

A constitutional convention could be the single most dangerous way to 'fix' American government



By **Robert Greenstein** October 21, 2014

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A dangerous [proposal](#) is [circulating](#) in states across the country that could widen political divisions and jeopardize cherished rights and freedoms. The push is coming primarily from well-organized, arch-conservative groups seeking to capitalize on the decline in public trust in government to limit the federal government's role and spending powers. And the method they prefer is a constitutional convention — the first since the 1787 conclave that produced the U.S. Constitution.

Under the Constitution, if two-thirds of state legislatures call for a convention to amend it, one must be convened. Some of those pushing for a convention [say](#) that 24 of the needed 34 legislatures have approved such resolutions. Advocates of a convention have targeted more than a dozen other states and are developing lobbying campaigns to push for such resolutions there.

The implications are enormous. At stake, potentially, are the freedoms we take for granted under the Bill of Rights; the powers of the president, Congress and the courts; and the policies the government can or cannot pursue. Conventioneers could alter absolutely anything about the way the United States is governed. Some say they want to terminate all federal taxes and to require super-majorities in the House and the Senate to put any new taxes in their place. Others want to bar the government from carrying out a number of its functions, for example by constraining its ability to regulate interstate commerce. Whatever changes a convention approved would be enshrined in the Constitution if three-fourths of the states ratified them.

Yet the processes for impaneling the convention, selecting the delegates, setting the convention's voting rules, and determining what issues the convention would consider and how much of the Constitution it would seek to rewrite are a mystery. That means that under a convention, anything goes. There are no rules, guideposts or procedures in any of these areas.

The Constitution has been amended 27 times since 1791, in every case by the other amendment process allowed by our nation's charter: two-thirds of the Senate and the House approve an amendment and three-quarters of state legislatures then ratify it. This process has served us well. The 27th amendment, which prohibits members of Congress from raising their salary until the current term ends, took effect in 1992.

By contrast, there has not been a constitutional convention since the first one, and for good reason. As constitutional experts from the late [Chief Justice Warren Burger](#) to [Justice Antonin Scalia](#) to [Harvard Law School Professor Laurence Tribe](#) have warned, a constitutional convention would place the nation in uncharted territory, with very serious risks for our political system. Convening a convention, as Tribe [put it](#), would be “putting the whole Constitution up for grabs.” And although I don’t often agree with Scalia, he hit the nail on the head when he [said](#) recently: “I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?”

The Constitution sets no rules for how a constitutional convention would work. What standards determine whether 34 states have called for a convention? Do all resolutions that state legislatures have *ever* passed count — even if they called for conventions on very different topics, or were passed 50 or 100 years ago, or were later rescinded, as some have been? Oklahoma, for instance, passed a resolution in 1976 calling for a convention but [rescinded it in 2009](#), citing concerns about throwing the Constitution wide open to unknown changes; some proponents argue that Oklahoma should still count anyway. Can that be right? The Constitution is silent on all of these issues.

That’s just the start. If a convention were called, how many delegates would each state get, and how would they be selected? How long could the convention last? The Constitution provides no guidance on those questions either.

Constitutional law experts generally agree that it would be up to Congress to decide these issues. The president has no role, and with no legal guideposts, the courts probably would decline to intervene. Given the high stakes involved, these issues could generate intense partisan division and acrimony, and Congress could make decisions on them on a highly partisan basis.

Suppose, for example, that Congress ruled that every state would have two votes in the convention and the convention could approve amendments by simple majority vote. In that case, the 26 least populous states, with less than 18 percent of the nation’s population, could approve broad changes in our Constitution and send them to the states for ratification.

Some convention proponents, such as the American Legislative Exchange Council, blithely [promise](#) that Congress could limit the scope of the amendments that a convention could consider. But many prominent constitutional law experts [disagree](#). The Constitution provides no authority above that of a constitutional convention itself; accordingly, the courts probably would decline to intervene here, as well, to limit a convention's scope. As Burger [wrote](#), "[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."

Similarly, as the late Justice Arthur Goldberg cautioned, "There is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights." Proponents are already calling for a convention to consider [such actions](#) (in addition to ending all current taxes) as setting term limits for Congress and the Supreme Court, imposing sharp limits on presidential authority, and scaling back the General Welfare and Commerce clauses of the Constitution.

Moreover, given the potential to write major policy changes into the Constitution where they would be almost impossible to remove, powerful, well-funded interest groups probably would spend vast sums to influence the selection of delegates and then the convention itself. There are no federal or state limits on what powerful interests and wealthy individuals could spend to influence convention delegates. Burger expressed concern that a "Constitutional Convention today would be a free-for-all for special interest groups."

One can readily imagine a convention leading to extensive "log-rolling," where delegates backed certain changes to the Constitution in return for others' support for their own preferred changes. A sprawling package of alterations could emerge, designed to build support for the overall package by including the favored fixes of single-issue constituencies.

Our country faces enough problems and division. We don't need to add to them and inflame an already toxic political

environment by placing at risk the constitutional structure that has served us well for more than two centuries — and heading into dangerous, unknown territory by convening a convention to rework the Constitution.