As discussed in an earlier [post](http://www.pointoforder.com/2013/08/11/rob-natelson-on-the-article-v-convention/), Professor Rob Natelson has done groundbreaking work on the Article V convention and the rules that apply to such a convention. One of the issues Natelson explores is whether and how state legislatures can limit the scope of the convention’s deliberations. His study of pre-constitutional interstate (or “multi-government”) conventions shows that states could and did ordinarily limit the scope of such conventions. *See, e.g.*, Robert G. Natelson, [Founding-Era Conventions and the Meaning of the Constitution’s “Convention for Proposing Amendments,”](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044296) 65 Fla. L. Rev. 615, \*\*18-66 (forthcoming 2013) (hereinafter “Founding-Era Conventions”); Robert G. Natelson, [Proposing Constitutional Amendments by Convention: Rules Governing the Process](http://constitution.i2i.org/files/2011/01/Rules_for_Art_V_Conventions.pdf), 78 Tenn. L. Rev. 693, 715-32 (2011) (hereinafter “Rules Governing the Process”).

Natelson finds that this practice exemplified the principal-agent relationship that existed between state legislative bodies and an interstate convention. *See* Robert G. Natelson, [Amending the Constitution by Convention: Lessons for Today from the Constitution’s First Century](http://liberty.i2i.org/files/2012/03/IP_5_2011_c.pdf) 2 (Independence Institute 2011) (hereinafter “Independence Institute Paper II”) (“Conventions for proposing amendments, like other federal conventions, are made up of delegates who are agents of the state legislatures. In effect, the entire convention is a collective agent of the state legislatures.”). Pre-constitutional interstate conventions were governed by principles of eighteenth-century fiduciary and agency law, in which the state legislatures were the principals, and the convention was the agent with fiduciary obligations to the principal. See Robert G. Natelson, [Amending the Constitution by Convention: A More Complete View of the Founders’ Plan](http://constitution.i2i.org/files/2010/12/IP_7_2010_a.pdf) 3 (Independence Institute 2010) (hereinafter “Independence Institute Paper I”); Rules Governing the Process, 78 Tenn. L. Rev. at 703-06.

There are actually two types of principal/agent relationships involved: one running from each state legislature to the delegates from that state and one running from the state legislatures collectively to the convention as a whole. Under the first type, “[t]he state legislature, or its designee, grants and defines the authority of the commissioners, instructs them, and may recall them.” Robert G. Natelson, [The Article V Convention Process and the Restoration of Federalism](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044296), 36 Harv. J. L. Pub. Pol’y 955, 959 (2013) (hereinafter “The Article V Convention Process”); *see also* Rules Governing the Process, 78 Tenn. L. Rev. at 747 (“As in all prior federal conventions, delegates to a convention for proposing amendments are representatives of the state legislatures, and therefore subject to instructions.”). A state legislature can limit the authority of its own delegation either through instructions or through the “commissions” that each delegate (also referred to in pre-constitutional practice as a “commissioner”) receives.

Under the second type of principal/agent relationship, the authority of the convention as a whole may be limited. Natelson draws this conclusion not only from eighteenth-century convention practice, but “from the record of the framing, from debates over the Constitution’s ratification, and from subsequent history and some subsequent case law.” The Article V Convention Process, 36 Harv. J. L. & Pub. Pol’y at 958. For example, Natelson points out that if state legislatures could not limit the authority of the Article V convention to the types of amendments they desire, it would undercut the fundamental purpose of the convention, which is to serve as an “effective congressional bypass” allowing states to obtain amendments to rein in the national government. Independence Institute Paper II at 11.

Natelson also relies on the principle, evident from both the Philadelphia Convention and the debate over ratification, that Article V establishes equality between Congress and the state legislatures in originating amendments. Madison emphasized this principle in Federalist No. 43, noting that Article V “equally enables the general and the State governments to originate the amendment of errors.” This, Natelson argues, “suggests that if Congress may specify a subject when it proposes amendments, the states may do so as well.” Independence Institute Paper II at 11; *see also* Independence Institute Paper I at 14 (“Since Congress may propose amendments directly to the states for ratification or rejection, granting equal (or nearly) equal power to the states requires either that they have the power to propose directly (which they do not) or that the convention be their agent. There is no third alternative.”).

In one respect, however, Natelson believes that the state legislatures lack the power to confine the deliberations of the Article V convention. He maintains that “[t]he states may not dictate the precise wording of an amendment or require the convention to propose it.” Independence Institute Paper I at 2.

Natelson acknowledges that this conclusion qualifies the general principal/agent relationship between the state legislatures and the convention:

Because the convention for proposing amendments is the state legislatures’ fiduciary, it must follow the instructions of its principals—that is, limit itself to the agenda, if any, that the states specify in their convention applications. . . .

However, the obligation of an agent to submit to the principal’s instructions may be altered by governing law. The Constitution assigns to the convention, not the states, the task of “proposing” amendments. This implies that the convention has discretion over drafting. If two-thirds of the states could dictate the precise language of an amendment, there would be no need for a convention.

Independence Institute Paper II at 17-18.

The textual argument here is that the word “proposing” somehow “implies that the convention has discretion over drafting.” But I am not aware of any definition of “proposing” that encompasses the act of drafting. There is nothing illogical or incoherent about saying that a convention has proposed an amendment drafted by someone else. One might argue that the phrase “convention for proposing amendments” implies that the convention itself makes the decision as to whether a particular amendment should be proposed, but it is difficult to see how it implies that the convention originated, devised or specified the wording of the amendment.

This point becomes clearer when one looks at the state resolutions leading up to the Philadelphia Convention of 1787. Many of these resolutions explicitly referred to that Convention’s function of “devising” (e.g., New Jersey), or “devising and discussing” (e.g., Virginia and New Hampshire), or “devising, deliberating on and discussing” (e.g., Pennsylvania and Delaware), alterations and provisions related to the federal constitution. If the Framers had wanted to specify that the Article V convention would be drafting or originating the amendments it proposed, they could have easily incorporated such terms. The fact that Article V merely refers to a “convention for proposing amendments” would seem to dispel, rather than support, any notion that the Framers were attempting to limit or qualify the convention’s fiduciary duties to the state legislatures.

Natelson also argues that if Article V permitted state legislatures to dictate the precise wording of any amendment, there would be no need for a convention at all. In other words, why not simply provide that if two-thirds of the state legislatures agree on a specific amendment, Congress is obligated to submit that amendment to the states for ratification?

It seems to me that there are several possible answers to this question. In the eighteenth century, it may have been thought highly unlikely that multiple state legislatures could agree on specific wording of an amendment without holding a physical meeting of their delegates. Or it may have been thought necessary (or at least preferable) to have a joint meeting so that delegates could sign a single document reflecting the proposed amendment, thereby avoiding any confusion or misunderstanding as to the agreed text. Or the Framers may not have thought, one way or the other, about a separate procedure for this situation. None of these answers necessarily implies that the state legislatures should be prohibited from dictating the wording of the desired amendment to the convention.

There is also a more fundamental reason for holding a convention even if two-thirds of the states have already agreed on the text of an amendment. The proposed amendment, if ratified by three-quarters of the states, will bind every state. A convention provides an opportunity for any states that object to the amendment to express their views and seek to dissuade their sister states from proposing it.

In this regard the Article V convention is different from the pre-constitutional interstate conventions with which the Framers were familiar. The latter were voluntary meetings, the sole purpose of which was for the participating states to attempt to reach agreement on a matter of common interest. States that chose not to participate were not legally bound by the outcome in any way.

It is therefore not surprising that there are no historical examples of interstate conventions in which the states had already agreed on the precise outcome prior to the convention. There would have been little, if any, point to holding a convention if the participating states had already reached a complete agreement on the particular issue to be discussed. On the other hand, as far as I know, there is no historical evidence to suggest that it would have been viewed as illegal or improper to hold a convention for the sole purpose of formally ratifying an agreement that the states had already reached.

Natelson argues that pre-constitutional interstate conventions invariably exercised discretion beyond simply voting up or down on a proposed agreement. *See* Founding-Era Conventions, 65 Fla. L. Rev. at \*74 (“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.”). The question, however, is whether this is simply a byproduct of how states happened to use conventions in the eighteenth century or whether it demonstrates something about the meaning of a “convention for proposing amendments” in Article V. It seems that there is nothing about the term “convention” itself that implies delegates must have discretion beyond voting up or down on a particular proposal. Article V provides for state ratifying conventions that are limited to an up or down vote. And, as already discussed, “proposing” does not imply any additional measure of discretion.

In short, nothing in constitutional text or history suggests that state legislatures are precluded from agreeing in advance on the particular wording of an amendment to be considered by an Article V convention. Even absent affirmative evidence of an intent to authorize a single amendment convention, therefore, it would seem that such a convention is permitted under the background rules established by agency law.

In fact, however, there is a significant amount of historical evidence, compiled by Natelson himself, that affirmatively supports the conclusion that an Article V convention may be limited to a single amendment. *See, e.g.*, Rules Governing the Process, 78 Tenn. L. Rev. at 727-31. First there is Hamilton’s observation in Federalist No. 85 that “every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. . . . And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place.” As Natelson observes, Hamilton’s reference to nine states “represented the two thirds then necessary to force a convention,” implying that two thirds of states would initiate the amendment process when they were already “united in the desire of a particular amendment.” Rules Governing the Process, 78 Tenn. L. Rev. at 727.

Similarly, Natelson cites George Washington’s April 1788 letter to John Armstrong, in which Washington explained that “a constitutional door is open for such amendments as shall be thought necessary by nine States.” Id. at 727 & n.230 (*quoting* Letter from George Washington to John Armstrong (Apr. 25, 1788)). Again the implication is that the applying states would identify the amendments they thought necessary, not merely a subject matter or a problem to be solved, prior to the convention.

Even more strikingly, the Federalist writer Tench Coxe wrote in 1788:

If two thirds of those legislatures require it, Congress *must* call a general convention, even though they dislike the proposed amendments, and if three fourths of the state legislatures or conventions approve such proposed amendments, they become *an actual and binding part of the constitution*, without any possible interference of Congress.

Rules Governing the Process, 78 Tenn. L. Rev. at 727 & n.232 (*quoting* A Pennsylvanian to the New York Convention, PA Gazette, June 11, 1788)).

As Natelson notes, Coxe’s statement “reveals an assumption that states would make application explicitly to promote particular amendments,” which would be known (and possibly disliked) by Congress before the Article V convention. Rules Governing the Process, 78 Tenn. L. Rev. at 728. He cites several others, including Patrick Henry, who shared the same assumption and spoke as if “the states rather than the convention would do the proposing.” Id. at 730.

One might argue that these statements were imprecise and that the Founders only anticipated that the state legislatures would identify the substance, rather than the exact wording, of a desired amendment. But even if that is so, this evidence shows that the Founders did not assume the Article V convention would necessarily be originating or devising the amendments it proposed. Moreover, the fact that they sometimes attributed the acts of an Article V convention to the states or state legislatures seems entirely consistent with Natelson’s description of the governing rules, under which the convention was the fiduciary or “instrumentality” of the states. Founding-Era Conventions, 65 Fla. L. Rev. at \*69. It is also consistent with the principle of equality between Congress and the state legislatures in the Article V process because Congress, obviously, does not merely identify subjects but drafts specific amendments to be proposed.

All of this suggests that the best legal view is that the state legislatures may prescribe the wording of a particular amendment in their applications and confine the deliberations of the convention to whether to propose that amendment. Natelson, however, argues that this approach presents significant practical difficulties. He notes that “the more terms and conditions applications contain, the less likely they will match each other sufficiently to be aggregated together to reach the two-thirds threshold.” Rules Governing the Process, 78 Tenn. L. Rev. at 742. Moreover, “Members of Congress and judges who dislike the contemplated amendments may seize upon wording differences to just refusal to aggregate.” Id.

Natelson also contends “the courts are likely to reject any effort by state legislatures to impose rules or specific language on the convention.” Id. Although he presents this as a legal difficulty, it is also a practical difficulty for state legislatures concerned about the potential for judicial interference with an Article V convention, regardless of whether such interference would be constitutionally justified.

Although these practical difficulties do not bear directly on the meaning of Article V, some may argue (I am not sure if Natelson would be one of them) that they are indirectly relevant in that the Founders should be presumed to have established a coherent and workable system. Others might argue that the task of “constitutional construction” requires establishing a workable doctrine for applying Article V to real-world problems so that the practicalities are relevant even if they do not shed light on the interpretation of the constitutional text. For purposes of argument, I will assume the practicalities are legally relevant, though they may be merely matters for the political and practical judgment of the state legislatures.

On balance, though, I believe that the practicalities cut against recognizing a “single amendment” exception to the principal-agent relationship between state legislatures and the Article V convention. Whether or not it is feasible for two-thirds of the state legislatures to reach agreement on the text of a specific amendment in advance of the Article V convention is a highly situation-dependent question that legislators themselves, not courts or constitutional scholars, are in the best position to answer. There would seem to be little reason, either in 1787 or today, to constitutionalize the answer to this question.

Furthermore, while the danger of Congress (or, to a lesser degree, the courts) refusing to aggregate applications is a real one, the problem is actually greater for subject-matter limited applications than for single-amendment applications. In the latter case it is clear that the states must agree on the exact text of the desired amendment; doing so should largely eliminate the aggregation issue. In the case of subject-matter limited applications the rules are murkier. State legislatures may be tempted to rely on non-standardized descriptions of the convention’s subject and this risks a finding (justified or not) that the applications cannot be aggregated.

Finally, there is the question of whether a single-amendment convention is more likely to be held invalid by the courts. For the reasons already discussed, I do not believe that a court should hold such a convention invalid (assuming that it reaches the merits at all), but that is different from predicting what a court will do. Given that no Article V convention has ever been held and there is little if any case law to provide guidance, confident predictions are difficult.

My own view is that the courts will not want to interfere in the Article V convention process if they can possibly avoid it. There are plenty of reasons for finding challenges to an Article V convention non-justiciable (e.g., standing, ripeness, political question). On the other hand, if a court is strongly inclined to reach the merits, it will not be difficult it to find a ground to “seize upon,” as Natelson puts it, to reach the conclusion it desires. This is true whether the convention is limited to a subject or to a particular amendment.

Will it be marginally easier for a court to justify invalidating a convention if it is limited to a single amendment, rather than to a single subject? Perhaps. But it will also be easier for a court (or Congress) to justify invalidating a limited subject convention if its supporters embrace the proposition that a single amendment convention is invalid.

For one thing, this proposition undercuts some of the very rationales Natelson invokes in favor of a subject matter limited convention. He argues that such limitation furthers the equality between Congress and the states that lies at the heart of Article V’s dual track amendment process. Congress, of course, drafts the actual wording of a proposed amendment; it does not merely identify the subject matter. Thus, if the state legislatures are to be treated equally to Congress, they must have the power to draft a specific amendment, just as Congress does. It is difficult to explain why the equality principle requires that the state legislatures be able to limit the convention to a particular subject, but not to a particular amendment.

Similarly, the principle that the Article V convention is entitled to some deliberative independence can be used to attack any limited convention. Natelson stresses that the Article V convention was designed to be a “deliberative body.” *See, e.g.,* Robert G. Natelson, [The State-Application-and-Convention Method of Amending the Constitution: The Founding Era Vision](http://constitution.i2i.org/files/2012/01/STATE-APP-CONVENTION-METHOD-CooleyLR.pdf), 28 Thomas M. Cooley L. Rev. 9, 19 (2011) (“[T]he convention was to be a deliberative body.”); id. (“[T]he applications were to identify areas of concern or amendments designed to accomplish particular purposes, leaving it to the convention to discuss, draft, and propose amendments.”). Of course, as Natelson acknowledges, even conventions limited to an up-or-down vote are deliberative to some extent. Founding-Era Conventions, 65 Fla. L. Rev. at \*\*73-74. How much deliberation or deliberative independence, then, is required in a “convention for proposing amendments”?

Some subject matter limited conventions could be quite narrow. For example, a convention to propose an amendment for the direct popular election of U.S. senators (which many states applied for before the adoption of the 17th Amendment) leaves relatively little to the discretion of the delegates. It might be argued that such a convention lacks sufficient deliberative scope or independence to satisfy constitutional standards.

Would it have the constitutional right to consider alternative solutions (like, say, requiring a popular vote but making it merely advisory)? Or suppose the state legislatures prescribed the exact wording of the desired amendment, but authorized the convention to make non-substantive changes? Or authorized changes but only with a super-majority vote? Or suppose they draft a modular amendment, giving the convention a specific number of limited choices (e.g., whether the Governor be able to fill senatorial vacancies on a temporary basis) to make before voting on proposing the amendment? All of these slippery slope issues invite judicial or congressional review of any limited convention the state legislatures may seek.

Another area of concern relates to instructions. Under pre-constitutional practice, a state legislature could limit the authority of its own delegates, even if the convention as a whole had a broader mandate. Founding-Era Conventions, 65 Fla. L. Rev. at \*17 (“A delegate’s commission or instructions could restrict his authority to a scope narrower than the scope of the call.”). This could sharply limit or even eliminate entirely the deliberative independence of the delegation:

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.

Id. at \*73 (emphasis added).

This approach creates a dichotomy in which the convention as a whole enjoys some measure of constitutionally protected deliberative independence, but each delegation does not. But if Article V is interpreted as protecting the deliberative independence of the convention, there will be a strong tendency among lawyers and judges to apply this principle to instructions as well. Even an originalist might reason that if Article V’s “convention for proposing amendments” implies some degree of deliberative independence, instructions that infringe on this independence are invalid. Non-originalists, of course, would be even more likely to curtail the authority of state legislatures on this basis.

It is thus not difficult to imagine a court using the principle of deliberative independence to conclude either (a) state legislatures lack the power to impose *any* limitations on an Article V convention or (b) the court must strike down those limitations, in applications and/or instructions, which unduly infringe (however that may come to be defined) on the deliberative independence of the convention. This danger seems to me far greater than the possibility that a court will conclude that single amendment conventions alone are invalid.

For all of these reasons, I believe it is a mistake, both legal and practical, to constitutionalize limitations on the principal/agent relationship between state legislatures and the Article V convention. Applying for a convention limited to a single amendment may be a bad idea, but that is a judgment for the state legislatures to make.

I am loath to take this position contrary to Professor Natelson, who is the leading expert on the Article V convention. However, I take some comfort in two facts. First, for the reasons explained above, I think my position is the one better supported by Natelson’s own work- the purer Natelsonian view, as it were. Second, if I am wrong, at least I am in good company. See Michael B. Rappaport, [The Constitutionality of a Limited Convention: An Originalist Analysis](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2035638), 81 Const. Comm. 53, 70-72 (2012).