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The Wingnut Plot to Rewrite the Constitution

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Marco Rubio wants a Constitutional Convention. So do lefty pundits and right-wing talk show hosts. Here's why that's a terrible idea.

In his quest to catch the Road Runner, the Coyote in the old Warner Brothers cartoons would always order supplies from the ACME Corporation, but they never performed as advertised. Either they didn't work at all, or they blew up in his face.

Which brings us to the idea of a so-called Article V convention assembled for the purpose of proposing amendments to the U.S. Constitution, an idea currently enjoying some vogue at both ends of the political spectrum.

On the left, a group founded by liberal TV host Cenk Uygur is pushing a convention aimed at overturning the Supreme Court's hated Citizens United decision and declaring that from now on corporations should stop having rights, or at least not a right to spend money spreading political opinions. Four liberal states—California, Vermont, Illinois, and New Jersey—have signed on to this idea.

On the right, the longstanding proposal for a convention to draft a balanced budget amendment has at times come within striking distance of the requisite two-thirds of state legislatures needed to trigger the idea. And for the past few years, talk show host Mark Levin has been campaigning for a convention with broader conservative goals, an idea that got a boost when Florida Senator Marco Rubio recently endorsed it, citing "Washington's refusal to place restrictions on itself."

Rubio's specifics are still sketchy—term limits for members of Congress and Supreme Court justices would be part of it—but Texas Republican Gov. Greg Abbott has now jumped in with a detailed "Texas Plan" of nine constitutional amendments mostly aimed at wresting various powers back from the federal government to the states.

Some of these ideas are better than others—Gov. Abbott's 92-page report (PDF) is rather erudite, and lays out its arguments skillfully even if I do not find all of them sound—but every such scheme to stage an Article V convention should come with a giant ACME brand stenciled on its side. If it doesn't just sit there doing nothing, it's apt to blow up on the spot.

The detonation that skeptics most fear is what's called a runaway convention, in which the delegates called together to, say, install term limits or revamp campaign finance decide to venture into other areas as well, and perhaps start proposing whatever new amendments they think might be a good idea. Hence Justice Antonin Scalia's brusque dismissal: "I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?"

Some respected scholars who favor a convention argue that strict instructions would deter the assembled delegates from venturing beyond the velvet rope. But if that cannot be made a legal requirement, it winds up more like an honor code. "Congress might try to limit the agenda to one amendment or to one issue, but there is no way to assure that the Convention would obey," wrote the late Chief Justice Warren Burger.

Don't believe Scalia or Burger? Go ahead and read the instruction kit for a convention, such as it is, in Article V of the U.S. Constitution. It's quite brief. Here's the full relevant text:

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…

Note what this 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).

Does Congress, or perhaps the Supreme Court, get to resolve these questions—the same Congress and Supreme Court that the process is aimed at doing an end run around? If the Supreme Court resolves them, does it do so only at the very end of the process, after years of national debate have been spent in devising amendments that we find out after the fact were not generated in proper form?

Justice Burger described the whole process as "a grand waste of time." One reason is that after advocates get the process rolling by convincing two-thirds of states, or 34, itself a fairly demanding number, the amendments that emerge from a convention do not get ratified unless three-quarters of states ratify, or 38, a quite demanding number.

Put differently, it takes only 13 states to refuse to act to kill any of these ideas, bad or good, in the end. Sorry, Cenk and Marco, but so long as we have a nation fairly closely divided between

Blue and Red sentiment, there will be at least 13 states skeptical of some systemic change so big that you had to go around the backs of both Congress and the Supreme Court to pull it off. If you're a progressive who thinks the populist winds blow only in your favor, reflect for a moment on the success of Donald Trump. If you're a conservative to whom radio call-ins resound as the voice of the people, consider that state legislatures confronted with the hard legal issues a convention would raise might turn for advice and assistance to elite lawyers (yikes) or even law professors (double yikes).

Finally, we shouldn't assume—as do some of Gov. Abbott's co-thinkers—that most state governments are as eager as Texas to curtail the powers of the feds. One of the most significant conservative books on federalism lately, George Mason University professor Michael Greve's *The Upside-Down Constitution*, sheds light on this. Conservatives tell a campfire story of how the federal government got big by taking power away from the states. But in his (admittedly long and complicated) book, Greve argues that the truth is closer to the opposite.

Whether in spending programs, regulations, subsidies, you name it, almost every big expansion of federal power has been skillfully designed as a deal that cuts state political elites into some of the resulting flow of power and money—consider, for example, how state education, police, road, and environmental departments have come to depend on Washington's largesse. And while many states may join Texas in sincerely griping at the bad end of the deal—the endless paperwork, the unfunded mandates—that doesn't mean they'd actually join Gov. Abbott in risking the connection.

Yes, the federal government has slipped its constitutional bounds, and yes, that's infuriating. Just don't confuse a plan for talking, which is what these amount to, with a plan for actually changing things, and always beware of a cure that might kill the patient.

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