

# THE CHRONICLE

of Higher Education

## Research

[Home](#) [News](#) [Faculty](#) [Research](#)



September 18, 2011

### **Unconventional Meeting of Minds**

Scholars and Tea Partiers gather to consider changing the Constitution

*By Christopher Shea*

Calls to change the Constitution are suddenly everywhere, and they aren't limited to any political quarter. Rick Perry, the Texas governor and Republican presidential hopeful, has proposed repealing the 17th Amendment—the one permitting the direct election of U.S. senators—and some Tea Partiers have rallied around a proposal to let state legislatures overrule acts of Congress (the so-called Repeal Amendment).

At the same time, many on the left support a constitutional amendment, if necessary, to undo the Supreme Court's 2010 *Citizens United* opinion, which grants corporations many of the same free-speech (and campaign-donation) rights that ordinary citizens have.

Lawrence Lessig, the Harvard law professor best known for his work on intellectual property but more recently a good-government reformer, has sensed the ferment and seized the moment: This month he will play host, with Mark Meckler, a national coordinator of the Tea Party Patriots, to a conference in Cambridge to discuss whether the time has come for a constitutional convention. Calling such a convention is a right given to Congress and the states under Article V of the Constitution but has never been exercised.

"Fifteen years ago, I didn't have the sense that the republic was prepared for this," Mr. Lessig says. "Now I do."

Among the unlikely bedfellows scheduled to show up are legal heavyweights like the University of Texas' Sanford Levinson and Harvard's Laurence Tribe; state representatives who have proposed amendments; and leaders of left- and right-leaning activist groups. The public is invited, too, which means attendees in "Don't Tread on Me!" T-shirts may be mingling with bearded college students whose shirts cry, "Jobs, Not Cuts."

#### **A 'Critical Mass' Moment**

The meeting could be a purely academic exercise—or something

more. "This is a critical-mass moment," says Nick Dranias, constitutional-policy director at the Goldwater Institute, which does public-policy research. Like Mr. Lessig, he says that the founders viewed the conventions outlined in Article V of the Constitution as a pragmatic check on the powers of the federal government, but that today, unfortunately, many politicians and lawyers think of calling a convention as a Pandora's box best left untouched.

Getting a convention called would be an accomplishment in itself, Mr. Dranias says. "I think that legitimizing this process is more important than any specific outcome."

Article V discusses, in sometimes frustratingly vague terms, several ways to change the Constitution. Two-thirds of both houses of Congress can propose amendments, which would then be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof. ... " That has been the traditional route of formal constitutional change (setting aside when the Supreme Court has a change of heart about something big). But legislatures of two-thirds of the states can also call for a convention for proposing amendments—which would then face the same approval process.

The article offers no guidance, however, for how convention delegates would be chosen or how they would vote. By state? Majority rule? (Historically, when momentum has built in the states toward calling a convention—as it did with the movement for direct election of senators—Congress has stepped in to act, in that case by writing the 17th Amendment.

Today, critics of that amendment, like Governor Perry, argue that if senators were appointed by their state legislatures instead, they would be less beholden to Washington.)

Article V places one key limit on a convention: It can't alter the fact that each state is represented by an equal number of senators. But there are some legal scholars who believe that "We the People" can, in the presence of overwhelming popular will, authorize an even more-sweeping convention—in the spirit of 1787.

#### **Beginning With Copyright**

Mr. Lessig's own disillusionment with the present state of government began with the belief that he was failing to make headway on copyright issues (he thinks Congress is too solicitous of the interests of large corporations in extending copyright protections to old works), in part because "there was so much money on the other side." Then he concluded that the influence of

the political money-culture wasn't limited to esoteric questions like copyright. It drove the system. At the very least, the perception that donors' money rather than voters' wishes drives policy is absolutely corrosive of democracy, he felt.

He disagrees with the Tea Party on most issues but sees in it a reflection of his own frustration. "An important point is that you don't have to agree on what a constitutional convention will do in order to call for one," he says. "Some people might want a balanced-budget amendment or a line-item veto. Some might want changes in *Roe v. Wade*."

"My idea is that this is a way to talk about issues in a different way, one that's not so tied up with the special interests of Washington."

Bill Norton, constitutional coordinator of the Tea Party Patriots, says his group's ranks are split between those who think a convention might be useful in restoring the "lost Constitution"—the one that more sharply limited federal power and was supplanted during the New Deal and by subsequent Supreme Court decisions—and those who fear that a convention would make things worse. "The people who are against it"—including him—"fear a runaway convention," he says.

Some on the left have similar feelings. Brenda Wright, director of the democracy program at the nonprofit group Demos (and a scheduled attendee at the conference), describes her view as one of "sympathetic skepticism."

On the one hand, Mr. Lessig accurately describes problems with current political arrangements, Ms. Wright says. "But if you look at the history of state efforts to call on Congress for a constitutional convention, you can immediately see that the topics have tended to be exactly those that, in my view, are going to take us backwards"—such as attempting to define marriage as a heterosexual institution.

"I think the hesitation of progressives on this issue is grounded in a history of understanding the Constitution itself as a check on the majoritarian tyranny over minorities," she says.

Mr. Lessig and others counter that there are checks on whatever a convention produces: Amendments, as Article V says, must be approved by three-quarters of the states. But Ms. Wright points to an element of paradox in that defense: On the one hand, a convention is supposed to solve many of our civic woes—implying sweeping reform. On the other, we needn't worry that it will be too

sweeping, because of checks and balances. Don't those arguments cancel each other out?

Then again, the checks are precisely what appeal to some people. There's a groundswell of interest in Constitutional reform "given the paralysis in Congress," says Art Wittich, a Montana state senator and a Republican who led a successful effort in that state to formally ask Congress to pass a balanced-budget amendment. (He describes himself as "more conservative than most people" but not a Tea Party member.) A convention offers one possible solution, he says, "but it will never work on a partisan basis," which is precisely what he likes about it.

Sanford Levinson, of the University of Texas at Austin, has long chided liberals for opposing constitutional reform out of fear that their neighbors would undo the Bill of Rights if they got half a chance. "Most liberals these days appear to be fully Madisonian in being close to terrified of the passions of their fellow citizens," he wrote in *Our Undemocratic Constitution* (Oxford University Press, 2006). That fear, plus overly sentimental reverence for the Constitution, he has argued, have blinded Americans to its defects. His list of pet grievances includes the Senate's supermajority voting rules, the difficulty of overriding a presidential veto, and life tenure for Supreme Court justices—and the overrepresentation, in the Senate, of small-population states.

He indulges a fantasy of a two-year-long convention, televised by C-Span, that would agree to sweep aside some of the Article V restrictions—in his vision, the people would rally behind the convention as the solidity of its work became apparent—and deal with even the unrepresentative Senate (the very thing verboten by the Constitutional text).

But, in truth, is there any kind of constitutional reform that can bridge America's remarkably polarized politics? Interviews with invitees make clear that activists on the left and right increasingly share a vocabulary centered on moving power from Washington to the local level. "Prior to the Cold War and prior to the 1930s, what's called the left in America did celebrate decentralization," says Ben Manski, executive director of the Liberty Tree Foundation for the Democratic Revolution. He sees a return to those progressive roots, which may be opening the door to fresh ideas about the Constitution.

And Mr. Dranias, of the Goldwater Institute, says: "I am hopeful that a kind of policy détente, on a common principle of

decentralizing power, will allow for experimentation to take place in the states. The left will say, 'We'll take medical marijuana and gay marriage in California.' The right will say, 'We want more freedom from environmental regulation in our state.' The left may not like these policy decisions, but they may appreciate the principle."

#### **Two Ends of the Spectrum**

Are there the makings of a constitutional bargain here? The size of the challenge is implicit in the divergent amendments proposed by the Goldwater Institute and Liberty Tree. The first group has been pushing for a "national debt-relief amendment," which would require a majority of state legislatures to approve any increase in the national debt. The bipartisan advantages, as Mr. Dranias sees them: Instead of a last-minute showdown behind closed doors in Washington, Congress would have to make its case for a budget early in the process. Of course, it's also designed to reduce federal spending across the board, not the left's ideal outcome.

Liberty Tree, meanwhile, has pushed a quite different agenda: In a campaign called Move to Amend, it is promoting an amendment that would "firmly establish that money is not speech, and that human beings, not corporations, are persons entitled to constitutional rights." Liberty Tree would also like to see enshrined in the Constitution the requirement that citizens can register on Election Day.

And Mr. Lessig? He'd like to entrench, in the form of an amendment, some version of an opt-in financing system that would support Congressional candidates through small donations only. And he would clarify that Congress has the power to limit, but not ban, expenditures by any noncitizen—including corporations.

Asked if he thought he could find common ground with Tea Partyers, Mr. Manski pauses for quite a while before saying, "I don't know." Then he chuckles. But convention proponents are quick to point out that the original Constitutional Convention included slaveholders and anti-slavers, who loathed each other; still, they managed to produce a nontrivial document.

Attendees to the Cambridge conference are not planning to produce a document. Instead they will discuss the legal issues surrounding a convention, what amendments might be offered, and what kind of national effort would be necessary to carry the project forward—or whether the whole idea should be scuttled.

It promises to be a cultural as well as an intellectual event. Will anyone show up dressed as Thomas Jefferson? And will that person

try to shout down the mild-mannered Mr. Lessig?

Mr. Levinson sees at least two ways the conference could break:

"One would be that people come together and within 10 minutes are shouting at each other," he says. "Another one would be that there is unanticipated common ground and people leave energized to spread the idea to the neighbors next door." Obviously, Mr. Lessig and fellow-minded reformers are hoping that the conference is the first step toward something much bigger.

#### Comments

0 red by

Add a comment



cshea

0 comments 0 likes received

Type your comment here.

Post as cshea

Showing 10 comments

Sort by **Oldest first** Follow comments: [by e-mail](#) [by RSS](#)

Real-time updating is **enabled**. (Pause)



RedWell 2 weeks ago

I won't defend the Constitution as inviolate or a perfect fit for the modern world, but this sounds like a can of worms being opened by people on both sides who don't really understand the state of U.S. government in its long-term dimensions. The exercise may be illuminating and fruitful, but reworking the world's oldest and still operative written constitution will certainly carry more baggage and unintended consequences than the putative result would be worth.

28 people liked this. [Like](#) [Reply](#)



wclibrary 2 weeks ago

Academics with lots of time on their hands love to convenioneer. Tea partyers with lots of time on their hands love to shout.

The one thing the US has over the EU and--yes--even China, is that everybody--even especially the people who count in China--still believes in the fiction that the US remains, relatively, a unified, stable country.

Wait and see what happens if enough people who count start getting taken seriously about another constitutional convention.

3 people liked this. [Like](#) [Reply](#)

Copyright 2011. All rights reserved.

The Chronicle of Higher Education 1255 Twenty-Third St, N.W. Washington, D.C. 20037



**12105442** 2 weeks ago

This sort of thing has a very bad ring to it. Both sides want to change the rules in their favor, but those of us in center left and center right prefer a slower and more frustrating rate of change. We're getting what we want (and deserve)...the stalemates just indicates we're conflicted about what we want, where we'll go and what we'll eventually deserve from that process. H'm, until all that sorts itself out, sounds good to me.

2 people liked this. [Like](#) [Reply](#)



**umstbechg** 2 weeks ago [in reply to 12105442](#)

I understand that a Constitutional Convention would open the entire constitution to change. With the political issues we have today, there is no way we should open our entire way of life to those political and lobbying interests.

Let's stay with the methods we have been using to make changes gradually and thoughtfully.

6 people liked this. [Like](#) [Reply](#)



**11142568** 2 weeks ago

I certainly hope that the difficulties involved in amending the constitution or in calling a convention would make it unlikely to happen. The country does seem to be very divided. One of the distressing things is that both sides seem to be trying to avoid coming together to find solutions before the 2012 election. And yet given our divisions, it is not very likely that the results of that election will end divided government. The democrats carried the day in 2008, a victory that included enough votes in the Senate to override filibusters, but there were enough divisions in that party that they were unable to accomplish much legislatively. And given our divisions, it does not seem likely that we would be able to come to consensus on any wise constitutional changes. The day of American ascendancy seems to be drawing to a close. We are living beyond our means. The last financial upheaval has come close to begging significant parts of the population. There is a lot of rage and resentment abroad. In some ways, we may be lucky that the government is more or less in a perpetual state of paralysis. Given the national mood, if we lost our paralysis, we might compound folly upon folly. In a certain sense we are not unlike the sub-continent after the partition: 2 blue sides and a red middle. Happily all the rage and resentment hasn't yet led to widespread massacres. Peter Baker

2 people liked this. [Like](#) [Reply](#)



**polarscribe** 2 weeks ago

The Goldwater Institute spokesman's ideas are uncommonly silly and obviously libertarian. There are any number of reasons why minimum environmental regulations should be established on a national level. Environmental effects and non-human species pay absolutely no attention at all whatsoever to our lines drawn on a map. If power plants in Wyoming are allowed to poison the air that Coloradans breathe, what recourse would cancer-stricken Denver residents have? Allow mines in Missouri to discharge their toxic-sludge wastewater into the Mississippi and let Louisianans deal with the mess downstream.

Insanity.

4 people liked this. [Like](#) [Reply](#)



**nyhist** 2 weeks ago

People from the left and right who advocate a new Constitutional Convention because they think it will be less paralyzed and less influenced by lobbyists and special interests than Congress is are incredibly naive. To argue against a convention, as I would, is not to be ultimately Madisonian (in a fear of the 'mob')—it is to be realistic about recognizing that a Pandora's Box would be opened, with little chance the lid could be reattached without disastrous consequences. Just because Congress is currently paralyzed by partisanship does not mean it always will be, after 2012 and beyond.

1 person liked this. [Like](#) [Reply](#)



**dencuddy** 2 weeks ago

Nothing more than sore losers from 2008 joined by opportunists all trying to change what they say they love and reverse.

1 person liked this.



**robert\_wyatt** 2 weeks ago

Just remove the damn money from the election process.



**sand6432** 1 week ago

One idea that Prof. Levinson has already expressed interest in--besides those mentioned in the article--is lowering the age for people to qualify to hold federal office: <http://www.psupress.org/books/...> Another interesting idea is to add a fourth branch of government: <http://www.psupress.org/books/...> All the people attending this conference would do well to read this book, which tackles issues that seem to worry Prof. Lessig a lot: <http://www.psupress.org/books/...> Thatcher