No, the Necessary and Proper Clause Does NOT Empower Congress to Control an Amendments Convention

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A few days ago I heard a presentation by a spokesman for a group that claims to defend the Constitution and revere the Founders. Yet the spokesman trashed the Constitution's framers for allegedly exceeding their authority and claimed they added a provision that largely rendered another provision useless. In other words, the spokesman charged the framers with being both (1) dishonorable and (2) incompetent.

The framers inserted the "Convention for proposing Amendments" in the Constitution to provide the states with a way of obtaining constitutional amendments without federal interference. Tench Coxe, a leading advocate for the Constitution during the ratification debates, pointed out that the convention device allows the states to obtain whatever amendments they choose "although the President, Senate and Federal House of Representatives, should be unanimously opposed to each and all of them." (Italics in original.)

The spokesman, however, asserted that the Constitution allowed Congress, through the Necessary and Proper Clause, to dictate, either in the convention call or by previous legislation, how an amendments convention is structured and how commissioners (delegates) are selected and apportioned.

The claim that Congress can use the Necessary and Proper Clause to structure the convention was first advanced in the 1960s, and has been repeated numerous times since then. A Congressional Research Service report published earlier this year noted that some in Congress have taken the same line, although the report did not actually endorse it.

But pause to consider: Why would the framers place in the Constitution a method by which Congress could largely control a convention created to bypass Congress? Were that framers that stupid?

Of course not. Most of them were highly experienced and extremely deft legal drafters.

Behind the belief that the Necessary and Proper Clause empowers Congress to structure the convention are three distinct assumptions—all erroneous: They are (1) that the scope of Congress's authority under the Necessary and Proper Clause is broader than it is, (2) that the Clause covers the amendment process, and (3) that ordinary legislation may govern the amendment process.

The Necessary and Proper Clause is the last item in the Article I, Section 8 list of congressional powers. It reads:

> *The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

It happens that the most extensive treatment of the Necessary and Proper Clause is an academic book I co-authored with Professors Gary Lawson, Guy Seidman, and Geoff Miller: *The Origins of the Necessary and Proper Clause* (Cambridge University Press, 2010) (cited by Justice Thomas in a Supreme Court case earlier this year and apparently relied on by Chief Justice Roberts in 2012). This book reveals the Necessary and Proper Clause to be a masterpiece of legal draftsmanship.

The Clause was based on usage common in 18th-century legal documents. It is not a grant of authority, but a rule of interpretation. It tells us to construe certain enumerated powers as the ratifiers understood them rather than in an overly-narrow way. In legal terms, the Necessary and Proper Clause informs us that those enumerated powers include "incidental" authority.

Even if the Clause did apply to the amendment process, the authority "incidental" to Congress's call would be quite narrow. An entity that calls an interstate convention always has been limited to specifying the time, place, and subject matter. It is the state legislatures who control selection of their own commissioners, thank you very much.

But in fact the Necessary and Proper Clause does not extend to the amendment process. To explain:

The Constitution includes numerous grants of power. These grants are made to Congress, to the President, to the courts, to the electoral college, and to state legislatures, state governors, and various conventions. An entity exercising a power under one of those grants is said to exercise a "federal function."

The Necessary and Proper Clause is crafted to apply to most federal functions, but it also excludes a number of them. Specifically, it covers only the grants listed in Article I, Section 8, and those vested in the "Government of the United States" and in "Departments" and "Officers" of that government.

In other words, the Clause omits constitutional grants made to entities that are not part of the "Government of the United States," even when those entities exercise "federal functions." See, for example, *Ray v. Blair*, 343 U.S. 214 (1952) (holding that presidential electors, who ultimately derive their power from the Constitution, exercise a federal function but are not federal officers or agents). Among other the entities exercising federal functions but *not* acting as part of the U.S. government are (1) state legislatures regulating congressional election law, prescribing selection of presidential electors, ratifying constitutional amendments, providing for state ratifying conventions, applying under the Guarantee Clause, or (before the 17th amendment) choosing U.S. Senators, (2) state governors issuing writs of election to fill congressional vacancies or applying under the Guarantee Clause, (3) state ratifying conventions, and (4) the convention for proposing amendments.

Yes, but Congress calls the convention. Could Congress use the Necessary and Proper Clause to regulate *itself* as a calling agency on the ground that it (Congress) is a "Department" of the federal government?

Highly unlikely. Allowing Congress to insert binding regulations in the convention call would allow it to do indirectly what it is forbidden to do directly: regulate the convention. That flies in the face of established legal principles.

Moreover, it is doubtful whether Congress is EVER a "Department" of government as the Necessary and Proper Clause uses the word. Here's one reason: During the Founding Era, "department" could apply either to an entire branch of government (legislative, executive, or judicial), or to an *executive* department. In both of the two other instances where the original Constitution uses the word, it clearly means only executive departments. So for the Necessary and Proper Clause to the entire legislative branch, you would have to assume the word means something different in that Clause from what it means elsewhere. That violates basic rules of constitutional construction.

But no matter: Even if we assume for sake of argument that Congress is a "Department" for the *other*

purposes, the rules for Article V are different.

The difference is that (according to the courts) when Congress and state legislatures act in the amendment process they do not act as the legislative branches of their respective governments. Instead, they act as *ad hoc* assemblies for registering the popular will. They can exercise only the power granted by Article V, and not powers granted by other parts of the U.S. Constitution or by state constitutions. Thus, in *Idaho v. Freeman* (1981), a federal court ruled that

> *"Congress, outside the authority granted by Article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by Article I" [which includes the Necessary and Proper Clause].*

(This case was later vacated as moot, but there were no problems with the merits of the ruling.) Or, as the Supreme Court of Missouri pointed out when addressing the state legislature's Article V functions,

> *"[The legislature] was not, strictly speaking, performing the functions of a legislative body for the state, but was acting as a representative of the people, pursuant to authority delegated to it by the federal Constitution. . . " State ex rel. Tate v. Sevier (1933).*

(The U.S. Supreme Court denied certiorari in that case, meaning it refused to consider reversing this decision.)

Again, when legislatures act under Article V they do so as separate assemblies, not as the legislative branches of their governments. This is a very old principle, dating back to 1798, when the Supreme Court held that when Congress proposes amendments, it does does not need presidential signature, as it does when it acts as the federal legislature. See also United States v. Sprague (1931).

Well, if Congress cannot insert language in the "call" structuring the convention, can it pass laws for the same purpose? Again, the answer is "no." A long list of 20th century cases from courts at all levels holds that the amendment process is governed by the express and implied provisions of Article V, not by other sources of law, such as statutes, state constitutions, or ordinary legislative rules. See, for example, Leser v. Garnett (1922) and Dyer v. Blair (1975).

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