



CONVENTION OF STATES

The States Control the Article V Process

Robert Kelly, J.D.

Staff Counsel, Citizens for Self-Governance

Opponents of an Article V convention have been repeatedly defeated in their claims that an Article V convention would “run away.”¹ The Framers of our Constitution were wiser than that, and placed numerous checks and balances to ensure the safety of such a convention. Opponents of a convention have since rallied around a new set of arguments claiming that Congress, not the states, will control any Article V convention. Robert Brown’s May 15th article entitled “The Article V Convention as Defined by Article V” is typical of the genre. This argument fares no better than the last. Like the runaway convention argument, it ignores history and substitutes fearful speculation for known fact.

Claims that Congress controls a convention show a basic ignorance of how laws, and particularly constitutions, are interpreted. For instance, Mr. Brown repeatedly asserts that “the plain text and clear meaning of Article V” give Congress power to set the rules for a convention. On the most basic level, this statement is demonstrably false. Article V says absolutely nothing about the rules for a convention and whether they are set by Congress or the states. According to ordinary rules of constitutional interpretation, when the text is silent, we must look to historical precedent and the intent of the lawmakers.

Mr. Brown appears to draw his “clear” conclusion by reading the Necessary and Proper Clause in conjunction with Congress’s authority to “call” the convention in Article V. But this conclusion presupposes that setting out rules for a convention is a necessary and proper extension of Congress’s authority to “call” the convention. Contrary to Mr. Brown’s claims, this is anything but clear.

¹ The runaway convention argument has long been touted by members of Eagle Forum and the John Birch Society. Constitutional attorney Michael Farris faced Andrew Schlafly, the son of Eagle Forum founder Phyllis Schlafly, in a critical debate in New Jersey. The debate can be viewed in full here: <http://conventionofstates.com/michael-farris-debates-andy-schlafly-new-jersey-2/>. Since the debate many of the leaders of Eagle Forum and the John Birch Society have backed down from their claims that an Article V convention will “run away.”

In fact, the historical record suggests that the calling body merely sets the time and place for the initial convention meeting. For instance, Virginia “called” the Constitutional Convention of 1787.² In its call Virginia set the time and place for the convention, but it didn’t presume to determine the rules for the convention or decide how the other states would select their delegates.³ Calls for other historical conventions followed the same pattern.⁴ Thus, as applied to Article V, the Necessary and Proper Clause gives Congress authority to take all necessary and proper steps to set the initial time and place of the convention. To be sure, Congress has a role in the process, but that role falls far short of setting the rules or selecting the delegates for the convention. History shows that this power belongs to the state legislatures.

Mr. Brown next asserts that “Congress has historically recognized this authority” to control a convention by “considering many bills concerning the selection of delegates,” etc.⁵ Congress has in fact considered 41 such pieces of legislation. But as any legislator knows, the mere fact that legislation is filed means very little.

What is far more telling is the fact that not a single one of these pieces of proposed Article V legislation has ever passed Congress. Despite 41 occasions to do so, Congress has not asserted control over an Article V convention. If anything, Congress’s hesitancy should reinforce the states’ case that they, not Congress, control the convention.

The argument then turns to ratification. Mr. Brown quite correctly states that Article V gives Congress authority to select one of two modes of ratification. Ratification can be either by the state legislatures or by special ratification

² 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559–63 (Max Farrand, ed. 1911).

³ In fact, even if you treat the Confederation Congress as the body which called the Constitutional Convention (an assertion which is patently unhistorical), the Confederation Congress didn’t set the rules for the convention either. *Id.* at 579 n.7. The Convention itself did so according to established parliamentary rules of the time, and subject to the instructions set by the states. See Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”* 65 FLA. L. REV. 615, 674–80 (2013).

⁴ See Natelson, at 687.

⁵ To bolster this claim, Mr. Brown and other opponents of a convention often look to a Congressional Service Report that details these past legislative efforts by Congress. Our staff has addressed the CRS report here: <http://conventionofstates.com/wp-content/uploads/2014/04/CRS-Response.pdf>. The bottom line is that the CRS Report is merely a catalog of past and present Article V efforts and Congress’s response. It does not take any position with regard to those efforts. Unfortunately, the Report ignores much of the research that has been done into historical convention practices, and thus gives an incomplete summary of the topic. But even as written the report does little to support the John Birch/Eagle Forum position.

conventions within the states. The latter method has only been used once, for the ratification of the 21st Amendment.

This second mode of ratification, however, hardly excludes the state legislatures. As was the case with the ratification of the 21st Amendment, state legislatures will be the bodies deciding how delegates to the state ratification conventions will be selected.⁶ Though state legislatures may not be voting directly on ratification, they will still exert significant influence over the process.

Stepping solidly outside the realm of plausibility, Mr. Brown then states that a third method of ratification is possible, where the convention unilaterally scraps the three-fourths ratification requirement and imposes some lower threshold of its own invention. His basis for this claim is that the Constitutional Convention of 1787 invented a new method of ratification for the Constitution, so an Article V convention today could do the same.

Leaving aside the historical inaccuracies behind this argument,⁷ it ignores a fundamental difference between the Constitutional Convention and an Article V convention. The Constitutional Convention was not called under the Articles of Confederation. The Articles made no provision for such a convention.⁸ Rather the Constitutional Convention was called under the reserved sovereign authority of the states. Therefore, it could do anything which the states allowed it to, up to and including choosing a method of ratification for its own proposals. By contrast, an Article V convention is, by definition, called under the authority given in the Constitution. Therefore it is subject to the procedures and forms laid down in the Constitution, like those for ratification. Mr. Brown and other opponents of a convention gloss over this critical distinction, and consequently err in their analysis.

Oddly enough, just a few paragraphs later Mr. Brown undercuts his own argument. According to Mr. Brown, conventions not called under Article V “do not set any precedent for an Article V convention.” Of course, if that were true, he could not rely on the Constitutional Convention as valid precedent for ratification.

⁶ See, e.g., FL. STAT. § 107.01–107.11; N.M. STAT. ANN. § 1-18-1; VT. STAT. ANN. tit. 17, §§ 1811–1825.

⁷ As constitutional attorney Michael Farris notes, all 13 state legislatures approved the new ratification process for the Constitution, therefore the unanimity requirement of the Articles of Confederation was satisfied. Mr. Farris’s article is available here: <http://conventionofstates.com/wp-content/uploads/2014/05/Can-We-Trust-the-Constitution-2.01.pdf>.

⁸ No provision in the Articles of Confederation says anything about a convention. Moreover, the Articles explicitly disclaimed the idea of implied powers. ARTICLES OF CONFEDERATION, art. II. As the result, the only possible legal basis for the Constitutional Convention and other conventions of the time was the reserved sovereign authority of the states.

Thankfully, Mr. Brown is wrong. Obviously precedent from prior Article V conventions would provide weightier evidence than other sorts of multi-state conventions, and the plain text of the Constitution would trump them all. Unfortunately, the text of the Constitution is silent with regard to the rules for a convention, and there are no prior Article V conventions to draw from. So we must turn to other conventions. Article V, after all, was not written in a vacuum.

Historical research shows that the Founders held at least 32 multi-state conventions in the period leading up to the adoption of the Constitution, 11 of which were held in the decade between the Declaration of Independence and the Constitutional Convention.⁹ Clearly, the Founders were no strangers to conventions. Indeed, the frequency of these pre-constitutional conventions may explain the brevity of Article V.¹⁰

Rules and procedures at these pre-constitutional conventions were surprisingly uniform. The conventions themselves elected their own officers and set their own rules subject always to the instructions issued by their state legislatures.¹¹ Voting at these conventions was uniformly on the basis of one state, one vote.¹² The indication of all existing precedent is that the states, not Congress, will exert ultimate authority over any Article V convention.

Completely apart from these historical conventions, there is one critical piece of evidence that cements the states' control over a convention: the intent of the Founders as evidenced by the proceedings of the Constitutional Convention itself. James Madison gives a full account of the proceedings leading to the final draft of Article V in his notes from the Convention. According to these notes, George Mason strenuously objected to a proposal that only gave Congress authority to propose amendments. As Madison records, "Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendment is . . . to depend . . . on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive as he verily believed it would." Responding to Mason's concerns, Gouverneur Morris and Elbridge Gerry "moved to amend the article, so as to require a convention on application of two thirds of the states." The motion passed unanimously.¹³

The whole point of the convention method of amendment was to bypass Congress and the federal government. If Congress were to set the rules for the

⁹ Natelson, at 620.

¹⁰ As Professor Natelson observes, "where the Constitution does provide rules it does so precisely in those few areas where existing practice had permitted variations." *Id.* at 682.

¹¹ *Id.* at 686–90.

¹² *See generally id.*

¹³ 2 FARRAND'S RECORDS 629–30.

convention or select the delegates, the entire purpose of the convention provision would be undermined.

In short, every piece of historical evidence we have tells us that the states will control any Article V convention. Against this, Mr. Brown can only set vain imaginings and shoddy analysis. The Founders knew what they were doing when they put an Article V convention in the Constitution. They knew the federal government would become too powerful, and they wanted to give the states and the people a way to preserve their rights. That is what a convention was designed to do, and that is what Article V can do, if state legislators will exercise their constitutional authority.