

The Breakfast Club

Constitutional Minute for 15 March 2022

Fixing Our Damaged Constitution

You knew this was coming sooner or later; well, it's here; I'm going to take on the Article V controversy in two pages or less. I've written very extensive and detailed treatises on the topic, I've publicly debated this topic and I've listened to scores of people who simply repeat long-ago debunked arguments against it. I've yet to encounter an objection which has no cogent answer. Here we go.

There are two methods for proposing amendments in Article V. Why? In the waning days of the Constitutional Convention, two days before they adjourned, Virginia delegate George Mason noted that there was only a single method for proposing constitutional amendments to the states for ratification: Congress. What if Congress refuses to propose necessary amendments? "[N]o amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as [Mr. Mason] verily believed would be the case," wrote [James Madison in his notes](#). Another delegate moved to add this second method, a convention of the states, and the measure passed unanimously.

Do we not face today precisely the situation Mason foresaw? It has been 50 years since Congress proposed the 26th Amendment.ⁱ As you will learn in my seminar, major damage has been inflicted on the limits the Constitution once placed on the federal government, particularly the Congress. Today Congress "can do most anything in this country."ⁱⁱ As I indicated last week, Jefferson urged us to "*let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.*" Oh, if only the Constitution still had some "chains."

The federal government today is a monster; it intrudes into nearly aspect of our personal lives. Any student of the original Constitution knows this was not intended. There were many defects in the Articles of Confederation that needed correction, a government with far more power than the Confederation Congress was certainly needed, but Madison, Hamilton and other supporters of the Constitution's ratification pointed out, time and again, the limited and enumerated powers intended for the new government. Had the delegates of the ratifying conventions caught a glimpse of what the federal government would one day become, they would have immediately rejected the document.

Today, Congress can spend money without limit, they can tax you without limit, they can borrow money indefinitely by simply raising the debt limit, which they do repeatedly, and, through the panoply of Executive branch agencies they have created, they can regulate anything they want to.

Much of this damage to the concept of a limited government is the result of Supreme Court decisions. Theoretically, the Court could therefore undo the damage itself. But the Court does not recognize the damage it has done and shows no awareness that anything needs to be fixed.

I hope we can at least agree that Congress will never pass with a 2/3 vote of both chambers and send to the states for ratification: a term limits amendment, a balanced budget amendment, nor any amendment which in any way reduces the near plenary power they currently enjoy. The Senate will never agree to an amendment to repeal the 17th and return Senators to appointment by the state legislature. Agreed?

Amendments such as these do get proposed in Congress, every year, and are promptly sent to

committee to die a natural death. Why don't we simply send a few more constitutional conservatives to Congress in hopes they will tip the balance? There is no "balance" that can be tipped: Congress simply has no intention of fixing things.

The biggest objection to an Article V Convention (as it is properly called -- it is absolutely not a "Constitutional Convention") is that the convention will somehow "runaway" as did, they charge, the 1787 convention. A runaway convention might scrap the existing Constitution, substitute another, and somehow force it on the American people. As ludicrous as this sounds, many people believe it. Here's why that can't happen:

First, if a convention is actually called, it will be because 34 states (2/3 of the several states) have applied to Congress using the Convention of States Project [model legislation](#). Thirty-four states will have applied to Congress for exactly the same three purposes.ⁱⁱⁱ These 34 states represent a super majority of the 50 states which will likely attend (even those states which don't submit applications would be authorized to attend, it is a convention of the states after all). This super-majority of states will determine what passes or doesn't pass in the convention. Every convention of states ever held in this country's history operated under the rule of "one state, one vote." Every-last-one-of-them. True, the California delegation can be expected to propose several wacko amendments; and thirty-four states can be expected to vote these out of order. At least thirty-four state delegations will have been authorized and empowered by their state legislature to produce ONLY the amendments described in the state's application to Congress. This too is part of the COS Project plan.

What about a delegate or even a delegation which decides to abandon or ignore the limited authorization contained in the credentials issued them by their state? I think the enormity of this event -- never before in our history under the Constitution has such an event been attempted -- will require it be televised. And I guarantee the states will be watching what their delegations do in the convention. Delegates or delegations who deviate from their authorization will be recalled. What state would not do that? In 1787, two of the three delegates from New York (Yates and Lansing) believed the convention was exceeding their limited authority (it wasn't, as I can explain if you are interested). They left the convention rather than exceed their authority as they perceived it. Some states have passed legislation promising a felony prosecution to any delegate deviating from their instructions.

The final safeguard of an Article V Convention is that anything passed by the convention must still be ratified by 38 states (3/4 of 50) just as an amendment proposed by Congress must be. If you think about it Congress sits, every day, as an amendment convention. Any day they are in session, Congress could pass an amendment with a 2/3 vote of each chamber and send it to the states for ratification. They won't propose any of the COS Project amendments, for obvious reasons, but they have the power to. A de facto Article V Convention sits in Washington, D.C. each day Congress is in session, and yet we don't sit on the edge of our seats worrying about what they might propose, do we?

When I look at the other options available to us to fix the mess Congress and the Courts have made of the U.S. Constitution, I simply don't see another option with any chance of success. On March 4, West Virginia became the 18th state to pass the COS Project Model Legislation. We're now past the half-way point; the continued insanity of the Biden administration only helps more states see that they must exert the power Article V gives them and use that power to return the federal government to the limited and enumerated powers it once had.

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ⁱ The 27th Amendment was actually proposed, by Congress, in 1789. It failed ratification by 1791 when the rest of what we know as the Bill of Rights went into effect. This original second article was finally ratified in 1993

ⁱⁱ Remarks of former Congressman Peter Stark at a Townhall meeting in Hayward, California, 2010/

ⁱⁱⁱ These three purposes are: “amendments .. that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress.”