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Excerpts from American Enterprise Institute's Panel Discussion on Article V with Panelist Antonin Scalia

May 23, 1979

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MR. DALY: All right. Professor Scalia, Richard Rovere in the New Yorker, suggested that the convention method of amendment might reinstate segregation and even slavery, throw out much or all of the Bill of Rights, eliminate the Fourteenth Amendment's due process clause, reverse any Supreme Court decision the members didn't like, and perhaps for good measure, eliminate the Supreme Court, itself. [Laughter.] Now, what would you anticipate from an unlimited convention?

ANTONIN SCALIA, professor of law, University of Chicago: I suppose it might even pass a bill of attainder to hang Richard Rovere. [Laughter.] All those things are possible, I suppose, just as it is possible that the Congress tomorrow might pass a law abolishing social security as of the next day, or eliminating Christmas. Such things are possible, remotely possible. I have no fear that such extreme proposals would come out of a constitutional convention. Surely, whether that risk is sufficient to cause anyone to be opposed to a constitutional convention depends on how high we think the risk is and how necessary we think the convention is. If we thought the Congress were not necessary for any other purpose, the risk that it might abolish social security would probably be enough to tell its members to go home. 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.]

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
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PROFESSOR SCALIA: I have not proposed an open convention. Nobody in his right mind would propose it in preference to a convention limited to those provisions he wants changed. Regardless of the issue-say, a constitutional amendment on abortion-its supporters would want a convention that considers that issue and nothing else; or one that considers only the particular features of the Constitution that they do not like, but precludes consideration of those features they do like. I think there is nobody, except maybe one or two anarchists, who would sincerely want an open convention for its own sake, to expose the whole system to possible change. There comes a point, however, at which one has to be willing to run the risk of an open convention to get the changes that are wanted. [Essentially what I have said is that there is some risk of an open convention, even with respect to the limited proposal of financial responsibility at the federal level. I think that risk is worth taking. It is not much of a risk. Three-quarters of the states would have to ratify whatever came out of the convention; therefore, I don't worry about it too much.] I would also be willing to run that risk for issues primarily involving the structure of the federal government and a few other so-called single issues. I would favor a convention on abortion, which some consider a single issue. I suppose slavery could have been called a single issue, too. It all depends on how deeply one feels about the issue. In any case, I do not have any great fear of an open convention, since three-quarters of the states do have to ratify what comes out of it. The clucking that Richard Rovere and others do about it is simply an intentional attempt to create panic and to make the whole idea sound unthinkable. It is not unthinkable at all; it is entirely thinkable.

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PROFESSOR SCALIA: I listed first among the things that I would like to have considered the structural issues at the federal level. I do not have a lack of trust in the American people. [I am the one here who is least terrified of a convention.] We have come a long way. We have gotten over many problems. But the fact remains that a widespread and deep feeling of powerlessness in the country is apparent with respect to many issues, not just the budget issue. The people do not feel that their wishes are observed. They are heard but they are not heeded, particularly at the federal level. The Congress has come up with a lot of palliatives--the legislative veto, for example-which do not solve the problem at all. Part of the



 problem as I have noted is simply that the Congress has become professionalized; its members have a greater interest than ever before in ~~CONVENTION OF STATES (U)~~ in office; and it is served by a bureaucracy and is much more subject to the power of individualized pressure groups than to the unorganized feelings of the majority of the citizens. This and other factors have created a real feeling of disenfranchisement that I think has a proper basis. The one remedy specifically provided for in the Constitution is the amendment process that bypasses the Congress. I would like to see that amendment process used just once. I do not much care what it is used for the first time, but using it once will exert an enormous influence on both the Congress and the Supreme Court. It will establish the parameters of what can be done and how, and after that the Congress and the Court will behave much better. ...

PROFESSOR SCALIA: May I rehabilitate myself? Maybe reach down a hand to pull Paul back up on the bandwagon? When I say I do not much care what it is about, I mean that among various respectable issues for a constitutional convention, I am relatively neutral as to which goes first. The process should be used for some significant issue that concerns the American people, but which issue is chosen is relatively unimportant. I would not want a convention for some silly purpose, of course. But I think there are many serious purposes around, many matters that profoundly concern the American people and about which they do not now have a voice. I really want to see the process used responsibly on a serious issue so that the shibboleth-the Richard Rovere alarm about the end of the world--can be put to rest and we can learn how to use the process responsibly in the future.

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