A BRIEF REPLY TO PROFESSOR PENROSE

MICHAEL STERN*

"It's tough to make predictions, especially about the future."[1] In her thoughtful and gracious response, Professor Mary Margaret Penrose emphasizes the uncertainty inherent in the Article V Convention process.[2] Indeed, there are a number of unsettled issues surrounding that process, ranging from administrative matters, such as where the convention will meet, to more complex and controversial questions, such as how it will vote.[3] I agree with her that there are elements of uncertainty in the convention process and that resolving issues in advance of a convention is a laudable goal.

Uncertainty about some things, however, does not mean uncertainty about everything. Take, for example, Senator Ferry's 1869 warning, quoted by Penrose, that a convention cannot be limited to "'the simple amendment which you are proposing to it. It may go on to amend your State constitution and to subvert the whole machinery of your State government, and there is no power in your State to stop it.'"[4] This is certainly wrong. In the first place, an Article V Convention cannot by itself amend anything; its authority is limited to proposing amendments.[5] Second, it can only propose amendments to the federal Constitution, not to state constitutions.[6]

Moreover, while it is true that there has never been an Article V Convention to propose amendments,[7] it does not follow that there is no experience from which reasonable predictions can be made about the Article V process. In fact, while an Article V Convention cannot propose amendments to state constitutions, there have been many state

---

* The author formerly served as Senior Counsel in the Office of General Counsel, U.S. House of Representatives, as Deputy Staff Director for Investigations for the Senate Committee on Homeland Security and Governmental Affairs, and as Special Counsel to the House Permanent Select Committee on Intelligence. He writes about constitutional issues relating to the legislative process and other congressional legal issues at www.pointoforder.com.

1. ANTHONY ST. PETER, THE GREATEST QUOTATIONS OF ALL-TIME 264 (2010).

2. *See generally* Mary Margaret Penrose, *Conventional Wisdom: Acknowledging Uncertainty in the Unknown*, 78 TENN. L. REV. 789 (2011) (responding to Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011)).

3. *See* Penrose, *supra* note 2, at 794–95.

4. *Id.* at 794 n.19 (quoting Ralph R. Martig, *Amending the Constitution, Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1252, 1272 (1936)).

5. *See* U.S. CONST. art. V.

6. *See id.*

7. *See* Penrose, *supra* note 2, at 790.

constitutional conventions throughout American history that have exercised precisely that power.[8] A recent work identifies some 233 such state conventions that "have much in common in the way their delegates have been selected, their business conducted, and their work submitted."[9] The history of these conventions reveals no tendency for them to fall under the control of radical or irresponsible elements and should provide some comfort that there is nothing inherently dangerous about such proceedings.[10]

This is in no way to disagree with Penrose's suggestion that the planning for an Article V Convention begin now.[11] It is important, however, to differentiate between two distinct objectives of such an effort. The first objective is to address collective action problems, which present a barrier to holding a convention. Absent an agreement on the location, funding, organization, and procedures of a convention, such a convention may disintegrate before it ever gets started, making it impossible to address the substantive constitutional amendment that the states wish it to consider.

The second objective would be to prevent a runaway convention, which was the focus of my original article.[12] It must be emphasized that the collective action problems noted above do not make a runaway convention more likely; to the contrary, they make it less likely that the convention will be able to consider or propose any amendment at all. The risk of a failed or stillborn convention seems to me to be significantly larger than that of a runaway convention.

Nevertheless, my article proposes a number of additional safeguards that could be adopted to minimize any risk of a runaway convention.[13] The safeguards, though perhaps unnecessary, would serve as confidence-builders to assure state legislatures that an Article V Convention will not be hijacked in the service of an unknown agenda.[14] Enacting some or all of these measures would be consistent with Penrose's approach, and she does not appear to dispute that they would be efficacious.[15]

Thus, although Professor Penrose and I view this issue from divergent perspectives, the practical differences in our approaches may be fairly modest. There are two areas, however, where our disagreements deserve further explication.

1. The Role of the States versus Congress. Penrose aptly notes that "[t]he purpose of including the State Convention method in Article V is to

---

8. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 7 (2009).

9. *Id.* at 12.

10. *See generally id.*

11. *See* Penrose, *supra* note 2, at 793–94.

12. *See generally* Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 TENN. L. REV. 765 (2011).

13. *See id.* at 784–87.

14. *See id.* at 787–88.

15. *See generally* Penrose, *supra* note 2.

provide the individual states with the power to amend when the national government refuses to act."[16] Consistent with that purpose, Article V gives Congress an extremely limited role in the convention process.[17] Congress has the ministerial duty of calling the convention when the requisite applications have been received, and it must determine the method of ratification for any amendment proposed by the convention.[18]

Penrose nonetheless proposes that Congress consider and enact legislation to establish procedures to govern a convention.[19] While it is arguable that Congress has some limited authority in this regard, such as determining the place of the convention, any attempt by Congress to prescribe the rules of the convention would be in considerable tension with the purposes of Article V.

Commentators have concluded that Congress therefore may not exercise any discretionary authority over the convention method of amendment.[20] Professor William Van Alstyne, for example, finds that "Congress [is] supposed to be mere clerk of the process convoking state-called conventions."[21] Professor Robert Natelson contends that Congress is supposed to act as the agent of the state legislatures with respect to the calling of an Article V Convention.[22] As an agent, Congress must follow the directions received from its principals and "may not impose rules of its own on the states or on the convention."[23]

The task of setting rules and procedures for an Article V Convention therefore must fall to the states rather than to Congress. Congress can play a limited, but important, role by declaring in advance how it will count applications for a limited convention and whether it will recognize proposed amendments that exceed the scope of a limited convention. Any attempt by Congress, however, to impose rules and procedures on a convention would be constitutionally questionable at best and would give rise to the very type of state-federal imbroglio that Penrose fears.[24]

---

16. *Id.* at 795.

17. *See* U.S. CONST. art. V.

18. *See id.*

19. *See* Penrose, *supra* note 2, at 797–98.

20. *See, e.g.*, William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (1978).

21. *Id.* at 1303.

22. *See* Robert. G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan (Part 1 in a 3 Part Series)*, POLICY REPORT NO. 241 (GOLDWATER INSTITUTE), Sept. 2010, at 19–22, *available at* http://www.goldwaterinstitute .org/article/5005.

23. *Id*. at 21.

24. *See* Penrose, *supra* note 2, at 793–94. On the other hand, it is certainly permissible for Congress to hold hearings on an Article V Convention, to hear from experts about various issues that may arise with regard to a convention, and even to issue recommendations on rules and procedures that either the states, the convention, or both may wish to adopt.

A state-led effort to prescribe rules and procedures for an Article V Convention would no doubt be more difficult and cumbersome, but it is far from impossible. A uniform act to establish the required rules could be developed, and each state that enacted the law would instruct its delegates to vote for such rules as the first act of the convention. Comparable efforts to address state functions under the federal Constitution with respect to the electoral college have enjoyed considerable success.[25] Moreover, the state conventions that ratified the Twenty-first Amendment relied heavily on a uniform state law approach, with many states adopting a prototype statute verbatim.[26] A uniform state law approach to the collective action problems of an Article V Convention is thus entirely feasible.

2. The Role of the Courts. Much of Penrose's analysis is devoted to showing that the courts cannot be relied upon to resolve any particular controversy regarding the Article V Convention method of amendment.[27] This is true both because there is little case law regarding the merits of most of the potential areas of legal disagreement, and because doctrines of justiciability make it uncertain when, if ever, the courts might reach the merits of any such disagreement.[28]

Penrose is certainly correct in this regard. However, I have difficulty accepting the implication that this state of affairs somehow makes the Article V Convention a riskier proposition. The proposition appears to rest on the assumption that a legislative or constitutional process is inherently unpredictable unless the courts have pronounced how it is to operate. In fact, our normal legislative processes operate based on rules which are set by the legislative body or directly by the state or federal constitution, with little or no judicial intervention.[29]

Nor is it the case that court decisions, generally speaking, necessarily make the law more clear or predictable. The opening observation about predicting the future is at least as applicable to judicial decision-making as to baseball games or other areas of human endeavor.

---

25. For example, the National Conference of Commissioners on Uniform State Laws produced in 2010 a Uniform Faithful Presidential Electors Act. *See generally* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT (2010) *available at* http://www.law.upenn.edu/bll/archives/ulc/fpe/2010_final.htm. Additionally, the National Popular Vote bill, which would commit enacting states to award their presidential electors to the candidate receiving a majority of the national popular vote, has been enacted in six states and the District of Columbia. *See* Explanation of the National Popular Vote, NATIONAL POPULAR VOTE, http://www.nationalpopularvote.com/pages/explanation.php (last visited May 5, 2011).

26. *See* Richard M. Evans, *How Alcohol Prohibition Was Ended*, http://www.druglibrary.org/think/~jnr/endprohb.htm (last visited May 5, 2011).

27. *See* Penrose, *supra* note 2, at 799–803.

28. *See id.*

29. *See generally* United States v. Ballin, 144 U.S. 1 (1892); Marshall Field & Co. v. Clark, 143 U.S. 649 (1892).

So long as there is a doubt as to the constitutional validity of an out-of-scope amendment, it is highly unlikely that an Article V Convention would propose such an amendment. Doing so would entail substantial legal and political risks for delegates who have been instructed by their states to limit consideration to a particular amendment or subject. It would also mean that the convention's work would likely be for naught, as it could be nullified by Congress or the state legislatures themselves.

The possibility of judicial review merely adds an additional "veto point" to the process, and therefore makes it even more unlikely that the convention would propose an out-of-scope amendment. While it is uncertain whether the courts would reach the merits of a challenge to the constitutionality of the amendment and, if so, what they would ultimately decide, it can be said with confidence that there would be legal challenges that would add more time and expense to an already complex ratification process.

Thus, far from enhancing the risk of an Article V Convention, the possibility of judicial review contributes to the stability of the process. If the states set forth guidelines for the conduct of a convention, including a limit on the amendments the convention may consider, the safe harbor will be for the convention to stay within those guidelines. The same is true for delegates who are given instructions by their states. Violating the guidelines or disobeying the instructions would certainly lead to protracted and expensive litigation and could potentially result in invalidation of a proposed amendment, on the one hand, and civil or criminal sanctions for the faithless delegate, on the other. There will be a strong incentive, therefore, for delegates individually and the convention as a whole to turn square corners in implementing the mandate from the states.

Life is full of uncertainty and comes with few guarantees, other than death and taxes. Predictions are hard, especially about the future. Yet the Framers well understood these facts when they chose to include the convention method of amendment within Article V. Specifically, they understood that there were no guarantees that the federal government they established would be restrained by mere "parchment barriers." To address this uncertainty, they designed the Article V Convention as a means for the states to resist federal encroachment. The process they established is as yet unused, but it is not unsafe.[30] With appropriate action by the states, it can be made safer still.

---

30. *See* PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION 13–14 (Paul L. Murphy ed. 1989). "[W]hat the Founders did was far more cautious, careful and respectful of citizens' rights and established procedures than the term 'runaway convention' implies." *Id.* at 13.