

November 28, 2018

Dear members of the Government Oversight and Reform Committee,

On behalf of Common Cause's more than 25,000 members and supporters in Ohio, I am writing to urge you to vote against SJR 1. Common Cause is a nonpartisan grassroots organization dedicated to upholding the core values of American democracy. In the last few years, Common Cause has successfully helped rescind Article V convention applications in Delaware, New Mexico, Maryland, and Nevada and lobbied against passing Article V convention applications in states across the country, including Texas, Hawaii, Illinois, Colorado, Nebraska, Kentucky, Wisconsin, Connecticut, and Rhode Island. Why? Because these resolutions call for a dangerous Article V constitutional convention that could put every American's fundamental constitutional rights and civil liberties at risk. A constitutional convention would give unelected delegates and special interest groups the power to potentially rewrite our entire constitution.

One of the nation's foremost constitutional law scholars, Dean Erwin Chemerinsky, recently wrote that "no one knows how the convention would operate. Would it be limited to considering specific proposals for change offered by the states or could it propose a whole new Constitution? After all, the Constitutional Convention in 1787 began as an effort to amend the Articles of Confederation, and the choice was made to draft an entirely new document."<sup>1</sup>

Simply put, there are no rules governing an Article V convention in the U.S. Constitution. A constitutional convention would open a Pandora's Box of problems that are impossible to predict and could not be halted or mitigated once introduced.

Several Supreme Court justices have warned about the potential outcomes of constitutional conventions. Former Chief Justice Warren Burger wrote that a "Constitutional Convention today would be a free-for-all for special interest groups."<sup>2</sup>

Former Justice Arthur Goldberg wrote that "[t]here is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights."<sup>3</sup> Justice Antonin Scalia said that he "certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?"<sup>4</sup>

<sup>1</sup> Erwin Chemerinsky, "Is It a Good Time to Overhaul Constitution?," Orange County Register, Jan. 21, 2016, <http://www.ocregister.com/articles/constitutional-700670-convention-constitution.html>.

<sup>2</sup> Robert Greenstein, "A Constitutional Convention Would be the Single Most Dangerous Way to 'Fix' American Government," Wash. Post, Oct. 21, 2014, <https://www.washingtonpost.com/posteverything/wp/2014/10/21/a-constitutional-convention-could-be-the-single-most-dangerous-way-to-fix-american-government/>.

<sup>3</sup> *Id.*



Common Cause is particularly concerned that there are so many questions about a constitutional convention that are, in the words of one Constitutional Scholar,

*“beyond resolution by any generally agreed upon political or legal method.”*<sup>5</sup>

For example, the following questions have no agreed upon answer:

1. May a state application insist that Congress limit the convention’s mandate to a single topic, or a single amendment?
2. May the Convention propose amendments other than those it was called to consider?
3. May Congress prescribe rules for the convention or limit its powers in any way?
4. May the Convention set its own rules, independent of Article V, for how amendments that it proposes may be ratified – which is what the Philadelphia Convention did? The Philadelphia Convention was called under a scheme that said ratification required unanimity among the states – but they departed from that. What if ratification is decided by a national referendum?
5. Are the states to be equally represented, or does the one-person, one-vote rule apply? What about the District of Columbia? Do the citizens of the District have a role in a convention?
6. Could delegates be bound in advance by legislation or referendum to propose particular amendments or vote in a particular way? If delegates are chosen by lottery, it’s hard to imagine how they could be bound in advance.
7. Could the convention propose amendments by a simple majority, or a supermajority of 2/3?
8. If each state gets one convention vote, must delegates representing a majority of the population nonetheless vote for an amendment in order for it to get proposed?
9. Conversely, if the convention uses the one-person, one-vote formula, must the delegations of 26 states – perhaps including the District of Columbia – vote in favor of a proposed amendment?
10. What role, if any, would the Supreme Court play in resolving conflicts among Congress, state legislatures, governors, referenda, and the convention itself? Can we rely on the Court to hold things in check? The Court has assumed that

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<sup>4</sup> *Id.*

<sup>5</sup> Laurence Tribe, “Conference on the Constitutional Convention: Legal Panel,” Harvard Law School, Sept. 24, 2011, available at <https://www.youtube.com/watch?v=ZbJ7NOF3HRU&t=52m56s> (uploaded Oct. 6, 2011).



questions about the ratification process are non-justiciable political questions that it can't get involved in.

It risks too much to discover the answers to the above questions after-the-fact.

Common Cause is one of 240 organizations that is opposed to calling an Article V convention.<sup>6</sup> There is far too much at stake to risking putting the entire Constitution up for a wholesale re-write as part of a constitutional convention – including all of the civil rights, protections, and liberties that we enjoy today. For these reasons, I urge you to vote against SJR 1.

For more information, below is a list of quotes from legal scholars and law professors warning of the dangers of an Article V convention.

Sincerely,



Catherine Turcer

Executive Director, Common Cause Ohio

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<sup>6</sup> "Constitutional Rights and Public Interest Groups Oppose Calls for an Article V Constitutional Convention," April 14, 2017, available at <http://www.commoncause.org/issues/more-democracy-reforms/constitutional-convention/constitutional-rights-and.pdf>



## Legal Scholars Warn of the Dangers of an Article V Convention

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

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

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

"First of all, we have developed orderly procedures over the past couple of centuries for resolving [some of the many] ambiguities [in the Constitution], but no comparable procedures for resolving [questions surrounding a convention]. Second, difficult interpretive questions about the Bill of Rights or the scope of the taxing power or the commerce power tend to arise one at a time, while questions surrounding the convention process would more or less need to be resolved all at once. And third, the stakes in this case in this instance are vastly greater, because what you're doing is putting the whole Constitution up for grabs." – [Laurence Tribe](#), **professor of constitutional law at Harvard Law School**

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

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

"Danger lies ahead. Setting aside the long odds, if California and 33 more states invoke Article V, there's a risk that we'd end up with a "runaway" convention, during which delegates would propose amendments on issues including abortion, gun rights and immigration." – [Rick Hasen](#), **Chancellor's Professor of Law and Political Science at the University of California, Irvine**

"Holding a Constitutional convention when the U.S. is embroiled in extremely toxic, uninformed and polarized politics is a really, really bad idea." – [Shelia Kennedy](#), **professor of law and policy at Indiana University Purdue University Indianapolis**



"But no rule or law limits the scope of a state-called constitutional convention. Without established legal procedures, the entire document would be laid bare for wholesale revision. Article V itself sheds no light on the most basic procedures for such a convention. How many delegates does each state get at the convention? Is it one state, one vote, or do states with larger populations, like California, get a larger share of the votes? The Supreme Court has made at least one thing clear — it will not intervene in the process or the result of a constitutional convention. The game has neither rules nor referees." - [McKay Cunningham](#), professor of law at Concordia University

"The result will be a disaster. I hate to think of the worst-case scenario. At best, the fight over every step along the way would consume our country's political oxygen for years." – [David Marcus](#), professor of law at the University of Arizona

"At present, there are no rules regarding who can participate, give money, lobby or have a voice in a constitutional convention. There are no rules about conflicts of interest, disclosure of who is giving or expending money. No rules exist that address political action committees, corporate or labor union involvement or how any other groups can or should participate. Not only might legitimate voices of the people be silenced by convention rules, but special interests may be given privilege to speak and affect the deliberations...there are no rules limiting what can be debated at a constitutional convention. Given the potential domination by special interests, who knows the result?" - [David Schultz](#), political science and election law professor at Hamline University

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

"But nothing in the Constitution limits such a convention to the issue or issues for which it was called. In other words, anything and everything could be on the table, including fundamental constitutional rights. Nor are there any guarantees about who would participate or under what rules. Indeed, for these reasons, no constitutional convention has been called since the first in 1787." - [Helen Norton](#), professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law at the University of Colorado, and David Super, professor of law at Georgetown University

"The lack of clear rules of the road, either in the text of the Constitution itself or in historical or legal precedent, makes the selection of the convention mechanism a choice whose risks dramatically outweigh any potential benefits." – [Richard Boldt](#), professor of law at the University of Maryland

"We live in deeply partisan times. There are no certainties about how a constitutional convention would play out, but the most likely outcome is that it would deepen our partisan divisions. Because there are no clear constitutional rules defining a convention's procedures, a convention's "losers" may deem illegitimate any resulting changes. Regardless of the ultimate outcome, the process itself would likely worsen our already vicious national politics." – [Eric Berger](#), associate dean professor of law at the University of Nebraska College of Law

"There are no such guarantees. This is uncharted territory...We should not now abandon the very document that has held us together as a nation for over two and one quarter centuries. Rewriting the Constitution is a dangerous errand that would not only unravel the legal ties that have kept us together



for so long but would also undermine our sense of national identity and the way that view ourselves as a people.” – [William Marshall](#), **professor of law at University of North Carolina**

“Terrible idea... Today’s politicians don’t have the timeless brilliance of our framers. If we were to rewrite our constitution today, we wouldn’t get a particularly good one.” – [Adam Winkler](#), **professor of constitutional law and history at the University of California, Los Angeles**

“I believe it’s a time for constitutional sobriety. It’s a time to keep our powder dry and not to move on an uncharted course. We are not the founding fathers. This would be disastrous.” – [Toni Massaro](#), **constitutional law professor at the University of Arizona**

“Having taught constitutional law for almost 40 years, and having studied constitutions from around the globe, I have difficulty imagining anything worse.” - [Bill Rich](#), **professor of law at Washburn University in Topeka, Kansas**

“There are no constitutional limits on what the convention could do, no matter what the states say going into it.” - [David Schwartz](#), **professor of law at the University of Wisconsin Law School**

“The Constitution allows for the calling of conventions on a petition of enough states, but not limited conventions of enough states. If the delegates decide they don’t want to be bound by the (state) resolution, they are right that they can’t be bound.” - [Richard H. Fallon Jr.](#), **constitutional law professor at Harvard University**

“Once you open the door to a constitutional convention, there are no sure guidelines left. This is the constitutional equivalent of opening a can of worms.” - [Miguel Schor](#), **constitutional law professor at Drake University School of Law**

“Thus, neither the states nor Congress may limit the convention to specific subjects. While the goal to propose a balanced budget amendment may provide guidance to the convention, it would not have the force of law... Put simply, the rewards of any constitutional change is not worth the risks of a convention.” - [Sam Marcossou](#), **professor of law at the University of Louisville**

“Even more frightening is that the entire Constitution will be in play during a convention. The First Amendment could disappear, so could gun rights. There is no guarantee that any of our current constitutionally protected rights would be included in a new constitution. The only guarantee is that all of those rights would be imperiled.” - [Mark Rush](#), **the Waxberg Professor of Politics and Law at Washington and Lee University in Lexington**

“Most significantly, we advise the Legislature that a federal constitutional convention called with this resolution could potentially open up each and every provision of the United States Constitution to amendment or repeal. In other words, a federal constitutional convention could propose amendments to eliminate the protections of free speech; the protections against racial discrimination; the protections of freedom of religion; or any of the other myriad provisions that presently provide the backbone of American law.” – [March 2018 legislative testimony of Russell Suzuki, Acting Attorney General, and Deirdre Marie-Iha, Deputy Attorney General, of the state of Hawaii](#)

“Whatever one thinks about these proposed amendments, trying to pass them through an Article V convention is a risky business. The Constitution does not specify how the delegates for such a convention would be chosen, how many delegates each state would have, what rules would apply at



the convention or whether there would be any limits on what amendments the convention could consider. A convention that was called to address a specific issue, such as budget deficits, might propose changes to freedom of speech, the right to keep and bear arms, the Electoral College or anything else in the Constitution. There is no rule or precedent saying what the proper scope of the convention's work would be." - Allen Rostron, **associate dean for students, the William R. Jacques Constitutional Law Scholar, and a professor at the University of Missouri**

"Whether I like or dislike the specific proposal is not the point — the point is that a constitutional convention is a risky and potentially dangerous way to propose amendments." - Hugh Spitzer, **professor of law at the University of Washington School of Law**

