

Policy Brief

January 18, 2016 - No. 4



COMPACT FOR AMERICA

Rooted in the Tenth Amendment: The Article V Convention

By Nick Dranias

Introduction

The movement to amend the Constitution by convention under Article V has recently garnered incredible strength. In the past five years, nearly two dozen pieces of Article V legislation have been passed in as many states by nearly as many public policy organizations. From the Left to the Right, Americans are recognizing that the rules of the political game need to be rewritten outside of Washington to reform the federal government.

Much of this recent legislative ferment is attributable to the seminal work of one man. But what if that man was now tragically and inadvertently working to extinguish his own handiwork? What if in a valiant, but strained effort to mold inapplicable Supreme Court precedent into rules of the road for an Article V convention, that man fumbled a huge opportunity to vindicate the Founders' intent from a clean slate?

Sadly, that appears to be happening. A leading Article V scholar recently contended that the Tenth Amendment has no applicability to the Article V convention process. This policy brief is written to refute that contention thoroughly. As discussed below, there is simply no question that the status of the Article V

convention as a "convention of states" rests firmly on Tenth Amendment principles.

States as States Organize the Convention

On December 18, 2015, an article authored by retired law professor Robert Natelson asserted that the Tenth Amendment does not "give" power to state legislatures under Article V of the U.S. Constitution.¹ This declaration was at once inane and potentially misleading. It was inane because, of course, the Tenth Amendment does not "give" power to anything. It guarantees the preservation of the sovereign powers of the states (or the people) to the extent that they are not limited or superseded by the delegated powers of the federal government. For this reason, it is a mere truism to say that the Tenth Amendment does not "give" power to state legislatures under Article V.

But such a truism is potentially misleading when written by a leading Article V convention advocate. It appears to disclaim a role for state sovereignty in organizing an Article V convention. And such a disclaimer invites Congress to fill what some perceive to be the yawning textual gaps of Article V, including its lack of express governance on the scope of an Article V convention agenda, the nature of its convention rules, and the identity of convention participants. Congress, after all, is the natural repository of legislative authority for all things federal. If the Tenth Amendment cannot be invoked to fill those gaps, it is pretty obvious what and who will.

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Fortunately, nothing could be further from the truth than the notion that state sovereignty has nothing to do with Article V. How do we know this? Because the Founders said so.

In Federalist 43, James Madison wrote Article V “equally enables the general and the State governments to originate the amendment of errors.”² Notice that this statement was in reference to “State governments,” not what Natelson calls “independent assemblies” performing a federal function. In Federalist 85, Alexander Hamilton emphasized that “alterations” in the Constitution may be “effected by nine States” which would “set on foot the measure” through their application.³ George Nicholas, the Constitution’s leading advocate during the Virginia ratification convention, declared, “it is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments.”⁴ Finally, George Washington wrote, “It should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States.”⁵

In all of the foregoing instances, the reference is plainly to “states” as states using the convention process to propose the amendments they desired. There is no way to assume the truth of the Founders’ representations about Article V without also assuming that the sovereign powers of the states—those guaranteed by the Tenth Amendment—would have a role in directing the convention mode of proposing amendments under Article V. Indeed, the plain text of Article V leaves no other natural interpretative possibility open.

States as States Set the Agenda

Specifically, Article V says “on the Application” of two-thirds of the state legislatures, Congress “shall call a convention for proposing amendments.”⁶ Grammatically, no express grant of power to make the requisite “Application” is conferred by Article V

on state legislatures. Rather, the “Application” power is presumed to exist, which presumption implies that it references a reserved power.

This is not surprising because the pre-constitutional Congressional Record includes numerous instances of states making applications through their legislatures to the Continental Congress for various things.⁷ An “application” was simply a type of petition within the ordinary legislative power of the state. The power to petition Congress for anything, including to amend the constitution by convention, is thus naturally regarded as inherent in state sovereignty. It did not require further articulation in Article V.

The ability of states to set the agenda for an Article V convention through what they request in their application is confirmed by two other textual elements of the Constitution. First, it is a bit of a misnomer to say Congress was delegated a “call power.” Article V imposes a “peremptory”⁸ duty on Congress to call

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the convention “on Application” of the state legislatures. Strictly speaking, Congress has a “call duty” triggered by the “Application,” not a “call power.” Therefore, in the absence of an express delegation of power to Congress, the congressional call is best construed as implementing the Application, which itself is an exercise of state sovereign power; there is no textual basis for Congress or any other federal body to claim a freestanding power over the convention process.

Second, the power of states as states to set the agenda of the Article V convention through their “Application” is entirely consistent with and parallel to the role of the “Application” in the only other part of the Constitution in which an application is mentioned—namely, Article IV, section 4, which provides: “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the

Legislature cannot be convened) against domestic Violence.”⁹ The most natural reading of this provision is that the “Application” would specify the domestic violence to be addressed and how it should be addressed.

Just as the federal government’s “agenda” for protecting the states from domestic violence is necessarily determined by the triggering Article IV “Application,” an Article V convention’s agenda is determined by its triggering “Application.”

Further, notice that an Article IV “Application” is being used by the states in aid of their sovereign powers. Nothing in Article IV confers power on state legislatures or executives to act as federal bodies that are somehow “independent” of their respective state governments. Nothing in Article IV suggests that applying states are somehow disabled from using all of their reserved powers in tandem to address the same domestic violence that prompted the “Application.” The federal government is simply being “deputized” to back up the state’s internal policing at the request of an appropriate representative branch of state government. Similarly, an Article V “Application” is submitted by state legislatures in aid of the states’ traditional sovereign power to organize interstate conventions, and Congress acts on their behalf in calling the convention. There is no textual indication that the states are otherwise disabled from exercising their reserved legislative powers in parallel to ensure the “Application” indeed governs the resulting convention.

Taken together, the “Application” is the clear textual point of entry for state control over an Article V convention based on reserved legislative power. The lack of express substantive content in Article V as to the nature of the “convention for proposing amendments” combined with Congress’ purely ministerial duty in calling the convention logically yields the convention agenda to whatever is requested in the “Application.” The Founders’ representations about how the states would obtain desired amendments through

the convention process confirm that the “Application” would determine what the resulting Article V convention was authorized to propose; and that nothing in Article V was meant to disable states in exercising their sovereign powers to enforce compliance with the Application. The Tenth Amendment’s guarantee of the reserved powers of the states is, therefore, critically important to understanding and enforcing Article V. There is no indication in existing precedent the Supreme Court would rule otherwise.

The Court Does Not Oppose State Control

For example, those who oppose applying Tenth Amendment principles to the Article V convention process primarily rely upon *Hawke v. Smith* (1920)¹⁰ and *Leser v. Garnett* (1922)¹¹ for the proposition that the Supreme Court has “invalidated efforts to control the amendment process though state law.” Others point to *United States v. Sprague* (1931)¹² and *U.S. Term Limits v. Thornton* (1995)¹³ as somehow establishing that states have no reserved powers under Article V.

Such reliance is just plain wrong.

Neither *Hawke*, *Leser* nor *Sprague* dealt with the Article V “amendment process” in general, much less the Article V proposing convention in particular. *Sprague* simply reaffirmed the fact of Congressional control over the selection of the mode of ratification. Both *Hawke* and *Leser* were exclusively concerned with state legislative power over the ratification of a congressionally proposed amendment. *Hawke* ruled only that “ratification by a state of a constitutional amendment is not an act of legislation.” *Leser* ruled only that the “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.” None of these cases speaks at all to the nature, source or effect of the power of legislatures to join in or enforce an “Application” for an Article V convention.

The Article V Application is the clear textual point of entry for Tenth Amendment Principles.

The power to ratify an amendment in response to a congressional amendment proposal is obviously not equivalent to the power to petition Congress to organize a convention for proposing amendments. The ratification power is textually conferred by the Constitution; whereas, as discussed above, the application power is textually presumed to exist and, therefore, its nature and scope is derivative of the reserved powers of the states. Further, the authority delegated by the People to Congress in responding to the “Application” consists solely of the nondiscretionary duty to call the convention—unlike the selection of the mode of ratification, over which Congress has discretion.

Additionally, there is a distinction between the power to ratify and the power to organize the body that

is responsible to ratify. The Supreme Court has never held, for example, that Congress must supply parliamentary rules for state legislatures when they ratify amendments. It is a historical fact that when states were directed by Congress to organize conventions to ratify the repeal of prohibition, the organization of the conventions was left to the states based on the exercise of their plenary reserved sovereign powers.¹⁴ Thus, even if the ratification of an amendment is itself not an exercise of state legislative power, the procedure by which ratification takes place is still governed by Tenth Amendment principles. Similarly, even if the power to propose amendments itself were viewed entirely as a construct of the federal constitution, that would in no way suggest that states are disabled from exercising legislative control over the convention itself or the proposal process.

In speaking of state legislatures possessing powers directly delegated by the People in ratifying an amendment, rather than exercising their sovereign legislative authority, both *Hawke* and *Leser* simply underscored an implication of the fact that ratification effects the amendment of the Constitution, which is, after all, a delegation of authority by the People. Logically, it takes a delegation of power from the People to effect

a change in an instrument created by a delegation of power from the People. However, nothing in Article V textually or in the history of the Constitution suggests that the mere proposal of an amendment by convention organized on “Application” of the state legislatures involves a similar delegation of authority by the People. To the contrary, as discussed above, the Founders repeatedly emphasized that the States as sovereigns—or in the words of Federalist 43 “State governments”—would have the equal authority to propose amendments by convention.

Reliance on *U.S. Term Limits* is likewise misplaced.

The case does not speak to Article V at all. It dealt with federal election qualifications. Significantly, the Court ruled: “States can exercise no powers whatsoever which exclusively spring

out of the existence of the national government.” The use of the phrase “exclusively” is key. As discussed above, the “Application” power referenced in Article V does not “exclusively spring out of the existence of the national government,” it would have existed with or without the national government. To understand the nature and scope of the “Application” power and the convention triggered thereby, reference must be made to the traditional power of states to petition another governmental body for a desired outcome and to organize interstate conventions. That requires the application of Tenth Amendment principles.

In the final analysis, it is a huge theoretical error to insist that precedent governing the ratification power under Article V (or any other power exclusively springing out of the existence of the national government), which truly is entirely a construct of the federal constitution, applies to the organization of a convention for proposing amendments, which leverages the states pre-constitutional power to organize interstate meetings. That error creates a significant risk of encouraging Congress to claim that the determination of the agenda and logistics of an Article V convention is a “federal function,” for which the invocation of its Article I powers to take control over the convention

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is far more natural than deferring to state legislative powers, customs and practices that predate the Constitution. For this reason, an adverse assessment of the Tenth Amendment's relationship to Article V threatens the latest research demonstrating that the Founders meant for Article V to organize a "Convention of States," not a convention of Congress or the People.¹⁵

The Court Should Support State Control

To the extent that opposition to the application of Tenth Amendment principles in the Article V convention context boils down to an armchair prediction of a future Supreme Court's ruling, which is certainly a fair opinion to hold, the truth of the matter is that the prediction involves a question of first impression on multiple levels for the Court. No one really knows whether or how the Court will rule. For this reason, we should encourage states to robustly exercise their sovereignty over the Article V convention process and the Court to follow the Founders' clear guidance in this virgin legal territory. We should not grab any case that mentions "Article V" and try to mold it into a semblance of a legal theory that threatens to undercut the whole Article V movement. And if we must leverage existing precedent to have a foothold in legal argument, we should rely on those cases that will guide the Court to enforcing the Founders' promise of state control over the proposal of amendments by convention.

From this vantage point, the Supreme Court's ruling in *Ray v. Blair* (1952)¹⁶ constitutes strong legal support for reaching the right (i.e. originalist) result. The Court ruled, after all, that states had the right to require nominees for elector to the Electoral College to pledge to support the national candidate of a party. It ruled essentially that the states could do this because the Twelfth Amendment did not prohibit them from doing so—evoking in not so many words the text of the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it

to the States, are reserved to the States respectively, or to the people"). Likewise, nothing in Article V prohibits states from exerting control over the agenda or logistics of a convention for proposing amendments through their Application or other ancillary means within their traditional governing authority, such as legislating or compacting with other states to ensure their agents at the convention actually do their legal duty.

Additionally, the principle of robust state legislative control over an Article V convention is advanced by *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015),¹⁷ the most recent Supreme Court case dealing with the nature of the power of state legislatures in our federal system. There, the Court expressly recognized "it is characteristic of

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the federal system that States retain autonomy to establish their own governmental processes free from incursion by the Federal Government." Based on this

unacknowledged Tenth Amendment principle, the Court interpreted the redistricting authority of state legislatures under the Elections Clause as embracing the entire reserved legislative power of the States, not as merely conferring power on a designated branch of state government. This ruling, perhaps ironically, provides a solid basis for buttressing state legislative control over the amendment by convention process.

Conclusion

Given the makeup of the deciders in *Arizona State Legislature*, perhaps the best evidence of what the current Supreme Court would do vis a vis state control over an Article V convention can be found in the words of Professor Antonin Scalia (now Justice). In response to a question about whether an Article V convention can be limited, then-law professor Scalia said: "There is no reason not to interpret it to allow a limited call, if that is what the states desire."¹⁸

There is no stronger statement of Tenth Amendment

principle applied to Article V than that. It is also the simplest reading of Article V.

The plain text of Article V neither immunizes convention-goers from state legislative power nor deputizes the “Legislatures of two thirds of the several States” to serve as federal bodies that are somehow independent of their underlying state governments. Rather, Article V simply mandates Congress to call a convention “on the Application of the Legislatures of two thirds of the several States.” The most natural reading of Article V is that “Legislatures” are acting on behalf of their respective state governments in submitting their “Application,” the convention call embraces the terms of the “Application,” and nothing prohibits the states from deploying their plenary legislative power to ensure that convention-goers actually heed the “Application” and follow the Constitution.

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A version of this Policy Brief was originally published by AmericanThinker.com.
The Author has authorized this publication.