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## How to Address Voters who Express a Concern over a “Runaway” Convention

### 1. How can the Constitution be amended?

Article V has two methods: Congress can propose an amendment, or a “convention of states” can. Important note: the Constitution does *not* say anything about a “Constitutional convention.” Those words do not appear in the Constitution. It says, instead, Congress shall call a “convention for proposing amendments” when 2/3 of the states call for such a convention. The term “Constitutional convention” suggests that the entire Constitution would be up for consideration, but since that term *does not appear* in the Constitution, there is really no authority for suggesting that such a convention would open up the entire Constitution. Most of the time, people use the term “Constitutional convention” out of ignorance of the actual language of the Constitution; sometimes, they use the term intentionally to scare you into thinking the convention is akin to opening Pandora’s Box.

### 2. I’ve heard lots of people say that a convention of states could run away and completely change the Constitution. Where is this fear of a “runaway convention” coming from?

Both the left and the right. Article V does not provide rules for how a convention is to be conducted, so opponents of various amendments over the years have exploited that fact to create fear and defeat the proposal they fear. The most recent example has been attempts on the right to pass a balanced budget amendment. Many left-leaning groups like Common Cause then ginned up fears of a “runaway convention” in an effort to scare state legislators into not joining the call.

That effort was very successful in many states, including Wyoming until just this last session. More on that later. But the most important thing to remember that, even if a convention did “run away,” anything it proposed would still have to be ratified by 3/4s of the states, or 38 states. So that is the ultimate check on a convention’s power.

**3. Is it possible for a convention to run away?**

Very unlikely. We've never had a national convention, so we have no experience at the national level, but hundreds of state conventions have been held to amend state constitutions and none of them have "run away." The closest thing we have to a national convention is the Electoral College every four years, and it has never "run away."

**4. You just said that Article V has no rules for how the convention would be conducted. Doesn't that mean it could write its own rules and do whatever it wants?**

This is a very common misconception. The fact that Article V does not provide rules does not mean that there are no rules; you just have to look for the rules elsewhere. And there are plenty of places where rules can be found.

Most important outside rule: the Due Process Clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendments. Due process is kind of a nebulous concept (almost everything in the Constitution is nebulous and needs to be interpreted by the courts), but the key aspect of due process is notice and an opportunity to be heard. If 34 states called for a convention to do one thing, and the convention decided to do something else, the legislators and voters who called for the convention would not have their voices being heard.

Another outside rule: the law of agency. Very basic law, uniform in all 50 states. If a person appoints somebody else to be his agent to do something, the agent can only do that one thing. Lets say I gave Shelby \$15 and asked him to go to the store to buy a carton of cigarettes for me. If he returned driving a brand new Ferrari, handed me the keys, and tells me "Here you go! I bought this new Ferrari for you," he has exceeded his authority. I do not own that Ferrari and can't be made to pay for it. Likewise, when either the legislature or the voters appoint delegates to a convention and delegate to them the power to do one thing (vote on an amendment declaring that only human beings have political rights), the delegates have no authority to go beyond that delegated authority and do anything else.

**5. Okay, but who chooses which rules to follow?**

That is a great question, and I don't think anybody has a definitive answer for it. Most likely it would be Congress, though. Article V still requires *Congress* to call the convention, after 2/3s of the states call for it, so it seems pretty likely that in the call, Congress would specify some rules. And Congress would also, almost certainly, limit the call to the topic that 2/3s of the states have specified (in our situation the political rights of corporations).

**6. But Congress is currently controlled by Republicans. Couldn't they create rules that allowed for a runaway convention?**

I think that is very unlikely. Many Republicans are just as afraid of a runaway convention as Democrats are. And recent history, including the town hall meetings regarding health care reform and the Affordable Care Act, show that many Republicans do listen to their constituents.

But ultimately I believe that if Congress issued a call for convention that was too broad, or exceeded the calls for a limited convention made by 2/3s of the states, lawsuits would be filed and resolved in favor of those who would insist on limiting the convention to the authorized subjects. The Due Process clause, the laws of agency, and the other rules I mentioned before seem to give courts the power to step in and stop a runaway before it got rolling.

By the way, this is not just me talking. Many scholars have studied this and agree that a convention could be limited, and that the courts would have the power to prevent a runaway. The most persuasive treatment of this, to me, was an opinion by Attorney General Edwin Meese in 1987 that thoroughly examined the issue and reached these conclusions. You can find that on the Volunteer Resources tab of our website.

I also want to note that there are proposals in Congress right now to create rules for how a convention to propose amendments would be called and conducted. Both the Attorney General Opinion from 1987 and many scholars have suggested that it would be good to have such rules in place before any call reaches the critical mass of 34 states. Given how dysfunctional Congress is at the moment, I don't have a great deal of confidence that Congress will adopt any such rules in the near future, but we can always hope.

## **7. Can states impose rules on a convention?**

Great question. An individual state probably cannot impose rules that govern the entire convention, but they can impose rules on their own delegates to such a convention. And that is happening right now, including right here in Wyoming.

Remember I said earlier that Wyoming had resisted calling for an Article V convention of states to propose a balanced budget amendment. Bills to do that failed in the Wyoming legislature many times until this last session. You and I witnessed this directly last January when we testified before the House Corporations Committee in favor of the Free and Fair Elections resolution. Several people who testified, including me, were asked if our resolution called for an Article V convention; we all reassured them that it did not. Even so, the committee adopted an amendment to the resolution specifying that it could not be interpreted as a call for an Article V convention. The legislators were terrified of an Article V convention.

Yet later in the session the legislature did in fact adopt a resolution calling for an Article V convention of states to propose a balanced budget amendment. But at the same time,

they adopted a new state statute which strictly governs how delegates to such a convention would be called, and this is important, strictly limiting the power of those delegates to vote on matters. Specifically, the new state statute says that Wyoming delegates are only allowed to vote on “authorized amendments,” meaning amendments within the call for a limited convention. If they voted on “unauthorized amendments,” (a) those votes would not count, (b) the delegates could be removed from the delegation, and (c) the delegate could be charged with a felony punishable by up to 5 years in prison for having cast that vote.

Thus, if an Article V limited convention tried to run away, it is very unlikely that any Wyoming delegates would be running with them!

A similar bill has been approved in Indiana already, and several other states are considering similar bills to prevent runaway conventions.

**8. I don't know. There just seem to be so many things to be worked out that I'm still kind of afraid of this whole idea.**

That is understandable. There are many unknowns for sure. But one thing we do know: if we do nothing, nothing changes, and the already horrible situation of money in politics will only get worse. Doing nothing is not an option.

Relying on Congress to propose this amendment is also not a very good solution. Theoretically it could act, but since it is the entity most addicted to money in politics, I really don't trust Congress to do this. Article V was put into the Constitution for exactly this situation: where Congress is the problem, or won't act, the people have a way to take matters away from Congress and do things directly. This is such a time.

The risk to our democracy from money in politics is manifest: we must correct it. The risk of an Article V convention misbehaving is vanishingly small; the risk of Congress doing nothing to correct the problem is very large. This is why Wyoming Promise strongly advocates for an Article V solution. Article V is not a perfect solution because of the various unknowns we just discussed, but let's not let the perfect be the enemy of the good. Article V is a very good solution.

Let's not act out of fear. Let's lead with courage.