THE STATE-APPLICATION-AND-CONVENTION METHOD OF AMENDING THE CONSTITUTION: THE FOUNDING ERA VISION

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I. THE NATURE OF ARTICLE V AND THE CONVENTION PROCESS

Thank you all for coming. This is my first trip to Lansing, and I've seen enough to hope that I get to come back—a lot. I'd like to thank everybody responsible for setting up this Symposium. That would of course include Professor Trudeau, who has been unfailingly competent and professional throughout; Justice Brennan, who literally wrote the seminal article on this subject;[1] the *Cooley Law Review*; and perhaps most of all, those people who were responsible for setting up the tables, putting in the microphones, getting the food and drink here, and making the general arrangements.

My primary area of research is the Founding Era.[2] So, as the moderator has just told you, I'm going to be setting the stage. I only have a half hour, and there is a lot of material to cover, so I'll speak a little bit faster than I normally like to; if you have questions or concerns, we can raise those on Q and A. Don't try to get everything into your brain all at once.

There has been a great deal of misinformation, and there are many questions about the state-application-and-convention process. Accordingly, I'm going to put our concepts on "reset"—or perhaps give you an instant replay—so we can look at the process the way the founders saw it. However, one thing I hope you will never hear from my lips, at least today, in discussing this particular type of convention, is the words—and I hope this is the last time I'll say them—"constitutional convention" because a convention for proposing amendments is not, properly speaking, a constitutional convention. I often have made the mistake of calling it that, but it is a serious mistake because it causes people to misunderstand what the convention is all about. The Constitution gives the convention a

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1. Thomas E. Brennan, *Return to Philadelphia*, 1 COOLEY L. REV. 1 (1982).

2. *See About Rob Natelson*, INDEPENDENCE INSTITUTE (Sept. 19, 2010), http://constitution.i2i.org/about/.

specific name—a convention for proposing amendments[3]—and I think we should call it that or perhaps an *Article V convention*, an *amendments convention*, or a *convention of the states*.[4] Now, before I go into how the founders looked at this process, I need to make two preliminary points.

Preliminary point number one: the way Article V works is that it provides for amendments by empowering clusters of legislatures and conventions.[5] It empowers state legislatures to apply for a convention for proposing amendments. It empowers, under certain circumstances, state legislatures to ratify amendments. It also authorizes conventions, and it gives some powers to Congress.[6]

The powers under Article V arise by reason of grants from "We the People," through the Constitution, and to these various conventions and legislatures. Those power grants also bring with them certain subsidiary powers that we call incidental powers.[7] And one reason it's important to understand Founding Era custom is that it was established doctrine at the time of the founding, and to a certain extent today, that incidental powers are defined in part by custom.[8] In other words, the kinds of things that a convention for proposing amendments can do—the kinds of things that the applying states can do—are the kinds of things that it was customary for

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3. U.S. CONST. art. V ("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 . . . .).

4. Variants of the term "convention of the states" were widely used in the Founding Era and the nineteenth century to describe an Article V convention. *See* Robert G. Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers* at 2 (Part Three in a Three-Part Series), GOLDWATER INSTITUTE (Feb. 22, 2011), http://www.goldwaterinstitute.org/article/5730 [hereinafter *Practical Guidance*].

5. United States v. Sprague, 282 U.S. 716, 733 (1931) (stating that Article V grants power to Congress *qua* Congress, not to the U.S. government); Hawke v. Smith, 253 U.S. 221 (1920); Dyer v. Blair, 390 F. Supp. 1291, 1308 (N.D. Ill. 1975) ("[T]he delegation [from Article V] is not to the states but rather to the designated ratifying bodies."). *See generally* Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 702–03 (2011) [hereinafter Natelson, *Rules Governing*].

6. *Practical Guidance*, *supra* note 4, at 6–7.

7. *See generally* Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause* and *The Framing and Adoption of the Necessary and Proper Clause*, *in* THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE at 88.

8. *See id.* at 65–66; Natelson, *Rules Governing*, *supra* note 5, at 704–06.

them to do in 1788, the year the Constitution was ratified. So we have to look at Founding Era customs to understand what it means to *apply* for a convention, or to *call* a convention, or to *propose amendments*.

Preliminary point number two: we must understand thoroughly why this state-application process was created. If you can take Article V—and I realize it's a formidable block of type—and dissect it, you will see that there are two methods for proposing amendments, and there are two methods for ratifying amendments. And the convention method is one of two ways of proposing amendments. The other way is for Congress to propose them.[9]

Why did the founders provide for two separate methods of proposing amendments? Well, they thought that Congress usually would do the proposing because Congress was involved with the government and knew how well things were working.[10] But the founders provided for this other method that would come from the states because they recognized that sometimes there would be a big problem that Congress couldn't or wouldn't deal with.[11] This has happened several times in our history. Notably, just before the Civil War, a lot of people wanted compromise to stave off war, and Congress was deadlocked and couldn't take the action necessary. And so, some people suggested a convention as the ideal mechanism to use, but the process never got far enough.[12] So the state-

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9. *See* U.S. CONST. art. V.

10. James Madison, *Journal*, *reprinted in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (Max Farrand, ed., Yale Univ. Press rev. ed. 1937) (Sept. 10, 1787) (paraphrasing Alexander Hamilton as stating, "The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments . . . .").

11. *Id.* at 629. George Mason thought, before the convention proposal method was added, that

> the plan of amending the Constitution [was] exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, 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.

Id.; *see also* Robert G. Natelson, *Amending the Constitution by Convention: A Complete View of the Founders' Plan* at 7–8 (Part One in a Three-Part Series), GOLDWATER INSTITUTE (Sept. 16, 2010), http://www.goldwaterinstitute.org/article/5005 [hereinafter *Founders' Plan*]; Natelson, *Rules Governing*, *supra* note 5.

12. *See generally* Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in America's First Century* at 5–11 (Part Two in a Three-Part Series), GOLDWATER INSTITUTE (Nov. 4, 2010), http://www.goldwaterinstitute.org/article/5353 [hereinafter *First Century*].

application-and-convention method is a way of bypassing Congress. That's its purpose.

II. WHAT FOUNDING ERA HISTORY TELLS US ABOUT HOW THE STATE-APPLICATION-AND-CONVENTION PROCESS WAS TO OPERATE

With those initial comments in mind—that the Constitution empowers conventions and legislatures and that the state-application-and-convention method was designed as a congressional bypass—let's look at what conventions were during the Founding Era. This morning, I got an email. The email quoted a person who purported to be a constitutional expert, who said, *You know the only federal convention that's ever been held was the one that met in Philadelphia in 1787, and we don't really have much to go on, and that's the only precedent we've got*. I used to think that too, but it's not true. It's very much not true—in fact, the convention, including the federal convention, was a favorite device of the founding generation.

The original meaning of *convention* is just a *meeting*.[13] But by the time of the founding, the word had become identified with a particular type of meeting: an ad hoc assembly that was designed to deal with government problems, as opposed to a legislature that sits regularly.[14] The convention came together, addressed a problem, and then went home. There were conventions in England in the seventeenth century: a convention that brought back Charles II in 1660 after England's ill-fated experiment with republicanism and a convention that brought William and Mary to the throne in 1689.[15] There were conventions in seventeenth-century America.[16] And there were *many* conventions during the Founding Era, so the Founders had a great deal of experience with conventions.

Conventions set up new state governments after the royal governors had been sent packing. Conventions ratified the United States Constitution. Conventions also dealt with interstate problems: they sometimes were called *federal conventions*. Among the federal gatherings was a convention that met in Providence, Rhode Island, in 1776 and 1777, which dealt with price-stabilization issues.

Here are a few more so you can get an idea of how many of these gatherings there were.[17] There was the Springfield Convention of 1777,

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13. *Founders' Plan*, *supra* note 11, at 8.

14. *Id.* at 9.

15. RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDMENT THE CONSTITUTION BY NATIONAL CONVENTION 3–26 (1988) (outlining pre-1787 convention experience); *See also* Natelson, *Rules Governing*, *supra* note 5, at 706–08, 715–19

16. *Id.* at 6–7.

17. *Id.* at 16–22.

which addressed currency and wartime profiteering. There was a convention in York, Pennsylvania, called by Congress in 1777, which dealt with price inflation. A gathering in New Haven, Connecticut, in 1778, addressed wartime economic regulation. There was another one in Hartford, Connecticut, in 1779, and then a second Hartford convention in 1780. The first Hartford meeting addressed price stabilization, and the second one treated the federal taxing power. There also was a Philadelphia convention—and here I do not mean the one in 1787, but in 1780—which addressed issues of price stabilization. Better known is the Annapolis Convention of 1786, which was called to deal with commercial issues.[18]

So there were many conventions. They had recognized prerogatives, and they had recognized procedures. People understood how they worked in a way that we typically don't understand today.

They say there are two types of people in the world: there are those who divide everyone into two types of people, and then, there's everybody else. Like all lawyers, I'm a classifier, so I'm going to divide conventions into categories for you.

One category consists of the Founding Era conventions that met exclusively within sovereignties, such as the state ratifying conventions. Another category consists of those conventions that were meetings among sovereignties, either in the diplomatic field or among American states. As already suggested, the interstate gatherings sometimes were called federal conventions. The two categories of conventions followed somewhat different selection and voting rules. The delegates that met within sovereignties were elected by the people and represented them directly. However, the conventions that met among sovereignties—among states—were constituted differently. Each state sent delegates to the convention, and they voted at the meeting as states.[19] So the people were represented but only indirectly.

Another set of categories among conventions is the following: first, there were conventions that Founders, such as James Madison and Alexander Hamilton, called *plenipotentiary conventions*.[20] These were assemblies designed to deal with practically anything—erect a new government, for example. But most of the Founding Era conventions fell into another category: those designed for a special purpose—to solve a particular problem. The delegates met and solved the problem (or decided they couldn't solve it), and they went home.[21]

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18. *Id.* at 22–24.
19. *Founders' Plan*, *supra* note 11, at 9.
20. *Id.*
21. *Id.*

In which categories does a convention for proposing amendments fit? Is it a great popular convention directly elected by all the people of the United States, or is it a federal convention? Is it a plenipotentiary convention, as some people have suggested, that can do anything—even overturn the government? Or is it a limited-purpose convention?

Once you examine the Founding Era record thoroughly, you can deduce the answers to those questions virtually without uncertainty. It all becomes very clear: a convention for proposing amendments is a *federal convention*; it is a creature of the states or, more specifically, of the state legislatures. And it is a *limited-purpose convention*. It is not designed to set up an entirely new constitution or a new form of government.

How do we know that it's a federal convention? We know that it is a federal convention because that was the only kind of interstate convention the Founders ever knew, or likely ever considered.[22] Indeed, when they talked during the ratification process about conventions for proposing amendments, they always talked about them as representing the states. When, in 1789, Virginia and New York submitted the first applications ever for an amendments convention, in each of their applications they referred to the proposed gathering as one of "deputies from the several states."[23] And the same year, when the Pennsylvania Legislature refused to follow Virginia and New York, and decided not to apply for an amendments convention, Pennsylvania also referred to it as a "convention of the states."[24] So a convention for proposing amendments is not a homogenized, national sort of assembly where every elector votes for delegates from his or her own district; it is a collection of representatives of the states. That shines through rather clearly from the Founding Era record. The people *are* represented, but they are represented indirectly.

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22. CAPLAN, *supra* note 15, at 16–22 (surveying federal conventions); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) ("[The Constitution] was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass.").

23. H.R. REP. NO. 1, at 28–30 (1825) (reproducing the Virginia and New York applications).

24. William Russell Pullen, The Application Clause of the Amending Provision of the Constitution 23 (1951) (unpublished dissertation, University of North Carolina) (on file with University Library, University of North Carolina) ("[T]he calling of a convention of the states for amending the foederal [sic] constitution." (quoting MINUTES OF THE GEN. ASSEMBLY OF PA., 58–61, (1789))).

Moreover, this understanding—that the convention for proposing amendments is a collection of the states—continued to prevail throughout the nineteenth century. For example, in 1831, in a case called *Smith v. Union Bank of Georgetown*,[25] the United States Supreme Court also referred to a convention to propose amendments as a convention of the states.[26]

Certain things flow from that conclusion, for better or for worse. The delegates are agents of the state legislatures. They are subject to the instruction of the state legislatures. The state legislatures have the power to determine how the delegates are selected: they can choose the delegates themselves or leave it to election by the people.[27] It also follows that each state gets one vote. It also follows that Congress may not alter that process, as Congress has sometimes made motions toward doing.

Well, you might say, *Isn't this really unfair? Does that mean that states representing a small portion of the overall population could change the Constitution?* I think the Founders' answer to that was *No, it's not unfair because democracy is protected in the ratification process*. You need three-quarters of the states to ratify, and as a practical matter—whatever the numbers might say theoretically—you cannot induce three-quarters of the states to ratify anything unless the majority, or more likely a substantial super-majority, of the American people favor it. Thus democracy is protected.[28]

We next turn to the question of whether this is a limited or a plenipotentiary convention. Once again, the answer to that comes from the Founding Era record loud and clear and from authorities no less than James Madison[29]: this is a *limited convention*. It is designed to accomplish the specific purpose of proposing amendments. From that, and from Founding Era custom, it follows that the states may instruct their delegates and specify in their applications what the scope of the convention will be. In other words, if the states say, *We want a convention to propose a balanced-*

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25. 30 U.S. (5 Pet.) 518 (1831).

26. *Id.* at 528.

27. *Practical Guidance*, *supra* note 4, at 4–6, 17.

28. *Id.* at 23.

29. Letter from James Madison to George Lee Turberville (Nov. 1788), *in* 11 THE PAPERS OF JAMES MADISON 330–31 (Robert A. Rutland & Charles F. Hobson eds., 1977) (Madison made this clear in a November 1788 letter to George Lee Turberville in which Madison distinguished between a convention that considers "first principles," which "cannot be called without the unanimous consent of the parties who are to be bound to it" and a convention to propose amendments, which could be convened under the "forms of the Constitution" by "previous application of 2/3 of the State legislatures.").

budget amendment, that's the scope of the agenda. The convention does not have authority to go beyond that.

On this point, also, the evidence from the Ratification-Era debates is overwhelming. Again and again, you see the assumption made by people at the founding that the agenda of a convention for proposing amendments not only *could be* fixed by the states, but that it usually *would be*. Thus, Federalist writers, such as Tench Coxe, said that Congress must call a general convention even though Congress dislikes the proposed amendments.[30] Proposed by whom? Proposed by the states in their applications. Similarly, George Washington wrote in 1788 that under the Constitution, a "constitutional door is open for such amendments as shall be thought necessary by nine states"[31]—nine being then the two-thirds necessary to apply.[32]

Unfortunately, some of the collections reproducing these sources have been published only in the last few years and have not been available to prior writers.[33] But when you examine these sources and see how people discussed the convention for proposing amendments, the message is clear: the convention was designed to address problems identified by the states.

To this conclusion, I add one caveat, however: the convention was to be a deliberative body. The design was not for the states to dictate particular language in their applications, thereby requiring the convention to vote merely "yes" or "no." Rather, the applications were to identify areas of concern or amendments designed to accomplish particular purposes, leaving it to the convention to discuss, draft, and propose them.[34]

III. CORRECTING COMMON ERRORS

There are some claims that you hear over and over on this subject to which I want to respond. It is sometimes said, notably for example, by

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30. Tench Coxe, *Pennsylvanian to the New York Convention*, PA. GAZETTE, June 11, 1788, *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1139, 1142–43 (John P. Kaminski et al. eds., 2004).

31. Letter from George Washington to John Armstrong (Apr. 25, 1788), http://etext.lib.virginia.edu/toc/modeng/public/WasFi29.html.

32. See *Founders' Plan*, *supra* note 11, at 15–18, and Natelson, *Rules Governing*, *supra* note 5, at 723–32, for additional evidence on the Founding Era expectations.

33. *See id.* at 6 (explaining that another problem has been the lack of curiosity many writers have had about the available sources, apparently because their "scholarship" was written merely to serve pre-established conclusions).

34. *Practical Guidance*, *supra* note 4, at 2–3 (summarizing the Founding Era evidence and the modern law on this point); Natelson, *Rules Governing*, *supra* note 5, at 742–47.

Professor [Charles L. Black], that for the first one-hundred years of our history there was no, or only one, state application for a limited convention—and that, therefore, everybody understood that a convention for proposing amendments had to be wide open.[35]

There are two problems with that claim: first, what a state might have done in 1850 or 1830 is really not very good evidence of what the Founders intended. Second, the claim is flatly untrue. There were, in fact, a number of specific single-subject applications by states in the first hundred years.[36] You can make an argument—I don't know if it's a winning argument, but you can make an argument—that Virginia's 1789 application was for a limited convention. South Carolina's 1832 application certainly was. Alabama's 1833 application was designed to deal specifically with the issue of federal taxing power. And Oregon's application of 1864 was designed to deal specifically with the issue of slavery. So if you hear that statement, that during the first hundred years all applications were general, be aware that it is not accurate.

Another, even more common claim, runs like this: *You know, we had experience with a constitutional convention once before* (notice the word *constitutional* there)—*we had experience with a constitutional convention once before, in 1787, and it was a runaway. Those guys were brought to Philadelphia to amend the Articles of Confederation, and they ignored the limits and gave us a whole new form of government, didn't they?*"

Well, of course they really didn't give us the new form of government; the states had to ratify it. However, the problem with the claim goes beyond that. The congressional call for the 1787 Convention did ask for amendments to the Articles of Confederation, but under the law of the time, particularly the law of agency, the scope of the 1787 Convention was *not* set by Congress. It was set by the formal commissions issued to the delegates from the various state legislatures.

When you interpret those commissions in light of eighteenth-century legal and linguistic rules, you find that the commissions from ten of the twelve states that sent delegates authorized those delegates to propose an entirely new constitution. In other words, as to the overwhelming majority of the delegates, the 1787 Convention was not a runaway. It was designed to be a plenipotentiary convention, unlike the sort of convention we are discussing today.[37]

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35. Charles L. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 202 (1972).

36. The applications are discussed in *First Century*, *supra* note 12, at 8–9, 13.

37. *Founders' Plan*, *supra* note 11, at 10–12; Natelson, *Rules Governing*, *supra* note 5, at 719–23 (discussing the factual background of the 1787 federal convention and the corresponding legal rules).

IV. CONCLUSION

A great deal more can be learned about the state-application-and-convention process from its history. For those in the audience who are interested in knowing more about the process, I strongly recommend that you study the campaign for direct election of senators in the late-nineteenth and early-twentieth centuries. It is a case study in how states can use the application process to successfully accomplish what they want to accomplish. The advocates of direct election addressed a popular issue, readily understandable by state lawmakers, and one on which Congress had refused to act. Moreover, the advocates of direct election emphasized that they were acting in accordance with Founding Era principles. They carefully coordinated their campaign in a way that can be a model for modern reformers.

So even if you disagree with the Seventeenth Amendment[38]—even if you think that direct election of senators is horrible, and we need to go back to selection by the state legislatures—please study that campaign. The Progressives did a great job in using the application process, even though a convention was never held.[39]

I'd like to finish by giving you two quick plugs. One is for a book called *Constitutional Brinkmanship*, by Russell Caplan.[40] I picked up a copy at Amazon.com for less than eight dollars, shipping included. Caplan's book was published by Oxford University Press in the 1980s. It is an excellent review and certainly the most thorough review of this process up until the time he wrote it. There are a few problems in it, mostly due to the fact Caplan did not have as much access to Ratification-Era material as we are fortunate to have today. But generally, it is an excellent treatment.

The second plug is much more shameless: and that is starting today, on the website of the Goldwater Institute,[41] you can get my paper on the

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38. *See* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.").

39. *See First Century*, *supra* note 12, at 16–22.

40. CAPLAN, *supra* note 15.

41. *Founders' Plan*, *supra* note 11.

Founders' vision for conventions for proposing amendments. It surveys the evidence, gives you all the citations I left out in my main talk, and was written without strong preconceptions. If anything, I may have had a feeling that such a convention was not controllable, but I changed my view to what the evidence told me. In other words, it's an honest piece of work; it's not a piece of advocacy.

The Goldwater Institute, shortly, will publish second and third papers from me on the same subject. The second will discuss the experience with the state-application-and-amendment process during the late-eighteenth, nineteenth, and early-twentieth centuries.[42] The third will examine cases issued on the subject by the Supreme Court and other federal courts and deduce from all the evidence recommendations for state lawmakers.[43] Thank you all very much. I have really enjoyed being here.

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42. *First Century*, *supra* note 12.

43. *Practical Guidance*, *supra* note 4. See Natelson, *Rules Governing*, *supra* note 5, where the material in all these papers is summarized and extensively supplemented (summarizing rules for Article V conventions, based on both historical and legal materials).