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American Constitution Foundation
c/o Ed Sutton, President
PO Box 468
Monument, CO 80132

Re: Article V Applications and Professor Paulsen's Response

Gentlemen:

I have read Professor Paulsen's e-mail dated September 18, 2018 following his hurried review of my September 11, 2018 opinion on Article V. I have two exceptions and six comments.

Exceptions:

First, I never said, even with respect to limited applications, that "Congress could properly call a constitutional convention pursuant to Article V limited to such topics". I said:

> 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.

Opinion at 25, ¶4 and 27, ¶4.

Second, after giving due regard to Professor Paulsen's hurried read of my opinion, I do not think he can conclude from "reading the first several entries (on Appendix)" that my view of the applications of the Convention of States Project ("COS") is central to my conclusions "with respect to a great many states, that their lights are 'on' for an unrestricted Article V convention". In fact, I noted on Appendix C that only six of the twelve Convention of States' applications were utilized to expand 30 valid applications by Paulsen's standards to 36.

Comments:

First, with respect to his disagreement with my interpretation of the COS applications, he stated that the limitations in the COS applications "would exclude proposed amendments altering

or repealing (in whole or in part) individual liberties", "a proposed amendment banning flag burning", "a proposed amendment banning abortion..." and "a proposed amendment limiting the right to keep and bear arms".[1] When one reviews all of the 437 applications, he will find that the only ones dealing with our rights or moral issues were those related to polygamy, right to life and school prayer. Applications dealing with these issues are 19, 18 and 4, respectively, for a total of 41 or 9% of all applications. Moreover, none of them were filed after 1980. In other words, the state's interest in these subjects is minor compared to other issues.

Second, while I defer to Professor Paulsen on constitutional issues and concede he is more experienced than I am in this area, I can point out that Article V was adopted before any of the amendments in the Bill of Rights. Whether later amendments could be amended under Article V was not likely discussed in 1787.

Third, the term "application" in Article V can be construed to exclude proposed amendments to change any of the Bill of Rights (with the possible exception of the Tenth Amendment) as opposed to repealing the U.S. Supreme Court's interpretation thereof. The U.S. Supreme Court has held that laws are "to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose". *United States v. Katz*, 271 U.S. 354, 357 (1926) and *United States v. Kirby*, 74 U.S. 482, 486 (1868) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."). I see no reason why these rules should not apply to the Constitution.

Fourth, as you will have surmised from my opinion, I believe there is a strong policy to interpret Article V in a manner to achieve a convention. And while a COS application might not cover everything, it covers almost everything with the only exceptions so far stated as being unlikely or impermissible or not within the meaning of "application". For example, COS applications could justify proposed amendments vacating undesirable Supreme Court decisions,

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[1] Professor Paulsen's recitation of matters that, in his opinion, are excluded from the COS applications is not exclusive. And I suspect there are others. However, it is clear to me that proposed amendments of basic rights fall within the class of inalienable rights. Professor Amar states that a "genuinely *inalienable* right would not be a permissible amendment...". Professor Paulsen and his son state "The right to the free exercise of religion was therefore an inalienable 'natural right' that preceded the Constitution and the social compact, a sphere that no mere human authority could properly invade". *The Constitution: An Introduction*, Michael Stokes Paulsen and Luke Paulsen (2015) at p. 99. I think one can easily argue that more freedoms than religion fall under the natural law theory.

Further, all issues mentioned by Professor Paulsen have been decided by the Supreme Court and, under the plain terms of the COS applications, amendments restricting the jurisdiction of the Supreme Court and declaring some of its rulings to be invalid would effectively accomplish amendments on those issues and allow the states to severally determine what they wanted for their states. Also, one can predict that any such proposals of the so-called excluded amendments would never be ratified and therefore not likely ever proposed.

limiting its jurisdiction and delegating powers denied to the federal government to the States (to avoid powers untreated by the Constitution as the Supreme Court ruled in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), with respect to term limits).

Fifth, one must always understand that the convention can establish the agenda of the "convention of states" regardless of a "limited application". As I said in my opinion:

> 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.

The foregoing means that the convention itself will decide the scope of the convention, not limitations on an application and not Congress.

Lastly, as mentioned above, we should be grateful that Professor Paulsen is willing to review applications. He need only review the ones I reviewed, namely 40 applications and rescissions, all of which can easily be printed from the Article V Library. I predict that his own review, for which we should all be thankful, will yield that 30 states are "on". I have erred by his standards only in that I determined that six COS applications were unlimited because they were limited to everything.

I think it is an excellent idea to obtain a meeting with Professor Paulsen if at all possible.

If you require further comments on my part, please advise.

Sincerely yours,

John M. Cogswell

JMC:sm