



GEORGETOWN LAW

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Honorable Ron Ryckman
Speaker of the House of Representatives
Kansas State Capitol
300 SW 10th St., Room: 370-W
Topeka, Kansas 66612

Re: Carpenter Amendment to Legislative Rules

Dear Speaker Ryckman:

I was alarmed to learn that the Kansas Legislature will be considering an amendment to its rules that would purport to override Article 2, Section 13, of the Kansas Constitution and allow simple majority votes to pass calls for a convention under Article V of the United States Constitution. Although the Legislature is free to propose an amendment of Section 13 to the People of Kansas on the 2022 ballot, it lacks the power to override the Constitution on its own. For it even to attempt to do so would gravely undermine the Rule of Law. If the Legislature were overtly to disregard one provision of the Constitution, the People of Kansas can only ask which provision will be next. Adherence to the constitutional order is particularly important in times such as these, with control of the State government divided between the two major parties. If the Legislature openly disregards one provision of the Constitution, it will undermine its ability to criticize actions of the Governor that it believes are overreaches.

Those that oppose calling a convention under Article V of the United States Constitution point to the enormous power such a convention would have to dismantle our constitutional liberties. The First Amendment, for example, is under almost constant attack from many quarters, and recent events at the U.S. Capitol will surely bring redoubled efforts to restrict the Second Amendment. Proponents of an Article V convention insist, without legal support, that a convention would choose to adhere to the limits of the agenda on which it was called. Imagining that an Article V convention would decline to exercise its enormous powers, especially in this might-makes-right political environment, has always been wishful thinking. But if proponents of an Article V convention are willing to disregard explicit requirements of state constitutions, such as Section 13, to get their way, they are demonstrating that they cannot be trusted to adhere to limitations on a convention's agenda that have no constitutional authority and which no body is empowered to enforce. Indeed, if the Kansas Legislature may disregard Article 2, Section 13, of its Constitution, one can readily imagine an Article V convention disregarding Article V's requirement that three-quarters of the states ratify any proposed amendments to the United States Constitution.

I have studied Attorney General Opinion 2019-10 and find it wholly unpersuasive. The Attorney General, of course, has no power to amend or override provisions of the Constitution, and his opinion does not relieve legislators of their obligations to uphold their own oaths under Article 15 Miscellaneous,

§ 14, to support the Kansas Constitution. *See Richards v. Schmidt*, 274 Kan. 753, 759 (2002) (Attorney General's opinions are not binding); *City of Junction City v. Cadoret*, 263 Kan. 164, 173 (1997) (same); *State v. Scherzer*, 254 Kan. 926, 932 (1994) (same). The essence of the Opinion is its contention that calling for an Article V convention is an entirely federal function and that this deprives the People of Kansas of any say in how that function may be exercised. This is untenable for several reasons.

First, as proponents of an Article V convention often note, the Framers intended the process of calling a convention to provide the People with the means of reining in the federal government in an emergency. It is utterly inconsistent with this purpose to say that the federal government, not the People, may control when and how a state legislature exercises this power on the People's behalf.

Second, although the Supremacy Clause would make Article V dominant in case of a clear conflict, no such conflict exists in this instance. Article V speaks of convention calls from the states; it says nothing about how those calls are issued. The natural implication is that the calls come from whatever organs the People of the respective states have adopted for expressing their will, operating as the People have directed through their state constitutions. In most states, that means the concurrence of majorities in both chambers of the state legislature. Nothing in Article V, however, makes any reference to such a process. Under the Nebraska Constitution, convention calls need only prevail in a single vote in its unicameral legislature; under the Kansas Constitution, convention calls require a two-thirds vote of each chamber of the Legislature. By the Opinion's logic, Nebraska is incapable of calling for an Article V convention because it lacks the typical bicameral legislature. The question of how states decide whether to call for an Article V convention, on which Article V is silent, should be contrasted with potential instances of genuine conflicts with the terms of Article V. For example, if Congress sent a proposed amendment to the states with the specification that ratification should occur in state conventions, the Kansas Legislature would, indeed, be powerless to ratify that proposed amendment itself under the terms of Article V. Nothing in Article V, however, conflicts with Section 13.

Third, by imagining a conflict where none exists, the Opinion disregards crucial interpretive maxim that legal texts should be read in harmony with one another if reasonably possible. “[C]ourts have the duty to ascertain legislative intent, where such be possible, in honest endeavor to harmonize conflicting provisions”. *Great Lakes Pipe Line Co. v. Wetschensky*, 193 Kan. 706, 710 (1964). “This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if this can be done within the apparent intent of the legislature in passing the statute.” *Skov v. Wicker*, 272 Kan. 240, 244 (2001), quoting *State v. Martinez*, 268 Kan. 21 (1999). As important as this principle is for ordinary statutes, the duty to find a harmonizing construction is even greater to prevent the invalidation of a provision of the Constitution. Thus, even if Article V did require that final passage of a convention call be by a simple majority vote, the Legislature could still honor Section 13 by requiring a two-thirds vote of each chamber to put such a resolution on its calendar. Article V cannot conceivably be read to override all state rules governing the conduct of the People's legislatures. If a legislator desires to call for an Article V convention at a time when the Legislature, pursuant to Article 2, Section 8, is out of session, surely Article V does not force the Legislature back into session to act on the matter. The Opinion neither makes any serious effort to harmonize its reading of Article V with Section 13 nor provides a principled basis for determining which provisions of the Kansas Constitution are overridden and which may stand.

Fourth, the Opinion is internally inconsistent in asserting that Article V requires that state legislatures' decisions on whether to call for a convention must be decided by a majority vote but then stating that the Legislature may adopt a two-thirds requirement instead. If Article V somehow requires a simple majority vote – despite the absence of any language even hinting at such a requirement – surely the Legislature would have even less authority than the People to disregard it. The Opinion's privileging the Legislature over the People entrenches the very kind of elite political dominance that the Founders intended Article V's convention mechanism to disrupt.

Finally, and most fundamentally, a basic tenet of law is that possession of a broad power implies possession of a narrower component of that power. *Director of Taxation, Dept. of Revenue v. Kansas Krude Oil Reclaiming Co.*, 236 Kan. 450, 454 (1984); *State ex rel. Boyle v. Board of Education of City of Topeka*, 59 Kan. 501 (1898). The People of Kansas unquestionably have the power to do away with the Legislature completely, as their neighbors in Nebraska did in the last century. If the People can completely eliminate the Legislature, they unquestionably have the power to constrain how it acts with a Bill of Rights, limits on the length of legislative sessions, and supermajority requirements. To imply otherwise is to assert that the People are not, in fact, sovereign in Kansas, that the People are subservient to the Legislature rather than the other way around. For the Legislature to disregard explicit limits the People have placed on its powers would be the ultimate act of arrogance and contempt.

The People's right to impose supermajority voting requirements for especially momentous decisions is a hallmark of constitutionalism. Kansas is by no means alone in requiring a supermajority to take actions relating to the amendment of the U.S. Constitution. The New Hampshire Senate requires a two-thirds vote to place any resolutions relating to the amendment of the U.S. Constitution on its calendar; over the years, that requirement has frustrated liberals and conservatives alike but both parties have honored it scrupulously. Other states have limitations on the consideration of Article V convention calls that also have the practical effect of requiring broad, bipartisan support to take the most consequential action possible in our constitutional system.

Once legislatures begin to disregard constitutional requirements of supermajorities, there will be no obvious stopping point. Can the new Democratic majority in the U.S. Senate conclude that the constitutional requirement of a two-thirds vote to convict in impeachment trials is merely "precatory" and convict President Trump by a simple majority? Can a Democratic Congress change its rules to override the next Republican president's vetoes with simple majorities? Can the many state legislatures whose constitutions require a two-thirds majority to enact an unbalanced budget or to increase public debt evade those limits with simple rules changes? Indeed, if proponents of an Article V convention succeed in adding a balanced budget amendment to the U.S. Constitution, could Congress then treat its requirements as merely precatory, citing Kansas's example as support? This road has no logical stopping point other than the destruction of the constitutional order as we know it. I know well the frustration supermajority requirements can bring, but the evils they prevent far outweigh the positive innovations they postpone.

Thank you very much for your consideration.

Sincerely yours,

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