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Inside the Conservative Push for States to Amend the Constitution

By MICHAEL WINES AUG. 22, 2016



A clause in Article 5 of the Constitution allows for states to sidestep Congress and draft amendments.

Nick Oxford for The New York Times

Taking advantage of almost a decade of political victories in state legislatures across the country, conservative advocacy groups are quietly marshaling support for an event unprecedented in the nation's history: a convention of the 50 states, summoned to consider amending the Constitution.

The groups are an amalgam of free-market, low-tax and small-government proponents, often funded by corporations and deeply conservative supporters like the billionaire [Koch brothers](#) and [Donors Trust](#), whose contributors are mostly anonymous. They want [an amendment to require a balanced federal budget](#), an idea many conservatives have embraced, many economists disdain and Congress has failed to endorse for decades.

But as the groups near their goal, critics and some skeptical constitutional scholars are warning that holding an amendment-writing meeting with no historical parallel and no written rules could open a Pandora's box of constitutional mischief.

The process, which is playing out largely beyond public notice, rests on a clause in [Article 5 of the Constitution](#) that allows the states to sidestep Congress and draft their own constitutional amendments whenever two-thirds of their legislatures demand it.

That will by no means be easy. Even if the two-thirds threshold were reached, a convention would probably face a court battle over whether the legislatures' calls for a convention were sufficiently similar. And as with any amendment that Congress proposes, state-written amendments would need approval by three-quarters of the states — either by their legislatures or by state conventions — to take effect.

But as Republicans have surged to control of state legislatures and moved sharply rightward during the Obama years, what was once a pet project of the party's fringe has become a proposal with a plausible chance of success. Some of the former Republican presidential candidates, including comparative moderates like [John Kasich](#) and [Jeb Bush](#), have endorsed a state amendment convention.

So far, 28 states have adopted resolutions calling for a convention on a balanced-budget amendment, including 10 in the past three years, and two, [Oklahoma](#) and [West Virginia](#), this spring. That is just six states short of the 34 needed to invoke the Article 5 clause.

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“I think the prospect is very good in 2017,” said Gary Banz, a Republican who is the majority whip in the Oklahoma House of Representatives. “You can look at any number of states that are not on board yet, and they're controlled by very conservative elements.”

Including nominally nonpartisan Nebraska, Republicans now [control 31 state assemblies](#) — more than double the number in 2010. Of the 11 states advocacy groups have targeted for pro-convention lobbying next year, Republicans control both houses of the Legislature in seven.

Representative Banz is among those leading the charge. In addition to his statehouse job, he is the national secretary of the [American Legislative Exchange Council](#), known as ALEC, a nonprofit financed by corporate and private donors, including the Kochs, that is at the center of the convention effort.

At ALEC's annual meeting, in Indianapolis last month, another leading advocacy group, the [Balanced Budget Amendment Task Force](#), staged a seminar for legislators on an amendment convention.

Citizens for Self-Governance, a Texas-based group with [Tea Party roots](#), has ALEC backing for [a more sweeping goal](#): an amendment that would “impose fiscal restraints” on the federal government, reduce its authority and limit the terms of federal elected officials.

The juggernaut nature of the convention movement has almost overshadowed the longstanding debate about its motivation: to imbue the Constitution with a binding limit on federal spending.

Supporters say the philosophy that state governments and ordinary people usually adhere to — that it is wrong and destructive to spend beyond one's income — should apply to the federal government as well. In that view, the \$19.4 trillion [national debt](#) threatens to destroy Americans' future prosperity.

“It's immoral for one generation to borrow and spend beyond its means and leave the bill to the next generation,” said Scott Rogers, the director of the Balanced Budget Amendment Task Force.



Gary Banz, a Republican and majority whip in the Oklahoma House of Representatives, is among those leading a charge for a convention on a balanced-budget amendment. Nick Oxford for The New York Times

But opponents say an amendment, not the deficit, is the threat. A government that could not run deficits, they argue, would not be able to stimulate the economy during recessions, when job-creating spending is most needed. And it would not be able to elude budget ceilings for benefits like [Social Security](#), or for job-creating projects like highways that are financed with debt.

In truth, they say, debt is a fact of life for both states and ordinary households — in bond issues that finance revenue generators like convention centers and bridges, and for ordinary necessities like cars, kitchen remodelings and homes. Banning deficit spending, they say, would bring the economy to a halt.

But the basic argument for federal frugality has broad appeal. Polls generally indicate strong support for a balanced-budget amendment, and advocates persuaded 32 state legislatures to back an amendment convention during the Reagan administration.

Congress defused the movement by passing the Gramm-Rudman-Hollings Balanced Budget and [Emergency Deficit Control Act of 1985](#), which pledged — toothlessly, it turned out — to eliminate annual federal deficits within six years. Over the next three decades, many legislatures rescinded their convention calls. Only recently has the movement seen a revival.

Amendment conventions are not exclusively a conservative cause. With liberals' backing, four states have passed resolutions advocating a convention to overturn the Supreme Court's [Citizens United ruling](#) on campaign finance.

Yet debate over an amendment's merits has taken a back seat to a more fundamental question: whether delegates to a convention could be trusted not to tinker with other parts of the Constitution.

Article 5 places no limits on a convention's power. Some experts note that the Constitution itself arose from a convention called to amend its predecessor, the Articles of Confederation — and tore up the document and started from scratch. That convention even scrapped the Articles' terms of ratification — unanimous approval by the states — and substituted a lower barrier, three-fourths of states. (Some pro-amendment conservatives argue that the delegates to Philadelphia did not go rogue, but always planned to rewrite the Articles.)

So what rules would an amendments convention follow? “The answer to almost every question you could ask is ‘We don't know,’” said Michael J. Klarman, a constitutional law expert at Harvard whose [book on that convention](#), “The Framers' Coup: The Making of the United States Constitution,” will be published in October. “I think a convention can do anything they want — re-establish slavery, establish a national church. I just don't think there's any limit.”

Michael J. Gerhardt, a University of North Carolina law professor and scholar in residence at the National Constitution Center in Philadelphia, said Article 5's reticence gave states leeway to improvise.

"Once you have a convention, then in some respects it becomes a free-for-all," he said. "All bets are off."

History suggests at least one Founding Father had similar qualms. During the drafting of the Constitution, James Madison did not oppose the Article 5 clause, but worried "that [difficulties might arise](#) as to the form, the quorum."

Advocates scoff at the hand-wringing. Conventions of states, they say, are nothing new: About three dozen met from the 1700s to 1922 — most before the Constitution was drafted — considering everything from trade to slavery to divvying up the Colorado River's water. Most did not include every state, but each generally followed a preset agenda. A convention to draft amendments, they say, would be no different.

"There's never been a convention where the delegates went wild," said [Rob Natelson](#), a former University of Montana constitutional scholar who wrote an amendment convention handbook for ALEC and is now a fellow at the conservative Independence Institute in Denver. "They all negotiated a deal, came to an agreement or didn't, and went home," he said.

There is, though, one signal difference: None of those meetings bore the Constitution's blessing. One, in 1861, did propose an amendment to avert an impending civil war, but it was an ad hoc affair, not an Article 5 meeting.

At least one contrarian liberal agrees with Mr. Natelson. [Lawrence Lessig](#), the Harvard Law School professor and recent, if brief, Democratic presidential candidate, said he doubted that an amendments convention would run amok, rewriting the nation's seminal rules.

But even if it did, he said, he would not be especially concerned: After all, a convention only proposes amendments.

"The very terms of Article 5 state that proposals aren't valid unless they're ratified by three-fourths of the states," he said. "There's no controversial idea on the left or the right that won't have 13 states against it."