

Testimony on House Joint Memorial 201

February 10th, 2016

Common Cause respectfully opposes HJM 201.

Although Common Cause supports a federal constitutional amendment to overturn court decisions such as *Citizens United* that treat corporations as people and money as speech, (and other cases that have removed reasonable limits on the raising and spending of money to influence elections), we strongly oppose using the process of a “constitutional convention” to accomplish this goal.

The main problem with a constitutional convention is that very little is known for sure about how it would operate. Could you restrict the convention to one topic, or can a convention propose and pass more than one amendment? How would you choose the delegates? Does a governmental body have the ability to settle disputes that arise during the convention? There are so many unknowns that come with a constitutional convention that this could threaten to become a “Pandora’s Box” for our most cherished civil liberties.

A constitutional convention would take place at a time of extreme gerrymandering and in an environment of unlimited political spending. It would allow the wealthiest Americans to re-write the rules that govern our system of government.

Please do not authorize Oregon to be part of what triggers such a fiasco.

According to one of the nation’s most esteemed constitutional law scholars, Professor Laurence Tribe of Harvard Law School, a constitutional convention would put “the whole Constitution up for grabs.”¹

Another of our 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.”²

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.”³ Former Justice Arthur Goldberg wrote that

¹ Michael Leachman & David A. Super, “States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment and Other Issues,” Center for Budget and Policy Priorities, July 6, 2014, [available at http://www.cbpp.org/sites/default/files/atoms/files/7-16-14sfp.pdf](http://www.cbpp.org/sites/default/files/atoms/files/7-16-14sfp.pdf).

² 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>.

³ 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/>.

“[t]here is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights.”⁴ And current Justice Antonin Scalia has said that he “certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?”⁵

Some proponents of measures similar to HJM 201 in other states have argued that a convention convened pursuant to Article V of the Constitution could be limited to a single topic, and that any proposed amendments will still need to be ratified by 38 states as a “check” on a runaway convention.

There are no guideposts or rules, however, to prevent delegates from lowering the threshold of 38 states currently necessary for ratification or going beyond the purpose for which it convenes. At the most recent constitutional convention in 1787, for example, attendees re-wrote the rules for ratification – indeed, they re-wrote the entire governing charter – and reduced the number of states needed to agree to the new Constitution.

Prof. Tribe enumerated a number of questions about a constitutional convention that he says are “*beyond resolution by any generally agreed upon political or legal method.*”⁶

Specifically, Prof. Tribe explained 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?
 - If Congress can call a convention independent of state applications (as Professor Sandy Levinson argues it may), then how could state applications possibly constrain a convention’s mandate?
 - If applications are constraining, then how are applications proposing related (but different) topics to be combined or separated?
 - Are they added up or not added up?
 - When do you hit the magic number 2/3 of the states submitting applications?
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?

⁴ *Id.*

⁵ *Id.*

⁶ 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).

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 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.

The undue influence of big money in politics ails our democracy today. There are a variety of solutions that will begin to stem the tide. Small donor public financing, improved transparency of political spending, a new jurisprudence and a constitutional amendment are all policy options that demand our energy and attention.

Ultimately, however, a constitutional amendment to reverse *Citizens United* and other harmful campaign finance cases should be subject to the same rigor as the previous 27 amendments: debated in Congress, passed by two-thirds of the House and Senate, and sent to the states for ratification.

There is far too much at stake to risking putting the entire Constitution up for a wholesale rewrite as part of a constitutional convention – including all of the civil rights, protections, and liberties that we enjoy today.