

A Federalism Amendment

Some Corrections To The Record

By Bill Walker

In the April 23, 2009 edition of the Wall Street Journal, Randy E. Barnett, Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center published an opinion article entitled, "[The Case for a Federalism Amendment](#); How the Tea Parties can make Washington Pay Attention."

In sum, the article presents Mr. Barnett's proposal for a "federalism" amendment, which would, according to its author, "restore balance between federal and state power and better protect individual liberty...." Mr. Barnett proposes in his amendment a rewriting of the Tenth Amendment. He proposes the prohibition of regulation by Congress of "any activity that takes place wholly within a single state..." He advocates the limitation of appropriations by Congress and the repeal of federal income tax. His amendment proposal permits the judicial power of the United States "the power to nullify any prohibition or unreasonable regulation of a right exercise of liberty," but specifies the words of the Constitution "shall be interpreted according to their public meaning at the time of their enactment."

It is not the purpose of this column to debate the merits of this amendment proposal. Instead, its purpose is to point out several significant errors or omissions made by Mr. Barnett in his article. According to public record since March 4, 1789, Congress has received over [10,000 amendment proposals](#). Only 27 of these proposals have become amendments to the Constitution. Thus, the odds favor that it is highly unlikely this proposal will actually become part of our Constitution. The Article V amendment procedure is tough proposition for any proposal. The Framers of our Constitution intentionally made it so to ensure well vetting of any amendment to our founding document before becoming law of the land.

Mr. Barnett writes, "While well-intentioned [tea parties held April 15, 2009] such symbolic resolutions are not likely to have the slightest impact on the federal courts... But the state legislatures have a real power under the Constitution by which to resist the growth of federal power: They can petition Congress for a convention to propose amendments to the Constitution." He then continues, "An amendments convention is feared because its scope cannot be limited in advance. The convention convened Congress to propose amendments to the Articles of Confederation produced instead the entirely different Constitution under which we now live. Yet it is precisely the fear of a runaway convention that states can exploit to bring Congress to heel."

In the next paragraph, Mr. Barnett states, "Here's how. State legislatures can petition Congress for a convention to propose a specific amendment. Congress can then avert a convention by proposing this amendment to the states, before the number of petitions reaches two-thirds. It was the looming threat of state petitions calling for a convention to provide for the direct election of U.S. senators that induced a reluctant Congress to

propose the 17th Amendment, which did just that.” Finally, Mr. Barnett concludes, “What sort of language would restore a healthy balance between federal and state power while protecting the liberties of the people? One simple proposal would be to repeal the 16th Amendment enacted in 1913 that authorized a federal income tax.”

Mr. Barnett either misstates or omits several important facts, which bear directly on his amendment proposal. Anyone judging his proposal should consider them. They are:

1. The scope of an amendment convention cannot be limited. As Mr. Barnett pointed out in his article, convention or Congress may propose amendments. Each has identical power of amendment proposal equally limited by the Constitution. If one “fears” a convention because its agenda “cannot be limited in advance” then one must also “fear” Congress because neither can its agenda be limited in advance. This example of “Whose Afraid of the Big Bad Wolf” simply has no merit. A convention is limited, just as Congress, with a two-thirds vote of its membership, whether the vote is by state delegation or individual delegates, to pass out an amendment proposal. Further, unless the states apply for a convention call, Congress cannot call a convention. Finally, there is the ultimate control of state ratification. Any amendment proposal cannot become part of this Constitution unless consent of 3/4th of the states, whether by state legislature or state convention, is granted.

2. The convention convened by Congress to propose amendments to the Articles of Confederation produced the entirely different Constitution... The language of the convention call of Congress disproves this myth in February 1787. In [Federalist 40](#), Madison discusses this language. “Whereas, there is provision in the articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several States; and whereas experience hath evinced, that there are defects in the present Confederation; as a mean to remedy which, several of the States, and particularly the State of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these States a firm national government:

Resolved -- That in the opinion of Congress it is expedient, that on the second Monday of May next a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.”

A mere reading of this resolution shows Congress requested the convention “render the federal Constitution adequate to the exigencies of government...” Further, as stated in the resolution, the Articles of Confederation permitted “alterations,” not amendments. Moreover, the proposed Constitution, first submitted to Congress, who approved it under the terms of the Articles of Confederation, includes a [prohibition against states belonging](#)

[to a confederation](#). Congress then sent it to the states for their approval. In sum, the states and Congress were well aware of the proposal and its effect on the Articles of Confederation. Obviously, if what the 1787 convention has proposed was not what Congress intended, it would have rejected the proposal outright.

3. Barnett's plan that "state legislatures...petition Congress for a convention to propose a specific amendment" and "Congress...then avert a convention by proposing this amendment to the states, before the number of petitions reaches two thirds" contains several factual flaws. Mr. Barnett obviously failed to check public record before writing his article.

Public record shows [all 50 states have submitted over 750 applications](#) for an Article V Convention. As admitted by the government in a [recent federal lawsuit](#), the basis of a convention call is a simple numeric count of applying states with no other terms or conditions meaning if 34 states apply for a convention, Congress must call. While there may be individuals who "fear" a convention and consider it the Big Bad Wolf of the Constitution, the fact is the states, with their 750 applications, clearly have no fear about a convention or being unable to limit "its scope" in advance. The reason why is obvious: the states realize they have the ultimate Ace in the Hole: ratification. Therefore Mr. Barnett's plan of "avert[ing]" a convention "before the number of petitions reaches two thirds" is totally flawed as the two thirds number was reached decades before Mr. Barnett was born. Further, as the public record shows that several amendment issues have received enough state applications to cause a convention call on their own merit, not to mention the total number of applications from all 50 states, it is obvious Congress will not fall for the constitutional blackmail Mr. Barnett proposes.

Mr. Barnett discusses the "looming threat of state petitions calling for a convention to provide for the direct election of U.S. senators..." Public record dispels this myth. As shown by the applications [at least 31 states had applied for a convention call](#) by 1911. The date is significant as in 1911 there were only 46 states in the Union. Under the terms of Article V, Congress shall call a convention on the application of two-thirds of the state legislatures. Therefore, when there were fewer states in the union, the two-thirds number was different from present day. In 1911, the two-thirds number was 31 states, which is the number of states that applied for a convention. Further, there is nothing in Article V or elsewhere in the Constitution that allows Congress the right to avoid its mandated duty of calling a convention by proposing an amendment of its own. Even if Congress does propose an amendment, it still is required to call a convention. Thus, based on public record and well-settled constitutional law, Mr. Barnett's proposal of constitutional blackmail fails. As Mr. Barnett wrote a June 27, 2008 article entitled "[News Flash: The Constitution means what it says](#)" clearly he is aware of this well settled interpretation of constitutional law that what the Constitution says is what it means.

4. Mr. Barnett discusses the repeal of the 16th Amendment either as a stand-alone amendment or as part of his Federalism Amendment proposal. It is obvious again; Mr. Barnett is unaware of public record. According to the texts of the applications, 39 states have already applied for the repeal of the 16th Amendment; one more than is required to

ratify such an amendment proposal. Therefore, as the states have clearly expressed the desire to repeal the 16th Amendment for many years, it is likely this will occur rather than repeal being incorporated within a Federalism Amendment which, to date, has received no state support in the form of applications for an Article V Convention call.

No doubt, other thoughtful proposals such as Mr. Barnett's will arise in the general media as time goes on and the pressure steadily mounts by those behind the Tea Parties and Tenth Amendment movement to produce actual results. Obviously in the end, in order to achieve permanent solution, this will mean new constitutional amendments made by an Article V Convention. However, before suggesting new ideas, those publicly proposing them might first examine what already is proposed. Frankly, the 750 applications cover such a wide range of proposals all based on the theme to reduce federal government excess it is unlikely any more proposals are required. The issue then, is not to see how many more amendment applications can be submitted (given that Congress will in all likelihood simply ignore them as it has all others), but how political pressure can be brought on Congress to call an Article V Convention and thus address the huge number of applications already submitted.