

Who say that:

A CONSTITUTIONAL CONVENTION

- CANNOT BE LIMITED TO A SINGLE ISSUE

* CAN BECOME A RUNAWAY —

PROPOSING CHANGES TO THE MOST
BASIC STRUCTURE OF GOVERNMENT
AND THE BILL OF RIGHTS???

See their own words in the following pages

Two former U. S. Supreme Justices:

Chief Justice Warren Burger

Associate Justice Arthur Goldberg

Retired U. S. District Judge Bruce Van Sickle

Eight Nationally Reputed Professors of Law

Lawrence Tribe, Harvard University Law School
Gerald Gunther, William Cromwell Professor of Law, Stanford University
Professor Neil Cogan, School of Law, Southern Methodist University
Jefferson Fordham, College of Law, Utah State University
Charles Rice, Professor of Law, Notre Dame Law School
Rex Lee, Professor of Law and President of Brigham Young University
Professor Christopher Brown, University of Maryland School of Law
Charles Wright, School of Law, The University of Texas at Austin

*presented by George Detweiler
in support of HJR 38*

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

CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

June 22, 1988

Dear Phyllis:

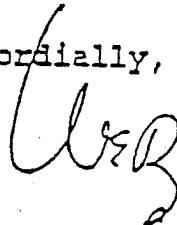
I am glad to respond to your inquiry about a proposed Article V Constitutional Convention. I have been asked questions about this topic many times during my news conferences and at college meetings since I became Chairman of the Commission on the Bicentennial of the U.S. Constitution, and I have repeatedly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

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

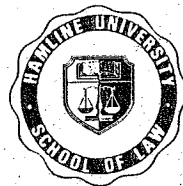
convention when he said an Article V national convention would "give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of that flame which has 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.

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).

HAMLIN LAW REVIEW



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

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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.

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

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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.