May state legislative applications limit an Article V convention? Subject, yes; specific language, probably not (Part II of 2)

As noted in my last post, some excellent constitutional scholars believe state applications for a convention for proposing amendments may limit the convention to voting "yes" or "no" on a specifically-worded amendment. A prescribed-wording application, they say, reduces the fear of a "runaway" convention and places the state legislatures in the equal position with Congress that Article V of the Constitution was designed to give them.

I agree with those scholars that state applications may limit the convention to one or more *subjects*. But I think the risks of trying to limit the convention to an up-or-down vote on a *specifically-worded amendment* are just too great. The risks are legal, political, and practical.

The Legal Problems.

I believe there is a good chance courts reviewing prescribed-wording applications would invalidate them as not qualifying as proper "applications" at all. Here's why:

* The text of the Constitution grants the *convention*, not the applying state legislatures, the power to "propos[e] Amendments." The Framers could have drafted language permitting the states to propose amendments directly (some modern commentators have suggested such an approach), but they did not. One possible reason is the belief that a convention of all the states is more likely to produce a well-thought-out, widely-acceptable proposal than two-thirds of states, meeting apart before the convention has even opened.

* While it is true that a purpose of Article V is to give state legislatures a role co-equal to Congress as a promoter of amendments, that purpose is served by the make-up of the convention: a gathering of state delegations, chosen and instructed by the state legislatures.

* A long line of court cases holds (almost without dissent) that assemblies empowered by Article V must enjoy a certain amount of deliberative freedom (although this does not mean infinite deliberate freedom). *See, e.g., Miller v. Moore*, 169 F.3d (8th Cir. 1999); *Bramberg v. Jones*, 20 Cal. 4th 1045, 978 P.2d 1240 (1999); *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975) (opinion by Justice Stevens). Thus, the courts have voided measures, such as ballot language and referenda, that try to dictate to Article V legislatures or conventions how they are to conduct their business. Although prescribed-wording applications still would allow the "convention for proposing amendments" to vote a measure up or down, the courts might well rule that Article V requires that a proposal convention (as opposed to a ratification convention) be given more deliberative freedom than that. The reasons follow.

* Although some parts of Article V are too clear to require interpretation, *see, e.g., United States v. Sprague*, 282 U.S. 716 (1931), the precise meanings of other parts are less obvious. In those instances, the courts use the historical and legal background to interpret the meaning of words and phrases in Article V. *See, e.g., Opinion of the Justices*, 167 A. 176 (Me. 1933) (using historical materials to construe the meaning of a state ratifying convention); *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975) (opinion by Justice Stevens) (using Founding-Era materials to interpret "ratify" and "ratification"); *Opinion of the Justices to the Senate*, 373 Mass. 877, 366 N.E. 2d 1226 (1977) (using Founding-Era materials to interpret "application"); *Berlotti v. Lyons*, 182 Cal. 575, 189 P. 282 (1920) (referencing Founding Era and other materials to interpret "Legislatures"). Thus, Founding-Era history and, to a

certain extent subsequent history, is of great importance in interpreting Article V.

* The name “convention for proposing amendments” tells us that this is a *proposing* convention. The Founders would have distinguished it both from a *plenipotentiary* convention (with very broad powers) and from a *ratifying* convention (limited to an up-or-down vote). These distinctions were well understood.

* The invariable practice for multi-state (and, before Independence, multi-colony) proposing conventions was for the entity applying for or calling the meeting to provide it with specific problems to work on, but also to grant the commissioners (delegates) the deliberative freedom to do so—something like the modern business or government problem-solving task force. This was true from the late 17th century through the Founding Era.

* The Founding-Era evidence is buttressed by subsequent practice. Nineteenth century proposing conventions, such as the Washington Conference Convention of 1861, worked within the same pattern. As far as I can tell, limiting an interstate proposal convention—in fact, limiting any interstate convention—to an up-or-down vote would be unprecedented.

* Limiting the convention to the role of “Answer the question: Yes or no? Which is it?” is inconsistent with the status of the interstate convention as an assembly of respectable and equal sovereigns. It certainly is inconsistent with the international law usages upon which the American multi-state convention was based. And that is no doubt one reason it would be unprecedented.

* When a court examined the pre-1787 history for understood meanings of “application” and “call,” the court would find that no application or call for a multi-colony or multi-state convention (and there were over 30 such gatherings) *ever* tried to limit the scope to an up-or-down vote on prescribed language.

* The court also might consider that until the 20th century, it was unprecedented for an applying state to even try to limit an Article V amendments convention to prescribed wording.

Political and Practical Problems.

* The Framers inserted a convention into the amendment process presumably because the convention setting encourages collective deliberation, compromise, and conciliation among all the states, not merely among those that apply. Deliberation requires the ability to weigh alternatives.

* A proposal deriving from a convention of all states is more likely to be acceptable to the country than one imposed by two-thirds of the states. Two-thirds of the states might even represent less than half the population of the country; this is impossible at an amendments convention and almost impossible among the three-quarters of states necessary to ratify.

* Even if the courts uphold prescribed-wording applications, the language of the amendment is likely to be torn apart by opponents, and any substantial vulnerability will kill the entire enterprise. If the convention is ever called, it would have no power to amend the proposal to meet legitimate objections.

* State lawmakers enjoy being creative, and that means that in the world of real politics, legislative applications always vary. When the applications address a broad subject (such as “congressional term limits” or “federal balanced budget amendment”), this situation is manageable. But when applications must specify the precisely-identical wording, then variations probably can’t be counted together to reach the two-thirds threshold necessary for a convention.

For such reasons, I recommend that applications specify their general subject(s), but not try to limit the convention to voting “aye” or “nay” on indelible language.

Tags: amendment applications, amendments convention, Article 5, balanced budget, balanced budget amendment, constitution, constitutional amendment, constitutional convention, constitutional law, convention for proposing

amendments, Natelson Rob, ratification, Rob Natelson, supreme court

Comments