Testimony of Jay Heck, Executive Director of Common Cause in Wisconsin

AJR021/SJR018 – Application to Congress under the provisions of Article V of the Constitution of the United States for a convention for proposing amendments relating to a balanced budget.

Assembly Federalism and Interstate Relations & Senate Financial Services, Constitution and Federalism Committees.

March 28, 2017

Common Cause Wisconsin respectfully opposes AJR 21/SJR 18

A constitutional convention would put at great danger our most cherished civil liberties and system of government. It would take place at a time of extreme gerrymandering (with legislators likely choosing the delegates), and in an environment of unlimited political spending. It would allow the wealthiest Americans to re-write the rules that govern our system of government.

Please do not authorize Wisconsin to be part of what triggers such a fiasco.

According to one of the nation’s most esteemed constitutional law scholars, Professor Laurence Tribe of Harvard Law School, a constitutional convention would put “the whole Constitution up for grabs.”

Another of our nation’s foremost constitutional law scholars, Dean Erwin Chemerinsky, recently wrote that “no one knows how the convention would operate. Would it be limited to considering specific proposals for change offered by the states or could it propose a whole new Constitution? After all, the Constitutional Convention in 1787 began as an effort to amend the Articles of Confederation, and the choice was made to draft an entirely new document.”

Simply put, there are no rules governing constitutional conventions. A constitutional convention would create an unpredictable Pandora’s Box. This is why we ask that you refrain from advancing this measure.

Several Supreme Court justices have warned about the potential outcomes of constitutional conventions. Former Chief Justice Warren Burger wrote that a “Constitutional Convention today would be a free-for-all for special interest groups.” Former Justice Arthur Goldberg wrote that “[t]here is no enforceable mechanism to prevent a convention from reporting out wholesale changes to our Constitution and Bill of Rights.” The late Justice Antonin Scalia said that he “certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?”

Some proponents of measures similar to AJR 21/SJR 18 in other states have argued that a convention convened pursuant to Article V of the Constitution could be limited to a single
topic, and that any proposed amendments will still need to be ratified by 38 states as a “check” on a runaway convention.

There are no guideposts or rules, however, to prevent delegates from lowering the threshold of 38 states currently necessary for ratification or going beyond the purpose for which it convenes. At the most recent constitutional convention in 1787, for example, attendees re-wrote the rules for ratification – indeed, they re-wrote the entire governing charter – and reduced the number of states needed to agree to the new Constitution.

Prof. Tribe enumerated a number of questions about a constitutional convention that he says are “beyond resolution by any generally agreed upon political or legal method.”

Specifically, Prof. Tribe explained the following questions have no agreed upon answer:

1. May a state application insist that Congress limit the convention’s mandate to a single topic, or a single amendment?
   - If Congress can call a convention independent of state applications (as Professor Sandy Levinson argues it may), then how could state applications possibly constrain a convention’s mandate?
   - If applications are constraining, then how are applications proposing related (but different) topics to be combined or separated?
   - Are they added up or not added up?
   - When do you hit the magic number 2/3 of the states submitting applications?

2. May the Convention propose amendments other than those it was called to consider?
3. May Congress prescribe rules for the convention or limit its powers in any way?
4. May the Convention set its own rules, independent of Article V, for how amendments that it proposes may be ratified – which is what the Philadelphia Convention did? The Philadelphia Convention was called under a scheme that said ratification required unanimity among the states – but they departed from that. What if ratification is decided by a national referendum?
5. Are the states to be equally represented, or does the one-person, one-vote rule apply? What about the District of Columbia? Do the citizens of the District have a role in a convention?
6. Could delegates be bound in advance by legislation or referendum to propose particular amendments or vote in a particular way? If delegates are chosen by lottery, it’s hard to imagine how they could be bound in advance.
7. Could the convention propose amendments by a simple majority, or a supermajority of 2/3?
8. If each state gets one convention vote, must delegates representing a majority of
the population nonetheless vote for an amendment in order for it to get proposed?
9. Conversely, if the convention uses the one-person, one-vote formula, must the
deleagations of 26 states – perhaps including the District of Columbia – vote in
favor of a proposed amendment?
10. What role, if any, would the Supreme Court play in resolving conflicts among
Congress, state legislatures, governors, referenda, and the convention itself? Can
we rely on the Court to hold things in check? The Court has assumed that
questions about the ratification process are non-justiciable political questions that
it can’t get involved in.

It risks too much to discover the answers to the above questions after-the-fact.

There is far too much at stake to risking putting the entire Constitution up for a wholesale
re-write as part of a constitutional convention – including all of the civil rights, protections,
and liberties that we enjoy today.

Thank you.