Convention of States

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A Handbook for Legislators and Citizens

Second Edition

CITIZENS FOR
SELF-GOVERNANCE
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Convention of States

A PROJECT OF CITIZENS FOR SELF-GOVERNANCE

A Solution As BIG As The Problem!

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The Case for a Convention of States

Introduction

The public widely believes our nation is headed in the wrong direction. They believe that future prospects are troubling, not only for this generation but for generations to come.

The public is correct.

What is not widely known is that the Constitution itself provides a real, effective solution. Mark Levin's bestselling book, *The Liberty Amendments*, has opened the eyes of millions of Americans to the possibility of stopping the federal abuses of power through a Convention of States. Although we began the COS Project independently, our plan is a near-perfect match with Levin's ideas.

The plan we propose does not commit us to any particular amendments. That will be up to the states when they convene. But it does commit us to a particular subject—a convention must be held to limit the power and jurisdiction of the federal government.

If we do nothing to halt these abuses, we run the risk of becoming, as Alexis de Tocqueville warned, nothing more than "a flock of timid and industrious animals, of which the government is the shepherd."

Washington, D.C., is Out of Control and Will Not Relinquish Power

We see *four major abuses* of the federal government.

- The Spending and Debt Crisis
- The Regulatory Crisis
- Congressional Attacks on State Sovereignty
- Federal Takeover of Decision Making

These abuses are not mere instances of bad policy. They are driving us towards an age of "soft tyranny" in which the government "softens, bends, and guides" men's wills. If we do nothing to halt these abuses, we run the risk of becoming, as Alexis de Tocqueville warned in 1840, nothing more than "a flock of timid and industrious animals, of which the government is the shepherd." (Alexis de Tocqueville, Democracy in America, 1840)

1. The Spending and Debt Crisis

The $17 trillion national debt is staggering, but it only tells a part of the story. If we apply the normal rules of business accounting, the federal government owes at least $50 trillion more in vested Social Security benefits and other programs. This is why the government cannot tax its way out of debt. Even if they confiscated everything owned by private citizens and companies, it would not cover the debt.

2. The Regulatory Crisis

The federal bureaucracy has placed a regulatory burden upon businesses that is complex, conflicted, and crushing. Little accountability exists when executive agencies—rather than Congress—enact the real substance of the law. Research from the American Enterprise Institute, shows that since 1949 federal regulations have lowered the real GDP growth by 2% and made America 72% poorer.

3. Congressional Attacks on State Sovereignty

For years, Congress has been using federal grants to keep the states under its control. By attaching mandates to federal grants, Congress has turned state legislatures into their regional agencies rather than truly independent republican governments.

A radical social agenda and an erosion of the rights of the people accompany all of this. While substantial efforts have been made to combat the social engineering and protect peoples' rights, we have missed one of the most important principles of the American founding. State legislatures need to be free to implement the will of the voters in their own states, not the will of Congress.

4. Federal Takeover of the Decision-Making Process

The Founders believed the structures of a limited government would provide the greatest protection of liberty. There were to be checks and balances at the federal level. And everything not specifically granted to Congress for legislative control was to be left to the states and the people.

Collusion among decision-makers in Washington, D.C., has overrun these checks and balances. The federal judiciary supports Congress and the White House in their ever-escalating attack upon the jurisdiction of the fifty states. This is more than an attack on the independence of the states. This robs the people of their most fundamental liberty—the right of self-governance.

We need to realize that the structure of decision-making matters. Who decides what the law shall be is even more important than what is decided. The protection of liberty requires a strict adherence to the principle that power is limited and delegated.

Washington, D.C., does not believe this principle, as evidenced by an unbroken practice of expanding the boundaries of federal power. In a remarkably frank admission, the Supreme Court rebuffed a constitutional challenge to the federal spending power by acknowledging their approval of programs that violate the will of the Founders:

> *This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.*
>
> *New York v. United States, 505 U.S. 144, 157 (1992).*

This is not a partisan issue. Washington, D.C., will never voluntarily relinquish meaningful power—no matter who is elected. The only rational conclusion is this: unless some political force outside of Washington, D.C., intervenes, the federal government will continue to bankrupt this nation, embezzle the legitimate authority of the states, and destroy the liberty of the people. Rather than securing the blessings of liberty for future generations, Washington, D.C., is on a path that will enslave our children and grandchildren to the debts of the past.

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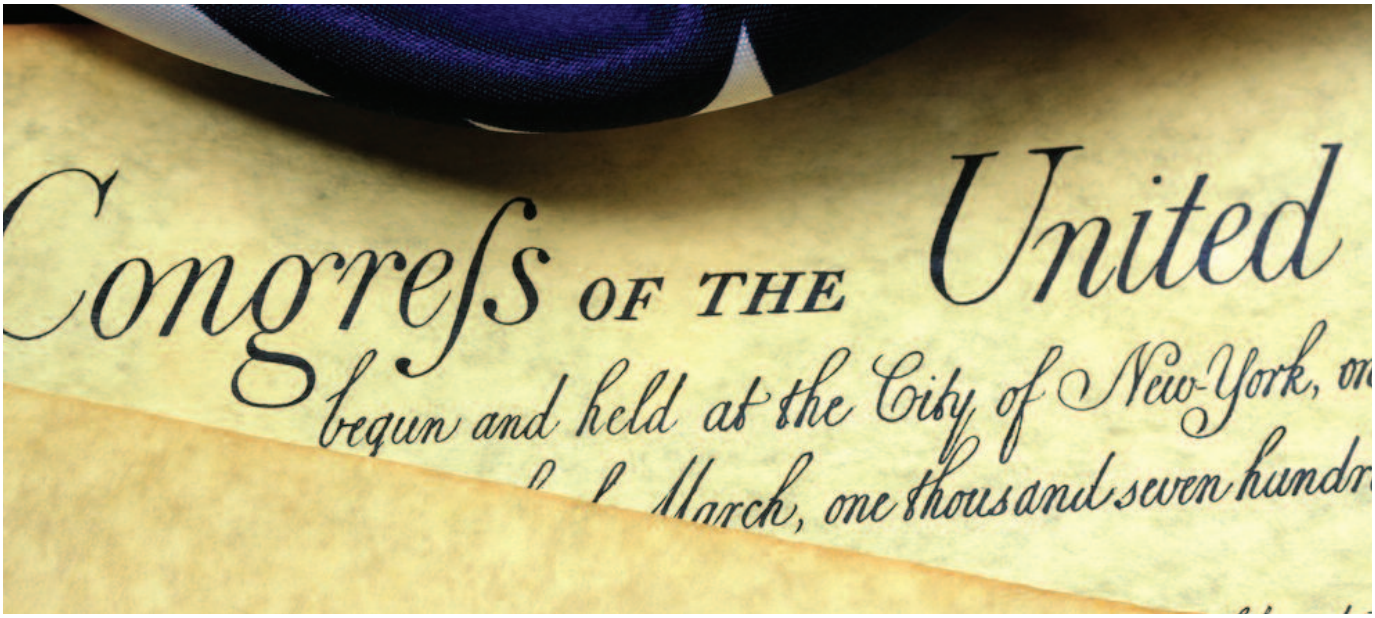


"By calling a convention of states, we can stop the federal spending and debt spree, the power grabs of the federal courts, and other misuses of federal power."

The Founders Gave Us a Solution: A Convention of States

Many people don't know that there are two methods to propose amendments to the Constitution.

1. Two-thirds of each house of Congress agrees to propose a particular amendment.
2. Two-thirds of the state legislatures pass applications for a convention for the purpose of proposing amendments on the same subject.

The Founders knew the federal government might one day become drunk with the abuses of power. The most important check to this power is Article V. Article V gives states the power to call a convention *for the purpose of proposing amendments to the Constitution.*

By calling a convention of states, we can stop the federal spending and debt spree, the power grabs of the federal courts, and other misuses of federal power. The current situation is precisely what the Founders feared, and they gave us a solution we have a duty to use.

After the states propose, debate, and vote upon the proposed amendments, they will be sent to the 50 state legislatures for ratification. Congress *must* choose one of two "modes of ratification." They can either submit the amendments to state conventions elected for that purpose or to the state legislatures. Three-quarters of the states must agree for any of the proposed amendments to be ratified.

Congress has no authority to stop such a process. The Founders made sure of that.

We are approaching a crossroads. One path leads to the escalating power of an irresponsible centralized government, ultimately resulting in the financial ruin of generations of Americans. The other path leads to the restoration of liberty and an American renaissance.

Which will you choose?

Article V, U.S. Constitution

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

A story from the Convention of 1787: "On September 15, as the Convention was reviewing the revisions made by the Committee of Style, George Mason expressed opposition to the provisions limiting the power to propose amendments to Congress. According to the Convention records, Mason thought that *"no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."* In response, Gouverneur Morris and Elbridge Gerry made a motion to amend the article to reintroduce language requiring that a convention be called when two-thirds of the States applied for an amendment.

30 Harvard Journal of Law and Public Policy 1005, 1007 (2007).

How Our Proposal Differs from Other Article V Plans

We believe our strategy gives us an almost-certain chance of success.

Two goals separate our plan from all other Article V efforts:

1. We want to call a convention for a particular *subject* rather than a particular *amendment*. Instead of calling a convention for a balanced budget amendment (though we are entirely supportive of such an amendment), we want to call a convention for the purpose of limiting the power and jurisdiction of the federal government.
2. We believe the grassroots is the key to calling a successful convention. The goal is to build a political operation in a minimum of 40 states, getting 100 people to volunteer in at least 75% of the state legislative district (that's 3,000 districts). We believe this is very realistic. Through the support of the American people this project will succeed.

Our Solution is Big Enough to Solve the Problem

Rather than calling a convention for a specific amendment, Citizens for Self-Governance (CSG) has launched the Convention of States Project to urge state legislatures to properly use Article V to call a convention for a particular subject—reducing the power of Washington, D.C. It is important to note that a convention for an individual amendment (e.g. a Balanced Budget Amendment) would be limited to that single idea. Requiring a balanced budget is a great idea that CSG fully supports. Congress, however, could comply with a Balanced Budget Amendment by simply raising taxes. We need spending restraints as well. We need restraints on taxation. We need prohibitions against improper federal regulation. We need to stop unfunded mandates.

No current Article V proposal has been able to reach the 34 state applications needed to call a Convention of States. There is not enough momentum behind any one amendment. Ideally, the Convention of States Project allows all these Article V efforts to combine, giving them the collective force necessary to call a convention.

Once called, the delegates will be able to debate and impose a complete package of restraints on the misuse of power by all branches of the federal government. This is what our plan will do. It would allow ALL amendments germane to "reducing the power of the federal government" to be considered.

What Sort of Amendments Could be Passed?

The following are examples of amendment topics that could be proposed at a convention of states:

- A balanced budget amendment
- Reducing federal spending power (fixing the General Welfare Clause)
- Reducing federal regulatory power (fixing the Commerce Clause)
- A prohibition of using international treaties and law to govern the domestic law of the United States
- A limitation on using Executive Orders and federal regulations to enact laws (since the Congress is supposed to be the exclusive agency to enact laws)
- Imposing real checks and balances on the Supreme Court (such as term limits)
- Placing a limit on federal taxation

Of course, these are merely examples of what could be up for discussion. So long as a proposed amendment relates to limiting the power of the federal government, the Convention of States itself would determine which ideas deserve serious consideration, and it will take a majority of votes from the states to formally propose any amendments.

American citizens have become so frustrated with runaway federal power that they have begun discussing ideas like nullification and even secession. Such ideas are not only impractical; they could ultimately lead to a violent conflict. We need not turn to such dangerous alternatives. The Founders gave us a legitimate path to save our liberty by using our state governments to impose binding restraints on the federal government. We must use the power granted to the states in the Constitution.

> "A convention of States needs to be called to ensure that we are able to debate and impose a complete package of restraints on the misuse of power by all branches of the federal government."

Our Political Plan to Call a Convention of States

The Grassroots

The leadership of the COS Project believes the success of a Convention of States depends directly on the American citizens. Our plan is not only simple, it is *realistic*:

- We will build viable political operation that is active in at least 40 states.
- These 40 states have approximately 4000 state house districts. Our goal is to have a viable political operation in at least 3000 of these districts.
- We will have 3000 district captains who will organize at least 100 people in each district to contact their state legislators to support a convention of states, and turn out at least 25 people per district at legislative hearings.

Legislators must know that our grassroots team will have their backs if they support a Convention of States. A widespread grassroots organization has been missing from the Article V movement. CSG's President, Mark Meckler, was the co-founder of the Tea Party Patriots—one of the largest tea party groups in the country. Michael Farris is the founder of the Home School Legal Defense Association. As such, he brings with him over 30 years of grassroots leadership and activism in all 50 states. Eric O'Keefe was the lead organizer for the term limits movement that resulted in 23 states passing ballot initiatives to that effect. We are rapidly building not only a staff for this project, but networking with like-minded coalition members across America.

The strategic advantage of a fresh start on the application process is that we will be building current grassroots operations in all of the states needed to ratify any proposed amendments, and have them all addressed at one convention. If one of the existing proposals (such as the Balanced Budget applications) achieved 34 valid applications, CSG certainly would support it as well.

The success of a Convention of States depends directly on the American citizens.

Unfortunately, the BBA plan relies on applications that were enacted ten, twenty, and thirty years ago. The grassroots organizations that achieved those victories are long gone. Starting fresh insures that we have current political operations in all the states necessary to actually ratify our proposed amendments.

Starting fresh also allows us to avoid any legal difficulties that may arise during the "aggregation" process. Applications must deal with the same issue in order for them to be counted towards the necessary 34 (or, in order for them to be "aggregated"). Many of the BBA applications, for example, are sufficiently different that they may be subject to legal challenge when the time comes to determine which states are included in the count. It is unlikely all BBA applications currently pending will be successfully aggregated. We will be proceeding with a unified application using the same operative language in all states.

Thus, there is both a legal advantage (clear aggregation) and a political advantage (current grassroots networking) to a fresh start on the application process. Moreover, we will have a greater ability to protect our liberty by addressing the full scope of the problems of Washington, D.C., in a Convention of States.

This unique strategy combined with strong grassroots support will guarantee the success of this project.

Only one question remains.
Will you help?

Why a Convention of States is the Safest Alternative to Preserve Our Liberty

The most common objection to an Article V convention envisions a doomsday scenario in which delegates disregard the purpose of the convention, rewrite the Constitution, and change the entire American system of government. This has been called the "runaway convention" theory, and it is based on fear and misinformation.

Here are the facts:

1. **There is a clear, strong single-subject precedent that would almost certainly be declared binding in the event of a court challenge.** There have been over 400 applications from state legislatures for an Article V convention in the history of the Republic. No such convention has ever been called because there has never been an application from two-thirds of the states for a single subject. In addition to this, there is a huge amount of historical precedent that limits interstate conventions to a particular subject. (See Professor Robert G. Natelson's handbook here: www.alec.org/publications/article-v-handbook/). Also see his essay on page 21.

2. **Ratification of any proposed amendment requires the approval of 38 states.** It only takes 13 states to vote "No" to defeat any proposed amendment. The chances of 38 state legislatures approving a rogue amendment are effectively zero.

3. **Improper changes to the process can be legally challenged by state legislators.** The Supreme Court has held that Congress acted unconstitutionally when it changed the rules of the process in midstream. See, *Idaho v. Freeman*, 529 F.Supp. 1107 (D.C. Idaho 1981) (vacated on the ground of mootness.) CSG's Senior Fellow for Constitutional Studies, Michael Farris, was lead counsel for Washington state legislators in that litigation.

4. **There is absolutely no historical precedent for a runaway convention.** Many opponents of a Convention of States make the historically false allegation that our Constitution was adopted as the result of an illegal runaway convention. Such an argument was invented by the enemies of the Constitution and is unsupported by historical fact. The truth is that the new process for adopting the Constitution was unanimously approved by both the Congress and all thirteen states as required by the Articles of Confederation. (See "Was the Constitution Illegally Adopted?" by Michael Farris on page 17).

Thus, there are multiple lines of defense against an amendment that departs from the original subject: (1) A majority of states at the Convention would almost certainly vote such a proposal to be out of order; (2) If such an amendment was proposed, a proper legal challenge would certainly be filed and has a good likelihood of success; (3) It highly probable that at least 13 states would defeat any such proposed amendment; (4) It is a historical fallacy to argue that we have an established precedent of Conventions changing the rules illegally. (See Appendix, "A Response to the Runaway Scenario" for a detailed argument.)

American citizens must evaluate the relative safety of two choices. Should we allow our runaway federal government to continue to abuse the Constitution and the rights of the people, with the vague hope that someday Washington, D.C., will see the light and relinquish power? Or should we call a Convention of States, trusting one of the many lines of defense will stop any misuse of power?

At the end of the day, we must trust either Congress or the states. Recent history makes that an easy choice. Washington, D.C., is clearly the greatest danger to our liberty.

We believe the choice is clear. A Convention of States is the safest path to preserve self-government and liberty.

"At the end of the day, we must trust either Congress or the States. Recent history makes that an easy choice. Washington, D.C., is clearly the greatest danger to our liberty."

"The convention for proposing amendments is called to propose solutions to discrete, pre-assigned problems." "When two-thirds of the states apply on a given subject, Congress must call the convention."

We Know How a Convention of States Would Operate

There are some who claim we know nothing about how a Convention of States would function. They say that no precedent exists for such a convention, and it should be avoided due to all the unknowns. The historical record requires us to disagree with these assertions. It tells us how a Convention of States would operate. Interstate conventions were common during the Founding era, and the rules and procedures for such conventions were widely accepted. (For more on this historical precedent see Natelson's article on page 21.) According to Professor Rob Natelson, leading expert on the Article V process, we know that:

- The "convention for proposing amendments" was consciously modeled on federal conventions held during the century leading up to the Constitutional Convention, when states or colonies met together on average about every 40 months. These were meetings of separate governments, and their protocols were based on international practice. Those protocols were well established and are inherent in Article V.
- Each federal convention has been called to address one or more discrete, prescribed problems. A convention "call" cannot determine how many delegates ("commissioners") each state sends or how they are chosen. That is a matter for each state legislature to decide.
- A convention for proposing amendments is a meeting of sovereign governments, and each state has one vote. Each state commissioner is empowered and instructed by his or her state legislature.
- As was true of earlier interstate gatherings, the convention for proposing amendments is called to propose solutions to discrete, pre-assigned problems. There is no record of any federal convention significantly exceeding its pre-assigned mandate—not even the Constitutional Convention, despite anti-historical claims to the contrary.
- The state legislatures' applications fix the subject-matter for a convention for proposing amendments. When two-thirds of the states apply on a given subject, Congress must call the convention. However, the congressional power is limited to setting the time and place of meeting.

The language in Article V does not specify any procedural rules because the Founders knew them so well. It would have seemed unnecessary to specify exactly how an interstate convention would operate. These rules are well-established and would be upheld by the courts today.

"The best plan is for state legislatures to adopt applications with operative language that is identical or as close to identical as possible."

Action Steps for Legislators

To call a Convention of States, 34 state legislatures must pass applications on the same subject matter. Governors play no official role in this process. A simple majority rule applies unless the state legislature has adopted prior rules requiring a different number.

"Aggregation" is the most important issue for legislators to consider. Will one state's application be counted toward the required 34-vote majority, or will it be considered distinct from those of other states? The great variety of applications for a proposed Balanced Budget Amendment demonstrates the problem. Most legal scholars believe that a handful of the existing applications will be considered sufficiently distinct to deny aggregation status in a final count.

The best plan is for state legislatures to adopt applications with operative language that is identical or as close to identical as possible. CSG's draft application is contained in the Appendix. This Model Application was drafted in consultation with a wide range of constitutional scholars, legislators, and citizen activists.

Action Steps for Citizens

Ultimately, the success of a Convention of States depends on the citizens of the United States. The grassroots will be the engine that drives this project. If Americans are willing to sacrifice their time and energy, there is still a chance to halt the tyrannical abuses of the federal government.

In each state, we will appoint three state-wide volunteer leaders: the State Director, Legislative Liaison, and Coalitions Director. These individuals will organize the movement across the state, coordinating volunteers, connecting with state legislators, and building the grassroots network.

In each state legislative district, a District Captain will be appointed to coordinate and mobilize volunteers in their district.

There are a number of ways volunteers will be able to be involved in helping move the project forward:

- Recruiting friends, family, neighbors and co-workers to join the effort.
- Writing letters, making calls, and/or visiting state legislator's offices to encourage them to support a Convention of States.
- Attending legislative hearings to show support for a Convention of States.
- Working on campaigns to elect candidates who support the cause.
- Organizing and speaking at events in your area as a representative for COS.

For more information about leadership job descriptions and volunteer opportunities visit www.conventionofstates.com.

The Founders gave us the tools to curb the federal abuse of power. It's time we stand up and use them to preserve liberty—not only for ourselves but for posterity.

"The grassroots will be the engine that drives this project."

Leadership of the Convention of States Project

Mark Meckler

Citizens for Self-Governance, President

BA in English Literature, San Diego State University-California State University

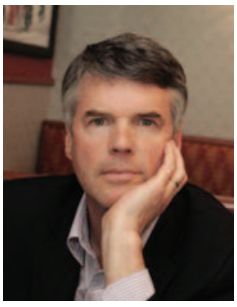
J.D. from UOP McGeorge School of Law (with Honors)

Mark Meckler is the founder and President of Citizens for Self-Governance (CSG), an organization created to support grassroots activism in taking power from Washington, D.C., and returning it to its rightful owners, the citizens of the states. Meckler is widely regarded as one of the most effective and well-networked grassroots organizers in the nation and is regularly called on for political commentary in all forms of media.

Meckler is the co-founder and former National Coordinator for the Tea Party Patriots, the largest tea party organization in the nation. He left the organization in February 2009 and founded CSG to work more broadly on expanding the self-governance movement beyond the partisan divide.

As the President of CSG, Meckler makes sure that all projects, including Convention of States, are fully and appropriately funded, staffed and managed, with a focus on strict stewardship of donor dollars for maximum leverage and effect. Meckler is also personally involved in all media and public relations efforts.

Meckler and his wife Patty live in Northern California with their teenage children, where they share a love of outdoor recreation and equestrian activities.



Eric O'Keefe

Citizens for Self-Governance Board of Directors

Eric O'Keefe has a twenty-five year history as an active strategist, board member and donor with organizations working to advance individual liberty, promote citizen engagement and restore constitutional governance. O'Keefe helped found U.S. Term Limits in 1991 and, and in recent years, co-founded the Campaign for Primary Accountability, the Health Care Compact Alliance, and Citizens for Self-Governance. O'Keefe is also a founding board member of the Center for Competitive Politics and Citizens in Charge Foundation.

O'Keefe's book on the corruption of Congress, "Who Rules America," won praise from the late freedom advocate Milton Friedman.

O'Keefe also serves on the board of directors of the Wisconsin Club for Growth, which has been active defending Gov. Walker's agenda during legislative campaigns, recall campaigns, and legislative races.

When he is not engaged in political activities, O'Keefe is a private investor based in rural Wisconsin, where he and his wife raised three children.

Michael P. Farris

Citizens for Self-Governance — Senior Fellow for Constitutional Studies, head of Convention of States Project

B.A. in Political Science, magna cum laude, Western Washington University (formerly Western Washington State College)

J.D., honors graduate, Gonzaga University School of Law

LL.M. with Merit in Public Inter-national Law, University of London

Michael Farris is the Chancellor of Patrick Henry College and Chairman of the Home School Legal Defense Association. He was the founding president of each organization.

Farris is a constitutional appellate litigator who has served as lead counsel in the United States Supreme Court, eight federal circuit courts, and the appellate courts of thirteen states.

He has been a leader on Capitol Hill for over thirty years and is widely known for his leadership on homeschooling, religious freedom, and the preservation of American sovereignty.

A prolific author, Farris has been recognized with a number of awards including the Salvatori Prize for American Citizenship by the Heritage Foundation and as one of the "Top 100 Faces in Education for the 20th Century" by *Education Week* magazine.

Farris and his wife Vickie have 10 children and 17 grandchildren.

Appendix

We want you to have all of the information you need to get involved.

Please see the materials we've gathered for you to be the most informed person in your community.

It'll take hard work, but it's time to spread the word!

Application for a Convention of the States Under Article V of the U.S. Constitution

Whereas, the Founders of our Constitution empowered State Legislators to be guardians of liberty against future abuses of power by the federal government, and

Whereas, the federal government has created a crushing national debt through improper and imprudent spending, and

Whereas, the federal government has invaded the legitimate roles of the states through the manipulative process of federal mandates, most of which are unfunded to a great extent, and

Whereas, the federal government has ceased to live under a proper interpretation of the Constitution of the United States, and

Whereas, it is the solemn duty of the States to protect the liberty of our people – particularly for the generations to come – to propose Amendments to the Constitution of the United States through a Convention of the States under Article V to place clear restraints on these and related abuses of power,

Be it therefore resolved by the legislature of the State of _____:

Section 1. The legislature of the State of _____ hereby applies to Congress, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for Members of Congress.

Section 2. The secretary of state is hereby directed to transmit copies of this application to the President and Secretary of the United States Senate and to the Speaker and Clerk of the United States House of Representatives, and copies to the members of the said Senate and House of Representatives from this State; also to transmit copies hereof to the presiding officers of each of the legislative houses in the several States, requesting their cooperation.

Section 3. This application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made applications on the same subject.

The Convention of States
is a project of
CITIZENS FOR
SELF-GOVERNANCE

Was the Constitution Illegally Adopted?

Michael Farris, JD, LLM
Chancellor, Patrick Henry College
Senior Fellow for Constitutional Studies, Citizens for Self-Governance

We can't walk boldly into our future, without first understanding our history.

From the time the Constitutional Convention concluded until today, there has been a contentious allegation that it was a runaway convention and that the Constitution was illegally adopted. For example, historian Joseph Ellis, in his recent bestseller *Founding Brothers*, repeats the following charges against the Constitutional Convention:

> *Over the subsequent two centuries critics of the Constitutional Convention have called attention to several of its more unseemly features: the convention was extralegal, since its explicit mandate was to revise the Articles of Confederation, not replace them; …the machinery for ratification did not require the unanimous consent dictated by the Articles themselves. There is truth in each of these allegations.*[1]

These two charges are serious because they suggest that under the law existing at the time, the Constitution was actually illegally adopted. These two allegations can be summarized as follows: (1) a new document was proposed rather than mere changes to the Articles of Confederation as specified in the call of the convention; and (2) the new Constitution allowed for ratification by only nine states whereas the Articles of Confederation required all thirteen states to approve any changes before they became effective.

On the surface, these two accusations are plausible. Indeed, the essentially unanimous view of historians is that the second of these charges is true. It should be noted, however, that most of these same historians believe that the end of saving the Republic justified the means of violating the Articles' rules concerning the amendment process.

However, a fresh look at historical documents and clearly established legal principles shows that both of these attacks on the integrity of the Constitution are in error.

How we got the Constitution: A procedural review

At the request of Virginia, the Annapolis Convention convened with only five states in attendance. The convention had been called solely for the purpose of considering changes to the Articles of Confederation relative to the regulation of commerce. The delegates quickly concluded that a second convention needed to be called with broader authority and with more states in attendance. On September 11, 1786, the delegates adopted this resolution:

> *Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the [U]nion, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the*

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Was the Constitution Illegally Adopted? *Continued from page 17*

> *exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.*

On February 21, 1787, Congress responded by voting to authorize a convention in Philadelphia under these terms:

> *Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.*

The authorization for the convention was for the "sole and express purpose of revising the Articles of Confederation." But, as is obvious, the Constitutional Convention recommended an entirely new document—or was it?

No one would suggest that the Constitutional Convention had violated the scope of its authority if it had recommended two or three modest changes in the text of the Articles but also added a recommendation that the name of the document be changed to "The Constitution of the United States."

Thus, the mere fact there was a name change does not make the work of the convention illegal.

In fact, it is normal legislative practice to change the names of existing laws. Moreover, it is a recognized legal principle that the title of a law is no part of the body of the law. Thus, changing the name is of no legal consequence.

There were no limits placed on the authority of the convention to make amendments. It could recommend one change or a thousand.

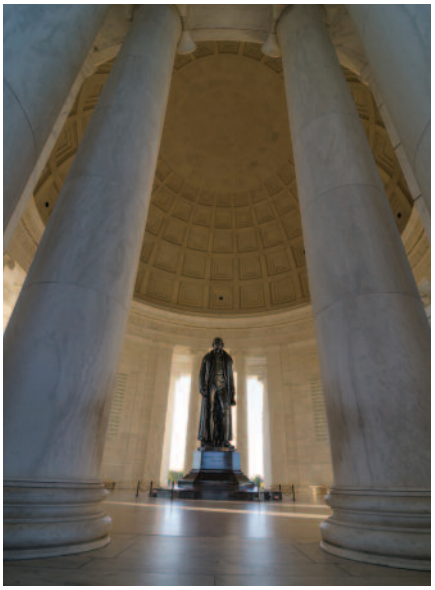
Additionally, some matters of substance did not change from the Articles of Confederation to the Constitution.

- Article I of the Articles of Confederation named the nation the United States of America. This did not change in the Constitution.
- Article II asserted that the states retained all power not specifically delegated. This was not changed, as was made evident by numerous declarations to this effect by the various state ratification documents. Moreover, the Tenth Amendment was later added to make this clear.
- Article III said that the states formed a mutual defense compact. The operation of the military changed under the Constitution, but the duty of defense of the whole nation did not change.
- Article IV had a provision that people moving from state to state had to be treated as citizens in the new states when they arrived—a provision that appears in Article IV, Section 2, of the Constitution with only modest changes in wording. This is sufficient to demonstrate that indeed the Constitution was a series of recommended amendments to the Articles of Confederation. Many additional phrases and concepts, including the General Welfare Clause, were carried over from the Articles to the Constitution. So it is simply not true to assert that its content was "an entirely new document."

To be sure, the proposed amendments were presented as a package deal to be voted up or down, rather than as a series of individual amendments. But there was nothing in the document that created the Philadelphia Convention that prevented the convention from recommending the proposed amendments be approved en masse. In fact, no credible politician would have ever thought it wise to propose twenty or thirty amendments to be considered by Congress on a one-by-one basis. Any recommended changes would necessarily require a series of political compromises to reach a balance. It simply made common political sense that the amendments would be submitted as a single package deal. And there is nothing at all in the call of the convention that would suggest such an approach was improper.

Remember the resolution from Congress gave the Constitutional Convention the charge to make recommendations to the Articles and then to submit its recommendations to Congress and then the states.

After the convention completed its work, on September 17, 1787, the delegates officially transmitted the proposed Constitution to Congress, which was then meeting in New York. At this point, the Constitution was nothing more than a mere recommendation. Until Congress and the state legislatures acted, no ratification action was possible.



History tells the story.

The Constitution was legally adopted.

Now, let's move on to getting our nation back to the greatness the Founders originally envisioned.

On September 28, 1787, eleven days after receiving the recommendation from the Philadelphia Convention, Congress voted to approve the submitted recommendation. The official language read as follows:

> *Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.*

Note that Congress was the agency that had said the convention was called "for the sole and express purpose of revising the Articles of Confederation." And this same Congress *unanimously* approved the proposed Constitution and sent it on to the states. If the convention had indeed exceeded its authority, then Congress was the body with the legal authority and the clear opportunity to say, "We reject this proposal because this document violated your authority."

Thus, by examining the content of the document as well as the unanimous approval of Congress, it is clear the Constitution was an appropriate, albeit substantial, amendment to the Articles of Confederation.

This brings us to the second charge levied by critics to prove the Constitution was illegally adopted: the fact that the Constitution was to be ratified by just nine states instead of the unanimous vote of thirteen states required by the Articles of Confederation.

It is misleading to focus on the number of states required for ratification, because there was actually a more important change in the process. Under the Articles of Confederation, proposed amendments were to be sent to the state *legislatures*. Under the Constitution, they were to be ratified by state *conventions*. Therefore, before we can even consider the switch from thirteen states to nine, we have to ask: how was the switch made from ratification by legislatures to ratification by conventions?

If things were going to be done properly under the Articles of Confederation, then all thirteen states would have to approve of this *change in process* before the Constitution could be legally adopted by this new method. Remember the new method had two components: (1) ratification by conventions, and (2) ratification by nine states only.

Let us once again look at the language from Congress that approved the work of the Constitutional Convention.

> *Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.*

Congress did not send the Constitution to the state conventions. The report was "transmitted to the several *legislatures*" (emphasis mine). The legislatures had to act, if they agreed, to authorize the election of delegates "in conformity to the resolves of the Convention." This last clause meant the states were being asked to approve this new process that authorized the election of delegates to a ratification convention and nine ratifications would be sufficient. Both matters were clearly specified in the "resolves of the Convention."

Thus, before any state could submit the proposed Constitution to a ratification convention, its state legislature had to approve this new process. If all thirteen state legislatures in fact approved this change in process, then the Articles of Confederation would be fully satisfied.

This analysis looks at ratification as a two-step process:

1. The state *legislatures* approved the new process.

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Was the Constitution Illegally Adopted? *Continued from page 19*

2. The state ratification conventions approved the new Constitution.

As long as all thirteen state legislatures approved the change in process, then it would be perfectly legal under the Articles for nine state conventions to ratify the Constitution. However, it is very important to note that without the approval for the change in process by the legislatures, it would not be legal to submit the Constitution to state conventions no matter how many ratifications were required for approval.

Eleven states held ratification conventions and approved the Constitution between December 17, 1787, and July 26, 1788. The government under the Constitution went into effect on March 4, 1789. It is self-evident that the legislatures of each of these states voted to approve the new process, since these conventions required prior legislative approval.

However, we must also consider North Carolina and Rhode Island, which did not ratify the Constitution before it was put in operation. If North Carolina and Rhode Island had failed to approve or had rejected this *change in process*, then the critics would be right—the Constitution would have been adopted contrary to the rules of the Articles of Confederation requiring unanimity among the states.

But the North Carolina *legislature* clearly approved this change in process. The legislature authorized the election of delegates for this express purpose. On August 2, 1788, the North Carolina convention tabled any further consideration of the Constitution by a vote of 183 to 83. The convention delegates attached a number of recommended amendments they wanted to see adopted by a second general convention before ratification. This was a tacit rejection of the Constitution as written. But this rejection by the *convention* has no bearing on the action of the *legislature* that had previously approved the change in the process.

An unconventional convention

This leaves Rhode Island. It is generally thought Rhode Island simply ignored the entire process until after the new government under the Constitution had already begun operation. And if this were true, then the second charge against the Constitution (that it did not properly follow the amendment process under the Articles of Confederation) would be true.

However, in February 1788, the legislature of Rhode Island adopted a resolution submitting the Constitution of the United States to a vote of all the people of the state.[2] In effect, this act appointed all the people of the entire state as delegates to the ratification convention. The people were to assemble on the fourth Monday of March in "conventions" in each town. These Rhode Island ratification conventions were different from those in any other state, but nothing in the text of the transmittal from Congress prohibited Rhode Island from adopting this format for a ratification convention. These town conventions were held on March 24, 1789, and the Constitution was overwhelmingly rejected (2,708 to 237). The defeat was more lopsided than it might have been, since most federalists boycotted the meetings.

But this rejection by the Rhode Island *convention* does not detract from the fact that the Rhode Island *legislature* approved the process that had been suggested by the Philadelphia Convention and had been officially approved by Congress. Without this approval by the legislature, the town conventions could have never been held.

Therefore, the Articles of Confederation were fully satisfied. Before the Constitution was agreed to, Congress and all thirteen state legislatures approved a new process for changing the Articles of Confederation. By the unanimous action of thirteen state legislatures, ratification conventions were convened—an explicit approval of the new process that included the transfer of decision making from legislatures to conventions and changed the required number of approvals from thirteen to nine. Both of these accusations against the Constitution are disproved by a careful examination of the multiple steps in the process. The Constitutional Convention did not exceed its authority by incorporating all of its proposed amendments into a single document with a new name—as is proven by the unanimous acceptance of the report by the very agency that called the convention into session. Moreover, Congress and all thirteen state legislatures approved the new ratification process as required by the Articles.

The Constitution of the United States was legally adopted.

Endnotes

[1] Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Alfred A. Knopf, 2000), 8.

[2] The resolution adopted by the Rhode Island legislature is printed in the March 8, 1788, edition of the *Providence Gazette and Country Journal*, no. 1262, p. 2, col. 2–3.

[The following is an excerpt from Professor Robert G. Natelson's *Florida Law Review* article titled below. For brevity all cites have been removed. It can be downloaded in full at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044296. With his permission we have highlighted his historical precedent for a Convention of States.]

Founding-Era Conventions and the Meaning of the Constitution's "Convention For Proposing Amendments"

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April 22, 2012
65 Fla. L. Rev. 615 (2013)

Overview Of Prior American Experience With Conventions [...]

A. Conventions Before the Constitution

The Founders understood a political "convention" to be an assembly, other than a legislature, designed to undertake prescribed governmental functions. The convention was a familiar and approved device: several generations of Englishmen and Americans had resorted to them. In 1660 a "convention Parliament" had recalled the Stuart line, in the person of Charles II, to the throne of England. A 1689 convention Parliament had adopted the English Bill of Rights, declared the throne vacant, and invited William and Mary to fill it. Also in 1689, Americans resorted to at least four conventions in three different colonies as mechanisms to replace unpopular colonial governments, and in 1719 they held yet another.

During the run-up to Independence, conventions within particular colonies issued protests, operated as legislatures when the de jure legislature had been dissolved, and removed British officials and governed in their absence. After Independence, conventions wrote several state constitutions.

Those state constitutions also resorted to conventions as elements of their amendment procedures. The Pennsylvania Constitution of 1776 and

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The Founders understood a political "convention" to be an assembly, other than a legislature, designed to undertake prescribed governmental functions.

What does that mean for a modern Convention of States?

Founding-Era Conventions and the Meaning of the Constitution's "Convention For Proposing Amendments" *Continued from page 21*

the Vermont Constitution of 1786 both authorized amendments conventions limited as to subjects by a "council of censors." The Massachusetts Constitution of 1780 provided for amendment by convention. The Georgia Constitution of 1777 required the legislature to call a convention to draft constitutional amendments whose gist had been prescribed by a majority of counties.

Conventions within individual colonies or states represented the people, towns, or counties. Another sort of "convention" was a gathering of three or more American governments under protocols modeled on international diplomatic practice. These multi-government conventions were comprised of delegations from each participating government, including, on some occasions, Indian tribes. Before Independence, such gatherings often were called "congresses," because "congress" was an established term for a gathering of sovereignties. After Independence, they were more often called "conventions," presumably to avoid confusion with the Continental and Confederation Congresses. But both before and after Independence the terms could be employed interchangeably.

Multi-government congresses or conventions were particularly common in the Northeast, perhaps because governments in that region had a history of working together. In 1643 the four colonies of Massachusetts, Plymouth Colony, Connecticut, and New Haven formed the United Colonies of New England. Essentially a joint standing committee of colonial legislatures, this association was not always active, but endured at least formally until 1684. In 1695, the Crown created the Dominion of New England, a unified government imposed on New England, New York, and New Jersey. The Dominion proved unpopular, and in 1689 colonial conventions swept it away; nevertheless, northeastern governments continued to confer together. Many of these meetings were conclaves of colonial governors, usually conferring on issues of defense against French Canada and her allied Indian tribes, rather than conventions of diplomatic delegations. An example from outside the Northeast was the meeting of five governors held at Alexandria, Virginia in 1755. Many others, however, were full-dress conventions among commissioners appointed from three or more colonies. These meetings were usually, but not always, held under the sanction of royal authorities.

To be specific: Three colonies met at Boston in 1689 to discuss defense issues. The following year, the acting New York lieutenant governor called, without royal sanction, a defense convention of most of the continental colonies to meet in New York City. The meeting was held on May 1, 1690, with New York, Massachusetts Bay, Connecticut, and Plymouth colonies in attendance. A similar gathering occurred in 1693 in New York, this time under Crown auspices. Other defense conventions were held in New York City in 1704, Boston in 1711, Albany in 1744 and 1745, and New York City in 1747. The New England colonies held yet another in 1757.

In addition to defense conventions, there were conventions serving as diplomatic meetings among colonies and sovereign Indian tribes, particularly the Iroquois. There were at least ten such conclaves between 1677 and 1768 involving three or more colonies. Those ten included gatherings in 1677, 1689, 1694, and 1722 at Albany, New York; in 1744 at Lancaster, Pennsylvania; in 1745, 1746, 1751, and 1754 at Albany; and in 1768 at Fort Stanwix (Rome), New York.

The assembly at Lancaster became one of the more noted. Participants included Pennsylvania, Maryland, Virginia, and several Indian tribes. The proceedings lasted from June 22 to July 4, 1744, and produced the Treaty of Lancaster. Even more important, however, was the seven-colony Albany Congress of 1754, whose proceedings are discussed in Part IV.A.

The most famous inter-colonial conventions were the Stamp Act Congress of 1765 and the First Continental Congress of 1774, discussed in Parts IV.B and IV.C. As for the Second Continental Congress (1775-81), participants might initially have thought of it as a convention, but it is not so classified here because it really served as a continuing legislature.

After the colonies had declared themselves independent states, they continued to gather in conventions. All of these meetings were called to address specific issues of common concern. Northeastern states convened twice in Providence, Rhode Island—in December, 1776 and January, 1777, and again in 1781. Other conventions of northeastern states met in Springfield, Massachusetts (1777); New Haven, Connecticut (1778);

Hartford, Connecticut (1779 and 1780); and Boston, Massachusetts (1780). Conventions that included states outside the Northeast included those at York Town, Pennsylvania (1777), Philadelphia, Pennsylvania (1780 and, of course, 1787), and Annapolis, Maryland (1786). There also were abortive calls for multi-state conventions in Fredericksburg, Virginia, Charleston, South Carolina, and elsewhere.

Thus, the Constitutional Convention of 1787—far from being the unique event it is often assumed to be—was but one in a long line of similar gatherings.

Conclusion: What Prior Conventions Tell Us About The Convention For Proposing Amendments

As noted above, Founding-Era customs assist us in understanding the attributes and procedures inherent in a "convention for proposing amendments," and the powers and prerogatives of the actors in the process. This Conclusion draws on the historical material collected above, together with the brief constitutional text, to outline those attributes and procedures.

The previous record of American conventions made it clear that a convention for proposing amendments was to be, like its immediate predecessors, an inter-governmental diplomatic gathering—a "convention of the states" or "convention of committees." It was to be a forum in which state delegations could meet on the basis of sovereign equality. Its purpose is to put the "states in convention assembled" on equal footing with Congress in proposing amendments.

Founding-Era practice informs us that Article V applications and calls may ask for either a plenipotentiary convention or one limited to pre-defined subjects. Most American multi-government gatherings had been limited to one or more subjects, and the ratification-era record shows affirmatively that the Founders expected that most conventions for proposing amendments would be similarly limited. Founding-Era practice informs us also that commissioners at an amendments convention were to operate under agency law and remain within the limits of their commissions. Neither the record of Founding Era conventions nor the ratification debates offer significant support for the modern claim that a convention cannot be limited.

The only Founding Era efforts to insert in a convention call prescriptions other than time, place, and subject-matter were abortive. When Massachusetts presumed to set the voting rules while calling a third Hartford convention, two of the four states invited refused to participate. In the few instances in which convention calls suggested how sovereign governments should select their commissioners, some of those governments disregarded the suggestions, but their commissioners were seated anyway. This record therefore suggests that a convention call, as the Constitution uses the term, may not include legally-binding terms other than time, place, and subject. However, the occasional Founding-Era practice of making calls and applications conditional and of rescinding them suggests that

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History and the constitutional text inform us that a convention for proposing amendments is, like its direct predecessors, a multi-government proposing convention.

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Article V applications and calls also may be made conditional or rescinded. In accordance with Founding-Era practice, states are free to honor or reject calls, as they choose.

Universal pre-constitutional practice tells us that states may select, commission, instruct, and pay their delegates as they wish, and may alter their instructions and recall them. Although the states may define the subject and instruct their commissioners to vote in a certain way, the convention as a whole makes its own rules, elects its own officers, establishes and staffs its own committees, and sets its own time of adjournment.

All Founding-Era conventions were deliberative bodies. This was true to a certain extent even of conventions whose formal power was limited to an up-or-down vote. When Rhode Island lawmakers submitted the Constitution to a statewide referendum in town meetings rather than to a ratifying convention, a principal criticism was that the referendum lacked the deliberative qualities of the convention. Critics contended that a ratifying convention, unlike a referendum, provided a central forum for a full hearing and debate and exchange of information among people from different locales. They further contended that the convention offered a way to supplement the affirmative or negative vote with non-binding recommendations for amendments.

Before and during the Founding Era, American multi-government conventions enjoyed even more deliberative freedom than ratifying conventions—as, indeed, befits the dignity of a diplomatic gathering of sovereignties. No multi-government convention was limited to an up-or-down vote. Each was assigned discrete problems to work on, but within that sphere each enjoyed freedom to deliberate, advise, consult, confer, recommend, and propose. Multi-government conventions also could refuse to propose. Essentially, they served as task forces where delegates from different states could share information, debate, compare notes, and try to hammer out creative solutions to the problems posed to them.

History and the constitutional text inform us that a convention for proposing amendments is, like its direct predecessors, a multi-government proposing convention. This suggests that an amendments convention is deliberative in much the same way its predecessors were. This suggests further that when a legislature attempts in its application to compel the convention to merely vote up-or-down on prescribed language, it is not utilizing the application power in a valid way.

Prevailing convention practice during the Founding Era permitted a few procedural variations, and it is precisely in these areas that the text of Article V prescribes procedure. Specifically:

- During the Founding Era, multi-state conventions could be authorized merely to *propose* solutions for state approval, or, less commonly, to *resolve* issues; in the latter case each state "pledged its faith" to comply with the outcome. Article V clarifies that an amendments convention only may propose. At the Constitutional Convention, the Framers rejected proffered language to create an amendments convention that could resolve.
- During the Founding Era, a proposing convention could be plenipotentiary or limited. Article V clarifies that neither the states nor Congress may call plenipotentiary conventions under Article V, because that Article authorizes only amendments to "this Constitution," and, further, it proscribes certain amendments.
- During the Founding Era, an "application" for a multi-government convention could refer either to (1) a request from a state to Congress to call, or (2) the call itself. Article V clarifies that an application has only the former meaning.
- During the Founding Era a call could come from one or more states, from Congress, or from another convention. Article V prescribes that the call for an amendments convention comes only from Congress, but is mandatory when two thirds of the states have submitted similar applications.
- During the Founding Era, one proposing convention (that of 1787) had attempted to specify how the states were to review its recommendations. Article V clarifies that an amendments convention does not have this power.

Thus do text and history fit together to guide us in the use of Article V.

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