for a convention by virtue of earlier applications. Nevada's next previous application seeks a convention “for the purpose of” proposing an amendment prohibiting the coercive use of federal funds, but does not in terms condition the application on a subject-matter limitation on the convention. 121 CONG. REC. 19,117 (1975); *see* 1975 Nev. Stat. 1995. This application constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

126 CONG. REC. 1104-05 (1980)  
 125 CONG. REC. 16,350 (1979)

**Subject(s) Mentioned**

Balanced budget  
 Right to life

125 CONG. REC. 2112 (1979)	Balanced budget
121 CONG. REC. 19,117 (1975) (text at 1975 Nev. Stat. 1995)	Coercive use of funds
119 CONG. REC. 17,022-23 (1973)	School assignment
113 CONG. REC. 7126 (1967)	Apportionment
111 CONG. REC. 2776-77 (1965)	Apportionment
109 CONG. REC. 4942 (1963)	Apportionment
106 CONG. REC. 10,749 (1960)	Repeal Sixteenth Amendment
67 CONG. REC. 456 (1925) (text at 1925 Nev. Stat. 358)	Repeal Eighteenth Amendment
42 CONG. REC. 163 (1907) 1905 Nev. Stat. 272-73*	Direct election of Senators
37 CONG. REC. 24 (1903)	Direct election of Senators
35 CONG. REC. 112 (1901) (text at 1901 Nev. Stat. 141-42)	Direct election of Senators

### \*779 NEW HAMPSHIRE

New Hampshire's light is "on" for a constitutional convention. New Hampshire's most recent application calls on Congress to propose and submit a balanced budget amendment and "alternatively" seeks a convention for the "specific and exclusive" purpose of considering such an amendment. 125 CONG. REC. 11,584 (1979). Whether or not the "in-the-alternative" formulation constitutes a valid application, the subject-matter limitation renders it invalid. The next previous application seeks a convention for the purpose of proposing a school prayer amendment, but specifically conditions the application on the convention being limited to consideration of that subject only. 119 CONG. REC. 22,887-88 (1973). This application is invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment concerning federal revenue sharing, but does not in terms condition the application on a subject-matter limitation on the convention. 115 CONG. REC. 36,153-54 (1969). This application constitutes a valid, unrepealed application for a general constitutional convention.

#### *Citation*

125 CONG. REC. 11,584 (1979)  
119 CONG. REC. 22,887-88 (1973)  
115 CONG. REC. 36,153-54 (1969)  
111 CONG. REC. 12,853 (1965)  
97 CONG. REC. 10,716-17 (1951)  
89 CONG. REC. 3761-62 (1943)

#### *Subject(s) Mentioned*

Balanced budget  
School prayer  
Revenue sharing  
Apportionment  
Federal taxing power  
Federal taxing power

### NEW JERSEY

New Jersey's light is "on" for a constitutional convention. New Jersey's most recent application seeks a convention that would conduct "no other business" than consideration of a right-to-life amendment. 123 CONG. REC. 10,481 (1977). This application is invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment to permit voluntary prayer in public schools, but does not in terms condition the application on a subject-matter limitation on the convention. 119 CONG. REC. 11,446 (1973); *see* Assem. Con. Res. No. 91, Leg., Sess. (adopted Feb. 1, 1972). This constitutes a valid, unrepealed application for a general constitutional convention.

#### *Citation*

123 CONG. REC. 10,481 (1977)  
119 CONG. REC. 11,446 (1973)  
(text at Assem. Con. Res. No. 91,  
Leg. Sess. (adopted Feb. 1, 1972)  
116 CONG. REC. 41,879 (1970)  
95 CONG. REC. 4571 (1949)

#### *Subject(s) Mentioned*

Right to life  
School prayer  
  
Revenue sharing  
World federal government

90 CONG. REC. 6141 (1944), <sup>†</sup> <i>repealed by</i> 100 CONG. REC. 11,943 (1954)	Federal taxing power
75 CONG. REC. 3299 (1932)	Repeal Eighteenth Amendment
45 CONG. REC. 7117 (1910) [1907]	Direct election of Senators

## NEW MEXICO

New Mexico's light is “on” for a constitutional convention. New Mexico's most recent application requests that Congress propose a balanced budget amendment and “alternatively” seeks a convention for the “specific and exclusive purpose” of considering such an amendment. 125 CONG. REC. 2112-13 (1979). Whether or not the in-the-alternative formulation constitutes a valid application, the subject-matter limitation renders it invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 112 CONG. REC. 199 (1966). This application constitutes a valid, unrepealed application for a general constitutional convention.

### *Citation*

125 CONG. REC. 2112-13 (1979)  
112 CONG. REC. 199 (1966)  
98 CONG. REC. 947-48 (1952)

### *Subject(s) Mentioned*

Balanced budget  
Apportionment  
Federal taxing power

## \*780 NEW YORK

New York's light is “on” for a constitutional convention. New York's most recent application seeks a convention “for the sole and exclusive purpose” of proposing an amendment providing that nothing in the Constitution prohibits a state from spending public funds on secular education of children in nonpublic schools. 118 CONG. REC. 33,047-48 (1972). This application is invalid. The next previous application seeks a convention “to repeal Article XVIII of the Constitution of the United States of America, and no other article of the Constitution.” 75 CONG. REC. 48 (1931). This application is ambiguous, but arguably may be understood as limiting the proposals that may be made by the convention, at least to the extent that no existing provisions other than the Eighteenth Amendment may be *repealed*. This probably renders the application invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment prohibiting polygamy, but does not in terms condition the application on a subject-matter limitation on the convention. 40 CONG. REC. 4551 (1906). This application constitutes a valid, unrepealed application for a general constitutional convention.

### *Citation*

118 CONG. REC. 33,047-48 (1972)  
75 CONG. REC. 48 (1931)  
40 CONG. REC. 4551 (1906)  
HOUSE OF REPRESENTATIVES J. 36 (1789)

### *Subject(s) Mentioned*

Funding private schools  
Repeal Eighteenth Amendment  
Anti-polygamy  
General

## NORTH CAROLINA

North Carolina's light is “on” for a constitutional convention. North Carolina's most recent application calls on Congress to propose a balanced budget amendment and “alternatively” seeks a convention “for the exclusive purpose” of proposing such an amendment. 125 CONG. REC. 3310-11 (1979). Whether or not the in-the-alternative formulation constitutes a valid application, the subject-matter limitation renders it invalid. The next previous application seeks a convention “for the sole purpose” of proposing an amendment concerning state legislative apportionment. 111 CONG. REC. 10,673 (1965). This application is invalid. (Though a resolution of the North Carolina House of Representatives purports to withdraw that house's concurrence in the 1965 resolution, it does not appear that a single house can rescind a legislative act, as a matter of North Carolina law, and the resolution does not so represent. 115 CONG. REC. 18,411 (1969).) The next previous application seeks a convention “for the sole purpose” of proposing amendments necessary

to authorize the United States to negotiate with other nations a constitution for world federal government. 95 CONG. REC. 6587-88 (1949). This application is also invalid. The next previous application seeks a convention “for the purpose of proposing amendments to the Constitution of the United States.” 45 CONG. REC. 7117 (1910). This constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

125 CONG. REC. 3310-11 (1979)  
 111 CONG. REC. 10,673 (1965)  
 95 CONG. REC. 6587-88 (1949)  
 45 CONG. REC. 7117 (1910) [1907]  
 1901 N.C. Sess. Laws 1029\*

***Subject(s) Mentioned***

Balanced budget  
 Apportionment  
 World federal government  
 General/Direct election of Senators  
 Direct election of Senators

**NORTH DAKOTA**

North Dakota's light is “on” for a constitutional convention. North Dakota's most recent resolution concerning a constitutional convention is inartfully worded, but is best understood as an application for a constitutional convention. The legislature resolves, “That we respectfully propose an amendment to the Constitution of the United States and call upon the people of the several states for a convention for such \*781 purpose as provided by Article V of the Constitution, the proposed Article providing as follows ....” 125 CONG. REC. 2113 (1979). The proposed amendment concerns a balanced budget. While this resolution could be understood *only* as urging convention applications from other states, the more natural reading is that North Dakota is seeking a convention but understands the convening of such convention to be an aspect of state sovereignty, not congressional prerogative. The application does not in terms condition the application on a subject-matter limitation on the convention and thus constitutes a valid unrepealed application for a general constitutional convention.

Even if this application is discounted, North Dakota's light should be regarded as “on.” The next previous resolution seeks a convention “for the sole and exclusive purpose” of proposing an amendment concerning federal revenue sharing. 117 CONG. REC. 11,841 (1971). This application is invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 113 CONG. REC. 11,175 (1967). This application constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

125 CONG. REC. 2113 (1979)  
 117 CONG. REC. 11,841 (1971)  
 113 CONG. REC. 11,175 (1967)  
 111 CONG. REC. 8395 (1965)  
 109 CONG. REC. 4140 (1963)

***Subject(s) Mentioned***

Balanced budget  
 Revenue sharing  
 Apportionment  
 Apportionment  
 School prayer

**OHIO**

Ohio's light is “on” for a constitutional convention. Ohio's most recent application seeks a convention “for the sole and exclusive purpose” of proposing an amendment concerning federal revenue sharing. 117 CONG. REC. 22,280 (1971). This application is invalid. The next previous application seeks a convention “to propose” a specific amendment concerning revenue sharing, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 25,237 (1965). This application constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

117 CONG. REC. 22,280 (1971)  
 111 CONG. REC. 25,237 (1965)

***Subject(s) Mentioned***

Revenue sharing  
 Revenue sharing

47 CONG. REC. 660-61 (1911)	Anti-polygamy
1911 Ohio Laws 741*	Direct election of Senators
1908 Ohio Laws 641-42*	Direct election of Senators
1861 Ohio Laws 181*	General

## OKLAHOMA

Oklahoma's light is "on" for a constitutional convention. Oklahoma's most recent application seeks a convention "for the sole and exclusive purpose" of considering a right-to-life amendment. 126 CONG. REC. 8972 (1980). This application is invalid. The next previous application calls on Congress to propose a balanced budget amendment and "alternatively" seeks a constitutional convention for the "specific and exclusive purpose" of proposing such an amendment. 124 CONG. REC. 12,397 (1978). Whether or not the "in-the-alternative" formulation constitutes a valid application, the subject-matter limitation renders it invalid. The next previous application seeks a convention "for the sole and exclusive purpose" of proposing an amendment prohibiting the coercive use of federal funds. OKLA. SENATE J., 354-354a (Mar. 9, 1976); 122 CONG. REC. 16,814 (1976). This application is invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment forbidding compulsory school reassignment (busing), but does not in terms condition the application on a subject-matter limitation on the convention. 119 CONG. REC. 14,428 (1973). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
126 CONG. REC. 8972 (1980)	Right to life
124 CONG. REC. 12,397 (1978) [1976]	Balanced budget
122 CONG. REC. 16,814 (1976) (text at OKLA. SENATE J. 354-354a (Mar. 9, 1976))	Coercive use of federal funds
119 CONG. REC. 14,428 (1973)	School assignment
111 CONG. REC. 11,488 (1965)	Presidential electors
111 CONG. REC. 1216 (1965) <sup>†</sup>	Apportionment
109 CONG. REC. 1172-73 (1963)	Apportionment
109 CONG. REC. 1172 (1963)	Revision of Article V
101 CONG. REC. 9941 (1955)	Federal taxing power
1911 Okla. Sess. Laws 388-89*	Anti-polygamy
45 CONG. REC. 7117-18 (1910) [1908]	General/Direct election of Senators

## \*782 OREGON

Oregon's light is "on" for a constitutional convention. Oregon's most recent application seeks a convention for the "specific and exclusive purpose" of proposing a balanced budget amendment. 125 CONG. REC. 5953 (1979). This application is invalid. The next previous application seeks a convention for the "sole and exclusive purpose" of proposing an amendment concerning federal revenue sharing. 117 CONG. REC. 17,056-57 (1971). This application is invalid. Oregon's next previous application seeks a convention "for the purpose of" proposing an amendment to establish the philosophy and principles of the Townsend national recovery plan as part of the Constitution, but does not in terms condition the application on a subject-matter limitation on the convention. 84 CONG. REC. 985 (1939). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 5953 (1979)	Balanced budget
117 CONG. REC. 17,056-57 (1971)	Revenue sharing
84 CONG. REC. 985 (1939)	Townsend plan
49 CONG. REC. 2463 (1913)	Anti-polygamy
43 CONG. REC. 2071 (1909)	Direct election of Senators
41 CONG. REC. 2928 (1907)	Direct election of Senators
45 CONG. REC. 7118 (1910) [1903]	Direct election of Senators

35 CONG. REC. 117 (1901)	Direct election of Senators
34 CONG. REC. 2290 (1901) (text at 1901 Or. Laws 477-78)	Direct election of Senators/General

## PENNSYLVANIA

Pennsylvania's light is "on" for a constitutional convention. Pennsylvania's most recent resolution calls on Congress to propose a balanced budget amendment and "alternatively" seeks a convention "for the specific and exclusive purpose" of proposing such an amendment. 125 CONG. REC. 2113-14 (1979). Whether or not the in-the-alternative formulation constitutes a valid application, the subject-matter limitation renders it invalid. The next previous application seeks a convention "for drafting and proposing" a right-to-life amendment, and specifically provides that "The purpose of the Constitutional Convention shall be to only consider the above and no other business." 124 CONG. REC. 11,438 (1978). This application is invalid. The next previous application seeks a convention "for proposing" an amendment prohibiting the attachment of conditions to federal grants-in-aid. 89 CONG. REC. 8220 (1943). But this application is not in terms conditioned on a limitation on the subject matter of amendments that may be considered by the convention. This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
125 CONG. REC. 2113-14 (1979)	Balanced budget
124 CONG. REC. 11,438 (1978)	Right to life
89 CONG. REC. 8220 (1943)	Coercive use of federal funds
89 CONG. REC. 8220 (1943)	Federal taxing power
1913 Pa. Laws 869*	Anti-polygamy
1907 Pa. Laws 821-22*	Anti-polygamy
45 CONG. REC. 7118 (1910) [1901]	Direct election of Senators

## \*783 RHODE ISLAND

Rhode Island's light is "off" for a constitutional convention. Rhode Island's most recent application seeks a convention for the "sole and exclusive" purpose of considering a right-to-life amendment. 123 CONG. REC. 15,808 (1977). This application is invalid. The next previous application seeks a convention for the "sole and exclusive" purpose of proposing an amendment concerning federal revenue sharing. 1971 R.I. Acts & Resolves 216-18. This application is also invalid. The next previous application seeks a convention "for the purpose of" proposing an amendment limiting the federal taxing power, but does not in terms condition the application on a subject-matter limitation on the convention. 86 CONG. REC. 3047 (1940). However, this application was repealed in 1949. 95 CONG. REC. 8286 (1949). Rhode Island therefore has no valid applications that have not been repealed.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
123 CONG. REC. 15,808 (1977)	Right to life
1971 R.I. Acts & Resolves 216-18*	Revenue sharing
86 CONG. REC. 3047 (1940), <i>repealed by</i> 95 CONG. REC. 8286 (1949)	Federal taxing power

## SOUTH CAROLINA

South Carolina's light is "on" for a constitutional convention. South Carolina's most recent application seeks a convention "for the specific and exclusive" purpose of proposing a balanced budget amendment. 125 CONG. REC. 2114 (1979). This application is invalid. The next previous application calls on Congress to propose a balanced budget amendment and also seeks a convention "for the specific and exclusive purpose" of proposing a balanced budget amendment. 122 CONG. REC. 4329 (1976). This application is invalid. The next previous application seeks a convention "for the purpose of proposing" a specific proposed amendment concerning state control of public education, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 3304



(1965). Another application submitted that year, and reported in the *Congressional Record* on the same date, seeks a convention “for the purpose of proposing” an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 3304 (1965). Both 1965 applications constitute valid, unrepealed applications for a general constitutional convention.

**Citation**

125 CONG. REC. 2114 (1979) [1978]  
 122 CONG. REC. 4329 (1976)  
 111 CONG. REC. 3304 (1965)  
 111 CONG. REC. 3304 (1965)  
 109 CONG. REC. 10,441-42 (1963)  
 109 CONG. REC. 10,441 (1963)  
 109 CONG. REC. 10,441-42 (1963)  
 108 CONG. REC. 5051 (1962)  
 53 CONG. REC. 2442 (1915)

**Subject(s) Mentioned**

Balanced budget  
 Balanced budget  
 Control of public schools  
 Apportionment  
 Establish Court of the Union  
 Revision of Article V  
 Apportionment  
 Repeal Sixteenth Amendment  
 Anti-polygamy

**SOUTH DAKOTA**

South Dakota's light is “on” for a constitutional convention. South Dakota's most recent application seeks a convention “for the specific and exclusive purpose” of considering an amendment with respect to coercive use of federal funds. That application specifically provides that it is “null, and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose.” 139 CONG. REC. S3362 (daily ed. Mar. 22, 1993). This application is invalid. The next previous application seeks a convention “for the specific and exclusive purpose” of proposing an amendment concerning \*784 congressional term limits. 135 CONG. REC. S3233 (daily ed. Apr. 4, 1989). This application is invalid. The next previous application seeks a convention “for the specific and exclusive purpose” of proposing an amendment granting the President line-item veto authority. 132 CONG. REC. S2548 (daily ed. Mar. 12, 1986). This application is invalid. The next previous application seeks a convention “for the specific and exclusive purpose” of proposing a balanced budget amendment. 125 CONG. REC. 3656-57 (1979). This application is invalid. The next previous application seeks a convention “for the sole purpose” of proposing a right-to-life amendment. 123 CONG. REC. 11,048 (1977). This application is invalid. The next previous application seeks a convention for the “sole and exclusive purpose” of proposing an amendment concerning federal revenue sharing. 117 CONG. REC. 5303 (1971). This application is invalid. The next previous application seeks a convention “for the purpose of” considering an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 3722-23 (1965). This constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

139 CONG. REC. S3362  
 (daily ed. Mar. 22, 1993)  
 135 CONG. REC. S3233  
 (daily ed. Apr. 4, 1989)  
 132 CONG. REC. S2548  
 (daily ed. Mar. 12, 1986)  
 125 CONG. REC. 3656-57 (1979)  
 123 CONG. REC. 11,048 (1977)  
 117 CONG. REC. 5303 (1971)  
 111 CONG. REC. 3722-23 (1965)  
 109 CONG. REC. 14,639 (1963)  
 109 CONG. REC. 14,638-39 (1963)  
 101 CONG. REC. 2861-62 (1955)  
 99 CONG. REC. 9180-81 (1953)  
 45 CONG. REC. 7118 (1910) [1907]

**Subject(s) Mentioned**

Coercive use of federal funds  
  
 Congressional term limits  
  
 Line-item veto  
  
 Balanced budget  
 Right to life  
 Revenue sharing  
 Apportionment  
 Apportionment  
 Revision of Article V  
 Revision of Article V  
 Revision of Article V  
 Direct election of Senators

43 CONG. REC. 2670 (1909)  
 43 CONG. REC. 2667-68 (1909)  
 34 CONG. REC. 2440 (1901)

Anti-polygamy  
 Direct election of Senators  
 Direct election of Senators

## TENNESSEE

Tennessee's light is "on" for a constitutional convention. Tennessee's most recent application seeks a convention "for the sole and exclusive purpose" of considering a right-to-life amendment. 126 CONG. REC. 9765 (1980). This application is invalid.

The next previous application presents a difficult interpretive question. It seeks a convention "for the purpose of proposing" an amendment concerning the selection and tenure of federal judges. 124 CONG. REC. 11,437 (1978). The application provides that it should be regarded as a continuing application "until the legislatures of two-thirds (2/3) of the several states shall have made like applications and such convention shall have been called and held in conformity therewith, unless the Congress itself propose a similar amendment within [60 days of receiving the necessary applications from two-thirds of the states]," which "shall render such convention unnecessary and the same shall not be held." Though the question is not free from doubt, the better answer is that this application constitutes a valid application for a general convention that states a condition subsequent on which the application terminates.

The application is not in terms conditioned on a subject-matter limitation on the work of the convention. The application is stated in terms of subject-matter purpose, not subject-matter limitation. The best reading of the "continuing application" provision is that it specifies the conditions on which the application (to this point, clearly for a general application) *terminates*-the holding of a convention in conformity with the state applications (which are, by hypothesis, "similar" to Tennessee's, i.e., valid applications for a general convention, but with the stated subject-matter purpose of seeking a balanced budget amendment), or the proposal by Congress of a "similar amendment." Consistent with this understanding, the language indicating that congressional proposal of such a similar amendment renders the convention "unnecessary" is best understood as expressing Tennessee's position that if Tennessee's subject-matter agenda in seeking a convention has been successfully completed, Tennessee then wishes its light to be "off" for a general constitutional convention.

**\*785** It is possible to understand the application's validity as conditioned on the existence of two-thirds of the states (including Tennessee) submitting *applications* specifying a similar subject-matter purpose in seeking a convention. In such a case the application would constitute a valid, *conditional* application for a *general* convention (i.e., "count our light as on for a general convention if and only if condition X is satisfied"), the condition of which (the existence of a sufficient number of valid general applications reciting the same subject-matter purpose) has *not* (yet) been satisfied. Again, however, the better reading of the language actually employed is that it sets a condition for termination, not recognition, of the application.

The matter is sufficiently doubtful, however, as to warrant consideration of earlier applications. Such consideration verifies that Tennessee's light is "on." Another application from 1978 is formulated similarly to the judicial tenure application and is reported in the *Congressional Record* on the same page as that application. 124 CONG. REC. 11,437-38 (1978). Assuming, *arguendo*, that that application either states an invalid condition on the application or a valid condition that has not yet been satisfied, it becomes necessary to resort to the next previous application. Tennessee's next previous application seeks a convention "for the sole and exclusive purpose" of proposing an amendment giving the President line-item veto authority. 123 CONG. REC. 22,002 (1977). This application is invalid. Another application submitted that year by Tennessee seeks a convention "for the purpose of" considering a balanced budget amendment but contains a "continuing application" paragraph identical to the two 1978 applications discussed above. 123 CONG. REC. 18,419 (1977) (text at 1977 Tenn. Pub. Acts 1536-39). Another 1977 application, concerning limiting the terms of federal judges, is similarly formulated and presents the same interpretive issues. 123 CONG. REC. 18,419 (1977) (text at 1977 Tenn. Pub. Acts 1533-35).

The next previous application seeks a convention “for the purpose of” proposing an amendment prohibiting coercive use of federal funds to impose mandates on the states, but does not in terms condition the application on a subject-matter limitation on the convention. 122 CONG. REC. 3307-08 (1976). This constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

126 CONG. REC. 9765 (1980)  
 124 CONG. REC. 11,437 (1978)  
 124 CONG. REC. 11,437-38 (1978)  
 123 CONG. REC. 22,002 (1977)  
 123 CONG. REC. 18,419 (1977)  
 (text at 1977 Tenn. Pub. Acts 1536-39)  
 123 CONG. REC. 18,419 (1977)  
 (text at 1977 Tenn. Pub. Acts 1533-35)  
 122 CONG. REC. 3307-08 (1976)  
 118 CONG. REC. 16,214 (1972)  
 (text at 1972 Tenn. Pub. Acts 2318-19)  
 118 CONG. REC. 16,214 (1972)  
 (text at 1972 Tenn. Pub. Acts 2319-21)  
 116 CONG. REC. 7112-13 (1970)  
 112 CONG. REC. 199-200 (1966)  
 47 CONG. REC. 187 (1911)  
 45 CONG. REC. 7118 (1910) [1905]  
 1903 Tenn. Pub. Acts 1630-31\*  
 35 CONG. REC. 2344 (1902) [1901]

Note: Tennessee submitted two separate applications in 1972 relative to school assignment.

***Subject(s) Mentioned***

Right to life  
 Selection and tenure of federal judges  
 Balanced budget  
 Line-item veto  
 Balanced budget  
  
 Selection and tenure of federal judges  
  
 Coercive use of federal funds  
 School assignment  
  
 School assignment  
  
 Taxation of bonds  
 Apportionment  
 Anti-polygamy  
 Direct election of Senators  
 Direct election of Senators  
 Direct election of Senators

**TEXAS**

Texas's light is “on” for a constitutional convention. Texas's most recent resolution asks Congress to propose a balanced budget amendment and “alternatively” petitions for a constitutional convention “for the specific and exclusive purpose” of proposing such an amendment. 125 CONG. REC. 5223-24 (1979). Whether or not the “in-the-alternative” formulation constitutes a valid application, the subject-matter condition renders it invalid. The next previous application seeks a convention “for proposing” a specific amendment concerning compulsory school assignment (busing) but specifically conditions its application on the understanding that the convention would be limited to consideration only of that particular text. 119 CONG. REC. 11,515 (1973). This application is invalid. The next previous application seeks a convention \*786 “for the purpose of” proposing an amendment concerning federal revenue sharing, but does not in terms condition the application on a subject-matter limitation on the convention. 113 CONG. REC. 17,634 (1967). This application constitutes a valid, unrepealed application for a general constitutional convention.

***Citation***

125 CONG. REC. 5223-24 (1979)  
 119 CONG. REC. 11,515 (1973)  
 113 CONG. REC. 17,634 (1967)  
 111 CONG. REC. 18,171 (1965)  
 109 CONG. REC. 11,853 (1963)  
 109 CONG. REC. 11,852 (1963)  
 109 CONG. REC. 11,852 (1963)  
 103 CONG. REC. A4782-83 (1957)  
 103 CONG. REC. 7265 (1957)  
 101 CONG. REC. 2770-71 (1955)  
 (text at 1954 Tex. Gen. Laws 1668-70)

***Subject(s) Mentioned***

Balanced budget  
 School assignment  
 Revenue sharing  
 Apportionment  
 Presidential electors  
 Revision of Article V  
 Apportionment  
 Preservation of states' rights  
 Oil and mineral rights  
 Revision of Article V

1911 Tex. Gen. Laws 281-82*	Anti-polygamy
1911 Tex. Gen. Laws 276-77*	Direct election of Senators
45 CONG. REC. 7119 (1910) [1901]	Direct election of Senators
33 CONG. REC. 219 (1899)	General

## UTAH

Utah's light is probably "off" for a constitutional convention. Utah's most recent application seeks a convention "for proposing an amendment to the Sixteenth Amendment to the Constitution of the United States," but further states that "said call for a convention by the state of Utah is limited to the express purposes herein enunciated and for no other purpose, and the state of Utah is not to be counted in a convention call for any other purpose except as limited herein." 133 CONG. REC. S5486 (daily ed. Apr. 24, 1987). This application can be fairly read either as conditioned on a limitation on the work of the convention or as stating a limitation on Utah's "call" (application) for a convention: i.e., that Utah's application should only be counted if a sufficient number of other states have expressed a similar desire to discuss only the amendment proposed therein and have similarly limited their convention calls. If understood as a limitation on the work of the convention, the application is invalid. If understood as stating a limitation on the circumstances in which Utah's application should be counted, the application constitutes a valid conditional application for a general convention, the condition of which has not been satisfied, and Utah's light cannot be regarded as "on" by virtue of this application.

While the question is not free from doubt, the application's statement that "the state of Utah is not to be counted in a convention call for any other purpose except as limited herein" is probably best read as repealing the state's prior constitutional convention applications. Resolving the doubt against the validity of the prior applications, Utah's light is "off" for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
133 CONG. REC. S5486 (daily ed. Apr. 24, 1987)	Federal taxing power
125 CONG. REC. 4372-73 (1979)	Balanced budget
123 CONG. REC. 13,057-58 (1977)	Right to life
111 CONG. REC. 4320 (1965)	Apportionment
109 CONG. REC. 5947 (1963)	Presidential electors
109 CONG. REC. 5947 (1963)	Apportionment
98 CONG. REC. 947 (1951)	Federal taxing power
45 CONG. REC. 7119 (1910) [1903]	Direct election of Senators

## VERMONT

Vermont's light is "on" for a constitutional convention. Vermont's sole application seeks a convention "to propose" an amendment banning polygamy, but does not in terms condition the application on a subject-matter limitation on the convention. 49 CONG. REC. 1433 (1913) [1912]. This constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
49 CONG. REC. 1433 (1913) [1912]	Anti-polygamy

## \*787 VIRGINIA

Virginia's light is "on" for a constitutional convention. Virginia's most recent application seeks a convention for the "sole and exclusive purpose" of proposing an amendment giving the President line-item veto authority. 123 CONG. REC. 9289 (1977); text at 1977 Va. Acts 1528-29. This application is invalid. Virginia's next previous resolution requests that Congress propose a balanced budget amendment and "alternatively" petitions for a convention "for the specific and exclusive purpose" of proposing such an amendment. 122 CONG. REC. 8335-36 (1976). Whether or not the "in-the-

alternative” formulation constitutes an actual application, the subject-matter condition renders the application invalid. The next previous application seeks a convention “for the specific and exclusive purpose” of proposing a balanced budget amendment. 121 CONG. REC. 5793 (1975). This application is invalid. The *Congressional Record* of 1973 reports the receipt of a memorial from Virginia asking for a convention for proposing an amendment concerning compulsory school assignment. 119 CONG. REC. 10,675 (1973). However, Virginia does not appear to have passed any resolution corresponding to this *Congressional Record* reference. Accordingly, it should be discounted entirely. The next previous application seeks a convention “for the sole and exclusive purpose” of proposing a balanced budget amendment. 119 CONG. REC. 8091 (1973). This application is invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 880-81 (1965). This constitutes a valid, unrepealed application for a general constitutional convention. Another application submitted that same year, and reported on the same date in the *Congressional Record*, seeks a convention “for the purpose of” proposing an amendment amending Article V, but does not in terms condition the application on a subject-matter limitation on the convention. 111 CONG. REC. 880 (1965). That application also constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
123 CONG. REC. 9289 (1977) (text at 1977 Va. Acts 1528-29)	Line-item veto
122 CONG. REC. 8335-36 (1976)	Balanced budget
121 CONG. REC. 5793 (1975)	Balanced budget
119 CONG. REC. 10,675 (1973)†	School assignment
119 CONG. REC. 8091 (1973)	Balanced budget
111 CONG. REC. 880-81 (1965)	Apportionment
111 CONG. REC. 880 (1965)	Revision of Article V
110 CONG. REC. 5659 (1964)	Apportionment
106 CONG. REC. 5240-41 (1960)	Control of public schools
98 CONG. REC. 1496 (1952)	Repeal Sixteenth Amendment
CONG. GLOBE, 36th Cong., 2nd Sess. 600-01 (1861)	General
ANNALS OF CONG. 248 (1788), <i>reprinted in S. Doc 78, 71st Cong.,</i> 2d Sess. 31 (1930)	General

## WASHINGTON

Washington's light is “on” for a constitutional convention. Washington's most recent application seeks a convention “for the purpose of” proposing an amendment concerning state legislative apportionment, but does not in terms condition the application on a subject-matter limitation on the convention. 109 CONG. REC. 5867 (1963). This application constitutes a valid, unrepealed application for a general constitutional convention.

<i>Citation</i>	<i>Subject(s) Mentioned</i>
109 CONG. REC. 5867 (1963)	Apportionment
46 CONG. REC. 651 (1911) [1910]	Anti-polygamy
44 CONG. REC. 127 (1909)	Anti-polygamy
45 CONG. REC. 7119 (1910) [1903]	Direct election of Senators/General
1901 Wash. Laws 333*	General

## \*788 WEST VIRGINIA

West Virginia's light is “on” for a constitutional convention. West Virginia's most recent application seeks a convention “for the sole purpose” of proposing an amendment concerning federal revenue sharing. 117 CONG. REC. 541-42 (1971).

This application is invalid. The next previous application seeks a convention “to propose” an amendment banning polygamy, but does not in terms condition the application on a subject-matter limitation on the convention. 1907 W. Va. Acts 433-34. This application constitutes a valid, unrepealed application for a general constitutional convention. (While this application does not appear in the *Congressional Record*, the resolution directs that it be transmitted to Congress. It is probable that the resolution was transmitted but not entered into the *Congressional Record*.)

**Citation**

117 CONG. REC. 541-42 (1971)  
1907 W. Va. Acts 433-34\*

**Subject(s) Mentioned**

Revenue sharing  
Anti-polygamy

**WISCONSIN**

Wisconsin's light is “on” for a constitutional convention. Wisconsin's most recent application seeks a convention “to propose” an amendment providing for proportional allocation of a state's electoral college votes, but does not in terms condition the application on a subject-matter limitation on the convention. 109 CONG. REC. 14,808 (1963). This application constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

109 CONG. REC. 14,808 (1963)  
89 CONG. REC. 7525 (1943)  
89 CONG. REC. 7524 (1943),  
*repealed by* 91 CONG. REC. 3226 (1945)  
75 CONG. REC. 57 (1931)  
71 CONG. REC. 2590 (1929)  
50 CONG. REC. 42-43 (1913)  
47 CONG. REC. 1873 (1911)  
45 CONG. REC. 7119-20 (1910) [1908]  
42 CONG. REC. 165-66 (1907)  
37 CONG. REC. 276 (1903) †

**Subject(s) Mentioned**

Presidential electors  
Limit presidential tenure  
Federal taxing power  
Repeal Eighteenth Amendment  
General<sup>59</sup>  
Anti-polygamy  
General  
Direct election of Senators  
Direct election of Senators  
Direct election of Senators

**Footnotes**

† Wisconsin's 1929 resolution may not actually be an *application* for a convention. In form, it is a demand that Congress perform ‘the mandatory duty imposed upon it’ by Article V to call a convention on the basis of previous applications submitted by Wisconsin and other states. The 1929 resolution appears premised on a theory similar to that set forth in this Article.

**WYOMING**

Wyoming's light is “on” for a constitutional convention. Wyoming's most recent resolution asks Congress to propose a balanced budget amendment “or” to call a convention for the “specific and exclusive” purpose of considering such an amendment. 125 CONG. REC. 2116 (1979). Whether or not the “or” formulation constitutes an actual convention application, the subject-matter condition renders the application invalid. The next previous application seeks a convention “for the purpose of” proposing an amendment to alter the Article V amendment process, but does not in terms condition the application on \*789 a subject-matter limitation on the convention. 109 CONG. REC. 4779 (1963). This constitutes a valid, unrepealed application for a general constitutional convention.

**Citation**

125 CONG. REC. 2116 (1979) [1978]  
109 CONG. REC. 4779 (1963)  
109 CONG. REC. 4779 (1963)  
109 CONG. REC. 4778-79 (1963)

**Subject(s) Mentioned**

Balanced budget  
Revision of Article V  
Apportionment  
Establish Court of the Union

107 CONG. REC. 2759 (1961)  
105 CONG. REC. 3085-86 (1959)  
84 CONG. REC. 1973 (1939)

Balanced budget  
Repeal Sixteenth Amendment  
Federal taxing power

103 YLJ 677

---

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.