

The American Conservative

Rebooting the Republic

Tea Partiers and Rootstrickers call for a constitutional convention.

By W. James Antle III | November 2, 2011

[1]“Excuse me,” said the man leaning out the window of his SUV. “Is this the way to Harvard Law School?” With a bald spot surrounded by a crown of gray hair, he looked more alumnus than student. “I hope so,” I replied. The cab driver had dropped me off at the business school campus, and I was now trudging down the street toward Harvard Square.

“Get in,” the man and his co-pilot, also middle-aged and somewhat lawyerly in appearance, beckoned. I climbed in the backseat. As it turned out, we were headed to the same conference. “We’re Rootstrickers!” one of my new friends exclaimed. Together we navigated vague maps of the university’s various schools and found our way to Austin Hall, a building that seemed to be a mystery to everyone in Cambridge, including Harvard employees.

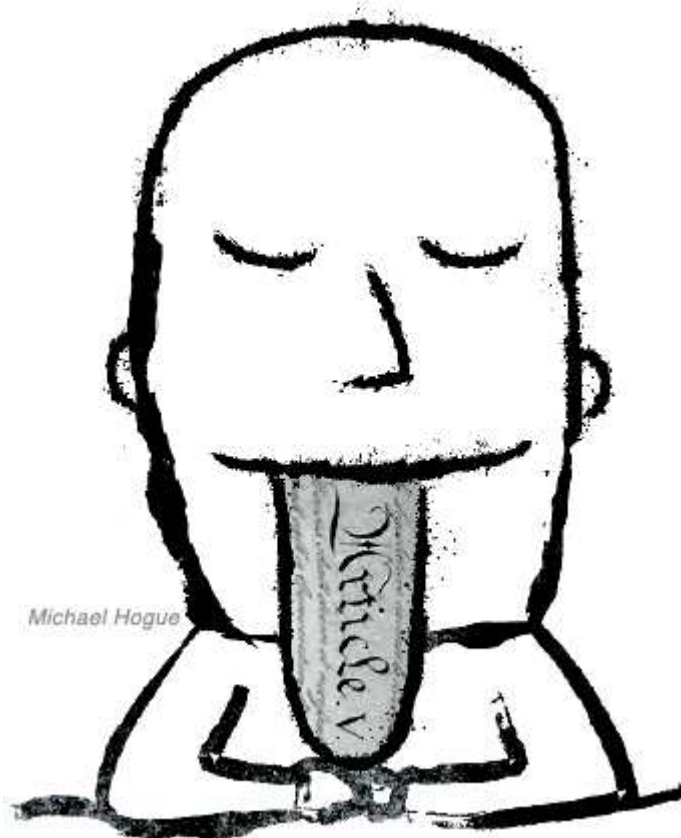
This bit of left-right cooperation was in keeping with the theme of the weekend. Rootstrickers, a left-wing group dedicated to the proposition that corporate money has a malign influence on American politics, and the conservative Tea Party Patriots had banded together to organize a Conference on the Constitutional Convention.

The progressive left and the populist right would spend two days together studying Article V of the U.S. Constitution.

Article V provides two ways two amend the Constitution. The first is familiar: “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution...” That’s essentially the origin of all 27 ratified amendments, including the Bill of Rights. But alternatively if “the legislatures of two thirds of the several States” request it, Congress must “call a Convention for proposing Amendments.”

This unprecedented method of amending the Constitution appeals to those who believe we are living in a crisis as great as the one that faced the Founding Fathers in Philadelphia. On that much, our co-hosts agreed. “From the Tea Party Right to the Progressive Left, there is agreement that something fundamental has gone wrong,” wrote Harvard law professor and Rootstrickers co-founder Lawrence Lessig.

Mark Meckler, co-founder of Tea Party Patriots, concurred. “With each passing year,” he wrote, “politicians seem more and more out of touch with the people they allegedly represent, regardless of their party affiliation.” Lessig suggested a solution: “a process to amend the Constitution through the one path the Framers gave us that has not yet been taken—a Convention.”



Esoteric as this may seem, it's not a purely academic concern. Conservatives and libertarians have occasionally dusted off this oft-ignored provision of Article V as a possible way of reasserting constitutional limits on the federal government. Congress may not be eager to advance amendments that curb its own power, but an Article V convention called by the state legislatures should have no such compunctions.

In fact, that was precisely the argument Alexander Hamilton made in *Federalist* 85 to calm Anti-Federalist fears that the central government would grow too powerful. "We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority," he wrote. Randy Barnett, a constitutional law professor at Georgetown, wants to test Hamilton's prediction. In an article for *Forbes*, Barnett proposed a 10-point "Bill of Federalism" to be enacted through an Article V convention.

One of the amendments Barnett advocates would restore the original understanding of the interstate commerce clause, overturning decades of liberal jurisprudence on the subject. Another would give the president line-item veto power, which has been popular in conservative circles since at least the Reagan years. But the proposal most enticing to the right is Barnett's "repeal amendment," which would allow two-thirds of the states to roll back any federal law or regulation. Supporters of this last amendment have President Obama's national healthcare law squarely in their sights.

Progressives are also intrigued by the possibility that Article V would allow them to contemplate constitutional changes that could never clear Congress—an institution they see as too beholden to the special interests. One of the most popular causes at the Harvard conference was a proposed amendment to revoke the legal concept of corporate personhood and overturn the *Citizens United* decision, which found important parts of the McCain-Feingold campaign-finance reform unconstitutional. "The Framers knew there might be times when Congress is not capable of the proposing the amendments that the country needs," Lessig says.

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The conference started out promisingly enough, though from the beginning Lessig seemed more enthusiastic than Meckler about the prospects of an Article V convention. After a gentle dig from the moderator for his role in reversing Arizona's "clean elections" law, the Goldwater Institute's Nick Dranias got to work emphasizing common ground between the liberals and conservatives in the room.

Dranias said the event reminded him a bit of the old "Spy vs. Spy" cartoon in *Mad*, where two secret agents would smile at each other while privately planning to stab one another in the back. To prove that wasn't the case here, he asked members of the audience to raise their hands if they supported TARP, the bipartisan \$700 billion Wall Street bailout.

When barely anybody did, Dranias pointed to TARP as the kind of issue an Article V convention could address, a subject where left and right are united in opposition to something the bipartisan political class, which dominates Congress, supports. An anti-bailout movement could get the support of the 34 states necessary to call for the convention and the 38 states needed to ratify a constitutional amendment. Dranias contended that conventions could be called to propose amendments on single issues.

And to those who fear a runaway convention—one that goes beyond its initial mandate and puts the whole Constitution on the chopping block—Dranias argued that we already have a "runaway Congress and Supreme Court," which unilaterally amend the Constitution, with fewer checks on their power all the time. "Why should they get to have all the fun?" Dranias challenged audience members to become experts on the Constitution themselves by doing research on the Internet.

But it quickly became clear that some of his fellow panelists did want a convention in which the entire founding document is open for debate. Sanford Levinson—a University of Texas law professor who authored the 2006 book *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Fix It)*—said a televised "no holds barred, everything is on the table convention" would be the "ultimate reality show." And that would be a good thing.

Levinson argued that there could be support for this on both the left and the right. "I assume that centrists would have no interest in this," he continued, "because they are defined by their support of the status quo." He dismissed concerns about a runaway convention as driven by a "deep fear of we the people" and an "elite-driven view of politics," which he called "Leninist."

“I really do not believe there is a movement to reinstate slavery,” Levinson said by way of reassuring progressives that a constitutional convention need not be reactionary. But for all his advocacy of a more democratic convention, some forms of democracy—or at least some results—did seem to trouble him. He called elections, both as a way of choosing convention delegates and as something that might happen during the convention, an “obvious problem.” He worried that they would cause “single-issue groups to take over the convention.” He proposed instead that delegates be selected by a national lottery—“a national citizen jury.”

Other liberal panelists, such as the University of Virginia’s Barbara Perry, admitted they had been skeptical of Article V conventions back when they thought they might produce conservative results, like a balanced budget amendment or prohibition of abortion. But they came to believe that the growth of corporate money’s influence on elected officials, polarization between the two parties, and the crash of the global economy had changed political conditions to the point where Article V is now worth considering.

After a lengthy introduction from Lessig in which he was praised in terms once reserved for Thomas Jefferson, Harvard constitutional scholar Lawrence Tribe rose to pour cold water all over the idea. “How do we have a non-runaway convention?” he asked. “Who sets the rules?” Tribe had more questions: “What if the convention decides to have a national popular vote” instead of sending amendments to the states for ratification? “What about D.C. residents? What role, if any, would the Supreme Court have?” He noted that James Madison thought Article V vague, and the Father of the Constitution “was an expert, even if he didn’t look at things on the Internet.”

Tribe accused advocates of a constitutional convention of “living in two worlds at once”: they want to argue the political system is irredeemably broken but then “rely on this supposedly failed process as a backstop to make this safe.” Convention supporters believed that a failed political class could replicate the handiwork of Jefferson and Madison.

Even though the Framers had their flaws, Tribe maintained, they at least had the “common ground” of “forming a more perfect union,” while the sponsors of the event at which he was speaking had diametrically opposed visions of what they would try to accomplish through an Article V convention. He also doubted that the courts would want to go “anywhere near” anything such a convention did.

Perry countered that she didn’t think the Supreme Court would ever do anything like *Bush v. Gore*—a case Tribe had argued. “You really know how to hurt a guy,” he replied. He then allowed that he wasn’t inalterably opposed to the states compelling Congress to call a convention, but he would need his questions answered before deeming it advisable.

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University of Tennessee law professor Glenn Reynolds, of Instapundit blog fame, delivered the keynote address from the right. Reynolds was ambivalent about his role as designated conservative, preferring to describe himself as a “trans-humanist libertarian.” He was equally ambivalent about an Article V convention.

He announced to thunderous applause that Americans are currently governed by the “worst political class in our country’s history” and this might be justify a convention. On the other hand, he said, that could be “like saying we have the worst medical profession in our country’s history, and I’m ready for my brain surgery now.” Reynolds revealed that his students are surprised to learn that constitutional law frequently has more to do with the “postwar consensus” in law and politics than with anything in the Constitution itself.

Perhaps returning to trans-humanist mode, Reynolds likened constitutional law to a computer’s operating system, with the remainder of the legal code more closely resembling applications. But he acknowledged the limits of that analogy—which echoed Lessig’s popular dictum “code is law”—as it pertained to a constitutional convention. “When I install a new version of Windows,” he deadpanned, “millions of people don’t die or lose their property.”

Reynolds argued that most constitutional amendments were either “reallocations of power” between the federal government, states, and the people or fixes to “procedural bugs.” The one exception, the amendment that instituted Prohibition, was also “the biggest disaster.” He suggested that a convention should look to amendments that limit federal power by “setting ambition against ambition.” One example: creating a legislative body whose chief task would be repealing, rather than making, laws.

Lessig's keynote from the left was a more straightforward call for a convention. He began with a quote from Henry David Thoreau that inspired his Rootstrikers project: "There are a thousand hacking at the branches of evil to one who is striking at the root." The speech paralleled Lessig's own right-to-left trajectory from former Supreme Court clerk for Antonin Scalia to intellectual force behind progressive movements like Rootstrikers and Occupy Wall Street. He claimed that a "distinctly American feeling" of "greatness" was being lost in our politics, replaced by a sense that "we've become Britain or Rome or Greece."

"A generation ago, Ronald Reagan rallied the nation to deny a similar charge by Jimmy Carter," Lessig recalled. "I was one of the people so rallied and I still believe Ronald Reagan was right." He mapped out a series of public policies that passed Congress with strong bipartisan support despite not making much sense from a conservative, liberal, or libertarian perspective. He cited the Copyright Extension Act enacted after the death of Rep. Sonny Bono and the deregulation of derivatives while maintaining deposit insurance.

In Article V, Lessig argued, the Framers had given the American people a mechanism for proposing amendments that would never get a hearing in Congress. Lessig's personal cause is moving to a system of small-donation political campaigns, much like that envisioned by minor Republican presidential candidate Buddy Roemer. But the most important thing from Lessig's perspective was giving ordinary Americans a role in the country's deliberative process.

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The conference did not always live up to Lessig's high-minded aspirations. Most of the speakers were there to plead for their own pet issues rather than discuss the merits of a constitutional convention. We heard from a North Dakota state senator who wanted a supermajority of states to approve any increase in the national debt. Someone else made a pitch for proportional representation.

At first, there had merely been disagreements about how an Article V convention would work in practice. But as the weekend wore on, speakers became increasingly hazy about why one should even be called in the first place, when they bothered to mention constitutions or conventions at all.

David Cobb, the 2004 Green Party presidential nominee, delivered a stemwinder against the "corporations that rule us." He claimed he could walk into "any bowling alley" in America and people would agree with him about the need for political solutions to our most pressing problems. Cobb then denounced the United States as a "racist, sexist, and class-oppressive" country—something I would not recommend doing in most bowling alleys.

Progressive activist George Friday reminded the crowd that many members of minority groups don't share the white majority's warm feelings about the Founding Fathers and the early history of the republic. She suggested that the lack of diversity in the room indicated attendees did not know how to put together a movement big enough for an Article V convention to succeed. White liberals at the conference applauded her implicit criticism of their whiteness, as doing so made them feel good about their liberalism.

Questions from the audience further illustrated the left-right split, with conservatives attacking the Supreme Court and liberals railing against corporations. One bearded Marxist leftover promoted his recent *Harvard Crimson* op-ed on something called the "New Socialist Constitution" before denouncing Harvard Law for inviting the "states rights-supporting, white supremacist Tea Party Patriots" to campus. Another got up to give a diatribe against electronic voting machines.

An activist from Portland, Oregon made a novel comparison between American democracy and the "ask the audience" lifeline on the TV game show "Who Wants to Be a Millionaire?" Both democracy and asking the audience work well because the collective knows more than the individual, he reasoned. But the audience often gets it wrong when a contestant biases the outcome by blurting out an incorrect answer beforehand. Similarly, he asserted, democracy short-circuits when corporations spend millions advertising that "The answer is B!"

The Cato Institute's John Samples gently pushed back against the notion that money was ruining politics. He said that polls show many Americans favor less free speech than the First Amendment actually allows. Limits on campaign expenditures might injure people who are neither George Soros nor the Koch brothers. As Samples spoke, a man in front of me seethed. When Samples concluded, the man stuck out his tongue.

^[2] Annabel Park, a filmmaker and co-founder of a progressive group called [_____](#)

the Coffee Party, expressed a heretical thought: “We are here under false pretenses.” She said that rather than trying to get together to support an Article V convention, the disparate groups were really gathered to discover “Can we talk to each other? Do we actually like each other? And what are the implications if we don’t?” Park likened it to a first date between progressives and the Tea Party.

Certainly there are many issues around which left-right coalitions can be built: civil liberties, foreign policy, the Federal Reserve, the corporatist intersection of business and government. Even the question of money in politics can raise interest on the right as well as the left end of the spectrum. “It is hard to see how genuine conservatives benefit from removing limits on corporate political expenditures,” Tom Piatak argued last year in the pages of *Chronicles*. “Generally speaking, dissident conservative candidates have been forced to rely on small individual donors because their views are distasteful to the economic elite.”

Article V could be another cause around which progressives and conservatives can rally—but opponents of constitutional conventions have been just as ideologically diverse as the Harvard gathering. Liberals like Charles Black and Kennedy speechwriter Theodore Sorensen began writing against invoking Article V after conservatives floated the idea in the 1960s as a way to reverse Warren Court precedents. Conservatives like Phyllis Schlafly and the John Birch Society have long warned that conventions could be the death knell of constitutionally limited government—a fast track for the Equal Rights Amendment. The Constitution Party has opposed Article V conventions since its first platform two decades ago.

Attempting to amend the Constitution in this fashion would probably not be as radical as either its opponents fear or its supporters hope. It is difficult to imagine a proposal that could win the support of the 38 state legislatures necessary for ratification but not command a significant following in Congress. But as a preview to a left-right convention called at the request of the states, the Harvard Law School conference wasn’t terribly encouraging. An Article V convention could be much like my trip to the conference in the first place. I was able to work with some Rootstrickers to find the convention hall. Afterward, we went our separate ways.

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