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Article V Convention: Path of Least Resistance

By [Robert Berry](#)

In what is taking shape as a sort of Great Awakening, state legislators have begun to learn that they hold equal status with Congress when it comes to proposing amendments to the U.S. Constitution. Indeed, a handful of state legislators from each state, as yet unknown, are destined for the annals of American history the moment the nation's first Convention for Proposing Amendments is gavelled to order. The process, found in Article V of the U.S. Constitution, requires the legislatures of at least two thirds (34) of the states to pass resolutions demanding that Congress call a "Convention for Proposing Amendments" -- an ad hoc assembly where state legislators, voting state-by-state, may propose (but not ratify) amendments.

The thought of such a thing, while horrifying to Congress, represents the last constitutional method to reform a federal government run amok. And nothing more clearly illustrates the divide between flyover country and the federal city than the remedies that are sure to be proposed and later ratified by the states. To the ruling class, nothing could be more anathema than the prospect of amendments requiring term limits, balanced budgets, single-subject bills, and commerce clause reform.

Few on the Hill seem to be taking notice of the gathering clouds -- a situation that the states would do well to exploit. If anything, the nascent "Article V movement" is little more than a curiosity among the ruling elite. Congress, aware of Article V, has every expectation that the states will continue a 200-year losing streak when it comes to coordinating the resolutions necessary to trigger the process. This is entirely due to the fact that the founders left Congress in charge of counting the resolutions.

Really bad idea, that.

The issue comes down to the "aggregation" of the resolutions. To whatever extent each state's resolution differs from other states, Congress can play games with the counting. The only way around the problem is for the states to coordinate their efforts and agree on resolution language that could be introduced verbatim into dozens of legislatures simultaneously -- a "shock and awe" maneuver if ever there was one.

While coordinating resolutions may seem like a trifle, its a step that will have to be taken if ever an amendments convention is to be held. A serious complicating factor

is the issue of deciding if the "scope," or subject, of the assembly should be limited to the discussion of specific amendments (e.g., balanced budget, term limits, etc.).

In the founding era, a subject was customarily stated as a matter of protocol to provide focus for the gatherings. Colonies, and later states, were then able to send "commissioners" to the conventions who possessed specialized knowledge or expertise in the area to be discussed.

But today the idea of restricting the scope of an amendments convention is in play for a very different reason: to placate fear-mongers who gratuitously assert that the assembly would be the constitutional equivalent of a nuclear bomb. Though completely discredited, this remnant of opponents from the Balanced Budget Amendment (BBA) dustup of the 1980s sees only sinister plots. To this day, the opponents continue to feign ignorance of the distinction between an Article V Convention for Proposing Amendments -- which, needless to say, proposes amendments -- and a full authority Constitutional Convention.

As legislators become educated about the process, fears of nightmare scenarios melt away, but the terror of the boisterous band remains. Put another way, legislators don't really buy the "arguments from Armageddon," but they do fear the zealots who make them. So the idea of restricting the amendments convention to a narrow scope is being offered to provide political cover for legislators who want to give the appearance that they are taking "the concerns" seriously.

It hasn't worked.

Having gotten exactly zero mileage from the accommodation, some pro-Article V state legislators are doubling down. Browbeaten into thinking that the only path to reform goes through the conspiracy theorists, "Delegate Limitation Acts (DLAs)" are being offered as a way to severely punish fiendish delegates to the amendments convention who might propose...a New World Order Constitution? Apparently it is lost on these lawmakers that DLAs only fuel the conspiracy scenarios.

With such defensive tactics and timidity, it becomes plain to see why the Article V movement has been so spectacularly unsuccessful, and for so long.

Not only are such accommodations entirely unnecessary, but they would have the effect of hamstringing the amendments convention and every delegate in attendance to the point that little could be accomplished. Even worse, anything that manages to get accomplished would be subject to an endless barrage of lawsuits using the limiting measures as a pretext to rule any and every amendment proposal *ultra vires*, or beyond the power of the convention's call -- even those that are clearly *within* the

convention's call! Anything and everything that can send the matter into the courts will be used to that end.

And the federal court system will be the graveyard for state-initiated amendment reform.

Rather than protecting the amendments convention, limiting measures will be used as a set of levers by Congress, the courts, and all other opponents as a means to pry it apart. Thus, state legislators who have deluded themselves into thinking that support for limiting measures is the responsible and conservative course are in fact being reckless. Far from quelling opposition, the defensive tactics have managed only to fan flames and legitimize the nonsensical.

Instead of splitting hairs with crackpots, state legislators had better consider the seasoned opponent occupying the strategic ground on Capitol Hill.

Less is More

The way forward is for the states, in their resolution language, to simply quote the part of Article V, which compels Congress to call the amendments convention:

The Congress ... on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments[.]

A minimalist resolution basically quoting Article V provides no purchase for legal challenge and is effectively saying to Congress, "The Constitution says we can demand it...so we're demanding it. Period." The bonus of taking this path of least resistance is that [there are already 18 states with valid resolutions](#) of this type -- and those resolutions never expire!

The resulting unfettered Convention for Proposing Amendments will be a place where delegates can deliberate state-centric solutions to that which vexes the nation. Delegates, more properly known as "commissioners," each attend with a written "commission" from his or her home legislature. By signing this document, commissioners agree to act under the "law of agency," carrying out their home state's bidding, and crucially, acknowledging that they can be pulled from the assembly in disgrace should bad conduct warrant.

If state legislators can steel their courage, taking the full fury of the imbalanced opposition, an Article V Convention for Proposing Amendments becomes an inevitability.

Only then will these lawmakers be worthy of their place in history.

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