Article V Conventions and the Tenth Amendment Go Hand-in-Hand

The movement to amend the Constitution by convention under Article V has recently garnered incredible strength. In the past five years, nearly two dozen pieces of Article V legislation have been passed in as many states by nearly as many public policy organizations. From the Left to the Right, Americans are recognizing that the rules of the political game need to be rewritten outside of Washington to reform the federal government.

Most of this recent legislative ferment is attributable to the seminal work of one man. But what if that man were now inadvertently working to extinguish his own handiwork? What if, in a valiant but strained effort to mold Supreme Court precedent into rules of the road for an Article V convention, that man fumbled a huge opportunity to vindicate the Founders’ intent from a clean slate?

Sadly, that appears to be happening.

In the last couple of weeks of 2015, Rob Natelson published an article in the *American Thinker* in which he asserted that the Tenth Amendment does not “give” power to state legislatures under Article V of the U.S. Constitution.[[1]](#endnote-1) This declaration both attacked a strawman and was potentially misleading. It attacked a strawman because, of course, the Tenth Amendment does not “give” power to anything. It guarantees the preservation of the sovereign powers of the states or the people to the extent that they are not limited or superseded by the delegated powers of the federal government. For this reason, it is a mere truism to say that the Tenth Amendment does not “give” power to state legislatures under Article V.

But such a truism is potentially misleading when written by a leading Article V convention advocate. It appears to disclaim a role for state sovereignty in organizing an Article V convention. And such a disclaimer invites Congress to fill what some perceive to be the yawning textual gaps of Article V, including its lack of express guidance on the scope of an Article V convention agenda, the nature of its convention rules, and the identities of convention participants. Congress, after all, is the natural repository of legislative authority for all things federal. If the Tenth Amendment cannot be invoked to fill those gaps, it is pretty obvious who will.

Fortunately, nothing could be further from the truth than the notion that state sovereignty has nothing to do with Article V. How do we know this? Because the Founders said so.

In Federalist 43, James Madison wrote that Article V “equally enables the general and the State governments to originate the amendment of errors.”[[2]](#endnote-2) This statement was in reference to “State governments,” not what Natelson calls “independent assemblies” performing a federal function. In Federalist 85, Alexander Hamilton emphasized that “alterations” in the Constitution may be “effected by nine States” which would “set on foot the measure” through their application.[[3]](#endnote-3) George Nicholas, the Constitution’s leading advocate during the Virginia ratification convention, declared “it is natural to conclude that those States who will apply for calling the Convention, will concur in the ratification of the proposed amendments.”[[4]](#endnote-4) Finally, George Washington wrote, “It should be remembered that a constitutional door is open for such amendments as shall be thought necessary by nine States.”[[5]](#endnote-5)

In each of these quotations, the reference is plainly to “states” *as states* using the convention process to propose the amendments they desired. There is no way to assume the truth of the Founders’ representations about Article V without also assuming that the sovereign powers of the states—those guaranteed by the Tenth Amendment—would have a role in directing the convention mode of proposing amendments under Article V. Indeed, the plain text of Article V leaves no other natural interpretative possibility open.

Specifically, Article V says “on the Application” of two-thirds of the state legislatures, Congress “shall call a convention for proposing amendments.”[[6]](#endnote-6) Grammatically, no express grant of power to make the requisite “Application” is conferred by Article V on state legislatures. Rather, the “Application” power is presumed to exist, which presumption implies that it references a reserved power.

This is not surprising because the pre-constitutional Congressional Record includes numerous instances of states making applications through their legislatures to the Continental Congress for various things.[[7]](#endnote-7) An “application” was simply a type of petition within the ordinary legislative power of the state. The power to petition Congress for anything, including to amend the constitution by convention, is thus naturally regarded as inherent in state sovereignty. It did not require further articulation in Article V.

The ability of states to set the agenda for an Article V convention through what they request in their application is confirmed by two other textual elements of the Constitution. First, it is a bit of a misnomer to say Congress was delegated a “call power.” Article V imposes a mandate or “peremptory”[[8]](#endnote-8) duty on Congress to call the convention “on Application” of the state legislatures. Strictly speaking, Congress has a “call duty” or “call mandate” triggered by the “Application,” not a “call power.” In the absence of an express delegation of power to Congress, the congressional call can only be construed to implement the Application, which itself is an exercise of state sovereign power; there is no textual basis for Congress or any other federal body to claim a freestanding power over the convention process.

Second, the power of states as states to set the agenda of the Article V convention through their “Application” is entirely consistent with and parallel to the role of the “Application” in the only other part of the Constitution in which an application is mentioned—namely, Article IV, section 4, which provides: “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, *and shall protect each of them* against Invasion; and *on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence*.”[[9]](#endnote-9) The most natural reading of this provision is that the “Application” would specify the domestic violence to be addressed and how it should be addressed. Similarly, just as the federal government’s “agenda” for protecting the states from domestic violence is necessarily directed and guided by the content of the Article IV “Application,” an Article V convention’s agenda is set by the triggering “Application.”

Further, the “Application” in Article IV, section 4, is being used by the states in aid of their sovereign powers. Nothing in Article IV confers power on state legislatures or executives to act as federal bodies that are somehow “independent” of their respective state governments. Nothing in Article IV suggests that applying states are somehow disabled from using all of their reserved powers in tandem to address the same domestic violence that prompted the “Application.” The federal government is simply being “deputized” to back up the state’s internal policing at the request of an appropriate representative branch of state government. Similarly, the “Application” in Article V is submitted by state legislatures in aid of the states’ traditional sovereign power to organize interstate conventions, and Congress acts on their behalf in calling the convention. There is no textual indication that the states are otherwise disabled from exercising their reserved powers in parallel to ensure the “Application” indeed governs the resulting convention.

Taken together, the “Application” is the clear textual point of entry for state control over the authority of an Article V convention based on reserved legislative power. The lack of express substantive content in Article V as to the nature of the “convention for proposing amendments” combined with Congress’ purely ministerial duty in calling the convention logically yields the convention agenda to whatever is requested in the “Application.” The Founders’ representations about how the states would obtain desired amendments through the convention process confirm that the “Application” would determine what the resulting Article V convention was authorized to propose, and that nothing in Article V was meant to disable states in exercising their sovereign powers to enforce compliance with the Application. The Tenth Amendment’s guarantee of the reserved powers of the states is, therefore, critically important to understanding and enforcing Article V.

Existing precedent does not indicate that the Supreme Court would rule otherwise. Those who oppose applying Tenth Amendment principles to the Article V convention process primarily rely upon *Hawke v. Smith*,[[10]](#endnote-10) *Leser v. Garnett*,[[11]](#endnote-11), *United States v. Sprague*[[12]](#endnote-12) and *U.S. Term Limits v. Thornton*[[13]](#endnote-13) for the proposition that the Supreme Court has “invalidated efforts to control the amendment process though state law”[[14]](#endnote-14) and as somehow establishing that states have no reserved powers under Article V.[[15]](#endnote-15)

Such reliance is misplaced.

Neither *Hawke* nor *Leser* nor *Sprague* dealt with the Article V “amendment process” *in general*, much less the Article V convention process. *Sprague* simply reaffirmed the fact of Congressional control over the selection of the mode of ratification. Both *Hawke* and *Leser* were exclusively concerned with state legislative power over the *ratification* of a congressionally proposed amendment. *Hawke* ruled only that “*ratification* by a state of a constitutional amendment is not an act of legislation.” *Leser* ruled only that the “function of a state Legislature in *ratifying* a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function.” None of these cases speaks at all to the nature, source or effect of the power of legislatures to join in an “Application” for an Article V convention.

The power to ratify an amendment in response to a congressional amendment proposal is not equivalent to the power to petition Congress to organize a convention for proposing amendments. The ratification power *is* textually conferred by the Constitution on state legislatures; whereas, as discussed above, the application power is textually *presumed to exist* and, therefore, its nature and scope is derivative of the reserved powers of the states. Further, the power delegated by the People to Congress in responding to the “Application” consists solely of giving the states what they want—unlike the selection of the mode of ratification, over which Congress has discretion.

In speaking of state legislatures possessing powers directly delegated by the people in the ratification process, rather than exercising their sovereign legislative authority, both *Hawke* and *Leser* simply underscored an implication of the fact that ratification effects the *amendment* of the Constitution, which is, after all, a delegation of authority *by the people*. It takes a delegation of power from the people to effect a change in an instrument created by a delegation of power from the people. However, nothing in Article V textually or in the history of the Constitution suggests that the mere proposal of an amendment by convention organized on “Application” of the state legislatures involves a similar delegation of authority by the people. To the contrary, as discussed above, the Founders repeatedly emphasized that the States as sovereigns—or in the words of Federalist 43 “State governments”—would have the equal authority to propose amendments by convention.

Reliance on *U.S. Term Limits* is likewise misplaced. The case does not speak to Article V at all. It dealt with federal election qualifications. Significantly, the Court ruled: “States can exercise no powers whatsoever which *exclusively* spring out of the existence of the national government.” The use of the phrase “exclusively” is key. As discussed above, the “Application” power referenced in Article V does not “exclusively spring out of the existence of the national government,” it would have existed with or without the national government. To understand the nature and scope of the “Application” power and the convention triggered thereby, reference must be made to the traditional power of states to petition another governmental body for a desired outcome and to organize interstate conventions. That requires the application of Tenth Amendment principles.

It is a theoretical error to insist that precedent governing the ratification power under Article V, which truly is entirely a construct of the federal constitution, applies to the amendment-by-convention process. That error creates a significant risk of encouraging Congress to claim that the determination of the agenda and logistics of an Article V convention is a “federal function,” for which the invocation of its Article I powers to take control of the convention is far more natural than deferring to state legislative powers, customs and practices that predate the Constitution. For this reason, an adverse assessment of the Tenth Amendment’s relationship to Article V threatens the latest research demonstrating that the Founders meant for Article V to organize a “Convention of States,” not a convention of Congress or the People.[[16]](#endnote-16)

Opposition to the application of Tenth Amendment principles in the Article V convention context may boil down to a prediction of a future Supreme Court’s ruling. This is certainly a fair opinion to hold, but it is difficult to predict the outcome of a hypothetical case involving a question of first impression on multiple levels. Because no one really knows whether or how the Court will rule, states should robustly exercise their sovereignty over the Article V convention process; the Court should then follow the Founders’ clear guidance in this virgin legal territory. We should not grab any case that mentions “Article V” and try to mold it into a semblance of a legal theory that threatens to undercut the whole Article V movement. And if we must leverage existing precedent to have a foothold in legal argument, we should rely on those cases that will guide the Court to enforcing the Founders’ promise of state control over the proposal of amendments by convention.

From this vantage point, the Supreme Court’s ruling in *Ray v. Blair*[[17]](#endnote-17) constitutes strong legal support for reaching the right (i.e. originalist) result. The Court ruled, after all, that states had the right to require nominees for elector to the Electoral College to pledge to support the national candidate of a party. It ruled essentially that the states could do this because the Twelfth Amendment did not prohibit them from doing so—evoking the text of the Tenth Amendment (“The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States,* are reserved to the States respectively, or to the people.”). Likewise, nothing in Article V prohibits states from exerting control over the agenda or logistics of a convention for proposing amendments through their Application or other ancillary means within their traditional governing authority, such as legislating or compacting with other states to ensure their agents at the convention actually do their legal duty.

State legislative control over an Article V convention is supported by last term’s *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[[18]](#endnote-18) the most recent Supreme Court case dealing with the nature of state legislative power in our federal system. There, the Court expressly recognized that the Elections “Clause surely was not adopted to diminish a State’s authority to determine its own lawmaking processes” and allowed redistricting to be accomplished through a body created by ballot measure.”[[19]](#endnote-19) Based on this unacknowledged Tenth Amendment principle, the Court interpreted the redistricting authority of state legislatures under the Elections Clause as yielding to the entire reserved legislative power of the States, not as merely conferring power on a designated branch of state government. This is despite the Elections Clause appearing textually to confer power only on a designated branch of state government, and despite it dealing with a power to regulate federal elections that exclusively springs out of the existence of the federal government. This ruling, perhaps ironically, provides a solid basis for buttressing state legislative control over the amendment by convention process. After all, given the Founders’ repeated representations that states as states would have equal authority with Congress to propose amendments, the convention mode of proposing amendments under Article V is even more cogently read as embracing the full scope of state legislative authority than is the Elections Clause.

Indeed, given the makeup of the majority in *Arizona State Legislature*, perhaps the best evidence of what the current Supreme Court would do *vis a vis* state control over an Article V convention can be found in the words of Justice Antonin Scalia. In response to a question about whether an Article V convention can be limited, then-law professor Scalia said: “There is no reason not to interpret it to allow a limited call, if that is what the *states* desire.”[[20]](#endnote-20)

There is no stronger statement of Tenth Amendment principle applied to Article V than that. It is also the simplest reading of Article V. The plain text of Article V neither immunizes convention-goers from state legislative power nor deputizes the “Legislatures of two thirds of the several States” to serve as federal bodies that are somehow independent of their underlying state governments. Rather, Article V simply mandates Congress to call a convention “on the Application of the Legislatures of two thirds of the several States.” The most natural reading of Article V is that “Legislatures” are acting on behalf of their respective state governments in submitting their “Application,” the convention call embraces the terms of the “Application,” and nothing prohibits the states from deploying their plenary legislative power to ensure that convention-goers actually heed the “Application” and follow the Constitution.

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1. Rob Natelson, *The Constitution’s Article V, Not the 10th Amendment, Gives State Legislatures Their Power in the Amendment Process* (Dec. 18, 2015), *available at* http://www.americanthinker.com/articles/2015/12/the\_constitutions\_article\_v\_not\_the\_10th\_amendment\_gives\_state\_legislatures\_their\_power\_in\_the\_amendment\_process.html. [↑](#endnote-ref-1)
2. The Federalist No. 43, (James Madison) (Gideon ed., 1818) *available at* oll.libertyfund.org/?option=com\_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27. [↑](#endnote-ref-2)
3. The Federalist No. 85, (Alexander Hamilton) (Gideon ed., 1818) *available at* oll.libertyfund.org/?option=com\_staticxt&staticfile=show.php%3Ftitle=788&chapter=108643&layout=html&Itemid=27. [↑](#endnote-ref-3)
4. The Debates in the Several State Conventions of the Adoption of the Federal

Constitution, vol. 3 at 101­–­02 (Virginia) (Johnathon Elliott Ed., 1827), *available at* files.libertyfund.org/files/1907/1314.03\_Bk.pdf. [↑](#endnote-ref-4)
5. *From George Washington to John Armstrong, 25 April 1788*, Founders Online, National Archives, *available at* http://founders.archives.gov/documents/Washington/04-06-02-0201. [↑](#endnote-ref-5)
6. U.S. Const. Art. V. [↑](#endnote-ref-6)
7. “Letter from Nick Dranias and Kevin Gutzman, Chairman Craig and Members of the Judiciary Committee of the Assembly of State Legislatures,” June 3, 2015, *available at* http://media.wix.com/ugd/e48202\_ea3d26f51b0644578089f52b6db7e50b.pdf. [↑](#endnote-ref-7)
8. The Federalist No. 85, (Alexander Hamilton), supra note 3. [↑](#endnote-ref-8)
9. U.S. Const., Article IV, section 4 (emphasis added). [↑](#endnote-ref-9)
10. *Hawke v. Smith*, 253 U.S. 221 (1920). [↑](#endnote-ref-10)
11. *Leser v. Garnett*, 258 U.S. 130 (1922). [↑](#endnote-ref-11)
12. *U.S. v. Sprague, et al.,* 282 U.S. 716 (1931). [↑](#endnote-ref-12)
13. *U.S. Term Limits Inc., et al. v. Ray Thornton et al.*, 514 U.S. 779 (1995). [↑](#endnote-ref-13)
14. Rob Natelson, *The Constitution’s Article V, Not the 10th Amendment, Gives State Legislatures Their Power in the Amendment Process* (Dec. 18, 2015), *available at* http://www.americanthinker.com/articles/2015/12/the\_constitutions\_article\_v\_not\_the\_10th\_amendment\_gives\_state\_legislatures\_their\_power\_in\_the\_amendment\_process.html. [↑](#endnote-ref-14)
15. *Id*.; Bill Walker, *The Article V Convention: Discussing*

*The Reality Versus The Fantasy*, T. M. Cooley L. Rev., Vol. 28:1 , 23-30 (2011), *available at* http://www.cooley.edu/lawreview/\_docs/Walker.pdf [↑](#endnote-ref-15)
16. Nick Dranias, *Introducing “Article V 2.0": The Compact for a Balanced Budget*, Heartland Institute Policy Study No. 134 (July 2014), *available at* http://media.wix.com/ugd/e48202\_e59bb75110b8432ea41b24caf1a20d93.pdf. [↑](#endnote-ref-16)
17. *Ray v. Blair*, 343 U.S. 214 (1952). [↑](#endnote-ref-17)
18. *Arizona State Legislature v. Arizona Independent Redistricting Commission, et al.*, No. 13–1314, slip op. (2014), *available at* http://www.supremecourt.gov/opinions/14pdf/13-1314\_kjfl.pdf. [↑](#endnote-ref-18)
19. *Id.* at \* 35. [↑](#endnote-ref-19)
20. A Constitutional Convention: How Well Would it Work? at 5–6, 12­–13, 18–19, 22­–23, 36, 38 (American Enter. Inst. Pub. Policy Research, May 23, 1979), *available at* http://media.wix.com/ugd/e48202\_b26e64fe2413413fb362f5e4b4e6afd5.pdf. [↑](#endnote-ref-20)