

## **Amending the U. S. Constitution by Convention**

### **Introduction**

The League of Women Voters of the United States (LWVUS) Constitutional Amendment Committee is conducting a study on the process for proposing an Article V Constitutional Convention in order to determine whether LWVUS would support such a convention and if so, under what circumstances. The conclusions of the study will be based on responses to the consensus questions submitted by each League.

The objectives of the study are to establish guidelines for: 1) evaluating constitutional amendment proposals, 2) establishing acceptable procedures of an Article V Constitutional Convention, and 3) considering the balance of process and position for League support of a constitutional amendment.

Article V of the U.S. Constitution states:

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; 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.

### **Historical Perspective – States’ Attempts to Call a Convention**

The possibility of a constitutional convention has been the motivation for Congress to act. During the debates of the Constitution’s ratification the possibility of a second constitutional convention was a main factor for Congress proposing the Bill of Rights. There have been several instances when the number of state applications for a convention approached the required two-thirds. The threat of such a convention created the events leading up to the adoption of the Seventeenth Amendment, and possibly the Twenty-first, Twenty-second, and Twenty-fifth Amendments.

Over the last fifty years there have been two nearly successful attempts by states needing only one or two additional votes to reach the two-thirds requirement. The first was a reaction to two Supreme Court decisions in 1964 pertaining to reapportionment of votes and voting districts. It failed because of the fear that the convention would not be limited to a single issue and would result in an uncontrollable convention. The second nearly successful attempt in the

late 1970's arose out of the state legislatures' push for a balanced-budget amendment. The pressure from state applications caused the Senate to approve a budget amendment in 1982; however, the amendment did not pass in the House.

("Constitutional Convention Amendment Process," James Kenneth Rogers, Harvard Journal of Law and Public Policy, Vol.30, No.3, Summer 2007)

Recent developments have brought the balanced budget amendment to the fore-front. Questions arise concerning how long state applications are valid and can states be counted if they rescinded their applications. In March 2014 the Georgia legislature applied for a convention to consider a balanced federal budget amendment. Tennessee applied in April 2014. Both states had rescinded previously. The Ohio legislature in November 2013 and Michigan legislature in 2014 applied to Congress for an Article V Constitutional Convention to consider a balanced federal budget amendment. They represent the 33<sup>rd</sup> and 34<sup>th</sup> applications since 1982. If all 32 previous related state applications are valid, then it is arguable that the constitutional requirement for requests from two-thirds of the states has been met, and that Congress should consider calling a convention. ("The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress," Thomas H. Neale, Congressional Research Service, April 11, 2014)

### **Desirability of a Constitutional Convention**

*The following comments are excerpted from Introduction of "Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change." A publication of Citizens for the Constitution a project of the Century Foundation, The Century Foundation Press, 1999.*

Although more than 11,000 proposed constitutional amendments have been introduced in Congress, only thirty-three received the requisite congressional supermajorities, and only twenty-seven have been ratified by the states. The most significant of these amendments, accounting for half of the total, were proposed during two extraordinary periods in American history—the period of the original framing, which produced the Bill of Rights, and the Civil War period, which produced the Reconstruction amendments. Aside from these amendments, the Constitution has been changed only thirteen times.

No newly proposed amendment has been adopted since 1971. Nonetheless, there has been a sudden rash of proposed amendments that have moved further along in the process than ever before and that, if enacted, would revise fundamental principles of governance such as free speech and religious liberty, the criminal justice protections contained in the Bill of Rights, and the methods by which Congress exercises the power of the purse. Within the past few years, six proposed constitutional amendments—concerning a balanced budget, term limits, flag desecration, campaign finance, religious freedom, and procedures for imposing new taxes—have reached the floor of the Senate, the House, or both bodies.

We believe that the plethora of proposed amendments strongly suggests that the principle of self-restraint that has marked our amending practices for the past two centuries may be in danger of being forgotten.

There are several good reasons for attempting to reaffirm this self-restraint. Restraint is important because constitutional amendments bind not only our own generation but future generations as well. Constitutional amendments may entrench policies or practices that seem wise now, but that end up not working in practice or that reflect values that cease to be widely shared.

Restraint is also important in order to preserve the Constitution as a symbol of our nation's democratic system and of its cherished diversity. In a pluralistic democracy, in which people have many different religious faiths and divergent political views, maintaining this symbol is of central importance.

The Constitution's symbolic significance might also be damaged if it were changed to add the detailed specificity of an ordinary statute in order to control political outcomes.

Restraint is necessary because proposed amendments to the Constitution often put on the table fundamental issues about our character as a nation, thereby bringing to the fore the most divisive questions on the political agenda.

None of this is to suggest that the Constitution should never be amended or that its basic structural outlines are above criticism. There have been times in our history when arguments for restraint have been counterbalanced by the compelling need for reform. Advocates of amendments of any kind should focus not only on the desirability of the proposed change, but also on the costs imposed by attempts to achieve that change through the amendment process as contrasted with other alternatives. In the Guidelines that follow, we pose some general questions that, we hope, participants in debates about constitutional change will ask themselves.

*The following comments are excerpted from Commentary on the Guidelines of "Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change." A publication of Citizens for the Constitution a project of the Century Foundation, The Century Foundation Press, 1999.*

Most of the Guidelines are designed to raise concerns that those considering amendments might want to weigh against the perceived desirability of the changes embodied in the amendments.

**1. Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?**

The Constitution should not be amended solely on the basis of short-term political considerations. To be enduring, constitutional amendments should usually be cast, like the

Constitution itself, in general terms. Both powers and rights are set forth in our basic document in broad and open-ended language.

Even when amendments are not overly detailed, they may be inappropriate because they focus on matters of only short-term concern.

## **2. Does the proposed amendment make our system more politically responsive or protect individual rights?**

Of the twenty-seven amendments to the Constitution, seventeen either protect the rights of vulnerable individuals or extend the franchise to new groups. With the notable exception of the failed Prohibition Amendment, none of the amendments simply entrenches a substantive policy favored by a current majority.

There are good reasons for this overwhelming emphasis either on individual rights or on democratic participation. In a constitutional democracy, most policy questions should be decided by elected officials, responsible to the people who will be affected by the policies in question. It follows that the Constitution's main thrust should be to ensure that our political system is more, rather than less, democratic.

The Constitution is also designed to shield vulnerable individuals from majority domination, whether temporary or permanent. Hence, many amendments guarantee minority rights. Although the protection of individual rights is a central aim of the Constitution, it is not the only aim, and it is emphatically not true that every group that comprises less than a majority is entitled to constitutional protection because of its minority status.

Amendments that merely entrench majority social or economic preferences against future change make the system less rather than more democratic. They narrow the space for future democratic deliberation and sometimes trammel the rights of vulnerable individuals. It is a perversion of the Constitution's great purposes to use the amendment process as a substitute for ordinary legislative processes that are fully available to groups proposing popular changes and will be equally available to future majorities that may take a different view.

## **3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?**

The force of the Constitution depends on our ability to see it as something that stands above and outside of day-to-day politics. The very idea of a constitution turns on the separation of the legal and the political realms. The Constitution sets up the framework of government. It also sets forth fundamental political ideals—equality, representation, and individual liberties—that limit the actions of a temporary majority. This is our higher law. All the rest is left to day-to-day politics.

Accordingly, the Constitution should not be amended to solve problems that can be addressed through other means, including federal or state legislation or state constitutional amendments.

The more the Constitution is filled with specific directives, the more it resembles ordinary legislation. And the more the Constitution looks like ordinary legislation, the less it looks like a fundamental charter of government, and the less people will respect it.

A second reason for forgoing constitutional amendments when their objectives can be otherwise achieved is the greater flexibility that political solutions have to respond to changing circumstances over time. Amendments that embody a specific and perhaps controversial social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be more easily revisable by future generations in light of their own circumstances. Such amendments convert the Constitution from a framework for governing into a statement of contemporary public policy.

#### **4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?**

Because the Constitution gains much of its force from its cohesiveness as a whole, it is vital to ask whether an amendment would be consistent with constitutional doctrine that it would leave untouched. Does the amendment create an anomaly in the law? Such an anomaly is especially likely to occur when the proposed amendment is offered to overrule a Supreme Court decision, although the danger exists in other circumstances as well.

To be sure, every amendment changes constitutional doctrine. That is, after all, the function amendments serve. A difficulty occurs only when the change has the unintended consequence of failing to mesh with aspects of constitutional doctrine that remain unchanged.

#### **5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?**

Advocates of amendments should think carefully about how the amendments will be enforced. A provision susceptible of being ignored because no one can require its observance permits the kind of executive or legislative lawlessness that our founders wished to prevent. A provision that may be willfully ignored when those charged with observing it find the result inconvenient or undesirable undermines the rule of law, the government's own legitimacy, and the Constitution's special stature in our society.

#### **6. Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?**

When the original Constitution was drafted, the delegates to the Constitutional Convention regarded the new document as a unified package. Much energy was directed to considering how the various parts of the Constitution would interact with each other and to the political philosophy expressed by the document as a whole. The amendment process is necessarily much more ad hoc. Consequently, proponents of new amendments need to be especially careful to think through the legal ramifications of their proposals, considering, for example,

how their proposals might shift the balance of shared and separated powers among the branches of the federal government or affect the distribution of responsibilities between the federal and state governments. They should also explore how their proposals mesh with the Constitution's fundamental commitment to popular sovereignty and to the guarantees of liberty, justice, and equality.

#### **7. Has there been full and fair debate on the merits of the proposed amendment?**

The requirement that amendments be approved by supermajorities makes it more difficult to amend the Constitution than to enact an ordinary law. In theory, this requirement should produce a more deliberate process, which, in turn, should mean that the issues are more fully ventilated in Congress.

For most amendments, there are two types of questions: the policy questions, which include whether the basic idea is sound and whether the amendment is the type of change that belongs in the Constitution, and the operational questions, including whether there are problems in the way that the amendment will work in practice. If the answer to either part of the policy inquiry is "no," then the operational questions need not be asked. Even when there is a tentative "yes" to the policy questions, the answer may become "no" if operational problems are identified.

#### **8. Has Congress provided for a nonextendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?**

The Constitution should be amended only when there is a contemporaneous consensus to do so. If the ratification process is lengthy, ultimate approval by three-quarters of the states may no longer reflect such a consensus. Accordingly, there should be a nonextendable time limit for the ratification of all amendments, similar to the seven-year period that has been included in most recent proposed amendments.

For additional information see the LWVUS website at <http://forum.lwv.org/category/member-resources/our-work/constitutional-amendment-study>

This material was compiled by Linda Ferdowsian and Susan Tavakolian.

## Constitutional Amendment Consensus Questions

This study is in three parts. The questions in Part I are to develop guidelines for evaluating constitutional amendment proposals. Part II asks about aspects of an Article V Constitutional Convention that may be important in conducting such a convention. Part III asks two overall balancing questions between process and positions.

Answer each question, regardless of your answers to other questions.

### Part I - Considerations for Evaluating Constitutional Amendment Proposals

#### 1. Which of these should or should not be a consideration in identifying an appropriate and well-crafted amendment?

a) Whether the public policy objective addresses matters of such acute and abiding importance that the fundamental charter of our nation must be changed.

**PRO:** *Amendments are changes to a document that provides stability to our system and should be undertaken to address extreme problems or long-term needs.*

**CON:** *When public sentiment is overwhelmingly in favor of change, restraint based on veneration of the document is misplaced.*

**Should**       **Should not**       **No consensus**

b) Whether the amendment as written would be effective in achieving its policy objective.

**PRO:** *Amendments that may be unenforceable, miss the objective or have unintended consequences will not work to achieve the policy objective.*

**CON:** *It's all right to deliberately put something in the Constitution that will need to be interpreted by courts and legislatures over time.*

**Should**       **Should not**       **No consensus**

c) Whether the amendment would either make our political system more democratic or protect individual rights.

**PRO:** *Most amendments have sought to make our system more democratic by extending voting rights, for example, or to protect the rights of minorities from powerful interests.*

**CON:** *What has been typical in the past is not a good measure of what's appropriate or necessary today or in the future, especially since there have been relatively few amendments.*

**Should**       **Should not**       **No consensus**

d) Whether the policy objective can be achieved by a legislative or political approach that is less difficult than a constitutional amendment.

**PRO:** *Due to the difficulty of amending the Constitution, it is important to consider whether legislation or political action is more likely to succeed than an amendment, in order to achieve the objective and to expend resources wisely.*

**CON:** *Important policy objectives should sometimes be pursued through a constitutional amendment even though it may be difficult for it to be enacted and even when other options are available.*

**Should**       **Should not**       **No consensus**

e) Whether the public policy objective is more suited to a constitutional and general approach than to a statutory and detailed approach.

**PRO:** *It is important to consider whether the goal can best be achieved by an overall value statement, which will be interpreted by the courts, or with specific statutory detail to resolve important issues and reduce ambiguity.*

**CON:** *Getting action on an issue is more important than how a policy objective can best be achieved.*

**Should**       **Should not**       **No consensus**

## **Part II - Aspects of an Article V Constitutional Convention**

### **2. What conditions should or should not be in place for an Article V Constitutional Convention initiated by the states?**

a) The convention must be transparent and not conducted in secret.

**PRO:** *The public has a right to know what is being debated and voted on.*

**CON:** *The lack of public scrutiny and the ability to negotiate in private may enable delegates to more easily reach agreement.*

**Agree**    **Disagree**    **No consensus**

b) Representation at the convention must be based on population rather than one state, one vote.

**PRO:** *The delegates represent citizens and should be distributed by U.S. population.*

**CON:** *The U.S. is really a federation of states that must agree by state to any change in the Constitution.*

**Agree**    **Disagree**    **No consensus**

c) State delegates must be elected rather than appointed.

**PRO:** *Delegates represent citizens and therefore need to be elected by them.*

**CON:** *Appointment allows for experts who wouldn't run in an election.*

**Agree**    **Disagree**    **No consensus**

d) Voting at the convention must be by delegate, not by state.

**PRO:** *As at the Articles of Confederation Convention, delegates from one state can have varying views and should be able to express them by individual votes.*

**CON:** *Because any amendment proposal will go to the states for ratification, voting by state blocs—however the delegates are originally chosen—reflects the probability of eventual ratification.*

**Agree**  **Disagree**  **No consensus**

e) The convention must be limited to a specific topic.

**PRO:** It is important to guard against a “runaway convention”.

**CON:** The convention alternative was provided for a time when Congress was not listening, so the delegates should not be constrained.

**Agree**  **Disagree**  **No consensus**

f) Only state resolutions on a single topic count when determining if a convention must be called.

**PRO:** *Counting state requests by topic ensures that there is sufficient interest in a particular subject to call a convention, and enhances citizen interest and participation in the process.*

**CON:** *There is no requirement for Congress to count state requests by topic and when enough states are unhappy enough to ask for a convention, it should happen.*

**Agree**  **Disagree**  **No consensus**

g) The validity of state “calls” for an Article V Constitutional Convention must be determined by the most recent action of the state. If a state has enacted a rescission of its call, that rescission should be respected by Congress.

**PRO:** *A state legislature should be free to determine its position in regard to an Article V Constitutional Convention. A rescission should be equally acceptable to Congress as a state’s call for a convention.*

**CON:** *A state legislature’s call for a convention cannot be overturned because the process may never end.*

**Agree**  **Disagree**  **No consensus**

**3. Should the League oppose an Article V Constitutional Convention to propose amendments to the U.S. Constitution because of unresolved questions about the powers and processes of such a convention?**

**PRO:** *The Constitution is too important to trust an unknown or uncontrollable process. It is unclear whether conditions or safeguards regarding powers and processes for a convention can be successfully put in place.*

**CON:** *A convention is intended to be an unrestrained process to propose amendments to the Constitution.*

**Should**  **Should not**  **No consensus**

### Part III – Balancing Questions

#### 4. Should the League consider supporting a constitutional amendment that will advance a League position even if:

a) There are significant problems with the actual amendment as proposed?

**PRO:** *Our positions have been studied and agreed to. If other organizations are supporting an amendment in a policy area we also support, we might participate even though it is inconsistent with the evaluation guidelines we support under Part I.*

**CON:** *If the League has a consensus on the evaluation guidelines outlined in Part I, then the League should not campaign on an amendment when it is inconsistent with those standards, even though the League supports the policy outcome.*

**Should consider**    **Should not consider**    **No consensus**

b) It is being put forward by a procedural process the League would otherwise oppose?

**PRO:** *Our positions have been studied and agreed to. If other organizations are supporting an amendment in a policy area we also support, we might participate even though it is inconsistent with the process criteria we support under Part II.*

**CON:** *If the League has a consensus on the process criteria outlined in Part II, then the League should not campaign for an amendment when the process being proposed is inconsistent with those standards, even though the League supports the policy outcome.*

**Should consider**    **Should not consider**    **No consensus**

**Comment Section (max. 500 words)**