

The Breakfast Club Constitutional Minute for 9 November 2021

Amending the Constitution

Continuing with our discussion of pertinent questions you should ask any candidate for elective office; I recommend this question:

“Mrs. Candidate. Many Americans believe the federal government has acquired too much power, much more than intended by the framers of the original Constitution. First, do you agree with the belief that the federal government has too much power, and second, if you could propose one constitutional amendment that would have the effect of reducing Congress’ power, what would it be?”

This question obviously rests on at least two assumptions: 1) that the federal government indeed exerts far more political power than the Constitution originally gave it, and 2) that it is worthwhile and desirable to reduce this immense power in some way. The question makes no claim as to how this power-accretion could have happened over the years, but there is little dispute, at least on the Right, that it has happened. There are several causes for this situation, and we will explore some of them here. Others are discussed in my Constitution seminar.

One reason unwarranted power is gained by government is through usurpation, simple taking of power. This is made more difficult when there is a written Constitution in place since the text can be consulted and undelegated power identified. This has happened in the U.S. but not to a great extent.

The second way to accrue power is to rely on a power-expansive interpretation of the Constitution by the court system. This, in my view is the chief means the federal government has used to accrue the near plenary power in the U.S.

In a Town Hall meeting in Hayward, California in 2010, former Democrat Congressman Peter Stark was goaded into saying: “*Yes, the federal government can do most anything in this country.*” The question posed to Congressman Stark had been related to Obamacare: “*If [the federal government] can do this (i.e., order citizens to purchase health insurance or face a tax penalty), what can’t they do? Is your answer that they can do anything?*” It was a skillful setup, to be sure, but it produced what I think was an honest answer, one that reflects the reality of today. Thanks to two cases: *U.S. v Butler* (1936) and *Helvering v. Davis* (1937) Congress can do anything it wants if the action can be accomplished by spending money (using the General Welfare clause as justification). According to *Mistretta v U.S.* (1989), Congress can delegate its legislative power to Executive branch agencies. This results in the issuing of rules with the force of law. Break a rule and you’re going to jail, just as if you broke a law.

If we can agree, at least for the sake of argument, that the federal government exerts too much power today over our individual lives (Amazingly, many on the Left complain that the federal government has *too little* power), how do We the People proceed to rectify that situation?

One way to have a less powerful Congress is to elect Congressmen and women who will simply legislate within the bounds of the original Constitution as understood by the Framers of the document and those who ratified it, ignoring the immense power given Congress by many Supreme Court rulings

over at last one hundred years. This is not likely to happen. We in Virginia might be successful in electing such people, but what about the other 49 states, particularly those with a Democrat majority?

We could wait for the Supreme Court to awaken to the fact that their previous rulings were poorly reasoned and should be reversed. But the Court is prevented from taken such action unilaterally; they must first be presented with a “case or controversy,” normally on appeal, which allows them to revisit the earlier area of law that produced the errant ruling.

We could ask Congress to propose an amendment to the Constitution that would have the effect of reducing their own awesome power. This, I hope you realize, is also unlikely to happen.

That leaves us with one final option, and the only option in my opinion which stands any chance of effectively reducing the power of the federal government: Article Five describes two methods by which a Constitutional amendment can be proposed: by Congress, as I’ve mentioned, or by a convention of states called for that purpose. Once 34 state governments (2/3 of 50) petition Congress to call such a convention, Congress must do so; the Constitution gives them no option but to comply.

An Article V Convention is controversial simply because trust in people in this country has eroded to such an extent that no one trusts anyone anymore. A vocal minority on the Right have convinced themselves that such a convention presents too much of an opportunity for mischief, perhaps the convention could even scrap the existing Constitution and write a new one (and somehow expect the American people to adopt it).

I personally support an Article V convention and if you attend my seminar, you will encounter a discussion of arguments on both sides of this issue. You can decide for yourself which make more sense. The safety in the convention not proposing something wacky lies in the credentials/instructions issued to the state’s delegates (called Commissioners). If those instructions narrowly define the delegate’s authority, then the delegates have only authority to consider amendments which will have the desired effect. If the delegate’s instructions are written more broadly, they have broader authority. If the states desire a very limited convention, limited even to considering and proposing a single sort of amendment, then they only need limit the credentials/authority of their delegates.

If the [Convention of States Project](#), a project of Citizens for Self-Governance, can persuade 34 state assemblies to pass their model legislation and forward a rightly worded application for a convention to Congress, than 34 delegations (a super majority) will arrive at the ensuing convention with the majority needed to make sure the convention follows their limited instructions. Sixteen state legislatures have done so thus far, almost half the number they will need, but progress is progress.

The choice is yours: continue operating with a federal government that “can do most anything in this country,” or begin the arduous work of convincing 18 more state legislatures to apply for a convention that will produce amendments reducing the power the courts have given the government.

Which will it be?