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Avoiding the Article V Trap

Legal Scholars, Editorial Boards Warn of the Dangers of a New Constitutional Convention

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Some 230 national organizations, including Common Cause, released a letter last week detailing their concerns about efforts by far right wing organizations to force the convening of a constitutional convention under Article V of the Constitution. Convention advocates are perilously close to securing convention calls from 34 state legislatures, which would force the convening of a convention. Here's a look at some of the concerns that have been raised about a possible convention.

“[T]here is no way to effectively limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the convention to one amendment or one issue, but there is no way to assure that the Convention would obey.” – Warren Burger, Chief Justice of the U.S. Supreme Court (1969-1986).

“I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?” – Antonin Scalia, Associate Justice of the U.S. Supreme Court (1986-2016).

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

“First of all, we have developed orderly procedures over the past couple of centuries for resolving [some of the many] ambiguities [in the Constitution], but no comparable procedures for resolving [questions surrounding a convention]. Second, difficult interpretive questions about the Bill of Rights or the scope of the taxing power or the commerce power tend to arise one at a time, while questions surrounding the convention process would more or less need to be resolved all at once. And third, the stakes in this case in this instance are vastly greater, because what

you're doing is putting the whole Constitution up for grabs.” –Laurence Tribe, professor of constitutional law at Harvard Law School.

The bigger threat is that a constitutional convention, once unleashed on the nation, would be free to rewrite or scrap any parts of the U.S. Constitution. Do we really want to open up our nation's core defining values to debate at a time when a serious candidate for the White House brags about his enthusiasm for torture and the surveillance state, wants to "open up" reporters to lawsuits, scoffs at the separation of powers and holds ideas about freedom of religion that are selective at best? – David Super, professor of law at Georgetown University.

“Note what [Article V] does not say. It says not a word expressly authorizing the states, Congress, or some combination of the two to confine the subject matter of a convention. It says not a word about whether Congress, in calculating whether the requisite 34 states have called for a convention, must (or must not) aggregate calls for a convention on, say, a balanced budget, with differently worded calls arising from related or perhaps even unrelated topics. It says not a word prescribing that the make-up of a convention, as many conservatives imagine, will be one-state-one-vote (as Alaska and Wyoming might hope) or whether states with larger populations should be given larger delegations (as California and New York would surely argue).”- Walter Olson, senior fellow at the Cato Institute's Center for Constitutional Studies.

“A constitutional convention could spiral out of control, proposed amendment language so far is deeply problematic, and the Legislature may have self-interested reasons for including a campaign finance question on the ballot. There is, however, a good reason for voters to support this flawed proposal.” – Rick Hasen, Chancellor's Professor of Law and Political Science at the University of California, Irvine.

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

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

“We may disagree about the wisdom of these individual proposals, but no rules limit a constitutional convention to a pre-assigned topic. Once states call for a convention, anything could be fair game. Private-interest groups wouldn't be looking for compromises that serve the nation well in the long-term. To the contrary, they'd fight to further their current political objectives, and it's anyone's guess what kind of a country we'd end up with.” – Eric Burger, professor of law at the University of Nebraska College of Law.

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

Major newspapers' editorial boards agree that an Article V constitutional convention is a dangerous way to amend the U.S. Constitution

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

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

“Supporters will tell you that the convention would be limited to writing an amendment on a balanced budget. But once assembled, those in attendance might find they have an appetite for more changes. Maybe there'd be a temptation to curb all those annoying protests by limiting the freedom to assemble. Or to make this a more Christian nation by messing with the freedom to worship. Or to act against mass shootings by taking out any right to bear arms. Or to move against what the president has labeled as “the enemy of the people,” a free media.” – Milwaukee Journal Sentinel.

“There's good reason why this has never happened: There are no rules, and for every “good” idea for an amendment that a convention could produce, there are several “bad” ones that could also result from it.” – The Fort Worth Star-Telegram.

“Once convened, however, delegates to the convention could radically rewrite the Constitution, a potentially dangerous development that should be avoided.” – Knoxville News-Sentinel.

“Calling a Convention sets a precedent that could endanger the very document so many Americans hold dear... There's a reason a Constitutional Convention hasn't been called since 1787. Conservatives and others who value the nation's founding document should be wary of the can of worms a Constitutional Convention could open.” – Charleston Gazette-Mail.

“The danger of such an event is that its delegates would run amok. No one can say with certainty what the government would look like after they got done reinventing the country.” – The Lincoln Journal Star.