GEORGETOWN LAW

Eccentric Claim that Congress Must Call an Article V Convention Cannot Revive Failing Effort

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Several groups affiliated with the American Legislative Exchange Council (ALEC) have been working for over a decade to compel Congress to call a convention for purposes of amending of the U.S. Constitution. The most prominent of these efforts proposes to add a balanced budget amendment to the Constitution, although once called a convention could open up any parts of the Constitution to change. Despite spending vast sums of money on this effort, these groups have fallen short. Even by their own, highly tendentious, count, only twenty-seven states currently have live applications for an Article V convention on a balanced budget amendment. Article V directs Congress to call a convention on the applications of two-thirds of the states, which at present would be thirty-four. Moreover, the momentum is in the other direction: over the past few years, five states (Colorado, Delaware, Maryland, Nevada, and New Mexico) have rescinded Article V applications submitted decades earlier.

Rather than accept defeat, convention proponents have been advancing increasingly eccentric theories for why Congress must call a convention notwithstanding their failure to convince enough states. At one point, their chief legal strategist opined that Congress should refuse to recognize states' rescissions of old applications because those states made a "mistake" in not accepting pro-convention arguments.[1] They apparently failed to see the irony of supposed states' rights campaigners asking Congress to determine that states are incapable of making their own decisions.

Convention proponents also argued that they could reach the thirty-four-state threshold by combining applications seeking a convention to promulgate a balanced budget amendment with much older applications for different purposes: Oregon and Washington's early 20th century applications seeking the popular election of senators, Illinois, Kentucky and New Jersey's 1861 applications seeking to avert the Civil War, and New York's 1789 application seeking to add a Bill of Rights to the U.S. Constitution.[2] Even with these six "generic" applications and the twenty-seven balanced budget amendment applications they claimed they had, proponents would still be short of the threshold, but they hoped they could turn one more state around. A key pro-convention strategist argued that aggregating unrelated applications was the only way they could succeed as they were failing to persuade state legislators.[3]

This unprincipled aggregation strategy also seems to be falling apart. In December, the New Jersey Legislature recently rescinded all the State's previous Article V applications, including the 1861 Civil War application that convention proponents wanted to count.

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[1] Rob Natelson, *Are recent "rescissions" of Article V applications valid?*, INDEPENDENCE INST. (Aug. 13, 2018), https://i2i.org/are-recent-rescissions-of-article-v-applications-valid/.
[2] Rob Natelson, *Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?*, FEDERALIST SOC. REV. (May 9, 2018), https://fedsoc.org/commentary/publications/counting-to-two-thirds-how-close-are-we-to-a-convention-for-proposing-amendments-to-the-constitution.
[3] Paul Gardiner, *A New Strategy for the Article V Convention of States Movement*, HUNT FOR LIBERTY (Feb. 13, 2020), https://huntforliberty.com/a-convention-strategy/#_edn6.

Apparently concluding that at no point in the future will they have a remotely tenable claim to have reached the two-thirds threshold, convention proponents are now arguing that the two-thirds threshold was met more than forty years in the past. By their telling, Nevada's application seeking a convention to propose a balanced budget amendment in 1979 was the thirty-fourth state to request a convention, compelling Congress to call a convention. They also argue that the many state rescissions enacted over the past four decades are irrelevant because the threshold was met in 1979. Thus, in their view it would seem that every Member of Congress to have served over more than forty years has violated his or her oath of office. Each major party has had complete control of Congress for many years over that period yet neither took any steps toward calling an Article V convention. None of the eight U.S. presidents or numerous attorneys general to serve over that period have suggested that Congress had this obligation.

Precedent certainly does not support the convention proponents' claim. If one applied their eccentric method of counting, Congress would have been obliged to call an Article V convention in 1911. In that year, Maine applied to Congress for calling a convention to achieve direct election of United States senators. That made 29 states, two short of the two-thirds required under Article V. (At the time, the country had 46 states.) But the proponents would count New York's 1789 application seeking a convention to draft a Bill of Rights. And by similar reasoning, they would count Georgia's and South Carolina's 1832 applications seeking to address some of the disputes that ultimately led to the Civil War.

Congress, of course, did not call an Article V convention in 1911.[4] Exercising the power Article V delegates to it, Congress apparently concluded that the two-thirds threshold had not been met because the applications from New York, Georgia, and South Carolina were too old and reflected entirely different political concerns than those driving the 29 states currently seeking a convention. No serious argument was made, then or since, that Congress violated its obligations under the Constitution. The federal courts did not become involved because the Supreme Court has held that amending the Constitution is a political question outside the judicial competence.

Even if the proponents' eccentric theory was somehow plausible, it still would not justify ignoring states' subsequent rescissions (roughly eighteen between 1988 and 2010 plus the additional six recently). Proponents are fond of invoking Contract law, and under basic Contract an offer may be withdrawn at any time prior to its acceptance. Because Congress did not accept states' applications by calling a convention under Article V, states remained free to reconsider their applications – as many of them did.

Most fundamentally, it is simply too late to raise concerns about the legitimacy of Congress's exercise of its delegated constitutional powers more than four decades after the fact. The equitable doctrine of laches precludes granting relief to parties that have "slept on their rights" for an unreasonable period of time. Although the U.S. Constitution was adopted and ratified contrary to the procedures every state agreed to in the Articles of Confederation, it is widely understood that the time to raise those concerns has long since passed. Similarly, no one today would give a hearing to complaints about the ratification of the Thirteenth, Fourteenth, or Fifteenth Amendments. The materials convention proponents are relying on have been publicly available throughout this period. The only thing that has not previously been available is the proponents' eccentric aggregation theory – a theory born out of their failure to convince enough state legislatures of the wisdom of their proposal.

This latest desperate attempt to justify calling an Article V convention is not remotely plausible on its own terms. It is, however, revealing as to the true character of the pro-convention organizations. First, their convenient abandonment of their long-asserted position that all applications must be on a single

[4] New Mexico and Arizona joined the Union in early 1912, raising the two-thirds threshold to 32 states, but counting the old New York, Georgia, and South Carolina applications would still have met that threshold if anyone believed it was proper.

subject shows that none of the assurances they provide about the safety of an Article V convention may be trusted. Second, once they ask Congress to aggregate wildly disparate applications, the emptiness of their argument that a convention would somehow be limited in scope by the content of those applications becomes apparent. And third, their suggestion that the changes a convention might propose be ratified on their November 2022 ballot raises questions about how seriously they are about following Article V's ratification process. Thus, no one should assume that the ratification process will protect us from extreme or irresponsible proposals from a convention.

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