

THE ARTICLE V CONVENTION PROCESS AND THE RESTORATION OF FEDERALISM

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Two recent events should be sobering for those of us who are committed to the Founders' vision of federalism, or, with deference to Professor Heather Gerken, "federalisms."¹ The first is the Supreme Court's decision to uphold most of the Affordable Care Act.² The second, of course, is the outcome of the recent election. Both demonstrate the basic failure of the strategy of trying to restore constitutional limits by concentrating exclusively on federal elections and Supreme Court appointments. In reality, no Congress or President is likely to do much to restore constitutional limits on federal power. Furthermore, any efforts of the Supreme Court will be marginal, at best.

I propose a better way of restoring federalism, one that has generated much discussion at the state level but really has not made its way into the national consciousness. This better way of restoring federalism centers on the ability of states, and particularly state legislatures, to amend the Constitution to rein in a runaway central government.³ Consider the debates over the

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1. See generally Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552–61 (2012) (outlining the various strains of federalism scholarship which collectively constitute "many federalisms").

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–98 (2012) (opinion of Roberts, C.J.) (upholding the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)).

3. U.S. CONST. art. V ("The Congress . . . 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 . . .").

ratification of the Constitution during the period from 1787 to 1790. Two arguments were at the heart of the case against the Constitution from those who opposed it.

The first argument was that the Constitution granted too much power to the federal government, which could lead to abuse of that power.⁴ The second argument was more subtle but ultimately proved more prescient: Even if the Constitution, when honestly, fairly, and objectively read, did not give the federal government excessive power, ambitious and clever people would nevertheless twist its language to justify the seizure by the central government of enormous power, regardless of the understanding of those who wrote and ratified the instrument.

Advocates of the Constitution responded in four ways to these arguments. First, they emphasized the limited scope of the authority given to the federal government. This sentiment is exemplified by James Madison's famous statement that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined."⁵ Madison's statement was not just campaign rhetoric: When one examines the Constitution's grants of power against the background of eighteenth-century usage and jurisprudence, it is clear that for the most part these powers were fairly well-defined. The phrase "regulate commerce," for example, was understood to mean governing activities such as mercantile trade, navigation, cargo insurance, and imposing certain tariffs. But, as Randy Barnett, I, and others have documented, it did not include such activities as manufacturing, most insurance policies, or health care.⁶

Second, advocates of the Constitution listed explicitly activities that the federal government could not regulate and that would remain within the exclusive jurisdiction of the States. These included local business, agriculture and other forms of land use, real estate titles and inheritance, local government,

4. See, e.g., 1 ESSAY OF BRUTUS (Oct. 18, 1787), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 274–75 (Ralph Ketcham ed., 2003).

5. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

6. See, e.g., Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 214–15 (2007); Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702–03 (1996).

tort law and other aspects of civil justice among people in the same state, criminal law, religion, education, and social services.⁷ The Constitution's advocates sold the document to the ratifying public precisely by representing that such activities were outside the federal sphere.⁸ One concept must be made clear: Everyone understood even then that there were close interrelationships between the activities reserved to the states and the activities subject to federal regulation. For overriding and very good reasons, though, certain matters were left out of federal jurisdiction.

The third response of the Constitution's advocates, after some hesitation, was to promise a Bill of Rights.⁹ The fourth—the most germane here—was that Article V gave the States substantially unilateral power to adopt amendments, which the States could do if the federal government proved oppressive.¹⁰ In other words, the Founders saw the amendment procedure as more than a way of responding to changed circumstances. They saw it as a tool for curbing excesses and abuses.

During the ratification process, many of the Constitution's advocates pointed out that the States could not only ratify proposed amendments, but that acting through their instrumentality—something that the Constitution calls a “Convention for proposing Amendments”¹¹—they enjoyed concurrent power with Congress to propose changes in the instrument. That reason is why Alexander Hamilton said that if the States were determined to insert a corrective amendment into the Constitution, then “that amendment must infallibly take place.”¹²

7. Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469, 481–88 (2003).

8. See, e.g., THE FEDERALIST NO. 45, *supra* note 5, at 292–93 (James Madison).

9. See, e.g., Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL'Y 391, 396–97 (1995) (“Despite earlier opposition to including a list of rights in the Constitution, James Madison was obligated by ratification and campaign commitments to introduce some such measure in the First Congress.”).

10. See, e.g., THE FEDERALIST NO. 85, *supra* note 5, at 526 (Alexander Hamilton) (noting that state legislatures could invoke the Article V amendment process to “erect barriers against the encroachments of the national authority”); see also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 148 (1996) (“Article V was proffered as an assurance of the protection afforded by the new Constitution to the peoples of the several states.”).

11. U.S. CONST. art. V.

12. THE FEDERALIST NO. 85, *supra* note 5, at 525 (Alexander Hamilton).

Over the last fifty years, state lawmakers have largely overlooked their amendment power because of widespread misunderstanding about this convention for proposing amendments. It is commonly and inaccurately labeled a “constitutional convention” and is assumed to be inherently uncontrollable.¹³ Many seem to think it is independent of the state governments; that, for example, Congress can designate how delegates are chosen or how they are allotted.¹⁴

Such misconceptions are the product of ignorance of the relevant history and law. In fact, the convention for proposing amendments is nothing but a diplomatic gathering of the States to which each state sends a delegation, called a committee, and in which each state stands in a position of sovereign equality.¹⁵

The convention’s agenda and its deliberations are subject to the limits imposed by the state legislatures.¹⁶ This is clear from eighteenth-century convention practice, from the record of the framing, from the debates over the Constitution’s ratification, and from subsequent history and some subsequent case law.¹⁷

The Founding generation had extensive experience with interstate conventions.¹⁸ The convention that wrote the Constitution was only the latest in at least twenty-five gatherings among the American colonies and States that occurred within

13. See, e.g., James Kenneth Rogers, Note, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1009 (2007) (noting that during the 1960s, some states rescinded applications to call a convention on the issue of the apportionment of state legislative districts once the constitutional threshold was neared partly because “well-publicized speculation that the convention, once called by Congress, could not be limited to a single issue spread fear of an uncontrollable convention”).

14. But see Michael B. Rappaport, *Reforming Article V*, 96 VA. L. REV. 1509, 1524–25 (2010) (noting that it is an unsettled question whether Congress would be able to determine the method for selecting delegates under Article V and the Necessary and Proper Clause).

15. Robert G. Natelson, *Proposing Constitutional Amendments By Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 708, 739–40 (2011).

16. *Id.* at 747.

17. See *id.* at 715–32.

18. See *id.* at 707–08 (explaining the prominence of interstate conventions during the Founding era and noting that “federal convention customs, practices, and protocols were fairly well standardized when Article V was written”).

the lifetime of Benjamin Franklin alone.¹⁹ Leading Founders had attended many of these gatherings and conventions, and both procedures and protocols were well understood. We can recover them today in the convention journals, calls, and other records. When the States met in convention in 1861 in an attempt to avert the Civil War, they followed those procedures and protocols to the letter.²⁰

When one examines these procedures and protocols, one can understand why so many founders affirmed that the States could amend the Constitution in any way they desired. In an interstate convention like the Constitution's convention for proposing amendments, the states "run the show." Congress has almost nothing to say about it beyond fixing the time and place of the call and identifying the subject matter specified by the States in their applications.²¹ Each state legislature fixes the number of delegates—called commissioners—from that State, and determines how the commissioners are selected.²² The state legislature, or its designee, grants and defines the authority of the commissioners, instructs them, and may recall them.²³ Once gathered together, the convention adopts its own rules, elects its own officers, and commences the work assigned to it.²⁴ On the convention floor, each state has one vote.²⁵ The convention decides whether to propose one or more amendments, and, if it decides to do so, it drafts them.²⁶ The proposals are ratified or rejected in the same manner as congressional proposals are.²⁷

On several occasions, before this learning escaped us, state legislatures flexed their Article V muscles by applying, in a concerted manner, for a convention to propose amendments. At the turn of the last century, for example, the States forced the United States Senate to agree to the Seventeenth Amend-

19. See Robert G. Natelson, *Founding Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044296##.

20. See generally CRAFTS J. WRIGHT, OFFICIAL JOURNAL OF THE CONFERENCE CONVENTION HELD AT WASHINGTON CITY (Washington, M'Gill & Witherow 1861).

21. See generally Natelson, *supra* note 15, at 733–36.

22. *Id.* at 740.

23. *Id.* at 740, 747.

24. *Id.* at 740.

25. *Id.* at 741.

26. See *id.* at 744.

27. *Id.* at 748–49.

ment—which provides for direct election of senators²⁸—when thirty-one of the necessary thirty-two applied for a convention limited to proposing a direct election amendment.²⁹

If recent history tells us anything, it is that we are not going to restore federalism, or for that matter federalisms, merely by choosing the right Presidents, members of Congress, or Supreme Court Justices. The state legislatures will have to do the job. And as James Madison pointed out late in his life, their ultimate constitutional tool for doing so is the procedure of Article V.³⁰

28. See U.S. CONST. amend. XVII.

29. See Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 325–26 (2011); Rogers, *supra* note 13, at 1008.

30. Letter from James Madison to Edward Everett (Aug. 28, 1830), in 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 398 (Galliard Hunt ed., 1910).