GEORGETOWN LAW

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Why a Runaway Article V Convention is Likely

An Article V convention, whatever its nominal purpose, would pose a grave threat to important civil liberties. This is because no rules limit the agenda of any Article V convention, leaving it free to revisit and rewrite any part of our Constitution (with the possible exception of states' equal representation in the U.S. Senate). An unconstrained convention is not just possible but likely for five basic reasons: (1) no rules constrain the issues a convention may consider; (2) even if such rules existed, no entity would have the power to enforce them; (3) leading proponents of an Article V convention themselves are working toward an unconstrained convention; (4) the moneyed special interest groups that dominate our politics with increased ruthlessness would not pass up a chance to lock their priorities into the U.S. Constitution for generations to come; and (5) the ratification process could readily be manipulated or circumvented.

1. No rules limit the scope of a convention.

- **Article V** says nothing at all about the scope of an Article V convention. It states that a convention would be "for proposing Amendments", but it says nothing to limit the scope of those amendments. Repealing any or all of the Bill of Rights would be an "amendment". Relatively small changes could transform our basic form of government. Article V reads in its entirety:

  > *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*

- **Congress** has no power under Article V to limit the scope of a convention.
- **State legislatures** similarly have no authority under Article V to limit a convention's scope.
- **Custom and tradition** are inapplicable because we have never had an Article V convention before. The fact that delegates behaved appropriately in meetings with other purposes or in simulations run by pro-convention groups tells us nothing about how delegates would act if the enormous power of reshaping the United States Constitution was in their hands. The only applicable precedent is the Philadelphia Convention of 1787, which was called as an amendments convention to improve the Articles of Confederation but chose to draft an entirely new constitution. State constitutional conventions are inherently limited because the Supremacy Clause prevents them from eliminating basic rights under the U.S. Constitution. An Article V convention would have no such protection.
- **Case law** does not address the scope of an Article V convention. Because no convention has ever been called, no court has had any occasion to consider any cases relating to such a convention.

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- **The intent of the Framers** is neither clear nor binding absent any support in the text of the Constitution. Convention proponents take individual Framers' statements out of context. For example, some quite remarkably try to turn Alexander Hamilton's Federalist No. 85 – he was arguing that future discrete amendments were preferable to the harm that could come from a convention – into an endorsement of their position. Read in context, the Framers' statements express concern about the dangers of a convention. They certainly are not remotely clear enough to constrain a willful Article V convention.

2. Even if rules limited a convention's scope, Article V empowers no one to restrain a convention.

- **The President** has no role whatsoever in Article V.
- **Congress** is given no power over a convention once it is convened under Article V. The allowance for a convention under Article V was specifically designed to bypass Congress and prevent it from interfering in the formulation of amendments.
- **The Courts** could not regulate the workings of an Article V convention. In *Coleman v. Miller*, 307 U.S. 433, 450 (1939), the U.S. Supreme Court held "that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures … be regarded as a political question pertaining to the political departments". In rejecting arguments for courts to intervene in the process of amending the Constitution, the Court declared that "We find no basis in either Constitution or statute for such judicial action." The Court went on, at page 453, to ask "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." After saying that any intervention "would be an extravagant extension of judicial authority", the Court flatly declared, at page 454 "The questions they involve are essentially political and not justiciable." Earlier cases addressing other aspects of the process of amending the Constitution reached the same conclusion. For example, *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (holding that the Secretary of State's determination about a constitutional amendment's validity "is conclusive upon the courts").
- **State legislatures** have no power under Article V over a convention once it is convened. Although proponents like to talk about "a convention of the states", that term appears nowhere in the U.S. Constitution. Nothing in Article V even empowers states to select delegates to a convention unless Congress chooses to let them, and nothing gives states any supervisory authority over the delegates. This is in sharp contrast to presidential electors, whom Article II, Section 1 empowers states to "appoint". The Supreme Court has upheld states' authority to discipline electors whom they appoint when those electors fail to vote for the candidate they were appointed to choose. The Constitution gives states no such authority over convention delegates. Even if states did have that authority, determining which packages of proposed amendments are or are not consistent with the state's wishes is vastly more difficult than determining whether an elector voted for a particular presidential candidate. And even if Congress allows states to select the delegates, states could not effectively recall those delegates because, by the time a delegate votes for the output of the convention, the convention is likely to have adjourned, with the damage done.

3. Leading advocates of an Article V convention increasingly reject any limits on its agenda.

- **House Budget Committee Chairman Jodey Arrington** (R-Texas) has introduced House Concurrent Resolution 24, which would call an Article V convention. This resolution does not purport to place any limits on the scope of what a convention might consider. Its call reads in its entirety:

  > *As provided in Article V of the Constitution of the United States, and except as provided in paragraph (2), Congress hereby calls a Convention for proposing amendments to the Constitution of the United States for a date and place to be determined on calling the Convention.*

  Paragraph (2) vitiates the call only if the House Clerk disputes the resolution's assertion that, under its novel and highly dubious aggregation methodology, a sufficient number of states *at some point in history* have applied for an Article V convention.

- **Paul Gardner**, a long-time convention advocate, wrote in an influential 2020 article that "One of the major takeaways from the above report is that years 2018 and 2019 experienced a 'plateauing' of effort by the various AV groups in securing the required 34 COS [Article V convention] applications. Unless there is a significant change in strategy, this article argues that not much will improve during year 2020 and beyond. In fact, efforts to rescind COS applications might very well increase in different states due to the growing presence of leftist, socialist politicians in state legislatures. This is a risk factor that must be taken into account when considering future COS strategy and timing." He concludes that a plenary convention, without any subject-matter limits, is the only path forward for convention advocates. Paul Gardiner, *A New Strategy for the Article V Convention of States Movement*, HUNT FOR LIBERTY, Feb. 13, 2020, https://web.archive.org/web/20200225214249/https:/huntforliberty.com/a-convention-strategy/

- **Pro-convention advocates sued to force an unrestricted Article V convention.** This action, *McCall v. Pelosi*, Civ. Action No. SA-22-CV-00093-XR (W.D. Texas 2022), was dismissed without prejudice on procedural grounds, but makes clear that many of those seeking an Article V convention reject any subject-matter limitations.

4. **Moneyed special interests would work to lock their agendas into the Constitution.**

- **Chief Justice Warren E. Burger** predicted that a convention would be "a free-for-all for special interest groups", explaining "A new Convention could plunge our Nation into constitutional confusion and confrontation at every turn…" He further noted that "there is no effective way to 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 to one issue, but there is no way to ensure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don't like its agenda." Letter to Phyllis Schlafly (June 22, 1988).

- **Justice Arthur J. Goldberg** declared that "no single issue or combination of issues is so important as to warrant jeopardizing our entire constitutional system of governance at this point in our history". *Steer clear of constitutional convention*, MIAMI HERALD, Sept. 14, 1986.

- **Justice Antonin Scalia** put it much more directly: "I certainly would not want a Constitutional Convention. I mean whoa. Who knows what would come out of that?" (April 17, 2014). https://www.youtube.com/watch?v=z0utJAu_iG4&t=3962s

5. **The ratification process does not provide reliable protection against harmful amendments.**

- **A convention could bundle** several different changes into a single amendment, betting that its attractive features would persuade enough states to overlook the problematic parts to ratify the attractive ones. Several existing ones, including the Fifth, Sixth, Eighth and Fourteenth Amendments, combine provisions on several different subjects.

- **Once proposed, amendments would linger indefinitely**, waiting for a wave election or a crisis that panics the electorate to be ratified. The Twenty-Seventh Amendment was ratified more than two centuries after being proposed to the states.

- **A convention could disregard Article V's ratification process** just as the 1787 Philadelphia Convention disregarded binding the ratification rules in Article XIII of the Articles of Confederation (which required the unanimous approval of the states). Already, House Budget Committee Chair Jodey Arrington proposes that any amendments an Article V convention proposes "shall be ratified by a vote of We the People in three-quarters (38) of the States" as well as state ratifying conventions. Although Article V allows Congress to call for state ratifying conventions, it does not authorize ratification by referendum. Moneyed special interest groups might like ratification by referendum as they could dominate the airwaves and persuade voters that the package of amendments they designed was in the national interest.