

The Law of Article V

State Initiation of Constitutional Amendments

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§ 3.9.6. Counting Applications

[Excerpt concerning counting plenary and subject matter specific applications together.]

Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.” As Section 3.9.5 pointed out, Founding-Era evidence demonstrates that when “two thirds of the several States” apply, the duty to call arises only when they apply on the same general subjects.

To be sure, state applications are seldom identical. Congress will need to judge which applications should be aggregated. This is not inconsistent with the ministerial, mandatory nature of the congressional task, since even ministerial duties may call for exercise of threshold discretion.¹⁸⁵ But because the duty to call is mandatory and because the application and convention process is designed to bypass Congress, its exercise of discretion should be subject to heightened judicial scrutiny. This conclusion is strengthened by the fact that a refusal increases congressional authority, thereby creating a conflict of interest.

So long as thirty-four applications, however worded, agree that the convention is to consider a particular subject and do not include governing phrases fundamentally inconsistent with each other, the count may be easy. Aggregation may be facilitated by a recent trend (first suggested by this author) by which an applying legislature provides explicitly that its own applications should be aggregated with designated applications from other states.

In this area, history argues that flexibility is appropriate and that hyper- technical readings are not. Founding-Era resolutions calling conventions and empowering commissioners almost never matched identically—but many conventions were held.¹⁸⁶

Thus, an application calling for an amendment limiting “outlays” to expected revenue surely should be counted with an application for an amendment limiting “appropriations” to expected revenue. These, in turn should be aggregated with applications calling merely for a convention to consider a “balanced budget amendment.” More difficult problems arise... [where]

¹⁸⁵ *Roberts*, 176 U.S. 222 (holding that threshold discretion as to construction of law does not alter ministerial nature of the duties).

¹⁸⁶ *See generally* Natelson, *Conventions*, *supra* note 2.

[s]ome applications prescribe a convention addressing Subject A and others call for a plenary convention—one unlimited as to topic.

There is no direct judicial authority interpreting the Constitution on these points. We do know, however, that the Founders expected the document to be interpreted in the larger common law context, and that in interpreting the document themselves they freely resorted to analogies from both private and public law.¹⁸⁷

In this instance, the closest analogue may be the law of contracts. Nearly all the Founders were social contractarians, and they frequently referred to the Constitution as a “compact.”¹⁸⁸ The application process itself is closely akin to the kind of group offer and acceptance that leads to such legal relationships as partnerships and joint ventures. Like offers, applications may be rescinded. Like offers, they become binding on the parties when the conditions for acceptance are satisfied. Contract principles provide some guidance for all four of the situations outlined above.¹⁸⁹

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In [this] situation, some applications address Subject A and others petition for a plenary amendments convention. Should a plenary application count toward a convention on Subject A? It may be possible to answer that question from the wording of the application.¹⁹⁶ For example,

¹⁸⁷ For example, during the ratification process, James Iredell, a leading North Carolina lawyer and judge and subsequently associate justice of the Supreme Court, likened the Constitution’s scheme of enumerated powers to a “great power of attorney,” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 148-49, (Jonathan Elliot ed., 2d ed. 1827) [hereinafter ELLIOT’S DEBATES], while Edmund Pendleton explained the Constitution’s delegation of powers by referring to (a) conveyance of a term of years, (b) conveyance of a fee tail or life estate, (c) conveyance of a fee simple, and (d) agency. Letter from Edmund Pendleton to Richard Henry Lee (Jun. 14, 1788), *reprinted* in 10 DOCUMENTARY HISTORY, *supra* note 57, at 1625-26 (Merrill Jensen et al. eds., 1976).

¹⁸⁸ The examples are many. *See, e.g.*, 3 ELLIOT’S DEBATES, *supra* note 186, at 384, 445, 591 (quoting Patrick Henry, an anti-federalist, at the Virginia ratifying convention). *id.* at 467 (quoting Edmund Randolph, a federalist, at the same convention).

¹⁸⁹ The contract analogy occurred to me in part because I did extensive work in contracts while in law practice and occasionally taught the subject as a law professor. More importantly, in writing this I have had the advantage of guidance by Scott Burnham, the Frederick N. & Barbara T. Curley Professor of Law at Gonzaga University, who is one of the nation’s premier scholars on the law of contracts.

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¹⁹⁶ Professor Burnham notes:

As a matter of interpretation, we must again determine what the offeror [i.e., an applying state legislature] intended. The offeror could be saying in effect, ‘I am open to discuss any topic,

in March, 1861, the Illinois legislature adopted a plenary application that appears still to be valid. Its gist was that if dissatisfaction is sufficiently widespread to induce enough other states, when counted with Illinois, to apply for a convention, then for the sake of unity Illinois will meet with them.¹⁹⁷ This statement evinces a willingness to convene with other states, whatever they wish to discuss.

As the date indicates, Illinois' application was a response to suggestions that the states use Article V to avoid the Civil War. But the application's language is not limited to that situation and its general principle extends well beyond any one crisis. The application seems aggregable with all others.

In the usual case, however, a plenary application merely calls for a convention without adding the "welcoming" language appearing in the 1861 Illinois resolution. An advocate for aggregation might contend that this fourth scenario is really a version of the third, and that therefore a convention should be held on Subject A. Furthermore, an advocate for aggregation might assert that when a legislature passes an application for a convention to consider any and all topics, the legislature is chargeable with recognizing that the convention may do so. If the legislature objects to the content of other applications, it may resort to the same remedies available to a dissenting state in the third situation: rescission, amendment, action at the convention, and refusal to ratify.

An opponent of aggregation might respond that in this situation, unlike the third, there is no subject-matter nexus between the two groups of applications. Everyone understands that "fiscal restraints" may include a balanced budget amendment; indeed, at the state level a balanced budget rule is a common kind of fiscal restraint. But a legislature adopting a plenary

leaving the offeree to choose the topic; alternatively, the offeror could be saying in effect, 'I am open to discuss only all topics, barring the offeree from narrowing the chosen topics.

¹⁹⁷ The application provides in part:

WHEREAS, although the people of the State of Illinois do not desire any change in our Federal constitution, yet as several of our sister States have indicated that they deem it necessary that some amendment should be made thereto; and whereas, in and by the fifth article of the constitution of the United States, provision is made for proposing amendments to that instrument, either by congress or by a convention; and whereas a desire has been expressed, in various parts of the United States, for a convention to propose amendments to the constitution; therefore,

Be it resolved by the General Assembly of the State of Illinois, That if an application shall be made to Congress, by any of the States deeming themselves aggrieved, to call a convention, in accordance with the constitutional provision aforesaid, to propose amendments to the constitution of the United States, that the Legislature of the State of Illinois will and does hereby concur in making such application.

1861 Ill. Laws 495.

application may have had completely different issues on its collective mind, or it may have contemplated reform only in the context of a wider constitutional examination.

In this case, it seems, there is no answer based on logic alone. However, Justice Oliver Wendell Holmes, Jr. famously observed that “a page of history is worth a volume of logic”—and fortunately, history provides guidance in this instance.

An application is a conditional authorization and direction to Congress call a convention on the topics listed in the application.¹⁹⁸ Although we do not have an historical instance of aggregating plenary and limited applications toward an Article V convention, we can refer to convention practice governing other documents based on the same general principles.

Specifically, convention records demonstrate that states often have authorized their commissioners to participate in limited conventions by issuing plenary credentials. Further, limited conventions have routinely seated commissioners with plenary credentials.¹⁹⁹ Thus, both states and conventions have assumed that a commissioner with wider authority may participate fully in a convention of narrower scope—in other words, that their powers may be aggregated. For example, Connecticut issued plenary commissions to authorize its representatives to participate in the limited-subject 1777 Springfield Convention. Several states employed plenary credentials to empower their commissioners to the limited-subject Washington Conference Convention of 1861.²⁰⁰

There also are many examples of states adopting plenary applications on the assumption that they were aggregable with more limited applications. One illustration is the 1789 plenary application of New York, which the legislature intended for Congress to aggregate with Virginia's more limited application adopted the previous year. The 1899-1912 application campaign for direct election of Senators is a source of additional illustrations.²⁰¹

So it does appear that in this aspect of convention practice the governing rule is the legal maxim that the greater includes the lesser: When counting toward a convention on a limited subject or subjects, Congress should add plenary applications to the applications limited to those subjects. Of course, the reverse is not true: Applications explicitly limited by subject should not be counted toward a plenary convention.

¹⁹⁸ *Supra* §3.8.2.

¹⁹⁹ For examples, see Natelson, *Counting*, *supra* note 117, at 57-59.

²⁰⁰ *Id.* at 58-59.

²⁰¹ *Id.* at 59.