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September 11, 2018

American Constitution Foundation
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Re: Article V Applications

Gentlemen:

You have performed an aggregation study under Article V of the Constitution and have posted on your website that 37 states have valid applications requiring Congress to call a convention. You have asked for my opinion as to whether I agree with the results you have obtained.

Rather than test your methodology, I have done a separate study on my own which is set forth herein. The results of that study, subject to the comments below, are as follows:

(1) There are 36 valid applications according to the standards applied by Professor Michael Stokes Paulsen which I have adopted. Professor Paulsen's aggregation study was done in 2011 with the effect that I was required to read all applications after 2010. My analysis is fully discussed in **Appendix** A to this opinion.

(2) There are 30 valid applications by Paulsen standards and 6 Convention of States'[1] applications that are limited to everything and are therefore not limited at all but are valid by the Paulsen standards.

(3) Professor Robert G. Natelson likely agrees with Paulsen's analysis of valid applications meaning he supports the Paulsen study.

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[1] The twelve states involved are Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Louisiana, Missouri, North Dakota, Oklahoma, Tennessee, and Texas. All but one of these states (North Dakota) have valid applications by the Paulsen standard. The six applications used in my count are those from Alabama, Arizona, Louisiana, Oklahoma, Tennessee and Texas.

The term "Convention of States" refers to the Convention of States Action or Convention of States Project which is an organization seeking to cause state legislatures to adopt its proposed application.

(4) Congress has a duty to call a convention for proposing amendments without any limitations on the agenda of the convention which will decide its own rules and agenda.

(5) An application is valid, which, whether or not it sets forth the motivation of the applicable state legislatures, requests that Congress call a convention for proposing amendments but does not limit the request to a particular subject or contain language evincing an intent that the application is solely or exclusively to consider a specific subject or amendment.

(6) The standard for determining the validity of applications is that of a reasonable person who, upon minimum observation of an application, can recognize its validity.

(7) Congress has a duty right now to call a plenary convention.

As part of my analysis, I have applied Professor Natelson's standards and provided the results of that analysis in **Appendix B**. A summary of my findings can be found in **Appendix C** attached.

You have independently conducted your own aggregation analysis to reach your opinion that there are 37 valid applications. However, I have not critiqued your methodology but can observe that it is similar to the Paulsen aggregation model because the results of your study and mine are the same when your analysis is adjusted to delete the South Dakota application used by you but which was disavowed by South Dakota in 2004 and is no longer valid.

In order to assist you in understanding this opinion, please note that my reference to a "general" convention is one that can consider anything and is one called by an application that contains no limitation on what the convention can consider. Such an application is a "valid application" according to Paulsen standards. My reference to a "plenary convention" means a convention which has power to consider any subject that comes up at the convention. My reference to a "limited application" is one that requests a call for a convention limited to a specific subject. Such an application is invalid according to Professor Paulsen but valid according to Professor Natelson. Sometimes the phrase "plenary application" is used. This is, in effect, a general application, the result of which is a request for a "plenary convention".

In reaching my opinions, I have reviewed the following sources, excluding cases of the U.S. Supreme Court and other commentaries which I have reviewed and cited when used. I recognize Professor Paulsen and Professor Natelson as the two most prominent scholars on the subject of Article V and have therefore confined my comments to a careful review of their opinions to illustrate my positions and how I have reached them. A table of contents follows to assist the reader.

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1. **Materials Examined**

(1) *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment* by Michael Stokes Paulsen, published in the Yale Law Journal in 1993.

(2) *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process* by James Kenneth Rogers and published in the Harvard Journal of Law & Public Policy in 2007.

(3) *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention* by Michael Stokes Paulsen, published in the Harvard Journal of Law & Public Policy in 2011.

(4) *Amending the Constitution by Convention: A More Complete View of the Founders' Plan* by Robert G. Natelson, published by the Independent Institute in 2010.

(5) *The Proposed Amendment of Article V: A Threatened* Disaster by Charles L. Black, Jr., published in The Yale Law Journal in 1963.

(6) *Counting to Two-Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution* by Robert G. Natelson, published by the Federalist Society in 2018.

(7) *State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters*, Robert G. Natelson (4th Ed. 2016).

(8) Article V Library and the contents thereof.

(9) The records of the Clerk of the House of Representatives who receives and documents filings of applications by the States.

(10) Documents Illustrative of the Formation of the Union of the American States (GPO 1927).

(11) *White Paper* published by you and found at *www.amconfdn.org/whitepaper*.

(12) *An Analysis of the Issues and Problems Relating to State Applications or Petitions to Congress for a Constitutional Convention, Such as to Balance the Federal Budget* dated April 19, 1982 by Thomas M. Durbin for the Congressional Research Service.

(13) *Constitutional Conventions: Political and Legal Questions* dated December 19, 1988 by David C. Huckabee for The Congressional Research Service.

(14) *Why the Constitution's "Convention for Proposing Amendments" Is a Convention of the States* by Robert G. Natelson published by The Heartland Institute in 2017.

2. **Article V.**

The full text of Article V is as follows:

> 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 to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

3. **Comments on Article V.**

Article V does not set forth the procedures of a convention or answer the numerous questions arising from the express terms thereof. This observation is noted by every scholar who has attended to Article V and the meaning thereof. Professor Akhil Amar, noted Yale Law School constitutional law professor, said it this way:

> For all its improvements upon its predecessors, Article V was neither an embodiment of pure republicanism nor an exemplar of perfect draftsmanship. After all, here were perhaps the most important rules in the entire document, specifying how and by whom everything else might be changed – a meta-Constitution operating on a higher conceptual plane than the rest of the document (except the ordainment rule of the Preamble and Article VII). Yet Article V left a great deal uncertain.
>
> For example, could a proposing convention be limited by subject matter? Would any congressional action triggering a proposing convention need to come before the president for his signature or veto? Who would decide the delegate-selection rules for such a convention, states or Congress? Within the convention itself, what voting rules and apportionment ratios would apply, and who would decide these questions? How would ratifying conventions in the several states be structured? By whom?

America's Constitution, A Biography (2006) at 291.

As a consequence of the foregoing, numerous scholars have offered their views on the meaning of Article V. Professor Paulsen, at Note 194 in his 1993 *A General Theory of Article V* said:

> 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: [names omitted and continues]. 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 the selection of delegates? And so on."); Charles L. Black, Jr., "The Proposed Amendment of Article V: A Threatened Disaster", 72 Yale LJ 958, 964 (1963) ("[n]either text nor history give any real help") [with continuing observations in support of the theme expressed above].

Id. at 733.

Because of this theme, no one can say with any certainty, despite the persuasion he or she may express, that his or her construction of Article V is the only one. On the other hand, Article V becomes meaningless if it cannot be applied and, thus, the fundamental question is why was Article V included in the Constitution? In 1787, when the constitutional convention was in process, only three states had amendment clauses in their constitutions confirming a common acknowledgment that a procedure was needed for changing a constitution. Professor Amar said "...none of these remaining [ten] states offered the delegates at Philadelphia direct guidance about how a constitution that had in fact been established in some exceptionally democratic way by *The People* themselves might later be amended" *America's Constitution* at 288. While Article V gave Congress the authority to propose amendments, how would the Constitution be changed if Congress usurped the power of the People to preserve corruption or tyranny? In the last days of the constitutional convention, Col. Mason said he thought:

> ...the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

Documents at 735. To hedge this risk, the Founding Fathers also gave the States, through their legislatures, the power to change the Constitution. Congress had a duty to call a convention for proposing amendments upon "applications" of two-thirds of the legislatures of the States.

It is clear that the primary purpose of Article V, apart from the powers assigned to Congress, was (i) to give the States in convention the power to propose amendments for ratification by three-fourths of the States and (ii) to limit Congress' role to calling the convention for proposing amendments, i.e., specifying where and when, and specifying whether ratification will be by the legislatures or state conventions. The stated purpose of Article V ("for proposing amendments") was furnished by Article V.

The early applications of the States were called for that purpose ("proposing amendments") but later on included language that the convention would be limited to particular amendments. For example, between 1788 and 1899, twelve applications were filed, all but two of which were "general" (for proposing amendments without specifying a particular subject). Later, many applications were limited to certain subjects or specifically proposed amendments. According to the Article V Library, since 1899, 425 applications have been filed of which only 23 are unrepealed general applications submitted by a total of 16 states according to the Library's standard. Limited applications have raised questions as to whether a general

application for proposing amendments (the purpose specified in Article V) could be aggregated with applications limited to specific conditions or amendments in determining whether there were applications from two-thirds of the state legislatures. This question raised other questions including whether a court could resolve conflicts based on "the political question doctrine".[2] However, the Supreme Court in cases not subject to a political question has issued various rules of construction which can be helpful in construing Article V. We need to turn to these rules of construction used by the Supreme Court before we can comment on resolution of the Article V issues raised above.

4. **Rules of Construction Applicable to Article V.**

The Primacy of Inalienable Rights.

While Professor Amar suggested that the slavery clause being an anti-freedom clause should be construed "with special strictness", this is the only comment he makes regarding the standard for construing Article V as a legal document. In fact, he inferred that the overriding bedrock principle of the Constitution "could not be abrogated without undermining the very foundation of the document" and that an amendment, as such, would not be a permissible amendment. For this conclusion, he relies on "the Preamble's text about the rights of Our Posterity and from the very act of ordainment that what We, the People, originally established, we could later amend." *Id.* at 292.

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[2] Under applicable law, the judiciary will not decide a case where the issue is determined to be a political question. The resulting "political question doctrine" arises from the separation of powers. The Supreme Court has ruled that:

> [A controversy] involves a political question...where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.

Baker v. Carr, 369 U.S. 186 (1962). Professor Paulsen dealt with this subject and concluded that the political question doctrine would preclude the judiciary from reviewing Article V issues discussed. *A General Theory of Article V* at 706-707, 713-721. However, the political question doctrine, arising as it does out of the Separation of Powers, does not affect a state's standing to bring suit. *Baker v. Carr*, *supra* at 210 ("It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the State, which give rise to the political question.") Thus, the judiciary may have jurisdiction to hear cases brought by states against Congress to enforce Article V if necessary. Professor Natelson argues that Article V issues can be resolved by the courts as they have in the past and cites various supporting authorities. Professor Paulsen, in his 2011 essay, while noting that the political question doctrine is fraught with difficulties to achieve judicial review, also believes that resort to the courts will ultimately become "an allowable course of action". *How to Count to Thirty-Four* at FN 35. I make no opinion on this issue or the applicability of the political question doctrine.

The foregoing comments justify a scholar, when construing Article V, to not only keep in mind the purposes of Article V as stated above, but to resolve ambiguities by construing the freedom of the People liberally (in light of Professor Amar's strict construction of the slavery clause [anti-freedom]. This means that the People should have an *inalienable right* to convene and propose changes to the Constitution as later confirmed by the First Amendment that is discussed below. For me, a liberal construction of Article V means that one should (i) stick to the text in the Constitution as understood by the public at the time of ratification, (ii) diminish conclusions that fuel controversy or divert attention from the plain meaning of Article V in a manner to frustrate the exercise of our inalienable rights as free people, (iii) limit the duty of Congress to the ministerial duty provided and (iv) present a plausible understanding of Article V likely to be accepted by state legislatures.

History as a Guide

Many scholars like to apply procedures and practices that predated the Constitution, a look, if you will, at what the states were doing and how they managed amendments to their several constitutions and the language they used. On the other hand, Professor Amar begins his commentary on Article V with the conclusion that none of ten states

> ...could be said to have ordained its constitution by some extraordinary inclusive act of popular participation. *Thus, none of these states offer the delegates at Philadelphia direct guidance about how a constitution that had, in fact, been established in some exceptionally democratic way by the people themselves might later be amended.* The remaining three states – Pennsylvania, Massachusetts and New Hampshire – had each undergone a more populous ordainment process. Interestingly enough, all three amendment clauses followed the same pattern, identifying the specific date, or set of dates, in which an amendment process might be triggered by an institution outside the legislature...
>
> Yet, none of these three documents explained how the people *at any other time* might properly alter what they had originally ordained. If these amendment clauses were the exclusive means of constitutional revision, didn't they abridge the theoretically inalienable right of the people to alter or abolish?...
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> Such questions could never have been far from the minds of the Philadelphia delegates. After all, they were hoping that these three states, along with the other ten, would ratify the proposed federal constitution sometime before mid-1788...
>
> *Given the absence of any genuinely well-specified amendment provision in any antecedent document, the Philadelphia framers did a respectable job in Article V, avoiding many of the grossest errors of earlier Revolutionary efforts.* [He then describes Article V.]
>
> This system combined most of the virtues of the state amendment clauses while side-stepping most of their vices. First, in order to safeguard all the important restrictions imposed on Congress by the people in the rest of the Constitution, Article V wisely denied Congress the unilateral authority to lift those restrictions. In this way Article V buttressed the Constitution's status as a law far superior to an ordinary

> congressional statute subject to ordinary congressional repeal...Thus, Article V sensibly required Congress to get outside approval.
>
> Second, in order to prevent a self-dealing Congress from simply bottling up needed reforms that might limit its own powers, *Article V offered an alternative amendment-proposal system that would not depend on congressional will.* This alternative – a federal convention – might never need to be deployed in order to have its desired effect. Its mere potential availability might suffice to pry needed amendment proposals from a Congress desirous of maintaining control over the amendment agenda...
>
> Third, in order to guard against a despotic federal convention that might try to crown itself king, Article V made clear that, if and when summoned into existence, its federal convention could merely propose amendments that would need to be independently ratified. This limiting Article V proposing conventions was important not only if and when such conventions in fact materialized, but at every other moment as well. By making its proposing convention less terrifying to would-be amenders, Article V rendered this instrument a more credible weapon to be brandished by those whose main goal was to prod Congress itself into action.
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> Fourth, in order to avoid the danger that self-dealing state legislatures might thwart needed reforms limiting their own powers or shifting additional authority to the central government, Article V allowed Congress to bypass these bodies in favor of special state ratifying conventions. Here, the Article V amendment process paralleled the Article VII ordainment process, in which the Philadelphia framers themselves outflanked potentially obstructionist and self-serving state legislatures.
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> Finally, in order to enable the nation to respond to a crisis whenever it arose, Article V imposed no date restrictions on the amendment process – except, of course, for its special concession to slavery interests ...[and] the rule of equal state representation in the senate…

(Emphasis supplied). *America's Constitution, A Biography* at 288-291. The foregoing makes it clear that the history of the states in dealing with changes to their constitutions has no relevance when it comes to construing Article V.

Based upon Professor Amar's comments, my respect for him as the recognized eminent constitutional scholar of the day and the scholar most frequently cited by the U.S. Supreme Court in its decisions and my comments above, I infer that, if there is a rule of construction applicable to Article V, it relates to the importance of our inalienable rights and the freedoms the Constitution was formulated to protect. The corollary rule is that, in case of doubt, the doubt shall be resolved to preserve and protect our inalienable rights and the freedom of the people to establish the form of government they desire. This corollary rule means that applications should be construed liberally to count toward the required 34 states.

When one is confronted with interpreting the Constitution for the first time, he will almost always refer to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which sets forth the fundamental principle in dealing with the Constitution. Chief Justice Marshall said:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

Each and every one of the applications under Article V propose an amendment to the constitution and reflect a discontent with the bands which the Constitution established and embody the exercise of the people through their legislatures "to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness..." -- in other words, "to form a more Perfect Union". This principle is reflected in Article V, and as applied to a constitutional convention called for by the states, is clearly not "frequently repeated" and, in fact, has never happened. In other words, each application, one way or the other, reflects the opinion of a state's legislature that the Constitution as used in the management of government does not satisfy those principles which "conduce their own happiness". Thus, Article V has to be construed liberally to accord the people through their legislatures the "right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness...." In *Boyd v. United States*, 116 U.S. 616, 635 (1886), the Supreme Court said how to avoid "silent approaches and slight deviations from legal modes of procedure":

> This can only be obviated by adhering to the rule that constitutional provisions *for the security of person and property* should be liberally construed...It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

It is also common knowledge in the law that remedial statutes are construed liberally. There can be no doubt that Article V, while not a statute, is remedial and should be liberally construed. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968). It is also common knowledge that a statute or constitutional provision, if not ambiguous, will be given its plain meaning. If it is ambiguous, then liberal construction, if appropriate, applies. For example, the word "application" in Article V would seem to be self-evident. Yet, the question has arisen whether the application can be qualified by limitations or not. In answering this question, a liberal construction of the word "application" is required. "Liberal" is often used to signify an interpretation which produces broader coverage. It is a construction which makes the ambiguous provision apply to more things or in more situations than would be the case under a strict construction. Thus, in the case of Article V, the word "application" with any associated qualifiers should be construed to validate applications if at all possible with invalidation occurring only when the application is clearly limited by its qualifiers that it stands alone -- invalid according to Professor Paulsen as we will later show but deserving of special treatment according to Professor Natelson. Further, every scholar who has addressed the subject agrees that the convention itself decides the rules of

the convention including the agenda. Thus, verbiage in an application dealing with the convention or qualifying its power is irrelevant to the validity of an application.

The Role of the First Amendment

In addition to the fundamental concept of the people deciding the form of their own government is the First Amendment, which occurred after the adoption of Article V. In fact, an application under Article V is equivalent to a petition under Article V and thus invokes the Supreme Court's construction of the First Amendment as applied to a petition under Article V. In fact, Professor Amar referred to the applications in Article V as "petitions" and, thus, invokes the First Amendment.[3] The First Amendment provides, in relevant part, that "Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances." The right to petition extends to every department of government which would include the Congress. *California Motor Transport. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The Supreme Court has recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967) and *Lozman v. City of Riviera Beach, Florida*, 138 S. Ct. 1945, 1948 (2018), and has explained that the right is implied by "[t]he very idea of a government, republican in form," *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). One can infer that neither the judiciary nor Congress, both departments of government, can make any ruling abridging the right of state legislatures to petition Congress for a convention proposing amendments. As Justice Scalia said in *District of Columbia v. Heller*, 554 U.S. 576-577, 592 (2008), the First Amendment codified a *pre-existing* right", this right including the right set forth in *Marbury v. Madison*.

Common Sense Construction

There are few established rules of construction when it comes to reading the Constitution. However, there are many words intended to describe judicial method. These include direct construction, originalism, judicial activism, judicial restraint, textualism, and liberal construction. The common sense approach is the wisest in my opinion. Justice Scalia said "a text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means". It needs to be noted that some, but not many, Supreme Court cases discuss construction of the Constitution. See *Boyd v. United States*, *supra*, and *Byars v. United States*, 273 US 28-31 (1927).

The meaning of words in a constitutional provision is best determined by historical background. In *District of Columbia v. Heller*, 554 US 570, 576 (2008), Justice Scalia, writing for the majority, concluded that the Second Amendment guaranteed the individual right to possess and carry weapons. Justice Scalia stated:

> In interpreting this text [Second Amendment], we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning".

[3] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> [Citation omitted.] Normal meaning may of course include an idiomatic meaning, that it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

Justice Scalia also observed that, when a provision provides a stated purpose and a command, then there has to be "a link between the stated purpose and the command". *Id.* at 577. These requirements "may cause a prefatory clause to resolve an ambiguity in the operative clause". Moreover, "a prefatory clause does not limit or expand the scope of the operative clause". The operative clause is to be given the scope its words require as long as that scope is consistent with prefatory clauses. In fact, it is not unusual for an operative clause to extend beyond the motivations described in the prefatory clauses. *Id.* at 578. Yet, the operative clause must be consistent with the prefatory clause, the announced purpose of the provision.

Article V, like the Second Amendment, has both a prefatory clause (applications to Congress for a convention for proposing amendments) and an operative clause (Congress shall call a convention). It is commonly accepted that the Article V language related to Congress' duty to call a convention is ministerial with limited discretion. As such, it cannot be construed to contain any discretion other than counting thirty-four valid applications and stating where and when the convention will be held (a common sense meaning of the word "call"). See Paulsen's essay, *How to Count to Thirty-Four* at 860. No interpretation of the word "call" implying a greater discretion is consistent with the stated purpose of Article V and must be disregarded for reasons previously stated.

Construing "Application" as used in Article V

The prefatory clause in Article V is "on the applications of the legislatures". And so, the question is, what is an application? As noted earlier, it is equivalent to a petition requesting the states assemble by convention to propose amendments. If there is any meaning to the word, it is the fact that for over 100 years the twelve applications filed were all general but two. Why? Because that was the understanding at the time on how to submit an application. This understanding is of the highest relevance in any discussion over the meaning of "application".

The equivalent of a general application is like a letter from one state to other states that the applicant has some serious problems the way the Government is being run, wants to share these problems with other states and wants to decide what to do. This reflection of harmony among the states dates to Athenian democracy that sharing problems with each other leads to better solutions. The notion that applications can limit the requested convention to specific amendments or subjects defies the underlying principles of democracy in exchange for the arrogance that a specific remedy, and that remedy alone, should be discussed when, in all probability, different views and remedies would surface to solve a given problem in more ways than envisioned by a specific limitation. Accordingly, limitations in application are unwelcome and should be construed into oblivion if rationally possible.

The above view was acknowledged by Dr. Franklin on the last day of the convention:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller

> consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.
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> ***
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> On the whole, Sir, I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity, put his name to this instrument.

Documents at 739-740.

Limited Applications are not Democratic

Dr. Franklin's philosophical thoughts presaged later studies and was unwittingly responsible for a conclusion that limited applications are not part of Article V.

We have to appreciate that every proposal for an amendment not only reflects serious discontent with our government but contains a prediction that, if such proposed amendment becomes part of the Constitution, it will improve our government. Yet, no one can be sure what the future will behold with or without the amendment. This led University of Texas Classics and Philosophy Professor Paul Woodruff to remark:

> Any government is government by ignorance. No one knows what the future will bring...There is no expert knowledge that governs decisions of state.

First Democracy, Oxford University Press (2005) at 153, 156. Professor Woodruff elucidates in his book seven ideas that encompass democracy:

> Three of them – harmony, the rule of law and freedom – belong to every ancient theory of good government. (*Id.* at 30.)
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> ***
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> Without harmony, there cannot be *dêmos* – a people – who can hold the reins of power. Only factions. And rule by a faction is not democracy. Harmony is as necessary in time of peace as it is in time of war, because without it democracy is impossible. (*Id.* at 93.)
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> ***
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> Every step toward democracy is a step towards harmony. You won't believe this if you think that democracy is majority rule, because majority rule often destroys harmony. Democracy, when it really works, engages majority and minority elements in a cooperative enterprise. If the two groups are unwilling to cooperate, if the majority will make no concessions to the minority and vice versa, then the two sides are unwilling to take part in democracy. (*Id.* at 218.)

In his later book, *Reverence: Renewing a Forgotten Virtue* (Oxford University Press, 2014), Professor Woodruff says, "Power without reverence is aflame with arrogance, while service without reverence is smoldering toward rebellion. Politics without reverence is blind to the general good and deaf to advice from people who are powerless."

We learn from Protagoras in Plato's *Protagoras* 322 c., that Zeus "fearing that our whole species would be wiped out, sent Hermes to bring reverence and justice to human beings in order that these two would adorn society and bind people together in friendship". Zeus was worried because people would gather together in groups, do wrong to each other and be unable to form a society. Reverence is the parent of Harmony and it is hard to distinguish the two. Yet, without both of them, a democracy will fail.

Tocqueville, in *Democracy in America*, emphasizes the importance of associations among the people and the necessity for them to preserve democracy. He explains the reason why Congress should not have power over associations such as a convention of states to improve the government the people live under. He states, "If once the sovereign had a general right of authorizing associations of all kinds upon certain conditions, he would not be long without claiming the right of superintending and managing them, in order to prevent them from departing from the rules laid down by himself". *Id.* at 330-331. (Vintage Books, Inc., 1945)

Jonathan Sacks, in *The Dignity of Difference* (Continuum, 2003), said:

> Where are they [virtues] created? In families, communities, friendships, congregations, voluntary associations and fellowships of various kinds – in short, wherever people are brought together not by exchange of wealth or power but by commitment to one another or to a larger cause they serve in common. It was this insight that famously led Edmund Burke, reflecting on the French Revolution, to speak of the "little platoons" as the birthplace of "public affections". It was this also that moved Alexis de Tocqueville to assert that it was American "habits of association" –their tendency to form voluntary associations and join churches – that protected freedom through the exercise of citizenship. Burke and de Tocqueville have been subjects of intense interest in recent years because of a growing realization that, between them, the market and the state have weakened trust-creating institutions – sometimes called "third-sector" or "mediating" structures....What they have in common is their emphasis on non-contractual, or what I have called covenantal relationships. Without them, not only do markets and states begin to falter, social life itself loses grace and civility. The bonds that connect us to one another start to fray.
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> ***
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> Without stable association with others over extended periods of time, we fail to acquire the habits of co-operation which form the basis of trust on which the economic and politics of a free society depend.

Id. at 152, 158.

In light of the above, one can infer that a general convention under Article V would bring the conflicting views of our citizens together and restore "We, the People" once again to make our Union more perfect.

Construing the "Call" of Congress

Interestingly, some scholars have opined that limited applications are valid but to reach this conclusion they had to expand Congress' powers by saying, not only did Congress have the duty to call a convention, it had a duty to determine and apply its own standards to group applications by their limitations or subjects. Yet, the Supreme Court has told us that construction of the Constitution (including Article V) cannot "defeat, to a large extent, the object of its enactment". *Stewart v. Kahn*, 78 U.S. 493, 506 (1870). As noted above, one purpose of the Article V language was to deny Congress any role other than calling a convention (a ministerial duty) and designating whether ratification was by the legislatures or state conventions. In my view, Congress has no power to group applications except according to their validity determined as set forth herein. If it grouped by any other standard, it could impose grouping standards in such a way as to deny the states their rights under Article V. For example, Congress could say that the applications had to be identical or that an application limited to fiscal restraint was not the same as an application limited to balancing the budget. To avoid interference by Congress, the only standard is that the applications are either valid by the Paulsen model (hereafter discussed) or, if limited, are valid because the similarity of the subject matters are so obvious to a reasonable person that Congress, if presented 34 applications limited to similar subjects, could easily recognize the similarity upon minimum observation of the applications during the counting process.

Despite Congress' duty to call a convention, it has to have enough discretion to count the applications and determine which are valid. Hamilton, in *Federalist Paper No. 85,* noting the efforts needed to obtain a more perfect Union, said, "The Congress 'shall call a convention'. Nothing in this particular is left to the discretion of that body". However, Congress must not only count and decide the ratification method, it must group the applications between the valid and invalid ones. In furtherance of the strong policy for a convention of states, the grouping standards must be of the most simple nature and permit Congress to determine the valid applications because their validity is so obvious to a reasonable person that Congress could easily recognize their validity upon minimum observation.

Summary of Rules of Construction

The foregoing analysis allows us to apply the following rules of construction in construing Article V:

(1) The purpose of Article V is to allow the People, through their legislatures, to exercise their inalienable right to have a convention to propose changes to the Constitution that they believe will increase their happiness subject to ratification by the states.

(2) The stated purpose of Article V (prefatory clause) is to allow state legislatures to apply to Congress for a convention for proposing amendments.

(3) The operative clause of Article V is that Congress call a convention upon receipt of 34 valid applications.

(4) Words in the Constitution must be given the meaning assigned to those words by ordinary people during the ratification process and not technical meanings not known to ordinary people and not what any particular Founding Father intended.

(5) People are happiest when they are free and thus doubts regarding construction of Article V should be resolved in favor of protecting their freedom, security and prosperity.

(6) A liberal construction of the application, being part of a First Amendment petition, shall be applied in favor of aggregating the same with other applications and to protect this most precious of our rights without conditions or impediments inconsistent with the primary purpose of Article V.

(7) Article V should be construed reasonably to effectuate its purpose and any ambiguities within Article V should be construed to reflect the understanding of the voters when the Constitution was ratified with doubts resolved in favor of a valid application for calling a convention.

(8) Limitations in applications are a vain insult to the policy of a healthy democracy to work together, to be smart enough to see a problem but humble enough to acknowledge that no single state necessarily has a predetermined solution and that reverence for the opinions and proposed solutions of others is essential in our federal system.

(9) No interpretation of an application should be countenanced which increases the power of Congress beyond counting the number of valid applications, calling the convention and specifying the mode of ratification.

(10) No limitation in an application should be construed to exclude other applications which strive to achieve a similar purpose ("proposing amendments") unless such limitation clearly excludes all issues other than a stated special subject which limitation should be obvious to any reasonable person upon minimum observation during the counting process.

Having set forth the rules for determining the meaning of Article V, let us now turn to the views of prominent scholars who have addressed this subject.

5. Rules of Construction Applicable to Applications of the Legislatures.

One could argue that, while rules of constitutional construction can apply to legislation, it is nonetheless important to set forth rules of construction applicable to statutes. This is appropriate using Paulsen's concurrent legislation model. These rules are broader than the rules of constitutional construction and are set forth below during my comments on the Convention of States' proposed application.

6. **Professor Paulsen ("Paulsen").**

Professor Paulsen was among the first to analyze competing theories and then to advance his own theory of Article V, from which he proceeded to complete an aggregation model. His model is supported by the historical record and his logic is coherent and compelling.

Following a lengthy discussion on why Article V applications continue indefinitely unless rescinded or repealed, Paulsen outlined a model for interpreting the requirements for Article V and stated:

> 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 super majorities of Congress, and of state legislatures, resulting in their *concurrent approval* of an identical proposal.

A General Theory of Article V at 677.

He summarizes this model by reference to "concurrent legislation" and concludes that it "has more explanatory power and poses fewer textual and practical problems than any competing theory". *Id.* at 723. He states that "it offers a principled explanation of *why* amendment proposals have potentially unlimited life, how it is that Congress may rescind such proposals [its own proposals], and why states may repeal ratifications or attach procedural and substantive conditions to their ratifications." *Id.* at 732. His model does not include problems associated with a convention that he defers that to another day.

Professor Paulsen says "the real question is whether, to permit cumulation, the applications for a constitutional convention all have to say *approximately* the same thing." In other words, to call a constitutional convention, Congress has an obligation, ministerial in nature, to make inquiry into:

> (i) The proper Article V rule concerning when an application is valid, (ii) 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.

Id. at 737.

His conclusions include:

(1) Applications "for proposing amendments' without any limitations are called general applications and they are valid applications.

(2) Applications "for the purpose of proposing a specified amendment or subject without words of limitations are valid applications for a general constitutional convention" (a plenary convention).

(3) There is no such thing as a "limited" constitutional convention because a convention by definition and practice is a free agency and may propose whatever it likes or, as Professor Black put it, "a convention for proposing such amendments is what that convention decides to propose."

(4) There are three checks on the convention, namely the need for three-fourths of the states to ratify its work, Congress' control over whether the ratification method is by state legislatures or state ratifying conventions and the convention's adopted rules.

(5) "Those who dread a 'runaway' convention thus misapprehend the very nature of a constitutional convention, which is inherently illimitable in what it may propose.'"

(6) "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."

(7) If a limited convention were permissible, applications would count only toward the total needed for a convention, thus limited, and would not count toward the number needed for a general application.

(8) Words of applications for proposing amendments, even specified amendments, are valid applications if they do not have language of limitation.

(9) It is preferable to construe the language of convention applications in the most natural sense.

(10) Valid applications may be cumulated with other valid applications dealing with different subjects but without language of limitation.

(11) Valid applications are not repealed by subsequent invalid applications.

In his second essay on the subject, published in 2011 in the *Harvard Journal of Law and Public Policy* entitled *How to Count to Thirty-Four: The Constitutional Case for Constitutional Convention*, Paulsen focuses on Congress' duty to call a convention when two-thirds of the states have filed with it valid applications for a general convention. Relying on the 1787 historical meaning of a "convention", Paulsen reinforces his concept that it is a free agency by stating "the most natural straight forward sense of this language ["a convention for proposing amendments"]. In other words, a convention for proposing amendments is a convention for proposing such amendments as the convention deems proper to propose." *Id.* at 842. Second, he states that "Congress – not the convention – was designed by the text to be the 'pass through' body, with no deliberative role." *Id.* at 844. Thus, Paulsen concludes "The historical evidence suggests that the Framers thought about this and settled on a non-pass-through convention as an intervening body. Such intervention implies, very strongly, full deliberative powers." *Id.* at 845. Lastly, he states that "the question of cumulation across the subject is easy: if the subject matter is not stated as conditioning the application, it is just a statement of subject matter interest and agenda." *Id.* at 852.

Paulsen relies on Professor Dellinger's work that textual argument and history indicate "that the convention method of Article V was intended to *avoid* reliance on Congress". *Id.* at 739. Paulsen also shows support for the conclusion that early practice suggested that "the founding generation understood convention to be plenary".[4] Paulsen then concludes that this practice should apply unless the application is conditioned on a limitation in which case the application is inconsistent with the purpose and meaning of a convention and is therefore void. This is the best standard formulated to date that takes Congress out of the equation except for calling a convention.

Further support for Paulsen's analysis is that it has met one of the most relevant factors in construing Article V: Acceptance by the People. Of the 437 applications currently shown in the Article V Library, 196 of them have been repealed by 34 states. Of the 196 repeals, 155 of them have been made by 18 states after 1993. When Paulsen noted in 1993 that there were sufficient applications for Congress to call a convention but that applications, being like legislation, could be rescinded or repealed, the states began their rescission actions. Prior to 1993, 15 states filed rescissions or repeals dispensing with an estimated 41 applications. Louisiana was responsible for repealing 16 of these 41 applications. Since 1993, 18 states have filed repeals (155 applications) equal to 78% of all repeals filed. Of these states, only Idaho filed a repeal before 1993 and after 1993. The foregoing circumstantial evidence shows that Paulsen's 1993 article influenced the states which circumstantially confirmed their acceptance of his analysis by rescinding or repealing prior applications.

7. **Professor Natelson ("Natelson").**

Professor Natelson is a constitutional lawyer highly respected by Article V organizations for his specialization in the meaning of Article V. In his article, *Amending the Constitution by Convention: A More Complete View of the Founders' Plan*, published in December 2010, he reaches the following conclusions:

(1) A convention for proposing amendments under Article V is not a "constitutional convention" but more like a drafting committee as an agent for the state legislatures.

(2) His interpretation of Article V is based upon original understanding, original meaning and original intent well-grounded on what the voters for ratification actually understood or what a reasonable person at the time understood.

(3) The Founders judged themselves by a fiduciary standard and used the law of agency to give meaning to the fact that the Founders were acting for the People as agents.

(4) Dictionaries at the time of the constitutional convention define "convention" as an assembly or meeting of people with no particular purpose attached. Yet, he noted that states at the time frequently came together for dealing with particular problems.

[4] Ten of the first twelve applications under Article V were plenary.

(5) An Article V convention is a convention for proposing amendments and is therefore a limited purpose assembly (limited to proposing amendments) and not a plenary or constitutional convention.

(6) Applications of legislatures under Article V may be limited to particular subject matters.

(7) "There seems to have been little dissent to the understanding that the applying states could fix the agenda. The belief was so widespread, it sometimes led to the assumption that the states, rather than the convention, would do the proposing." *Id.* at 13.

(8) "The historical evidence pretty well disproves the view of a few writers that state applications referring to subject-matter are void....The evidence strongly suggests that the states legally could limit the scope of a convention for proposing amendments, and that the Founders expected this to happen more often than not." *Id.* at 13.

(9) Congress' duty to call a convention was designed to bypass congressional discretion which had to be strictly limited, clerical or ministerial. Yet, "Because of its agency rule, Congress may – in fact, must – limit the subject matter of the convention to the extent specified by the applying states" (*Id.* at 15) and "This is one area where 'ministerial' duties necessarily require a certain amount of discretion, since Congress may have to decide whether differently worded applications actually address the same subject." *Id.* at 16.

(10) A convention "must remain within the scope of its call. If the convention opts to suggest amendments outside its call, those suggestions are not legal proposals but merely recommendations for later action under some future procedure." *Id.* at 19.

In the Natelson Treatise, Professor Natelson makes the following points. I have addressed some of these points in paragraph 8 of this opinion and others by comments beneath Natelson's positions below.

(11) Natelson believes he is part of a "third wave" which has concluded that an Article V convention for proposing amendments "is a limited purpose gathering, not a constitutional convention". He said "Founders expected all or most amendments conventions to be so limited".

Comment: The problem with a "third wave" is when will it be replaced by the "fourth wave"? What the Founders expected is irrelevant. What is relevant is what the voters ratifying the original Constitution thought. Natelson points out that the word "convention" as expressed in the Samuel Johnson dictionary was not qualified by limitations.

(12) "Congress serves as an agent for the states, counting applications and calling the convention." *Id.* at 27.

Comment: This is true but the use of the word "agent" should not ripen into fiduciary relationships which I have criticized elsewhere.

(13) "There should be, therefore, a presumption that a state legislature may apply for a convention to consider only certain topics rather than be required to apply only for an unlimited convention." *Id.* at 36.

Comment: The state legislatures can file anything they want. The question is whether their filings are applications under Article V and, if so, whether they are valid.

(14) "Indeed, the central purpose of the state application and convention procedure – to grant state legislatures parity with Congress in their proposal process – would be largely defeated unless those legislatures had the same power Congress does to define an amendment's scope in advance." *Id.* at 37.

Comment: While Congress may be able to limit an amendment it proposes to the states, every congressman is free to propose any amendment he wants for approval by Congress. In fact, there have been an estimated 12,000 such proposals. In order to obtain parity, what the legislatures do is better compared with what a congressman can do, not the net result of Congress, which is more appropriately compared to what a convention of states comes up with.

(15) "It also follows from historical practice, not to mention common sense, that Congress should aggregate together towards the two-thirds threshold only those applications that address the same general topic." *Id.* at 37.

Comment: This applies only to the extent applications limited to a specify subject are deemed valid.

(16) "Conditions on applications may or may not be valid, depending on the nature of the conditions. However, they are not recommended. Besides the fact that a court may declare a condition invalid, there is a risk that conflicting conditions among state applications otherwise covering the same subject may prevent Congress from aggregating them toward the two-thirds threshold. There is also the risk that conditions may be seen as coercing Congress or the convention in a manner not permitted by Article V." *Id.* at 38.

(17) "This background indicates that before Congress is obliged to call a convention, there must be thirty-four applications that overlap as to subject." *Id.* at 52.

(18) "The mandatory duty to call is clearly not a legislative function, but an executive one. It is not exercised on behalf of the federal government, but on behalf of the applying state legislatures. It is, moreover, ministerial in nature, and therefore should be enforceable judicially. In other words, if Congress refuses to undertake its constitutional obligation, judicial relief – such as mandamus, a declaratory judgment, or an injunction – compel it to do so." *Id.* at 53.

(19) "So long as thirty-four applications, however worded, agree that the convention is to consider a particular subject and do not include language fundamentally inconsistent with each other, the count may be easy. Aggregation may be facilitated by a recent trend by which an applying legislature provides explicitly that its own applications should be aggregated with designated applications from other states." *Id.* at 54.

(20) "In this area, history argues the flexibility is appropriate and that hyper-technical readings are not." *Id.* at 54.

(21) "Both contract principles and common sense dictate that applications with fundamentally inconsistent terms should not be aggregated together: According to the classical 'mirror image' rule, the offer and the acceptance must match in order to form a contract." *Id.* at 56.

(22) "The second situation arises when some applications ask for a convention addressing Subject A while others ask for a convention addressing both Subject A and unrelated Subject B. At one time, I believed those applications could be aggregated as to Subject A, but that result is inconsistent with contract principles. In this case, as in the first situation, the applications seek quite different conventions. If the convention were to address only Subject A, then the expectations of one group of applicants would not be met; but, if a convention were in power to address both subjects, it would fail to meet the expectations of the other group. Put another way, the 'offer' is materially different from the purported 'acceptance'." *Id.* at 57.

(23) "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." *Id.* at 59.

(24) "As the date indicates, Illinois' [1861] 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." *Id.* at 60.

In his *Counting to Two-Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?*, published in 2018, Professor Natelson "argues that, in aggregating applications from states to call a convention for proposing amendments under Article V..., Congress should count plenary (unlimited) applications toward a limited-subject convention." He also adds the following:

(1) The Supreme Court and other tribunals have decided nearly 50 reported Article V cases and have repeatedly consulted history to clarify the Article's words and procedures. *Id.* at 5.

(2) "Calls and other convention applications almost invariably inform the recipients of the subjects for which the convention was sought." *Id.* at 6.

(3) "Calls and applications specifying different topics were understood to require different conventions." *Id.* at 6-7.

(4) "Nothing in the Constitution supports the notion that Congress can expand its role to include, for example, dictating how commissioners are selected *or what convention rules must be*." (Emphasis supplied.) *Id.* at 7.

(5) Aggregation of applications on different subjects "conflicts with the dictates of common sense".

(6) "All valid applications must be aggregated with all other valid applications to yield a plenary result (i.e., convention unlimited as to topic)." *Id.* at 8.

(7) For applications to aggregate, they should overlap to some extent such as an application for a balanced budget should be aggregated with an application regarding fiscal restraint on the federal government.

(8) Unrescinded applications do not lapse with the mere passage of time.

(9) "It is a basic rule of legal interpretation that, when there are apparent inconsistencies between a preamble and operative words, if the operative words are clear...they prevail."

Professor Natelson, having set forth the foregoing positions, undertakes an effort to determine how many applications exist for a balanced budget amendment. Relying on the Article V Library, he notes that 28 states have unrescinded applications though he finds Mississippi's application dubious because it "improperly purports to dictate to the convention an up-or-down vote on prescribed language" to be adopted by the convention. He then notes that the Article V Library lists 16 states with unrescinded plenary applications (no limitation), that 9 of those states have independent balanced budget applications, leaving 7 states with plenary applications having no balanced budget applications. These 7 states are Illinois, Kentucky, New Jersey, New York, Oregon, South Carolina and Washington. Of these 7 states, South Carolina's application is eliminated because it is not addressed to Congress nor does it call for an Article V convention and is on a different topic. He then proceeds to consider the remaining 6 states which, when added to the 27 existing balanced budget applications, yields a total of 33 applications, one application short of what it takes for Congress to call a convention.

His arguments for the validity for each of the specified states meaningfully illustrates the filter Professor Natelson applies. Thus,

- ***Illinois***: He relies on a 1861 general application simply calling for a convention to propose amendments. He also relies on a 1903 application of a similar nature but containing prefatory language related to the direct election of senators. Yet, the application was "to call a convention for proposing amendments" without any limitations. Natelson categorized the latter application as one where there was no inconsistency between the preamble and operative words because "a legislative body may be motivated by an issue without necessarily limiting its response to that issue".

- ***Kentucky***: Kentucky's 1861 application was deemed valid because, even though motivated by grievances of other states, it simply asked for a convention for

proposing amendments. It suggested a particular amendment but its operative words were unlimited.

- ***New Jersey***: He relies on an 1861 application motivated by the impending Civil War putting the country in "imminent danger" but which, again, was an application for a convention to propose amendments without limitation.

- ***New York***: He relies on a 1789 application for a proposed amendment that promotes common interests and secure posterity and inalienable rights of mankind but having operative language without limitation.

- ***Oregon***: He relies on a 1901 application relating to the direct election of senators but with unlimited operative language.

- ***Washington***: He relies on a 1901 application to call a convention for proposing amendments.

Professor Natelson then shows that it is appropriate to aggregate general applications (those without any limitation as to what can be done at the convention) with limited applications having the same subject. He argues that limited applications may not be aggregated with general applications though general applications may be aggregated with limited applications. With respect to the former, he argues that "Congress as the agent for the state legislatures to call a plenary convention in these circumstances would violate its fiduciary duties to legislatures seeking to limit the convention's scope". He states:

> When a state legislature applies to Congress for a limited convention, it grants Congress its authorization to call a convention on that topic. When a state legislature applies for a plenary convention, it grants Congress authority to call a convention to consider any amendments to the current Constitution. The plenary applications says, in effect, "We'll meet with commissioners from the other states any time to talk about whatever amendments the commissioners might think helpful". Thus, Founding Era practice supports the conclusion that a state issuing a plenary application thereby adds to the count for a more limited one.

8. Commentary on the Opinions of Others.

Professor Paulsen.

Paulsen relies on Professor Dellinger's work that textual argument and history indicate "that the convention method of Article V was intended to *avoid* reliance on Congress. *Id.* at 739. Paulsen also shows support for the conclusion that early practice suggested that "the founding generation understood convention to be plenary". *Id.* at 740. Paulsen then concludes that this practice should apply unless the application was conditioned on a limitation in which case the application was inconsistent with the meaning of a convention as used in Article V and was therefore void. This is the best standard formulated to date that takes Congress out of the equation except for calling a convention and related requirements. It means that an application, even with prefatory language showing a discrete purpose, is valid if it is not "for the sole and

exclusive" purpose of some named subject or amendment and if the application contains unlimited operative language.

Further support for Paulsen's analysis meets one of the most relevant factors in construing Article V: Acceptance by the People. As noted above, after his 1993 publication, 18 states confirmed their acceptance of Paulsen's analysis by rescinding or repealing an estimated 155 prior applications.

While Paulsen has articulated defensible criteria for judging the validity of applications, he overlooks what has to be a singular exception. That is that one cannot easily dismiss the applications of 34 states that, even though limited to a specific subject, are exactly the same. One might reach the same conclusion if the applications were *slightly* different but dealt with the same subject. See Paulsen's item (7) on page 18. Yet, risks always exist as noted above, when one enters the land of approximation and similarity and finds nebulous boundaries. If minor differences were the problem, Congress would not have to make a study on whether there were, in fact, thirty-four applications sufficient to require it to call a convention of states. On the other hand, any excuse that would invite an expansion of congressional discretion would risk loss of our most precious rights.

Profession Paulsen's approach is sound and brilliant and works to justify conventions when there is a common interest in a convention, even though the ulterior motive of each application may be grounded in different subjects. Profession Paulsen would say that a convention by virtue of its nature cannot be limited by its underlying applications. Thus, even if a convention were called based on limited applications, there is no reason why the convention could not adopt rules to change the agenda on a certain vote. If that occurred, what would a given state with a limited application do? Or, what difference does it make if two-thirds of the states approved a change in the agenda and one-third of the states opposed it and filed suit? Certainly, a state would not wish to abandon a legally called convention. The various states, in caucusing with their leaders back home, would undoubtedly make reasonable decisions with respect to the scope of the convention. I agree with Paulsen that the courts should stay away from any convention related controversies, based on the political question doctrine which he has so ably discussed, but also agree with him that access to the courts may ultimately occur.

In light of the foregoing, I believe Paulsen's position is correct if there are 34 "valid" applications as determined by him. However, I also believe that, if there are thirty-four states that want a limited convention on the same subject, Congress would have a duty to call the convention but not to limit it. The limiting, if any, is within the jurisdiction of the convention. The only qualification is that verbiage in the applications be so sufficiently "similar" to the same subject that no reasonable person upon minimum observation (including Congress) would disagree. The call under these circumstances should include a notice that the applications giving rise to the call were limited to the particular subject but the call should not seek to limit the convention.

Paulsen ably defends the policy behind Article V derived from the historical basis therefor that the states be able to have a convention without any meddling by Congress. The more technicalities, conditions and limitations imposed upon an application to obtain a

convention, the greater is the effect of denying people their rights under Article V. This is why Paulsen has reached the decisions he has set forth.

Over the years states have filed a plethora of applications related to numerous subjects including, but not limited to: revenue sharing, debt limits, apportionment, state taxing power, right to life, state control of public education, direct election of senators, balanced budget, coercive federal funding, school prayer, polygamy, counter-manding the Supreme Court, labor regulations and general subjects such as those set forth in the Convention of States' proposed application recommended to be adopted by the states. Some of the foregoing applications pertain to very specific subjects but are not limited solely to the specific subjects. Thus, when the applications state that they have been filed "for the purpose of ..." a particular subject but do not expressly exclude the consideration of other subjects, Paulsen finds the applications are valid for purposes of calling a general convention. His comments in assessing the validity of applications is in most cases similar to this one he makes with respect to Arkansas: "Arkansas' 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...This application constitutes a valid, unrepealed application for a general constitutional convention". Other applications are made for the sole and exclusive purpose of proposing an amendment but not for holding a convention dealing with other amendments. These are limited applications by Paulsen standards and are invalid.

In my view, Paulsen was correct in using the meaning of "convention", the concurrent legislation model and the importance of denying to Congress any discretion beyond the ministerial function of counting applications. Congress should accept the opinions of qualified persons like Paulsen or Natelson that 34 specified applications entitle the states to a convention and the calling of the convention. As pointed out above, Congress can easily confirm compliance with the Paulsen standard and, if limited applications are involved, Congress can easily confirm the commonality of the application by minimum observation during the counting process and by relying on the policy that calling a convention and not denying one is the purpose of Article V. Paulsen's views on the subject have been widely adopted by reason of the massive rescission action taken by 18 states in response to his first article in 1993.

The use of verbiage in applications to make them limited (unlike the applications of early days) has arisen presumably in order to avoid concerns over a runaway convention repeatedly raised by all those who for political reasons oppose an Article V convention but without consideration of the implications of limitation as discussed above. Thus, it is not uncommon to find language in many applications that aggregation (Paulsen uses the term "cumulation") of a particular application with any other application not related to the specific subject involved would void the application *ab initio*. However, a careful reading of each application will show in some cases that a limitation has been erased by other language. We will turn to this issue when dealing with the Convention of States' proposed application limited to three subjects.

Professor Natelson

Based upon what I know, I can say that my opinions of Professor Natelson's work are mixed. Let me comment on his conclusions in no fixed order.

First, I think his concentration on the meaning of "convention" is unnecessary to any of his material findings. In fact, a convention for proposing amendments is almost the same as the constitutional convention except that the latter started from nothing and crafted our Constitution. A convention for amendments could easily amend the Constitution in its entirety and replace it with some other document though it is unlikely the states would ever approve that. Moreover, according to Professor Amar, any departure from the theory of liberty, the pursuit of happiness and our inalienable rights will not tolerate any changes inconsistent with their preservation. I prefer to read Article V for what it says, namely applications to Congress "to call a convention for proposing amendments".

Second, Professor Natelson shows that the word "convention" in and around 1787 meant an assembly, a meeting of the people. It expresses no purpose and, to assign one, Natelson gives the term "convention" a meaning it did not have. Professor Natelson supports many of his arguments by reference to what a few persons said, or states did, at one time or another. In any case, the resort to historical evidence is only appropriate where ambiguities arise and the meaning assigned to Article V by a few people is hardly the same as determining the public mind of the ratifying voters. I see no ambiguity with respect to the meaning of "convention".

Third, Professor Natelson never defines the criteria he uses to determine the validity of an application. He says it has to be addressed to Congress, that operative language prevails over prefatory language if there are inconsistencies and that fiduciary and contract principles compel certain decisions. In fact, he treats all complying applications as valid and then adopts the grouping theory. At the same time, one can determine from the criteria he uses to determine general applications that he has adopted the Paulsen standard.

Fourth, while Professor Natelson correctly agrees with many others that Congress has a ministerial duty to call a convention upon 34 applications of the legislatures of the states, at the same time, he says Congress has no authority to deal with the rules established by the convention. Clearly, the convention could establish a rule that it would open up the agenda to consider amendments other than those contained in the limited applications giving rise to the convention. In fact, it is inconceivable that an application for balancing the budget would not stray into other areas that could be classified as within the proximity of subjects or permitted overlap or approximation or similarity between one limited application and another. Natelson's conclusion in *Amending the Constitution by Convention* is that a convention "must remain within the scope of its call". He offers no authority for this conclusion. Moreover, Congress cannot limit the convention to anything. All it can do is call one. If the call is for a limited convention, the most Congress can do is to specify in its call a notice to the legislatures that the call was inspired by a specified subject. It is up to the states in convention to decide whether to limit the scope of the convention to the applications that gave rise to the call.

Fifth, in order to justify his grouping theory, Natelson has to increase the powers of Congress beyond the ministerial level he first sets forth. When one considers that the purpose of Article V was to bypass Congress, how could one possibly give Congress any authority other than the duty to call the convention upon counting 34 valid applications? Further, the grouping theory has a tendency to deny people's rights under Article V to have a convention by making it difficult to obtain a convention, excepting applications such as the balanced budget applications that are, with obvious uniformity, widely submitted by the states.

Sixth, he supports his view supporting limited applications on the fiduciary principle that Congress is the agent of the legislatures (which are principals). This is a convenient way to give potentially accountable discipline to Congress when it counts and groups the applications but it is not realistic because it means Congress has 50 principals who likely will disagree with each other. The only thing all of them have in common is a desire for a convention. In effect, the fiduciary duty approach requires a grouping of the values of the 50 states to ascertain what is in common (if that is possible at all). However, I doubt any court in the Nation would find that Congress violated its fiduciary duty or be able to enforce compliance if there is a breach of fiduciary duty. Rather than expand the discretion of Congress and control that discretion with the unenforceable discipline of fiduciary duty, I believe that groupings be liberally construed with all doubts resolved in favor of calling a convention. After all, the objective of Article V is to bypass Congress. Furthermore, bringing fiduciary principles into the mix of Article V is not a good choice in an effort to obtain simplicity.

Seventh, both Paulsen and I have shown why applications limited "for the sole and exclusive purpose of proposing" a certain amendment are invalid. Natelson, on the other hand, believes the state legislatures *should* be able to make applications for a single subject convention or for an unlimited convention. However, he provides no authority for this position and complicates the issue (i) by increasing the power of Congress beyond the meaning intended by Article V, (ii) by utilizing an undefined form of contract law (offer and acceptance) and (iii) by applying fiduciary principles.

Natelson's approach is completely different from Paulsen's approach which is to treat the applications as pieces of legislation. Natelson's contract theory does not work because he has to depart, and already has departed, from it. Thus, in his treatise, he rejects the notion that limited applications can be aggregated with general applications. His reasoning was that the result is "inconsistent with contract principles" and contrary to respective expectations of the legislatures. Yet, in his most recent publication, *Counting to Two-Thirds* (2018), he agrees that it is acceptable to aggregate limited applications with general applications even though the expectations of the general group might never be discussed. This treatment, in my opinion, shows that Natelson is drifting towards the model proposed by Paulsen.

Eighth, Natelson recommends against conditioning applications because "a court may declare the condition invalid" or Congress may refuse to aggregate them with other applications if they see the conditions as coercing Congress or the convention in a manner not permitted by Article V. I disagree with these general observations. My approach in construing applications is that the common phrase "for the purpose of proposing amendments" qualifies the application and not the convention. All the legislatures can do is file applications. Paulsen's position is that the applications are legislation and, if the application is "for the purpose of" (in contrast "for the sole and exclusive purpose of") without any language precluding others from seeking amendments, it is a valid amendment. On the other hand, it is not possible to read an application "for the sole and exclusive purpose of..." as being anything other than a limited application. In such circumstances, an operative clause with no language precluding other amendments would be in direct conflict with the application. One could ignore the application and rely on the operative clause but neither Paulsen nor I have done this. Further, as I have said elsewhere, verbiage in a resolution specifying matters clearly entrusted to the convention are irrelevant because it is

unanimously understood by all scholars that the rules of the convention are to be decided by the convention.

Lastly, he believes plenary applications can be aggregated with limited applications. He does not discuss the fact that those states which have plenary applications used in the aggregation process may have to be limited with respect to what they would like to accomplish at the convention. In other words, they are being used and receive no consideration. I can support his conclusion insofar as one can say that limited applications are valid, because his reasoning can increase the likelihood of a constitutional convention. But, at that convention, I believe rules can be adopted which would expand the scope of the convention beyond the subjects imposed by the limited applications. In doing this, I rely on the policy that states are entitled to have a convention and any reasonable argument that encourages a convention is acceptable to me.

In conclusion, though I disagree with some very important aspects of Professor Natelson's view, I acknowledge that I am prepared to support the effort of anyone to obtain a constitutional convention based upon a reasonable aggregation theory. However, the principle of legality underlying Natelson's conclusions is not as precise and well-reasoned as that supplied by Professor Paulsen to whom I have deferred on almost all of my conclusions. As previously pointed out, all efforts to achieve a convention under Article V should, to the extent possible, work to diminish controversy and disagreement.

Professor Natelson Does Not Oppose Professor Paulsen's Method

In reading Natelson's work, it is clear that he disagrees with Paulsen that limited applications are not valid. Natelson believes limited applications are valid and are aggregable if they pertain to the same subject. He also believes Congress' discretionary power to call a convention is increased to the extent necessary to group applications by subject matter. Paulsen also agrees with congressional grouping during the count but states that the grouping standard is that valid applications count but invalid applications don't count. Validity is determining by reading the plain language of an application to determine whether it is limited or not. An application where the motivation is limited to one thing (prefatory clause) but not exclusively and where the operative resolution or related aggregation language does not preclude other amendments at the convention requested is a valid application.

Notwithstanding the above, to my knowledge, Natelson has never said that applications aggregated according to the Paulsen method cannot require Congress to call a convention. In fact, he has recently acted to the contrary. First, in his recent article *Counting to Two-Thirds*, he reversed his position in the treatise that plenary applications cannot be aggregated with limited applications to achieve thirty-four states. Second, in determining whether applications alleged to be plenary are, in fact, plenary, Natelson sets forth his reasoning which parallels Paulsen's methodology. Thus, in looking at the six states Natelson treats as having plenary applications, namely, Illinois, Kentucky, New Jersey, New York, Oregon and Washington, Natelson did not let the motivation for an application ripen into a limitation but, rather, looked at the operative clause to determine whether it contained any language of limitation. He says, "The preamble recites direct election [of senators] as its motivation, but the operative language is unlimited." Confirming the foregoing is an analysis of the way he decided that an application was plenary.

Thus, he found Illinois' two applications plenary where the motivation was unstated aggrievements of other states in one application and, in another application, the election of senators. He found a Kentucky application plenary where the motivation was present and future grievances. He found a New Jersey application plenary where the motivation was imminent danger to the union. He found a New York application plenary where the motivation was to promote common interests and the inalienable rights of mankind. He found an Oregon application plenary where the motivation was the election of senators. And he found a Washington application plenary where the motivation was election of senators. In all these cases the operative language was unlimited. Significantly, Natelson has applied the very same standards of Paulsen in reaching his conclusion as to the existence of plenary applications. Under Paulsen's standards, if the applications are valid, they are also plenary.

In his treatise, Natelson states: "Both contract principles and common sense dictate that applications with fundamentally inconsistent terms should not be aggregated together: According to the classical 'mirror image' rule, the offer and the acceptance must match in order to form a contract." Natelson has not provided a test for determining whether applications have "fundamentally inconsistent terms". One can argue that prefatory clauses infer preferences but not limitations. That is what Natelson has shown us above. However, can one say that the six plenary applications he discusses have "fundamentally inconsistent terms"? Natelson's reasoning with respect to the six states shows that the prefatory terms of the six applications do not contain fundamentally inconsistent terms where the states were motivated by (i) unstated aggrievements of other states, (ii) the election of senators, (iii) present and future grievances, (iv) eminent danger of the union and (v) promotion of common interests and inalienable rights. If there is no fundamental inconsistency with these six states, I doubt one could persuasively argue that Paulsen's valid applications are invalid because they don't meet Natelson's fundamentally inconsistent test. Paulsen does not apply the Natelson fundamentally inconsistent test. In his opinion, if the applications are valid by his standard, differing motivations with operative clauses without a limitation on the convention are valid. For example, Paulson's aggregation model disregards differences because one state was worried about right to life, another about polygamy, another about prayer in school, and another about school busing where the underlying applications do not preclude other amendments.

Meaning of Similar

Natelson's theory that limited applications are valid and must be aggregated by subject or similar applications requires a few words on what is similar. When do applications deal with the "same subject" or are "similar"? This problem only arises if one accepts Natelson's limited application position.

The meaning of "similar" includes items with similar characteristics in common, like in substance or essentials, or "almost, but not exactly". Application of these synonyms is some help to the ordinary person who has a sense of what is "similar". In applying the language in its natural sense and according to the intent of the application and its text, we learn that balanced budget applications extend to issues relating to the national debt and those other possible amendments which are "related and appropriate fiscal restraints" even though these restraints are presently unknown but foreseeable in ensuing discussion among those searching for methods to obtain fiscal responsibility by Congress.

The American Heritage Dictionary, Houghton Mifflin Company, 1976, defines "similar" as "related in appearance or nature; alike though not identical, resemblance". An application that says it is aggregable with an application on a "similar subject" does not mean that the details of the application have to be repeated but that "the subject" of the second application has to be similar to the subject in the first application. In my opinion, the applications to restrict rates on income tax and repeal of the Sixteenth Amendment address the same subject as the balanced budget amendment. They deal with their common understanding that Congress is abusing its power, that taxes are too high and that the separation of powers is out of balance. This common understanding stands out in my summary of the whereas clauses in the balanced budget applications.

Convention of States' Proposed Application

While applications for specific amendments or specific subjects are one thing, how do we analyze applications limited to broad subjects that have a defined center but no discernable circumference? The Convention of States' proposed application falls into this category and deserves careful treatment in determining its validity for a general convention. Published reports are to the effect that the Convention of States included a limitation in its standard form application for states because of its worry that talk of a "runaway convention" would prevent an Article V convention altogether. To avoid this, it limited its application resolution to:

> ... for the calling of convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office of its officials and for members of Congress.

While most of the Convention of States' applications contain the proposed standard form resolution (operative language), some of them use different whereas clauses (prefatory language) and contain follow-up clauses dealing with convention issues.

It goes without saying that an application "limited to everything" is not really a limited application. If an application is limited to broad subjects, which by definition and experience include almost everything, then any difference between a general application and a limited application is without measure. At the same time, I must point out that each Convention of States' proposed application, even though containing the above basic resolution language, may vary in terms of validity, i.e., whether it calls for a "general" convention or a "limited" convention, the former being valid and the latter being invalid by the Paulsen standard.

In order to deal with the above, it is appropriate to deal with this challenge here rather than in the summary with respect to each state in **Appendix A** following my conclusions.

We begin with the standard Convention of States' proposed application to the states. It reads as follows:

Application for a Convention of the States under Article V of the Constitution of the United States

Whereas, the Founders of our Constitution empowered State Legislators to be guardians of liberty against future abuses of power by the federal government, and

Whereas, the federal government has created a crushing national debt through improper and imprudent spending, and

Whereas, the federal government has invaded the legitimate roles of the states through the manipulative process of federal mandates, most of which are unfunded to a great extent, and

Whereas, the federal government has ceased to live under a proper interpretation of the Constitution of the United States, and

Whereas, it is the solemn duty of the States to protect the liberty of our people – particularly for the generations to come – by proposing Amendments to the Constitution of the United States through a Convention of the States under Article V for the purpose of restraining these and related abuses of power,

Be it therefore resolved by the legislature of the State of _____:

Section 1. The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.

Section 2. The secretary of state is hereby directed to transmit copies of this application to the President and Secretary of the United States Senate and to the Speaker and Clerk of the United States House of Representatives, and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislative houses in the several States, requesting their cooperation.

Section 3. This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made applications on the same subject.

The scope of the three subjects can be interpreted to include almost everything. In fact, what it does not include can hardly be stated. One can say the proposed subjects that affect the federal government also affect the states by virtue of the nature of our federalist system. Thus, it is clear that restrictions on "the power and jurisdiction of the federal government" (which includes action to achieve a balanced budget amendment) will necessarily increase the power and responsibilities of the states or the People. The consequences of fiscal restraint cannot be

defined touching, as they do, not only substantive restraints but the rule making enforcement obligations of administrative agencies and a culture of leadership in the federal government motivated by self-interest and ambition rather than the country. In fact, imposing fiscal restraints on the federal government will affect everyone in the country: citizens, states, government employees, entitlements, defense and so forth. While we all understand term limits for members of Congress, amendments limiting "the terms of office of [the federal government's] officers" will affect the administrative state and all the regulations and enforcement activity of the various departments constituting the administrative state.[5]

The intent of those states using the Convention of States' proposed application, whether using its whereas clauses or supplying their own, reveals the reasons they used the application. These reasons are decidedly relevant in determining validity because they are relevant to the construction of the applications as legislation. Thus, the standard proposed application sets forth the reasons used by the Convention of States in proposing its proposed application but those states that set forth different reasons widen to an even larger scope and circumstantially show that the proposed resolution is limited to everything. The whereas clauses offered by the states using the standard form resolution are as follows: [6]

(1) "guardians of liberty against future abuses of power by the federal government;"

(2) "crushing national debt through improper and imprudent spending;"

(3) "manipulative process of federal mandates, most of which are unfunded;"

(4) "the federal government has ceased to live under a proper interpretation of the Constitution of the United States;"

(5) "the solemn duty of the States to protect the liberty of our people, particularly for the generations to come, to propose Amendments to the Constitution of the United States... to place clear restraints on these and related abuses of power:"

(6) "the Founders...provided...for a limited Federal Government of express and numerated powers,"

(7) "...the Tenth Amendment...specifically provides that all powers not delegated to the Federal Government nor prohibited by the Constitution are reserved to the States, respectively, or to the people, ..."

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[5] It is noted that the Convention of States' proposed application refers to "the terms of office for its officials and for members of Congress". Some of the actual applications refer to one or the other, but not both. I have concluded that the use of one does not materially differ from the use of both. As such, I have not used this variance in any validation determination.

[6] Convention of States' standard form contains items (1) – (5) above. Convention of States' Florida application contains items (6) – (12). Convention of States' Louisiana application contains items (13 – (17). Convention of States' Oklahoma application contains standard items and (18).

(8) "for many decades, this balance of power was generally respected and followed by those occupying positions of authority in the Federal Government, ..."

(9) "...as federal power has expanded over the past decades, federal spending has exponentially increased to the extent that it is now decidedly out of balance in relation to actual revenues or when comparing the ratio of accumulated public debt to the nation's gross domestic product, ..."

(10) "...the Federal Government's accumulated public debt exceeded seventeen trillion, which is more than double that in 2006, ..."

(11) "...projections of federal deficit spending in the coming decades demonstrate that this power shift and its fiscal impacts are continuing and pose serious threats to the freedom and financial security of the American people in future generations",

(12) "...it is a fundamental duty of state legislatures to support, protect and defend the liberty of the American people, including generations yet to come, by asserting their solemn duty and responsibility under the Constitution to call for a convention... to reverse and correct the ominous path that the country is now on and to restrain future expansions and abuses of federal power: ..."

(13) "...the powers of the federal government are limited to those powers enumerated in the Constitution."

(14) "...as set forth in provisions such as the Second, Fourth, and Fifth Amendments of the Bill of Rights concerning individual freedom and protections, and the Tenth and Eleventh Amendments covering the powers of the states, the U.S. Constitution was intended to include and specifically provide constraints upon the powers of the federal government and to further provide for the sovereign powers of the states".[4]

(15) "...despite such provisions a continuing crisis has been created by the rise and growth of unchecked power in all branches of the federal government."

(16) "...such unchecked power, and the national debt created by its exercise, adversely affects every state and every citizen of our nation now and into the foreseeable future."

(17) "...such continuing crisis can be resolved only through amendment to the U.S. Constitution, in order to clarify the powers, duties and limitations of the federal government and to clearly delineate the sovereign powers of the states that cannot be abridged by the unrestrained exercise of federal powers."

(18) "...the citizens of...Oklahoma believe it is in the best interest of the people of the United States to amend the...Constitution in order to adopt a balanced budget amendment and to address the areas of overreach of the federal government."

In construing the meaning of the Convention of States' proposed resolution, one must refer to the rules of construction applicable to legislation. In *Stewart v. Kahn*, 78 U.S. 493 (1870), the court refused to construe a statute in a way which "would defeat, to a large extent, the object of its enactment". *Id.* at 506. As previously noted, the object of Article V, insofar as the legislatures are concerned, was to overcome a Congress that has gone astray or is believed to be corrupt and allow the legislatures a chance to propose amendments to improve our government and protect our liberties and property.

In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), the court made clear that where the statute's language "is plain, 'the sole function of the court is to enforce it according to its terms'". Under such circumstances, reference to legislative history or pre-code practice is "hardly necessary". *Id.* at 241.

In *Yates v. United States*, 135 S.Ct. 1074, 1081-1082 (2015), the court said:

> Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.12d 808 (1997), See also *Deal v. United States*, 508 U.S., 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.

The *Yates* court also noted a relationship between *ejusdem generis* and *noscitura sociis*. In *Yates*, the court relied on "the principle of *noscitura sociis* – a word is known by the company it keeps – to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id.* at 1085. Here the opposite is true since none of the words used in the Convention of States' proposed application is inconsistent with any other words. Rather, each of the words complains about the unwillingness of the federal government including Congress to deal with issues of high importance to the states and their citizens. The court also noted that the "canon related to *noscitura sociis*, *ejusdem generis*, counsels: 'Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words'". *Id.* at 1086. A review of the whereas clauses used by the states that adopted the Convention of States' proposed resolution cite numerous specific ideas which, viewed as a whole, embrace every issue one can think of related to the management of the federal government in our constitutional system. This requires that Convention of States' applications be limited to everything except in those cases where language of limitation is clearly used. For example, see application of North Dakota in **Appendix A**.

It is my opinion that a Convention of States' application, absent unequivocal statements of limitation, is an application for a general convention and is not limited to anything. Thus,

absent special language of limitation, a Convention of States' application is, in Paulsen's words, "on" for a general convention.

Balanced Budget Applications

I became concerned with Professor Natelson's account of how he arrived at 33 applications for a balanced budget amendment. He started with 27 states having applications for the balanced budget amendment and then, after analysis, added 6 plenary applications from Illinois, Kentucky, New Jersey, New York, Oregon and Washington on the theory that plenary applications can aggregate with a series of other applications on a particular subject. Professor Natelson, relying on the Article V Library, stated that the 27 applications "differ in various ways, but none of them is really crucial".[7] I do not believe this conclusion is supported by the evidence. In commenting on the scope of a "similar subject", he listed four aggregation scenarios and concluded that the only simple scenario for aggregation was:

> Some applicants prescribe a convention addressing Subject A (e.g., a balanced budget amendment) while others demand one addressing Subject X, where Subject X encompasses Subject A (e.g., fiscal restraints on the federal government)

As with the whereas clauses in the Convention of States' proposed application, the whereas clauses in the balanced budget amendment applications are relevant in determining the scope of a limited application. A summary of the whereas clauses in the balanced budget amendment applications is provided as follows:

> (1) Complaints about historical and growing deficits; deficits are unsustainable and constitute a substantial threat to the solvency of the federal government; Congress is unwilling or unable to address the persistent problem of overspending and continues to take action that will cause the federal government to incur additional debt; , the consequences of current spending policy affect our indebtedness to foreign nations; federal programs that are unfunded or underfunded interfere with balancing budgets at the state and local level causing Americans to face increased taxation and a weakened economy.
>
> (2) Proper planning, fiscal prudence and plain good sense requires that the federal budget be in balance absent national emergency; and continuously unbalanced federal budgets cause continuous and damaging inflation and a threat to the political and economic stability of the United States.

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[7] It is worth observing that the applications of 9 balanced budget states add to their proposed balanced budget language the words "*together with any related and appropriate fiscal restraints*". This language clearly expands the breadth of their applications by corralling any amendment related to "fiscal restraint". The fact that other states have permitted aggregation with one or more of the named states diffuses any corresponding language limited solely to a balanced budget amendment. The 9 states with broad balanced budget applications are Florida, Louisiana, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah and West Virginia. Texas adds to the looseness of balanced budget applications by asking other states to file applications "requesting the enactment of an *appropriate amendment*".

(3) Unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget and are, not subject to the legal public debt limit; the fiscal irresponsibility at the federal level with the inflation which results "is the greatest threat which faces our nation; and constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility.

(4) Failure of the budget process has produced enormous consequences including a burden on the American people which threatens to burden their descendants for generations to come. The congressional practice of deficit spending and repeated raising of the ceiling on the federal debt has had the effect of endangering the jobs, incomes, retirement security, welfare, and future of American citizens.

(5) Debt diverts scarce resources from crucial programs to pay interest on the national debt, constricts the liability of the federal government to address long-standing national problems and to respond to new needs, and increases pressures to raise taxes on the American people.

(6) Tax problems of the states are caused largely by the invasion of tax sources by the federal government and their problems may be solved by some restraint upon present unrestrained exercise of the taxing power by the federal government.

(7) State and local needs are disadvantaged because the people are already taxed far beyond the real need for any purpose other than forcing the centralization of all Government in Washington.

(8) Amendments are necessary relative to taxes on incomes, inheritances, and gifts. The maximum taxes from any source cannot exceed 25% except in cases of war or emergency.

(9) The national debt is dangerously high and further increases will be harmful and costly to the people. The continuous program of deficit financing has been the chief factor in reducing the value of American currency. Payment of increased interest to cover increasing debt will impose an undue hardship on those with fixed incomes and those in lower income brackets. Deficit spending will deplete our supply of natural resources for future generations. Increased deficit financing has allowed the federal government to allocate considerable funds to wasteful and non-beneficial public programs.

(10) A report by President Obama's National Commission on Fiscal Responsibility and Reform issued a warning on the debt levels stating, "If the U.S. does not put its house in order, the reckoning will be sure and the devastation severe."

While I have concluded that Professor Paulsen's model is superior to that of Professor Natelson, I am also prepared to say that I will support Professor Natelson if his model can be successful in obtaining a convention and if Paulsen's aggregation study is not accepted. (And, as shown above, I also think that Professor Natelson would support Professor Paulsen's model if it identified 34 applications.) Because of this and my concern over the accuracy of his article

reaching 33 applications, I have reviewed all balanced budget applications as shown in **Appendix B**. Contrary to Professor Natelson's work, based on the Article V Library, I have read every application myself and found 28 states with balanced budget applications and aggregated those with Maine, Massachusetts and Illinois for a total of 31 applications. In aggregating the 28 states with balanced budget applications, I relied on the broad whereas clauses recited above. Thus, for example, Florida, Louisiana and Oklahoma contain whereas clauses in addition to those or in place of those submitted with the Convention of States' standard application. These other whereas clauses show that the states submitting the applications intend for the balanced budget amendment convention to cover treatment of all sorts of subjects. For example, implications of the common theme for "fiscal restraint" are that a balanced budget amendment is almost as close to a limitation to everything as the standard form of the Convention of States.

If you consider the restrictions required to have a balanced budget, you are talking about Congress' power to levy taxes and to spend money. These restrictions invite changes to both the power and jurisdiction of the federal government. I have added two applications dealing with repeal of the Sixteenth Amendment and restrictions on Congress' power to set tax rates (Maine and Massachusetts). These two states have not filed balanced budget amendment applications. I have also added Illinois based on a 2016 plenary application coupled with a 1952 application dealing with federal taxing power and the Sixteenth Amendment. These three applications clearly deal with the "same subject" or have "similar purposes", or deal with deficit spending or are encompassed by "related and appropriate fiscal restraints". They easily aggregate with the balanced budget amendments.

There are also some Convention of States' applications which expressly authorize their aggregation with applications from other states "similar" to one or more of the three specific items on the Convention of States' standard form application. Apart from this potential for aggregation, I have also concluded above that Convention of States' applications are limited to everything and, as such, are in effect "general" and can be used in the same fashion that Professor Natelson used to aggregate the six plenary applications he reviewed in his article "Counting to Two-Thirds". Yet, this is not possible because the 12 states that have adopted the Convention of States' proposed application have each also filed applications for a balanced budget amendment thereby obviating any opportunity to aggregate with their Convention of States' applications.

In addition to the foregoing, I have decided to accept Professor Natelson's model for dealing with limited applications but reworked it according to the very standards set forth by him. As a result of this work, set forth in **Appendix B**, there are 28 balanced budget applications on file, and 3 applications from states not having balanced budgets but having applications relating to the Sixteenth Amendment and the federal power of taxation. This reaches 31 applications. I have then added Professor Natelson's 5 states with plenary applications that do not have balanced budget applications to reach 36 applications. Contrary to his conclusion, I believe Illinois has a valid balanced budget application and have included it in my count of 31 applications. None of the remaining 5 states are included in my count of 31 applications. I have not studied the conclusions of Natelson that six states have plenary applications but accept what he has provided.

9. **Conclusion.**

My comments above support the conclusion that 36 states have filed applications for a general convention. My reasoning with respect to each state using the Paulsen model is set forth in **Appendix A** attached though I assume, when a reader is dealing with a Convention of States' proposed application, that the reader has read my comments above on why such application is limited to everything except where specific language of limitation is used.

ACF's aggregation model confirms its agreement with the Paulson model. Professor Natelson's work shows that he has used the Paulsen method himself to determine plenary applications and thus I infer he does not oppose that method.

Since 1788, every state except Hawaii has filed two or more applications. Eleven states have filed five or fewer applications but never less than two applications. A total of 437 applications have been made with an estimated 155 applications rescinded leaving 282 unrescinded applications on file. Twenty-one states have filed 10 or more applications. These applications illustrate the discontent of the state legislatures with the way our government is managed. What all of these applications have in common is a very real concern that the political bands that the Constitution provided to form a more perfect union and to connect the People together need reforming in one way or another. They also tell us that Congress will not reform bands that it has found to be contrary to the best interests its members who today value their reelection more importantly than the best interests of our country. If Congress refuses to call a convention based on the clear existence of 36 applications, we will learn that the tyranny feared by the Framers will have become the cancer they did their best to avoid.

In furtherance of the strong policy for allowing the state legislatures to have a convention of states, the undisputed interest of the states in having a convention and the undisputed aggregation analysis according to Professor Paulson's model, the Congress is now obligated to call a convention of the states and should do so quickly.

It is time for Congress to "call a convention for proposing amendments".

Sincerely yours,

John M. Cogswell

JMC:sm

Enclosures

(1) **Appendix A** (Paulsen Model)
(2) **Appendix B** (Natelson BBA Model)
(3) **Appendix C** (Summary of Appendices A and B)