



OPENING PANDORA'S BOX?



WHY THE CONVENTION OF STATES PROJECT WILL FAIL

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EXECUTIVE SUMMARY

Article V of the US Constitution provides the legal authority by which state legislatures can convene a convention of the states. Such a convention would give the states and the American people a larger say in deciding how much of the federal government's power should be returned to them. Competing amendment resolutions include the Balanced Budget Amendment task force (BBA), which proposes a balanced budget amendment, while the Convention of States project (CoS) seeks consideration of a broad batch of amendments, including fiscal restraints on the federal government, term limits, as well as limiting the size and power of the federal government, without prescribing specific remedies.

Key Findings

- It is highly probable that the CoS approach would result in a failed convention, opening a Pandora's box of competing agendas and proposals leading to procedural anarchy and ultimately failure of the convention.
- CoS language is too broad and its approach too unfocused to restrain delegates' pet projects and ambitions and to encourage the political consensus required to meet Article V's high threshold for ratification.
- The stubborn fact is that a failed convention is both possible and, indeed, probable under an overly ambitious resolution that, no matter how well-intentioned, is far too broad in scope.
- A broadly themed convention may be exploited by all manner of ideological and interest group agendas. Partisans on both sides long for an opportunity to drag a failed convention to the far left or far right.
- If state legislators ignore the practical pitfalls of the CoS approach, the unintended consequence of a convention quagmire may tarnish Article V's convention route to amend the Constitution and rob states and the people of the Founders' most powerful tool for curbing federal abuses.
- A limited convention on a single issue, such as a balanced budget amendment or congressional term limits, is far more likely than a thematic one to be a successful convention.
- Only narrowly focused, non-partisan, single amendment convention solutions offer the likelihood of eventual ratification and the promise of positive change.

INTRODUCTION

A great many Americans have strong opinions about the constitutional changes they desire. Yet, it has been 25 years since the US Constitution was last amended.¹ There have been only 27 successful constitutional amendments and each one originated in Congress and was subsequently sent to the states for ratification. A convention of the states for proposing amendments, as allowed under a little-known constitutional mechanism, has never been convened.

Nonetheless, the invoking of an Article V-mandated convention would enable the states to convene for the purpose of proposing and considering amendments among themselves, completely bypassing Congress, the President, the courts, and the federal bureaucracy. This is the approach that some organizations are pursuing nationally through state legislatures.

For Americans concerned about their country's structural economic and systemic

political problems, it is appropriate to consider seeking remedy through an Article V-mandated convention. Such a convention would give the states and the American people a larger say in deciding how much of the federal government's current power should be returned to them.

ARTICLE V'S AUTHORITY

Article V of the US Constitution specifically provides the legal authority by which state legislatures can convene a convention of the states. Article V reads as follows:

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 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first

¹ In 1992, the 27th amendment officially prevented Congress from adopting pay

increases for its members that take effect immediately.

article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

The amendment convention campaign rests on the clause that allows the states to circumvent Congress and draft their own constitutional amendments. This may occur whenever two-thirds of state legislatures apply for such changes by passing identical resolutions expressing their preference for such a convention. As with any amendment that Congress proposes, amendments originating at the state level require approval by three-quarters of the states (now 38 of 50) to take effect.

A convention of the states is therefore entirely in line with the Founders' intent and expectations. The Heritage Foundation's John Malcolm recounts that, "Article V was first introduced at the Constitutional Convention in Philadelphia on May 29, 1787, as part of the Virginia Plan."² The Founders saw granting state

legislatures the permission to advance constitutional amendments as an important component of their "checks and balances" infrastructure, an instrument that they anticipated would be utilized on a regular basis. Hence, Harvard University legal scholar Lawrence Lessig maintains that Article V serves the function of "reaffirming that link between the people and [their] Constitution."³

Both James Madison and George Mason insisted that states possess a method for amending the Constitution because they feared that the federal government might grow to the extent it would become deaf to states' needs. The Texas Public Policy Foundation's Brooke Rollins points out that, "Our founders, in their brilliance, gave us a tool to do that. And it's Article V"⁴; hence, their insertion of the relevant clause. As Madison wrote in *Federalist No. 43*, Article V:

² John Malcolm, "Consideration of a Convention to Propose Amendments Under Article V of the U.S. Constitution," Heritage Foundation, 19 February 2016.

³ Lessig, remarks to The Center to Restore the Balance of Government, American Legislative Exchange Council, Washington DC, 28 June 2016, <https://www.alec.org/article/second->

[annual-center-to-restore-the-balance-of-government-article-v-event-showcased-bipartisanship-and-the-crucial-role-of-the-states/](https://www.alec.org/article/second-annual-center-to-restore-the-balance-of-government-article-v-event-showcased-bipartisanship-and-the-crucial-role-of-the-states/)

⁴ Quoted in Jonathan Serrie, "States' rights advocates eye convention to bypass Congress, amend Constitution," FoxNews.com, 29 March 2016.

[G]uards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.”⁵

THE STATE OF PLAY

Competing amendment resolutions are currently making headway with state legislatures nationwide.

The Balanced Budget Amendment task force (BBA), a grassroots organization affiliated with the influential American Legislative Exchange Council (ALEC), is campaigning to have states apply to Congress to call an Article V convention of the states solely and specifically for the purpose of considering a balanced budget amendment. The BBA is presently only a half dozen states short of the 34 needed to invoke the Article V clause.

⁵ James Madison, “The Powers Conferred by the Constitution Further Considered,” *The Federalist No. 43*, 23 January 1788.

For the past three years, as the parent organization of the Convention of States project (CoS), the Texas-based Citizens for Self-Governance (CSG) has spearheaded an alternative resolution. CoS’ sweeping resolution, which is currently supported by eight states, asks Congress to call an Article V convention of the states to consider a broad batch of amendments, including fiscal restraints on the federal government, term limits, as well as limiting the size and power of the federal government. This resolution promotes vigorous discussion of these issues without prescribing specific remedies.

CoS’ “FAILED CONVENTION” ROUTE

According to CoS, itself, their amendments will be designed to “impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and set term limits for its officials and for Members of Congress.”⁶ It is highly

⁶ Quoted in Andrew Harris, “Tea Party co-founder holds convention in Williamsburg for amending Constitution,” 23 September 2016,

probable that, in its current form, the CoS campaign would result in a failed convention whereby delegates pass a plethora of constitutional amendments beyond the convention's actual mandate.

As the CoS campaign moves closer to its goal of a multi-themed convention, it is becoming increasingly clear that, as some constitutional scholars warn, the holding of an amendment-writing convention without a clear historical parallel, and without written rules, may open a Pandora's box of competing agendas and proposals leading to procedural anarchy and ultimately failure of the convention.

Many fiscal conservatives are concerned about a convention called to reign in federal power being expanded to address unrelated issues of longstanding interest to liberal activists. Among social conservatives, meanwhile, there is palpable

concern about a Pandora's box scenario. For example, Concerned Women for America's Cindy Flackle thinks that, once a constitutional convention is convened, the Constitution and the Bill of Rights may become vulnerable to all manner of special interest agendas.⁷

Among liberals, themselves, there is also considerable concern about the policy permutations that a CoS-driven failed convention could engender. For example, Grace Chimene, a member of the League of Women Voters of Texas, says her state's legislature should impose stricter limits on the delegates' powers because CoS' call for limiting the jurisdiction of the federal government "is much too broad." Chimene fears that, "federal powers that have been used to protect minorities and advance civil rights, labor and environmental regulations will be placed at risk."⁸

<http://wydaily.com/2016/09/23/tea-party-co-founder-holds-constitutional-convention-in-williamsburg/>

⁷ Quoted in Jack Taylor, "Article 5 convention advances in Pierre," www.kelo.com, 6 February 2017,

<http://kelo.com/news/articles/2017/feb/06/article-5-convention-advances-in-pierre/>

⁸⁸ Quoted in Bobby Cervantes, "Concerns linger as panel OKs convention of states resolution," *Houston Chronicle*, 16 February 2017, <http://www.houstonchronicle.com/local/texas-politics/texas-legislature/article/Concerns-linger-as-panel-OKs-convention-of-states-10938901.php>

Most fiscal conservatives and libertarians are attracted to the economic and political reforms implied by CoS' thematic resolution. However, the proposed amendments' respective merits should take a back seat to an even more important question: can such a broad application sufficiently constrain the assembled convention delegates and ensure that they will not venture off into other constitutional areas?

It is very likely that it cannot. In that vein, commentator Steven Hayward writes that:

While we could stipulate that any convention held today be open to public view and broadcast on C-SPAN, there is no guarantee against mischief after hours or out of public view. If the convention reported out amendments not contemplated in the state call to convention compact or in a Congressional resolution, it would render moot many of the proposed safeguards. It is a certainty that liberals will send their A-Team to any such convention. Massachusetts will send Lessig; Connecticut will send Bruce Ackerman and Akil Amar; California will send Erwin Chemerinsky. Are we confident Republican governors or legislators will find their conservative equivalent? (Just check Gov. Chris

Christie's New Jersey Supreme Court appointments if you want to see how this can go wrong.) The dynamic of the convention is easy to predict: liberals will move as a unified block and look to pick off weak-minded Republicans to go along with "good government reform" amendments.⁹

It is certainly to be hoped that, as Malcolm suggests, 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."¹⁰ Under a CoS-driven convention, this is a real concern, as Article V places no explicit limits on a convention's power.

Therefore, the rules that a CoS convention would follow are unknown. According to Harvard University constitutional scholar Michael Klarman, "The answer to almost every question you could ask is. 'We don't know'." He says, "I think a convention can do anything they want — re-establish slavery, establish a national church. I just

⁹ Steven F Hayward, "An Article V constitutional convention: A bad idea whose time has come?" *Forbes*, 7 August 2014.

¹⁰ Malcolm.

don't think there's any limit."¹¹ Michael Gerhardt, a scholar in residence at the National Constitution Center, states that Article V's reticence means that, "Once you have a convention, then in some respects it becomes a free-for-all. All bets are off."¹²

Supporters of the CoS project argue that there would be in-built protections against a failed convention. This argument focuses upon the subject matter and topics specified in the 34 respective state applications that would trigger the convention. However, as Simon Davis Cohen has observed, "That the subject matter of the resolutions will prevent a runaway convention may make sense in reference to the BBA, whose resolutions focus specifically on the balanced budget amendment, but when applied to the Convention of States' agenda, the argument fails, as the subject of their resolutions includes broad language to curb

the power and jurisdiction of the federal government."¹³

How would an Article V-mandated CoS convention actually work? In response to this critical logistical question, last fall CSG sponsored a simulated convention of states in Williamsburg, Virginia. CSG's simulated convention proposed six amendments that would have gone to the states for ratification.

Predictably, but worryingly, CSP's six amendments covered the policy waterfront. They included: public debt; acts of war and violent insurrection; term limits; the abrogation of federal laws; taxation, including income, duty, and excise taxes; and federal regulations.¹⁴ Such a lengthy wish-list clearly constitutes a constitutional accident waiting to happen. Furthermore, CoS spokesman Michael Farris has written that, at an actual convention, there could

¹¹ Quoted in Michael Wines, "Inside the conservative push for states to amend the Constitution," *New York Times*, 22 August 2016.

¹² Quoted in Wines.

¹³ Simon Davis Cohen, "Corporate America is just 6 states short of a constitutional convention," 14 March 2016, <http://inthesetimes.com/article/18940/alec->

[balanced-budget-corporate-constitutional-convention](http://www.cnsnews.com/commentary/rob-natelson/what-would-article-v-convention-states-actually-be)

¹⁴ See Rob Natelson, "What would an Article V convention of states actually be like?" CNS News.com, 27 September 2016, <http://www.cnsnews.com/commentary/rob-natelson/what-would-article-v-convention-states-actually-be>

be “as many as 10 to 12” proposed amendments.¹⁵

The irony is that CoS’ self-celebrated simulated convention actually demonstrates the validity of the pessimists’ perspective. CoS language is too broad and its approach too unfocused to restrain delegates’ pet projects and ambitions and to encourage the political consensus required to meet Article V’s high threshold for ratification.

TOO BROAD A CONVENTION, TOO LIBERAL AN OUTCOME?

A amendment conventions under Article V are far from an exclusively conservative or libertarian campaign. A broadly themed convention may be exploited by all manner of ideological and interest group agendas. Unsurprisingly, influential individuals and well-organized institutions across the political spectrum possess constitutional

amendment wish-lists that, given the opportunity, they would enthusiastically impose upon their fellow citizens.

For example, retired Supreme Court Justice John Paul Stevens, a liberal stalwart, proposes truly significant changes in his book, *Six Amendments: How and Why We Should Change the Constitution*.¹⁶ These include amendments that would weaken Second Amendment rights and would affect the First Amendment by overturning the Supreme Court’s Citizens United v. Federal Election Commission decision.

Without question, some support the Article V convention project precisely because of their opposition to the Citizens United decision. The Wolf PAC organization, for example, seeks to overturn Citizens United and has called for “a limited amendments convention for the purpose of proposing a Free and Fair Elections Amendment to the United States Constitution.”¹⁷ Five state legislatures (California, Illinois, New Jersey, Rhode Island, and Vermont) already

¹⁵ Quoted in Davis Cohen.

¹⁶ John Paul Stevens, *Six Amendments: How and Why We Should Change the Constitution* New York: Little, Brown 2014.

¹⁷ Quoted in Malcolm.

support such a convention on campaign finance reform.

Partisans on both sides long for an opportunity to drag a failed convention to the far left or far right. Justice Democrats is the latest 'progressive' organization to put its collectivist shoulder to the constitutional wheel. Led by former senior staffers from, and supporters of, Senator Bernie Sanders' 2016 presidential campaign, Justice Democrats believe that the current Democratic party is overly beholden to corporate donations. And, they see a convention of the states as at least a partial remedy.

Hence, according to a Justice Democrats press release, "It's time for an Article V convention to take our democracy back from the brink of oligarchy."¹⁸ These European-style social democrats have put forward a lengthy laundry list of must-dos, including campaign finance reform, raising the minimum wage, universal healthcare,

¹⁸ Quoted in Glenn Rohrbaker, *Charger Bulletin*, 31 January 2017, <http://chargerbulletin.com/22900/politics/justice-democrats-look-to-take-back-democratic-party/>

free public college, and spending more on renewable energy.

Campaigning, also, are the 11 states, comprising 165 electoral votes, that seek to amend the electoral college process. They have agreed in principle to abide by the National Popular Vote plan, under which states would agree to pledge their electoral votes to the ticket that wins the popular vote around the country.

Supporters and defenders of the CoS campaign note, correctly, that their desired convention has the power solely to propose amendments, which would then have to be ratified by 38 states. They argue that this steep ratification hurdle would rule out any radical amendments, either from the Left or the Right. Hence, Nate Madden argues that "anything proposed would have to pass an immense legislative hurdle. Whether in metaphor or reality, high hurdles aren't conducive to running away."¹⁹ According to Lessig, "There's no controversial idea on the

¹⁹ Nate Madden, "'Could an Article V convention backfire on conservatives?'" *Conservative Review*, 27 August 2016, <https://www.conservativereview.com/commentary/2016/08/could-an-article-v-convention-backfire-on-conservatives>

left or the right that won't have 13 states against it."²⁰

As Malcolm concludes, the ratification process itself, requiring support from three-fourths of the states, may decrease the likelihood of some radical proposal ultimately becoming imbedded in the Constitution.²¹ A lower success rate, however, is not the same as a guaranteed failure. It is worth recalling that 82 percent of proposed amendments that have been sent to the states for ratification were able to achieve the necessary levels of support.

The argument that enormous legislative and political hurdles will inoculate the CoS process from becoming a failed convention is actually a powerful argument against a broad-based convention agenda in the first place.

Why should everyone involved go to all that effort if the likelihood of ultimate success for ideologically-driven, contentious amendment proposals is so remote? And,

what is so clearly reformist about an amendment package that most likely will contain both popular and unpopular measures, with the latter probably securing the former's political doom.

The logical conclusion suggested by the "Don't worry, we can't ratify" position is an amendment resolution that pledges a completely agenda-free convention. After all, if there is no possibility of any radical, dangerous, or unpopular amendments passing muster at the convention, simply let the states send their delegates to a blank-slate national debate forum.

The entire country could witness deliberative democracy in practise within the hothouse atmosphere of an interactive, televised, tweeted constitutional amendment convention free-for-all. Is that an efficient and effective way to determine the utility of any given amendment proposal?

²⁰ Quoted in Debra Cassens Weiss, "Conservative groups push for constitutional convention; would it open Pandora's box of mischief?" *ABA Journal*, 23 August 2016,

http://www.abajournal.com/news/article/conservative_groups_push_for_constitutional_convention_would_it_open_pandor/

²¹ Malcolm.

A LIMITED CONVENTION

IS CONSTITUTIONAL

Although some observers believe that a convention of the states cannot be limited to a specific, pre-drafted amendment, or to a clearly defined subject, many constitutional scholars disagree. As, constitutionally, a limited convention is neither required nor proscribed, such a convention would be constitutional.

It is noteworthy that such narrowly focused conventions of the states are not a modern invention. The Founders intended for interstate conventions to be limited to a single purpose. By 1922, three dozen such conventions had taken place, mostly with a single topic, such as slavery, on the agenda. In that vein, if a sufficient number of states applied for a convention limited to a particular subject or pre-drafted amendment, Congress would be required to call such a convention, and the convention would be obliged to consider *only* that particular subject matter or amendment.

UNLIMITED ADVANTAGES

The most likely topics for a single-issue convention are a BBA-style balanced budget amendment or a term limits amendment. Both possess the decisive advantage of being overwhelmingly popular proposals.

Opinion polls reveal longstanding and broad-based majority support for both potential amendments. Their respective political utility stems from the fact that both measures are non-partisan, non-ideological reforms that reflect grassroots support for substantive, tangible fiscal and political reforms.

A limited convention on a single issue, such as a balanced budget amendment or congressional term limits, is far more likely than a thematic one to be a successful convention. By focusing exclusively upon a balanced budget amendment or congressional term limits, the convention's outcome will be far more popular than a convention that produces a raft of amendments, some popular, some

unpopular, regardless of their respective merits.

A successful convention that reflects populist sentiments and accurately mirrors the democratic will of the American people would stand a much greater chance of ratification among the states than one promoting controversial and esoteric amendments that could be easily misrepresented and unfairly sullied by ideologues and partisan opponents.

Having retained its national prominence since President Ronald Reagan's endorsement 35 years ago, the balanced budget resolution currently making its way through respective state legislatures demands that Congress balance the federal budget except in times of national emergency.²²

The BBA has drafted model state applications and legislation designed to strictly limit the would-be delegates'

authority to consideration of an amendment to balance the federal budget.

Perhaps, the largest advantage inherent in the balanced budget amendment effort is that it is not weighed down by the principal disadvantage carried by the CoS campaign, that is, the widespread concern that, once convened, its convention would be inefficient and ineffective, at best; and, at worst, spontaneous, undisciplined, and even reckless.

Proponents of a limited convention nonetheless must steel themselves for well-funded and well-orchestrated "attempts to frustrate the will of states that call for a limited convention by those who oppose the concept of a limited convention, want to use the convention to consider other subjects, or do not like the results of such a convention. Such challenges could take various forms including lawsuits that could take years and lead to unpredictable results."

²² In the early 1980s, the effort to convene a convention of the states to call for a balanced budget amendment fell just three short of the necessary 34 states. See Herbert H Denton and

William Chapman, "Reagan backs balanced-budget amendment," *Washington Post*, 13 July 1982.

“This is not an argument against proceeding with a constitutional convention,”²³ but, rather, an appreciation for the challenges ahead, albeit far fewer than those that lie in wait for a broader, CoS-style convention.

The CoS project is now running into some heavy legislative weather. Ideologically sympathetic target states, that is, so-called “red” states, such as Arkansas, South Dakota, Utah, and Wyoming, have rejected recent opportunities to pass CoS’ broad language.

Another of the CoS project’s political weaknesses is that it is an inherently high-risk endeavor with regard to its potential for maintaining enthusiastic supporters throughout the entire process. Those voters supporting a convention call today because they favor amendments in one or another of CoS’ subject areas may reconsider their support if, once a convention has been held, their particular pet topic has been dropped or additional amendments in new subject areas, with disagreeable positions, are put forward for ratification in the states.

²³ Malcolm.

CONCLUSION

Those who suggest that a failed convention is a practical impossibility are simply wrong. CoS continues to struggle to provide a persuasive argument addressing growing anxiety about the threat of a failed convention.

The stubborn fact is that a failed convention is both possible and, indeed, probable under an overly ambitious resolution that, no matter how well-intentioned, is far too broad in scope.

To prevent ratification will require only 13 states to oppose the outcome of any convention. The political arithmetic is sufficiently tricky that, in practice, it is highly probable that a thumbs-down from only one additional Republican state and one additional Democratic state will put a stop to the ratification process. The bottom line is that a simple Democratic majority in a key state house chamber or state senate could prevent ratification of an ideologically driven amendment menu.

The Republicans now enjoy control of 33 state legislatures. The capture of one more state legislature would make it possible, on paper, for a unified Republican party to call a convention to amend the Constitution. However, one should appreciate that 2016 probably represents the zenith of Republican party success. For a host of cyclical, demographic, and electoral reasons, over coming elections state Democratic parties are likely to gain back some lost ground, at least.

If either a balanced budget amendment or congressional term limits have a chance of ratification, it is now, under Republican majorities that are disproportionately sympathetic to the democratic will on those specific issues. To squander the present opportunity by trading a one item shopping list with a high political ceiling for a limitless issue menu with a low ceiling not only precludes reform but also foreshadows constitutional stasis.

The state-by-state ratification route is a precarious path for any proposed amendment. There is simply no margin for error. The ratification prospects of

comparatively unpopular limited government amendments are currently mediocre, at best, while astutely marketed big government proposals could ride a populist wave to ratification.

If state legislators ignore the obvious practical pitfalls of the CoS approach, the unintended consequence of a convention quagmire may tarnish Article V's convention route to amend the Constitution and rob states and the people of the Founders' most powerful tool for curbing federal abuses. Only narrowly focused, non-partisan, single amendment convention solutions offer the likelihood of eventual ratification and the promise of positive change.