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A Brief Reflection on Article V of the U.S. Constitution

Our Legislature is considering differing versions of joint resolutions invoking the power conferred on the States through Article V of the U.S. Constitution. I write today not to opine on the merit of a particular version, but rather to reflect on the legitimacy of what those resolutions propose: a convention of the States.

Article V of the U.S. Constitution provides, in relevant part:

> 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 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.

U. S. CONST. art. V. By its plain terms, Article V empowers both Congress and the States to propose amendments to the U.S. Constitution. While Congress has done so many times in the past, the States have not, even though Article V gives the States the same power.

When two-thirds of the States call for a proposing convention on the same subject or subjects, Congress *must* set a time and place for the convention. Congress then determines whether ratification will be by state legislatures or state conventions. If, through a convention, an amendment is ultimately proposed and then ratified by three-fourths of the States through a subsequent process, then such amendment is as validly a part of the U.S. Constitution as anything proposed by Congress.

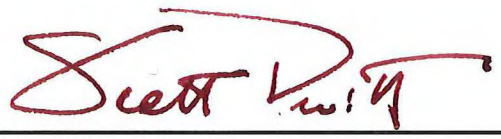
While States have not exercised their power to amend the Constitution through a convention, there is, in fact, a great deal of precedent for how such a convention would work. Before Independence, American colonies met in conventions twenty times, and from Independence through 1787, the States met in convention eleven times. These historical conventions employed the same fundamental structure, protocol, and practices. For example, States—and colonies before them—commissioned representatives

referred to as "delegates" or "commissioners" to act on the States' behalf through instructions specifying the extent of the representatives' authority. Employing historical structure, protocol, and practices would ensure that a convention does not operate against a blank slate, but is organizationally sound.

Nevertheless, it is my understanding that there is some fear of a "run-away" convention. Principally, convention critics fear that sweeping changes will be proposed, potentially destroying the nature of our Constitution. Indeed, while addressing what he dubbed the "minimal risks" associated with an Article V convention, Justice Antonin Scalia once stated that the founders foresaw the convention as a remedy against a recalcitrant Congress and that "[i]f the only way to get that convention is to take this minimal risk, then it is a reasonable one." While concerns are thus understandable, safeguards exist to protect our Constitution against abuses.

First, Article V makes plain that conventions called under that provision may only propose amendments. A plenipotentiary convention—a constitutional convention called for a broad and unrestrained purpose—is not authorized under the U.S. Constitution. Second, because they act as agents, representatives must remain within the limits of the authority placed on them by their respective States, and if they do not, their ultra vires acts are not legally binding. Moreover, States can recall their representatives, with enforcement mechanisms for the respective States available via state court proceedings. Finally, and perhaps most importantly, ratification requires that thirty-eight States (three-fourths) approve the amendment. That any proposal coming from a convention of the States must meet that ratification requirement should allay any concerns that unruly and misguided acts of a run-away convention would find their way into and transform the U.S. Constitution.

In conclusion, I hope that as these resolutions are debated, we are sensitive to the opportunity a convention provides. As a run-away Washington D.C. has eroded constitutional limits, we have placed our hope in pushing back against this erosion through federal elections and Supreme Court nominations—all efforts premised on reining in Washington D.C. from the inside. Article V exists so that States may restore constitutional limits through their own independent efforts. And that the States explore this opportunity is consonant with the philosophy of the Founders. Tench Coxe, a prominent Federalist essayist, wrote: "Congress . . . cannot hold any power, which three fourths of the states shall not approve, on experience." The Article V convention power is a legitimate and integral constitutional power.



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