

What Legal Experts
Have Said About a
CONSTITUTIONAL CONVENTION
Under Article V of the
United States Constitution,
Including the Actual Possibility of a
Runaway Convention

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Supreme Court of the United States
Washington, D. C. 20543

June 22, 1988

CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

Dear Phyllis:

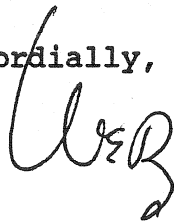
I am glad to respond to your inquiry about a proposed Article V Constitutional Convention. I have been asked questions about this topic many times during my news conferences and at college meetings since I became Chairman of the Commission on the Bicentennial of the U.S. Constitution, and I have repeatedly replied that such a convention would be a grand waste of time.

I have also repeatedly given my opinion 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 assure 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. The meeting in 1787 ignored the limit placed by the Confederation Congress "for the sole and express purpose."

With George Washington as chairman, they were able to deliberate in total secrecy, with no press coverage and no leaks. A Constitutional Convention today would be a free-for-all for special interest groups, television coverage, and press speculation.

Our 1787 Constitution was referred to by several of its authors as a "miracle." Whatever gain might be hoped for from a new Constitutional Convention could not be worth the risks involved. A new Convention could plunge our Nation into constitutional confusion and confrontation at every turn, with no assurance that focus would be on the subjects needing attention. I have discouraged the idea of a Constitutional Convention, and I am glad to see states rescinding their previous resolutions requesting a Convention. In these Bicentennial years, we should be celebrating its long life, not challenging its very existence. Whatever may need repair on our Constitution can be dealt with by specific amendments.

Cordially,



Mrs. Phyllis Schlafly
68 Fairmount
Alton, IL 62002

Steer clear of constitutional convention

By ARTHUR J. GOLDBERG

As we look forward to celebrating the bicentennial of the Constitution, a few people have asked, "Why not another constitutional convention?"

I would respond by saying that one of the most serious problems Article V poses is a runaway convention. There is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights. Moreover, the absence of any mechanism to ensure representative selection of delegates could put a runaway convention in the hands of single-issue groups whose self-interest may be contrary to our national well-being.

A constitutional convention could lead to sharp confrontations between Congress and the states. For example, Congress may frustrate the states by treating some state convention applications as invalid, or by insisting on particular parliamentary rules for a convention, or by mandating a restricted convention agenda. If a convention did run away, Congress might decline to forward to the states for ratification

Former U.S. Supreme Court Justice Arthur J. Goldberg, a member of the advisory board of Citizens to Protect the Constitution, wrote this article for The Herald in response to an article by Arthur S. Miller, "Why not another constitutional convention?" (Viewpoint, July 6).

In Response

those proposed amendments not within the convention's original mandate.

Ultimately, the courts would be called upon to decide these matters. This raises unprecedented problems. If every disgruntled convention delegate, member of Congress, state legislator or concerned citizen could sue at any time, a convention could mire the federal and state governments in a debilitating web of lawsuits. Could government thus preoccupied with a convention meet the needs of their citizens and the country as a whole?

If the issues are not reviewable by the courts, then the convention would take place outside our system of checks and balances and the dangers of a runaway convention increase. If the convention issues are reviewable, then serious enforcement problems arise.

Proponents for a convention offer assurances that it can be limited to a single issue by saying the state legislatures have called for a convention for the "sole and express purpose" of drafting a specific amendment, particularly the balanced budget amendment.

In response, they should be reminded that the convention of 1787 was called "for the sole and express purpose of revising the Articles of Confederation." As we know, that convention, in these special and unique circumstances, discarded the Articles and drafted the U.S. Constitution,

despite its limited mandate.

History has established that the Philadelphia Convention was a success, but it cannot be denied that it broke every restraint intended to limit its power and agenda. Logic therefore compels one conclusion: Any claim that the Congress could, by statute, limit a convention's agenda is pure speculation, and any attempt at limiting the agenda would almost certainly be unenforceable. It would create a sense of security where none exists, and it would project a false image of unity.

Opposition to a constitutional convention at this point in our history does not indicate a distrust of the American public, but in fact recognizes the potential for mischief. We have all read about the various plans being considered for constitutional change. Could this nation tolerate the simultaneous consideration of a parliamentary system, returning to the gold standard, gun control, ERA, school prayer, abortion vs. right to life and anti-public interest laws?

As individuals, we may well disagree on the merits of particular issues that would likely be proposed as amendments to the Constitution; however, it is my firm belief that no single issue or combination of issues is so important as to warrant jeopardizing our entire constitutional system of governance at this point of our history, particularly since Congress and the Supreme Court are empowered to deal with these matters.

James Madison, the father of our Constitution, recognized the perils inherent in a second constitutional

convention when he said an Article V national convention would "give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of that flame which has already heated too much men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I would tremble for the result of the second."

Let's turn away from this risky business of a convention, and focus on the enduring inspiration of our Constitution.

The bicentennial should be an occasion of celebrating that magnificent document. It is our basic law; our inspiration and hope, the opinion of our minds and spirit; it is our defense and protection, our teacher and our continuous example in the quest for equality, dignity and opportunity for all people in this nation. It is an instrument of practical and viable government and a declaration of faith — faith in the spirit of liberty and freedom.

HAMLIN LAW REVIEW



LAWFUL AND PEACEFUL REVOLUTION:
ARTICLE V AND CONGRESS' PRESENT DUTY
TO CALL A CONVENTION FOR
PROPOSING AMENDMENTS

The Honorable Bruce M. Van Sickle
Lynn M. Boughey

George C. Detweiler
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convention. Congress cannot thwart amendments proposed by a convention by refusing to designate whether ratification will be by the state legislature or by state conventions. Such an attempt would be such a naked assertion of unconstitutional power that it scarcely deserves serious discussion. Nonetheless, the proposed legislation described above²⁴¹ amazingly provides for this thinly veiled veto power. The enactment and use of this proposal would completely defeat the purpose of Article V, and would constitute nothing less than the nullification of a constitutional provision by legislative fiat. If the convention proposes one or more amendments, Congress then is obliged under Article V to designate the mode of ratification. Article V cannot be read as granting Congress the authority to prevent, by any means, the forwarding of proposed amendments to the states for their review.

IV. THE INABILITY OF STATES TO LIMIT AN ARTICLE V CONVENTION

Article V provides to the states the power to apply for a convention for proposing amendments, and the power to ratify amendments proposed either by Congress or by the convention process. As shown in this article, the plain language of Article V and the history of its drafting demonstrate that a convention for proposing amendments cannot be limited to a single issue. The states, like Congress, have no authority to limit the scope of the convention to a single topic. As such, a state does not have the power to limit a constitutional convention to particular topics by limiting the efficacy of its application for a convention called to consider only one topic.²⁴² A state does not have the ability to defeat its application by claiming viability of the application only if the convention accedes to that state's improper demand that only one topic be addressed at the convention. The states have no authority to place such an unconstitutional demand in the application. When a state applies under Article V for the calling of a convention for proposing amendments it knows from the language of Article V that it cannot inhibit the scope of the convention. It is a convention for proposing *amendments*. The clear language of the Article, combined with the historic fact that the selection of the plural form of the word "amendments" was a deliberate act, leads steadfastly to the inescapable conclusion that a state cannot limit the convention, or its application, to one

241. See *supra* text accompanying notes 212-23.

242. See *supra* text accompanying notes 172-78.

topic.²⁴³

On the other hand, prior to reaching the necessary applications from two-thirds of the states, a state presumably has the ability to rescind its application or to include a time limit on the effectiveness of its application. Moreover, a withdrawal of an application after reaching the necessary two-thirds mark cannot be effective because once that mark is reached the terms of Article V trigger the requirement of Congress to call a convention. Once the final legislative vote applying for a convention for proposing amendments has been taken, the Constitution obliges Congress to call a convention, and no subsequent act can vitiate that obligation. Thus, permitting a state to rescind its application after the two-thirds has been met would be contrary to Article V because it would have the disastrous consequence of giving each applying state a veto power over the convention after it was already required to be called.

V. COUNTING THE PENDING APPLICATIONS

In determining the number of states that have pending applications for a convention for proposing amendments to the Constitution, several points must be recognized. First, the mere passage of time does not defeat the efficacy of an application. The time lapse between the first application and the thirty-fourth application is not material. Second, there is nothing in Article V that supports a construction of contemporaneousness. According to the text of Article V, Congress must call a convention upon the application of two-thirds of the state legislatures. There is nothing in the language of Article V that provides a time limit on the applications. An application, once made, continues unless it is rescinded or reaches its own termination date.

It is true that a contemporaneousness requirement has some intuitive appeal, based on the sense that the framers inserted the two-thirds requirement so that a convention would be called only when there was a substantial nationwide consensus that a convention was needed. If

243. Although Congress may fix reasonable time limits relating to the ratification of its own proposed amendments, *Dillion v. Glass*, 256 U.S. 368, 325-76 (1921); *Coleman v. Miller*, 307 U.S. 433, 452 (1939), there is nothing in the text of Article V or the intent of the framers that would support a limitation being placed upon the states relating to time limits for applying for an Article V convention for proposing amendments. This point can also be shown by the analogous Supreme Court decision in *Leser v. Garnett*, 258 U.S. 130 (1922), in which the Leser Court points out that the governing law relating to the amendment process is Article V of the Constitution, and that Article V necessarily "transcends any limitation sought to be imposed by the people of a state." *Id.* at 137.

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The primary threat posed by an Article V Convention is that of a confrontation between Congress and such a Convention. Upon Congress devolves the duty of calling a Convention on application of the legislatures of two-thirds of the states, and approving and transmitting to the states for ratification the text of any amendment or amendments agreed upon by the convention. The discretion with which Congress may discharge this duty is pregnant with danger even under the most salutary conditions.

In the event of a dispute between Congress and the Convention over the congressional role in permitting the Convention to proceed, the Supreme Court would almost certainly be asked to serve as referee. Because the Court might feel obliged to protect the interests of the states in the amendment process, it cannot be assumed that the Court would automatically decline to become involved on the ground that the dispute raised a nonjusticiable political question, even if Congress sought to delegate resolution of such a dispute to itself. Depending upon the political strength of the parties to the dispute, a decision to abstain would amount to a judgment for one side or the other. Like an official judgment on the merits, such a practical resolution of the controversy would leave the Court an enemy either of Congress or of the Convention and the states that brought it into being.

A decision upholding against challenge by one or more states an action taken by Congress under Article V would be poorly received by the states involved. Truly disastrous, however, would be any result of a confrontation between the Supreme Court and the states over the validity of an amendment proposed by their Convention. Yet the convention process could, quite imaginably, give rise to judicial challenges that would cast the states into just such a conflict with the Supreme Court -- despite congressional attempts to exclude such disputes from the Court's purview.

At a minimum, therefore, the federal judiciary, including the Supreme Court, will have to resolve the inevitable disputes over which branch and level of government may be entrusted to decide each of the many questions left open by Article V.

The only possible way to circumvent the problematic prospect of such judicial resolution is to avoid use of the Convention device altogether until its reach has been authoritatively clarified in the only manner that could yield definitive answers without embroiling the federal judiciary in the quest: through an amendment to Article V itself.

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January 17, 1979

Mr. Timothy E. Kraft
Assistant to the President
The White House
Washington D.C.

To Griffin Bell.
Spine-chilling
questions -
J.C.

Dear Tim,

I'm enclosing the memo you asked me to prepare on the subject of the call for a balanced budget convention. It's longer than you or I expected, mostly because the subject seems to me both complex enough and crucial enough to require fairly full treatment. An assistant of mine, David Remes, helped with the background research and made it possible for me to put together something I think you should find useful. At least I hope it does the trick.

I'd be glad to come down to chat about any questions you or the President might have, or to help in any other way that makes sense. The issue is one that's really sneaking up on the country, and the challenge it poses isn't one we can afford to ignore or to defer.

Sincerely,

Laurence H. Tribe

Electrostatic Copy Made
for Preservation Purposes

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MEMORANDUM

January 17, 1979

TO: Tim Kraft
The White House

FROM: Larry Tribe

SUBJECT: A "Balanced Budget" Constitutional Convention

Article V of the Constitution provides that Congress, on the application of the legislatures of two-thirds of the states, shall call a convention for the purpose of proposing amendments. Twenty-two states have already passed resolutions asking Congress to call an Article V Convention to propose a balanced budget amendment. This memorandum responds to your request for my thoughts about the campaign for such a convention.

I. SUMMARY

Holding an Article V Convention to write a balanced budget policy into the Constitution would be unwise for at least two sets of reasons.

First, the Constitution embodies fundamental law and should not be made the instrument of specific social or economic policies -- particularly when those policies could be effected more sensitively and realistically through congressional or executive action within the existing constitutional framework.

Second, it would be a mistake to take the uncharted course of an Article V Convention while the well travelled route of amendment by congressional initiative remains open -- particularly when the nation badly needs to recover from an era of division, uncertainty, and unrest.

Great political caution nonetheless seems due in opposing the current convention campaign. The calls for a balanced federal budget and a limited rate of growth in federal spending reflect at least some sound aspirations and are widely supported. Opposition to an amendment in this area should thus be coupled with a reaffirmation of commitment to fiscal austerity as a policy objective. Moreover, at least in theory, the convention device itself is preeminently democratic, and resistance to its use can easily be made to appear anti-populist. To avoid such an impression, one should oppose an Article V Convention in the fiscal context not as too open-ended an opportunity for the people to alter their Constitution, but rather as a complex, perilous, and needless undertaking -- one likely to generate uncertainties where confidence is indispensable, one likely to invite division and confrontation where unity

is critical, one likely to thwart rather than vindicate the will of the American people and damage rather than mend the fabric of the Constitution.

II. THE IMPROPRIETY OF WRITING A BALANCED BUDGET
POLICY INTO THE CONSTITUTION

A. The Constitution Embodies Fundamental Law and Should Not be Trivialized as the Instrument of Specific Social or Economic Policies.

To endure as a source of unity rather than of division, the Constitution must embody only our most fundamental and lasting values -- those defining the structures by which we govern ourselves, and those proclaiming the human rights government must respect. As Justice Holmes wrote at the turn of the century, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire."* Unlike the ideals rightly embodied in our Constitution, however, fiscal austerity -- though sound as a current goal -- speaks neither to the structure of government nor to the rights of the people. It is symptomatic of this difference that, unlike values infusing the basic structures of fundamental rights, the goal of a balanced budget would have to couch its policies either

* Lochner v. New York, 198 U.S. 45, 75 (1904) (dissenting opinion).

in such flexible and general terms as to be virtually meaningless, or in such rigid and specific terms as to be unthinkably extreme -- or in such great detail as to be wholly out of place in a constitution.

Consider, for example, what it would mean if the Constitution today actually required that the federal budget be balanced. The implications of such a mandate for the most vital programs, for the national security, for economic growth, and for the burdens of federal taxation are staggering to contemplate. Surely the mandate would have to incorporate major exceptions -- loopholes large enough, it would seem, to drive the federal budget through -- in order to avoid disastrous consequences in just such periods as the present. That very fact underscores the folly of engraving the policy of fiscal austerity in the Constitution. Thus the currently popular ideal of a balanced budget should not be frozen into our fundamental law.*

Experience, no less than intuition, counsels against the incorporation of particular social or economic programs into the Constitution -- even assuming that a balanced budget policy could be expressed in terms that would make sense in that document. Slavery is the only economic arrangement our Constitution has ever specifically endorsed, and prohibition

* For contrary views, see, e.g., "Brown Stresses Conservatism in Inaugural," N.Y. Times, Jan. 10, 1979, at A1, col.3 (urging California to become 23d state to apply for balanced budget convention); "Friedman Urges Amendment to Set a Limit on Government Spending," N.Y. Times, Oct. 25, 1976, at 44, col.6.

the only social policy it has ever expressly sought to implement. It demeaned the Constitution to embrace slavery and prohibition not only because one was evil and the other intolerant, but also because neither arrangement expressed the sorts of broad and enduring ideals to which both the Constitution and the country can be committed -- not just over a decade or two, but for centuries. The goal of fiscal austerity expresses no such ideals -- notwithstanding its immediate popular appeal or the long-term soundness of at least some of its premises.

Because the Constitution is meant to express fundamental law rather than particular policies, it should be amended only to modify fundamental law -- not to accomplish partisan goals. Thus Madison described the amendment process not as a mere alternative to the legislative mode, but as a means of correcting the "discovered faults" and "errors" in the Constitution itself.* That was plainly true of the first fifteen amendments. And, of the eleven amendments ratified since Reconstruction, all but two have served the purpose envisioned by Madison. Five have extended the franchise, three have involved presidential eligibility and succession, and one -- permitting a federal income tax -- gave to the federal government a power previously held unconstitutional by the Supreme Court. Of the two exceptional amendments, one attempted to enact a social policy -- prohibition. The other amendment repealed the first.

* The Federalist No. 43, at 296 (J. Cooke ed. 1961).

Thus a balanced budget amendment would be an anomaly not only in view of the Constitution's mission, but also in light of its history.

B. The Amendment Process Should Not be Used to Achieve Aims That May be Better Realized Through Congressional or Executive Action.

Even prohibition was a more appropriate subject for the amendment process than a balanced budget would be. For unlike fiscal policy, which lies at the heart of the congressional mandate, temperance could not be legislated for the nation by Congress without express constitutional authorization. A balanced budget amendment would therefore be objectionable not only because it would transform a specific economic policy into fundamental law, but also because there would be no need to amend the Constitution even if one wished to make the pursuit of that policy the law of the land.

Legislation has in fact been introduced in the last three Congresses promoting the objectives of the balanced budget amendment. The President has worked to serve those objectives as well -- and he has stressed to the public his continuing commitment to them. The matter is indeed much too complex to deal with through the sorts of generalities that belong in a constitution; it calls for the nuances and distinctions that can best be embodied in statutes, regulations, and executive programs.

Needlessly amending the Constitution injures our political system at its core. Once the amendment device had been transformed into a fuzzy substitute for the more focused legislative process, not only would the lawmaking function of Congress be eroded, but the Constitution itself would lose its unique significance as the ultimate expression of fundamental and enduring national values. If the Carter Administration were to continue its drive in Congress for action looking toward a balanced budget at the earliest feasible time, while resisting the abuse of the amendment device threatened by the current convention campaign, the Administration would thus visibly serve the national interest, preventing the Constitution's devaluation.

To be sure, this devaluation of the Constitution would not occur overnight. But until the Constitution had been effectively reduced to a shifting package of legislative commitments, each policy enshrined as an amendment would bind the government far more tightly than ordinary law. Obviously the proponents of the balanced budget amendment desire this very effect, but responsible opinion must resist any such constitutional strait-jacket for the nation. In few areas are flexibility and rapid responsiveness to changing circumstances more vital than in the realms of fiscal and monetary policy. Until the Constitution becomes easier to alter than it has ever been or should ever become, it will remain the least appropriate instrument for American economic policy. For just this reason, even those

sympathetic to its goals have described the balanced budget amendment as a "blunt weapon" that "would be flawed with a certain troubling rigidity" if ratified.*

Perhaps infused with a deeper understanding of the purpose of the amendment device than today's proponents of the balanced budget amendment have displayed, advocates of most earlier Article V Conventions have not sought to achieve through amendment what congressional and executive action could accomplish at least as well. Those advocates pursued ends that simply could not have been achieved without revising the Constitution itself -- for example, the direct election of senators; the prohibition of polygamy; the repeal of the eighteenth amendment; the limitation of presidential tenure; the modification of the presidential treaty-making power; the reversal of constitutional holdings by the Supreme Court involving reapportionment, school prayer, abortion, and busing; and the general revision of the Constitution. Whatever one may think of the specific ends sought by the advocates of those amendments, one cannot fault those advocates for aiming needlessly to circumvent the ordinary channels of change offered by Congress and the Executive Branch, or for tampering with the Constitution when less drastic remedies would not only have sufficed but would have been more focused and effective.

* Editorial, "The New, New Federalism," Wall St. J., Jan. 10, 1979, at 22, col.1.

III. THE ARTICLE V CONVENTION: A RELUCTANT COMPROMISE OF DUBIOUS PRESENT VALUE

Even if it were wise to amend the Constitution in order to mandate a balanced budget, calling an Article V Convention would be an exceedingly unsound means of achieving the desired end. Understanding why this is so requires a brief digression into the history of the convention mechanism.

The Article V Convention device was a compromise between those at the 1787 Constitutional Convention who believed that the states should have unchecked power to amend the Constitution, and those who considered congressional involvement an essential safeguard for groups and interests that might otherwise be sacrificed to the majority's will. The plan of union originally submitted to the Federal Convention by Edmund Randolph of the Virginia delegation stated that "provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."* The underscored clause was rejected by the Committee on the Whole; as Hamilton explained, if the convention process were entirely free of control by Congress, "the State legislatures will not apply for alterations but with a view to increase their own

* I J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 120 (2d ed. 1836) (emphasis added).

powers."* The Article V Convention provision as it was finally accepted marks the compromise, offered by Madison, between those Framers who supported Randolph's view and those who shared Hamilton's.**

Like many compromises among conflicting interests, the Article V Convention provision is strikingly vague. It provides only that "[t]he Congress . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments" One of the few points on which authorities generally agree is that the Article V Convention device is appropriately utilized only in extraordinary circumstances -- when a determined Congress rides roughshod over the interests of the states, or stubbornly refuses to submit for possible ratification an amendment widely desired by the states. Neither is the case today.

As for the hundreds of state applications that have been made to Congress since 1789,*** "[t]here can be no doubt that many [of those] petitions . . . were initiated not in the belief that Congress would convene a Constitutional Convention, but in the hope that the petitions would spur Congress to adopt a suggested proposal as its own and submit it to the States for

* II Farrand, The Records of the Federal Constitutional Convention of 1787, at 558 (rev. ed. 1937).

** Id. at 559-60.

*** A list of such applications made through 1974 is set forth in ABA Special Constitutional Convention Study Committee, "Amendment of the Constitution by the Convention Method Under Article V" 59-69 (1974).

ratification under the [congressional initiative] method of amending the Constitution."* If the current convention drive were meant simply to spur Congress to draft and submit to the states a balanced budget amendment of its own, the nation might not have to face the risks and resolve the riddles of the Article V Convention device. But twenty-two states have already applied to Congress for a convention, and at least twelve more are expected to have applied by late spring this year -- which would trigger a call by Congress for an Article V Convention.**

It is hard to imagine a less opportune moment for such a potentially revolutionary step. The past decade has been among the most turbulent in the nation's history. The Vietnam War, the near-impeachment of a President, political assassinations, economic upheavals -- it is hardly necessary to enumerate the many storms we have weathered. If, as a result of those bitter experiences, it is now time for self-healing and consolidation, for a return to basic concerns and a turning away from confrontation and division, little could be worse for the country than to risk the possible trauma of our first Constitutional Convention since 1787.

Indeed Jefferson, who considered the lack of a Bill of Rights in the Constitution a major defect in the draft originally submitted to the states, told Madison that he would

* Brickfield, Problems Relating to a Federal Constitutional Convention 8 (Staff Report for the House Comm. on the Judiciary, 85th Cong., 1st sess.) (Comm. Print 1957).

** "Theme For '80," Time, Jan. 22, 1979, at 29, col.1.

not oppose the Constitution's adoption -- in order to avoid a second Convention. In calmer times, when national wounds have not been so recently inflicted, and when single-issue disagreements did not run so deep, the risk of another Convention might be worth running -- if the need were sufficiently great and if other avenues of constitutional change had been exhausted. That is a time in which we do not yet live.

Particularly in a period of recovery from an era of unrest, it is vital that the means we choose for amending the Constitution be generally understood and, above all, widely accepted as legitimate. An Article V Convention, however, would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mystery of the most fundamental sort, as the following section will explain.

IV. ANSWERABLE AND UNANSWERABLE QUESTIONS ABOUT ARTICLE V CONVENTIONS

In fairness, one must concede that a few of the questions periodically raised about Article V Conventions do in fact have clear answers. Thus, although questions have from time to time been raised about Congress' duty to call an Article V Convention after two-thirds of the state legislatures have duly petitioned Congress to do so, neither the text nor the history of Article V leaves any reasonable doubt as to the answer: "The

Congress, . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments" In this context, "shall" clearly means "must."* It is equally clear that amendments proposed by any such Convention are to become part of the Constitution "when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as one or the other Mode of Ratification may be proposed by the Congress" Unless three-fourths of the states ratify in accord with the method Congress specifies, no amendment proposed by an Article V Convention can become the law of the land. Finally, although the text of Article V is silent on the point, it is clearly settled that the President has no role to play in the amendment process.

As to amendments initiated in the familiar way -- by a two-thirds vote of both Houses -- a good deal more could be said. But as to the untried Convention route, the preceding paragraph says all that is known or knowable. Nor should one suppose that the remaining matters involve minor technical questions which could readily be settled by Congress or the courts. On the contrary, the process of amending by Convention is characterized by fundamental uncertainties that yield to no ready mechanism of resolution. In an area demanding confidence and certainty, those issues stand as overwhelming obstacles to both.

* See The Federalist No. 85, at 593 (J. Cooke ed. 1961) (Hamilton).

The objection to calling an Article V Convention is based not on misgivings at the prospect of unchecked democracy, nor on any vague apprehension about unsealing a Pandora's box, nor on a reflexive preference for the familiar over the unknown. Inherent in the Article V Convention device is the focused danger of three distinct confrontations of nightmarish dimension -- confrontations between Congress and the Convention, between Congress and the Supreme Court, and between the Supreme Court and the states. However democratic an Article V Convention might be in theory, such a convention would inevitably pose enormous risks of constitutional dislocation -- risks unacceptable while recourse may be had to an alternative amendment process (the congressional initiative) that can accomplish the same goals without running such serious risks.

A. The Risk of Confrontation Between Congress and the Convention.

The primary threat posed by an Article V Convention is that of a confrontation between Congress and the Convention. Upon Congress devolves the duty of calling a convention on application of the legislatures of two-thirds of the states, and approving and transmitting to the states for ratification the text of any amendment or amendments agreed upon by the convention. The discretion with which Congress may discharge this duty is pregnant with danger under even the most salutary conditions.

Specifically, consider the wholly incidental yet critical disagreements that could arise as Congress endeavored in good faith to discharge its Article V duties. With no purpose whatsoever of avoiding its duty, Congress might nevertheless decide procedural questions arguably within its discretion in a manner that frustrated the desire of the states to call and conduct a convention -- by treating some applications as invalid, or by withholding appropriations until the Convention adopted certain internal reforms, or by refusing to treat certain amendments as within the Convention's scope. As a result, the nation might well be subjected to the spectacle of a struggle between Congress and a Convention it refused to recognize -- a struggle that would extend from the Convention's own claim of legitimacy to disputes over the legitimacy of the Convention's proposed amendments. Such a struggle would undoubtedly be judicial as well as political, and thus draw the Supreme Court into the fray. See Sections B and C infra. Considering the seriousness with which Congress and the Convention would take each other's challenge in light of the monumental stakes -- constitutional power -- it is unlikely that either side would surrender before the contest had deeply bruised the nation. Such a contest between Congress and the Convention, which could flare from a single procedural dispute in the balance of which hung the Convention's fate, the nation could ill afford.

B. The Risk of Confrontation Between Congress and the Supreme Court.

In the event of a dispute between Congress and the Convention over the congressional role in permitting an Article V Convention to proceed, the Supreme Court would almost certainly be asked to serve as referee. Because the Court would be obliged to protect the interests of the states in the amendment process, it cannot be assumed that the Court would automatically decline to become involved on the ground that the dispute raised a non-justiciable political question. In any event, depending upon the political strength of the parties to the dispute, a decision to abstain would amount to a judgment for one side or the other. Like an official judgment on the merits, such a practical resolution of the controversy would leave the Court an enemy either of Congress or of the Convention and the states that called it into being.

Even in the absence of such a dispute over the Convention's initiation and completion, the Court could become embroiled in a confrontation with Congress over the limits of congressional power under Article V. For example, a bill introduced in the last Congress by Senators Helms, Goldwater, and Schweiker, entitled the "Federal Constitutional Procedures Act," S.1880, 95th Cong., 1st Sess. §7(a) (1977), provided, in part: "A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall

be elected at large and one delegate shall be elected from each congressional district in the manner provided by law." One may readily guess that, were Congress to apply such a provision in the exercise of its Article V powers, the Supreme Court would be asked to decide whether the one-person, one-vote rule is applicable to a national constitutional convention.* Similarly, a rule prescribed by Congress providing that "a convention called under this Act may propose amendments to the Constitution by a vote of the majority of the total number of delegates to the convention," S.1880, supra, §10(a), might be challenged as an unconstitutional attempt to regulate the internal procedures of an Article V Convention.** Whether the Court, once called upon to vindicate the one-person, one-vote principle or the autonomy of a convention, would invalidate an act of Congress passed pursuant to Article V is no doubt an open question. But the stress that a decision either way would place upon our system is another unwelcome possibility inherent in the Article V Convention device. Like the risk of confrontation between Congress and the Convention, the possibility of conflict between the Supreme Court and Congress is, of course, not peculiar to the Article V Convention device. But this device, which carries the potential for such grave clashes of power, should be utilized only if no alternative process is at hand.

* See ABA Special Constitutional Convention Study Committee, "Amendment of the Constitution by the Convention Method Under Article V" 34 (1974) (concluding that the rule is applicable) [hereinafter cited as ABA Report].

** See ABA Report, supra, 19-20 (characterizing such an attempt as unwise and of questionable validity).

C. The Risk of Confrontation Between the Supreme Court and the States.

A decision upholding against challenge by one or more states an action taken by Congress pursuant to Article V would, needless to say, be poorly received by the states involved. Truly disastrous, however, would be any result of a confrontation between the Supreme Court and the states over the validity of an amendment proposed by their convention. Yet the convention process could, quite imaginably, give rise to judicial challenges that would cast the states into just such a conflict with the Supreme Court.

It is true that such conflicts are theoretically possible even when the more familiar amendment route -- the congressional initiative -- is followed. But in that context it has been settled for over half a century that Congress exercises exclusive control over the mode of an amendment's ratification, and thus has the last word on such matters as attempted rescission and the timeliness of ratification.* When the familiar route is taken, therefore, the established preeminence of Congress militates against any divisiveness arising from a conflict involving the states -- although even along this familiar route passions may sometimes run high, as the recent debates over extension and rescission of the Equal Rights Amendment demonstrated. But when the alternative course of an Article V Convention

* See Dillon v. Gloss, 256 U.S. 368 (1921); Coleman v. Miller, 307 U.S. 433 (1939).

is chosen, soothing assertions of congressional supremacy are bound to be undercut by reminders that the Convention device was, after all, meant to evade control by Congress. And, once such battle lines are drawn where Congress' authority is not widely recognized, the ensuing debate is sure to be vehement.

D. The Absence of Acceptable Answers in Such Confrontations.

Having indicated at the outset of Part IV of this memorandum that a few questions about the Article V Amendment device do indeed have clear answers, I would reiterate here that a large number of critical questions are completely open. These are questions that could well arise in one or more of the confrontations sketched above. As to each of those questions, one can find a smattering of expert opinion and some occasional speculation. But for none of them may any authoritative answer be offered. To make the point forcefully, one need only present a catalogue of the basic matters on which genuine answers simply do not exist -- the matters as to many of which protracted dispute could surely be expected:

1. The Application Phase.

- a. Must both houses of each state legislature take part in making application to Congress?
- b. By what vote in each house of a state legislature must application to Congress be made? Simple majority? Two-thirds?

- c. May a state governor veto an application?
- d. When, if ever, does a state's application lapse?
- e. Must every application propose a specific subject for amendment, or may a state apply to revise the Constitution generally?
- f. What of applications proposing related but slightly different subjects or amendments? By what criteria are distinct applications to be aggregated?
- g. May a state rescind its application? If so, within what period and by what vote?
- h. What role, if any, could a statewide referendum have in mandating or forbidding an application or a rescission?

MAY CONGRESS AUTHORITATIVELY ANSWER ANY OR ALL OF THE ABOVE QUESTIONS? MAY THE STATES? COULD SUCH ANSWERS APPLY TO APPLICATIONS ALREADY MADE? WHAT ROLE, IF ANY, WOULD COURTS PLAY IN ANSWERING SUCH QUESTIONS? EVEN THESE QUESTIONS (ABOUT WHO HAS THE POWER TO DECIDE) MUST BE DESCRIBED AS UNANSWERABLE.

2. The Selection and Function of Delegates.

- a. Who would be eligible to serve as a delegate?
- b. Must delegates be specially elected? Could Congress appoint its own members?
- c. Are states to be equally represented, as they were in the Convention of 1787?
- d. Would the one-person, one-vote rule apply instead, as it does to all legislative bodies except the Senate?
- e. Would delegates be committed to cast a vote one way or the other on a proposed amendment?
- f. Would delegates enjoy immunities parallel to those of members of Congress?
- g. Are delegates to be paid? If so, by whom?

WHICH OF THESE QUESTIONS, IF ANY, MAY CONGRESS AUTHORITATIVELY ANSWER? HOW MUCH SUPERVISION MAY CONGRESS EXERCISE OVER THE SELECTION AND FUNCTION OF DELEGATES? WHAT SUPERVISORY ROLE WOULD THE COURTS PLAY?

3. The Convention Process.

- a. May Congress prescribe any rules for the Convention or limit its amending powers in any way? In 1911, Senator Heyburn opined that, "[w]hen the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater

than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it."* Was he right or wrong? If he was right, then an Article V Convention could propose amendments on any imaginable subject.

- b. How is the Convention to be funded? Could the power to withhold appropriations be used to control the Convention?
- c. May the Convention remain in session indefinitely? May it agree to reconvene as the need arises?

AGAIN: UNKNOWNABLE ARE THE RESPECTIVE ROLES OF CONGRESS, THE STATES, AND THE COURTS IN RESOLVING THESE MATTERS.

4. Ratification of Proposed Amendments.

- a. To what degree may Congress -- under its Article V power to propose a "Mode of Ratification," or ancillary to its Article V power to "call a Convention," or pursuant to its Article I power under the Necessary and Proper Clause -- either refuse to submit a proposed amendment for ratification or decide to submit such an amendment under a severe time limit? What if Congress and the Convention disagree?

* 46 Cong. Rec. 2769 (Feb. 17, 1911).

- b. May Congress permit or prohibit rescission of a state's ratification vote? May the Convention? What if Congress and the Convention disagree?

UNKNOWABLE ONCE AGAIN ARE THE RESPECTIVE ROLES OF CONGRESS, THE STATES, AND THE COURTS IN PROVIDING A DEFINITIVE RESOLUTION IN THE EVENT OF DISAGREEMENT.

V. CONCLUSION

The call for an Article V Convention to write a balanced budget requirement into the Constitution reflects profoundly misguided views of how national fiscal policy should be implemented and how the nation's fundamental law should be amended. Of doubtful wisdom at any time, such a call especially misreads the needs of the country today. I would hope it also misreads the country's mood -- a mood that presidential leadership can help to shape.

STANFORD LAW SCHOOL

November 16, 1991

Personal Statement, Professor Gerald Gunther

My major concern is with constitutional processes. The convention method of amending the Constitution is a legitimate one under Article V: it is an appropriate method for proposing amendments when two-thirds of the state legislatures, with appropriate awareness of and deliberation about the uncertainties and risks of the convention route, choose to apply to Congress to call a convention. But the ongoing balanced budget convention campaign has not been a responsible invocation of that method. Instead, between 1976 and 1979, about half of the state legislatures adopted applications without any serious attention to the method they were using, in an atmosphere permeated with wholly unfounded assurances by those who lobbied for the convention route that a constitutional convention could easily and effectively be limited to consideration of a single issue, the budget issue. In my view, a convention cannot be effectively limited. But whether or not I am right, it is entirely clear that we have never tried the convention route, that scholars are divided about what, if any, limitations can be imposed on a convention, and that the assurances about the ease with which a single issue convention can be had are unsupportable assurances.

I find it impossible to believe that it is deliberate, conscientious constitution-making to engage in a process that began in the 1970s with a mix of inattention, ignorance and narrow, single-issue focus; that might well expand to a broader focus during the campaigns for electing convention delegates; and that would not blossom fully into a potentially broad constitutional revision process until the convention delegates are elected and meet. There is no denying the fact that, if the present balanced budget convention campaign succeeds in eliciting the necessary applications from 34 state legislatures, the convention call will be triggered by inadequately considered state applications, for the vast preponderance of the legislative applications rest on an entire absence of consideration of the risks of a convention route. In my view, that constitutes a palpable misuse of the Article V convention process. The convention route, as I have said, is legitimate when deliberately and knowingly invoked. The ongoing campaign, by contrast, has produced a situation where inattentive, ignorant, at times cynically manipulated state legislative action threatens to trigger a congressional convention call. I cannot support so irresponsible an invocation of constitutional processes.



Gerald Gunther,
William Nelson Cromwell Professor of Law

Crown Quadrangle
Stanford, California
94305



Statement of Professor Neil H. Coan

I agree almost entirely with the foregoing memorandum.

My understanding of the Federal Convention is that it is a general convention; that neither the Congress nor the States may limit the amendments to be considered and proposed by the Convention; that the Convention may be controlled in subject matter only by itself and by the people, the latter through the ratification process. My understanding is further that the States and Congress may suggest amendments and the people give instructions, but that such suggestions and instructions are not binding. Thus, I believe that should the Congress receive thirty-four applications that clearly and convincingly are read as applications for a general convention (whether or not accompanied by suggested amendments), then Congress must call a Federal Convention.

While it is plainly appropriate to examine the traditional historical sources -- text, debates, papers and pamphlets, correspondence and diaries -- it is plain too that these sources must be examined, and other sources chosen, within the context of our evolving theory of government. As I understand that theory, the Federal Convention is the people by delegates assembled, convened to consider and possibly propose changes in our fundamental structures and relationships -- indeed, in our theory of government itself --, and controlled only by the people and certainly not by other bodies the tasks and views of which may disqualify them from fundamental change and which themselves may be the subjects and objects of fundamental change.



THE
UNIVERSITY
OF UTAH

COLLEGE OF LAW
SALT LAKE CITY, UTAH 84112

November 29, 1983

I here offer brief comments of my own. The proponents are trying to blend the two methods of constitutional change made available by Article Five. They are saying that they do not trust a convention, so they propose to resort to such a body. That is incongruous. They may not have it both ways.

It is to be noted that in the American tradition a constitutional convention is not a constituent assembly -- a body competent both to draft and to adopt a constitution. In such an assembly is reposed sovereignty. The state antecedents of the Federal Constitution of 1787 all contemplated voter ratification. In this context it is not unreasonable to conclude that the members of the 1787 federal convention perceived such a convention to be competent to have the widest range of action in proposing amendments. Of course the very text confirms this by use of the plural "amendments." A convention might propose a single amendment but it would clearly have a wider range.

If what proponents desire is a particular change, the state legislative initiation method is adapted to the purpose. If more general review and possible changes are contemplated the convention method is plainly indicated.

Jefferson B. Fordham

Notre Dame Law School
Notre Dame, Indiana 46556

Direct Dial Number
219-239-5667

December 7, 1987

Mr. Don Fotheringham
Save the Constitution Committee
Box 4582
Boise, ID 83704

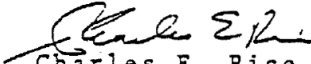
Dear Mr. Fotheringham:

You have asked my opinion the effort to rescind the Idaho legislature's approval of the proposed constitutional amendment to require a balanced federal budget. It would be within the power of the legislature, in my opinion, to rescind its approval. The courts could possibly regard the efficacy of that rescission as a political question committed by the Constitution to the discretion of Congress. Nevertheless, even if it were not judicially enforceable, such a rescission would be within the power of the Idaho legislature and it ought to be regarded by Congress as binding.

On the merits of the rescission, I support it for the reasons stated in the enclosed article from the April 22, 1987, issue of The New American.

I hope this will be helpful. If there is any further information I can provide, please let me know.

Sincerely,


Charles E. Rice
Professor of Law

Enclosure

November 25, 1991

STATEMENT OF PROFESSOR CHRISTOPHER BROWN

The most alarming aspect of the fact that 32 of the necessary 34 states have called for a constitutional convention is the threat this development poses to a system that has worked so well for nearly 200 years. In spite of the fact that 3 states have rescinded their calls for a constitutional convention in recent years, convention supporters have clearly stated their intent to lull the final 2 states into passing convention requests, thereby forcing the U.S. Supreme Court into either upholding the state rescissions or mandating the first federal constitutional convention since 1787. We are on the brink of encountering the risks of radical surgery at a time when the patient is showing no unusual signs of difficulty. If this country were faced with an uncontrollable constitutional crisis, such risks might be necessary; but surely they have no place in the relatively placid state of present day constitutional affairs. Now is not the time for the intrusion of a fourth unknown power into our tripartite system of government.

After 34 states have issued their call, Congress must call "a convention for proposing amendments." In my view the plurality of "amendments" opens the door to constitutional change far beyond merely requiring a balanced federal budget. The appropriate scope of a convention's agenda is but one of numerous uncertainties now looming on the horizon: Need petitions be uniform, limited or general? By whom and in what proportion are the delegates to be chosen? Who will finance the convention? What role could the judiciary play in resolving these problems? The resolution of these issues would inevitably embroil the government in prolonged discord.

Assembling a convention and thereby encountering and attempting to resolve these questions would surely have a major effect upon the ongoing operations of our government. Unlike the threats posed by Richard Nixon's near impeachment, the convening of a convention could not necessarily be compromised to avoid disaster. It would surely create a major distraction to ordinary concerns, imposing a disabling effect on this country's domestic and foreign policies. Only the existence of an actual breakdown in our existing governing structure warrants such a risk-prone tinkering with out constitutional underpinnings. Now is not the time to take such chances.

SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

727 East 26th Street • Austin, Texas 78705 • (512) 471-5151

RECEIVED APR 21 1987

April 16, 1987

The Honorable Clint Hackney
House of Representatives
Box 2910
Austin, Texas 78769

Dear Representative Hackney:

The law library has provided me with a copy of H.C.R. 69, which you introduced in the Legislature in order to have the Legislature rescind the petition by the 65th Legislature asking Congress either to adopt a balanced budget amendment or to call a constitutional convention for the purpose of proposing such an amendment. I enthusiastically support your resolution.

A balanced budget is something devoutly to be wished. I doubt very much, however, whether amending the Constitution is the way to get it. I feel quite certain that even opening the door to the possibility of a constitutional convention would be a tragedy for the country.

We celebrate this year the Bicentennial of the Constitution of the United States. For 200 years it has served us well. I start with a strong presumption against any amendment to it and with an absolutely conclusive belief that we should not have a constitutional convention. Your resolution correctly says that scholarly legal opinion is divided on the potential scope of a constitutional convention's deliberations. I think that is an accurate statement. My own belief, however, is that a constitutional convention cannot be confined to a particular subject, and that anything it adopts and that the states ratify will be valid and will take effect. We have only one precedent, the Convention in Philadelphia in 1787. It was summoned "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several Legislatures such alterations and provisions therein." From the very beginning it did not feel confined by the call and gave us a totally new Constitution that completely replaced the Articles of Confederation. I see no reason to believe that a constitutional convention 200 years later could be more narrowly circumscribed.

The Honorable Clint Hackney

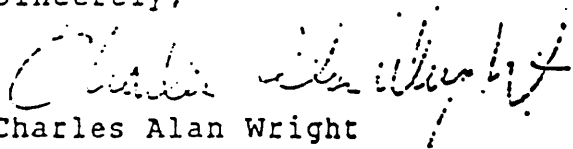
April 16, 1987

Page 2

We will have a balanced budget when we have a President and Congress with the determination to adopt such a budget. I hope that day comes soon, but I hope even more that the day never comes when the country is exposed to the divisiveness and the possible untoward results of a constitutional convention.

I hope you are successful in persuading your colleagues in the House and Senate to adopt H.C.R. 69.

Sincerely,


Charles Alan Wright

BRIGHAM YOUNG
UNIVERSITY

REX E LEE
PRESIDENT

THE GLORY OF GOD
IS INTELLIGENCE

December 18, 1989

Representative Reese Hunter
4577 Wellington Street
Salt Lake City, UT 84117

Dear Mr. Hunter:

This is in response to your letter of December 12 in which you asked for my opinion concerning whether under Article V of the United States Constitution, a constitutional convention called to consider a particular issue could be limited either by congressional directive or otherwise to that single issue.

The only safe statement that could be made on this subject is that no one knows, but the only relevant precedent would indicate that the convention could not be so limited. Anyone who purports to express a definitive view on this subject is either deluded or deluding. As a result, in determining the steps you should take as a responsible representative of the people of Utah, you and other members of the legislature should realize that the risks are very real that (1) just as happened in 1787, the convention might not in fact limit itself as instructed by Congress and (2) the convention's forays into areas forbidden them by Congress might eventually be upheld.

In short, if the question is whether a runaway convention is assured, the answer is no, but if the question is whether it is a real and serious possibility, the answer is yes. In our history we have had only one experience with a constitutional convention, and while the end result was good, the convention itself was definitely a runaway.

I hope this is helpful to you.

Sincerely,



Rex E. Lee

REL:jn

GUEST OPINION

Constitutional convention not what U.S. needs

By Richard H. Seamon

Idaho may soon join the states that are petitioning Congress for a convention to amend the U.S. Constitution. Most folks behind these petitions act with a conviction that the words of the Constitution matter, a conviction shared by the recently departed Justice Antonin Scalia. Before supporting a constitutional convention, therefore, Idahoans should know what Justice Scalia said on the subject in 2014: "I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?"

Scalia's opposition reflects his steadfast adherence to the words of the Constitution. Scalia was worried because the Constitution devotes so few words to the convention process. All it says is that Congress "shall call" a convention when asked to do so by the legislatures of two-thirds (today 34) of the states; constitutional amendments proposed by that convention take effect when ratified by three-fourths (today 38) of the states.

Most importantly, the Constitution does not address how to control what might come out of a convention. As former Chief Justice Warren Burger explained, "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." Likewise, individual states might try to limit their delegates' authority at a convention by giving them detailed instructions beforehand. But it is unclear how limits imposed by Congress or the states could be enforced. This is why Scalia, Burger and other jurists of all ideological stripes fear a "runaway convention."

History supports their fear. The convention in Philadelphia that framed our Constitution in 1787 was arguably a runaway convention. At least some of its delegates ignored their states' instructions. The convention as a whole ignored Congress's resolution urging it only to suggest changes to the Articles of Confederation. Instead, the Philadelphia convention proposed an entirely new document that created an entirely new system of government.

Of course, the new system proved far superior. But the 1787 convention in Philadelphia benefited from circumstances that would not exist today. For example, it operated in total secrecy, a circumstance that we would not tolerate today. Today, the public would demand an open convention, which would labor under the constraints of continuous tweeting and real-time public polling. Plus, the Philadelphia convention of 1787 was led by farsighted people – George Washington, Alexander Hamilton and James Madison – whose equal would be hard to find today.

Besides the risk of a runaway convention, one can't help wonder whether a constitutional convention addresses the real problem. One group supporting a convention, the "Convention of States," says the problem is that "[t]he federal government has overreached its constitutionally established boundaries." If that's true, the source of the problem isn't the Constitution; it's the people in the federal government who aren't obeying it. Instead of changing the Constitution, we should get rid of those people, by using a process in which Justice Scalia had great faith: the ballot box.

As to calling a convention, we should borrow Justice Scalia's word and just say, "Whoa."

Richard H. Seamon is a professor of law at the University of Idaho College of Law. He teaches and writes in the area of constitutional law.