



Article V Revisited: The U.S. Constitutional Provision for States to Control the Federal Government and Louisiana Participation

By Albert Dale Clary

The U.S. Constitution has a little-known provision for the states to control a runaway federal government: Article V, the amendments article. Article V has two methods for amending the Constitution, but only one has been used. All 27 of the current amendments to the Constitution were proposed by one method, in which Congress introduced amendments and states ratified those proposals. However, Article V has a second method for introducing amendments, known as the convention method.¹ The text, logic and history of Article V show this second method was created to give states the power to control the federal government when the federal government fails to honor the Constitution's limits on federal power.



plication 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...²

So, when two-thirds of the states apply for a convention for proposing amendments, Congress “shall” call that convention. However, any amendments proposed by the convention only become “part” of the Constitution if ratified by the legislatures of three-fourths of the states, just as any amendments proposed by Congress.

How the state power to control the federal government arose

As the Constitutional Convention neared its completion in 1787, the only method to propose amendments was for Congress to propose them. Then, on Sept. 15, 1787, George Mason of Virginia addressed the Convention and said, as

paraphrased by James Madison in his notes of the Convention, “It would be improper to require the consent of the Natl. Legislature because they may abuse their power, and refuse their consent on that very account...”³

Thus, Article V was modified to provide for states to control one mode of proposing amendments.⁴ Both modes of proposing amendments were subject to the same state ratification to become part of the Constitution. However, this second method puts states in control of both proposing the amendments and ratifying the amendments. As one contemporary essayist said,

The sovereign power of amending the constitution...does not lie with the federal legislature, whom some have erroneously apprehended to be supreme. That power, which is truly and evidently the real point of sovereignty, is vested in the several legislatures and [ratifying] conventions of the states, chosen by people respectively with them.⁵

Alexander Hamilton in 1788 observed this about Article V:

[T]he national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan the congress will be obliged, ...The words of this article are peremptory. The Congress “shall call a convention.” Nothing in this particular is left to the discretion of that body.⁶

The use of this second method of proposing amendments gives the states power over both proposing and ratifying



amendments. The role of Congress in this process is very limited, *i.e.*, only to “call” the convention.⁷ As explained by Professor Natelson, this convention is a Convention of States, not Congress,⁸ and Article V was written by those familiar with a long tradition of multi-colony and multi-state conventions.⁹

Current state efforts to amend the Constitution

State legislatures have approved numerous applications for amendment conventions. Various estimates range from dozens to over 400.¹⁰ In 2015, Congress began tracking these applications, and a registry of “memorials” to propose amendments is kept by the Committee on the Judiciary of the U.S. House of Representatives.¹¹ Other websites also privately track state resolutions.¹²

While no resolution has yet reached the threshold 34 states required to force Congress to “call” an amendment convention, national interest in limiting the growth of the federal government has given birth to several Article V amendment movements. Currently, the most notable are the Balanced Budget Amendment Task Force¹³ and the Convention of States Project,¹⁴ but there are other efforts.¹⁵

Louisiana Article V resolutions

Louisiana has been one of the most active states to approve such applications.¹⁶ For example, in 1907 the Louisiana legislature passed a resolution calling for a convention to propose an amendment for direct election of U.S. Senators, noting that “[t]he failure of Congress to submit such amendments

to the States has made it clear that the only practicable method of securing a submission to the States is through” an Article V convention.¹⁷ More recently, Louisiana has passed resolutions to question federal government control over public schools (1960),¹⁸ bar federal taxation of interest income on state debt (1970),¹⁹ allow school choice (1970),²⁰ impose limits on the federal debt (1975)²¹ and require a balanced federal budget (1975).²² However, in 1990 the legislature rescinded all prior Article V resolutions.²³

In 2016, the Louisiana legislature approved an application for a convention to propose amendments limited to three subject areas: to (1) limit the terms of office that may be served by its officials and by members of Congress, (2) impose fiscal restraints upon the federal government and (3) limit the power and jurisdiction of the federal government.²⁴ In 2018, the legislature approved a Commissioner Selection resolution, discussed further below. Since then, two Article V resolutions for term limits have failed to pass.²⁵

Possible Amendments arising from the 2016 Louisiana Article V resolution

The three subject areas of the Louisiana 2016 resolution could include amendments that impose significant limits on federal power. Possible amendments germane to the call would be those to impose term limits on members of Congress and the judiciary and to require a balanced budget. Other possible amendments could be to repeal the direct election of U.S. Senators,²⁶

grant the states direct authority to check Congress²⁷ or check the authority of federal bureaucracies²⁸ or to narrow the judicial expansion of the Commerce Clause or the General Welfare clause.

The Louisiana model legislation for state legislative control of the amendment convention

Although some authors critical of an Article V amendment convention raise the specter of a “runaway” convention,²⁹ Louisiana is one of the states that has already passed a resolution to direct how the state legislature will control the people sent to the convention. In the 2018 Commissioner Selection Resolution (CSR), the legislature directed how it will *select, authorize, instruct* and *supervise* the people who attend this convention.³⁰ As Professor Natelson reports, “Founding-Era practice informs us also that commissioners at an amendment convention were to operate under agency law and remain within the limits of their commissions[,]”³¹ which includes “*the duty to abide by instructions established by concurrent resolution of the legislature for participation in the convention and the duty to act only within the scope of the Louisiana Legislature’s application for the convention....*”³²

This 2018 CSR imposes two layers of limitations on the authority of Louisiana’s commissioners. First, the commissioners cannot act outside the convention resolution by the Louisiana legislature. The “duty to act only within the scope of the... Legislature’s application” means Louisiana’s commissioners cannot participate in any “runaway” convention.³³ Second, the commissioners’

authority to act will be limited by any “instructions established by concurrent resolution of the legislature.”³⁴

To leave no doubt, the Louisiana CSR contains the clear statement that any vote cast by a commissioner outside the scope of the legislature’s instructions or the legislature’s application “is an unauthorized vote and is therefore *void*.”³⁵ This Louisiana procedure is entirely consistent with similar historical conventions, for which typically the legislatures, sitting as representatives of the citizens, selected, “empowered,” instructed and supervised their amendment convention commissioners.³⁶ This procedure for limiting authority of commissioners to an Article V convention is also entirely consistent with the Louisiana Civil Code articles on mandate, which allow a principal to impose limitations on the authority of its mandates.³⁷ It is anticipated all states that send commissioners to the amendment convention would similarly select, authorize, instruct and supervise that state’s commissioners.

Conclusions

Louisiana has been a leader in the Article V movement. The legislature has passed perhaps more resolutions for Article V conventions than any other state and has also passed a CSR, which can serve as a model to other states on how to control the commissioners and conduct of any Article V convention.

¹ Michael Stern, *Reopening the Constitutional Road to Reform: Toward a Safeguarded Article V Convention*, 78 Tenn. L. Rev. 765, 765 (2011).

² U.S. Const. art. V (emphasis added).

³ Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 Tenn. L. Rev. 693, 732-33 n.21 (citing The Records of the Federal Convention of 1787 (Max Farrand ed., 1937)) and n.264-69.

⁴ See Robert G. Natelson, *Founding Era Conventions and the Meaning of the Constitution’s Convention for Proposing Amendments*, 65 Fla. L. Rev. 615, 621 (2013).

⁵ As stated by Trent Coxe, a Philadelphia businessman and one of the most influential pro-Constitution essayists, as described by Robert G. Natelson in *The Law of Article V, State of Initiation of Constitutional Amendments 28* (2018) (emphasis added).

⁶ Alexander Hamilton, *The Federalist Papers* No. 85 (1788) (emphasis added).

⁷ Natelson, *supra* note 3, at 733

⁸ Robert G. Natelson, *Why The Constitution’s “Convention for Proposing Amendments” Is a Convention of the States*, Policy Brief, The Heartland Institute, October, 2017.

⁹ Natelson, *supra* note 4, at 620.

¹⁰ The Article V Library, <http://article5library.org/applications.htm>.

¹¹ U.S. House or Representatives Clerk, *Selected Memorials*, <http://clerk.house.gov/legislative/memorials.aspx>.

¹² See, e.g., State Legislators Article V Caucus, <http://articlevcaucus.com/>; Friends of the Article V Convention <http://www.foavc.org/01page/Amendments/index.htm>.

¹³ <http://bba4usa.org/>.

¹⁴ Convention of the States Action, <https://conventionofstates.com/> (note that the author is a volunteer for the Convention of States Project).

¹⁵ See, e.g., U.S. Term Limits, <https://www.termlimits.com/>; Wolf-PAC, <https://wolf-pac.com/>.

¹⁶ See U.S. House Clerk, *supra* note 11.

¹⁷ National Archives, Center for Legislative Archives, *Application of the Louisiana State Legislature*

and Governor for a Convention to Propose a Constitutional Amendment for Direct Election of Senators, November 25, 1907, <https://www.archives.gov/legislative/features/17th-amendment/louisiana.html>.

¹⁸ House Concurrent Resolution (HCR) No. 21 (Act 2 of the First Extraordinary Session of 1960).

¹⁹ Senate Concurrent Resolution (SCR) No. 25 (Regular Session, 1970).

²⁰ HCR No. 12 (Reg. Session, 1970).

²¹ SCR No. 109 (Reg. Session, 1975).

²² HCR No. 269 (Reg. Session, 1975).

²³ HCR No. 218 (Reg. Session, 1990).

²⁴ SCR No. 52 (Reg. Session, 2016) (following the Convention of States resolution).

²⁵ HCR No. 28 (Reg. Session, 2020); HCR No. 51 (Reg. Session, 2021).

²⁶ The 17th amendment changed the method of selection of U.S. Senators.

²⁷ Mark R. Levin, *The Liberty Amendments* 179 (2013).

²⁸ *Id.* at 99.

²⁹ See, e.g., *The Article V Convention to Propose Constitutional Amendments: Current Developments*, Congressional Research Service, November 15, 2017, CRS report R44435, p. 18.

³⁰ HCR No. 4 (Reg. Session, 2018).

³¹ Natelson, *supra* note 4, at 686.

³² HCR No. 4, *supra* note 30, at Section 3.A (emphasis added).

³³ For an excellent analysis of the mistaken notion that an amendments convention can be a “runaway” convention to act on matters outside the authority of commissioners, see Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 Const. Comm. 53 (April 6, 2012), available at <https://ssrn.com/abstract=2035638>.

³⁴ HCR No. 4, *supra* note 30, at Section 3.A.

³⁵ *Id.* at Section 3.C.

³⁶ Robert G. Natelson, *The Law of Article V: State Initiation of Constitutional Amendments*, at § 3.10. Selecting Commissioners, § 3.11. Empowering Commissioners and § 3.12. Instructing and Supervising Commissioners.

³⁷ See La. C.C. art. 2989, *et seq.*

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