

A RESPONSE TO JUSTICE THOMAS BRENNAN'S REMARKS AT THE THOMAS M. COOLEY LAW SCHOOL ARTICLE V SYMPOSIUM

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Justice Brennan's presentation at the Cooley Law School Symposium announced the founding of Convention USA. With his enthusiastic endorsement, Convention USA has established a nationally accessible website by which the people may join and subscribe to petitions calling for a new constitutional convention.¹

The success of this grassroots movement, he suggests, may well put appropriate democratic pressure on Congress to convene a new constitutional convention as envisioned by Article V, pursuant to which new amendments to the Constitution may thereby be proposed. When new amendments are adopted by the called convention and forwarded to Congress, Congress would, in turn, submit any such proposed amendments for ratification by the states (either the respective state legislatures thereof or conventions held therein), and such amendments as might then achieve ratification by three-fourths of the states, within such time period as specified by Congress, would become part of the Constitution.²

Each of us, invited to reflect and comment on Justice Brennan's spirited presentation, did so either by joining the occasion of his original presentation or, for those like myself—unable to attend—by submitting subsequent remarks. My own remarks, acting on sage advice attributed to Winston Churchill, will be brief.³

Even as reflected in Justice Brennan's opening address, four ways of amending the Constitution are provided in Article V:

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

1. CONVENTION USA, <http://www.conventionusa.org> (last visited June 24, 2011).

2. *Id.*

3. Winston Churchill provided the following advice to speakers: "Be clear. Be concise. Be seated." Governor Mark Warner, *Wake Forest University 2006 Commencement Speech*, WAKE FOREST UNIVERSITY, <http://www.wfu.edu/wfunews/2006/051506warner.html> (last visited June 25, 2011).

fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress⁴

Thus, there are *two* ways by which amendments may be proposed, namely: (1) by Congress itself or (2) by a convention called by Congress pursuant to applications submitted by thirty-four state legislatures (two-thirds of fifty).⁵ And likewise, *two* ways in which proposed amendments may be ratified, namely: (1) by the legislatures of thirty-eight states (three-fourths of fifty) or (2) by conventions in thirty-eight states (again, three-fourths of fifty), *whichever route Congress may direct*.⁶ Or, if you like, *four permutations in all*:

(1) as proposed by two-thirds of both Houses of Congress and as ratified by thirty-eight state legislatures;

(2) as proposed by two-thirds of both Houses of Congress and as ratified by thirty-eight state conventions;

(3) as proposed by a called convention and as ratified by thirty-eight legislatures; and

(4) as proposed by a called convention and as ratified by conventions in thirty-eight states.⁷

As the reader of this Comment (or, indeed, anyone who attended Justice Brennan's able lecture) may already know, aside from the Philadelphia Convention of 1787—proposing a new constitution to displace the 1781 Articles of Confederation—all twenty-seven amendments to the Constitution, including the Bill of Rights, have proceeded *solely* as proposed by Congress.⁸ None *ever* proceeded from a called convention; indeed, not since the summer of 1787 has any such convention been convoked in point of fact.⁹

4. U.S. CONST. art. V.

5. *Id.*

6. *Id.*

7. *See id.*

8. Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 10 (2000).

9. Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment and How to Fix Them*, 96 VA. L. REV. 1509, 1512–14 (2010) (discussing the need for a more effective procedure for allowing the states to call for a national convention to amend the Constitution).

As some readers may know, too, the Twenty-first Amendment is the lone exception, not in the *origin* of its proposal (by Congress), however, but in the *manner* of its ratification (by conventions assembled in the states).¹⁰ Again, however, with the exception of the *original* Philadelphia Convention of 1787, there has never been another constitutional convention as such;¹¹ so too, therefore, no amendment has ever been proposed in this particular way.

No doubt, if just because this is so, there continues to be room for disagreement respecting the agenda of such a convention. No such convention having yet been successfully sought by the application of state legislatures,¹² Congress has simply had no occasion even to declare:

- (1) where it might be convened;
- (2) how its delegates might be chosen;
- (3) whether votes therein would be as in the Convention of 1787 (with each state having one vote—albeit several delegates)¹³ or, perhaps, each to have the same number of votes as in the Electoral College (namely, the sum of its House and Senate members);¹⁴
- (4) the rules to control its procedures; or
- (5) its agenda (e.g., whether the convention could determine it, whether Congress might prescribe it in

10. The Twenty-first Amendment repealed the Eighteenth Amendment (the prohibition amendment) and also ceded power to ban or permit “intoxicating liquors,” as each state might determine. U.S. CONST. amend. XXI, §§ 1–2. It bypassed the legislatures (in favor of state conventions) and, promptly approved in the requisite number, was published, “as ratified, December 5, 1933.” *Id.*; *Granholm v. Heald*, 544 U.S. 460, 497 (2005) (Thomas, J., dissenting); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 402–03.

11. James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1015 (2007) (discussing the Philadelphia Convention of 1787, the only convention, as a guide in determining the procedures during a convention to amend the Constitution).

12. See William Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1304–05 (1978).

13. See generally Rappaport, *supra* note 9, at 1528, 1559–72.

14. 3 U.S.C. § 3 (2006) (“The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled . . .”).

advance, or whether the agenda might be set as prescribed in the applications of the insistent thirty-four states, which Congress is then obliged to respect and to proceed accordingly, neither more nor less).

This latter question is the one that draws my Comment. As I have suggested in two earlier pieces,¹⁵ I have no doubt that, in the first instance, the scope of the convention agenda may be stipulated in the respective applications triggering the obligation of Congress to call the convention, consistent with those applications, neither more nor less. Assuming that those applications call for a convention solely to consider a particular subject, there to be discussed, debated, and then voted up or down, for example, that, indeed, shall exactly fix the occasion and agenda.

Should the called convention nevertheless presume to exceed the agenda as thus prescribed (and, say, presume to propose amendments not within that prescribed agenda). In my view, Congress would have no obligation to accept any such *ultra vires*¹⁶ proposal for timely submission to the states (whether to the legislatures thereof or to conventions assembled therein). If, indeed, those assembled in the called convention presume to exceed the only subject matter upon which its deliberation and disposition have been sought, then the convention, having no authority to conduct itself in this *ultra vires* fashion, may not complain that Congress, recognizing that fact, declined to forward its errant proposals. Indeed, to do otherwise, i.e., for Congress instead to treat such *unauthorized* proposals as though *authorized*, would itself be *ultra vires* of its own authority and in disregard of the provisions of Article V.

To put the same matter differently, in brief, the nature of the state-called convention is properly determined by the express wishes of those who asked for it, neither more nor less. If the legislatures of two-thirds of the several states wish to put the whole of the Constitution at risk, indeed, I do not doubt that Article V permits them to do so through suitable framed petitions and by submitting applications requesting a convention, which expressly empowers them to do exactly that, i.e., an “unlimited” convention as such. Similarly, I do not doubt that a state or several states, in any given fiscal year, may apply to Congress to call a convention both to resolve a suitable amendment to that end, as well as to consider such additional proposals as any other participating state may submit for debate and

15. Van Alstyne, *Unlimited Conventions*, *supra* note 12; William Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985 (1979).

16. *Ultra vires* is defined as “[u]nauthorized; beyond the scope of power allowed or granted by . . . law” BLACK’S LAW DICTIONARY 1662 (9th ed. 2009).

disposition. And correspondingly, to the extent that a given subject (e.g., whether one concerned with a balanced budget or, say, with term limits for federal judges) is the sole concern sufficient to produce applications from states to require that Congress shall call a convention in which that particular subject *alone* would be the agenda, it is clear to my own satisfaction, as I hope it may be to the reader's as well, that this choice is itself entirely consistent with the express provisions of Article V.

In short, it is emphatically not the case that the whole of the Constitution needs to be put at risk merely to seek an amendment of a particular sort in a convention called at the insistence of appropriate application by thirty-four states. Contrary representations, in my view, are frankly founded in hostility to or fear of (or both) the *most expected* uses of the convention method for proposing amendments; they frankly proceed, that is, principally from a political animus not at all reflected in Article V itself. Like those who may errantly believe that the power to declare war, as vested in Congress, means that we shall not engage in war at all unless it be an "unlimited" war,¹⁷ there are some that choose to view the amendment prerogatives described (and circumscribed) in Article V in the same manner. So opposed are they to the alternative means by which an amendment may be forthcoming as thus to dispose them to declaim that "unless one is willing to put the entirety of the Constitution at risk," no convention can be called at all!¹⁸

I find *no* support for this notion pursuant to Article V, however, and even now frankly believe it roughly of the same degree of credibility as those who would claim that World War II was actually started by, say, the

17. An unlimited war meaning a war without limitation on the character of weaponry, including nuclear bombs, lethal gases, and other manner of biological agents; the geography within which it may proceed; or the objectives sought. See generally Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 447–50 (2011) (providing discussion on what *limited* war means).

18. See, e.g., Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979); Walter E. Dellinger, *Who Controls a Constitutional Convention?—A Response*, 1979 DUKE L.J. 999 (1979); Bruce Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8. See generally Walker Hanson, *The States' Power to Effectuate Constitutional Change: Is Congress Currently Required to Convene a National Convention for the Proposing of Amendments to the United States Constitution?*, 9 GEO. J.L. & PUB. POL'Y 245 (2011).

Principality of Liechtenstein, rather than by Germany.¹⁹ But of course, this much is also true: after all else has been said and done, whether in my own musings or that of others, the reader must, of course, consider this matter for herself or himself, as I would urge equally here as in every instance, so to understand our Constitution, such as it is, including the parts that provide for such modifications that even now seem worthy of one's particular support.

In the meantime, I abide in optimism that the reader's independence of mind and personal, clear-eyed research will but very substantially confirm the view I have succinctly restated here. And so, I also now conclude, swiftly, to "be seated" once again—consistent with common sense (and with Winston Churchill's very sage advice).

19. To the contrary, Liechtenstein actually declared its neutrality during World War II. See *Background Note: Liechtenstein*, U.S. DEP'T OF STATE (May 31, 2011), <http://www.state.gov/r/pa/ei/bgn/9403.htm>.