

**Testimony**

**in Support of**

**SCR 4012**

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## TESTIMONY FOR SCR 4012

**The current political climate raises the possibility of grave consequences of an Article V convention.**

Every few years new batches of legislation fly across the desks of state legislators to apply to Congress for an Article V convention. People on the left and the right have seized on a constitutional convention as a silver bullet.

Article V of the Constitution requires Congress to call a convention on the application of two-thirds of the states (currently 34). Conservatives imagine a nationwide ban on abortion, a more robust Second Amendment, and a balanced-budget amendment that will force cuts in social programs like unemployment insurance and food assistance. Progressives envision strict campaign finance reform, abolishing the Electoral College, and dumping the Second Amendment outright.

**Next: It Might Happen Again as We Imagined It Happened Before!**

Otherwise stated, "An amendments convention is a constitutional convention. We've only had one constitutional convention and it exceeded its mandate. It 'ran away' and that could happen again."

A very quick answer to this claim is: "This isn't 1787. That convention met in secrecy and no one could follow its proceedings. Today the convention proceedings would likely be open and televised so state lawmakers could watch them 24/7. Or perhaps the delegates might decide to keep their proceedings secret till the end of the convention.

Assuming Congress cannot limit the scope of an Article V Convention called by state legislatures, debate still exists regarding whether the states have this power. Article V provides no guidance regarding what power the states have beyond obligating Congress to "call a Convention for proposing Amendments."

Some scholars argue that the text of Article V bars the states from limiting the Convention to a specific issue or amendment. The argument is that the language, "Congress . . . shall call a Convention for proposing *Amendments*" (emphasis added), indicates that an "Article V Convention has the power to consider various issues and to submit various amendments." Further, constitutional scholars suggest that Article V does not allow states to apply for *an amendment*, but rather authorizes states to apply for a *Convention* for proposing amendments. Thus,

scholars argue that states cannot apply for a Convention for a specific amendment, but rather can only oblige Congress to hold a Convention, where any subsequently proposed amendment could be proposed and voted on.

Florida Senator Marco Rubio wants a Constitutional Convention. So do lefty pundits and right-wing talk show hosts. And for the past few years, talk show host Mark Levin has been campaigning for a convention with broader conservative goals citing "Washington's refusal to place restrictions on itself." "Congress might try to limit the agenda to one amendment or to one issue, but there is no way to assure that the Convention would obey," wrote the late Chief Justice Warren Burger. Recently, Glenn Beck withdrew his support for such a convention.

Article V 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 nothing 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).

**Finally, we should take into account the vast opposition to an Article V convention:**

On just one online site, I found quotes from 40 legal scholars from across the nation opposing an Article V convention. I have given these to each of you, and I have underlined pertinent parts in each.

I strongly urge each of you to vote for SCR 4012 to rescind all calls for Congress to call an Article V convention.

3

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

Legal scholars from across the political spectrum agree that there is no way to limit the scope of an Article V convention and a new constitutional convention could be a dangerous process.

“[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)

“Questions about such a convention have been debated for years by legal scholars and political commentators, without resolution. Who would serve as delegates? What authority would they be given? Who would establish the procedures under which the convention would be governed? What limits would prevent a “runaway” convention from proposing radical changes affecting basic liberties?...With these thorny issues unsettled, it should come as no surprise that warning flags are being raised about a constitutional convention.” – Archibald Cox, Solicitor General of the United States (1961-1965) and special prosecutor for the U.S. Department of Justice (1973)

“Any new constitutional convention must have the authority to study, debate, and submit to the states for ratification whatever amendments it considers appropriate...If the legislatures of thirty-four states request Congress to call a general constitutional convention, Congress has a constitutional duty to summon such a convention. If those thirty -four states recommend in their applications that the convention consider only a particular subject, Congress still must call a convention and leave to the convention the ultimate determination of the agenda and the nature of the amendments it may choose to propose.” – Walter E. Dellinger, Solicitor

General of the United States (1996-1997) and the Douglas B. Maggs Professor Emeritus of Law at Duke University

“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

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5

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— 6 —

the American people, or of some of the people. “ – John Malcolm, 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

“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 and 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

“A Constitutional Convention could be dangerous and destructive to our country, and citizens should approach the idea with the same wariness the founders did...Do we really want to tinker with this nation’s fundamental rights – especially at a time when our country is deeply divided politically? Let’s not risk opening what could be a Pandora’s box of chaos and an existential crisis for the country.” – Dewey M. Clayton, professor of political science at the University of Louisville

“If that were to happen, anything goes. (The original constitutional convention was called to amend the Articles of Confederation, after all. They were scrapped instead.) The Constitution

specifies no rules, no referee and no bans on lobbying or foreign influence at constitutional conventions. Everything in the Constitution would be up for grabs – including the right to free speech, freedom of religion, freedom from random police searches and seizures and, yes, the right to vote.” – Kimberly Wehle, professor at the University of Baltimore School of Law and a former assistant U.S. attorney and associate independent counsel in the Whitewater investigation

“Amendment by convention has never been attempted and little is certain about the powers and prerogatives of such a convention. The basic problem is that there appears to be no effective way to limit the convention’s scope once it is called.” – Stephen H. Sach, Attorney General of Maryland (1979-1987)

“It is unclear, for instance, what the agenda of the convention that the states would call would be. Some people even think that the scope of the convention would be unlimited, and that makes a lot of very rational people wary of making the whole Constitution up for grabs.” – John O. McGinnis, the George C. Dix Professor in Constitutional Law at Northwestern University Pritzker School of Law

“The dangers stem largely from the fact that it is an uncharted course... The alternative route in Article V is one that has never been taken. This route is obviously legitimate, but it is an unknown... Moreover, the convention would have a plausible case for taking an even broader view of its agenda. Convention delegates could claim that they represent the people who elected them, and that they are entitled to deal with any constitutional issue of major concern to their constituency. The states, quite unthinkingly and without consideration of the implications, have started a process that may eventually produce a shock to them and to the country. It is a process of undeliberate constitution making that would make James Madison turn over in his grave.” – Gerald Gunther, constitutional law scholar and professor of law at Stanford Law School

“In these contentious times, democratic institutions, norms, and views are under unprecedented stress. When debating whether to adopt a resolution to apply to Congress to call for an Article V Convention, Maryland legislators should keep in mind the possibility that the call could add to a widespread perception of national disarray and push the American

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Republic closer to a breaking point. The perils of an Article V Convention running amok and altering the core framework of the American Republic are high. This method of reform should therefore be used only as a last resort.” – Miguel González-Marcos, professor of law at the University of Maryland

“There is a risk of a runaway convention.” – Michael Gerhardt, constitutional law professor at the University of North Carolina School of Law

“So the fear among some people is that if we were to have such a constitutional convention that the whole Constitution would be up in the air again. It might be possible that the whole thing would be undermined, and no one would know going in what might replace it.” – Daniel Ortiz, constitutional law professor at the University of Virginia

“First, the national convention method may not result in any amendment, because it generates many uncertainties that can defeat the passage of an amendment. These uncertainties include what the legal rules are that govern the amendment process, what actions the other states will take, what role the Congress will play, and what amendment the convention will propose. Second, this method may result in a different amendment than the one that the state legislature desired through a runaway convention. Even if the state legislature specifically provided that the convention should only address a particular amendment, it is quite possible that the convention could propose an entirely different amendment and that amendment would then be ratified by the states.” – Michael B. Rappaport, professor of law at the University of San Diego

“Given that Article V contains no safeguards to restrain delegates, or instructions for choosing delegates, no part of the Constitution would be off limits. While some advocating for a convention may claim to care only about one issue, invoking Article V in this way would put the most basic parts of our democracy at risk. Extremists would have free rein to everything from our systems of checks and balances, to our most cherished rights, such as freedom of speech and voting for our leaders.” – Wilfred Codrington, assistant professor of law at Brooklyn Law School

"I want to raise the  
powerful group  
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Constitution  
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the father of the Constitution" due to his pivotal role in its  
and that a convention was not the "most convenient or  
desired change. **When asked his opinion on a  
convention in 1788**, he said:

*...I am not disposed to take place for the avowed and sole purpose of revising  
the Constitution, but I naturally consider itself as having a greater latitude than the  
to administer and support as well as to amend the system; it would  
rather excite agitation to the public mind; an election into it would be  
attended with violent partizans [sic] on both sides; it [would] probably consist  
of heterogeneous characters; would be the very focus of that flame which has  
been kindled by so much heated men of all parties; would no doubt contain individuals of  
opposite 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...I should tremble for the result of a  
Second, meeting in the present temper of America and under all the disadvantages I  
have mentioned.***