Taking Back the Constitution – Part 2 - Proposing Amendments

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Why amend Article 5?

In this column, I propose a change that will replace an unused portion of the Constitution – the Convention-State method[i] for proposing amendments. Because it is of primary importance, I have placed my Article 5 proposal first. I believe the amendments in my following columns will require something better than the Convention-State method for adoption. In his recent book, *The Liberty Amendments: Restoring the American Republic*, Mark Levin adds yet another way in which amendments can be proposed. He waits until Chapter 9 and depends on the very questionable Convention-State method for his other amendments.[ii]

Our Congress is very unlikely to initiate a constitutional amendment to reduce the scope of their legislation, increase their qualifications for office, or reduce retirements. Therefore, we cannot rely on Congress to address all potentially beneficial amendments.

The constitutional amendment limiting the President to only two terms was only possible because Constitutional amendments do not require the President's signature. It is unlikely that Congress would initiate an amendment to limit their own terms. We do need, as the Founders proposed, an alternate route to amending our Constitution.

The Convention-State method for amending the Constitution does not require an affirmative vote on an amendment by Congress. It was used but once in 1787, for our original Constitution. It depends for the convention's setup, representation, and rules on the very Congress it was envisioned to bypass. Small wonder Congress has never called one. However, the reason for which it was defined in the Constitution still exists. Congress will never initiate an amendment for some issues, even if those issues are needed to rebalance the strength of the our government's components. I therefore propose an amendment that replaces the Convention-State amendment process by a more stringently defined process initiated by the states.

The ways in which the Constitution may be amended

There are two formal and two informal ways in which our constitution is amended. The formal ways are specified in the Constitution's Article 5:

> **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; …**[iii]

1) The first formal method (the Congressional-State method) requires a 2/3 vote of each house of Congress to propose an amendment and then that amendment's approval by ¾ of all the state legislatures or approval by ¾ of states in special state conventions called for that purpose.

2) The second formal method (the Convention-State method) requires that the legislatures of 2/3 of the states request a convention to propose amendments. Congress shall then call a convention and any amendments proposed by that convention must be ratified by 3/4 of the states. Note that Adoption requires approval by ¾ of the states. Forty-nine states have filed over 700 requests for conventions with Congress. Congress has ignored their requests.[iv] It will take a tremendous amount of pressure on Congress to get the amendment proposed below before the states for possible ratification.

3) The third method (informal) is for the Supreme Court to interpret the Constitution in a new way.

One example is the case of Helvering v. Davis (1937), which held that Social Security was constitutional.[v] This opened the floodgates to all sorts of federal intervention in the economy as long as the taxes applied "generally."

In the novel case of Wickard v. Filburn (1942) the Court recognized the power of Congress to regulate the economic behavior of a farmer inside a single state.[vi] This put a final nail in the coffin of the understanding that the commence clause[vii] in the Constitution applied to state limitations on actual trade across state lines.

4) The fourth method (informal) is to ignore the Constitution. This method is frequently used, but is always subject to challenge in the courts.

This often works for some time, as with the laws making guns illegal for individual citizens in certain jurisdictions. It was not until 2008 that the Supreme Court in a 5 to 4 decision declared the 1975 law outlawing guns in Washington D.C. to be unconstitutional.[viii] In 2010, the Supreme Court applied the 2nd Amendment to the states in another 5 to 4 case knocking out a 1982 law in Chicago.[ix]

Why are the informal ways often used?

The formal Congressional-State approval process is long, difficult and intentionally cumbersome.[x] If the proposed amendment affects the power of the Congress' members or decreases the power of the federal government in relation to the states, obtaining the required 2/3 affirmative vote in both houses is highly unlikely.

The formal Convention-State approval process is also long, and apparently impossible to achieve. It has never been used since the original 1787 Constitutional Convention for fear of another "runaway" convention. Therefore, people who are impatient or doubtful of their success chose the informal routes.

Court interpretation often either broadens or modifies the Constitution. A mere five justices out of the nine on the Supreme Court can determine what is constitutional. The justification revealed in their written opinions is often quite obtuse. It sometimes makes one marvel at their ability to find meanings that completely elude the reader of the actual text of the Constitution.

Running things through the Court takes considerable time, so Presidents and Congress often ignore the Constitution. They either ignore their oath of office or accept some very broad interpretation of the Constitution when they pass laws or make administrative decisions. Those decisions leave ordinary citizens gaping at their arrogant disregard for the actual language of the Constitution.

Correcting informal interpretations

If the administration or Congress does something that appears unconstitutional, the first line of the citizen's defense is to bring suit in federal court. Be prepared for a long, expensive battle. To bring such a suit one must also have "standing," which means incurring direct material damages. Speculative, incidental, or theoretical injuries do not count.

The courts will try very hard to resolve the issue without new constitutional interpretations. It helps considerably if a large number of state governments bring suit, as in the current battle over the provisions of Obamacare.

If the source of a strange constitutional interpretation is the Supreme Court -- good luck! Many years and a change in the Courts' composition may be your only hope for a review. Even then, a reversal may be unlikely, since courts normally give significant deference to preceding decisions (*stare decisis*).

A more likely avenue for relief, if the administration agrees with your position, is to fail to enforce the provision. Congress can also withhold funding for enforcement. Even these actions for relief may be short-lived because other parties can then sue for enforcement.

Why is the Convention-State method not used?

If Congress will not set an amendment process in motion, there is the alternative of a constitutional convention. Unfortunately, many citizens (and congress) reject convention requests citing the excuse that they fear a "run away" convention. It is feared that such a convention would propose such major changes to the U.S. Constitution as to undermine our remaining freedoms or structure of government. They have as an example the original constitutional convention. That convention was called to study alterations to the Articles of Confederation. The delegates essentially threw out the Articles and started from scratch.

Opponents of a constitutional convention have used this fear of a "run away" to support Congress, even as it ignores state calls for a convention.

Three-quarters of the states would have to agree to any changes. Any radical changes proposed by a convention would be unlikely to achieve ratification by those states. Some people lack confidence in the perspicacity of our citizens. They have accepted as possible the destruction of our Constitution under conditions of debate in ¾ of our state legislatures. I have more confidence in our citizens and our state legislators.

So let us do something about the potential danger of a "run away" convention and remove Congress from the management.

Making an alternate amendment method viable

In Alaska, the legislature may call constitutional conventions at any time. There is also a provision mandating a vote by the people every 10 years on whether to have a convention. So far, the voters have rejected all four (4) of these possible conventions.

This citizens' vote allows people to bypass reluctant legislators at the state level, but does not address the problem of a "run away" convention. If Alaska had a more restrictive form of convention, its citizens might well consent.

At the federal level, we need a procedure that replaces the constitutional convention with a state directed procedure so modest objectives can be addressed when the U.S. Congress fails to act.

With many states able to propose amendments, we must limit the number of new proposals so that adequate consideration is given to each. With the current 50 states the procedure I outline could produce up to five new proposals each year.

With potentially more amendment proposals being considered, I suggest that only three years be permitted for a proposal to receive recommendations from 2/3 of the states. Once the delegates charged with reviewing the proposal submit their report to the states the amendment would be considered rejected if not ratified by ¾ of the states within an additional three years.

I propose an amendment to the U.S. Constitution that: 1) replaces the convention method, 2) permits the states alone to amend the Constitution, 3) restricts amendments to a topic proposed by a single state, 4) limits the number of amendments proposed, 5) requires agreement on the language by at least 2/3 of the states, and 5) requires ratification by ¾ of the states of that exact language within 3 years. I suggest:

Amendment Number ____

Article 5 is hereby amended to replace the Constitutional Convention with a body of delegates, one from each state, charged with drafting a constitutional amendment pursuant to a specific call from their state.

States shall be numbered in alphabetic order. Each state legislature may initiate a single proposed constitutional amendment and select a state delegate when the last digit of its state number is the same as for that calendar year. Upon passage, the proposed amendment and the identity of the delegate shall be transmitted to at least the presiding officers of the legislative bodies in all other states.

The proposed amendment shall expire in three years unless approved and delegates selected from 2/3 of the states.

The delegate from the proposing state shall be the presiding delegate and determine when the legislatures of 2/3 of the states have approved the call and give notice of an assembly of delegates or their alternates to all states. A majority of state delegates may overrule the presiding delegate and may also select another delegate to preside over the convention at any time. Each state shall have one vote and delegates need not leave their states to attend. All proceedings shall be recorded for viewing by any interested citizen. Once a majority of delegates have agreed that the language is appropriate to the call's intent, the amendment shall be sent by the presiding delegate to every state legislature for ratification or rejection.

Each state legislature shall vote yea or nay on exactly the same amendment. The proposed amendment shall expire if not ratified within three years of its submission to the states. Once the presiding delegate determines that ¾ of the states have ratified the amendment, he shall give notice to the other delegates. Without an objection by the majority of the delegates, the amendment will become part of the Constitution in 30 days. At the expiration of the 30 days, the presiding delegate will transmit the signed official copies to the archivist of the United States and the amendment shall become part of the Constitution.

This proposal:

1) Eliminates the constitutional convention method,
2) Limits each state to one proposed constitutional amendment in each decade,
3) Limits an amendment topic to those approved by the legislatures of 2/3 of the states,
4) Limits to three years the period within which 2/3 of the states must approve the topic,
5) Has only state legislatures and their selected delegates involved,
6) Eliminates Congressional obstruction,
7) Permits modern electronic attendance of delegates at an assembly, and
8) Permits three years for ¾ of the state legislatures ratify the proposed amendment.

In column 17 of this series I will propose yet a third formal method of introducing Constitutional amendments to the states for potential ratification.[xi]

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[i] By Convention-State method, I mean the portion of Article 5 that says, "The Congress, … shall call a Convention for proposing Amendments, … when ratified by the Legislatures of three fourths of the several States, …."

[ii] Mark Levin does not directly modify the convention method of Article 5, but in the 9th of his proposed amendments provides a procedure for the states to directly amend the Constitution. My numbering of his amendments is shown in the 1st column of this series.

[iii] The remaining part of Article 5 states that "…Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. Obviously since we are now past 1808 that provision is no longer in force.

[iv] An organization called "Friends Of the Article V Convention" exists to attempt revival of the convention method. They have a lot of important information about this problem at: http://www.foavc.org/

[v] In Davis, the majority (5 to 2) said that Congress could spend for the "general welfare." They extracted this descriptive phrase from Article I, Section 8, clause 1 in violation of the Tenth Amendment to justify the federal government intruding on functions that had previously been the responsibility of the states, localities and individuals.

[vi] Filburn was growing wheat for his own use in excess of what the federal government permitted. The rationale was that he would have to buy wheat from other sources if his excess production was not grown and that wheat was a commodity traded across state lines. http://en.wikipedia.org/wiki/Wickard_v._Filburn.

[vii] Article I, Section 8, clause 3 states "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

[viii] In *District of Columbia v. Heller* (2008) the Court held that the 2nd Amendment protects an individuals tight to possess a firearm for self-defense in the home and within a federal enclave.

[ix] In *McDonald v. Chicago* (2010) the Court extended their protection of the 2nd Amendment to the States using the Due Process Clause of the Fourteenth Amendment.

[x] To learn about the importance of a difficult and cumbersome process for amending a constitution see the seminal book on constitutions: The Calculus of Consent by James M. Buchanan & Gordon Tullock.

[xi] This method, a special Constitutional Review Court, requires a significant addition to our Constitution. I believe a good discussion of the alternatives is desirable before taking up what might be a fairly controversial topic.