

**Testimony**

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Our country faces great and grave problems: out-of-control spending, and endless debt; an entitlement regime on an unsustainable trajectory; the rise in growth of the modern bureaucratic state, wrapping us all in regulations and administrative rules. Along with a judiciary that increasingly legislates, we can now add an executive that prefers not to be bound by the rule of law—both a logical extension and the symptom of rule by experts rather than self-government.

The idea that there might be a simple fix to all our problems has seduced many thoughtful and well-intentioned men and women over the ages. If only we could do this, then all would be well.

But let's not be fooled. By the very nature of man and the imperfection of politics, there are no silver bullets.

Such is the case with the proposal to hold an Article V constitutional amendments convention. A perennial question in American history, it seems on its face to be a simple suggestion to deploy a forgotten option to bring about the changes we seek.

In the course of advising state and federal lawmakers and allies across the country, I have been giving this issue close attention and study. A more complete assessment of the meaning, history and status of Article V can be found in the 2<sup>nd</sup> Edition of the Heritage Guide to the Constitution; the particular entry on an Article V amendments convention is appended below in my testimony. Stemming from that analysis, and taking into consideration the circumstances under which we are now operating, I do not believe that an Article V convention is the answer to our problems. The lack of precedent, extensive unknowns, and considerable risks of an Article V amendments convention should bring sober pause to advocates of constitutional reform contemplating this avenue.

This should come as no surprise. While the congressional method of proposing amendments is unambiguous—Congress, whenever two-thirds of both Houses deem it necessary, may propose specific amendments—things quickly get murkier with an Article V convention. The vagueness of this method—the result of a last minute compromise—led Madison to oppose the proposal at the Constitutional Convention: “difficulties might arise as to the form, the quorum etc. which

in constitutional regulations ought to be as much as possible avoided.” Combine that with the fact that no such amending convention has ever occurred, and too many serious questions are left open and unanswered.

The requirement that amendments proposed by such a convention must be ratified by three-fourths of the states is a significant limit on the process and would likely prevent a true “runaway” convention from fundamentally altering the Constitution. But I don’t think it is at all clear, for instance, that two-thirds of the states calling for an amendments convention can limit the power of all the states assembled in that convention to propose amendments to the Constitution. Other questions include the many practical aspects of how an amending convention would operate and whether any aspects of such a convention (including going beyond its instructions) would be subject to judicial review.

Nevertheless, I think we can understand something from a natural reading of the clause which is implicit in the idea of the convention itself. An amendments convention was not intended to be a pass-through but rather open and deliberative, restricted to a subject matter (as well as checks Congress held in determining the mode of ratification, which in turn required three quarters of the states) but otherwise an independent body, organized to propose amendments to solve problems the states together faced as a country. The Article 5 convention was intended to be an alternative to Congress; Congress here is not the deliberative body. Indeed, it would be odd if an article 5 convention had less discretion than Congress to propose amendments.

This reading of Article 5 is supported by the two occasions on which such a convention was proposed. Madison did propose an amendments convention during the nullification crisis of 1832, as a last ditch effort to prevent nullification and secession from destroying the union. Likewise, when Abraham Lincoln sought to resolve the slavery controversy in the midst of the Civil War, he argued that the convention mode "seems preferable" because it "allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose." In both cases the amendments convention idea was soon withdrawn, in the first case after the objectionable tariff legislation was revoked and in the second case when Lincoln advocated

what became the 13th Amendment by congressional proposal. In both cases, an amendments convention was understood to be free to propose whatever amendments thought necessary to address the questions at issue.

The broad subject matter of an amendments convention could be defined, and the states could coordinate their efforts, but it was understood to be a place where the states could deliberate and hash out the nation's problems without so many restrictions as to prevent arguments, deliberation, and compromise. This is just what makes us nervous today.

History suggests an amendments convention is an option *in extremis*, but today we want to use it as a policy reform tool. Hence the pension seen throughout the scholarship on this question, between the different groups advocating an Article 5 convention, and the political debate surrounding it. The Convention of the States group wants a broad subject matter convention, and lists at least eight possible amendments to control the size and scope of the federal government. On the right, Mark Levin has a dozen or so he wants proposed in an Article V convention. And on the mainstream left, Larry Sabato of the University of Virginia has more than twenty or more he'd like to see.

Does creating a compact among the states solve the unknowns of an Article 5 convention? That's an interesting idea, and one of the most interesting ideas proposed to do so. But it strikes me as too clever by half: full of assumptions and detailed planning to get around the inherent nature of Article 5. It narrows the amendments to be proposed to one specific amendment that is already been written to be voted on up or down. That is, it turns the amendments convention into a ratifying convention. Can one clause of the Constitution be used to restrict the constitutional powers and other clause of the Constitution? Not if an article 5 convention (once created) has its own constitutional powers of proposing amendments.

The compact proposal also raises other questions which I don't have the answers as I'm not an expert on the Compact Clause. It looks to me like the compact necessarily restricts or at least controls Congress's power under Article 5 to call a convention. Does Congress have to approve the compact? I would think so. And if so, they can, as they have the past, impose conditions for approval, such as changing the amendment. To the extent that the compact proposal includes

the call for a convention in the same legislation that approves the compact, that legislation would necessarily require Congressional approval. I think there are also questions about presentment, probably not concerning the Article V process, but quite possibly concerning the compact itself. Combining the Article 5 call in the compact in one piece of legislation does not answer that question.

My concern with the compact proposal it assumes politics can be planned and controlled in detail. But politics will abound, and so will litigation.

That said, advocating an Article V convention as part of a state-based strategy to press Congress to pass a constitutional amendment is not unreasonable. Precisely because of the potential chaos of the process, the very threat of an amendments convention will pressure Congress to act rather than risk having one proceed. That's what happened in the 1980s with the unsuccessful push for a balanced budget amendment (good example) but also during the progressive era with the successful push for the direct election of senators (bad example).

Serious scholars will undoubtedly continue to debate the historical record and speculate about the possibility of an amendments convention under Article V. But the argument that, as a matter of course, we should spend considerable time, money and effort right now to design, plan and implement a convention—despite the unknowns and risks involved—is both imprudent and potentially dangerous. It is a distraction that inevitably gets bogged down in a debate over technical details, taking valuable attention and focus away from the substance of the constitutional reforms themselves. Claims of the ease and efficacy of an Article V convention are also misleading to the many committed and well-meaning reformers and activists who are serious about constitutional change in the United States.

But all of this raises a broader question. We should always be leery of solving policy issues in the Constitution itself. Looking at the history of constitutional amendments, it is clear that amendments should close arguments, not open them. They should constitutionalize a settlement not enforce a policy agenda. Indeed, the one example of this approach was a complete disaster: prohibition. It created such a mess that it had to be repealed. So how about a balanced budget amendment? Congress has debated it many times, and in the most recent

iteration even the advocates couldn't agree how to do it. It's complicated, and difficult, and the more complicated it gets, the more likely it will spend more time in courtrooms rather than controlling legislative spending. Such an amendment—especially if pushed through this process—won't settle the matter, but more likely be the beginning of a long judicial reconstruction of the terms involved.

In my opinion, the answer to our problem is politics. We don't need more technical legalisms but more constitutional politics- aggressive checks and balances, debates about constitutional authority and powers, and more politics about using constitutional powers to achieve political objectives. There is nothing in Madison's Constitution that needs to be fixed for us to solve our problems through the normal political process. We need more aggressive states, challenging, coordinating, and engaging in checking the federal government. We need a more dynamic politics within our constitutional framework, one that engages and realigns the American people into a new governing coalition to reconstruct limited constitutional government.

Too often we look at the Constitution as a legal document, a technical contract with its own legal experts and judicial administrators. In our attempt to solve our problems, we are drawn as a result to technical fixes and silver bullets to be enforced by judicial decree. Such arguments might work well in the courtroom, and we should pursue them in the courtroom. But they are usually not good politics, and there is an anti-political sense to them, a sense that politics is litigation. But jurisprudence is not the same as political prudence, both in the cautious and bold sense of the term. The imprudence of an Article 5 convention is that we get tied up in narrow legalisms, and get lost in the weeds, absorb our time and treasure, all the while alienating voters from the real question, the clarity and fight over which is key to the outcome at the ballot box.

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#### Constitutional Analysis of Conventions for Proposing Amendments

After the Virginia Plan introduced at the start of the Constitutional Convention called in a general way for an amendment process that would allow but not require amendment by the national legislature “whensoever it shall seem necessary,” the Committee of Detail proposed a

process whereby Congress would call for an amendments convention on the request of two-thirds of the state legislatures. George Mason feared this method was insufficient to protect the states, while Alexander Hamilton thought that Congress should be able to propose amendments independent of the states. Madison (as recorded in his Notes of Debates in the Federal Convention of 1787) thought the vagueness of an amendments convention sufficiently problematic to reject the provision: "How was a Convention to be formed? By what rule decide? What the force of its acts?" After further debate, the delegates passed language proposed by Madison (and seconded by Alexander Hamilton) that combined the two ideas without an amendments convention: the national legislature would propose amendments when two-thirds of each house of Congress deems it necessary, or on the application of two-thirds of the state legislatures. Proposed amendments were to be ratified by three-fourths of the states in their legislatures or by state convention.

Just before the end of the Convention, George Mason objected that the amendment proposal would allow Congress to block as well as propose amendments, and the method was changed once again to require Congress to call a convention to propose amendments on the application of two-thirds of the states. Madison did not see why Congress would not be equally bound by two-thirds of the states directly proposing amendments (his original proposal for the states' initiation of amendments) as opposed to the same number calling for an amendments convention, especially when the proposed Article V convention process left so many unresolved questions. In the end, Madison accepted the compromise to include an amendments convention but consistent with his earlier comments warned "that difficulties might arise as to the form, the quorum etc. which in constitutional regulations ought to be as much as possible avoided."

As Madison predicted, the numerous unanswered questions inherent in the Article V amendments convention process have prevented its use. A first set of questions concerns calling the convention. The language here is "peremptory" according to Alexander Hamilton in *The Federalist* No. 85: "The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body." Nevertheless, there is dispute about the tabulation of applications in triggering that call. There have been hundreds of applications for an amending convention

over the years from virtually every state; some argue that there are currently more than enough applications to require Congress to call a convention. While various organizations have tabulated state applications, Congress has never officially tabulated or listed applications and has established no process for doing so. It is unclear, despite Hamilton's confidence, whether Congress could be compelled to call an Article V convention if it chose not to.

A second set of questions concerns whether such a convention can be limited in scope, either to a particular proposal or within a particular subject. While most calls for amendments conventions in the nineteenth century were general, the modern trend is to call (and thus count applications) for conventions limited to considering a single amendment. There seems to be a consensus that a convention cannot be limited to considering a specific amendment, as merely confirming a particular amendment already written, approved, and proposed by state legislatures would effectively turn the convention for proposing amendments into a ratifying convention. The debate focuses rather on whether a convention must be general and without limits or whether the convention can or even must be limited to a subject or subject areas based on state applications.

Still, some scholars, such as Michael Rappaport, do suggest that a "ratifying convention" is not outside the scope of Article V. As evidence, they cite James Madison's initial suggestion (that two thirds of the states should be able to propose amendments directly) and argue that the addition of a convention was merely to facilitate communication amongst the states in order to develop proposed amendments. If, however, two-thirds of the states were able to agree on the text of an amendment beforehand, then restricting the convention to an affirmation of that amendment would be appropriate.

Michael Stokes Paulsen makes an originalist argument that a convention properly understood holds broad powers as a deliberative political body. Other scholars argue from an originalist view that the states determine through their applications whether a convention is general or limited, and that an Article V convention is an agent of and responsible to the states. Robert G. Natelson has made a case for this view based on the history of interstate meetings prior to the Constitutional Convention. Nevertheless, it is not at all clear as a matter of constitutional



construction that the power of two-thirds of the states to make applications for a convention restricts, supersedes, or overrides the power of all the states assembled in that convention to propose amendments to the Constitution. The Federalist Papers, unfortunately, offer little guidance on this matter. Madison refers to amendments conventions in The Federalist No. 43 only in general terms, noting that Article V “equally enables the general and the State governments to originate the amendment of errors.” And in The Federalist No. 85, while discussing how Congress cannot limit the scope of an Article V convention, Hamilton says nothing as to whether states can or cannot do so.

A third set of questions concerns the many practical aspects of how an amendments convention would operate (time, place, duration, voting procedure, etc.) and whether authority over some or all of these questions is the purview of the states or is implied in Congress’s power to call the convention. Congress has historically understood its authority to “call” a convention as a broad mandate to establish procedures for such a convention, and in the last forty years has considered (but not passed) numerous bills to that effect. These procedural issues (along with limiting the subject matter of the convention) raise a further question as to whether Congress can refuse to forward amendments for ratification if those amendments are deemed to be beyond the scope of the convention.

Lastly, there is the general question whether and to what extent aspects of such a convention (including going beyond its instructions) would be subject to judicial review. A suit asserting that existing applications require Congress to call an Article V convention, for instance, was denied at the district court level (and later denied certiorari) as without standing and because it raised political questions more properly the province of Congress. *Walker v. United States* (2001).

While a valid method created and available under the Constitution, “a Convention for proposing Amendments” has never been viewed as just another tool for reform but has become ever more so an option to be deployed in extremis for the sake of maintaining the Constitution. Hence, the only time Madison proposed an amendments convention was during the Nullification Crisis of 1832 as a last ditch effort to prevent the unconstitutional alternatives

of nullification and secession that then threatened the continued existence of the United States. Likewise, when Abraham Lincoln looked to constitutional reforms to resolve disputed questions in the midst of the Civil War, he noted that “under existing circumstances” the convention mode “seems preferable” precisely because it “allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose.” Yet when the immediate crisis was over, Lincoln strongly advocated what became the Thirteenth Amendment by congressional proposal and did not pursue an amendments convention, despite the amendment’s initial failure in the House of Representatives. It should be noted that in both cases an amendments convention was understood to be free to propose whatever amendments thought necessary to address the problems at issue.

The requirement that amendments proposed by such a convention must be ratified by three-fourths of the states is a significant limit on the process and likely prevents a true “runaway” convention from fundamentally altering the Constitution. It is worth noting, however, that of the amendments that have been proposed to the states the vast majority (27 out of 33) have been ratified. Due to the lack of clear intentions or constitutional precedent, scholars will undoubtedly continue to debate the historical record and speculate about the possibility of an amendments convention under Article V.

Precisely because of the potential chaos of the process, the very threat of an amendments convention can be used to pressure Congress to act rather than risk an amendments convention. The movement favoring direct election of Senators was just one state away from an amending convention when Congress proposed the Seventeenth Amendment in 1911. There was also an effort to overturn the Supreme Court’s 1964 one man, one vote decisions (*Westberry v. Sanders* and *Reynolds v. Sims*). By 1969, the proponents obtained 33 state applications for a convention to consider amendments regarding legislative apportionment in the states; one vote short of the two-thirds necessary for Congress to call an amendments convention. Most recently, in the 1980s, state applications for a convention to propose a balanced budget amendment led Congress to vote on such an amendment and pass the Gramm-Rudman-Hollings Act (later declared unconstitutional in part by the Supreme Court)

requiring the federal budget to be balanced. Following the 2010 elections, renewed efforts on both sides of the political spectrum have looked to an Article V amendments convention as a way to circumvent Congress in order to achieve various policy outcomes. More recently, some scholars, recognizing the many unknowns of an Article V amendments convention, have suggested that an agreement among two-thirds of the states under the Compact Clause (Article I, Section 10, Clause 3) could be used to address many of the procedural questions involved in that process.

Adapted from “Convention for Proposing Amendments” entry in The Heritage Guide to the Constitution, Second Edition, David Forte and Matthew Spalding, Eds. (Regnery, 2014).