

HARVARD LAW SCHOOL

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February 12, 2014

Dear Delegate:

I am writing to address a concern raised about the possibility of Virginia supporting a call for an Article V convention.

I am a professor of law at Harvard. I have taught courses about the Article V convention. I have studied its history. It is the subject of one of the chapters of my book, *Republic, Lost*. I offer the following to help in the consideration of whether Virginia will adopt a resolution calling for an Article V convention. I am happy to answer any questions that this letter might raise.

A concern has been raised that an Article V convention is “dangerous,” because such a convention could “run away.” I do not believe an Article V convention is “dangerous,” and I don’t believe the fear that it could “run away” should concern anyone.

1. An Article V Convention Is Not A “Constitutional Convention.”

Though the American constitutional tradition plainly envisions “the People” retaining, as Jefferson put it, an “unalienable right to alter or abolish” their Constitution, it is a fundamental mistake to confuse that power with the power to call an Article V convention. A “constitutional convention” has the power to alter a constitution — directly if it chooses. But an Article V convention only has the power to “propose amendments” to the Constitution of the United States. Those amendments are not valid or effective unless ratified by 38 states. Until ratified, they are mere proposals, no more significant than an article written in the Yale Law Journal.

2. An Article V Convention Can Be Limited In Its Scope.

Throughout the history of conventions, it has been within the power of the entities calling a convention to set the scope of the

work of that convention. Those limits would be jurisdictional, meaning that work beyond any limits set would be invalid. And whether or not a Court would ever rule on that invalidity, a convention that acted beyond the scope of its mandate would fatally undermine the credibility of its work, and thereby destroy the opportunity for any of its proposed amendments to be ratified.

3. The Barrier to Ratification Is An Absolute Protection Against Crazy Amendments.

It is my view that an Article V convention presents no threat to any constitutional values supported by any substantial minority in America today. The proof in this view is captured by three numbers: 38, 27, 18.

It takes 38 states to ratify any proposed amendment to the Constitution.

That means that one house in 13 states would have the power to block any amendment to the Constitution.

In America today, there are 27 “double Red states” — meaning states where the Republican Party controls both houses of the legislative branch. There are 18 “double Blue states” — meaning states where the Democratic Party controls both houses of the legislative branch.

It is your expertise, not mine, that should make the salience of those numbers absolutely clear: *Obviously*, there is no chance that any amendment that Democrats strongly oppose would pass 38 states, given this breakdown of control. Likewise, there is no chance that any amendment that Republicans strongly oppose would pass 38 states, given this breakdown of control. The only amendments that could ever be ratified would be ones that appeal broadly to all Americans, and that earn the confidence of the vast majority of the country.

So imagine the worst: Imagine an Article V convention captured by extremists, either on the Right or Left; imagine those extremists succeed in proposing an amendment that conforms to their extreme views, beyond the limits imposed on the convention (say,

for example, to abolish the First Amendment, or to abolish the Second Amendment). No one credible could believe that either amendment could ever achieve ratification by 38 states. The Democratic Party and the Republican Party would certainly be able to muster the votes in 13 chambers to block either amendment. If they couldn't, that would be clear proof that such an amendment was, in fact, not "extreme."

4. The Important Challenge Is To Assure That Any Article V Convention Be Fairly Seen As Responsibly Cross-Partisan.

I believe an Article V convention is a critical alternative given to us by the Framers of our Constitution to address precisely the problem that we now face: A federal government that has lost the ability to function. Whether that's because of the corrupting influence of money in politics, or because of the exaggerated role the federal government now plays in the affairs of the states doesn't matter at this point. What's clear is that an institution that has less than 10% public confidence needs to be reformed, and that reform will not come from the inside.

The Framers foresaw this problem precisely. To address it, they modified the original amending procedure to give the states a way to force amendments onto the national stage. State legislatures, in this sense, were to be the backstop to a failed federal government. State legislators were to hold the ultimate responsibility for guaranteeing the Republic.

To exercise that power responsibly, it is critical that any call for an Article V convention be seen by Americans honestly to reflect the cross-partisan constitutional concerns that have been raised by citizens across the country. If an Article V convention is seen to be captured by the Right or the Left, that will guarantee the ultimate failure of any reform the convention proposes.

The urgent need now is for the framers of a call for a convention to craft that language to be inclusive and fair. Give Americans a chance to deliberate about a range of possible solutions to the problems we agree must be addressed — all Americans, whether Democrats, Independents, or Republicans. And leave the partisan

fighters to the ratification stage, when we all will have a clearer sense of the alternatives that can be selected among.

Reform is always difficult. It takes leadership. And if it is genuine reform, it is, ultimately, not partisan. The Framers of our Constitution were able to put to one side critical differences they had about fundamental issues — slavery, most importantly — so that they could craft a constitution that saved the nation from certain demise.

We need that same leadership today. I am hopeful Virginia will once again play the role it did 227 years ago, and help lead this nation through this difficult time.

With kind regards,

Lawrence Lessig