

Reconsidering the Wisdom of an Article V Convention of the States

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KEY TAKEAWAYS

The Framers envisioned Article V of the Constitution, which provides for a convention of states to amend the Constitution, as a potent check on federal power.

The grassroots Convention of the States Foundation seeks to use Article V to initiate “a convention for proposing amendments” to limit excessive federal power.

Such a convention would send a powerful message to Washington that the people are watching and are prepared to reclaim power if it is abused.

In early August of this year, a few of my Heritage Foundation colleagues and I joined representatives from 49 states in Williamsburg, Virginia, for a two-day “Simulated Convention of the States” to consider potential amendments to the U.S. Constitution. This was the second such simulated convention, the first having occurred in 2016. Given Williamsburg’s significance during the Revolutionary War and the Founding,¹ the setting seemed fitting.

Those who are not familiar with the process for amending our nation’s Charter in order to form “a more perfect union” may be surprised to learn that it can actually be accomplished in two ways. The process is laid out 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

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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 conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

In short, while ratification always requires the consent of three-fourths (now 38) of the states, there are two methods for sending proposed amendments to the states for potential ratification. Amendments can be sent either by a two-thirds vote of both houses of Congress or, alternatively, by a convention of the states that would be called “on the application of the legislatures of two thirds [now 34] of the several states.”

Our Constitution has been amended 27 times, and each time the amendment was forwarded to the states for ratification following a vote in Congress that met the requisite threshold. A convention of the states (at least a convention involving all of the states) has never been called other than, of course, the original Constitutional Convention that convened in Philadelphia in the summer of 1787.

This is not to say that smaller, interstate conventions have not been called. There have been many. Some were called for ignominious purposes, such as the nine-state convention that gathered in Nashville, Tennessee, in 1850 to coordinate a Southern response to federal policies opposed by many in the South and the seven-state convention that gathered in Montgomery, Alabama, in 1861 to organize Southern secession and draft the Confederate constitution. Others were called for more respectable and beneficial purposes, such as various multi-state conventions that sought to resolve disputes over boundaries and how to apportion natural resources shared between or among those states.²

Using Article V: A Potent Check on Federal Power

The fact that there has never been a convention of the states called to propose amendments to the Constitution means that most Americans are unaware that *we the people* have this power and need not rely on Congress to initiate the amendment process. This lack of familiarity with the convention-of-states option for proposing constitutional amendments is a problem

for our republic because it creates a strong inertia against the people's use of Article V as the potent check on federal power that the Framers envisioned it would be. It also creates uncertainty and doubt about how such a convention would work in practice.

A grassroots organization—the Convention of the States Foundation—seeks to remedy that problem. The organization has been spearheaded by Mark Meckler, a conservative activist and co-founder of the Tea Party Patriots; Mike Farris, founder of Patrick Henry College and the Home School Legal Defense Association and former CEO of Alliance Defending Freedom; and former U.S. Senator and Republican presidential candidate Rick Santorum. It seeks to call for “a convention for proposing amendments” limited to three subject areas:

- Fiscal restraints on the federal government;
- Limits on the jurisdiction of the federal legislative, executive, or judicial branches; and
- Term limits for members of the federal legislative or judicial branches.

The organizers believe that for too long, the people have permitted the fox to guard the hen house. While the people have relied on Congress to be the sole vehicle for amending the Constitution to curtail federal accumulation of power, all three branches of the federal government have been allowed to accumulate excessive power over time at the expense of the states and the people. The organizers further contend, with considerable justification, that the Constitution has been effectively amended under the guise of interpreting its various provisions, to paraphrase Justice George Sutherland.³

The notion that those in power would seek to accumulate more power, that judicial acquiescence and public lethargy might accommodate such power grabs, and that the people had to have a mechanism for addressing such abuses without having to rely on the abusers themselves to correct that situation is not new: It has existed for as long as we have had a Constitution. In his Farewell Address,⁴ which was read to the delegates at the recent Williamsburg simulated convention, George Washington stated that “[o]ne method of assault” on the integrity of our government and the well-being of the people “may be to effect in the forms of the Constitution alterations which will impair the energy of the system and thus to undermine what cannot be directly overthrown.” Guarding against such constitutional alterations requires vigilance. In that regard, Washington stated:

It is important...that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position.... If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

For this reason, among many others, Washington emphasized that “it is essential that public opinion should be enlightened.”

The organizers of the Convention of the States movement contend that the Framers of our Constitution would be bewildered and disheartened by the current state of affairs and by the fact that, like a muscle that has atrophied from disuse, the people, acting through their state legislatures, have failed to avail themselves of the precise mechanism in the Constitution to address this situation. They are undoubtedly correct. After all, as James Madison stated in Federalist No. 43, the Constitution “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.” And Tench Coxe, an ardent supporter of the Constitution who later served as Assistant Secretary of the Treasury under Alexander Hamilton, wrote:

[A]s the foederal legislature cannot effect dangerous alterations which they might desire, so they cannot prevent such wholesome alterations and amendments as are now desired, or which experience may hereafter suggest. Let us suppose any one or more alterations to be in the contemplation by the people at large, or by the state legislatures. If two thirds of those legislatures require it, Congress must call a general convention, even though they dislike the proposed amendments, and if three fourths of the state legislatures or conventions approve such amendments, they become an actual and binding part of the constitution, without any possible interference of Congress....

If then...the foederal government should prove dangerous, it seems the members of the confederacy will have a full and uncontroulable power to alter its nature, and render it completely safe and useful.⁵

The Convention of the States Foundation, which is active in all 50 states, has been making steady and impressive progress. To date, the legislatures in 19 states have passed resolutions calling for a convention of the states limited to the three proposed subjects,⁶ and in another seven states, one of the two houses in the state legislature has passed similar resolutions.⁷ The group targets different states during their respective legislative sessions as potential pickups in its quest to achieve the magic number of 34 states calling for a convention and, ideally, the 38 states needed to ratify whatever amendments a convention might propose.

The Simulated Convention of the States

As for the simulated convention that I attended, it was a unique and very special experience. Delegates arrived from 49 states. They all had one thing in common: They love their country and are very concerned about what is happening to it. The only state missing was Rhode Island, which seemed fitting given the fact that Rhode Island was the only one of the 13 original states to boycott the Constitutional Convention in 1787 and was the last to ratify the Constitution, finally doing so on May 29, 1790, more than a year after George Washington had been sworn in as our first President.⁸

There was a decent amount of pageantry. Delegates had their pictures taken in front of American flags or their respective state signs. Stirring speeches by George Washington and Patrick Henry were delivered by convincing reenactors. This all demonstrated the organizers' and delegates' pride in our country and undergirded the importance of engaging in this exercise. More subtly, but equally important, the pageantry helped to transport the delegates from their lives back home to a gathering place where, in their own way, they could rise to the occasion and become statesmen, which they largely did. It is, in fact, impossible to listen to the words those great men spoke without feeling a sense of pride swell in your breast and to focus on the thought they gave and the sacrifices they made to rise above their personal interests (for the most part) and consider what was best for the country as a whole.

But even if they didn't, what would it matter? Debates on important issues are conducted and issues are resolved all the time within families and civic organizations by concerned individuals who are not statemen but

who effectively represent differing viewpoints, gather the information that they need, and utilize common sense informed by their lived experiences. Why not repeat that on a broader scale?

The model rules were drafted by Mike Farris and Robert Natelson, a highly respected constitutional scholar who, like Farris, has written extensively on Article V.⁹ An actual convention would likely last weeks or months, while this simulation was conducted over a two-day period, but it was still amazing to see how much was accomplished in that circumscribed time period.

Many of the delegates and grassroots individuals and organizations had submitted proposed amendments in advance of the convention that satisfied the “germaneness” requirement in that they fit within the three broad parameters of fiscal restraints, jurisdictional limits, and term limits.

The first order of business was selecting a convention president. Candidates who wished to be considered announced their candidacy and provided background information about themselves in advance, although each was permitted to offer a brief speech touting his or her bona fides.

The delegates were assigned to one of three committees, one for each subject area, and those committees met for most of the first day to propose, debate, and draft potential amendments that would be considered the next day by the convention as a whole. Parliamentarians were available to consult on issues (primarily issues of germaneness) and to offer drafting suggestions if asked to do so.

In view of the time constraints, each committee was asked to propose no more than three amendments for consideration by all of the assembled delegates on the second day, although this limitation would obviously not exist were this not a simulation. This did, however, have the salubrious effect of focusing the mind and forcing the delegates in each committee to prioritize. A Committee on Style and Detail was created to review what came out of the three committees at the end of the first day to make sure the submitted proposals were in good form, although changes were certainly made once those amendments were presented to all of the delegates for their consideration.

The discussions in the committees on the first day and with all of the delegates on the second day¹⁰ about the merits, demerits, and potential unintended consequences of each proposal were substantive, sincere, thoughtful, spirited, respectful, and fascinating. Representatives from different states described how the issues covered by those proposals had played out and affected them in their respective states and offered perspectives that are rarely heard or considered in this “sound bite” era.

Common themes that surfaced, not surprisingly, were that the federal government, including federal courts, makes too many decisions that have a dramatic effect on our local lives; that public officials in Washington are more concerned with getting and keeping power than they are with serving the people they are supposed to represent; and that the federal government too often simply tells the states what to do and then gives them some money to make sure they do it.

In short, these were serious discussions by serious people about serious matters. When it came to voting on amendments, each state delegation was accorded one vote, so there was also a great deal of internal debate by delegates within each state as to what that state's position would be.

The debates were intense but never acrimonious. Serious questions were raised about federalism; the power of the courts, Congress, and the executive branch; and the administrative state. Some delegates proposed amendments that focused on what they would like to see in the best of all possible worlds; others articulated the view that it was better to offer amendments that would stand a greater likelihood of gaining the approval of the 38 states needed for ratification. In the short amount of time available, there were many potential amendments that did not get the time and attention they deserved and would no doubt receive during an actual convention.

Good Ideas and Refined Thinking

Some good ideas and refined thinking came out of the simulated convention, which could affect what would happen at an actual convention should one come to pass, not to mention that many of the people (especially from conservative states) who attended as delegates at the simulated convention would likely be delegates at an actual convention. One impressive thing about the simulated convention was that many, if not most, of the attending delegates were elected representatives in their home state legislatures.

Was the simulated convention realistic and representative of what an actual convention of the states would look like? In some ways, yes, and in other ways decidedly not. As previously stated, an actual convention would last for weeks and months, not two days. All of the delegates at the simulated event, even from the bluest-of-blue states, were right of center, and some states (including large ones) had very few representatives, so the votes of those delegates were magnified. In addition, no media were present. Were this an actual convention, media would be all over the place,¹¹ the chosen delegates would reflect the political diversity (and divisiveness) that exists

in our country, and some insurgent factions would undoubtedly attempt to raise aggressive challenges to the rules of the convention and to germaneness rulings by the parliamentarians.

One can only imagine what such debates would be like among delegates with diverse political views, but perhaps that was the point. There was value in hearing the views of others in an orderly, non-vitriolic fashion on serious issues that have not been reduced to a certain number of characters on a social media site or through the echo chamber of most media outlets on the Left and on the Right. I know my eyes were opened hearing how different issues affect people in different parts of the country. I certainly did not agree with everything I heard, but I learned something from everything I heard. That had value in and of itself.

I spoke to several of the delegates who had also attended the simulated convention in 2016. While there was no shortage of confusion about some of the rules and how they applied to the debates—which is hardly surprising given that most of the delegates were not conversant with *Robert's Rules of Order*—I was assured that there was far less confusion than there had been during the 2016 convention. More significantly, I was told that the delegates at the earlier convention were far less clear about what was happening and far more tentative about expressing their views. I was told that the people at this convention were more focused, confident, and willing to share their views and subject them to the scrutiny of their fellow delegates. All positive developments, as these would-be delegates to an actual convention would develop muscle memory about how a productive convention should be conducted.

When I first wrote about the Convention of the States movement in February 2016, I discussed the risk of a runaway convention (something the foundation's organizers reject¹²) and characterized the entire venture as essentially a high-risk, high-reward proposition.¹³ Having said that, I recognize the strength of the arguments made by those who reject the risks of a runaway convention. For instance, Congress has the ability to consider a single amendment or discrete subject areas for possible amendments. If the purpose of the state application and convention process is to provide states as separate sovereigns with a parallel process for amending the Constitution that bypasses Congress, why can't the states limit themselves to considering a single amendment or discrete subject areas?

Moreover, Congress has traditionally, and without any objections from its Members or from the states, aggregated applications in order to determine whether the requisite two-thirds threshold of states needed to call a convention has been reached, and in doing so, Congress has only considered

applications that cover the same topic. If, on the other hand, a convention of the states, once approved, would be open to possible amendments on any topic whatsoever, why wouldn't Congress have aggregated together *all* calls for a convention rather than only those that addressed the same subject matter? Congress's historical practice strongly suggests that a convention called by the states can be limited by the applications passed by the state legislatures to considering only proposed amendments that are germane to the topics specified in the state applications.

Why a Runaway Convention Is Unlikely

Since 2016 when I wrote my report, there have been some important developments that, in my view, significantly lessen the likelihood of a runaway convention and make the entire enterprise not only more palatable now, but downright enticing.

So what changed? At least two things.

First, the situation on the ground at the moment is favorable to conservatives. Assuming that delegates are carefully selected, this clearly minimizes the likelihood of a runaway convention.

Currently, there are 24 states that have a Republican “trifecta” (a Republican governor and both houses of the state legislature¹⁴ with a Republican majority) and only 17 states that have a Democratic “trifecta.”¹⁵ The situation for Republicans—and therefore, presumably, for conservatives—is even better than that because while there are five other states¹⁶ that have Democratic governors, both houses of the legislature in those states are controlled by the Republicans. As Article V makes clear, it is the state legislatures that can submit applications to Congress calling for a convention of the states; the governor has no involvement in that process.

Second, in 2020, the Supreme Court of the United States issued a significant decision that bears directly on this issue. In *Chiafalo v. Washington*,¹⁷ the Court addressed the issue of whether a state could remove or otherwise penalize a “faithless elector.” A unanimous Court held that states could do so.¹⁸

Throughout our nation's history, there have been instances of so-called faithless electors—that is, individuals (usually party activists) who were appointed as presidential electors based on their pledge to cast their ballot for their party's nominee (assuming their party's nominee captures the popular vote in that state) but ended up casting their ballot for someone else.

Several states, including Washington, had enacted laws containing some sanction against faithless electors, ranging from being automatically and

immediately removed and replaced to a financial penalty. In the 2016 presidential election, three electors from Washington violated their pledges to support Hillary Clinton by casting their votes for Colin Powell. After being fined \$1,000 each for breaking their pledges, they filed a lawsuit challenging the constitutionality of that law.

Writing for the Court, Justice Elena Kagan made it clear that states have broad discretion in appointing presidential electors and that nothing in the Constitution prohibits states from removing the discretion of those electors. The Court concluded that “[a]mong the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise.”¹⁹

As is the case with presidential electors, delegates chosen to represent a state at a convention of the states would be appointed based on their pledge to abide by the limitations set forth in that state’s application: specifically, to consider only amendments that fall within the three categories delineated in the application. And the state would be well within its rights to attach a penalty to any delegate who failed to abide by that condition. Based on *Chiafalo*, it is highly unlikely that any court would fail to uphold such a law.

Several of the 19 states that have already submitted applications calling for a convention of the states have also passed faithless delegate laws. While most of those states limit the penalty to immediate removal or a fine, others, including Georgia, Florida, Indiana, Arkansas, and Utah, carry criminal penalties.

In light of these developments, the risks of a runaway convention now appear to be minimal. At this point, the biggest downside of holding a convention of the states, in my estimation, is that no amendments proposed by the convention are likely to garner the necessary approvals from 38 states to achieve ratification. But what of it?

“A Worthy Cause”

As the organizers behind this effort expressed, and as I came to believe, the most important thing is not what gets done or comes out of a convention. It is simply having a convention. The actual convening of a such a convention would send a powerful message to federal officials and elected representatives in Washington not only that the people are watching what they are doing and are upset by what they are seeing, but also that they are prepared to flex their political muscles, get in the game, and reclaim power if it is abused, as it is all the time.

In Paris in 1910, a year after leaving office, former President Theodore Roosevelt delivered a legendary speech that has come to be known as “The Man in the Arena” in which he said:

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

The organizers of the Convention of the States movement embody this spirit. Perhaps the rest of us should too.

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Endnotes

1. Kate Gruber, *The History of Williamsburg, The Early Capital of Virginia*, AMERICAN BATTLEFIELD TRUST, <https://www.battlefields.org/learn/articles/history-williamsburg> (last visited Oct. 13, 2023); Kate Gruber, *The Gunpowder Incident*, AMERICAN BATTLEFIELD TRUST, <https://www.battlefields.org/learn/articles/gunpowder-incident> (last visited Oct. 13, 2023).
2. STEPHEN MULLIGAN, CONG. RSCH. SERV., LSB10807, INTERSTATE COMPACTS: AN OVERVIEW 2 (2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10807#:text=When%20Congress%20approves%20an%20agreement,by%20Congress%2C%20as%20federal%20law>.
3. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting) (“The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase ‘supreme law of the land’ stands for, and to convert what was intended as inescapable and enduring mandates into mere moral reflections.”).
4. 20 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, 1 APRIL–21 SEPTEMBER 1796, at 703–22 (David Hoth & William Ferraro eds., 2019), *reprinted in Founders Online: Farewell Address, 19 September 1796*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Washington/05-20-02-0440-0002> (last visited Oct. 13, 2023).
5. Tench Coxe, *A Pennsylvanian to the New York Convention*, PA. GAZETTE (June 11, 1788), *reprinted in 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1139, 1142–43 (Merrill Jensen et al. eds., 2019).
6. Those states are Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Tennessee, Utah, West Virginia, and Wisconsin. *Progress Map: States That Have Passed the Convention of States Article V Application*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/states-that-have-passed-the-convention-of-states-article-v-application> (last visited Oct. 13, 2023).
7. Those states are Iowa, New Hampshire, New Mexico, North Carolina, South Dakota, Virginia, and Wyoming. *See id.*
8. Christopher Klein, *7 Things You May Not Know About the Constitutional Convention*, HISTORY (Sept. 17, 2012), <https://www.history.com/news/7-things-you-may-not-know-about-the-constitutional-convention>.
9. In fact, all of the delegates were given a copy of Natelson’s book, *THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS* (2d ed. 2020).
10. A recording of the proceedings on the second day is available at *The Latest News*, CONVENTION OF STATES ACTION, <https://conventionofstates.com/latest> (last visited Oct. 23, 2023).
11. During the Constitutional Convention, the rules that were adopted by the delegates provided that “no copy be taken of any entry on the journal during the sitting of the House without leave of the House”; that “members only be permitted to inspect the journal”; and, that “nothing spoken in the House be printed, or otherwise published or communicated without leave.” 1 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 15 (Max Farrand ed., 1937). It is inconceivable that such a rule would be passed today, and if one were passed, it would, in all likelihood, be broken immediately.
12. *See, e.g.*, Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARV. J.L. & PUB. POL’Y 61 (2017); ROBERT NATELSON, *THE LAW OF ARTICLE V: STATE INITIATION OF CONSTITUTIONAL AMENDMENTS* 47–48 (2d ed. 2020); Robert Natelson, *A Response to the “Runaway Scenario,”* INDEPENDENCE INSTITUTE (Feb. 13, 2013), <https://i2i.org/a-response-to-the-runaway-scenario/>.
13. JOHN G. MALCOLM, *CONSIDERATION OF A CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS UNDER ARTICLE V OF THE U.S. CONSTITUTION* (Feb. 19, 2016), <https://www.heritage.org/the-constitution/report/consideration-convention-propose-amendments-under-article-v-the-us>.
14. Nebraska is unique in that it has a unicameral legislature, which is majority-Republican.
15. The states with a Republican trifecta are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. The states with a Democratic trifecta are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington.
16. Those states are Arizona, Kansas, Kentucky, North Carolina, and Wisconsin.
17. 140 S. Ct. 2316 (2020).
18. *Id.* at 2319–20.
19. *Id.* at 2328.