

Texas Public Policy Foundation

# 10th Amendment

## Legislator's Guide to the Issues 2017-18



## Convention of the States



### The Issue

This January at the Texas Public Policy Foundation's annual Policy Orientation for the Texas Legislature, Governor Greg Abbott announced his "Texas Plan" for restoring rule of law in the United States through state-led action: specifically, an Article V convention of states.

Beyond calling for an Article V convention of states, the Texas plan proposes nine amendments designed to rein in federal excesses, establish procedures for addressing violations of the rule of law, and restore a workable framework for federalism and separation of powers.

The nine amendments as described in the Texas plan would: 1) prohibit Congress from regulating activity that occurs wholly within one State; 2) require Congress to balance its budget; 3) bar administrative agencies from creating federal law; 4) bar administrative agencies from pre-empting state law; 5) allow a two-thirds majority of the States to override a U.S. Supreme Court decision; 6) require a seven-justice-super-majority vote for a U.S. Supreme Court decision that would invalidate a democratically enacted law; 7) limit the federal government to the powers expressly delegated to it in the Constitution; 8) give state officials the power to sue federal officials in federal court; and 9) allow a two-thirds majority of the States to override a federal law or regulation.

The mechanism for introducing these amendments is Article V of the Constitution. America's founders anticipated that government would expand beyond its constitutional limits. Article V provides states the means to restore the Constitution without needing to secure the agreement of Congress, one of the federal institutions whose encroachments make state action necessary.

Some take issue with the convention of states movement despite agreeing that Washington "has slipped its constitutional bounds." They fear "a cure that might kill the patient." The killing cure feared most is a runaway convention, in which rogue delegates hijack the proceedings and transform them into a "constitutional convention." A recent legal opinion issued by E. Scott Pruitt, attorney general of Oklahoma, observes that Article V conventions may "only propose amendments. A plenipotentiary convention—a constitutional convention called for a broad and unrestrained purpose—is not authorized under the U.S. Constitution." Pruitt thus debunks the notion that what Governor Abbott is calling for is—or could become—a "constitutional convention." Though often referred to as such, this everyday-language shorthand is misleading.

But there is a deeper reason not to fear a runaway convention: If 34 state legislatures actually agreed on a convention call, it would be the first time in history. Consider all the coalitions that would need to be formed in each state, between and among states, and across the country. The historic character of such a massive coalition would both require and, in turn, enhance significantly a similarly massive increase in public awareness. Moreover, ratification of any feared rogue amendments would take 38 states, which means that merely 13 states could veto any amendment.

Where one ultimately comes down on this issue depends on one's estimation of the possible risks and rewards of such an effort. On this calculation, consider what has become the final assessment of Antonin Scalia, whose passing has prevented him from providing further commentary on the matter. When asked about the claim that a convention of states would be "unlimited" and thus "might reinstate segregation and even slavery," Scalia rejoined, "I have no fear that such extreme proposals would come out of a constitutional convention."

We agree. Despite possible perils, the promise of a convention of states suggests that we "take this minimal risk," trusting that history will show it was "reasonable." The people are less to be feared today than the federal government. The prospect of a runaway convention is less to be feared than the reality of our runaway federal government.

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## The Facts

- Eight states have called for an Article V convention of states as of May 31, 2016: Alabama, Alaska, Florida, Georgia, Indiana, Mississippi, Oklahoma, and Tennessee.
- A recent Gallup poll reveals that 72% of Americans regard “big government” as a “greater threat” than “big business or big labor, a record high in the nearly 50-year history of this question.”
- The nonpartisan American Council of Trustees and Alumni recently declared “a crisis in American civic education,” with “survey after survey” showing recent college graduates unable to identify “the term lengths of members of Congress, the substance of the First Amendment, or the origin of the separation of powers.”

## Recommendations

- Texas should join the states mentioned above by passing legislation to call for an Article V convention of states when the 85th Legislature meets in 2017.
- The entire convention of states process—from state-level advocacy to national conversation and, potentially, the convention itself—should be conducted in a way that maximizes its civic educational value to the American people.

## Resources

[\*Restoring the Rule of Law with States Leading the Way\*](#) by Greg Abbott, Office of the Governor (2016).

[\*A Crisis in Civic Education\*](#) by William Gonch and Michael Poliakoff, American Council of Trustees and Alumni (Jan. 2016).

“[Record High in U.S. Say Big Government Greatest Threat](#)” by Jeffrey Jones, *Gallup* (Dec. 18, 2013).

“[The U.S. Constitution: An Illegal Document?](#)” by Thomas Lindsay, *Forbes* (May 25, 2016).

“[An Article V Constitutional Convention? Wrong Idea, Wrong Time](#)” by Walter Olson, Cato Institute (Jan. 5, 2016).

