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## Conventional Wisdom: Acknowledging Uncertainty in the Unknown

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# CONVENTIONAL WISDOM: ACKNOWLEDGING UNCERTAINTY IN THE UNKNOWN

MARY MARGARET PENROSE\*

## I. INTRODUCTION

*Necessity never made a good bargain.*<sup>1</sup>

That which has never been tried or tested cannot be confidently, much less boastfully, touted. In fact, something that has never occurred requires careful assessment and often receives numerous differing predictions regarding success and potential failure. In employing the scientific model, one relies on a hypothesis to calculate what is most likely to occur. But law does not use the true scientific method. Rather, law is as fluid and changing as the participants who make and interpret it.<sup>2</sup> Thus, as the Article V issue of a State-Convention process to amend the United States Constitution is considered, all commentators on the topic must confess that the dialogue being proffered is, at best, mere forecasting.<sup>3</sup> In truth, as none of the twenty-seven constitutional amendments have even been proffered through the State-Convention method, even the most sage constitutional scholars are at a loss to know, with any real precision, what will occur or which

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\* Professor of Law, Texas Wesleyan School of Law. The author wishes to thank her 2009 and 2010 Constitutional Law classes for insisting that the Constitution is a fluid and "living" document. Their faith in our democracy convinces me that our Constitution will live on for generations to come. The author further wishes to thank the entire library staff at Texas Wesleyan, with particular thanks to Laura Fargo, for their unconditional research assistance. Essays like this could not be drafted without the aid and support of librarians.

1. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 10 (Blackwell North America, Inc. 1987).

2. While *Marbury v. Madison* reminds that "it is emphatically the province and the duty of the judicial department to say what the law is," such declarations are far from static. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Society has, on occasion, witnessed radical shifts in court doctrines over the period of just a few years. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*, 198 U.S. 45 (1905).

3. See, e.g., Gerald Gunther, *The Convention Method of Amending the United States Constitution*, 14 GA. L. REV. 1, 2 (1979) ("[C]onstitutional convention route bristles with unanswered questions."). Professor Gunther went further to proclaim his belief that "the convention route promises uncertainty, controversy, and divisiveness at every turn." *Id.* at 5. In closing his essay, Professor Gunther later confessed: "Everything I have said constitutes conjecture about the past and advice about the future." *Id.* at 25. See also Neal S. Manne, *Good Intentions, New Inventions, and Article V Constitutional Conventions*, 58 TEX. L. REV. 131, 135 (1979) ("For the constitutional law scholar, the consideration of the convention alternative is a foray into conjecture and speculation.").

bodies—executive, legislative or judicial—will actually be involved in the process.<sup>4</sup>

Much like Benjamin Franklin's admonishment, we must recognize that going into an Article V State-Convention scenario without any guiding principles could lead to a very unstable and unpredictable outcome.<sup>5</sup> While this is not, in itself, problematic, legislatures and judges should heed the warning: "necessity never made a good bargain."<sup>6</sup>

In this short Essay, I will respond to the honorable Michael Stern's article—*Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*<sup>7</sup>—that assures us there is nothing to fear from the State-Convention process. While this is surely one approach, I believe it to be too trusting, if not naïve, in light of our constitutional history. With literally nothing serving as our compass, we risk the creation of rules that will undoubtedly be borne out of necessity. If nothing changes to guide the process, we can only hope that those in power during such an unprecedented and momentous undertaking will make wise and limited decisions. But, as this Essay demonstrates, there is nothing mandating such behavior. The State-Convention model has never been tested or used. Therefore, no one can be certain that upon its invocation either the procedures utilized or the outcomes reached will be moderate or even moderated.

## II. VISIONARY IDEAS — SHORT ON DETAIL

*[O]ne cannot work in constitutional law for long without appreciating the hazards of guesses about the future.*<sup>8</sup>

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4. See Gunther, *supra* note 3, at 10. Professor Gunther observed that it remains "a real question as to whether the courts would consider this an area in which they could intervene; other aspects of the amendment process have been held by the courts to raise non-justiciable questions." *Id.* Professor Gunther's further concern is expressed as follows:

In any event, the prospect of [any] lawsuit simply adds to the potentially divisive confrontations along the convention road—a confrontation between Court and Congress, to go with the possible other confrontations, between Congress and the convention, between Congress and the states, and perhaps between the Supreme Court and the states.

*Id.*

5. *Id.* at 10–11. Professor Gunther admonished that the State-Convention method, in its current form without any guiding principles "[I]s a road that promises controversy and confusion and confrontation at every turn." *Id.* at 25.

6. FRANKLIN, *supra* note 2, at 10.

7. Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011).

8. Gunther, *supra* note 3, at 1.

The Constitutional Convention that brought forth the United States Constitution was as visionary as it was revolutionary.<sup>9</sup> Historians and statesmen continue to revel in the Constitution's enduring value, its historic brilliance, and legal sustainability. Foremost among the visionary components of the Constitution is the recognition that to endure, the document must be capable of change.<sup>10</sup> Change was explicitly provided for in the Constitution through the amendment process in Article V.<sup>11</sup> However, necessarily lacking in this otherwise visionary proposal is any detailed provision for how the State-Convention option should logistically operate.<sup>12</sup>

Article V reads, in pertinent part, 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 the Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .<sup>13</sup>

And, while this language provides certain mathematical provisions that many Americans find familiar (because generally it takes two-thirds to propose and three-fourths to ratify) any guiding principles are patently lacking. Thus, the fear of a "runaway convention" appears at least as rationally based as the confidence shown by those debunking the idea of a "runaway convention." In truth, both arguments are mere prognostication and neither can be supported with traditional authority. There are few cases on these issues, and the cases that do exist are inconclusive and, at times, inconsistent. This schism exists simply because the State-Convention model has never been used, never been tested, and presents Americans with the potential, just as real as any other alternative, that a radical State-Convention paradigm could rethink the entire United States Constitution.<sup>14</sup>

Historically, the Framers' debate seemed to evidence concern that the amendment process not be entirely placed with either the individual states or the national government. Members of the Constitutional Convention

9. See Ralph R. Martig, *Amending the Constitution, Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1253–57 (1936).

10. See *id.* at 1253.

11. See U.S. CONST. art. V.

12. See Clifton McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution Amending*, 66 MICH. L. REV. 1001, 1003 (1967).

13. U.S. CONST. art. V.

14. See Martig, *supra* note 9, at 1256 ("There can be no doubt that [the Constitutional] convention, by proceeding to draft a new frame of government, exceeded its powers; these were explicit and confined to the sole purpose of revising the Articles of Confederation.").

evidenced distrust for any one government being the sole repository for the Amendment process. Thus, after much crafting and compromise,<sup>15</sup> Article V, in its current form, was presented and ratified without much fanfare. To date, Article V has been used twenty-seven times, though the first twelve amendments were passed nearly contemporaneously with the original Constitution.<sup>16</sup> At other times, like in the Civil-War era, Amendments were passed in a grouping of just a few years.<sup>17</sup> Then, there is the Twenty-seventh Amendment, which, curiously enough, was originally offered in 1789 and deemed ratified in 1992.<sup>18</sup>

Furthermore, all twenty-seven Amendments except the Twenty-first Amendment were actually ratified by the State-Legislature model.<sup>19</sup> That

15. See Manne, *supra* note 3, at 142–46.

16. See Martig, *supra* note 9, at 1266; see also Robert G. Dixon, Jr., *Article V: The Comatose Article of our Living Constitution*, 66 MICH. L. REV. 931, 931 (1967) (“[L]ay[] aside the ten in the Bill of Rights, which were really a continuation of the original process of constitution-making . . .”).

17. See Dixon, *supra* note 16, at 931 (“[T]he three Civil War amendments, which were part of the unique process of reformation of the Union . . .”); see also Manne, *supra* note 3, at 132–33 (“This paucity of formal change appears more acute if one considers, entirely reasonably, the first ten amendments (the Bill of Rights) to have been a continuation of the original process of constitution making. Three other amendments (the Thirteenth, Fourteenth, and Fifteenth) originated in the aftermath of the Civil War, and reform following military suppression of revolution does not fit very neatly into traditional doctrines of American constitutionalism. Two amendments—the Prohibition and repeal amendments—effectively cancel each other out.”).

18. Congress presented the Twenty-seventh Amendment with twelve other amendments. See VARAT, ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 16 n.1 (12th ed. 2006). In 1791, ten of the twelve amendments were ratified and comprise what is now considered the “Bill of Rights.” *Id.* In 1992, the thirty-eighth state, Michigan, finally ratified the Twenty-seventh amendment, reaching the requisite three-fourths states needed for the Amendment to take effect. *Id.* There remains, however, some controversy as to whether the twenty-seventh Amendment is truly part of the Constitution. See *id.*

19. See *Amendment of the Constitution by the Convention Method Under Article V*, AMERICAN BAR ASS’N SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., at 1–2 (1973); see also Martig, *supra* note 9, at 1270 (commenting that one of the founders, Senator Ferry of Connecticut, cautioned that the convention method was not preferable because conventions are “dilatatory, expensive, and unwise”). In an admonishment that remains timely, and apropos to the question at hand regarding State Conventions, Senator Ferry warned:

If a convention is once assembled you cannot limit its power to the simple amendment which you are proposing to it. It may go on to amend your State constitution and to subvert the whole machinery of your State government, and there is no power in your State to stop it.

*Id.* at 1272. Martig also explained that “[i]n submitting the Twenty-first Amendment, Congress failed to provide any regulation for the calling and supervising of the conventions,

amendment, the lone and anomalous amendment ratified through the State-Convention mode of unfortunately offered little guidance.

There is no discernable reason that the States have never reached the required two-thirds mandated for Congress to call an Article V Convention.<sup>20</sup> Every state has at one time or another petitioned Congress to call an Article V Convention.<sup>21</sup> The states have been close to reaching the requisite number and continue, even today, to send resolutions calling for an Article V Constitutional Convention.<sup>22</sup> But, having come up short on every occasion, the State-Convention procedure has never been tested.

While it is likely that most, beyond legislators and constitutional scholars, are unaware of the State-Convention model, society must be prepared to address this contingency should it occur. Presuming, for present purposes, that at some point in the future the State-Convention method will be used, I must respectfully disagree with Stern in his assessment that sufficient safeguards currently exist. I also disagree that the primary controversy is whether a convention will be limited to considering only discretely proposed amendments.<sup>23</sup>

Instead, I perceive the controversy as being much broader in scope and the challenges ahead much more deeply imbedded in our constitutional fabric. I believe the controversy, at its core, concerns the distribution of power and decision-making. Who will be the final arbiter of controversies? Who will control the process, including the selection of convention members, and the limitation, if any, of the State-Convention agenda?<sup>24</sup> In the final analysis, I believe it imperative that proactive steps be taken now to prepare for what will surely confront us later, and, all too possibly, catch

and the matter of details was left to the states." *Id.* at 1274.

20. As one author has noted, the State-Convention model under Article V has become little more than a "protest clause." Dixon, *supra* note 16, at 944. In discussing Article V, Professor Dixon further posits that it is "understandable that the convention device has never been used; piecemeal constitutional revision, which is all the people have ever desired, is more expeditiously handled by congressional initiation." *Id.*

21. See *Amendment of the Constitution by the Convention Method Under Article V*, *supra* note 19, at 2.

22. See RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 76, 83 (1988); Ronnie Ellis, *State Lawmakers Call for a Constitutional Convention*, THE DAILY INDEPENDENT (Feb. 22, 2011), <http://dailyindependent.com/local/x62852616/State-lawmakers-call-for-constitutional-convention>; Christian Gomez, *Texas State Senate Calls for Con-Con*, NEW AMERICAN (Feb. 28, 2011, 8:52 AM), <http://www.thenewamerican.com/index.php/usnews/politics/6474-texas-state-senate-calls-for-con-con>.

23. See Stern, *supra* note 7, at 766–67.

24. See Manne, *supra* note 3, at 145. Manne writes that Madison himself worried about the procedural matters relating to Article V. *Id.* ("Madison did not object to the provision for a convention, but noted the problems that might arise over form, quorum, and procedural matters . . ."). *Id.*

us unaware. If we wait until the moment is upon us, I fear that the necessity of the moment will strike a very bad bargain.

### III. PAST PROPOSALS FOR PROACTIVE STEPS

*There are few articles of the Constitution as important to the continued viability of our government and nation as Article V.*<sup>25</sup>

These twenty-one words introduced one of the most thoughtful and prestigious studies to have evaluated the Article V State-Convention model.<sup>26</sup> As the states had come close on many occasions to forcing Congress to call for a State Convention, the American Bar Association ("ABA") in August 1973 proposed a series of procedures that would delimit the various powers of those individuals and entities most likely to be involved in the State-Convention process.<sup>27</sup> These ABA suggestions, which responded to U.S. Senator Sam Ervin's twice-unsuccessful Senate Bill addressing Article V, continue to provide a very tempered approach to dealing, in advance of necessity, with the State-Convention model.<sup>28</sup>

The ABA Committee was comprised of three judges,<sup>29</sup> a law school dean,<sup>30</sup> a law professor,<sup>31</sup> and various other well-respected lawyers.<sup>32</sup> The Committee formed and considered a variety of questions<sup>33</sup> that, I believe, remain open questions under any Article V analysis, including:

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25. *Amendment of the Constitution by the Convention Method Under Article V, supra* note 19, at 1.

26. *See id.*

27. *See id.* at 5-6.

28. *See id.* at 4. Senator Ervin's proposed bill is contained in Appendix A to the ABA study. *Id.* at 47-57. The ABA Committee went to great lengths to consider, and attempt to improve through their Study, the Ervin proposal. *See id.*

29. *See id.* at iii-iv. The Honorable Sarah T. Hughes, a United States District Judge in Dallas, Texas, oft remembered as the judge that swore in Lyndon B. Johnson on an airplane in Dallas, Texas, after the death of President John F. Kennedy, was the lone federal judicial representative. The Honorable William S. Thompson, a Superior Court Judge from the District of Columbia, and the Honorable C. Clyde Atkins, United States District Judge were the other judicial representatives. *See id.* at iii-iv, ix-x.

30. Dean Albert M. Sacks was the Dean of Harvard Law School at the time. *See id.* at iii.

31. Professor David Dow of the University of Nebraska College of Law was previously the Dean of Nebraska's College of Law. *See id.* at iii, ix-x.

32. The remaining panel members included: Warren Christopher, Esq., of Los Angeles, California; John D. Feerick, Esq., of New York, New York; Adrian M. Foley, Jr., Esq., of Newark, New Jersey; and, Samuel W. Witwer, Esq., of Chicago, Illinois. *See id.* at iii-iv.

33. *See id.* at ix.

- 1) If the legislatures of two-thirds of the states apply for a convention limited to a specific matter, must Congress call such a convention?;
- 2) If a convention is called, is the limitation binding on the convention?;
- 3) What constitutes a valid application which Congress must count and who is to judge its validity?;
- 4) What is the length of time in which applications for a convention will be counted?;
- 5) How much power does Congress have as to the scope of a convention? As to procedures such as the selection of delegates? As to the voting requirements at a convention? As to refusing to submit to the states for ratification the product of a convention?;
- 6) What are the roles of the President and state governors in the amending process?;
- 7) Can a state legislature withdraw an application for a convention once it has been submitted to Congress or rescind a previous ratification of a proposed amendment or a previous rejection?;
- 8) Are issues arising in the convention process justiciable?;
- 9) Who is to decide questions of ratification?<sup>34</sup>

These are just a few of the more pressing questions that will eventually require resolution when the Article V State-Convention method is finally utilized, if ever it is.<sup>35</sup> One thing is certain: there will be tension between the individual states and national government. If there had been consensus on an issue, it would have been addressed by the national government and, more precisely, by Congress without the need for intervention by two-thirds of the States. The purpose of including the State-Convention method in Article V is to provide the individual states with the power to amend when the national government refuses to act.<sup>36</sup> Thus, if we ever reach this point,

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34. *Id.* at 5.

35. See McCleskey, *supra* note 12, at 1003. In addition to the questions posed by the ABA Committee Study, Professor McCleskey notes the “many detailed questions of concern” that will inevitably arise under the State-Convention method, including:

May a governor exercise his veto power to block legislative ratification? Who decides how a [State] convention is to be created and organized? May a popular vote be substituted for ratification by legislative or convention action? . . . Are there limits on the subjects that may properly be dealt with by amendment? May Congress incorporate a time limit for consideration in a proposed amendment? Does the President have any formal role in the process of initiating proposals?

*Id.*

36. See Gunther, *supra* note 3, at 17. Professor Gunther explained that what he thought “[t]he framers had primarily in mind, then, was that the states should have an opportunity to initiate the constitutional revision process if Congress became unresponsive, arrogant and tyrannical.” *Id.* Professor Gunther later underscores this point by stating that “[i]f the state-initiated method for amending the Constitution was designed for anything, it was designed to minimize the role of Congress.” *Id.* at 23.



we should expect a fierce power struggle between the state and national governments.

Textually, Article V has all the necessary ingredients for a perfect constitutional storm.<sup>37</sup> The textual language implies a power-sharing arrangement, but the most important details—including the issue of judicial review—are notably absent.<sup>38</sup> Furthermore, depending on the issue serving as impetus for the State-Convention method, one cannot anticipate whether the federal courts will intervene or whether the executive will try to participate.<sup>39</sup> Senator Ervin, and subsequently Senator Helms, both attempted during the 1970s to exercise “jurisdiction stripping” of Article V assessments from any court, state or federal, in their proposed Senate bills.<sup>40</sup> It is unclear whether, even without a “jurisdiction-stripping” provision, any congressional attempt to proactively delineate the parameters of Article V would qualify as a non-justiciable political question.

Accordingly, we should follow the lead of the ABA Committee and Senators Ervin and Helms and recommend that some standards be enacted to safeguard the essence of Article V’s mandate.<sup>41</sup> The text, standing alone, is ambiguous and vulnerable to manipulation. Unlike Stern, I do not believe there are sufficient safeguards in place.

#### IV. TEXTUAL LIMITATIONS – AMBIGUITY IN SEARCH OF RESOLUTION

*The logical starting point in this endeavor is the text of Article V, for its deceptively plain language conceals an array of ambiguities.*<sup>42</sup>

Professor McCleskey accurately depicts Article V as “deceptively plain” and yet, simultaneously ambiguous.<sup>43</sup> The words seem clear enough, but the text is rife with uncertainty. Numerous unanswered questions remain. Madison himself recorded concern in his personal notes: How was a State Convention to be formed? By what rule, or rules, would decisions be reached? What would be the force of State Convention’s acts?<sup>44</sup>

37. See Manne, *supra* note 3, at 135. Manne predicts that “[a] general article V convention, more than any other event possible in our political system, has the potential for a complete reworking of the rules by which government exercises its power.” *Id.*

38. See *id.* (“For the constitutional law scholar, the consideration of the convention alternative is a foray into conjecture and speculation. The method has never been used, and the text, history and policy considerations relating to the convention method are all less than unambiguous”).

39. Cf. *Bush v. Gore*, 531 U.S. 98 (2000).

40. See Gunther, *supra* note 3, at 21–22. Professor Gunther described the “jurisdiction stripping” component of the “Ervin-Helms” proposals to be filled with “grave constitutional doubts.” *Id.* at 21.

41. See *id.*

42. McCleskey, *supra* note 12, at 1003.

43. *Id.*

44. See Manne, *supra* note 3, at 144–45.

Additionally, “[t]here was no mention of the scope of applications or conventions at any time during debate over the amendment process at the Philadelphia Convention. Contempor[aneous] commentary on these issues was noticeably lacking.”<sup>45</sup>

One thing is clear, however, from Article V’s text: the design suggests an equal opportunity between the state and national governments for the *proposing* of constitutional amendments.<sup>46</sup> Beyond that, however, there is little textual guidance provided.<sup>47</sup> Congress, ultimately, is a necessary participant in any State-Convention process on at least two levels: first, in determining that the criteria have been satisfied requiring the calling of a Constitutional Convention and, second, in determining whether any proposals deemed to conform with Article V should be submitted to ratification by state legislative vote or further convention.<sup>48</sup>

These are the two textual roles that the national Congress must fill. However, as the ABA Committee appreciates, there are innumerable opportunities for mischief in filling those textually commanded roles.<sup>49</sup> The best occasion for curtailing any politically or constitutionally damaging machinations is in advance of any crisis.<sup>50</sup> If we wait until the crisis is upon us, the various players, both local and national, will be motivated more by the power struggle at hand and less by the constitutional mandates envisioned under Article V.

Stern suggests that while “the text is silent as to what amendments the convention may propose” among other details, we can simply turn to logic to infer solutions.<sup>51</sup> He deftly explains that the textual language provides clues, or expectations, as to what should occur upon the calling of an Article V Convention.<sup>52</sup> My concern is that Stern proffers only one interpretation of language that is anything but historically clear.<sup>53</sup> For each

45. *Id.* at 146.

46. *See* Martig, *supra* note 9, at 1258–61.

47. *See* Gunther, *supra* note 3, at 23 (“Congress was only given two responsibilities under [the State Convention] portion of Article V” and, he believed, “that, properly construed, these are extremely narrow responsibilities.”).

48. *See id.*

49. *See id.*

50. *See id.* at 24 (calling on Congress to address these issues that are “long overdue”). Professor Gunther further opines that: “If there is merit to my tale of confusion and uncertainty, Congress surely owes it to the country to consider the differing views about Article V and to clarify the misimpressions under which so many state legislatures may have [already] acted.” *Id.*

51. Stern, *supra* note 7, at 772.

52. *See id.* at 774–75 (discussing Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 *YALE L.J.* 677, 738, 740 (1993)).

53. *See* Manne, *supra* note 3, at 148 (observing that “[t]he most striking thing about this scholarly analysis of history, frequently couched in terms of the ‘intent of the framers’ . . . is not that there should be such irreconcilable disagreement, but that there should be this

article that suggests that an Article V State Convention poses no threat to our constitutional integrity and that the “solutions” to such Convention are discernable, there is another warning of the perils inherent in the State-Convention model.<sup>54</sup>

While I will refrain from entering the debate as to whether the calling of an Article V State Convention is prudential or risky, I do believe that pressing forward without some textual resolution or instruction, such as a legislative mandate or judicial pronouncement, will yield a troubled State-Convention process. The ABA Committee’s Study referenced above provides an exceptional opportunity to revisit this longstanding issue and work toward implementable solutions.<sup>55</sup> The debates that continue have not provided tangible solutions and I am not convinced that these writings clearly define the outstanding issues. Instead, our writings are academic, in the purest and most literal sense. They are predictive. They are historical. They are even entertaining.<sup>56</sup> While these writings might be influential to those ultimately called upon to resolve the Article V issue, I would welcome a change of focus from debating what we are certain will occur, based on textual expectations or interpretations, to a call for action demanding counsel as to how to conduct ourselves when the State-Convention moment is finally upon us.<sup>57</sup>

The text itself is neither dispositive nor necessarily informative in the constitutional sense. If the devil is in the details, then it is little wonder that the text of Article V bedevils all who strive to distill its true meaning and predict its future application.

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proliferation of [opposing] statements of what history ‘clearly demonstrates’ at all”).

54. See *id.* at 146–47 (cataloguing the varying positions of scholars).

55. But see Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 189 (1972) (calling the development of proactive legislation similar to the failed bills advanced by Senators Ervin and Helms in the 1970s as “a national calamity”).

56. See Manne, *supra* note 3, at 149–56. Perhaps the most entertaining presentation of the Article V quagmire is Manne’s “Play in One Act” entitled “The Second Coming of Thomas Jefferson.” In this play, set forth within his larger article, Manne posits a ghostly meeting between Professor Charles L. Black and Thomas Jefferson to discern the deeper meanings of Article V.

57. But see Black, *supra* note 55, at 194. Admittedly, Professor Black takes the exact opposite position. Professor Black would counsel against any proactive legislation noting that “[i]t is most unwise to try to settle such questions at a time when national attention is not and cannot be keenly focused upon them, and intense national debate be thus generated.” *Id.* Unlike the approach recommended in the current article, Black would rather wait for the crisis, constitutional though it may become, and allow the attendant focused debate and national attention to moderate behavior. My thesis differs in that I fear such a situation would likely yield emotional solutions as opposed to rational decisions devoid of emotion.

## V. CURRENT “SAFEGUARDS” – SUPREME CONFUSION?

*The question of justiciability pervades the discussion of all the above issues. How these controversies are ultimately resolved may depend more on who decides them than on the textual considerations just discussed or the historical and policy considerations that follow. Article V is silent on the issue of justiciability. Absent a clear grant or denial of judicial review, the question of justiciability is, by its nature, a policy issue. One should note that, in theory at least, each Article V question presents a separate issue as to justiciability; some might be held justiciable while others might not.*<sup>58</sup>

Issues surrounding Article V and the State-Convention method are not completely foreign to the United States Supreme Court. In fact, former Chief Justice Rehnquist provided tangential insight into the Article V process as recently as 1989.<sup>59</sup> As we move toward an eventual confrontation with Article V’s State-Convention model, we must be forward thinking in our desire to add clarity to the process. Rather than remain comfortable debating the potential breadth of any State Convention, scholars and legislators should join forces to provide a solution to what remains an obvious quandary. The guidance provided by the Supreme Court is neither definitive nor clear and only adds to the lingering confusion. Will this be an area where, ultimately, the Court will “say what the law is?”<sup>60</sup>

In the 1920s, the Supreme Court had two occasions to decipher Article V’s amendment process. In 1920, the Court presented a thorough interpretation of Article V’s ratification provisions in *Hawke v. Smith*.<sup>61</sup> The discrete question presented was whether the state of Ohio could, through State Constitutional provision, mandate a voter referendum for ratification purposes.<sup>62</sup> In finding the voter ratification method in conflict with Article V, Justice Day explained that “[t]he act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.”<sup>63</sup> The Court also reminded, “[i]t is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.”<sup>64</sup>

58. Manne, *supra* note 3, at 141–42.

59. See Uhler v. Am. Fed. of Labor-Cong. of Indus. Org., 468 U.S. 1310, 1312 (1989).

60. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803). While *Marbury* certainly established the notion of judicial review, other principles, including the concept of justiciability and the political question doctrine, often operate to curtail the power of judicial review.

61. See generally *Hawke v. Smith*, 253 U.S. 221 (1920).

62. See *id.* at 231.

63. *Id.* at 230.

64. *Id.* at 227.

Accordingly, the Court struck down the Ohio attempt at voter ratification finding that the Framers did not intend for the people, acting individually as such, to play any role in Article V's ratification process.<sup>65</sup> Rather,

The fifth article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the Legislatures of three-fourths of the states, or conventions in a like number of states. The framers . . . might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article [on this point] is plain, and admits of no doubt in its interpretation.<sup>66</sup>

Thus, the first case directly addressing the role of the people in Article V found that the historical meaning of "legislatures" was clear.<sup>67</sup> Legislatures, when used in the Constitution, mean those elected officials that serve as representatives of the people.<sup>68</sup> As Justice Day reminds, when the framers "intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose."<sup>69</sup>

What does *Hawke* add to this discussion? The Court had no trouble reaching a merits-based decision regarding Article V. In fact, the Court was willing to tell "the people" that their legislatures could, in fact, bind them to decisions without requiring any direct input from their citizens. Ohioans, as a people, were displeased that their legislature was capable of binding them to the Eighteenth Amendment. But, *Hawke* had little difficulty sanctioning the legislative ratification process.<sup>70</sup> Article V's ratification provisions were deemed to be clear, unambiguous and, most importantly, to exclude any role of the people, individually or directly.<sup>71</sup> We can interpret *Hawke* as allowing the Court to resolve Article V power struggles between state citizens and their state legislative representatives. Further, *Hawke* underscores that at least some provisions within Article V are subject to judicial review.

Two years later, the Court addressed the question of whether the Nineteenth Amendment had become part of the federal Constitution in

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65. *See id.*

66. *Id.* (internal citation omitted).

67. *See id.*

68. *See id.* at 227.

69. *Id.* at 228.

70. *See id.*

71. *See id.*

*Leser v. Garnett*.<sup>72</sup> Maryland sought to disqualify Cecilia Streett Waters and Mary D. Randolph from exercising their right of suffrage recently guaranteed by the Nineteenth Amendment.<sup>73</sup> In presenting its case to the Court, Maryland first suggested that the substantive requirements of the Nineteenth Amendment, giving women the right to vote, would, “if made without the State’s consent, destroy[] its autonomy as a political body.”<sup>74</sup> Justice Brandeis and the Court reminded Maryland that its previous refusal to ratify the Fifteenth Amendment, providing black males the right to vote, also did not prevent that Amendment from taking effect in every state, including Maryland.<sup>75</sup> Maryland’s second challenge, like that presented in *Hawke*, was that because of numerous state constitutional prohibitions, state legislatures are prohibited from acting for the people in ratifying amendments to the Constitution.<sup>76</sup> Justice Brandeis, much like Justice Day, reminded that:

[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitation sought to be imposed by the people of a state.<sup>77</sup>

Hence, *Leser*, like *Hawke*, reminds that the Supreme Court may invoke its power to enforce Article V’s provisions on the people of an objecting state. A merits-based review of Article V is certainly possible for any State-Convention question. *Leser* and *Hawke* also appear to be cases upholding Article V’s structural components. If a reviewing court finds that questions relating to the State-Convention model are structural, or that the Framers’ intent on the particular question is clearly discernable, there is little doubt that the Court has the power, precedentially as well as jurisprudentially, to resolve the controversy. However, neither *Leser* nor *Hawke* lends any insight into a situation where the question is not as clearly presented or as clearly defined.

The most troubling case casting its shadow upon Article V is *Coleman v. Miller*.<sup>78</sup> *Coleman* considered the Supreme Court’s ability to intervene in the amendment process under Article V where Congress had acted.<sup>79</sup> In reaching its decision that the issue of whether a State’s ratification of a

72. See 258 U.S. 130, 136 (1922).

73. See *id.* at 135–36.

74. *Id.* at 136.

75. See *id.* “That the Fifteenth is valid, although rejected by six states including Maryland, has been recognized and acted on for half a century.” *Id.* (citations omitted).

76. See *id.* at 136–37.

77. *Id.* at 137.

78. 307 U.S. 433 (1939).

79. See *id.*

Congressionally proposed amendment<sup>80</sup> was valid, despite an individual state's initial rejection and subsequent ratification, the Court announced that:

[W]e think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications.<sup>81</sup>

While the Court refused to rule directly on whether the various Article V issues constituted non-justiciable political questions, having been divided on the issue,<sup>82</sup> the decision is replete with language deferring to the national Congress.<sup>83</sup> Four Justices agreed that the issues presented were non-justiciable political questions, but failed to command a majority view.<sup>84</sup> Thus, there is uncertainty as to whether a modern court would be receptive to resolving an Article V challenge where the claim involves the role of Congress, like that addressed in *Coleman*,<sup>85</sup> or would find that such question was a non-justiciable political question. While *Leser* and *Hawke* contemplate an active decisional role for the Court,<sup>86</sup> *Coleman* creates an element of doubt in the equation.<sup>87</sup>

Over fifty years later, Chief Justice Rehnquist, sitting as Circuit Justice, refused to issue a stay intervening in the California controversy as to

80. *Coleman* involved the State of Kansas' initial rejection and subsequent ratification of the Child Labor Amendment. *Id.* at 435-36.

81. *Id.* at 456.

82. *See id.* at 447 ("Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion on that point.").

83. *Id.* at 450. The Court, deferring completing to the national Congress for resolution of the ratification decision opined:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

*Id.*

84. *See Uhler v. Am. Fed. of Labor-Congress of Indust. Orgs.*, 468 U.S. 1310, 1312 (1989) ("[F]our Justices of the Court adopted the position that the Court lacked jurisdiction to rule on questions arising in connection with the ratification of a constitutional amendment because all such questions were 'political' in nature. But that position did not command a majority in *Coleman* . . .").

85. *See Coleman*, 397 U.S. at 433.

86. *See Lesser v. Garnett*, 258 U.S. 130 (1922); *Hawke v. Smith*, 253 U.S. 221 (1920).

87. *Coleman*, 307 U.S. at 433.

whether the voters could require their state legislators to join in the call for an Article V State Convention.<sup>88</sup> The basis for the refusal, set forth in a brief three-page opinion, was that California had provided an independent and adequate state ground for reaching its decision and, therefore, the Supreme Court should not intercede.<sup>89</sup> Justice Rehnquist did, however, provide some illuminating dicta as to the political question doctrine, predicting that neither state nor federal courts would be completely powerless in addressing all Article V issues.<sup>90</sup>

Four Supreme Court opinions, spanning nearly 100 years, have yielded little in the way of resolving the potential Article V controversies that the State-Convention model presents.<sup>91</sup> In fact, most of the questions presented in the ABA Committee Study were not addressed by the Court, as the two most recent decisions were resolved without clearly delineating the role of the states, Congress, or, equally important, the judiciary, in any forthcoming Article V State-Convention process.<sup>92</sup> The soft doctrines of justiciability and political question provide the Court with an opportunity to remove itself from any particular and divisive issue.<sup>93</sup> Precisely because these doctrines are “soft” and malleable, one cannot predict with much certainty that the Court will rebuff, or receive, any particular challenger if the Court deems intervention necessary or the Constitutional issue paramount.<sup>94</sup> Thus, relying on the Court as an arbiter in this arena is speculative and risky.<sup>95</sup> With no clarity in reach, Article V presents the opportunity for Supreme confusion.<sup>96</sup>

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88. See *Uhler*, 468 U.S. at 1312.

89. See *id.* at 1311.

90. See *id.* at 1312.

91. See *Manne*, *supra* note 3, at 157. “The resolution of the scope issue, and other article V questions as well, may hinge on who decides them.” *Id.*

92. The role of the President under Article V was narrowed by the Supreme Court in *Hollingsworth v. Virginia*, 3 U.S. 378 (1798). The *Hollingsworth* holding was expanded from its facts by the Court in *Hawke* which exclaimed that “[a]t an early day this court settled that the submission of a constitutional amendment did not require the action of the President.” *Hawke v. Smith*, 253 U.S. 221, 229 (1920).

93. Of course, the mere existence of these doctrines does not mean the Court will invoke them. See *Bush v. Gore*, 531 U.S. 98 (2000) (where the Court addressed the Florida vote controversy without ever addressing the issues of standing, ripeness, political question, or adequate and independent state grounds).

94. See *id.*

95. The state courts, however, have played a more vibrant role in interpreting Article V’s parameters. In 1996, the Oklahoma Supreme Court found that the call for a convention “must come from the Legislature acting freely and without restriction or limitation, [and not directly] from the people through their initiative power.” See *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996). In doing so, the Oklahoma Supreme Court struck down the voter-driven initiative to instruct the Oklahoma legislature to call for a federal constitutional convention. *Id.* at 191. The case involved a proposed initiative that would have instructed the legislature to call for a national constitutional convention addressing legislative term limits.



## V. CONCLUSION

*Everything I have said constitutes conjecture about the past and advice about the future.*<sup>97</sup>

Professor Gerald Gunther uttered these words delivering a speech in 1979.<sup>98</sup> The sentiments, though not my own, are as potent a closing vehicle for me as they were for Professor Gunther over thirty years ago. Humility requires that I confess my writing, though well intended and, hopefully, equally well researched, is as speculative as any other on the topic of Article V. Rather than press forward in the certainty that any entity will adopt my interpretation on Article V, I can only hope to give advice as to how future actors should address the topic.

Much like Professor Gunther and the ABA Committee, I urge Congress to be proactive. Legislation defining the parameters of an Article V State-Convention scenario should be considered now, well in advance of any need or crisis mandating a particular response to a particular topic.<sup>99</sup> The worst-case scenario, in my opinion, is not finding ourselves without an answer as to whether any State Convention under Article V will be limited or unlimited, but rather finding ourselves face to face with an Article V State Convention without procedures specifying the roles of the various players. The value in proactively establishing convention procedures is that such advance directives should eliminate tying any power struggle with a particular topic, such as abortion, school prayer, or a federal balanced budget amendment. Procedures enacted in a hostile environment will be influenced as much by emotion as by reason.

The template needed for such proactive legislation is already in draft form, though substantial reconsideration must be given to the failed bills of Senators Ervin and Helms.<sup>100</sup> Therefore, I would recommend that Congress create an Article V sub-committee, with equal House and Senate

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The Supreme Court of Arkansas and the United States District Court of Maine followed this same approach in 1996 and 1997, respectively. *See* *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *League of Women Voters of Me. v. Gwadosky*, 966 F. Supp. 52 (Me. 1997).

96. *See* *Manne*, *supra* note 3, at 157 (“[A]ny argument regarding justiciability, no matter how well reasoned, can be made instantly wrong by five Justices.”).

97. *Gunther*, *supra* note 3, at 25.

98. *Id.* at 1. Professor Gunther, who at the time was teaching at Stanford University’s Law School, delivered the John A. Sibley Lecture in Law at the University of Georgia School of Law on May 24, 1979, and his comments were ultimately set forth in an essay format by the Law Review. *Id.*

99. *But see* *Black*, *supra* note 55, at 195 (“These problems can and should be solved when they arrive, by the Congress empowered to solve them, and on the basis of all the factors now unknowable and then existing.”). *Black*’s approach assumes a fact that this author neither concedes nor embraces: that the parameters of Article V will be for Congress, rather than the courts, state legislatures or executive, to decide.

100. *See* *Gunther*, *supra* note 3, at 21.

membership, to work in concert with the American Law Institute and the American Bar Association to create balanced and moderate procedures that would govern any Article V State Convention. Much like the previous ABA Committee,<sup>101</sup> a modern committee should include jurists, academics, and lawyers of the highest quality and experience. Additionally, the American Law Institute has proven itself adept at facing and proposing considered resolution for tough legal issues.<sup>102</sup>

Space prevents me from setting forth a detailed proposal of what items should be considered or how such sub-committee would function. But, then again, perhaps the details are best left to a sub-committee once created. While I would not confine any potential Article V sub-committee to a discrete series of questions for resolution, I would be remiss if I did not suggest that the 1973 ABA Committee's Study<sup>103</sup> provides an excellent template of where to begin. The consideration of those questions evaluated by the ABA Committee in 1973,<sup>104</sup> all still being unresolved, provides an excellent starting place.

In the end, I confess to caring less about the detail of what items are considered in any particular order. Instead, I am more concerned that a deliberate, proactive consideration of the relevant procedural issues takes place well in advance of any Article V State Convention. The importance of having sound procedures in place prior to the invocation of Article V assures all that the power struggle between state and national governments the framers sought to avoid actually can be avoided. Despite Stern's confidence in our government to adequately confront an Article V State Convention, I fear any bargain borne out of necessity.

The time for action is now. For if there is one truism of constitutional law it is that the textual vacuum of a constitutional provision will be filled by something.<sup>105</sup> I harbor grave concerns about not only *what* will fill the Article V void, but also *who* will ultimately make that decision.

Benjamin Franklin was a very wise man. Necessity, as we know, never made a good bargain.<sup>106</sup> Let us avoid that necessity and strive to fill the Article V void now. If we wait, having literally had centuries to resolve these issues, we deserve the "bargain" that befalls us.

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101. See *Amendment of the Constitution by the Convention Method Under Article V*, *supra* note 19, at 1.

102. See *id.*

103. See *id.*

104. See *id.*

105. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316 (1819).

106. FRANKLIN, *supra* note 1, at 10.

