

THE DANGERS OF AN ARTICLE V CONSTITUTIONAL CONVENTION

Legal scholars, national newspaper editorial boards, and constitutional rights and public interest groups are united in their opposition of a constitutional convention. Recently, special interest groups from the fringes of both sides of the aisle have begun calling for a constitutional convention in an attempt to push through several different constitutional amendments.

Background

Article V of the United States Constitution provides for the authority to amend the document in one of two ways: Congress can propose amendments to the states for ratification, or the states can formally ask Congress to call a new constitutional convention.

Traditionally, all amendments to the Constitution have been proposed by a joint resolution from Congress. That document is then submitted to the states for consideration and a three-fourths (38 state) majority is required before the amendment can be ratified.

None of the 27 amendments to the Constitution have ever been proposed by a constitutional convention. Under Article V of the Constitution, a convention of representatives from all 50 states may be called when two-thirds (34) of U.S. States petition for a convention to enact amendments to the Constitution.

Opposition

Opposition to a constitutional convention contends that this process for amending the Constitution opens a can of worms because there is no precedent – legally or constitutionally – for the process.

Professor Helen Norton and Ira C. Rothgerber, Jr. Chair in Constitutional Law at the University of Colorado, and David Super, professor of law at Georgetown University agree on the dangers of constitutional convention saying "...nothing in the Constitution limits such a convention to the issue or issues for which it was called. In other words, anything and everything could be on the table, including fundamental constitutional rights. Nor are there any guarantees about who would participate or under what rules. Indeed, for these reasons, no constitutional convention has been called since the first in 1787."

USA Today's editorial board agrees that controlling a constitutional convention is one of the major issues. "A convention would be impossible to control. Nothing in the Constitution gives Congress or the Supreme Court the power to tell to conventioners what to do, or not do. A convention might be tasked to draft a balanced budget amendment and then decide that it wants to radically change the nature of the federal government or its relationship with the states. It might take up a passion of the moment by, say, limiting immigration by nationality or religious affiliation. It would have nearly unfettered power to tinker with the DNA of America's 240-year-old democracy."

In an **OpEd piece from 2016**, *The Washington Post* said, “Many of us can point to one constitutional provision or another that we believe we could improve upon if given a chance. But a convention could do great damage to a charter that, on balance, has worked pretty well for a pretty long time. To take such a risk on behalf of a stupendously unworthy cause such as a balanced-budget amendment would be foolhardy in the extreme.”

In February 2018, 230 national, state, and local constitutional rights and public interest groups joined together to release the following letter in opposition of the formation of a constitutional convention.

Constitutional Rights and Public Interest Groups Oppose Calls for an Article V Constitutional Convention

February 1, 2018

Calling a new constitutional convention under Article V of the U.S. Constitution is a threat to every American’s constitutional rights and civil liberties.

Article V convention proponents and wealthy special interest groups are dangerously close to forcing the calling of a constitutional convention to enact a federal balanced budget amendment (BBA). This would be the first constitutional convention since the original convention in 1787 – all constitutional amendments since then have been passed first by Congress and then approved by three-fourths of the state legislatures. There are no rules and guidelines in the U.S. Constitution on how a convention would work, which creates an opportunity for a runaway convention that could rewrite any constitutional right or protection currently available to American citizens.

Under Article V of the U.S. Constitution, a convention can be called when two-thirds of the states (34) petition for a convention to enact amendments to the constitution. States can also rescind their calls by voting to rescind in the state legislature. Just a few states short of reaching the constitutionally-required 34 states to call a convention, Article V and BBA advocates have recently increased their efforts to call a new convention.

An Article V convention is a dangerous threat to the U.S. Constitution, our democracy, and our civil rights and liberties. There is no language in the U.S. Constitution to limit a convention to one issue and there is reason to fear that a convention once called will be able to consider any amendments to the constitution that the delegates want to consider. There are also no guidelines or rules to govern a convention. Due to the lack of provisions in the Constitution and lack of historical precedent, it is unknown how delegates to a convention would be picked, what rules would be in place, what would happen in the case of legal disputes, what issues would be raised, how the American people would be represented, and how to limit the influence of special interests in a convention.

Because there is no way to limit a convention’s focus, any constitutional issue could be brought up for revision by a convention. This includes civil rights and civil liberties, including freedom of speech, freedom of religion, privacy rights, the guarantee of equal protection under law, the right to vote, immigration issues, and the right to counsel and a jury trial, among others. Basic separation of executive legislative, and judicial powers would be subject to revision as well. A

convention might not preserve the role of the courts in protecting our constitutional rights. Even the supremacy of federal law and the Constitution over state laws could be called into doubt.

A 2016 **USA Today** editorial correctly stated that calling for a constitutional convention is “an invitation to constitutional mayhem” and “could further poison our politics and hobble American leaders at moments of crisis.” Notable legal scholars across the political spectrum agree. One of the nation’s most esteemed constitutional law scholars, Professor Laurence Tribe of Harvard Law School, has said a constitutional convention would put “the whole Constitution up for grabs.”

Georgetown University Law professor David Super wrote “a constitutional convention would circumvent one of the proudest democratic advances of the last century in America: one-person, one-vote. Without a precedent, no one really knows how a convention would unfold, but proponents predict that each state would have an equal vote in whatever they got up to.”

Former Supreme Court Chief Justice Warren Burger shared similar concerns, writing, “[T]here is no way to effectively 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 one issue, but there is no way to assure that the convention would obey.”

The late Supreme Court Justice Antonin Scalia also warned of the dangers of a constitutional convention. “I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it,” Scalia said in 2014.

The organizations below recently signed a letter strongly urging state legislatures to oppose efforts to pass a resolution to call for a constitutional convention and are strongly urging state legislatures to rescind any application for an Article V constitutional convention in order to protect all Americans’ constitutional rights and privileges from being put at risk and up for grabs.

National Organizations

African American Health Alliance	American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
African American Ministers In Action	American Federation of State, County and Municipal Employees (AFSCME)
AFSCME Retirees	Main Street Alliance
Alliance for Justice	Mi Familia Vota
American-Arab Anti-Discrimination Committee	NAACP
Americans for Democratic Action (ADA)	National Asian Pacific American Families Against Substance Abuse
Asian and Pacific Islander American Vote	National Association of Social Workers
Bend the Arc Jewish Action	National Council of Asian Pacific Americans
Brennan Center for Justice	National Council of Jewish Women
Campaign Legal Center	National Council of La Raza Action Fund
Center for American Progress	National Disability Institute
Center for Community Change	National Disability Rights Network
Center for Law and Social Policy (CLASP)	National Education Association (NEA)
Center for Media and Democracy	National Employment Law Project (NELP)
Center for Medicare Advocacy	National Fair Housing Alliance
Center for Popular Democracy	National Korean American Service & Education
Center on Budget and Policy Priorities	
Children’s Defense Fund	
Citizens for Responsibility and Ethics in Washington	

(CREW)
 Coalition on Human Needs
 Common Cause
 Communications Workers of America (CWA)
 Community Advocates Public Policy Institute
 Daily Kos
 Democracy 21
 Democracy for America
 Dream Defenders
 Earthjustice
 Eclectablog
 Economic Policy Institute
 EMILY's List
 Every Voice
 Fair Elections Legal Network
 Faith in Public Life
 Family Values at Work
 Food Research & Action Center (FRAC)
 Franciscan Action Network
 Greenpeace USA
 International Association of Fire Fighters
 Jobs With Justice
 Leadership Conference on Civil and Human Rights
 League of Women Voters of the United States
 Consortium (NAKASEC)
 National Partnership for Women & Families
 National WIC Association
 National Women's Law Center
 People Demanding Action
 People For the American Way
 ProgressNow
 Service Employees International Union (SEIU)
 Sierra Club
 Sisters of Charity of Nazareth Congregational Leadership
 Social Security Works
 State Innovation Exchange
 The Arc of the United States
 The Forum for Youth Investment
 The Public Interest
 The Voting Rights Institute
 UNITE HERE
 United Food and Commercial Workers (UFCW)
 Voice for Adoption
 VoteVets Action Fund
 Women's Voices Women Vote Action Fund
 Working America

ADDITIONAL LEGAL SCHOLARS WARN OF THE DANGERS OF AN ARTICLE V CONVENTION

"There is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights." – **Arthur Goldberg, Associate Justice of the US. Supreme Court (1962-1965)**

"First of all, we have developed orderly procedures over the past couple of centuries for resolving [some of the many] ambiguities [in the Constitution], but no comparable procedures for resolving [questions surrounding a convention]. Second, difficult interpretive questions about the Bill of Rights or the scope of the taxing power or the commerce power tend to arise one at a time, while questions surrounding the convention process would more or less need to be resolved all at once. And third, the stakes in this case in this instance are vastly greater, because what you're doing is putting the whole Constitution up for grabs." – **Laurence Tribe, professor of constitutional law at Harvard Law School**

"Note what [Article V] does not say. It says not a word expressly authorizing the states, Congress, or some combination of the two to confine the subject matter of a convention. It says not a word about whether Congress, in calculating whether the requisite 34 states have called for a convention, must (or must not) aggregate calls for a convention on, say, a balanced budget, with differently worded calls arising from related or perhaps even unrelated topics. It says not a word prescribing that the make-up of a convention, as many conservatives imagine,

will be one-state-one-vote (as Alaska and Wyoming might hope) or whether states with larger populations should be given larger delegations (as California and New York would surely argue).” – **Walter Olson, senior fellow at the Cato Institute’s Center for Constitutional Studies**

“Danger lies ahead. Setting aside the long odds, if California and 33 more states invoke Article V, there’s a risk that we’d end up with a “runaway” convention, during which delegates would propose amendments on issues including abortion, gun rights and immigration.” – **Rick Hasen, Chancellor’s Professor of Law and Political Science at the University of California, Irvine**

“Holding a Constitutional convention when the U.S. is embroiled in extremely toxic, uninformed and polarized politics is a really, really bad idea.” – **Shelia Kennedy, professor of law and policy at Indiana University Purdue University Indianapolis**

“But no rule or law limits the scope of a state-called constitutional convention. Without established legal procedures, the entire document would be laid bare for wholesale revision. Article V itself sheds no light on the most basic procedures for such a convention. How many delegates does each state get at the convention? Is it one state, one vote, or do states with larger populations, like California, get a larger share of the votes? The Supreme Court has made at least one thing clear — it will not intervene in the process or the result of a constitutional convention. The game has neither rules nor referees.” – **McKay Cunningham, professor of law at Concordia University**

“The result will be a disaster. I hate to think of the worst-case scenario. At best, the fight over every step along the way would consume our country’s political oxygen for years.” – **David Marcus, professor of law at the University of Arizona**

“At present, there are no rules regarding who can participate, give money, lobby or have a voice in a constitutional convention. There are no rules about conflicts of interest, disclosure of who is giving or expending money. No rules exist that address political action committees, corporate or labor union involvement or how any other groups can or should participate. Not only might legitimate voices of the people be silenced by convention rules, but special interests may be given privilege to speak and affect the deliberations...there are no rules limiting what can be debated at a constitutional convention. Given the potential domination by special interests, who knows the result?” – **David Schultz, political science and election law professor at Hamline University**

“An Article V convention might propose an amendment to restore or expand the liberties of the American people, but it also could propose an amendment that diminishes the liberties of the American people, or of some of the people. ” – **John Malcolm, director of the Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies**

“But nothing in the Constitution limits such a convention to the issue or issues for which it was called. In other words, anything and everything could be on the table, including fundamental constitutional rights. Nor are there any guarantees about who would participate or under what rules. Indeed, for these reasons, no constitutional convention has been called since the first in 1787.” – **Helen Norton, professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law at the University of Colorado, and David Super, professor of law at Georgetown University**

“The lack of clear rules of the road, either in the text of the Constitution itself or in historical or legal precedent, makes the selection of the convention mechanism a choice whose risks

dramatically outweigh any potential benefits.” – **Richard Boldt, professor of law at the University of Maryland**

“We live in deeply partisan times. There are no certainties about how a constitutional convention would play out, but the most likely outcome is that it would deepen our partisan divisions. Because there are no clear constitutional rules defining a convention’s procedures, a convention’s “losers” may deem illegitimate any resulting changes. Regardless of the ultimate outcome, the process itself would likely worsen our already vicious national politics.” – **Eric Berger, associate dean professor of law at the University of Nebraska College of Law**

“There are no such guarantees. This is uncharted territory...We should not now abandon the very document that has held us together as a nation for over two and one quarter centuries. Rewriting the Constitution is a dangerous errand that would not only unravel the legal ties that have kept us together for so long but would also undermine our sense of national identity and the way that view ourselves as a people.” – **William Marshall, professor of law at University of North Carolina**

“Terrible idea...Today’s politicians don’t have the timeless brilliance of our framers. If we were to rewrite our constitution today, we wouldn’t get a particularly good one.” – **Adam Winkler, professor of constitutional law and history at the University of California, Los Angeles**

“I believe it’s a time for constitutional sobriety. It’s a time to keep our powder dry and not to move on an uncharted course. We are not the founding fathers. This would be disastrous.” – **Toni Massaro, constitutional law professor at the University of Arizona**

“Having taught constitutional law for almost 40 years, and having studied constitutions from around the globe, I have difficulty imagining anything worse.” – **Bill Rich, professor of law at Washburn University in Topeka, Kansas**

“There are no constitutional limits on what the convention could do, no matter what the states say going into it.” – **David Schwartz, professor of law at the University of Wisconsin Law School**

“The Constitution allows for the calling of conventions on a petition of enough states, but not limited conventions of enough states. If the delegates decide they don’t want to be bound by the (state) resolution, they are right that they can’t be bound.” – **Richard H. Fallon Jr., constitutional law professor at Harvard University**

“Once you open the door to a constitutional convention, there are no sure guidelines left. This is the constitutional equivalent of opening a can of worms.” – **Miguel Schor, constitutional law professor at Drake University School of Law**

“Thus, neither the states nor Congress may limit the convention to specific subjects. While the goal to propose a balanced budget amendment may provide guidance to the convention, it would not have the force of law...Put simply, the rewards of any constitutional change is not worth the risks of a convention. ” – **Sam Marcossan, professor of law at the University of Louisville**

“Even more frightening is that the entire Constitution will be in play during a convention. The First Amendment could disappear, so could gun rights. There is no guarantee that any of our current

constitutionally protected rights would be included in a new constitution. The only guarantee is that all of those rights would be imperiled.” – **Mark Rush, the Waxberg Professor of Politics and Law at Washington and Lee University in Lexington**

“Most significantly, we advise the Legislature that a federal constitutional convention called with this resolution could potentially open up each and every provision of the United States Constitution to amendment or repeal. In other words, a federal constitutional convention could propose amendments to eliminate the protections of free speech; the protections against racial discrimination; the protections of freedom of religion; or any of the other myriad provisions that presently provide the backbone of American law.” – **March 2018 legislative testimony of Russell Suzuki, Acting Attorney General, and Deirdre Marie-Iha, Deputy Attorney General, of the state of Hawaii**

“Whatever one thinks about these proposed amendments, trying to pass them through an Article V convention is a risky business. The Constitution does not specify how the delegates for such a convention would be chosen, how many delegates each state would have, what rules would apply at the convention or whether there would be any limits on what amendments the convention could consider. A convention that was called to address a specific issue, such as budget deficits, might propose changes to freedom of speech, the right to keep and bear arms, the Electoral College or anything else in the Constitution. There is no rule or precedent saying what the proper scope of the convention’s work would be.” – **Allen Rostron, associate dean for students, the William R. Jacques Constitutional Law Scholar, and a professor at the University of Missouri**

“Whether I like or dislike the specific proposal is not the point — the point is that a constitutional convention is a risky and potentially dangerous way to propose amendments.” – **Hugh Spitzer, professor of law at the University of Washington School of Law**