



FEATURE

## Is It Time for a Convention?

By Philip Klein from the October 2010 issue

In August, Missouri became the latest state to rebel against the new national health care law when 71 percent of voters supported a ballot initiative rejecting the legislation's requirement that individuals purchase government-approved insurance. Several other states will consider similar measures on the ballot this November.

However satisfying this backlash against ObamaCare may be to opponents of the law, these state-based efforts could all be for naught if the U.S. Supreme Court sides with Congress and rules that the legislation's individual mandate is constitutional.

Such a decision would have far-reaching consequences, giving broad new power to the federal government over individuals and states. It would mean that the interstate Commerce Clause would have been interpreted so broadly as to allow the federal government to regulate the activities of people who choose not to engage in commerce, and within a health insurance market where businesses aren't even allowed to sell their products across state lines. It would represent the culmination of decades in erosion of the concept of the separation of powers between federal and state governments, and the boldest example of congressional over-reach in the age of Obama.

In that scenario, short of repeal, the only remaining way to fight the law would be to amend the Constitution. Given how polarized the modern U.S. Senate is, it's highly unlikely that a proposed amendment would garner the necessary 67 votes needed to amend the Constitution in the traditional manner. Yet the Founding Fathers left the states one last check on federal power.

valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States."

The Constitution has never been amended through a convention of the states, and this route remains controversial, with many conservatives fearing that the meeting would turn into a circus in the modern media age, and open the door to a wholesale rewriting of the nation's founding document. Yet a new body of research suggests that these fears are unwarranted, and that there are enough checks built into the system to prevent what scholars refer to as a "runaway convention." With state legislators and grassroots activists searching for ways to limit the abuses of Congress, the possibility has begun to generate more chatter.

"MY SENSE IN TALKING to state legislators and others is that there is growing interest in the idea," said Merrill Matthews, a scholar at the Institute for Policy Innovation. "About what it would take and what the Founders had to say. People are increasingly warming to the possibility."

One such legislator is James LeMunyon, a Republican member of the Virginia House of Delegates, who took to the pages of the *Wall Street Journal* this March to propose a convention as a means of reining in Washington. He has offered his own proposal in the Virginia legislature, pushing for a convention to amend the Constitution to give the president line-item veto power. Earlier this year, the Florida senate passed a measure calling for a convention to deal with the bloated federal budget.

"What we're really after, in the very broad sense, is to rebalance the relationship between federal and state governments," LeMunyon told *TAS*.

The prospect of a convention still has its many detractors.

"I think it's a terrible idea," Phyllis Schlafly told *TAS*. "Who are these people who think they could do a better job than George Washington and James Madison? We have a wonderful Constitution and we don't want to rewrite it or cause any discontent with the Constitution that we have."

Schlafly has long been one of the leading opponents of a convention, and has used her conservative activist group, Eagle Forum, to oppose it.

Michael Uhlmann, a political science professor at Claremont Graduate University, was also dismissive of the convention route.

"I don't take the idea seriously, and I don't think anybody else should," he said. "Unless you can figure out a way to reincarnate James Madison. Then I'll reconsider my position."

AT THE TIME of the founding, the ability of the states to call a convention to propose amendments was seen as a way to prevent the federal government from becoming too expansive. In essay No. 85 of the *Federalist Papers*, Alexander Hamilton cited the states' convention option in his response to critics who feared that Congress would never allow any amendments limiting its power. The Constitution orders that "The Congress *shall* call a convention" if two-thirds of

against the encroachments of the national authority, he predicted.

Yet as time went on, people came to see a convention as more nefarious, forming misconceptions about what it might mean, according to new research by Robert Natelson, who recently left his post as a law professor at the University of Montana to join the Independence Institute. Those misconceptions, Natelson says, start with the very name of the proceeding.

"It is not a constitutional convention," Natelson, who has written two forthcoming papers on the subject for the [Goldwater Institute](#), told *TAS*. "Nobody at the time it was drafted ever called it a constitutional convention. It started to get that name only in the 20th century, as far as I can determine, when that term was applied to it by some people who were opposed to an Article V convention, because they opposed the proposed amendments."

The Constitution itself refers to a "convention for proposing amendments."

"It was not until the 1960s, when several conservative groups were seeking a convention to propose amendments in order to reverse some of the liberal Supreme Court decisions, that liberal scholars and activists, like Charles Black of Yale Law School, or Theodore Sorensen, the Kennedy speechwriter, basically made up this idea that what you're doing is you're creating a big unlimited constitutional convention that could become a circus," he said.

Indeed, one reason for conservative suspicions is that liberals themselves have proposed a constitutional convention in order to make it easier to realize leftist policy goals. In 2006, for instance, University of Texas law professor Sanford Levinson wrote a well-received book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*. He argued for a convention in which the entire founding document is fair game.

But according to Natelson, there is a difference. While a constitutional convention is called to rewrite the Constitution, an "amendments convention" or "Article V convention" is tailored to a narrow purpose.

"The Founders believed that this method would be used more than has probably been used," he said. "It was seen precisely as a way of getting constitutional change that an abusive or corrupt Congress would not itself authorize.... To the extent that many people believe today that a Congress is abusing or exceeding its powers, this is precisely the situation that the Founders crafted this provision in the Constitution to serve."

Critics of the idea contend that once the convention is called, there would be no way to limit its scope. But Natelson argued that there are a number of built-in checks to prevent that from happening.

"The convention is bound by the nature of the call," Natelson said. "So if it's been told to propose an amendment forbidding the government from being involved in health care, that is the only issue it may address."

In Federalist No. 85, Hamilton wrote that "every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly....The will of the

must invariably take place. Currently, it would take 34 states to call a convention, and 38 states to ratify an amendment.

Even if a convention passed non-germane amendments, Congress would not even be permitted to submit them to the states for ratification if they went beyond the topic in the initial petitions for a convention. And courts would have to disallow them even if Congress did.

Furthermore, there's the political check, because if delegates were sent to the convention to address one issue and began to do something completely different, it would make the public back home "furious," Natelson argued.

And ultimately, any proposed amendment would have to be ratified by three-fourths of state legislatures to alter the founding document.

The most frequently cited example of a "runaway convention" was the original Constitutional Convention in 1787, which ended up scrapping the Articles of Confederation entirely. Yet Natelson said that this impression was historically inaccurate, because in reality, 10 of the 12 participating states sent their delegates to the convention with the power to write a new document.

LAST YEAR, Randy Barnett, a constitutional law professor at Georgetown University Law Center, took to the *Wall Street Journal* to argue that the states should use their power under Article V to call a convention to propose a federalism amendment aimed at curbing congressional power. He later expanded on the idea in *Forbes*, offering a 10-point "Bill of Federalism."

Of all the amendments he proposed -- which included, among other things, limiting congressional power under the Commerce Clause to its original intent and granting the president line-item veto power -- the one that has gained the most traction was what he calls the "repeal amendment." The very simple idea would be to amend the Constitution to allow two-thirds of the states to rescind any federal law or regulation.

The advantage this has over other proposals is that it would not only be a vehicle to address current matters such as ObamaCare, but it would also be available to combat any future abuses by Congress in decades to come. It would also restore a check on federal power that was lost when the nation moved from state legislatures appointing U.S. senators to having direct elections by the people.

"It allows states to provide an extra veto on abuse of federal power," Barnett said of his proposal.

Barnett emphasized that the amendment would be structural rather than tailored to a specific issue. "That means it actually creates a check and balance like the rest of our structural constitution that's still in effect," he said. It could be used, for instance, to overturn ObamaCare, or to block the Environmental Protection Agency from capping carbon emissions through the regulatory process.

He added, "It's self-executing, meaning the courts don't have to be relied on to enforce it."

are seeking ways to rein in the federal government.

"It's nonpartisan, because it's not a policy amendment," Radtke said. "So it should appeal to both parties, because it allows state legislatures to check a Republican or Democratic Congress."

BECAUSE THERE HAS NEVER BEEN an Article V convention before, there is considerable speculation about the scope of Congress's role in the process. Does it merely set the convention, and then submit any amendments to the states for ratification? Or does it have a more active role in managing the process?

"That needs to be established," Virginia legislator LeMunyon said of choosing delegates. "Because we've never done it, there's no precedent."

In the 1980s, Sen. Orrin Hatch and several colleagues introduced a bill trying to set the parameters for a convention. It proposed replicating the structure of the U.S. Congress, allowing states to send one delegate for each congressional district, and then two additional delegates for each state, regardless of population.

Natelson said that each state would determine how to select their delegates, but that ultimately states would get only one vote each.

The other question is, what happens if 34 states petition Congress to call a convention, but Congress never acts -- even though it is constitutionally required to do so -- perhaps because things get gummed up in the Senate?

"That's certainly possible," Barnett said. "But then what you have is a constitutional crisis." That would have to get resolved politically, and he postulated that Congress would be compelled to act, because otherwise it would face the wrath of voters. In practice, he said, "if you got to the point where there was enough public outrage to get close to an amendments convention, there wouldn't even be one. Because you have to ask yourself, what would the political world look like at that point?"

Historically, it was Virginia and New York petitioning for a convention that led to the Bill of Rights. And Congress only acceded to amending the Constitution to allow direct election of senators once state petitions on the matter were approaching the critical mass needed to call a convention. During the 1980s, there were 32 state petitions for a convention on a balanced budget amendment, but the effort faded in the ensuing decade as concerns about deficits receded.

In the case of ObamaCare, Barnett says that any form of public backlash against the law -- from the ballot measures to a push for a convention -- will increase the odds that pending lawsuits challenging the law will succeed.

"As public opposition to the mandate builds, this gives judges the fortitude they normally lack to enforce the Constitution against the will of Congress, which they deem to be the popular will," he said. "If it's not the popular will, they're a lot more willing to strike down laws that they otherwise would uphold."

"They're dreaming," Schiary said of those who think a convention could be controlled. "Have you ever been to a big convention? You know perfectly well that once a convention is convened, it can do whatever it wants to. Whoever is handling the gavel can gavel people down and do whatever they want. I've been to too many conventions, and there's no way it can be limited."

To bolster her case, Schlafly cited a letter sent to her in 1988 by former Supreme Court chief justice Warren Burger, which is viewable on the Eagle Forum website.

Burger wrote that "there is no effective way to limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or to one issue, but there is no way to assure that the Convention would obey."

Responding to the argument that any changes would need to be ratified by three-quarters of the states, Schlafly said, "I have other plans for the next 10 years than running around to state legislatures telling them to reject whatever this convention does. Why should we go through that type of agony?"

Gary McDowell, a constitutional scholar who teaches at the University of Richmond, said, "My general take is, any such convention will always be a disaster for my side.... You always think the convention is going to be our guys, and it's not our guys."

Claremont's Uhlmann was also critical. "Constitutional conventions aren't things to toy with," he said. "I for one, would not like to call for a constitutional convention, because I don't trust the spirit of the age. It could go anywhere."

Furthermore, he said he views it as an unnecessary risk. "If you had the political heft in numbers to call a constitutional convention," he said, "you would surely have the political heft in numbers to control the Congress, and the executive as well. So why not do it that way?"

BUT TO PROPONENTS of the idea, those who seek to limit the power of the federal government shouldn't be skittish about using this tool left to us by the Founders.

"The real question is, where is the greater risk?" Natelson asked. "Think of the idea of a runaway. In order for a runaway convention to succeed, the convention would have to ignore its duty, Congress would have to ignore its duty, the courts would have to not perform their duties, and the states would have to ratify something nobody wants. The idea that this convention can rewrite the Constitution as it likes is about as remote as the sun not coming up tomorrow. Theoretically it could happen, but it is an absurdly small possibility. But the important thing is, you have to weigh that against the virtual certainty of risk if we continue on the path we're going down. It is a virtual certainty that Congress is going to continue to do the things it does unless it's reined in. It's a virtual certainty that they're going to break whatever other constitutional barriers still exist against them.... The last 40 years has proven that the system is broken, and it's not going to be fixed without action."

He added that "if we don't use a mechanism that the Founders designed for the purposes for which they designed it, then we're not paying respect to their design."

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runaway Congress we now have? We have a clear and present danger of the runaway Congress.

Should the U.S. Supreme Court decide that ObamaCare's individual mandate is constitutional, it would mean that Congress has the power to force everybody to purchase a product that they may not want, which would have staggering implications for both personal liberty and federalism. Calling an Article V convention may represent an unprecedented step, but with Congress taking unprecedented steps to erode individual freedoms and eliminate the concept of state power, those who believe in limited government should, at the minimum, be considering the possibility.



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