The Justiciability of Controversies Related to the Article V Convention

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As you may know, there is increasing chatter about the possibility of Congress calling an Article V "convention for proposing amendments" (sometimes referred to, inaccurately, as a "constitutional convention").

Recently the New York Times featured a front page article by Michael Wines entitled "Inside the Conservative Push for States to Amend the Constitution." The focus of the article is on the effort to call a convention to propose a federal balanced budget amendment, which I know something about through my association with with the Balanced Budget Amendment Task Force (BBATF), one of the three groups featured in the piece.

If I might digress for a moment, I note that Wines's suggestion that the balanced budget amendment effort is "often funded by corporations and deeply conservative supporters like the billionaire Koch brothers and Donors Trust" is, unfortunately, not true, certainly with respect to the BBATF. To the contrary, the BBATF operates with little outside funding of any kind and depends on the work of citizen activists who volunteer their time and often pay their own travel expenses. (No need to mention that last part to my wife, though). But if you happen to be a wealthy donor, feel free to click through to the BBATF website and look for the donate button. . .

Anyway, as Wines notes, "Article 5 of the Constitution . . . allows the states to sidestep Congress and draft their own constitutional amendments whenever two-thirds of their legislatures demand it." Thus far, "28 states have adopted resolutions calling for a convention on a balanced-budget amendment, including 10 in the past three years, and two, Oklahoma and West Virginia, this spring." Thus, only six additional states are needed to trigger an Article V balanced budget amendment convention.

Wines is also correct that there are substantive legal issues which will undoubtedly be raised if and when the states reach the magic number of 34. For example, Wines says that "[e]ven if the two-thirds threshold were reached, a convention would probably face a court battle over whether the legislatures' calls for a convention were sufficiently similar."

What he refers to is the fact that the 28 existing applications for a balanced budget amendment convention do not use identical language, and it can be argued (and undoubtedly will be argued) that some of them are substantively different from the others in terms of the scope of the convention they seek. If Congress calls a convention based upon these applications, someone is likely to go to court to stop the convention from being held. Thus, Wines is right that there probably will be a "court battle" of some kind.

This doesn't mean, however, that a court would actually consider such a case on its merits. Before doing so, it will have to answer a novel question: when (if ever) are claims related to the Article V convention justiciable?

There is no black and white answer to this question, partly because Congress has never called an Article V convention and few issues regarding such a convention have ever been raised in court. There are a number of contingencies which could influence whether any particular Article V litigation would be deemed justiciable. As a doctrinal matter, the outcome could depend on factors such as the nature of the claim (e.g., is it a political question), the timing of the lawsuit (e.g., is the controversy ripe), the identity of the parties (e.g., is the plaintiff someone who has suffered a "concrete" and "particularized" injury caused by the defendant), and the nature of the relief sought (e.g., can the court grant this relief and will it redress the alleged injury). As a practical matter, other factors may also be important, such as the makeup of the judiciary at the time and whether the political climate is one hospitable to judicial intervention in the constitutional amendment process.

That being said, my general sense is that it will be difficult to persuade a court to reach the merits of a challenge to the Article V convention process. For one thing, judicial intervention with respect to constitutional amendments generally raises serious separation of powers concerns. Because federal courts already exercise a de facto supremacy over the interpretation of the Constitution, judicial review of the constitutional amendment process would give them total and unchecked control over what the Constitution says and means. *See* Thomas Millet, *The Supreme Court, Political Questions, and Article V—A Case for Judicial Restraint*, 23 Santa Clara L. Rev. 745, 747 (1983) ("By exercising review over article V cases, the Supreme Court retains not only control over the judicial process of constitutional amendment through overruling past cases, but also control over the non-judicial amendment process of article V. Potentially, the Supreme Court's ability to say what the law is would be unchecked, a result at odds with the constitutional concept of a republican government of separated powers.").

Furthermore, there are particular problems with judicial review of the Article V convention process. The Article V convention is fundamentally a fail-safe mechanism designed to enable the states to protect themselves against oppression or abject dysfunction on the part of the federal government. The intervention of the federal courts (and we are speaking primarily of the federal courts here) in such a politically delicate area is fraught with danger. If the courts can block the states from holding a convention, it arguably defeats Article V's purpose to allow the states to "sidestep Congress." And even if the courts uphold state authority in a particular case, the mere assertion of the power of judicial review tends to deprive the states of the autonomy that Article V guarantees.

Legal experts disagree on whether existing case law supports the applicability of the political question doctrine to all aspects of the constitutional amendment process, but this question is only one of the justiciability issues that might prevent a court from reaching the merits of an Article V controversy. In a coming series of posts, I will look at the principal cases and issues that might impact the justiciability of such a controversy. Since it would be impractical to consider all the different postures in which legal controversies could arise, I will use for illustrative purposes Wines's example of a case that challenges the aggregation of balanced budget amendment applications.