



CONVENTION OF STATES ACTION

Ohio House of Representatives Federalism and Interstate Relations Committee Testimony in Support of HJR 2

Thank you Madam Chair, members of the committee. My name is Robert Kelly and I am General Counsel for Convention of States Action and I am here to speak in favor of HJR 2.

Convention of States Action is a nationwide grassroots organization with over 2 million supporters across the country organized around this single issue: calling a convention of states to propose amendments to restrain the power of the federal government.

Our Article V application has passed in 10 states.¹ Right now, 21 of your sister states are considering this same piece of legislation.²

Restoring Federalism and the Balance of Power

HJR 2 is not about this or that policy position. It is not about being a Republican or a Democrat. It is not about liberal policies or conservative policies. It is about a much more fundamental question—James Madison would’ve called it the ultimate political question—who decides? The answer is clearly established in our Constitution: it is “We the People” who decide. And our Founders sought to protect that principle through the process of federalism—the idea that power should be divided between the state and federal governments to ensure that neither could tyrannize the American people.

Unfortunately, that process of federalism is largely a dead letter in American law today. The federal government treats the states as its regional agencies, rather than the equal sovereigns they are under our system of government. You do not have the power to act as the people of Ohio would ask you to act.

¹ Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Louisiana, North Dakota, Oklahoma, Tennessee

² Arkansas, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, New York, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia



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But I take great comfort in the fact the spirit of Federalism is alive in the hearts and minds of the American people. Despite all of our political differences 72% of the American people believe that the government is too large.³ The American people also believe their state governments do a better job than the federal government.⁴ This majority holds true across political and geographic boundaries. Federalism is alive and well in the hearts of the American people.

The federal government will not check itself—and that would not have surprised our Founders. George Mason said as much at the Constitutional Convention when he pointed that the states needed to have the ability to propose amendments.⁵ That is how the convention provision in Article V was born, and it was ultimately adopted by a unanimous vote.⁶ It is up to the states, representing the people, to restore that proper balance of power in our system. The Tenth Amendment is a great aspirational statement of federalism, but it is what James Madison referred to as a “parchment barrier.” It has no teeth. The procedural mechanism to restore federalism is an Article V convention.

Convention Opponents Misrepresent the Nature of the Amendment Process

Most convention opponents seem to get hung up on the use of the term “Convention” and somehow infer that an Article V Convention would have the same authority as the Constitutional Convention of 1787. But an Article V Convention, by its very nature, is called under Article V of the Constitution and must abide by the procedures laid down in that Article. If you read the text of Article V what it essential establishes is an interstate drafting committee. The convention only has authority to “propose amendments.” Those proposals must be ratified by 38 states before a single letter of our Constitution can be changed. This incredibly high bar ensures that no amendments could ever be passed that do not enjoy the overwhelming support of the American people.

The runaway convention argument, which enjoyed a short time in vogue in the seventies and eighties, has been roundly rejected by numerous authorities including the American Bar Association,⁷ the U.S. Department of Justice Office of

³ *Record High in U.S. Say Big Government Greatest Threat*, GALLUP, <http://www.gallup.com/poll/166535/record-high-say-big-government-greatest-threat.aspx> (Dec. 18, 2013).

⁴ Frank Luntz, *Americans Trust Their Own States But Not Washington*, TIME, <http://time.com/4682090/frank-luntz-america-relationship/> (Feb. 25, 2017).

⁵ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 629–30 (Max Farrand ed., 1911).

⁶ *Id.*

⁷ AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1973)



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Legal Policy,⁸ Former Supreme Court Justice Antonin Scalia,⁹ and leading Article V Scholar Professor Robert G. Natelson,¹⁰ and many others.

Opponents also suggest that Congress would control a convention, appoint the delegates, and otherwise wreak havoc. This of course makes no sense in light of the history of the convention provision, which was to provide a method to bypass Congress in the amendment process.¹¹ It is also completely belied by our country's historical practice of holding conventions. There have been at least 36 multi-state conventions in our history, and in every instance the participating states have appointed their own delegates and each state has had one vote. Eleven of these conventions were held in the decade between 1776 and 1787, or on average one convention every year.¹² The Founders were no strangers to this process, which perhaps explains the brevity of Article V. Even the Supreme Court itself, has referred to an Article V convention as a "convention of the states,"¹³ implying that the states are the entities represented by and in control of the convention.

The evidence furnished for this argument that Congress will control the convention is based on the fact that Congress has, over the past several decades, considered several pieces of legislation regulating the convention process in one manner or another. What is important to note about that legislation is that none of it has passed. If anything is to be inferred from this failed legislation it is that Congress does not think it controls the convention process, since it has considered the issue on numerous occasions and declined to assert any authority over it.

In sum, the concerns about the Article V process pale in comparison to the threat posed by our unchecked federal government which continues to spend beyond its means and expand its power at the expense of the people and the states.

I'll conclude my remarks there and happily address any questions or concerns the committee may have. Thank you.

⁸ U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL POLICY, LIMITED CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V OF THE UNITED STATES CONSTITUTION (1787)

⁹ See AMERICAN ENTERPRISE INSTITUTE, A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK? 5, 21–22, 36, reproduced in part at https://www.conventionofstates.com/justice_antonin_article_v_convention.

¹⁰ E.g., Robert G. Natelson, *Founding-Era Conventions and the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615 (2012).

¹¹ See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 629–30 (Max Farrand ed., 1911).

¹² Robert G. Natelson, *Founding-Era Conventions and the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 615, 620 (2012).

¹³ *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).