



MEMORANDUM

From: Samuel Fieldman, Article V Convention Consultant, FFSF

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Subject: Aggregation of Plenary and Subject-Specific Calls for an Article V Convention

I. Introduction

This memorandum addresses whether plenary calls for an Article V convention can be aggregated with subject-specific calls. Based on historical practice, legal precedent, and scholarly interpretation, we argue that aggregation is constitutionally permissible. The principle that "the greater includes the lesser," advocated by scholars like Robert Natelson and William Van Alstyne and supported by institutional sources like the Department of Justice, demonstrates that plenary applications inherently encompass subject-specific ones. Furthermore, under an objective reasonable person standard, a clear consensus emerges that plenary calls can be aggregated with those focused on specific amendments, obligating Congress to call a convention once the requisite number of applications is met.

These principles can be applied to the applications for a convention on the subject of fiscal responsibility. As of the year 1979, there were 39 valid applications, consisting of 30 single-subject fiscal responsibility and 9 plenary applications. The obligation to call a convention was triggered at that point. Subsequently, in 1982, Alaska passed an application for fiscal responsibility. In 1983 Missouri also passed a similar resolution, making Missouri's 1907 plenary application redundant. Hence, by 1983, there were 40 valid applications, consisting of 32 FRA and 8 plenary applications, the high water mark for applications on this issue. This memorandum will briefly summarize both the necessary issues of law and the facts surrounding the 8 plenary calls from the 1983 count. Both then and today, a meaningful majority of the 50 states have valid FRA applications, giving these states control over the amending convention agenda and thereby addressing concerns about the purported "runaway" convention.

II. Core Argument: "The Greater Includes the Lesser"

The legal principle that "the greater includes the lesser" holds that when general authority is granted, it inherently includes narrower or more specific applications of that authority. Robert Natelson provides the most detailed analysis of how and why this phrase applies to include plenary convention resolutions together with subject matter specific convention calls. Robert G. Natelson, *The Law of Article V: State Initiation of Constitutional Amendments* § 3.9.6 (1st ed. 2018) (hereinafter *Law of Art. V.*). He notes historical examples in which this precise situation occurred, such as the 1777 Springfield Convention in which the States agreed to limit the scope of debate, but Connecticut's delegates, who were not so limited, were seated without issue.

Few scholars have taken on this question directly simply because the answer seems so uncontroversial. The views of other scholarly reports are sometimes revealed when analyzing related questions. For example, the Department of Justice in 1979 addressed the question of

“divergent applications.” OLC Opinion, No. 79-5, at 408. They looked at the view that “Congress must simply assess the applications that are made, determine whether there is common ground among them, and call a convention whenever two-thirds of the applications exhibit a consensus supportive of some particular constitutional change.” *Id.* The paper agreed with this “foundation” but focused far more on debunking the view that this made subject-matter specific applications invalid. *Id.*

This general principle also applies where it is unclear on the face of the application as to the intent of the state legislature. Should a state simply apply for a convention without any text indicating a purpose, the historical practice dictates that it should be aggregated together with subject matter-limited calls. Of the eight plenary calls among the 40 that (as of 1983) comprise the aggregation for which we argue, only three fall within this category: Ohio (1861), Washington (1901), and Wisconsin (1929). In addition, New Jersey’s 1861 application discusses issues related to the Civil War, but has no explicit limitations on its scope.

III. Application of the Objective Reasonable Person Standard

William van Alstyne proposed a simple, objective, reasonable person test for counting non-identical applications. He argued that when Congress “has in fact received applications from two-thirds of the several states requesting a call for convention consideration of a given subject of sufficient common description that further insistence for more perfect agreement among the applications would clearly be unreasonable... [it] is under a constitutional obligation to call a convention responsive in good faith to those applications.” William W. Van Alstyne, Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague, 1978 Duke L. J. 1295, 1305 (1978). (emphasis original). Natelson similarly argued “there is no Founding-Era practice suggesting that the text should be read otherwise than in the most straightforward manner[.]” Robert G. Natelson, Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?, 19 Federalist Soc’y Rev. 50, 59 (2018).

To reach 34 states by 1983, only between two and five plenary applications are needed. The Ohio call was likely motivated by the need to prevent the Civil War. The Washington call was likely motivated by the need for direct election of Senators. And the Wisconsin call was likely motivated by a desire to repeal prohibition. However, all three are entirely open on their faces. None of them have any indication that they are not to be counted with applications that are more restrictive and so the general principle applies that the greater includes the lesser. When one party states that they are open to anything, no more agreement can be demanded. A similar argument likely applies to New Jersey where the civil war is discussed on the face of the application, but the application does not place any restrictions on the problems to be addressed.

In 1789, New York issued the second ever call for a convention for proposing amendments. It passed on the unanimous recommendation of the Convention that ratified the US Constitution in Poughkeepsie, NY in 1788. The recommendation letter was written by John Jay, first Chief Justice of the US Supreme Court with help from Alexander Hamilton. The resolution states that the Convention would have “full power to take into their consideration the defects of this Constitution that have been suggested by the State Conventions... .” This can be read as plenary or it can be read as broad, but not unlimited. However, all 9 states that proposed amendments called for any of 7 proposals related to fiscal responsibility including that 2/3 of each house of Congress would be

required to borrow money. The New York resolution (together with a similar one from Virginia) was a major factor leading to the passage of the Bill of Rights. However, while the Bill of Rights addressed many of the demands of the States, it did not address fiscal responsibility at all, leaving the need specified in the resolution unaddressed and still in effect.

An additional three states have applications that were motivated by a particular need, but clearly and unambiguously expressed that their intent is to be counted together with calls from other states that address other needs. These include: Illinois (1861); Kentucky (1861); and Montana (1911). The three from 1861 were all motivated by the need to prevent the civil war. The 1911 call was motivated by the desire for direct election of Senators. Illinois specified that it did not desire any change itself, but because other States do see such a need, Illinois “does hereby concur in making such application.”

Kentucky, similarly, said their call was motivated by the fact that “some of the States feel themselves deeply aggrieved.” Kentucky further made itself clear by saying the “Legislature of the Commonwealth of Kentucky suggest[s] for the consideration of that convention, as a basis for settling existing difficulties, the adoption, by way of amendments to the Constitution, the resolutions offered in the Senate of the United States by the Hon. John J. Crittenden.” This is a clear statement that Kentucky does not intend to restrict the scope of the Convention themselves. Further, the State does not desire any particular policy that it believes must be up for consideration. But rather, it believes that the Crittenden Amendment would be a suggestion for resolving some difficulties.

Montana’s application explicitly stated its support for Direct Election of Senators. However, like Kentucky’s, its application also said that “at the said convention, the State of Montana, will propose, among other amendments, that Section 3 of Article I, of the Constitution of the United States should be amended, so that the Senators from each state shall be chosen by the electors thereof, as the Governor is now chosen.” This application clearly indicates that this issue, which is now moot, is not the only issue which Montana believes to be important for consideration and expresses the intent that this application is to be counted together with those from other states regardless of the issue.

V. Conclusion

Ohio, Washington, and Wisconsin are as open as any application ever has been to consideration of any subject, with the issues that motivated their passage not even mentioned in the resolutions. New Jersey states the issue that motivated it, but did not restrict the application. New York could be argued to be either clearly open to include any subject or specifically open to a broad range of issues that explicitly include issues of fiscal responsibility. Illinois, Kentucky, and Montana applications all clearly indicate their intent to discuss issues beyond the ones that motivated their specific resolutions. In each case of the plenary applications at issue here, a reasonable person applying a straightforward reading of them must conclude that they are open to discussing fiscal responsibility. No further demand can be reasonably made of them. In conclusion, all plenary applications should count, and these plenary applications should all count with single subject fiscal responsibility applications.