10 Point Refutation

Many self-professed constitutionalists are pushing for a constitutional convention, proposed by the states, despite the dangers of such a plan.

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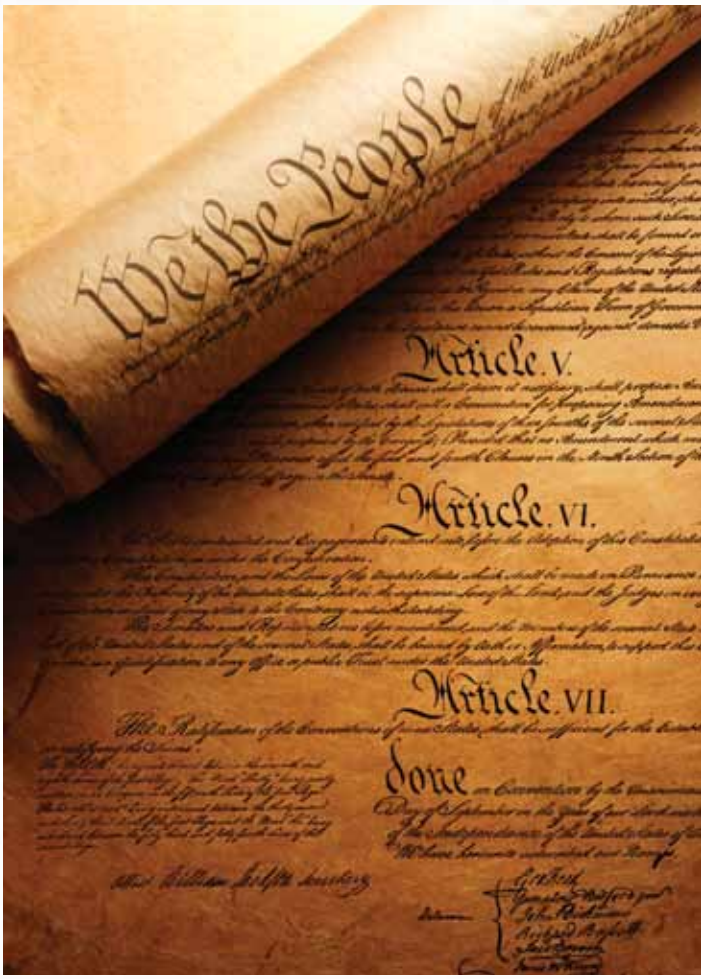
In order to buttress its call for an Article V convention, the Center for Constitutional Government at the Goldwater Institute has published a document entitled "10 Facts to Rebut the Mythology of a Runaway Convention." This list is designed to set forth a roster of reasons that an Article V convention is not only safe, but necessary. In order to effectively rebut the Goldwater Institute's rebuttal, the definition of a few key terms and concepts must be set forth. Principally, the reader must be familiar with Article V of the Constitution, the type of convention it anticipates, the history of such a provision, and the likely metes and bounds that would establish the legal territory of any convention authorized under the relevant constitutional grant of power.

First, let us look at the black letter of Article V. Article V of the Constitution reads in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

Plainly stated, Article V requires the Congress of the United States to call "a Convention for proposing Amendments" upon receipt of applications for such by two-thirds of the states. Then, any amendment proposed by such a convention becomes for "all Intents and Purposes … part of this Constitution" if subsequently ratified by three-fourths of the states, either by the state legislatures or by state conventions, as determined by Congress. To date, no such convention has been held. Recently, however, a significant bloc of erstwhile conservatives and constitutionalists has united in pleading with the states to apply to Congress to convene just such a convention.

What would be the purpose of such a convention, and why are otherwise conservative organizations working so diligently to bring it to pass? The answers to these questions are revealed through the "10 Facts" document and this article's refutation of those "facts." What follows is a recitation of the "10 Facts" followed by the appropriate constitutional response.



Verifying Facts

The first fact, verbatim, says: "Article V does not authorize a constitutional convention; it authorizes a convention for proposing specific amendments."

Right out of the chute, the "10 Facts" author adds a word to the Constitution that isn't there. Article V does not

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contain the word "specific" as a modifier of the noun "amendments." While this might seem like an inconsequential and picayune point, it is anything but, especially in light of the gravity of the matter at issue. The plain language of Article V limits neither the scope of the convention it anticipates nor the number or substantiveness of the amendments that may be proposed therein. In fact, if the purpose of the suggested convention is to propose amendments to the Constitution, doesn't that make it per se a constitutional convention, regardless of how narrow an agenda those calling for the convention say they will follow? It seems so very dangerous to rely upon semantics as a balance to the risks that would attend such a convention, regardless of the nomenclature preferred by its advocates. Besides, adding and deleting words from the Constitution is a trick typically employed by enemies of our Republic, not by those sailing under the colors of the Constitution.

The second of the Goldwater Institute's "10 Facts" states: "When the Founders drafted the U.S. Constitution in 1787, they specifically rejected language for Article V that would have allowed the states to later call for an open convention." As with the previous claim, this one is a mixture of a thimble of fact in an ocean of fiction. A brief recap of the relevant debate at the Constitutional Convention of 1787 is called for.

As with so many of the conflicts at the Philadelphia Convention, the debates over Article V fractured along the line separating the powers retained by the states and those to be granted to the new national authority.

There was general consensus among the delegates that the new charter should include an effective mechanism for enacting amendments. Their common experience under the impotent Articles of Confederation confirmed to the delegates that the process established by the new Constitution should be easier than the method under the Articles whereby one state could veto any proposed amendment, regardless of the number of sister states in favor of its passage. The delegates were not, however, in favor of reducing the process of amending the Constitution to something that would undermine the stability they sought to ensure by the working out of the difficult "bundle of compromises" that would hold the new union together.

The compromise that resulted in the version of Article V that was written into the Constitution revealed two salient points: First, Congress was not to have the exclusive power to propose amendments; and second, state legislatures were not to retain the power to propose and ratify amendments, as such a scheme could be manipulated by states to increase the scope of their power. The balance between state and federal power would be divided thus: The state legislatures could call for the convention and ratify any amendments proposed therein, but Congress must convene a convention upon receipt of the appropriate number of state applications. (Congress may also propose its own amendments that, like amendments proposed by a convention, must be ratified by the states.)

Put simply, if state legislatures were allowed to write the proposed amendments, as well as set the scope of the agenda for the Article V convention that would consider them, Congress' power would be effectively reduced and the delicate balance worked out by our Founding Fathers would be upset. Alternatively, if Congress were permitted to define the scope of the Article V convention called for by the states, then Congress would be usurping power not granted to it by the Constitution, also an outcome inconsistent with the principle of federalism that is the fulcrum upon which our Republic is balanced.

Consequences: The Founders might not recognize the republican system that they so carefully designed. Small changes made big differences. The 17th Amendment allowed the direct election of Senators, thereby depriving states of their main method of defending their sovereignty.

The third fact claims that as 38 states would have to ratify any proposed amendment coming out of an Article V convention, the potential for a "runaway" convention is reduced by the requirement of such a "broad consensus." As demonstrated in the historical information presented above, it is given to neither the states nor the national government to assume the role of arbiter of what is or is not a permissible proposal at an Article V convention. This "broad consensus" relied upon by the Goldwater Institute could likely prove broad enough to accommodate all manner of frightening meddling with our beloved Constitution, such as changing the method of ratification. But could a new proposal for ratifying amendments be adopted based on the newly proposed method as opposed to the method now in place? It's possible. Consider that the Constitutional Convention of 1787 scrapped the then-existing constitutional amendment process requiring ratification by all of the states in favor of a new process requiring ratification by only a three-fourths majority — and the new Constitution was then ratified based on the three-fourths majority. But even assuming that the Article V amendment procedure is strictly followed, Congress could still submit amendments proposed by the convention to special state ratifying conventions as opposed to the state legislatures as a means of circumventing the wills of the state legislatures. Congress sent the 21st Amendment (ending prohibition) to state ratifying conventions, in fact, fearing that it might not be possible to get three-fourths of the state legislatures to ratify an amendment ending prohibition.

Fourth, the Goldwater Institute assures readers that an Article V convention "couldn't simply rewrite the entire Constitution." Why not? Why couldn't an expansive amendment (or amendments) strike most or all of the language of the Constitution and replace it with new language?

But replacing the Constitution with a new constitution would by no means be necessary to radically alter the document. It wouldn't have to. The Constitution, as originally drafted and ratified by the states, has been amended into a document that would be unrecognizable to the Founders and that is irreconcilable with the principles of federalism and limited government that were the two chief cornerstones upon which our Republic was built (see, for example, the 16th Amendment, which gave Congress the power to collect income taxes, and the 17th Amendment, which provides for the direct election of U.S. Senators, rather than allowing their appointment by state legislatures).

The fifth fact is as fictional as the others in its insistence that the "convention can be limited to specific topics." This is mere wishful thinking. There is no legally binding precedent that would control in such a matter. In fact, as set forth above, the Founders purposefully avoided granting such power to either the states or the federal legislature. As eloquently addressed by Walter E. Dellinger, "To permit the state legislatures to dictate to the convention the exact terms of its proposals is to short-circuit the carefully structured division of authority between state and national interests." Our Constitution is the palladium of the viability of the coexistence of dual sovereignties. If we accept the logic of the "10 Facts," then we eviscerate the strength of the Constitution: the balance between state and federal authority.

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Balanced budget-amendment proponents claim an amendment is needed to curtail excessive government spending. However, most spending done by Congress, such as Social Security, is already illegal under the Constitution.

The next fact listed by the Goldwater Institute contends that "one cannot take the Constitution seriously and contend that Article V was not meant to be used." Serious opponents of an Article V constitutional convention do not argue that Article V was never meant to be used. There are, perhaps, in the universe of possibilities compelling reasons for the calling of an Article V convention. The purpose relied upon by the Goldwater Institute and its fellow Article V advocates is not one of those, however. This coterie of self-styled constitutionalists insists that an Article V convention is needed in order to curb the "endless growth of the federal government" and to "regain control over the federal government." We, the opponents of a new constitutional convention, counter by asserting that it is irrational to hold a convention to propose amendments whose purpose

is to clarify what is already part of the Constitution. Why, for instance, propose a balanced-budget amendment when most congressional spending is in violation of the Constitution? Why would Congress bother to follow new amendments when the American people don't require them to follow the present ones? Note that most states have strict rules about balanced budgets or have passed balanced-budget amendments, yet almost none have balanced budgets. We don't need amendments to save our Republic; we need renewed commitment to the Constitution — as written — and to the timeless principles of self-government and republicanism that undergird it.

Next, the Goldwater Institute wants to have its cake and eat it, too. In regard to concerns that a constitutional convention would exceed the scope of that set by those who called for the convention, it insists that there is "zero precedent" that any convention of the states has ever "run away" from its assigned agenda. This thesis is supported by the statement that "nearly all of the commissions for the delegates for each state" authorized them to "revise" and "alter" the Articles of Confederation — basically trying to undermine the argument that the Philadelphia Constitutional Convention in 1787 is a prime example of a runaway convention. Take this thought out of historical context and apply it to our own situation. Would the amendments proposed by a modern Article V constitutional convention be binding on the states whose delegates were not specifically authorized to vote on any amendments that fell outside the scope of their commissions?

"Fact 8" sets forth the rules by which an Article V convention would be governed. The fact is the Constitution is silent on the point and all of these assurances proffered by the Goldwater Institute are unreliable and self-interested attempts to soft-pedal the very real risks posed by the lack of enumerated rules that would govern the proceedings of an Article V constitutional convention and the legal scope thereof.

The last two points made by the Goldwater Institute read as restatements of earlier ones. The advocates of an Article V convention argue that the scope of an Article V convention would be "similar to that of state ratification conventions." That is not accurate. The state conventions that ratified the original constitution were limited to debate and vote on an already complete slate of proposals. Even the most cursory study of the history of those conventions revealed that delegates did not bind themselves by those rules, and numerous amendments were proposed, 10 of which eventually became the Bill of Rights. An Article V convention would potentially be in the hands of designing delegates of all political and social stripes, and it strains credulity to imagine that the product of such a confab would be as sound as our Bill of Rights, but it would still be just as much a part of our Constitution.

Why? Because "mere amendments" become the law, and very often with devastating effect upon the remarkable and unmatched system established by our Founders (again, see the 16th and 17th Amendments).

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Prohibition's demise: To pass the 21st Amendment, repealing prohibition, Congress relied upon "conventions in the several States," because state legislatures may have been stymied by voters who wished to continue outlawing alcohol.

A Way Forward

There is a simple answer: Look to the plain language of Article V. Not a single assurance provided by the Goldwater Institute in its "10 Facts" has any basis in that provision of our Constitution. As constitutionalists we should never be guilty of skulking about in penumbras to find tenuous justifications for our causes, no matter how noble their underlying intent.

Finally, why run the risk posed by an Article V convention? There is a substantial risk that the very foundations of our Republic would be left vulnerable to destructive forces inimical to our Constitution. Ironically, this risk is protected by the black letter of Article V and thus must be avoided at all cost.

If the true aim of the proponents of an Article V constitutional convention is to redress the imbalance between the states and the increasingly despotic federal government, should we not encourage the very fine organizations founded and funded by brilliant patriots to employ their time, talents, and treasure in the cause of supporting the election of candidates committed to hewing rigidly to the enumerated and limited powers already clearly written into our Constitution?

We mustn't sit idly by as otherwise right-minded constitutionalists lift the tub of our Republic and throw out the baby of our Constitution with the bathwater of federal usurpation of powers. Frequent elections is the drain by which the filth of congressional and executive tyranny is removed, and it is the clear water of the Constitution with which the tub must be refilled and used to cleanse the body politic. We should not mix this purifying liquid with the potentially muddying and infected draughts of an unnecessary Article V convention. ■