

AEI FORUMS

**A  
CONSTITUTIONAL  
CONVENTION:  
HOW WELL  
WOULD IT WORK?**

John Charles Daly, *Moderator*

Paul Bator  
Walter Berns  
Gerald Gunther  
Antonin Scalia

The American Enterprise Institute for Public Policy Research, established in 1943, is a publicly supported, nonpartisan, research and educational organization. Its purpose is to assist policy makers, scholars, businessmen, the press, and the public by providing objective analysis of national and international issues. Views expressed in the institute's publications are those of the authors and do not necessarily reflect the views of the staff, advisory panels, officers, or trustees of AEI.

---

#### Council of Academic Advisers

- Paul W. McCracken, *Chairman, Edmund Ezra Day University Professor of Business Administration, University of Michigan*  
Robert H. Bork, *Alexander M. Bickel Professor of Public Law, Yale Law School*  
Kenneth W. Dam, *Harold J. and Marion F. Green Professor of Law, University of Chicago Law School*  
Donald C. Hellmann, *Professor of Political Science and International Studies, University of Washington*  
D. Gale Johnson, *Eliakim Hastings Moore Distinguished Service Professor of Economics and Provost, University of Chicago*  
Robert A. Nisbet, *Resident Scholar, American Enterprise Institute*  
Herbert Stein, *A. Willis Robertson Professor of Economics, University of Virginia*  
Marina v. N. Whitman, *Distinguished Public Service Professor of Economics, University of Pittsburgh*  
James Q. Wilson, *Henry Lee Shattuck Professor of Government, Harvard University*
- 

#### Executive Committee

- |   |                    |
|---|--------------------|
| Herman J. Schmidt, <i>Chairman of the Board</i> | Richard J. Farrell |
| William J. Baroody, Jr., <i>President</i>       | Richard B. Madden  |
| Charles T. Fisher III, <i>Treasurer</i>         | Richard D. Wood    |
- 

- |  |  |
|--|--|
| Gary L. Jones, <i>Vice President, Administration</i> | Edward Styles, <i>Director of Publications</i> |
|--|--|
- 

#### Program Directors

- Russell Chapin, *Legislative Analyses*  
Robert B. Helms, *Health Policy Studies*  
Thomas F. Johnson, *Economic Policy Studies*  
Sidney L. Jones, *Seminar Programs*  
Marvin H. Kosters/James C. Miller III, *Government Regulation Studies*  
Jack Meyer, *Special Projects (acting)*  
W. S. Moore, *Legal Policy Studies*  
Rudolph G. Penner, *Tax Policy Studies*  
Howard R. Penniman/Austin Ranney, *Political and Social Processes*  
Robert J. Pranger, *Foreign and Defense Policy Studies*

#### Periodicals

- AEI Economist*, Herbert Stein, *Editor*  
*AEI Foreign Policy and Defense Review*, Robert J. Pranger and Donald C. Hellmann, *Co-Editors*  
*Public Opinion*, Seymour Martin Lipset, Ben J. Wattenberg, *Co-Editors*; David R. Gergen, *Managing Editor*  
*Regulation*, Antonin Scalia and Murray L. Weidenbaum, *Co-Editors*; Anne Brunsdale, *Managing Editor*
- 
- William J. Baroody, Sr., *Counsellor and Chairman, Development Committee*

**A  
CONSTITUTIONAL  
CONVENTION:  
HOW WELL  
WOULD IT WORK?**

John Charles Daly, *Moderator*

Paul Bator  
Walter Berns  
Gerald Gunther  
Antonin Scalia

Held on May 23, 1979  
and sponsored by  
the American Enterprise Institute for  
Public Policy Research  
Washington, D.C.

This pamphlet contains the edited transcript of  
one of a series of AEI forums.  
These forums offer a medium for  
informal exchanges of ideas on current policy problems  
of national and international import.  
As part of AEI's program of providing opportunities  
for the presentation of competing views,  
they serve to enhance the prospect  
that decisions within our democracy will be based  
on a more informed public opinion.  
AEI forums are also available on  
audio and color-video cassettes.

#### AEI Forum 31

© 1979 by the American Enterprise Institute for Public Policy Research, Washington, D.C. All rights reserved. No part of this publication may be used or reproduced in any manner whatsoever without permission in writing from the American Enterprise Institute except in the case of brief quotations embodied in news articles, critical articles, or reviews.

The views expressed in the publications of the American Enterprise Institute are those of the authors and do not necessarily reflect the views of the staff, advisory panels, officers, or trustees of AEI.

“American Enterprise Institute” is the registered service mark of the American Enterprise Institute for Public Policy Research.

ISBN 0-8447-2164-6  
Library of Congress Catalog Card No. 79-90218  
*Printed in United States of America*

**J**OHN CHARLES DALY, former ABC News chief and moderator of the forum: This public policy forum, part of a series presented by the American Enterprise Institute, is concerned with the prospect of a constitutional convention to propose amendment of the U.S. Constitution. It would be the first convention since the original in Philadelphia in 1787, which scrapped the Articles of Confederation and substituted our present Constitution. Our subject is “A Constitutional Convention: How Well Would It Work?”

Thirty states have now taken the extraordinary step of asking the Congress to call a constitutional convention. Article V of the Constitution states that if two-thirds of the states so petition, Congress “shall call a Convention for proposing Amendments.” That quotation from Article V provides the legal background for the expanding and complex conflict on how a constitutional convention would work. Does the language of Article V mandate a general convention to propose such amendments as the convention wishes, or does it permit a convention to be strictly limited to the specific issue, or issues, proposed in the petitions from two-thirds of the states?

Although petitions for a constitutional convention to consider other specific issues have come before the Congress, the focus now is on thirty petitions for a constitutional

amendment requiring a balanced federal budget except in times of national emergency. The chairman of the Senate Budget Committee, Maine's Edmund Muskie, said that the thirty petitioners have lost their grip on the enormity of what they are doing, and have taken the wrong way out of a troublesome dilemma. He called it an uncharted course to an unknown destination. But this forum is not concerned with the economic questions in the balanced federal budget amendment. Our primary interest is in the uncharted course, the fundamental constitutional questions, and the potential for political confrontations set in motion by the state petitions.

Professor Gunther, you have described the road to a constitutional convention as foggy and treacherous, beset with many questions, many uncertainties, and no authoritative answers. Will you broadly outline the dangers you anticipate?

GERALD GUNTHER, professor of law, Stanford University: The dangers stem largely from the fact that it is an uncharted course. We have had twenty-six amendments to the Constitution, all produced by proposals from Congress. The alternative route in Article V is one that has never been taken. This route is obviously legitimate, but it is an unknown.

The main danger I see is that the process now under way is not a deliberate one. Instead, it is a slowly mushrooming, broadening one, ultimately producing a kind of convention unanticipated by most of the state legislatures that are initiating the process. The thirty states that had asked for a convention assumed they would get one on an up-and-down vote on a specific proposal to balance the federal budget. If Congress does not propose an amendment of its own, it will probably call a convention to deal with a somewhat broader subject, such as fiscal responsibility. That issue

itself could bring in such issues as funding for abortions, health, or nuclear power. Moreover, the convention would have a plausible case for taking an even broader view of its agenda. Convention delegates could claim that they represent the people who elected them, and that they are entitled to deal with any constitutional issue of major concern to their constituency.

The states, quite unthinkingly and without consideration of the implications, have started a process that may eventually produce a shock to them and to the country. It is a process of undeliberate constitution making that would make James Madison turn over in his grave.

**MR. DALY:** Professor Bator, you have written that you are not in favor of having a convention and not in favor of a balanced budget amendment. You also, however, vigorously defend the right of the states and the Congress to limit a convention to issues raised in the petition for a convention. Will you broadly outline your position?

**PAUL BATOR,** professor of law, Harvard University: I disagree strongly with the argument that the current movement for a constitutional convention is wholly illegal and illegitimate because it is directed at a specific constitutional grievance, rather than being a call for an unlimited general constitutional revision. I think it is wholly legitimate for the states and the Congress, acting together, to try to create a convention addressing a specific constitutional grievance. The uncertainties of it cannot be eliminated, but I think that having such a convention was a major purpose of Article V. Whether such a convention, after the fact, can be effectively forced to limit itself is a harder question, but on balance the better view is that effective limits can be created by the states and by the Congress.

MR. DALY: Professor Berns, the constitutional convention is generally called the alternative method of amending. The more traditional method involves a proposal by two-thirds of both the Senate and the House that must be ratified by at least three-fourths of the state legislatures or by conventions in three-fourths of the states. Is there any sense that the traditional method was considered the vehicle for amendment of a specific issue, while the convention method was meant for unlimited deliberation?

WALTER BERNS, resident scholar, AEI: That argument has been made by distinguished professors of law, but I must say that I disagree with those distinguished professors of law. They have caused me to go through the records of the federal convention of 1787, and I do not see that those records sustain the argument they make.

The language of the amendment provision was worked out on almost the last day of the convention, on September 15, 1787, and this alternative mode of amending the Constitution was the response to an objection by George Mason, of Virginia, who said that under a prior version no amendments of the proper kind would ever be obtained by the people if the government should become oppressive. He was objecting to the proposal that allowed only the Congress of the United States to propose amendments, either on its own initiative or on the initiative of the states. Mason objected to this, saying, quite reasonably, that the people would not obtain amendments of the proper kind should the government become oppressive. He understood the possibility that the national government could become inadequate, and that there had to be an alternative mode to address the inadequacies. The 1787 convention was called to some extent because of the legitimate concern of people like Madison and Hamilton with the fiscal irresponsibility of the states, and the Constitution of the United States that



came out of that convention dealt effectively with that problem. Mason foresaw the possibility of fiscal or other kinds of irresponsibility on the part of the national government and that some way had to be found in the Constitution to deal with that. It seems clear to me that this alternative mode of amendment was put in the Constitution to deal with specific problems.

MR. DALY: All right. Professor Scalia, Richard Rovere in the *New Yorker*, suggested that the convention method of amendment might reinstate segregation and even slavery, throw out much or all of the Bill of Rights, eliminate the Fourteenth Amendment's due process clause, reverse any Supreme Court decision the members didn't like, and perhaps for good measure, eliminate the Supreme Court, itself. [Laughter.]

Now, what would you anticipate from an unlimited convention?

ANTONIN SCALIA, professor of law, University of Chicago: I suppose it might even pass a bill of attainder to hang Richard Rovere. [Laughter.]

All those things are possible, I suppose, just as it is possible that the Congress tomorrow might pass a law abolishing social security as of the next day, or eliminating Christmas. Such things are possible, remotely possible. I have no fear that such extreme proposals would come out of a constitutional convention. Surely, whether that risk is sufficient to cause anyone to be opposed to a constitutional convention depends on how high we think the risk is and how necessary we think the convention is. If we thought the Congress were not necessary for any other purpose, the risk that it might abolish social security would probably be enough to tell its members to go home.

So, it really comes down to whether we think a constitu-

tional convention is necessary. I think it is necessary for some purposes, and I am willing to accept what seems to me a minimal risk of intemperate action. The founders inserted this alternative method of obtaining constitutional amendments because they knew the Congress would be unwilling to give attention to many issues the people are concerned with, particularly those involving restrictions on the federal government's own power. The founders foresaw that and they provided the convention as a remedy. If the only way to get that convention is to take this minimal risk, then it is a reasonable one.

**PROFESSOR GUNTHER:** Unfortunately, Nino Scalia is not sitting in the state legislature. I wish he were there talking about the risks. In twenty-seven or twenty-eight state legislatures of this country in 1977, 1978, and 1979, nobody has talked about the risks. The issue has simply been an up-and-down vote on the principle of a balanced budget. One of the disturbing things about this irresponsible process is that state legislatures have gotten very close to launching this convention—which, I agree, is appropriate in proper circumstances—without even thinking about the risks. Instead, they have been told not to worry about it. My concern is that the nation not go into this convention with such vast inattention, ignorance, and misimpression of fact and law.

**PROFESSOR SCALIA:** I agree that would be nice, but I don't understand what your solution is. There is none short of obtaining action from the Congress, and its inaction is the whole reason for the call for the convention. Your position is essentially a throwing up of the hands and—

**PROFESSOR GUNTHER:** No, no. I think I have a solution. First, people like you and me should tell the state legislators what they are buying when they buy one of these resolu-

tions. In recent months, Montana, New Hampshire, and California faced this question with some explanation of what was involved. New Hampshire has said yes, but Montana and California said no.

Another thing that can be done—and I agree with you about irresponsible action in Congress—is to press Congress to pay some attention to what is going on. Congress has been almost as irresponsible as the state legislatures in not holding hearings on constitutional convention procedures—on the Ervin-Helms proposal, for example. In pussyfooting around, and in finding excuses, it is acting like the worst kind of technical lawyer.

Congress can make it clear what the states are buying, and that may lead to some reconsideration in states. Then, if the states want to vote for a convention, they will at least know what they are doing.

**PROFESSOR BATOR:** These risks do exist, but there is no need to stand on the sidelines silently and wait to see whether the risks will develop. There are things that can be done. There are political and legal dynamics that can be mobilized to minimize the risks. It seems to me that the call of the states for this convention is actuated by concern about a single grouping of issues. Congress, acting responsibly, could provide that the constitutional convention should address those issues and no others.

It is not certain whether that restriction is legally effective. But members of this convention will not be sitting on Mars; they, too, are subject to political dynamics. They, too, are subject to the forces and the processes of having to worry about their legitimacy.

On the strict legal question, the better view is that there is nothing in Article V to prevent the Congress from limiting the constitutional convention to the subject that made the states call it. There would be enormous pressure on the

convention to stick to that subject. I think it is unlikely that they will wander all over the reservation.

**PROFESSOR GUNTHER:** On the legal issue, Congress has a right to specify a subject, but that specification is no more than a moral exhortation to the convention. It creates a presumption of what the issue is. The convention then is free, however, to overcome that presumption. It can take up other subjects its constituents are interested in as well.

I think we differ on the political and legal dynamics of this. The fact is, under the Helms Bill, the delegates will run for election in various congressional districts; they will respond to concerns about nuclear power, abortion, busing, school prayers, the Equal Rights Amendment, or whatever. There will be considerable pressure on the delegates to throw in a few amendments about abortion, busing, and school prayer as well. The risk is there.

**MR. DALY:** A background note: in 1967, the United States faced the possibility of a convention to consider the Dirksen Amendment, which would have exempted one house of the state legislatures from the Supreme Court's one man-one vote ruling. That failed, but only by two petitions. Later that same year, Senator Sam Ervin introduced a bill spelling out in some detail the actual procedures that any constitutional convention would have to follow. It was passed in the Senate, but never taken up by the House, and in 1979, Senator Jesse Helms has introduced a very similar bill.

**PROFESSOR BERNS:** I join all of my colleagues here in hoping that the Congress of the United States becomes responsible on this issue and passes legislation that it is entitled to pass, governing certain aspects of this mode of amending the

Constitution. For example, I would like to see the Congress pass a statute specifying the form of an application. It might be as follows: The state of Illinois hereby applies to the Congress of the United States to call a convention for proposing amendments to the Constitution. To the extent possible the states should adopt the actual constitutional language in their applications. This would resolve the difficulty over what a valid application is. It might also give the states some second thoughts if they suspected that the convention might address itself to questions other than the one exercising that particular state at that particular time. Something could be gained if the Congress were to adopt legislation requiring these applications to be addressed to particular officers of the House and the Senate—for example, the Speaker of the House and the president of the Senate—who would certify to the states the receipt of those applications. This would facilitate the numbering and processing of applications, and it would prevent these applications from getting lost in the vast maze of Congress. How many applications for a constitutional convention do we have now? Who can give the authoritative answer to that question? It is important to be able to answer that question authoritatively.

I too am apprehensive about constitutional conventions of a sort we have never had. If the truth has to come out, I am not in favor of this particular kind of constitutional convention, largely because of my apprehensions.

On the other hand, the Congress of the United States is not a model I would choose for the proper way of amending the Constitution or proposing amendments to the Constitution. There are two so-called constitutional amendments floating around the states for their ratification. I consider one of them, the D.C. Amendment, to be unconstitutional. The second, on the ERA, simply lapsed sometime this year, and the extension was unconstitutionally done. If that is the way the Congress does things, let us try the states.

PROFESSOR GUNTHER: I am ready to fight on the D.C. Amendment and on the ERA, but let me fight with you on something else, first. [Laughter.]

The fight is on the congressional procedures. I agree with you that Congress has power and should address itself to the strictly procedural issues in the Ervin-Helms bill. And the applications should be handled to avoid the spectacle of two senators of the United States acknowledging only fourteen proposals, because the others were not addressed to the right people. But I think there is a serious problem with the Helms legislative proposal. The proposal now before Congress, which I wish Congress would pay some attention to, includes much more than those procedural things. It provides, for example, that a state has to specify a subject, which is outrageous. It would be nice to have a state specify a subject, but if a state wants to have a general convention, surely it ought to be allowed to propose that. Secondly, the proposal provides that Congress shall guess the general subject the states have in mind, and then require the convention delegates to take an oath not to discuss any other proposal. This is an outrageous expansion of congressional powers. Congress would then claim to be able to turn down any proposal it considered beyond the call. I think that is highly questionable.

The underpinnings of the proposal are rather strange, coming from conservative constitutional interpreters. They assume that the broad discretionary powers of Congress associated with the commerce power and the Fourteenth Amendment power somehow apply to Article V. The least bit of historical understanding makes it clear that Article V was specifically designed to minimize the role of Congress, and not to give it a lot of discretion. Congress has the power to make only the minimum, truly necessary provisions for electing delegates, setting up the convention, and then deciding on the mode of ratification, and nothing beyond that.

**PROFESSOR BATOR:** I would like to express a concern about Professor Gunther's interpretation of Article V. The central purpose of the convention provision of Article V was to give the states recourse in the event that intransigent central authority refuses to consider a grave constitutional infirmity or shortcoming. If by hypothesis, thirty-four or thirty-five states now feel that the Congress has intransigently refused to address what they think is a grave constitutional infirmity, that is, fiscal irresponsibility, Professor Gunther says there is nothing the states and the people can do about it, absolutely nothing, unless they risk establishing an institution that is wholly free to reinstitute slavery. This interpretation of our Constitution strikes me as being very strange. It is bizarre. If the nation wants to have a constitutional convention limited to one topic, what is there to prevent that? I agree that Article V is ambiguous, but of all the possible interpretations, why should the nation adopt the most uncomfortable one—the one that creates most unintended mischief? The central purpose of the framers was to give the states recourse. Professor Gunther says it will be very hard to have recourse without creating a time bomb, a kind of a doomsday machine that is utterly without control.

**PROFESSOR GUNTHER:** I appreciate the constitutional purpose in 1787 of giving the states recourse. I am not denying the states recourse. If the balanced budget is the only constitutional issue the country is concerned about, the states can have a convention to discuss only that issue. They are not likely to worry, nor should they worry, about the risk Mr. Rovere mentions about a provision reinstating slavery for the simple reason that there is no support in thirty-eight states for ratifying an amendment to reinstitute slavery.

On the other hand, the states should know that this is serious business. The business of the convention would include any issue that the delegates believe the states may

ratify, any issue of widespread interest in the country today. That does not include abolition of the Constitution or reinstatement of slavery; but it is a broader agenda than the balanced budget.

**PROFESSOR SCALIA:** I agree with Paul Bator on how Article V ought to be interpreted. There is no reason not to interpret it to allow a limited call, if that is what the states desire. But it is difficult to say absolutely that the convention will behave that way. For this reason, I am willing to acknowledge an iota of truth to Richard Rovere's absurdities.

I would like to put the whole thing in perspective, though, and tell why I am willing to risk those absurdities. I do not think there is any way—and I think Paul Bator would agree—to avoid the risk entirely. I agree that what he says is the law, but somebody else may think otherwise, and even if it is the law, the convention may ignore it. But what is the alternative? The alternative is continuing with a system that provides no means of obtaining a constitutional amendment, except through the kindness of the Congress, which has demonstrated that it will not propose amendments—no matter how generally desired—of certain types.

Congress could have resolved many of these questions pertaining to a convention long ago. It could have provided an amendment by the normal amending process saying that "limited" calls for conventions are proper. That would have eliminated all doubt. But the Congress is not about to do that. It likes the existing confusion, because that deters resort to the convention process. It does not want amending power to be anywhere but in its own hands.

Not long ago, Proposition 13 came out of California, and there was a great cheer about the country. That cheer, it seems to me, expressed not so much support for the particular issue involved as exhilaration on learning that, in California at least, when the people want something badly



enough, they can really get it, despite the opposition of the state legislature. We are facing the same problem at the federal level. The Congress knows that the people want more fiscal responsibility, but it is unwilling to oblige it. A means comparable to Proposition 13 is needed at the federal level. The Constitution has provided it. If the only way to clarify the law, if the only way to remove us from utter bondage to the Congress, is to take what I think to be a minimal risk on this limited convention, then let's take it.

**MR. DALY:** Let me come to this "minimal risk" question again. Professor Lawrence H. Tribe of Harvard Law School warns that inherent in an Article V convention is the danger of three distinct confrontations of nightmarish dimension. One is the confrontation between Congress and the convention over procedural questions, with Congress withholding appropriations pending adoption of internal reforms by the convention, or refusing to treat convention amendments as within the convention's scope. The second is a confrontation between Congress and the Supreme Court. And the third is between the Supreme Court and the states, since the Supreme Court would be called on to referee the conflicts between the Congress, the convention, and the states. In Professor Tribe's mind, this is an area of substantial danger and confusion for government.

**PROFESSOR GUNTHER:** There is that risk. I am not sure I would put it quite as melodramatically as Larry Tribe does. But the Helms Bill says, in at least three places, that all these doubts about the validity of the application and the scope of the convention's discussions, shall be decided finally by Congress and shall not be reexamined by any court.

Congress is aware of that potential confrontation and is trying to head it off by saying there shall be no judicial review. Although there is some precedent for declaring

certain aspects of the amendment process beyond the courts' authority, it is not at all clear that the courts cannot get into any part of it. But I suspect the courts will be perfectly happy to stay out of it. There is a potential confrontation there, however, and Congress may be aggravating it by telling the courts to keep out. In response, the courts may well say that the restriction on court jurisdiction is improper. These confrontations are examples of the unknown, unanswered problems along this route. And we certainly do not need any more divisiveness in this country now.

Those fears about confrontations may swamp the legitimacy of the process. In that respect, I am clearly on Paul Bator's side in trying to preserve the viability of this process. As more years go by and we still have not tried it, somebody can always say we should not try the unknown. The unknown ought to be understood and made usable. That is why I blame both the state legislatures, for being so irresponsibly inattentive to the problems, and the Congress, for being so irresponsibly reluctant to confront them.

**PROFESSOR BATOR:** If the political forces want confrontation they will have it whether there is a convention or not. There are other matters that can lead to confrontation even if no convention takes place. The key to avoiding confrontation is in trying to solve the uncertainties in what I call a constitutional spirit; that is, in trying, generously, to understand what the Constitution is seeking to accomplish in this situation.

Let me give an illustration. The first specific major problem the Congress will have is that when that thirty-fourth or thirty-fifth resolution comes in, the judiciary committees of the House and the Senate will have to determine whether a valid call for a constitutional convention has been made. That process can be approached in two ways.

One is to deal with these petitions more or less in the way people administered literacy tests to blacks in the South in the 1920s; that is, to worry about the *Ts* and the *Is*, treating the petitions ungenerously, in a technical way, and trying to knock them down, one by one, so that no proper call for a convention can be made. And maybe that will avoid a confrontation. But it seems to me that it would be a politically disastrous event if that were the spirit in which these petitions were treated.

The creative and responsible way to deal with the uncertainties is for Congress, at that point, to see whether the states express a roughly contemporaneous statement of a constitutional deficiency. And, if the petitions affirm this, the Congress should agree to set up reasonable procedures to allow a convention to gather and address that deficiency. I do not think that confrontation depends on wholly extraneous factors. It depends on whether we want it or we want to avoid it.

**PROFESSOR GUNTHER:** I agree with you, Professor Bator, on what Congress should do when the applications come in, but you can come up with more creative responsible responses than that. I do not think Congress ought to wait for the thirty-fourth state to come in, and then start battling about uncharitable or charitable approaches to the various applications on file. Congress ought to be doing something now to advise the states as to what it is they have committed themselves to. Congress probably can do that most easily by holding hearings right now on the Helms Bill, and by discussing the issue of what a constitutional convention is all about. It is clear that what the states cannot have—but which is the one thing most states think they *can* have—is a convention that will simply vote on the very specific balanced budget proposal of the National Taxpayers Union. That is not constitutionally permissible. It is time for Congress to

clarify this matter, before the thirty-fourth state comes along, so state legislators will know what their votes are all about.

**PROFESSOR SCALIA:** I just want to make sure I understand Professor Gunther's view on this matter. I understand your process objection: that the states, in your view, have made these calls without understanding what they entail. Now, suppose they do understand what is entailed—the risk of having a runaway convention. Do you say they should do it, or not?

**PROFESSOR GUNTHER:** I have no constitutional or process objection for a call with full knowledge of the risks. I suspect that our views differ as to whether the risks are worthwhile. But I have no constitutional objection if the states understand and accept my view of what a convention may do, and nevertheless want to go ahead.

**PROFESSOR SCALIA:** I suspect that you might not feel so strongly about your process objection if you felt more strongly about whether they should go ahead or not. To some extent, the debate boils down to how pleased or displeased one is about what is likely to come out of a convention; how necessary or unnecessary one thinks the product of the convention happens to be.

**PROFESSOR GUNTHER:** But I think that is very much a function of the process. It is more likely to be a deliberate convention and a responsible exercise of constitution making if the ground rules are better known than they are now. The votes in state legislatures can then be cast and delegate elections can then be held by knowledgeable participants.

**PROFESSOR SCALIA:** No doubt.

PROFESSOR BERNS: I wanted to buttress what you just said, Professor Gunther, that this is a very solemn thing, and every step of the procedure ought to emphasize that. To some extent, Congress can anticipate this and propose legislation that is likely to lead to conventions that are solemn.

As to Professor Tribe's confrontation between the Supreme Court and the states, the Supreme Court has handed down decisions in a variety of cases in recent years that have placed it in opposition to the states. The nation has survived that very well, indeed. I do not see that as a real problem, and I doubt very much whether Professor Tribe thinks it is a problem, frankly.

As to the Congress and the Supreme Court, my principal point is that I find it strange that one of the most important aspects of the Constitution—namely, the mode of amending it—should not be subject to rules of constitutional law. That statement, admittedly, needs qualification. But it stems largely from a Supreme Court decision of some forty years ago in which the Court came very close to saying that the issues that arise in this business are political, not judicial.

Four members of the Court, led by the famous Justice Felix Frankfurter, went so far as to say that all of these issues should be regarded as political. I find that unacceptable, because I think that this requires constitutional law, as determined in the way in which we traditionally do these things in the United States.

I would favor legislation—I would favor a convention to get some of these things clarified, to get cases before the courts, to have the solemn word of the Supreme Court of the United States with respect to these important issues. They are justiciable issues.

Since *Coleman v. Miller*, that decision of forty years ago, there have been developments, of course. We have had cases in which the speaker of the House of Representatives has been the defendant in a suit. We have had the United States

against Nixon, in which the President of the United States has been shown to be amenable to judicial process, contrary to a post-Civil War decision, *Mississippi v. Johnson*. So there have, indeed, been developments in this area. And it seems to me that it is entirely possible that the Court will reverse itself on this stand that the issues are political. I think it would be salutary to have some constitutional law issuing from the Supreme Court of the United States on these matters.

PROFESSOR GUNTHER: I don't mind the court getting into this, but I do want to object to the impression that there is no constitutional law unless the Court talks. There are several other authoritative voices, although not nearly as final as the Supreme Court.

PROFESSOR SCALIA: Just put me down for objecting to the Court's entering into it. It seems to me that this is not one of the areas where the Court can have much to contribute.

I have talked about the need for a convention because somehow the federal legislature has gotten out of our control, and there is nothing we can do about it. One can say the same thing about the federal judiciary. And that is one reason I am willing to take the chance in having a convention despite some doubts that now exist. I am not sure how much longer we have. I am not sure how long a people can accommodate to directives from a legislature that it feels is no longer responsive, and to directives from a life-tenured judiciary that was never meant to be responsive, without ultimately losing its will to control its own destiny.

For example, the very important issue of affirmative action has been declared to be of constitutional dimensions and is about to be decided by the Supreme Court. It utterly amazes me that we are all sitting breathlessly, waiting for the Supreme Court to decide our fundamental beliefs with re-

spect to this particular issue, without having a hope of getting anything done about it if the Supreme Court should find that our fundamental beliefs are, in fact, different from what we think they are. [Laughter.]

We have no recourse. There is not a chance that the Congress will overturn any decision that the Supreme Court hands down in the Weber case. And unless this alternative method of amending the Constitution is adopted, we will continue to live under what I consider an innately non-democratic system. It is foolish to sit, wringing one's hands, wondering what the Supreme Court is going to tell us the Constitution requires on an issue such as this. And that is what we are condemned to do unless we can screw up our courage and say, "Let's throw the dice." [Laughter.]

**PROFESSOR BERNS:** How desperate is our condition, that is really the question. [Applause.]

**PROFESSOR GUNTHER:** I'll agree to a convention only if you can guarantee I'll be a delegate. I've always wanted to be James Madison. [Laughter.] And I'm ineligible to be president, as is Paul Bator.

**PROFESSOR BERNS:** That opens up several questions. Who will be the delegates? Who will pay them? In 1787 they were reimbursed by their particular states. The constitutional convention itself passed a resolution calling on the Continental Congress to pay the officers of the convention: Mr. Jackson, who was the secretary, and I presume also those sentries who prevented the people from interrupting the procedures of the convention. But who will pay this time? And will television be there in 1984, the year I choose at random?

MR. DALY: That is, perhaps, where we can get the financing for it. [Laughter.]

PROFESSOR SCALIA: I'm sure the Congress would be happy to pass an equivalent to the Federal Election Campaign Law. You can have contributions from PACs (Political Action Committees) and campaign limitations. It'll be beautiful. [Laughter.]

PROFESSOR BERNS: Yes, but seriously, consider the situation that prevailed in 1787 when these people kept out the press to promote an atmosphere of a solemn convention, a very deliberative convention. They had the cobblestones around the hall covered with inches of dirt to muffle the sounds of the horses' hoofs and wagon wheels on the streets in order to promote calm and sensible deliberation. Everything was done to allow these particular people, an extraordinary body of men, to deliberate and to decide on a proposed Constitution. It had no validity, of course, until it was ratified by people.

But can we possibly reproduce this without Madison and the others? It is sobering to realize Jefferson was talking about the Revolutionary War when he said "from the end of this war we shall be going downhill."

PROFESSOR SCALIA: Walter, I have two responses. One is, we will not have Madison and Hamilton—the caliber of people will not match them. But, on the other hand, they will be people who can examine 200 years' worth of experience under the existing Constitution. You trade a little bit of smarts for a little bit of experience. I think it's likely to come out almost as well. [Laughter.]

The second point I want to make relates to the risk question. It is not as though we have had a sacrosanct, untouched Constitution. The Constitution has been



changed, whether we have liked it or not, during the last 200 years, and not merely by the ratification process. Many of the decisions of the Supreme Court have made fundamental alterations without giving us any opportunity to say whether we liked them. So it is not a matter of whether we leave the Constitution untouched, but whether we prevent somebody else from touching it in a way that we don't want.

**PROFESSOR BATOR:** The point that the Supreme Court has made controversial decisions reminds me of the issue of whether there should be judicial review—that is, whether the Supreme Court should step in and resolve these ambiguities and uncertainties about the meaning of Article V. I think we would be better off if the Supreme Court stayed out of this and kept to its decision that these are all political and not judicial issues, because this is one of the few areas the Supreme Court has said it will actually stay away from.

**PROFESSOR BERNS:** Treasure that precedent. [Laughter.]

**PROFESSOR BATOR:** The Supreme Court, and its decisions, may become protagonists in this drama. That is, one feature of intransigent central authority may be an interpretation of the Constitution given by the Supreme Court. That happens not to be so in the case of the balanced budget amendment. But it is troublesome to think of the Court's being the final arbiter of the powers of a convention that is called in response to a feeling that the Court has given us a Constitution we do not like.

On the whole, by far the happier, and not impossible, prospect is that with a certain constitutional spirit of trying to work one's way through these ambiguities, no litigation will be necessary.

**M**R. DALY: We have put down a very broad base for what should be an interesting question-and-answer session. May I have the first question, please?

ROBERT GOLDWIN, American Enterprise Institute: My question is for Professor Scalia, primarily, but also for anyone else who would like to answer.

We have been talking about how well a constitutional convention would work, and you spoke about procedures. Professor Scalia, you seem to be in favor of having a convention, but mostly, I gathered, because you would have fun seeing the discomfiture of the Congress. But in terms of results, what good might such a convention produce?

PROFESSOR SCALIA: I have not proposed an open convention. Nobody in his right mind would propose it in preference to a convention limited to those provisions he wants changed. Regardless of the issue—say, a constitutional amendment on abortion—its supporters would want a convention that considers that issue and nothing else; or one that considers only the particular features of the Constitution that they do not like, but precludes consideration of those features they do like. I think there is nobody, except maybe one or two anarchists, who would sincerely want an open convention for its own sake, to expose the whole system to possible change.

There comes a point, however, at which one has to be willing to run the risk of an open convention to get the changes that are wanted. Essentially what I have said is that there is some risk of an open convention, even with respect

to the limited proposal of financial responsibility at the federal level. I think that risk is worth taking. It is not much of a risk. Three-quarters of the states would have to ratify whatever came out of the convention; therefore, I don't worry about it too much.

I would also be willing to run that risk for issues primarily involving the structure of the federal government and a few other so-called single issues. I would favor a convention on abortion, which some consider a single issue. I suppose slavery could have been called a single issue, too. It all depends on how deeply one feels about the issue.

In any case, I do not have any great fear of an open convention, since three-quarters of the states do have to ratify what comes out of it. The clucking that Richard Rovere and others do about it is simply an intentional attempt to create panic and to make the whole idea sound unthinkable. It is not unthinkable at all; it is entirely thinkable.

**MARK GOLDBERG, White House Office of Consumer Affairs:** My question is directed at the panel. Is there a possibility that a constitutional convention might prove to be unfettered, not only in its scope but also in its duration, and thereby become a kind of standing body for the consideration of proposals for constitutional change?

**PROFESSOR GUNTHER:** That is not likely to happen, but I think it is entirely up to the convention by the very principle I suggested earlier. One more reason we ought to have hearings on the Helms Bill, which is a carbon copy of the Ervin Bill, is that one of its provisions would limit the convention to no longer than one year. That is not within congressional powers. The convention should meet and make most of its own decisions beyond the initial congressional decisions about how to elect and pay delegates and so on. I do not think, in reality, there is likely to be a problem,

because I suspect many of the delegates will be single-issue people who do not want to spend sixteen years at a continuing constitutional convention replacing the Supreme Court. But I think it is legally possible for a convention to meet indefinitely and entirely out of line for Congress to try and stop it.

**PROFESSOR BATOR:** Nothing in Article V suggests to me that a reasonable time limit by Congress would be invalid, and I should think it would be critical. I believe Congress should provide that the convention do its work within a reasonable time frame. Why is that not valid?

**PROFESSOR GUNTHER:** My premises are those Paul Bator so eloquently articulated earlier: the convention is a device that enables the states to have a check on a tyrannical central government. The idea that Congress would set a time limit seems to be contrary to the wish that I think is demonstrated quite clearly in the convention debates—that of having an independent entity rather than one that operates according to congressional ground rules.

**PROFESSOR BATOR:** I wasn't contemplating two or four weeks, but I would suppose the Congress might say that the lifetime of the convention should not exceed two or three years. I think that would be valid.

**PROFESSOR GUNTHER:** In a general statute such as the Helms Bill?

**PROFESSOR BATOR:** No, I wasn't talking about the Helms Bill. It seems to me Congress must pass a statute constituting the convention when the call comes in.

**PROFESSOR GUNTHER:** But my premise is that Congress has

the power to do what is necessary to establish a convention, and I think that premise follows from your assumptions about the purpose of the convention option. It is not necessary for establishing a convention to decide how long it can meet. It is particularly outrageous for Congress to establish a limit of one year when, in fact, a convention can cover anything from a balanced budget, abortion, and nuclear power to a complete broad-scale revision that will take a lot more time.

**PROFESSOR SCALIA:** Presumably Congress could fund it for only two years. You certainly would have no problem with that.

**PROFESSOR BERNS:** You are assuming that these delegates are to be federal officials of some sort who are to be paid by the federal government, whereas of course in 1787, they were not.

**PROFESSOR SCALIA:** With understandable reasons in 1787.

**PROFESSOR BERNS:** You mean the federal government at that time had no money?

**PROFESSOR SCALIA:** Yes.

**PROFESSOR BATOR:** This is a minor issue. But what is troublesome is the notion that Article V contemplates an institution that is basically a wild elephant, free to do anything it wants, and I don't think that is a sensible reading of the constitution.

**PROFESSOR GUNTHER:** Professor Bator, do you not agree that Article V contemplates a process that would be a device to bypass Congress? You started out by saying precisely

that—namely, that a convention would be an alternative to Congress. It would be a separate proposing body designed to vent popular grievances against the national establishment. Therefore, to read in Article V *McCulloch v. Maryland's* discretionary powers of Congress, or even a limited version of them, seems, in principle, to be highly questionable. I agree that this time limit issue is a minor one. But your position on it rests on a view of Article V congressional powers that is wrong in principle.

**PROFESSOR BERNs:** The fundamental issue here is whom do the delegates in such a convention represent when they are convened? Most likely they will answer and be answerable to the people they represent. If they are federal officials, to be paid by the Congress, for example, and therefore to be regulated in certain respects by the Congress, it would follow that the Congress could set a reasonable period of time for the convention to meet. If they represent the states, it would presumably be improper for the Congress to do this, but it might be proper for the states to set the time limit. If they represent the people of the United States in their sovereign capacity, however, that convention could sit as representatives of the people forever, and any attempt to limit it would be improper in principle.

I don't know the answer to the question, incidentally.

**PROFESSOR SCALIA:** I share Paul Bator's view that without some limits the convention would be an unmanageable device that no one would ever resort to using. Why should we adopt that view? It is not likely that Congress would abuse its authority to set limits. Would the Congress be better off to say two years or two weeks? I don't know. They might get a worse product if they let them sit for only two weeks.

**PROFESSOR GUNTHER:** But the justification for the congres-

sional claim to set the time limit, which I agree in its specifics is not terribly important, is the same as for the congressional claim to impose oath requirements, to impose specific limitations, or to cut off Supreme Court review; it is a claim of the very kind of aggrandizing Congress you worry about so much. Congress would be operating as if it were chartering a national bank, enacting New Deal legislation, or doing a lot of things that go somewhat beyond the original intent of Article V.

**PROFESSOR BATOR:** One reason for the success of our Constitution is that it has never created structures that were 100 percent logical.

**PROFESSOR GUNTHER:** That's a pretty difficult argument to answer. [Laughter.]

**PROFESSOR BATOR:** But it is important. No single line of argument or principle is allowed scope without the limitations of other principles. Of course, this way of amending the Constitution is a recourse against central authority—the Supreme Court and Congress, or the two together.

Nevertheless, it seems to me that the only possible interpretation of Article V is that there are several protagonists in the drama, all of whom have some role to play. The first group is the initiating states. I think that the substantive limitations on the convention must come through cooperation between the initiating states and the Congress. The second institution that must play a role—and one can only hope that it will play it in the constitutional spirit—is the Congress. And the third is the convention, itself. The possibility that this convention would have no restrictions has been overstated by people who are frightened of what it might do.

SHEILA HARTY, Center for the Study of Responsive Law: A question to the panel: How does a national initiative and referendum process, which has already been proposed as a constitutional amendment, compare with a constitutional convention as a means for people to express themselves and act to circumvent congressional legislative inadequacy?

PROFESSOR BERNS: There is scarcely anything more contrary to the spirit of the U.S. Constitution than such a proposal. So fixed and emphatic am I on this subject that members of this audience will think I planted you out there specifically to ask that question. [Laughter.] I first began to worry about this when former Senator Abourezk proposed a constitutional amendment to allow a national referendum.

To answer this question properly, one has to understand what representation in the American Constitution means. In the ninth *Federalist* paper, Alexander Hamilton raises the question why it was that, in the past, free government had seemed to be impossible, and why it was then possible, especially in North America. The answer was that there had been certain discoveries made by the science of politics. One was with regard to representation. There had been representative bodies in the past, and Hamilton knew about them probably better than anybody in this room. One is therefore bound to raise the question, What was unique about American representation that allowed him to consider it one of the new discoveries that made free government possible in the United States?

The answer to this is found in the sixty-third *Federalist* paper in which James Madison makes it clear that what is distinct about representation in the new sense is precisely that it is a device to keep the people out of government. American representation was an answer to direct democracy. It was a way of keeping people out of government.

The idea is that while the people are represented in



these various bodies in a certain sense, the representatives, when they are serving, are somehow to be detached from the people in any immediate sense. Our institutions were designed to detach people to the extent possible, to detach members of the Senate and, in the extreme case, the Supreme Court, as well as the president and even, if possible, the House of Representatives. A national referendum system would therefore be absolutely contrary to the spirit of American institutions.

**PROFESSOR GUNTHER:** I am glad you have answered a constitutional question without resort to the Supreme Court. The Supreme Court had a case over sixty years ago in which the argument was made that the introduction of the initiative and referendum in Oregon violated the republican form of government guarantee. The Court said—as it did about part of the amendment process—that the issue was not justiciable. You see, we can have constitutional law discussions without the Supreme Court telling us what it all means.

**PROFESSOR BATOR:** There are states which are quite fond of referendums. I don't have any very strong theoretical view, but about every five or six years the Massachusetts legislature votes itself a pay raise, and as regularly as the sun comes up, we, by referendum, revoke it. [Laughter.]

**PROFESSOR GUNTHER:** We do even more important things than that in California.

**PROFESSOR SCALIA:** I don't think keeping the people out of government is entirely the answer. Part of the current problem is that many citizens think that for various reasons the people are being kept out more than was originally intended. One reason is the professionalization of the Con-

gress and another is the vastly expanded role of the Supreme Court. Indeed, the only reason we are debating any proposal for a constitutional amendment is to make the Congress do what it is unwilling to do.

GROVER NORQUIST, National Taxpayers Union: I was wondering how the panel at large feels about the danger of a runaway convention, since anything a convention passed would have to be ratified by thirty-eight states, and only thirty-four states are necessary to call another convention. If enough people did want to interject something else into a convention dealing with of a balanced budget, they could simply go through the process of calling for their own convention and not have to mix two or three different issues.

PROFESSOR GUNTHER: A familiar argument from proponents of the budget amendment is that because there is a ratification process, crazy proposals will never be adopted. I agree that crazy proposals will not be adopted, but neither will the convention be limited to the balanced budget issue, as everyone on this panel and everyone I know in constitutional law agrees. My concern is not the crazy, far-out issue but the kind of issue for which there may well be support. There are constitutional issues in this country other than the National Taxpayers Union's balanced budget proposal, and it is not at all impossible that three-fourths of the states would support them.

You may say there is no problem so long as people are willing to support the proposal. The problem is, however, that the process is not a good one when it does not appear until very late in the process that a balanced budget amendment may have substituted for it the Milton Friedman spending proposal, or may have added to it a spending amendment on abortion, nuclear power, and health insurance, or a school prayer amendment. If everybody wants to

get into that kind of operation, fine, but they ought to know what they are doing in advance, and I am afraid the advocates of the convention process are not really helping to assure that.

**PROFESSOR SCALIA:** Instead of displaying utter confusion and an inability to do anything about the calls from the states, Congress could simply decide that they constitute a call for a constitutional convention on the broad issue of fiscal responsibility and control at the federal level. Some states that have requested a convention obviously wanted the focus to be much narrower—to the point of having a very specific proposal and letting the convention vote it up or down. Since the Congress would not know each state's intent, it could leave the call open for six months. And during that six months, any of the thirty-four states that have made a call could revoke it if they found the issue too broad for their liking. But in the absence of such revocation, Congress would go ahead.

Would that satisfy you?

**PROFESSOR GUNTHER:** That would be a very significant step in a healthy direction.

**MR. DALY:** It would also settle the question of rescission, wouldn't it, by establishing precedent for rescission?

**PROFESSOR SCALIA:** I am not sure. It would establish a precedent for the Congress's permitting clarification of uncertain calls. In effect Congress would be saying, "We have taken your call to mean *X*; you can tell us, if you wish, that it means *Y*." I would not think that would establish any precedent for rescission.

MR. DALY: I am the nonlawyer here; I won't fight. [Laughter.]

PROFESSOR BATOR: I would like to clarify a point. Professor Gunther, Professor Scalia, Professor Berns, and I agree that the convention cannot be limited to having simply a yes-no vote on a single amendment that comes from the states.

PROFESSOR GUNTHER: And that is the nature of the National Taxpayers Union proposal, as passed in many states, as of 1979.

PROFESSOR BATOR: Our views diverge in that I believe, and apparently Professor Gunther does not, that the convention can effectively be limited to a specific issue or set of issues.

PROFESSOR GUNTHER: But we agree that we cannot be sure.

PROFESSOR BERNS: Do we agree that the source of those limitations could not be the Congress?

PROFESSOR BATOR: The initiating states and the Congress, acting together, have to take joint responsibility for defining the scope and the agenda of the convention.

PROFESSOR GUNTHER: That is too general for me. Given the text of the Constitution, I think everybody has to agree that the states have a role, Congress has a role, and the convention has a role. In that sense, of course, they collaborate.

The questions of priorities and primary roles are what really tend to divide us. Nobody denies Congress or the states a role, but the question is, How much of a role?

I think the congressional role ought to be fairly limited because the purpose of a convention is to bypass Congress.

The convention would have the central role as the constitutionally designated proposing body.

**PROFESSOR SCALIA:** Let's give it a try and find out.

**PROFESSOR GUNTHER:** I'm game, and I assume Congress will hold some hearings; we can all testify. We will certainly demolish the advertisements by the National Taxpayers Union and statements made by my own governor earlier this year, that it is an easy issue and that there is no problem about having a convention on a specific narrow issue. Congressional hearings would be the healthiest way to clear the air, and then we can go forward from there.

**ADMIRAL WILLIAM C. MOTT,** president, Capitol Legal Foundation, a public interest law firm: Mr. Daly, you raised the word rescission.

The General Services Administrator has to certify to the Congress ratification by the states of proposed constitutional amendments. Suit has just been filed by one of my sister litigating foundations, the Mountain States Foundation, on behalf of the legislatures of Idaho and Arizona; and the attorneys general of those two states are representing not only the legislatures, but their individual members, to challenge the right of the General Services Administrator to certify ratification where there has been a rescission—by the states.

There is no question in my mind but that this suit is going to go to the Supreme Court of the United States, and my question is whether the panel thinks that the Court will duck this issue, or whether the question is justiciable.

**PROFESSOR BATOR:** Does this concern the ERA?

**ADMIRAL MOTT:** ERA is involved, but the District of Columbia Amendment ERA could also be involved. This is a chal-

lenge to the power of Congress to say that a state can reject an amendment and then later change its mind and be counted affirmatively, but that once it has accepted an amendment and then rescinds its acceptance, that its rescission cannot be counted against the amendment. We think that is improper and unconstitutional, and it is going to be challenged all the way to the Supreme Court.

**PROFESSOR GUNTHER:** I think the Court will decide *Coleman v. Miller* applies and will duck it; it won't decide the merits of that issue. However, my betting record on Supreme Court decisions is notoriously poor.

**PROFESSOR BERNS:** Since no constitutional law has come from the Supreme Court on this issue, it is necessary to speculate whether there are any principles in the political theory governing this country that shed some light on this question. My own view is that a state may not properly rescind a ratification. I would even say that a state may not properly rescind an application for Congress to call a convention. The ERA issue is a little more complicated because Congress has broken all the rules with respect to the extension of time, and a suit should properly be brought. I am delighted that the suit has been brought, and I hope that the Court decides it, but I suspect that it will deny standing on *Coleman v. Miller* grounds.

**PROFESSOR SCALIA:** I share Walter Berns's view on the substance of the ERA matter. I could accept, in isolation, either the Congress's power to extend the time or a rule that prohibits revocation. But the combination of the two—that one can extend the time and also prohibit revocation during the extended time—is really crazy. I don't share Professor Berns's glee that the suit has been filed, however. It seems to me a matter of jumping out of the frying pan into the

fire—getting away from the arbitrariness of the Congress by inviting the Supreme Court to govern more. I think the Supreme Court will turn it down, and I will be delighted if it does. I also have a bad record on predictions, though.

**PROFESSOR BERNS:** I spoke earlier about the solemnity that ought to govern this whole process, and this applies here, too. A state's ratification of a proposed constitutional amendment is a solemn step, indeed, and there is a difference between a decision to ratify and a decision not to ratify. A decision not to ratify may, in certain respects, be understood as a decision to postpone, with a promise of reconsideration. That makes sense because it amounts to maintaining the status quo, and nothing is done. But a decision to ratify has consequences.

In a really extreme case—the ERA has not reached that point yet—a constitutionally sufficient number of states might have ratified an amendment, and one state might then rescind its ratification. I think we could all agree that would raise real problems and such a rescission would be improper. The states should understand that ratification is final and ought not be done lightly.

**DON BANDLER,** Carnegie Endowment for International Peace: My question is first for Professor Scalia and then for the rest of the panel. You expressed some doubt about whether the American polity in its normal institutions would be able to handle and contain the political passions of the American people. And, yet, at a time when the power of the single-issue lobbies is increasing, we recently celebrated the twenty-fifth anniversary of *Brown v. Board of Education*. We got through the Vietnam War with some stretching of institutions but no fundamental or constitutional changes in them. What is so special about the issues that you think would be appropriate for constitutional conventions—the

budget issue, abortion—that requires this extraordinary remedy?

**PROFESSOR SCALIA:** I listed first among the things that I would like to have considered the structural issues at the federal level. I do not have a lack of trust in the American people. I am the one here who is least terrified of a convention.

We have come a long way. We have gotten over many problems. But the fact remains that a widespread and deep feeling of powerlessness in the country is apparent with respect to many issues, not just the budget issue. The people do not feel that their wishes are observed. They are heard but they are not heeded, particularly at the federal level. The Congress has come up with a lot of palatives—the legislative veto, for example—which do not solve the problem at all. Part of the problem as I have noted is simply that the Congress has become professionalized; its members have a greater interest than ever before in remaining in office; and it is served by a bureaucracy and is much more subject to the power of individualized pressure groups than to the unorganized feelings of the majority of the citizens.

This and other factors have created a real feeling of disenfranchisement that I think has a proper basis. The one remedy specifically provided for in the Constitution is the amendment process that bypasses the Congress. I would like to see that amendment process used just once. I do not much care what it is used for the first time, but using it once will exert an enormous influence on both the Congress and the Supreme Court. It will establish the parameters of what can be done and how, and after that the Congress and the Court will behave much better.

**PROFESSOR GUNTHER:** Part of the reason for my concern is that if we try it once we will blast the way for a lot of other



single issues to come along. Of course some thoughtful, concerned people may say that fifteen conventions on fifteen issues are not a horror. On the other hand, I know groups that are waiting in the wings, hoping that a convention is called for the balanced budget issue in its narrowest form so that they can present their narrow proposals. What is wrong is that the solemnity and seriousness of the process would be trivialized. If the convention is limited to the kinds of issues Nino Scalia would want to present, it may be all right; but there is, together with the benefit of giving reality to this alternative route, the risk of a process that is not serious, not solemn, but trivializing.

PROFESSOR BATOR: It has been fun to careen along on Professor Scalia's bandwagon for a long time, but I just—

PROFESSOR SCALIA: You're getting off. I sense it. [Laughter.] That's too bad.

PROFESSOR BATOR: I'm not getting off, I just fell off. [Laughter.] I do think that we ought to have a constitutional convention only if there are proposals that we think are wise. Having a constitutional convention merely to prove the point that we can do it and because we feel powerless, without any considered framing of issues, addressing of specific proposals, or concern whether this is a good amendment, strikes me as slightly crazy. I am against a constitutional convention because I have not been persuaded that the balanced budget proposal or the various alternatives so far proposed would be a wise thing for us to adopt. The issues are substantive. I really believe with Nino Scalia that Article V is a terribly important structural feature that protects our liberties. But it should be used for some purpose that strikes us as a wise constitutional purpose.

**PROFESSOR SCALIA:** May I rehabilitate myself? Maybe reach down a hand to pull Paul back up on the bandwagon?

When I say I do not much care what it is about, I mean that among various respectable issues for a constitutional convention, I am relatively neutral as to which goes first. The process should be used for some significant issue that concerns the American people, but which issue is chosen is relatively unimportant. I would not want a convention for some silly purpose, of course. But I think there are many serious purposes around, many matters that profoundly concern the American people and about which they do not now have a voice. I really want to see the process used responsibly on a serious issue so that the shibboleth—the Richard Rovere alarm about the end of the world—can be put to rest and we can learn how to use the process responsibly in the future.

**AUSTIN RANNEY,** American Enterprise Institute: I am amazed that in this discussion we have heard all sorts of comments about uncharted voyages into uncharted seas, as though we had no experience and were just guessing. The fact is we have had more than 200 constitutional conventions in this country since its origin. To be sure, all but one have taken place at the state level, and you may say that experience does not really matter and is not analogous. Perhaps, however, there is some experience there, and I would like to know what you think it tells us about what may happen nationally.

Everything that has been said about horrible things that might happen of the Rovere variety, or marvelous things that might happen of the Scalia variety, depends a good deal on the kind of people who get elected to the convention. One thing we do know is that elections of delegates to state constitutional conventions have very low voter turnouts: 15, 16, 18 percent. Barely half the electorate turns out even for

a presidential election, and now about a third for congressional elections; it is extremely unlikely that more than 20 or 25 percent of the voters would turn out for a national election of delegates.

My own view about whether the convention is a good thing has to do with whether there would be a large proportion of professors of law as delegates. If so, I would probably be strongly against it. God knows what damage they could do. [Laughter.] If there were a lot of professors of political science, I would probably be all for it; it would be a fine thing, and long overdue. [Laughter.] But I would like to know from both Gerry Gunther and Nino Scalia what kind of people they think would be elected with a low voter turnout, and whether they think those people would do the good things they would like to see or the bad things they fear.

**PROFESSOR GUNTHER:** Let me offer myself as a candidate, Professor Ranney. I used to teach political science and did some graduate work in it before I went to law school. Does that make me acceptable? [Laughter.]

**PROFESSOR RANNEY:** We'll make you an alternate. [Laughter.]

**PROFESSOR GUNTHER:** Professor Ranney is more expert at making predictions about elections than I could possibly be. But I am skeptical about the assumption of Professor Scalia and others that this is a marvelous opportunity for those who are opposed to the Supreme Court, the broad authority of Congress, and excessive national programs, to get their views implanted in the Constitution.

Since this would surely be a one-shot election, not a continuing process, it is likely that there will be a competition among issue-oriented groups. Contrary to Nino Scalia's

hopes, it is as likely that delegates would be elected who want to ban nuclear power, to establish new minority rights and new responsibilities for the federal government, and to mandate health insurance—people Professor Scalia would not like at all. It seems entirely foolhardy in this risk-prone business to guess who is likely to be elected in a set of elections of delegates to a constitutional convention six months, or a year, or two years from now.

**PROFESSOR BERNS:** It does depend to some extent on the method of election. If the delegates from a particular state are to be elected at large, then one can probably anticipate a certain outcome; but if we follow the provision of the various bills, say, the Helms Bill, the outcome is likely to be different. In the case of single-member constituencies I suppose various single-issue groups would propose candidates, and some single-issue groups would win in one constituency and others would win elsewhere. That of course is not the sort of constitutional convention that one would like to contemplate. If the convention is to be deliberative, these various delegates might not be bound by their instructions from the states, but they would be bound by instructions from their particular groups. That is the reason to be apprehensive.

**PROFESSOR SCALIA:** One could make the same arguments about the next congressional election. What kind of people would be elected to the Congress? The kind of person who is elected undoubtedly will depend, to some extent, on what it is thought the convention will deal with, and that is one reason I share Professor Gunther's concern that it be made clear initially what the convention issues are. If the convention is going to deal with only a single amendment—say, fiscal responsibility—one might expect some economists, as well as political scientists and lawyers, to be elected. On the

other hand, if it is going to be a much broader convention, covering other issues, the people would probably elect quite different representatives. I do not think they would elect delegates who cannot do an adequate job simply because, on one particular issue, the delegates happen to agree with them.

**MR. DALY:** This concludes another Public Policy Forum presented by the American Enterprise Institute for Public Policy Research. On behalf of AEI, our hearty thanks to the distinguished and expert panelists: Professor Walter Berns, Professor Gerald Gunther, Professor Paul M. Bator, and Professor Antonin Scalia, and also our thanks to our guests and experts in the audience for their participation.

## **AEI ASSOCIATES PROGRAM**

The American Enterprise Institute invites your participation in the competition of ideas through its AEI Associates Program. This program has two objectives:

The first is to broaden the distribution of AEI studies, conferences, forums, and reviews, and thereby to extend public familiarity with the issues. AEI Associates receive regular information on AEI research and programs, and they can order publications and cassettes at a savings.

The second objective is to increase the research activity of the American Enterprise Institute and the dissemination of its published materials to policy makers, the academic community, journalists, and others who help shape public attitudes. Your contribution, which in most cases is partly tax deductible, will help ensure that decision makers have the benefit of scholarly research on the practical options to be considered before programs are formulated. The issues studied by AEI include:

- Defense Policy
- Economic Policy
- Energy Policy
- Foreign Policy
- Government Regulation
- Health Policy
- Legal Policy
- Political and Social Processes
- Social Security and Retirement Policy
- Tax Policy

For more information, write to:

**American Enterprise Institute  
1150 Seventeenth Street, N.W.  
Washington, D.C. 20036**

**A Constitutional Convention: How Well Would It Work?** an edited transcript of an AEI Public Policy Forum, brings together four distinguished scholars to discuss the prospects for the first federal constitutional convention in this country since the Constitution was drafted in 1787. Article V of the Constitution provides for amendments to be proposed either by Congress or by a convention, but thus far this convention procedure has never been used. Such a convention is now a possibility—a wave of petitions from state legislatures have called for one to consider a balanced budget amendment. This prospect raises numerous questions: How valid are the petitions from the state legislatures? Could a convention be limited to the consideration of a balanced budget amendment, or would it be broader or even unlimited in scope? What is the power of the states in making that decision? Can Congress establish the procedures for the convention? What role should the courts play? John Charles Daly, former ABC News chief, serves as the moderator of the panel, which consists of:

- Paul Bator, professor of law at Harvard University
- Walter Berns, resident scholar at the American Enterprise Institute, and formerly professor of political science at the University of Toronto
- Gerald Gunther, professor of law at Stanford University
- Antonin Scalia, professor of law at the University of Chicago.

\$ 3.75



**American Enterprise Institute for Public Policy Research**  
1150 Seventeenth Street, N.W., Washington, D.C. 20036