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Constitutional Guidance for Lawmakers

Article V: Congress, Conventions, and Constitutional Amendments

Advocates of a "living" Constitution argue that the Founders' Constitution is hopelessly outdated and unable to grow and adapt to the times. The amendment procedure detailed in Article V belies such claims. As Madison explains in The Federalist, *the amendment procedure allows subsequent generations to correct errors and make whatever "useful alterations will be suggested by experience." Yet at the same time, the difficulty of constitutional amendment prevents the Constitution from being deprived "of that veneration, which time bestows on everything, and without which the wisest and freest governments would not possess the requisite stability." By design, the amendment process requires extensive deliberation and ensures that amendments are the settled opinion of the American people. To date, as was expected, every amendment to the Constitution has been proposed through Congress before being ratified by the states. Although there have been several attempts to call an Article V amending convention—some of which have driven Congress to act—the extensive unknowns and significant risks involved in that uncharted option make congressional proposal of amendments abundantly more prudent and the most viable method to achieve serious constitutional reform. This essay is adapted from* The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures 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 the Congress...."
— Article V

The process of amendment developed with the emergence of written constitutions that established popular government. The charters granted by William Penn in 1682 and 1683 provided for amending, as did eight of the state constitutions in effect in 1787. Three state constitutions provided for amendment through

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the legislature, and the other five gave the power to specially elected conventions.

The Articles of Confederation provided for amendments to be proposed by Congress and ratified by the unanimous vote of all thirteen state legislatures. This proved to be a major flaw in the Articles, as it created an insuperable obstacle to constitutional reform. The amendment process in the Constitution, as James Madison explained in *The Federalist* No. 43, was meant to establish a balance between the excesses of constant change and inflexibility: "It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story wrote that a government that provides

> no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution.... The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

In its final form, Article V creates two ways to propose amendments to the Constitution: through Congress or by a special convention called by the states for the purpose of proposing amendments. In either case, the proposed amendment or amendments must then be ratified by the states, either (as determined by Congress) by state legislatures or by ratifying conventions in the states.

The Virginia Plan introduced at the start of the Constitutional Convention called for amendment "whensoever it shall seem necessary." The Committee of Detail proposed a process whereby Congress would call for a constitutional convention on the request of two-thirds of the state legislatures. George Mason feared this method was insufficient to protect the states, while Alexander Hamilton thought that Congress should be able to propose amendments independent of the states. Madison (as recorded in his *Notes of Debates in the Federal Convention of 1787*) thought the vagueness of an amendment convention sufficiently problematic to reject the provision: "How was a Convention to be formed? By what rule decide? What the force of its acts?" After further debate, the delegates passed language proposed by Madison (and seconded by Alexander Hamilton) that the national legislature shall propose amendments when two-thirds of each House deems it necessary, or on the application of two-thirds of the state legislatures. Proposed amendments were to be ratified by three-fourths of the states in their legislatures or by state convention.

The careful consideration of the amending power demonstrates that the Framers would have been astonished by more recent theories claiming the right of the Supreme Court to superintend a "living" or "evolving" Constitution outside of the amendment process.

The Constitutional Convention made two specific exceptions to the Amendments Clause, concerning the slave trade (Article V, Clause 2) and equal state suffrage in the Senate (Article V, Clause 2), but defeated a motion to prevent amendments that affected internal police powers in the states.

Just before the end of the Convention, George Mason objected that the amendment proposal would allow Congress to block as well as propose amendments, and the method was changed again to require Congress to call a convention to propose amendments on the application of two-thirds of the states. Madison did not see why Congress would

not be equally bound by two-thirds of the states directly proposing amendments as opposed to the same number calling for an amendments convention, especially when the proposed Article V convention process left so many unresolved questions. In the end, Madison did not object to including an amendments convention "except only that difficulties might arise as to the form, the quorum etc. which in constitutional regulations ought to be as much as possible avoided."

The careful consideration of the amending power demonstrates that the Framers would have been astonished by more recent theories claiming the right of the Supreme Court to superintend a "living" or "evolving" Constitution outside of the amendment process. More significantly, the double supermajority requirements—two-thirds of both Houses of Congress and three-quarters of the states—create extensive deliberation and stability in the amendment process and restrain factions and special interests. It helps keep the Constitution as a "constitution," and not an assemblage of legislative enactments. Most importantly, it also roots the amending process in the Founders' unique concept of structural federalism based on the dual sovereignty of the state and national governments.

The advantage of the Amendments Clause was immediately apparent. The lack of a bill of rights—the Convention had considered and rejected this option—became a rallying cry during the ratification debate. Partly to head off an attempt to call for another general convention or an open-ended amendments convention, but mostly to legitimize the Constitution among patriots who were Anti-Federalists, the advocates of the Constitution (led by Madison) agreed to add amendments in the first session of Congress. North Carolina and Rhode Island acceded to the Constitution, and further disagreements were cabined within the constitutional structure.

Madison had wanted the amendments that became the Bill of Rights to be interwoven into the relevant sections of the Constitution. More for stylistic rather than substantive reasons, though, Congress proposed (and set the precedent for) amendments appended separately at the end of the document. Some have argued that this method makes amendments more susceptible to an activist interpretation than they would be otherwise.

As Madison predicted, the difficulties inherent in an Article V amendments convention have prevented its use, though some state applications (depending on how those applications are written and counted, an additional controversy in the Article V convention process) have come within one or two states of the requisite two-thirds. Precisely because of the potential chaos of the process, the very threat of an amendments convention can be used to pressure Congress to act rather than risk an amendments convention. The movement favoring direct election of Senators was just one state away from an amending convention when Congress proposed the Seventeenth Amendment in 1911. Most recently, in the 1980s, state applications for a convention to propose a balanced budget amendment led Congress to vote on such an amendment and pass the Gramm-Rudman-Hollings Act (later declared unconstitutional in part by the Supreme Court) requiring the federal budget to be balanced.

The lack of precedent, extensive unknowns, and considerable risks of an Article V amendments convention should bring sober pause to advocates of legitimate constitutional reform contemplating this avenue.

There have been hundreds of applications for an amending convention over the years from virtually every state. Because no amending convention has ever occurred, an important question is whether such a convention can be limited in scope, either to a particular proposal or within a particular subject. While most calls for amending conventions in the nineteenth century were general, the modern trend is to call (and thus count applications) for conventions

limited to considering a single, specific amendment. Some scholars maintain that such attempts violate the very mechanism created by Article V: the text says that upon application of the states Congress "shall call a Convention for *proposing Amendments*," not for confirming a particular amendment already written, approved, and proposed by state legislatures (which would effectively turn the convention for *proposing* amendments into a *ratifying* convention). Indeed, it is not at all clear as a matter of constitutional construction (and doubtful in principle) that the power of *two-thirds* of the states to issue applications for a convention restricts, supersedes, or overrides the power of *all* the states assembled in that convention to propose amendments to the Constitution. Other questions include the many practical aspects of how an amending convention would operate and whether any aspects of such a convention (including going beyond its instructions) would be subject to judicial review.

Much greater certainty—not to mention extensive historical experience and proven political viability—exists as to the power of Congress to propose amendments.

The Federalist Papers, unfortunately, offer no guidance on this matter. Madison refers to amendment conventions in *Federalist* No. 43 only in general terms, noting that Article V "equally enables the general and the State governments to originate the amendment of errors." And in *Federalist* No. 85, while Hamilton discusses how Congress cannot limit the scope of an Article V convention, he says nothing as to whether states can or cannot do so.

The requirement that amendments proposed by such a convention must be ratified by three-fourths of the states is a significant limit on the process and likely prevents a true "runaway" convention from fundamentally altering the Constitution. Serious scholars will undoubtedly continue to debate the historical record and speculate about the possibility of an amendments convention under Article V. Nevertheless, the lack of precedent, extensive unknowns, and considerable risks of an Article V amendments convention should bring sober pause to advocates of legitimate constitutional reform contemplating this avenue.

While a valid method created and available under the Constitution, "a Convention for proposing Amendments" has never been viewed as just another tool for reform but has become ever more so an ultimate option to be deployed only *in extremis* for the sake of maintaining the Constitution. Hence, the only time Madison pointed to an amendments convention was during the Nullification Crisis of 1832 as a last-ditch effort to prevent the wholly unacceptable and unconstitutional alternative of nullification and secession that then threatened the continued existence of the United States. Likewise, when Abraham Lincoln looked to constitutional reforms to resolve disputed questions in the midst of the Civil War, he noted that "under existing circumstances" the convention mode "seems preferable" precisely because it "allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose." Yet when the immediate crisis was over, Lincoln strongly advocated what became the Thirteenth Amendment by congressional proposal and did not pursue an amending convention, despite the amendment's initial failure in the House of Representatives. It should be noted that in both cases an amendments convention was understood to be free to propose whatever amendments thought necessary to address the problems at issue.

Much greater certainty—not to mention extensive historical experience and proven political viability—exists as to the power of Congress to propose amendments. Since 1789, well over 5,000 bills proposing to amend the Constitution have been introduced in Congress; thirty-three amendments have been sent to the states for ratification. Of those

sent to the states, two have been defeated, four are still pending, and twenty-seven have been ratified. Because of the national distribution of representation in Congress, most amendment proposals are defeated by a lack of general support and those amendments that are proposed to the states by Congress are generally likely to be ratified.

In a challenge to the Eleventh Amendment, the Supreme Court waved aside the suggestion that amendments proposed by Congress must be submitted to the President according to the Presentment Clause (Article I, Section 7, Clause 2). *Hollingsworth v. Virginia* (1798). In the *National Prohibition Cases* (1920), the Court held that the "two-thirds of both Houses" requirement applies to a present quorum, not the total membership of each body. One year later, in *Dillon v. Gloss* (1921), the Court allowed Congress, when proposing an amendment, to set a reasonable time limit for ratification by the states.

Since 1924, no amendment has been proposed without a ratification time limit, although the Twenty-seventh Amendment, proposed by Madison in the First Congress more than two hundred years ago, was finally ratified in 1992. Regardless of how an amendment is proposed, Article V gives Congress authority to direct the mode of ratification. *United States v. Sprague* (1931). Of the ratified amendments, all but the Twenty-first Amendment, which was ratified by state conventions, have been ratified by state legislatures. In *Hawke v. Smith* (1920), the Court struck down an attempt by Ohio to make that state's ratification of constitutional amendments subject to a vote of the people, holding that where Article V gives authority to state legislatures, these bodies are exercising a federal function.

Although some scholars have asserted that certain kinds of constitutional amendments might be "unconstitutional," actual substantive challenges to amendments have so far been unsuccessful. *National Prohibition Cases* (1920); *Leser v. Garnett* (1922). The Supreme Court's consideration of procedural challenges thus far does not extend beyond the 1939 decision of *Coleman v. Miller*, dealing with Kansas's ratification of a child labor amendment. The Court split on whether state ratification disputes are nonjusticiable political questions, but then held that Congress, "in controlling the promulgation of the adoption of constitutional amendment[s]," should have final authority over ratification controversies.

In the end, the Framers believed that the amendment process would protect the Constitution from undue change at the same time that it would strengthen the authority of the Constitution with the people by allowing its deliberate reform while elevating it above immediate political passions. "The basis of our political systems is the right of the people to make and to alter their Constitutions of Government," George Washington wrote in his Farewell Address of 1796. "But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all."

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