



Justice Scalia's Warning of a Constitutional Convention

In a recent e-mail from former U.S. Senator Tom Coburn (R-Okla.) to Oklahoma state legislators encouraging them to pass the Convention of States application for a "limited convention," Coburn used a supportive quote attributed to the late Supreme Court Justice Antonin Scalia (shown). The quote, as it appeared in the e-mail, reads:



If the only way to clarify the law, if the only way to remove us from utter bondage to the Congress, is to take what I think to be a minimal risk on this limited convention, then let's take it.

Reading this, one might believe that this portrays a recent view of the late justice, especially since Coburn's citation says "Justice." However, this is misleading.

Although no date was provided with the quote, it comes from remarks delivered by Scalia at a forum hosted by the American Enterprise Institute on May 23, 1979 — seven years before President Ronald Reagan nominated Scalia to the Supreme Court. The AEI forum was entitled, "[A Constitutional Convention: How Well Would It Work?](#)" and was moderated by former ABC News chief John Charles Daly.

Scalia was not a justice of the Supreme Court when he made that statement, but rather a law professor at the University of Chicago Law School. At the time, he also worked at the American Enterprise Institute, members of which he was addressing when he spoke in favor of the idea of a limited convention.

Scalia's full quote from 1979 reads:

So, it really comes down to whether we think a *constitutional convention* is necessary. I think it is necessary for some purposes, and I am willing to accept what seems to me a minimal risk of intemperate action. The founders inserted this alternative method of obtaining constitutional amendments because they knew the Congress would be unwilling to give attention to many issues the people are concerned with, particularly those involving restrictions on the federal government's own power. The founders foresaw that and they provided the convention as a remedy. If the only way to get that convention is to take this minimal risk, then it is a reasonable one. [Emphasis added.]

The "limited convention" that Scalia favored and was referring to in 1979 was a constitutional convention. However, much to dissatisfaction of Senator Coburn and the Convention of States (COS) Project, this quote does not accurately reflect Scalia's recent views on the subject of a modern-day convention.

On April 17, 2014, Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg appeared on an episode of *The Kalb Report*, a one-on-one panel discussion television and radio program jointly



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produced by the National Press Club Journalism Institute, George Washington University, and the Philip Merrill College of Journalism at the University of Maryland. The subject of the program was “A Conversation About the First Amendment.”

During the program, host Marvin Kalb asked a question of Seth Dawson from the office of Congressman Denny Heck (D-Wash.) regarding the recent suggestion by Justice John Paul Stevens of a [constitutional amendment to modify the Second Amendment](#). The question was, “If you could amend the Constitution in one way, what would it be, and why?” The first to answer was Scalia, who replied:

I certainly would not want a Constitutional Convention. I mean whoa. Who knows what would come out of that? But, if there were a targeted amendment that were adopted by the states, I think the only provision I would amend is the Amendment Provision. I figured out, at one time, what percentage of the populace could prevent an Amendment to the Constitution. And, if you take a bare majority in the smallest states by population, I think something less than two percent of the people can prevent a Constitutional Amendment. It ought to be hard, but it shouldn't be that hard. [Emphasis added.]

A video of Scalia's response can also be viewed [here](#) at time index 1:06:02 (one hour, six minutes, two seconds):

Scalia acknowledged the difficulty of amending the Constitution, and speaking in the context of amendments, he clearly warned against the notion of a convention, which is the second, or alternative, method for amending the Constitution under Article V.

During the question-and-answer session following a speech Scalia gave to the Federalist Society in Morristown, New Jersey, on May 8, 2015, he was asked whether a constitutional convention would be in the nation's interest.

“A constitutional convention is a horrible idea,” Scalia replied. “This is not a good century to write a constitution.”

Although COS would have one believe that a constitutional convention is a [“different creature entirely”](#) from an Article V convention or “convention of the states,” as they call it, this is simply not true.

Black's Law Dictionary, the definitive legal lexicon in American law, defines the term “constitutional convention” providing Article V of the Constitution as an example; the definition reads:

Constitutional convention. A duly constituted assembly of delegates or representatives of the people of a state or nation for the purpose of framing, revising, *or amending its constitution*. Art. V of U.S. Const. provides that a Constitutional Convention may be called on application of the Legislatures of two-thirds of the states. [Emphasis added.]

This definition of a constitutional convention originates from the second edition of *A Law Dictionary: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient, and Modern* published in 1910, by Henry Campbell Black (1860-1927), and remains unchanged in contemporary editions of *Black's Law Dictionary*.

Furthermore, during the height of the push for an Article V convention for a Balanced Budget Amendment (BBA) in the 1970s and '80s, both proponents of the BBA and the media referred to the Article V convention as a constitutional convention. Even Texas Governor Greg Abbott's 92-page [“Texas Plan”](#) calls his own proposal for an Article V convention a constitutional convention. For example, On



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page 67 of the plan it says:

To be sure, the Framers did not want to make it easy for the States to propose amendments. That is why *Article V requires two-thirds of the state legislatures to apply for a constitutional convention.* [Emphasis added.]

COS may attempt to explain away Scalia's use of the term constitutional convention, to say he did not mean an Article V convention, but it is undeniably clear that a constitutional convention *is* the same as an Article V convention, which from the context of his remarks in 2014 he clearly opposed.

Professor Scalia may have entertained the notion of an Article V convention back in 1979, but by 2014 he was firmly set against it, and rightly so, noting the uncertainty that could arise from such a modern convention. This is especially true given today's political climate and prevailing lack of education about the Constitution. The solution — as The John Birch Society advocates and Justice Scalia understood throughout his judicial career — is *adhering* to the Constitution, not changing it by way of amendments at an unpredictable convention.

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