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AMENDING THE CONSTITUTION BY THE CONVENTION METHOD

INTRODUCTION

What has made the United States Constitution an enviable living document is Article V, by which the Constitution provides for its own revision. Under this article, the Constitution has been amended 26 times. Whether there will be a 27th Amendment, to require a federal balanced budget, is something that a number of state legislatures, including those of New Hampshire, Kentucky, and Wisconsin, now are addressing.

Article V of the Constitution provides two methods for proposing amendments: 1) by a two-thirds vote of Congress, and 2) by a convention called by two-thirds of the states.[1] After such amendments are proposed, they must be ratified by three-fourths of the states before they are added to the Constitution.

Two to Go. The first method for passing amendments has been used all 26 times during the past two centuries. No amendments have been proposed through the second method. This may soon change; 32 states have enacted resolutions calling for Congress to convene a constitutional convention to propose the amendment requiring a balanced federal budget. Kentucky, Wisconsin, and some ten other states are considering such resolutions, while several states, including New Hampshire, are reconsidering their previously enacted resolutions. If two more resolutions pass, the nation could see its first constitutional convention under the terms of the 1787 Constitution.

Because no convention under Article V has ever been held, the prospect of a constitutional convention is prompting understandable but unfounded fears. Critics have

1 Article V provides: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress...."

argued that the convention method of amendment is an untried and dangerous process and that a convention could "run away" beyond its mandate and rewrite the entire Constitution, perhaps even repealing the Bill of Rights.

Safer than Congress. These worries, however, are based on a misperception of the nature of an Article V convention and of the safeguards built into the amendment process. A wide variety of authorities, including a special study committee of the American Bar Association, point out that a convention legally can be limited to a particular subject. These limitations can be enforced by Congress or the courts. A convention also would be constrained by a range of political factors, including the election of its delegates.

Most important, a convention called under Article V could only propose, not enact, amendments. These proposals still would have to be ratified by 38 states — no easy task. Given these strong safeguards, a convention would be far less able to "run away" with the Constitution than Congress itself, which may propose constitutional amendments at any time and on virtually any subject.

Safety Valve. The convention method of amendment is a critical ingredient of the constitutional balance of power. While Congress may in most cases be counted upon to propose constitutional amendments when needed or desired by the American people, the framers knew that Congress would be reluctant to do so if that would lead to a reduction in its own powers. The convention method thus provides a "safety valve" to propose needed amendments in cases where federal lawmakers might impede needed reform.

Even the looming possibility of a convention can be enough to force action by Congress. On at least one occasion this century, the threat of a convention led Congress to propose an amendment, which became the Seventeenth Amendment, establishing the direct popular election of Senators.

Far from being a threat to the Constitution, as critics suggest, the convention method of amending is a necessary and integral part of the Constitution. Constitutional conventions, of course, should not be taken lightly. Yet exaggerated claims should not dissuade state legislators from considering this vital element of the Constitution to deal with Congress's inability to resolve important national problems.

THE FRAMING OF ARTICLE V

Of the 26 amendments to the Constitution, all were proposed by the Congress, none by a convention. This would have surprised the framers of the Constitution, who saw equivalent roles for the Congress and conventions in the amending process. In fact, many preferred the convention method. The first suggestion for an amendment provision saw no role for Congress. The "Virginia Plan" for the Constitution simply stated that "provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required...."[2] In accordance with this view, the first draft of Article V, by the Philadelphia convention's "committee of detail,"

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2 M. Farrand, *The Records of the Federal Convention* 22 (1937).

provided for the proposal of amendments only by conventions, with no role at all for Congress.[3] This was consistent with state practice at the time. As of 1787, only three of the eight states with an amendment process gave their legislatures a role.[4]

Several delegates objected to this draft, fearing that it would give the states too much power at the expense of Congress. As a compromise, the convention settled on the current Article V, under which both the states and the Congress would play a role in proposing amendments. James Madison later wrote that Article V "equally enables the general and the State governments to organize the amendment of errors...."[5]

The delegates clearly felt that a two-pronged amending method would assure that no single institution could block important amendments. As George Mason of Virginia declared, it would be improper to require congressional approval of amendments "because they may abuse their power, and refuse their consent on that very account."[6] Under Article V, as finally adopted, neither Congress nor the states could, by themselves, block an amendment.

PAST USES OF THE CONVENTION CLAUSE

Although no convention has ever been called under Article V, individual states in hundreds of cases have called for a convention. During the 1800s, most such convention calls were for broad, general revisions of the Constitution. Since the turn of this century, however, resolutions for conventions normally have been limited to specific issues that Congress had refused, or failed, to address. Five times in this century, more than half of the states have requested such a limited convention regarding a particular issue.

The most effective use of the convention clause of Article V was in the campaign for direct election of U.S. Senators. Beginning with the rise of the progressive movement in the 1890s, sentiment began to grow for the election of U.S. Senators by direct popular vote, rather than by state legislatures as originally provided by Article I of the Constitution. Between 1893 and 1902, the House of Representatives passed several resolutions proposing a constitutional amendment requiring direct election. But the Senate, understandably, refused consistently to vote on the issue; many of its members, after all, could expect to lose their jobs if they had to win popular support.

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3 *Ibid.*, at 188.

4 See American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* (American Bar Association, 1974, as reprinted by the National Taxpayers Union), p. 15.

5 *The Federalist Papers*, No. 43 (New York: Mentor Books, 1961), p. 278.

6 Office of Legal Policy, U.S. Department of Justice, *Limited Constitutional Interventions Under Article V of the United States Constitution*, September 10, 1987, p.7.

To force Congress's hand, the states turned to the convention provision of Article V. Between 1893 and 1911, some thirty states called for a convention to propose an amendment regarding direct election, only one short of the 31 needed to trigger the convention process.[7] Rather than face the prospect of a convention, the Senate, on May 13, 1912, approved a direct election amendment, sending it to the states for ratification, where it obtained approval of three-quarters of the states and became the Seventeenth Amendment to the Constitution in 1913.[8] Thus although no convention took place, Article V had served its purpose by removing the congressional roadblock.

Roadblock. Supporters of the current campaign for a constitutional convention to propose a balanced budget amendment argue that a similar institutional roadblock exists today. While the federal budget is a major national problem, they say, Congress is hesitant to solve it in a way that would curtail congressional powers. Thus another means of initiating change is required.

In 1975, the North Dakota Legislature became the first to call for a convention to propose a balanced budget amendment. By 1983, some 32 state had done so – just two short of the required number. Although no additional states have approved resolutions calling for a such a convention since then, legislation is expected to be considered in at least twelve states this year. Passage of a resolution in any two could trigger the first constitutional convention in 200 years.

MYTH OF THE RUNAWAY CONVENTION

The most common question surrounding the convention clause of Article V is whether a convention could legally be bound by a limit on the subjects it may address, or whether it would be free to rewrite the entire Constitution, much as was done to the Articles of Confederation in 1787. Critics of the convention method often argue that a constitutional convention, by its nature, cannot be limited and thus could revise any part of the Constitution – even the Bill of Rights – if delegates were so inclined.

These fears, however, are unwarranted. There is ample legal authority concluding that any Article V convention legally can be limited to one subject and that such limits can be enforced. Just as important, there are numerous political and restraints which make it virtually impossible for a "runaway" convention to rewrite the Constitution against the wishes of the American people.

Legal Limitations on Conventions Under Article V

When most Americans think of a constitutional convention, they envision a gathering like that held in 1787 – a general convention engaged in an overall rewriting of the

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7 There were 46 states in the Union in 1911. Some commentators claim that 31 states in fact did request a convention. Because of the inconsistent way in which applications were recorded, the exact number remains unsettled. See American Bar Association, *op. cit.*, pp. 60-63.

8 See Paul J. Weber, "The Constitutional Convention: A Safe Political Option," 3 *Journal of Law and Politics* 51, 57-58 (1986).

Constitution. A convention under Article V, however, need not have such a broad scope. The article does not refer to a convention for the purpose of rewriting or even revising the Constitution. Instead, it specifically refers to "a Convention for proposing Amendments...."[9]

The history of this clause shows that the framers had in mind conventions assembled to address discrete problems. For instance, Alexander Hamilton, in *The Federalist Papers*, stated that his belief at the time was that "[e]very amendment to the Constitution, if once established, would be a single proposition....There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution."[10] Specific amendments, rather than comprehensive rewrites of the Constitution, appear to be what most framers expected.

Allowing Limitations. A more difficult question is whether a convention could, in fact, be legally prohibited from considering amendments on more than one subject. Article V itself is silent on this issue, not referring at all to how or whether a convention's scope may be limited. Many constitutional authorities, however, have concluded that such limitations are allowed under Article V. For instance, a special study committee of the American Bar Association, after a two-year study, concluded in 1974 that the Constitution does provide for the limitation of conventions.

The committee based its determination on several factors. It noted that early drafts of Article V had indicated an intention for conventions to be limited to the consideration of particular subjects. The initial draft of the article by the 1787 Constitutional Convention's committee of detail provided that:

> "[o]n the application of the Legislatures of two thirds of the States of the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention *for that purpose*.(emphasis added.)[11]

Standard Practice. The phrase "for that purpose" indicates an intent that conventions would be called for certain, discrete purposes, without authority to conduct a general review of the Constitution. The ABA committee pointed out that limited conventions were in line with the standard practice among state constitutional conventions at the time. Of the state constitutions then providing for conventions, most stated explicitly that the conventions could be limited to particular issues.[12]

The ABA committee also concluded that there are sound policy reasons why states should be able to call limited conventions. The convention method of amendment, it said, was meant to be a workable alternative to Congress in the amendment process. If states could not limit the agenda for such conventions, the ABA scholars reasoned, states would be unduly discouraged from employing this option. In addition, the committee found a limited convention to be more consistent with democratic principles, since voters would know the subject matter to be considered before electing delegates. If the range of topics

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9 See footnote 1 above.

10 *The Federalist Papers*, Number 85, *op. cit.*, p. 525.

11 American Bar Association, *op. cit.*, p. 12.

12 *Ibid.*, p. 15.

to be addressed were known and limited, the committee reasoned, the public would be better able to exercise an informed judgment in choosing among different candidates.

Safeguards Against a Runaway Convention

Even if a convention could be limited legally to a particular subject, critics say, it still could ignore its restrictions and embark upon a wide-ranging revision of the Constitution. These arguments, however, ignore the legal and political safeguards built into the amendment system, which make any such "runaway" convention virtually impossible. Among these safeguards:

1) Election of Delegates. Article V does not specify exactly how or when delegates to a constitutional convention would be chosen. This power has apparently been left to the Congress, which is given the responsibility to "call" the convention. Thus while Congress has no choice but to call a convention once the requisite number of valid state applications has been received, the power to "call" gives it an opportunity to craft the process by which delegates will be selected.[13] Using this power, Congress can take steps to provide for an election process which would maximize the public debate on the issue and to ensure the accountability of the delegates.

One bill now pending in Congress, S. 589, sponsored by Senator Orrin Hatch, the Utah Republican, would establish procedures for constitutional conventions.[14] Among other provisions, the bill would allow every state to send one delegate for each of its congressional districts, and two delegates selected on an at-large basis. The convention would begin no more than eight months after passage of a convention resolution by Congress.[15]

The election of convention delegates likely would be well contested. Because no such convention ever has been held, it would generate intense media and public interest, probably more than the typical congressional election. Political parties and interest groups could be expected to be very involved, ensuring a spirited debate. The leading candidates, especially in such a short campaign period, probably would be those with strong public name recognition. Thus, the eventual delegates would not be unknown and untried individuals. On the contrary, most likely they would be figures already known to the

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13 *Ibid.*, p. 9.

14 While no action has been taken on the Hatch bill in this session, similar bills were unanimously approved by the Senate Judiciary Committee in 1984 and 1985. In addition, similar legislation sponsored by the late Senator Sam Ervin, a Democrat from North Carolina, passed the full Senate in 1971 and 1973. See, S.Rept. No. 135, 99th Cong., 1st Sess. 13-15 (1985).

15 See, Henry Butler, "State Petitions for a Balanced Budget Constitutional Convention: A Descriptive Essay on the Political Economy of the Article V Process," in *The Constitutional Convention: How is it Formed? How is it Run? What Are the Guidelines? What Happens Now?* (Washington, D.C.: National Legal Center for the Public Interest, 1987), p. 30.

electorate — including civic leaders, government officials, and perhaps even members of Congress.[16]

During the campaign, the convention candidates would be asked where they stand not only on the amendments being proposed, but also on such concerns as whether they would attempt to lead the convention away from its defined subject matter. Delegates thus would be required to commit themselves on the question of a "runaway" convention even before they were elected.[17] While the delegates' promises would, of course, not be binding, the public scrutiny of the candidates would make organized efforts to lead the convention beyond its legal scope virtually impossible.

2) Congressional Power to Choose the Mode of Ratification. If, despite the political restraints imposed in the delegate selection process, a convention still strayed and proposed constitutional amendments outside of its designated subject matter, those amendments would face a second obstacle: Congress. Under Article V, the convention could not actually submit amendments to the states for ratification until Congress chose the "Mode of Ratification." Congress must designate whether state legislatures or state ratifying conventions are to ratify the amendments.

This gives Congress a tool to stop, in effect, any amendments that exceed the convention's charge. If amendments proposed by the convention went beyond the limits imposed upon it, Congress simply could decline to choose a mode of ratification for those amendments.[18] The proposed amendments would be able to go no farther.

Congress, of course, could only exercise this option if the proposed amendments were outside the legal scope of the convention. It could not, consistent with the Constitution, block validly adopted proposals. While a determination of the extent of Congress's powers in each case would not always be easy, the real danger faced — given Congress's interest in the matter — is that the convention would be circumscribed too much, not too little.[19]

3) Review by the Courts. Any amendments proposed that exceeded a convention's powers also would invite a legal challenge and could be invalidated by the Supreme Court.

There has been considerable controversy over the issue of the Court's jurisdiction in such matters. In the 1939 Supreme Court case of *Coleman v. Miller*, for example, the Court was asked to decide whether Kansas had validly ratified a proposed child labor amendment to the federal Constitution.[20] It declined to settle the issue, stating that questions regarding

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16 The Hatch bill would prohibit federal employees, including members of Congress, from serving as delegates. Given the experience and expertise such individuals could lend to the process, the advisability of this prohibition is not clear.

17 For a more detailed discussion of the probable nature of a convention delegate campaign, see Weber, *op. cit.*, pp. 61-63.

18 Office of Legal Policy, *op. cit.*, p. 43.

19 Congress's decision in this case probably also would be subject to court review.

20 307 U.S. 433 (1939).

the amendment process were "political questions" to be worked out by Congress and the President, without judicial intervention.

More recent decisions, however, indicate that federal courts today would be much more willing to settle political questions. During the 1960s, for example, the Supreme Court intervened to rule on such "political" questions as how state legislature districts should be apportioned and under what circumstances Congress can refuse to seat a member.[21] Moreover, even before *Coleman*, the Supreme Court settled numerous issues regarding the amendment process.[22] Thus it appears that the courts could, and would, resolve any questions arising from a constitutional convention, and prevent it from exceeding its bounds.

4) Ratification by the States. In the improbable event that all other safeguards failed, proposals made by a constitutional convention of course still would be only proposals. They would not become part of the U.S. Constitution until ratified by three-quarters of the states. Thus, even if a convention did "run away" and propose far-reaching revisions in the Constitution, those proposals would not become law unless they were approved by legislatures or specially held conventions in 38 states.

This is no easy task even for amendments with broad popular support. In fact, the last two amendments proposed by Congress — the popular equal rights amendment and an amendment to provide the District of Columbia with representation in Congress — failed in their bids for ratification. It is thus virtually inconceivable that some drastic rewriting of the Constitution, devised in smoke-filled rooms and opposed by a large body of the American people, could survive the ratification process. A proposal by a "runaway" convention, lacking broad popular support, would doomed.

CONCLUSION

Given the numerous safeguards built into the convention method of amendment, fears that use of this method would endanger the Constitution are unfounded. In fact, the convention method actually may be the safer method of amendment. A convention is subject to many constraints, while Congress may propose an amendment to the states at any time, with almost no limits on the subject matter of those amendments.

Framers' Intention. Thirty-two state legislatures have petitioned Congress to convene a constitutional convention to consider a balanced budget amendment, under the provisions of Article V of the U.S. Constitution. Proponents of this action maintain that Congress is incapable of restraining spending and eliminating the deficit, yet refuses to send a balanced budget amendment to the states for their consideration. Opponents of a convention argue that a convention is not an appropriate way of dealing with the problem because convention delegates might mount an assault on the Constitution. But the convention method of amendment is not only a safe method of amendment, it is an integral part of the constitutional system of checks and balances. The framers of the Constitution wisely intended the convention method to be a vital counterweight to the powers of Congress to

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21 *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969).

22 See cases cited in Office of Legal Policy, *op.cit.*, pp. 45-46.

block amendments. As the campaign for direct elections to the U.S. Senate demonstrated, the threat of a constitutional convention sometimes is necessary to force consideration of amendments that challenge the self-interest of Capitol Hill lawmakers.

The convening of a constitutional convention is, of course, a serious and complex matter. It must not be taken lightly. Nevertheless, the convention clause of Article V is an integral and necessary part of the constitutional system of checks and balances. Americans and their representatives in state legislatures and in Congress should not allow misinformation to divert them from employing this wisely crafted provision. When Congress fails to propose needed amendments to the Constitution, policy makers should not hesitate to put it to use.

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