

total, and that it should call a BBA convention if and when the aggregated total reaches 34.

I. BASIC PRINCIPLES

Article V provides that, to become part of the Constitution, an amendment must be ratified either by (1) three fourths of the state legislatures or (2) conventions in three fourths of the states. Congress chooses between the legislative and convention ratification methods. However, before an amendment may be ratified, it first must be duly *proposed*.³ Article V itemizes two permissible methods of proposal: (1) by a two thirds vote of both houses of Congress or (2) by “a Convention for proposing Amendments.” This paper focuses on the latter method, which the framers designed as a way of proposing amendments without the consent of Congress.

Article V does not delineate expressly the composition and nature of a convention for proposing amendments, and such a convention has never been held. For this reason, commentators, particularly those who oppose a convention, have long complained that Article V provides insufficient guidance on the subject.⁴ But the brevity of Article V is consistent with the drafting of the Constitution generally. The Framers sought to keep the document short by outlining the basics and leaving to readers the task of supplementing the text from contemporaneous law and circumstances. For example, Article I, Section 9, Clause 2 states that “The privilege of the writ of habeas corpus shall not be suspended” It does not explain what a writ of habeas corpus is, what it contains, how it is issued, or the traditional rules regarding suspension.⁵ Readers are expected to identify those facts for themselves. In this respect, Article V is no different.

Recent scholarly investigations into Article V have placed in the public domain the information necessary for understanding the Article V convention process.⁶ For example, both Founding-Era evidence⁷ and the Supreme Court⁸ inform us that a convention for proposing amendments is a kind of “convention of the states”—also called a “convention of states.” This characterization has the effect of clarifying basic convention protocols, because the protocols of such conventions were standardized long before the Constitution was drafted: The Constitutional Convention of 1787

was a convention of the states, and it had over thirty predecessors.⁹ In fact, many of the delegates at the Constitutional Convention were veterans of one or more previous interstate gatherings.¹⁰

Moreover, the protocols have not changed significantly since the Founding. Conventions of states met in Hartford, Connecticut (1814); Nashville, Tennessee (1850); Washington, D.C. (1861), Montgomery, Alabama (1861) St. Louis, Missouri (1889); Santa Fe, New Mexico and three other cities (1922); in various locations from 1946 to 1949; and in Phoenix, Arizona (2017).¹¹ Although the specific rules for each meeting differed somewhat, the basic protocols remained roughly similar.¹² Most interstate conventions, both before and after the ratification of the U.S. Constitution, have been regional or “partial” conventions to which colonies or states from only a single region of the country were invited. At least eight have been general conventions—that is, gatherings to which colonies or states from all regions were invited.¹³ An Article V convention for proposing amendments would be general, but there are no significant protocol differences between partial and general conventions.¹⁴ Those protocols determine such matters as the scope of a convention call, how commissioners are instructed, and how rules are adopted.¹⁵

Article V does not outline these details because they were so well known to the founding generation that there was no need to repeat them. Article V is more specific only in a few instances where clarification was necessary.¹⁶ In view of the wealth of history surrounding Article V, the courts appropriately defer to that history. The Supreme Court and other judicial tribunals have decided nearly fifty reported Article V cases,¹⁷ and they

3 U.S. CONST. art. V.

4 E.g., Laurence H. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 632 (1979) (calling the Constitution’s convention wording “strikingly vague”).

5 U.S. CONST. art. I, § 9, cl. 2. The guidelines for suspension are outlined in ROBERT G. NATELSON, *THE ORIGINAL CONSTITUTION: WHAT IT ACTUALLY SAID AND MEANT* 122-23 (3d ed. 2014).

6 In addition to sources cited in this paper, see Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 28 CONST. COMMENT. 53 (2012); Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011); JOHN VILE, *CONVENTIONAL WISDOM: THE ALTERNATE ARTICLE V MECHANISM FOR PROPOSING AMENDMENTS TO THE U.S. CONSTITUTION* (2016).

7 *Convention of the States*, *supra* note 2.

8 *Smith v. Union Bank*, 30 U.S. 518, 528 (1831) (referring to a convention for proposing amendments as a “convention of the states”).

9 The constitutional term “convention” is probably the most common designation, but at various times, they also have been known as interstate congresses, committees, and commissions. See generally *Founding-Era Conventions*, *supra* note 2; Robert G. Natelson, *List of Conventions of States in American History*, <http://articleinfocenter.com/list-conventions-states-colonies-american-history/>.

10 *Founding-Era Conventions*, *supra* note 2, at 691-710 (identifying attendees at the Constitutional Convention and prior Founding-Era conventions, initially listed by alphabetical order for each attendee, and then grouped by state).

11 Robert G. Natelson, *Lists of Conventions of States in American History*, <http://articleinfocenter.com/list-conventions-states-colonies-american-history/>.

12 For example, at all of these conclaves states enjoyed equal voting power. Specifically, at every convention except St. Louis (1889), each state had one vote. At St. Louis, each state had eight votes. Robert G. Natelson, *Newly Rediscovered: The 1889 St. Louis Convention of States*, <http://articleinfocenter.com/newly-rediscovered-1889-st-louis-convention-states/>.

13 *Id.* The general conventions were Albany (1754), New York City (1765 and 1774), Annapolis (1786), Philadelphia (1780 and 1787), Washington, D.C. (1861), and Phoenix (2017). *Id.*

14 The standard protocols originally were based on international practice. CAPLAN, *supra* note 2, at 95-96.

15 *Founding-Era Conventions*, *supra* note 2, at 686-90.

16 *Id.* at 689-90.

17 See GUIDE, *supra* note 2, at 12-13 for a table of cases.

have repeatedly consulted history to clarify the article's words and procedures.¹⁸

II. DEFINITIONS OF TERMS

When the Constitution was adopted, an *application* was an address from one person or entity to another.¹⁹ It was thus a very broad term, and it could include communications among equals or between superiors and inferiors. An application could be an invitation, a request, a delegation, or an order.

One kind of application was a convention *call*.²⁰ This was an official invitation, often called a “circular letter,” sent to all or some states to meet at a particular time and initial place to discuss topics itemized in the call. Most calls were issued by individual states; others came from Congress or prior conventions.²¹ Calls were limited to time, initial place, and topic. Additional material, on the rare occasions when it was included, was precatory.²²

Another kind of application, which might also be communicated by circular letter, encouraged the recipient to call or support a convention. Thus, a 1783 request from the Massachusetts legislature to the Confederation Congress asking it to call a convention was styled an “application.”²³ To similar effect was the report of the 1786 Annapolis convention suggesting to the states that they meet in Philadelphia the following year,²⁴ and the circular letter of July 26, 1788 issued by the New York ratifying convention urging another convention to consider amendments to the 1787 Constitution.²⁵

Calls and other convention applications almost invariably informed the recipients of the subjects for which the convention was sought. They almost never said merely, “let’s meet.” Rather, they said, “let’s meet to discuss trade issues”—or defense issues, or financial issues, or some specified combination.²⁶ Calls and applications specifying different topics were understood to require different conventions. In 1786, one convention call invited all states to discuss trade issues while another invited some states to

discuss navigation issues.²⁷ There was no move to aggregate the two into a single meeting to discuss both.

Another class of applications not mentioned in Article V but inherent in any convention of states are those directed by principals to their agents—that is, from state legislatures to their representatives. In this class are *commissions* (also called credentials) whereby legislatures designate their commissioners. A commission is much like a power of attorney in that it names and empowers one or more agents and defines the scope of their authority.²⁸ Each commissioner presents his or her commission to the convention before he or she may be seated. Closely related are *instructions*. As their name indicates, they contain more detailed directions from the appointing authority. Historically, commissions usually have been public documents while separate instructions often have been secret.²⁹

Article V refines to a certain extent how calls and other initial applications operate in the amendment context: Article V provides that state legislatures may apply to Congress, and when two thirds of them have done so, Congress must call an amendments convention. This enables state legislatures to promote amendments in a way that forestalls congressional veto. The congressional role in the convention process is mandatory and limited—ministerial rather than discretionary.³⁰ Congress acts as a convenient common agent for the state legislatures.³¹ It follows necessarily that Congress’s function as the calling agent does not entitle it to alter traditional rules. 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.³²

One last point pertains to terminology: Some commentators have referred to an unlimited convention as a “general convention.” This usage is incorrect.³³ A general convention is a conclave to which states from all regions of the country are invited—as

18 *Id.* at 26, n.54 (collecting cases relying on history).

19 Robert G. Natelson, *What is an Amendments Convention “Application?” What is a “Call?”* <http://articleinfocenter.com/what-is-an-amendments-convention-application-what-is-a-call/>.

20 *Id.* Thus, a call sometimes was labeled an application. *E.g.*, 1 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 589 (Charley Hoadley ed., 1894).

21 *Founding-Era Conventions*, *supra* note 2 (identifying the calling entities for major conventions held before 1788).

22 *See generally id.*

23 *Id.* at 667.

24 *Proceedings of Commissioners to Remedy Defects of the Federal Government: 1786*, Yale Law School’s Avalon Project, available at http://avalon.law.yale.edu/18th_century/annapoli.asp.

25 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 413-44 (1836) (communicating with the governors of other states and urging them to support another convention).

26 *See generally Founding-Era Conventions*, *supra* note 2.

27 *Id.* at 668-72 (discussing the Annapolis Convention of 1786 and a proposed “Navigation Convention”).

28 *See, e.g.*, THE FEDERALIST NO. 40 (James Madison) (“The powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents.”); see also CAPLAN, *supra* note 2, at 97.

29 For a convenient collection of the calls, credentials, and instructions of a Founding-Era convention, see C.A. WESLAGER, THE STAMP ACT CONGRESS 181-97 (1976).

30 THE FEDERALIST NO. 85 (Alexander Hamilton) (“The Congress ‘shall call a convention.’ Nothing in this particular is left to the discretion of that body.”); Remarks of Rep. James Madison, 1 ANNALS OF CONGRESS 260 (May 5, 1789).

31 CAPLAN, *supra* note 2, at 94.

32 Professor Charles Black of Yale Law School may have originated the notion that Congress can control convention protocols. Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 958, 964-65 (1963). To support this view, he relied on the Necessary and Proper Clause. However, that Clause does not apply to the amendment process. *See GUIDE*, *supra* note 2, at 48-52. As the title suggests, Black’s article was polemical rather than scholarly in nature.

33 Professor Black seems responsible for this error as well, Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198 (1972), although others have repeated it.

opposed to a partial or regional gathering. A convention for proposing amendments is necessarily general, but may be limited or unlimited as to topic. If unlimited as to topic, it should be referred to as *unlimited, open, or plenary*.³⁴

III. ARTICLE V APPLICATIONS MUST BE AGGREGATED BY SUBJECT MATTER

Only about twenty state legislative applications under Article V have been plenary—that is, seeking an unlimited or plenary convention.³⁵ The other applications have sought conventions to consider amendments on one or more designated subjects. Article V does not provide expressly that the required two thirds of applications must address the same or overlapping subjects. This has led some to argue that because there have been far more than 34 applications, a call for a plenary convention is already mandatory.³⁶ In other words, all valid applications must be aggregated with all other valid applications to yield a plenary result.

Three aspects of this argument render it unlikely of congressional or judicial acceptance. Most fundamentally, perhaps, it conflicts with the dictates of common sense: If 12 legislatures seek a convention to consider term limits, 12 seek a convention to consider a BBA, and 12 apply for a convention to consider campaign finance reform, it does not follow that 36 legislatures want a convention to consider everything, or all three topics, or any one of them. Further, this argument conflicts with Article V's background history. In the Founders' experience, convention calls and pre-call requests almost invariably designated one or more subjects and promoted a convention to address those subjects. Without prior agreement, states did not combine unrelated applications in a single convention.³⁷

Third, the argument conflicts with post-constitutional understanding. Consider by way of illustration the situation

in the year 1911. At that time, there were 46 states, so 31 were needed to call a convention. Twenty-nine states had issued applications for a convention to propose direct election of U.S. Senators. Thirteen states had outstanding applications for a convention to propose a ban on polygamy.³⁸ Subtracting states with applications on both subjects leaves 32—one state more than the required two thirds. Yet there is no evidence of widespread (or, indeed, any) contentions that direct election applications should be aggregated with anti-polygamy applications to force a convention. Not surprisingly, therefore, most commentators have concluded, or at least assumed, that for applications to aggregate they should overlap to some extent.³⁹ This certainly has been the tacit assumption of Congress.

But to what extent must they overlap? Surely they need not be exact copies of each other.⁴⁰ Founding-Era conventions met even though applications and instructions differed. In my 2016 treatise on the convention process, I addressed the question of how much coincidence is required. I listed four aggregation scenarios, as follows:

1. All applications seem to address the same subject, but restrictive wording in some renders them inherently inconsistent with others.
2. Some applications prescribe a convention addressing Subject A (e.g., a balanced budget amendment) while others prescribe a convention addressing both Subject A and unrelated Subject B (e.g., term limits).
3. Some applications 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).
4. Some applications prescribe a convention addressing Subject A and others call for a convention unlimited as to topic.⁴¹

The treatise examined the first three scenarios in light of history, including the Founders' own interpretive methods, and concluded that applications in the first two situations did not aggregate, but those in the third situation did.⁴² Because a full analysis of #4 would have consumed a disproportionate share of the treatise, I merely listed some arguments for both conclusions and suggested

34 Another possible kind of convention is "plenipotentiary." This term is best reserved for conclave meetings outside constitutional restraints—i.e., those that James Madison described as reverting to "first principles." James Madison to G.L. Turberville, Nov. 2, 1788, 5 THE WRITINGS OF JAMES MADISON 298-300 (Gaillard Hunt ed., 1904). By contrast, a convention for proposing amendments, even a plenary one, is limited to proposing amendments to the existing Constitution, and is subject to "the forms of the Constitution." *Id.* As explained below, states sometimes have sent commissioners with plenipotentiary powers to more limited conventions.

35 See The Article V Library, article5library.org. As of this writing, the Article V Library is the best and most reliable source for applications. There is at least one other website devoted to applications (<http://foavc.org/>), but it contains notable errors, including aggregating applications that do not overlap as to topic. A list of applications and rescissions kept by the Clerk of the U.S. House of Representatives at <http://clerk.house.gov/legislative/memorials.aspx> is incomplete and dates back only to 1960.

36 The most distinguished writer to urge this position is Michael Stokes Paulsen. See Paulsen, *supra* note 2, at 746-47. Professor Paulsen argued that an application conditioned on set topics was void, but that listing a particular change as its purpose should count toward a plenary convention. Professor Paulsen wrote in 1993, well before most of Article V's defining history was recovered, although five years earlier Russell Caplan had documented the Founding-Era expectation that most applications would be limited. CAPLAN, *supra* note 2, at 95-99.

37 *Founding-Era Conventions*, *supra* note 2, at 668-72 (discussing the Annapolis Convention of 1786 and a proposed "Navigation

Convention," with no suggestion that the two be aggregated).

38 For lists of applications by date and subject matter, see the Article V Library, article5library.org.

39 *E.g.*, CAPLAN, *supra* note 2, at 105 ("Twenty-four applications for a balanced-budget convention, and ten for a convention to consider school busing, will impose no duty on Congress"); See also Rees, *supra* note 2, at 89 ("It seems obvious that if seventeen States apply for a convention to consider anti-abortion amendments, for instance, and seventeen others apply for a convention on a balanced budget amendment, the requisite consensus does not exist.").

40 *Cf. id.* at 107 & 108.

41 GUIDE, *supra* note 2, at 55.

42 *Id.* at 56-58.

that an application's specific wording might be helpful in weighing whether the application should be aggregated.⁴³ The present paper examines the question more thoroughly. In doing so, we need not refer to hypothetical Subjects A, B, and X, because current events provide us with a real-life situation. Should BBA and plenary applications be aggregated together?

IV. WHY OLDER UNRESCINDED APPLICATIONS ARE STILL VALID

Before proceeding further, I should explain why the extant (unrescinded) BBA and plenary applications remain valid even though several BBA applications are over 40 years old and the plenary applications are even older. Why have they not lapsed with passage of time?

During the 20th century, there was considerable discussion of this "staleness" question.⁴⁴ Even the Supreme Court speculated on the staleness question as it pertains to ratifications of amendments,⁴⁵ although no court has ever ruled on it. The intervening years have fairly well resolved the question for us: Unless expressly time-limited, applications remain in effect until formally rescinded. There are at least five reasons for so concluding.

First: Legislative actions normally do not lapse due to the mere passage of time. If their text does not limit their duration, they remain in effect until repealed, even if they become outdated. Nothing in constitutional history or usage suggests that Article V legislative resolutions comprise an idiosyncratic exception.

Second: The Twenty-Seventh Amendment was first proposed by Congress in 1789, and several states ratified shortly thereafter. However, the amendment did not collect sufficient states for ratification until a new campaign ensued two centuries later. The necessary 38 states finally ratified, and the Twenty-Seventh Amendment became effective in 1992. Ensuing universal recognition of the validity of this amendment is inconsistent with the view that Article V resolutions lapse with the passage of time.⁴⁶

Third: Recognition of the durability of Article V legislative resolutions is implied by the practice of inserting specific time limits in congressional amendment proposals and in state legislative applications. Some states have supplemented this with explicit recitals to the effect that unrescinded applications are unlimited as to time unless otherwise so providing.⁴⁷

Fourth: Formulating and applying a staleness rule consistently with the purposes of Article V would be impractical.

⁴³ *Id.* at 58-60.

⁴⁴ *E.g.*, CAPLAN, *supra* note 2, at 114 (arguing that applications do not expire); *Tribe*, *supra* note 4, at 638 ("When, if ever, does a state's application lapse?"); *Rees*, *supra* note 2, at 99 (arguing that Congress may limit the life of an application); Douglas G. Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D. L. REV. 355, 369-71 (1979) (arguing that applications must be reasonably contemporaneous). Perhaps the most complete discussion is in *Paulsen*, *supra* note 2 (arguing that applications do not expire).

⁴⁵ *Dillon v. Gloss*, 256 U.S. 368 (1921).

⁴⁶ *Cf. Paulsen*, *supra* note 2 (exploring the practical effects of recognizing the validity of the Twenty-Seventh Amendment).

⁴⁷ An example is a partial rescission adopted by the Texas legislature in 2017, SJR 38 (2017), available at <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SJ00038E.pdf#navpanes=0> ("WHEREAS, Regardless of their

There are no judicial or legal standards sufficient to guide a court in this regard. (Is five years too long? Too short? What about 15 years?) Leaving the question to Congress would undercut the convention procedure's fundamental purpose as a mechanism for *bypassing* Congress. During the 1960s, Senator Sam Ervin pointed out that some senators and academics wanted to disregard any applications more than two years old.⁴⁸ This, of course, would destroy the process, since some state legislatures meet only biennially. Allowing Congress to fix a maximum life span on applications would fit the proverbial case of the fox guarding the hen-house.

Fifth: Rescission is a common procedure.⁴⁹ Legislatures, or at least lobbyists, now monitor applications and do not assume that mere duration vitiates outdated ones. Legislatures becoming dissatisfied with applications can, and do, regularly rescind them.

For these reasons, we are justified in concluding that unrescinded applications do not lapse with the mere passage of time.

V. THE UNRESCINDED BBA AND PLENARY APPLICATIONS

The *Article V Library*, which operates a website at <http://article5library.org/>,⁵⁰ currently lists 28 states with unrescinded BBA applications.⁵¹ Yet as a matter of prudence, the Mississippi application should not be counted. It may be invalid because it improperly purports to dictate to the convention an up-or-down vote on prescribed language.⁵² Even if it is valid, its prescribed

age, such past applications from Texas lawmakers remain alive and valid until such time as they are later formally rescinded.").

⁴⁸ Sam J. Ervin, Jr., *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 891 (1968).

⁴⁹ The Article V Library reports 22 rescissions of balanced budget applications since 1988 alone. See Article V Convention Application Analysis, <http://article5library.org/analyze.php>. There have been, of course, other rescissions.

⁵⁰ See *supra* note 35 for my reasons for relying on the Article V Library rather than other sources.

⁵¹ Article V Convention Application Analysis, *Balanced Budget*, <http://article5library.org/analyze.php?topic=Balanced+budget&res=1&gen=0&ylimit=0>.

⁵² The Mississippi application, adopted in 1979, is available at <http://article5library.org/gettext.php?doc=1184>. It reads in part as follows:

Now Therefore, Be it Resolved by the House of Representatives of the State of Mississippi, the Senate Concurring Therein. That we do hereby, pursuant to Article V of the Constitution of the United States, make application to the Congress of the United States to call a convention of the several states for the proposing of the following amendment to the Constitution of the United States: [proposed amendment language]

Modern scholarly opinion is split on whether prescribed language applications are valid; I am inclined to believe they are not, based both on Founding-Era practice and on subsequent case law. *GUIDE*, *supra* note 2, at 38-39. *Cf. CAPLAN*, *supra* note 2, at 107 (pointing out that there is no Founding-Era precedent for applications that "recite the text of an amendment and require the convention to adopt that language only."). Two commentaries arguing to the contrary are *Rappaport*, *supra* note 6, and *Stern*, *supra* note 6.

language seems to render it inconsistent with the other 27. Those 27 differ in various ways, but none of them is really crucial. Pre-convention documents issued by separate states always have varied somewhat, but that has not prevented conventions from meeting successfully.⁵³

The *Article V Library* lists 16 states with unrescinded plenary applications.⁵⁴ Nine of those states⁵⁵ have BBA applications as well, so only 7 states have plenary applications but no BBA applications: Illinois, Kentucky, New Jersey, New York, Oregon, South Carolina, and Washington. But just as we eliminated Mississippi from the BBA list, we must scratch South Carolina from the plenary list. The operative resolution of its legislature's 1832 resolution is as follows:

Resolved, That it is expedient that a Convention of the States be called as early as practicable, to consider and determine such questions of disputed power as have arisen between the States of this confederacy and the General Government.

Resolved, That the Governor be requested to transmit copies of this preamble and resolutions to the Governors of the several States, with a request that the same may be laid before the Legislatures of their respective States, and also to our Senator's [sic] and Representatives in Congress, to be by them laid before Congress for consideration.⁵⁶

Although this resolution qualifies as a call for a convention of the states, it does not qualify as an Article V application. It is not addressed to Congress, and it does not call for a convention for proposing amendments. Moreover, it is not plenary. The convention subject matter is identified as "such questions of disputed power as have arisen between the States of this confederacy and the General Government." A balanced budget amendment is not within the scope of that topic; nor are term limits nor several other subjects of modern interest. This leaves six plenary applications from states that have no BBA application outstanding, each of which is addressed below.

A. Illinois

Illinois has two valid plenary applications extant. The first dates from 1861. Its relevant language reads:

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

in various parts of the United States, for a convention to propose amendments to the constitution; therefore,

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

Essentially, this resolution expresses the Illinois state legislature's decision to join other states' applications, either in 1861 or in the future. It authorizes Congress to add Illinois to any other application lists.

The other extant Illinois application was adopted in 1903, during the campaign for direct election of Senators. Its relevant language is:

Whereas by direct vote of the people of the State of Illinois at a general election held in said State on the 4th day of November, A.D. 1902, it was voted that this general assembly take the necessary steps under Article V of the Constitution of the United States to bring about the election of United States Senators by direct vote of the people; and

Whereas Article V of the Constitution of the United States provides that on the application of the legislatures of two-thirds of the several States the Congress of the United States shall call a convention for proposing amendments:

Now, therefore, in obedience to the expressed will of the people as expressed at the said election, be it

Resolved by the senate (the house of representatives concurring herein), That application be, and is hereby, made to the Congress of the United States to call a convention for proposing amendments to the Constitution of the United States, as provided for in said Article V . . .

The preamble explains the motivating force for the resolution, but the operative words apply for a plenary convention. 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 (as they are here), they prevail. In this case, moreover, there really is no inconsistency because a legislative body may be motivated by an issue without necessarily limiting its response to that issue. Significantly, the Illinois legislature left this resolution in effect after adoption of the Seventeenth Amendment and has retained it to this day. Congress can therefore count Illinois among those states applying for a convention on any topic.

B. Kentucky

Kentucky adopted its application in 1861. The *Article V Library* contains only an announcement of the application from the Senate's presiding officer. It indicates that the application is not limited, but merely asks for a convention for proposing amendments. William Pullen's 1951 study of the application process reproduces the actual wording:

Whereas the people of some states feel themselves deeply aggrieved by the policy and measures which have been

⁵³ See generally *Founding-Era Conventions*, *supra* note 2.

⁵⁴ The Article V Library uses the misnomer "general" for plenary. See *supra* note 33 and accompanying text.

⁵⁵ Indiana, Ohio, Texas, Colorado, Iowa, Kansas, Missouri, Nebraska, and Wisconsin.

⁵⁶ This and the plenary applications discussed below are available at <http://article5library.org/analyze.php?topic=General&res=1&gen=1&ylimit=0>.

adopted by the people of some other states; and whereas an amendment of the Constitution of the United States is deemed indispensably necessary to secure them against similar grievances in the future: therefore—

Resolved, . . . That application to Congress to call a convention for proposing amendments to the Constitution of the United States, pursuant to the fifth article, thereof, be, and the same is hereby now made by this general assembly of Kentucky; and we hereby invite our sister States to unite with us without delay, in similar application to Congress.

* * * *

Resolved, If the convention be called in accordance with the provisions of the foregoing resolutions, the legislature of the Commonwealth of Kentucky suggests for the consideration of that convention, as a basis for settling existing difficulties, the adoption, by way of amendments to the Constitution, of the resolutions offered in the Senate of the United States by the Hon. John J. Crittenden.⁵⁷

This language is plenary. It recites its motivation (resolution of present and future grievances) and adds a suggested amendment, but its operative words are unlimited. Because of the recital of future grievances, the Kentucky application, like that of Illinois, looks forward to consideration of future topics.

C. New Jersey

The 1861 New Jersey application was motivated by impending civil war, as its lengthy text makes clear. However, the operative language of the resolution applies for a plenary convention:

And be it resolved, That as the Union of these States is in imminent danger unless the remedies before suggested be speedily adopted, then, as a last resort, the State of New Jersey hereby makes application, according to the terms of the Constitution, of the Congress of the United States, to call a convention (of the States) to propose amendments to said Constitution.

As in the case of Illinois and Kentucky, New Jersey's grant of authority to Congress has never been rescinded.

D. New York

The operative language of New York's 1789 application seeks a convention:

[W]ith full powers to take the said Constitution into their consideration, and propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest [i.e.,

ultimate] posterity, the great and inalienable rights of mankind.⁵⁸

This application is clearly plenary.

E. Oregon

Oregon's 1901 application, like the 1903 application of Illinois, arose out of the campaign for direct election of Senators. The preamble recites direct election as its motivation, but the operative language is unlimited:

Whereas, under the present method of the election of United States Senators by the legislatures of the several states, protracted contests frequently result in no election at all, and in all cases interfering with needed state legislation; and

Whereas, Oregon in common with many of the other states has asked congress to adopt an amendment to the Constitution of the United States providing for the election of United States Senators by direct vote of the people, and said amendment has passed the House of Representatives on several occasions, but the Senate of the United States has continually refused to adopt said amendment; therefore be it

Resolved by the House of Representatives of the State of Oregon, the Senate concurring:

That the Congress of the United States is hereby asked, and urgently requested, to call a constitutional convention for proposing amendments to the Constitution of the United States, as provided in Article V of the said Constitution of the United States.

Resolved, That we hereby ask, and urgently request, that the legislative assembly of each of the other states in the union unite with us in asking and urgently requesting the Congress of the United States to call a constitutional convention for the purpose of proposing amendments to the Constitution of the United States.

F. Washington

Two Washington State applications remain in effect, both dating from the direct election of Senators campaign. The 1901 application contains no preamble or other recitals. Aside from transmittal directions, it states merely:

That application be and the same is hereby made to the Congress of the United States of America to call a convention for proposing amendments to the constitution

⁵⁷ WILLIAM RUSSELL PULLEN, *THE APPLICATION CLAUSE OF THE AMENDING PROVISION OF THE CONSTITUTION 79-80* (Univ. of NC Ph.D. thesis, 1951).

⁵⁸ 1 ANNALS OF CONGRESS 29-30 (May 5, 1789). The application was dated Feb. 5, 1789.

of the United States of America as authorized by Article V of the Constitution of the United States of America.

The 1903 application is similar, except that it recites a motivation:

Whereas the present method of electing a United States Senators is expensive and conducive of unnecessary delay in the passage of useful legislation; and

Whereas the will of the people can best be ascertained by direct vote of the people: Therefore,

Be it enacted by the legislature of the State of Washington,

That application be, and the same is hereby, made to the Congress of the United States of America to call a convention for proposing amendments to the Constitution of the United States of America.

The language of each is plenary.

VI. AGGREGATING PLENARY WITH LIMITED APPLICATIONS

We now arrive at the issue of whether a plenary application may be aggregated with narrower applications. There are two questions here. The first is, “May applications limited to one or more subjects be aggregated with plenary applications to authorize a plenary convention?” The second is “May plenary applications be aggregated with those limited to one or more subjects to authorize a limited convention?”

The first question need not detain us, for the answer is a straightforward “no.” There is no historical precedent for such a result, and as Russell Caplan observes, “a state desiring a federal balanced budget may not, and likely does not, want the Constitution changed in any other respect.”⁵⁹ Today, in fact, while there is widespread current interest in a limited convention, there is little desire for a plenary one. For 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.

At initial inspection, answering the question of whether plenary applications may be aggregated toward a limited convention appears difficult because obvious precedent seems lacking. In pre-constitutional practice, states almost never issued plenary applications or calls. They almost universally specified the subjects a proposed convention was to consider, although those subjects sometimes were very broad. Hence there was no occasion when states aggregated plenary calls with more limited ones. Even the post-constitutional years have seen relatively few plenary applications. The first was issued in 1789 by New York⁶⁰ and the last in 1929 by Wisconsin, and in the intervening centuries

there were fewer than twenty.⁶¹ A closer look at historical practice, however, reveals some promising clues.

A. Founding-Era Practice

The Founders’ understanding of the word “application,” as we have seen, included requests for conventions (as in Article V), calls, commissions, and instructions.⁶² An Article V application is essentially a conditional commission and instruction: It directs Congress to call a convention on the topics listed in the application once a sufficient number of other legislatures agree, and it necessarily grants Congress authority to do so.⁶³ Like other Founding-Era applications, commissions and instructions could be narrow, wider but still limited, or plenary. Consistently with the legal maxim, “The greater includes the lesser,”⁶⁴ a commissioner with wider authority could participate fully in meetings restricted to subjects narrower than, but included within, the scope of his wider authority.

One relevant instance arose out of the convention known to history as the First Continental Congress (1774). The convention call appeared in a circular letter drafted by John Jay on behalf of the New York Committee of Correspondence. It read in part as follows:

Upon these reasons we conclude, that a Congress of Deputies from the colonies in general is of the utmost moment; that it ought to be assembled without delay, and some unanimous resolutions formed in this fatal emergency, not only respecting your [Boston’s] deplorable circumstances, but for the security of our common rights.⁶⁵

This charge is very broad⁶⁶—perhaps as close to a plenary call as any convention of states or colonies has come. Yet it is not quite plenary, because it focuses on Boston’s “deplorable circumstances” and “the security of our common rights” against Great Britain. It does not authorize discussion of, for example, colonial religious establishments or local business licensing. In response, several colonies sent commissioners to the First Continental Congress who enjoyed plenipotentiary authority—that is, they were empowered to discuss, and even to agree to, anything.⁶⁷ The record reveals no doubt that the grant of plenipotentiary

61 The Article V Library lists 21 plenary (which it calls “general”) applications from 1788 to 1929. The first—Virginia’s 1788 application—probably does not qualify. Although it is very broad, it is limited to amendments proposed by the state ratifying conventions. Also listed is South Carolina’s 1832 resolution, but as explained above that was not an Article V application.

62 *Supra* notes 19-29 and accompanying text.

63 *Cf.* CAPLAN, *supra* note 2, at 97 (“The applications submitted under article V, therefore, are the descendants of the pre-1787 convention commissions.”).

64 The original form is *Omne majus continet in se minus*, Duhaimé’s Law Dictionary, <http://www.duhaime.org/LegalDictionary/O/OmneMajusContinetInSeMinus.aspx>.

65 *First Continental Congress*, United States History, <http://www.u-s-history.com/pages/h650.html>.

66 *Cf.* *Founding-Era Conventions*, *supra* note 2, at 637.

67 *Id.* at 638.

59 CAPLAN, *supra* note 2, at 108.

60 *See infra* notes 72 & 73 and accompanying text for discussion.

authority authorized commissioners to participate in a more limited convention.

Another illustration arose from the assembly in 1777 at Springfield, Massachusetts. The scope of the call included paper money, laws to prevent monopoly and economic oppression, interstate trade barriers, and “such other matters as particularly [c]oncern the immediate [w]elfare” of the participating states, but it was restricted to matters “not repugnant to or interfering with the powers and authorities of the Continental Congress.”⁶⁸ Connecticut, however, granted its commissioners plenipotentiary authority, omitting the restriction in the call.⁶⁹ No one seems to have doubted the right of the Connecticut commissioners to participate in the convention despite their broader authority.

Similarly, the documents leading up to the 1780 Boston Convention show that it was targeted at immediate war needs. Yet New Hampshire empowered its commissioners with plenipotentiary authority to consult “on any other matters that may be thought advisable for the public good,” and they participated fully.⁷⁰

Even more on point are the first two Article V applications ever issued. The 1788 Virginia application petitioned Congress to call a convention “to take into their consideration the defects of this Constitution *that have been suggested by the State Conventions.*”⁷¹ This application was therefore limited. On the other hand, the 1789 New York application was plenary: It sought a convention “with full powers to take the said Constitution into their consideration, and propose such amendments thereto, as they shall find best calculated to promote our common interests, and secure to ourselves and our latest [i.e., ultimate] posterity, the great and inalienable rights of mankind.”⁷² The New York assembly surely intended its plenary application to aggregate with Virginia’s limited one, for the two applications were part of the same campaign for a second general convention.⁷³ Moreover, the New York legislature was justified in so intending. 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 application 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.

B. Post-Constitutional Practice

Post-constitutional practice impels one to the same conclusion. The 1861 Washington Conference Convention was a close analogue of an Article V convention for proposing amendments: Virginia called it to propose amendments that might avert civil war. The call fixed the convention’s wide, but still limited, scope this way:

[T]o adjust the present unhappy controversies, in the spirit in which the Constitution was originally formed, and consistently with its principles, so as to afford the people of the slaveholding States adequate guarantees for the security of their rights . . . to consider, and if practicable, agree upon some suitable adjustment.⁷⁴

Thus, the call provided that the subject was to (1) “adjust present . . . controversies,” *provided that* (2) the result was consistent with guaranteeing the “rights” of slaveholders.

The convention proceedings do not contain all of the commissioners’ credentials, but they do reproduce those issued by twelve states.⁷⁵ At least ten of the twelve granted authority in excess of the scope of the call.⁷⁶ Ohio, Indiana, Delaware, Pennsylvania, Rhode Island, and Missouri all authorized their commissioners to agree to “adjustments,” but without limiting their representatives to the call’s pro-slavery proviso. The four remaining states granted their commissioners authority to confer on anything:

- Illinois empowered its commissioners “to confer and consult with the Commissioners of other States who shall meet at Washington.”⁷⁷
- New Jersey ordered its delegates “to confer with Congress and our sister states and urge upon them the importance of carrying into effect” certain additional statements of principle.⁷⁸
- New York authorized its delegates to “confer” with those from other states “upon the complaints of any part of

68 *Id.* at 647.

69 1 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 601-02 (Charley Hoadley ed., 1894).

70 3 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 560-61 (Charles Hoadley, ed. 1922).

71 1 ANNALS OF CONGRESS 28 (May 5, 1789). The application was dated Nov. 14, 1788.

72 *Id.* at 29-30. The application was dated Feb. 5, 1789.

73 See CAPLAN, *supra* note 2, at 32-40.

74 A REPORT OF THE DEBATES AND PROCEEDINGS IN THE SECRET SESSIONS OF THE CONFERENCE CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 9 (L.E. Chittenden ed., 1864).

75 *Id.* at 454-64.

76 Kentucky’s credentials granted authority equal to the scope of the call. *Id.* at 457. Tennessee’s credentials technically authorized only participation in a convention of the slaveholding states. *Id.* at 454-56.

77 *Id.* at 459.

78 *Id.* at 461.

the country, and to suggest such remedies therefor as to them shall seem fit and proper.”⁷⁹

- Massachusetts authorized its agents to “confer with the General Government, or with the separate States, or with any association of delegates from such States . . .”⁸⁰

These grants of broader power clearly were designed to commit the states to participating in a convention whose subject matter was contained within their broad grants of authority.

Still another illustration arises from the state legislatures’ campaign for direct election of U.S. Senators. The campaign ran from 1899 to 1913. During that period, many legislatures adopted applications limited to the single subject of a direct election amendment.⁸¹ Others passed plenary applications while reciting in preambles that their motivation was to obtain a direct election amendment. Three examples of such applications were discussed above in section V—those of Oregon (1901), Illinois (1903), and Washington State (1903). As in the case of the 1789 New York application, the legislatures apparently assumed that plenary applications could be aggregated with those limited to a single subject, since they issued plenary applications as vehicles for addressing a particular issue.

VII. THREE OBJECTIONS ANSWERED

Article V provides that “The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments.” As the text indicates, this duty is ministerial and mandatory.⁸² Yet even ministerial duties may have some discretionary component.⁸³ Accordingly, some may object to Congress exercising its discretion to call a convention. The first possible objection may be stated in this way:

When a legislature applies for a plenary convention, it is not announcing its willingness to discuss only narrower issues. Rather, it is asserting, “We’ll attend a convention, but only if all constitutional amendments may be considered.” Thus, a plenary application should not be taken as an application for a narrower subject.

The problem with this objection is a lack of precedent to support it. In all the history of conventions of states, I am unaware of any state that ever took this “all or nothing” position. Certainly no Article V application has ever expressed it. On the contrary, the 1789 plenary New York application and the plenary applications promoting direct election of Senators argue for the contrary.⁸⁴ A legislature certainly has the prerogative of taking an

“all-or-nothing” position. In view of the lack of precedent, though, a legislature wishing to do so should express its position in clear language.

The second objection to aggregation may be summarized as follows:

Plenary resolutions should be scrutinized before aggregating them to see if their language is sufficiently inclusive to justify aggregation with BBA applications. If not sufficiently inclusive, they should be deemed a separate category. Thus, a plenary application that, like the 1861 Illinois resolution, looks to the future perhaps should be aggregated; but others should not be. Similarly, if an application recites a motivation other than desire for a BBA, such as direct election of Senators, then it should not be aggregated with BBA applications.

Congress (and, if need be, the courts) should reject this contention for several reasons. The initial reason involves the text and associated history. Article V provides that Congress shall call a convention “on the Application of the Legislatures of two thirds of the several States.” Running separate lists by subject is inferred from Founding-Era convention practice, not from the constitutional text. In this instance, however, there is no Founding-Era practice suggesting that the text should be read otherwise than in the most straightforward manner; an inferred exception should not be wider than the custom that implies it. This conclusion is reinforced by the Constitution’s use of the imperative: “Congress . . . shall call” and by the Founding-Era practice of treating applications in a forgiving manner.

Another reason for restraining Congress’s discretion as to which plenary applications to aggregate is the nature of Congress’ role in the convention process. When aggregating applications and issuing the call, Congress acts as an executive agent for the state legislatures. Because a primary purpose of the convention procedure is to check Congress, when it aggregates applications it does so in a conflict of interest situation. Fiduciary principles argue against allowing Congress to avoid a convention by interpretive logic chopping.

Still another reason for rejecting this second objection arises from the purpose of the convention procedure. The Founders inserted it as an important safeguard for constitutional government and for personal liberty⁸⁵—much like the Bill of Rights and other important constitutional checks. Just as the courts enforce most of the Bill of Rights rigorously through the use of “heightened scrutiny,” so Congress and the courts should apply heightened scrutiny to efforts to block a convention.

The third objection to aggregating plenary applications with limited applications may be stated this way:

Plenary applications should be aggregated with limited applications that already existed before the plenary applications, but not with future ones. A legislature issuing a plenary application may be on notice of previous limited applications.

⁷⁹ *Id.* at 462.

⁸⁰ *Id.* at 463-64.

⁸¹ Article V Convention Application Analysis, *Direct Election of Senators*, <http://article5library.org/analyze.php?topic=Direct+election+of+Senators&res=1&gen=0&ylimit=0>.

⁸² *Supra* note 30.

⁸³ *Roberts v. United States*, 176 U.S. 222, 231 (1900) (holding that a duty can be ministerial even though its performance requires statutory construction by the officer charged with performing it).

⁸⁴ See *supra* notes 71-73 & 81 and accompanying text.

⁸⁵ Advocates of the Constitution relied heavily on the availability of the amendments convention process as a way of inducing the public to support the Constitution. *Founding-Era Conventions*, *supra* note 2, at 622-24.

But it is unreasonable to assume a legislature intended to seek a convention on unknown future subjects.

This argument is stronger than the second because it offers less opportunity for Congress to block a convention by sophistic word-parsing. However, a rule that a plenary application aggregates with some limited applications but not others would insert in the plenary application a condition the legislature could have added, but chose not to. Such a rule would render plenary applications relevant for issues long past—such as a convention to address state nullification⁸⁶—but irrelevant for constitutional crises that might arise in the future.

The third objection also suffers from the same lack of justification from text or precedent that attended the previous two objections. Indeed, the precedent of the Constitutional Convention cuts in the opposite direction. The Constitutional Convention was called by the Virginia general assembly in late 1786, not by Congress in February 1787 as is often claimed.⁸⁷ The call recited as the subject matter a general overhaul of the political system.⁸⁸ Over the next few months, state after state granted their commissioners authority to match the scope of the call.⁸⁹ After seven states—a majority—had done so, the New York legislature restricted its commissioners to considering only amendments to the Articles of Confederation. Massachusetts imposed a similar limit even later in the process. Yet as far as we know, no one suggested the later narrow commissions abrogated the earlier broad ones. Even if the last seven states had adopted such restrictions, thereby imposing them on the convention, the earlier states' wider grants of authority (if not formally rescinded) would have continued those states' commitment to the convention. The gathering would have been constrained to the narrower limits, it is true; but the commissioners with wider authority still would have been empowered and expected to participate to the extent of the convention's scope.

A final point: In assessing all three of these objections, one must remember that if a legislature with a plenary application is

dissatisfied with having that application aggregate toward a limited convention, it has several remedies:

- It may rescind or amend its application before the thirty-four state threshold is reached;
- It may join at the convention with the non-applying states in voting against any proposal; and
- It may join with non-applying states in refusing to ratify.⁹⁰

VIII. CONCLUSION

When counting applications toward a convention for proposing a balanced budget amendment—or, indeed, toward a convention for proposing any other kind of amendment—Congress should add to the count any extant plenary applications. Currently, this count gives us 33 applications for a convention to propose a balanced budget amendment—only one short of the 34 needed to require Congress to call a convention.

⁸⁶ *Cf.* the 1832 Georgia application.

⁸⁷ See generally Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARVARD J. L. PUB. POL. 61 (2017).

⁸⁸ *Id.*

⁸⁹ For the credentials of the delegates to the 1787 convention, see 3 RECORDS OF THE FEDERAL CONVENTION 559-86 (Max Farrand ed., 1937).

⁹⁰ GUIDE, *supra* note 2, at 58.

