

INDEPENDENCE INSTITUTE ISSUE BACKGROUNDER

CURING FEDERAL DYSFUNCTION BY CONSTITUTIONAL AMENDMENT: A PRIMER

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SUMMARY

The Constitution gives citizens the direct means to rein in federal power and cure federal dysfunction through a “Convention for proposing Amendments.” This Issue Backgrounder explains the reasons why the Founders created the process and how it works. The Backgrounder also corrects common misunderstandings and explains how citizens may participate.²

FEDERAL DYSFUNCTION

Polls show that Americans currently award the federal government very low grades. Americans would prefer most public issues to be resolved at the local and state, rather than the federal, levels.³ Reasons for dissatisfaction are not hard to find. In recent decades, the federal government often has:

- exceeded constitutional limits on its power;
- abused legitimate powers; and
- committed egregious policy and administrative mistakes.

This paper refers to all three of those problems—exceeding power, abusing power, and negligent mistakes—as *dysfunction*.

THE FOUNDERS’ CURE

The Constitution’s framers and ratifiers understood that dysfunction can afflict any government system, no matter how well crafted. So they included a mechanism to cure dysfunction. That mechanism is the constitutional amendment process, set forth in Article V of the Constitution. The founding generation used the Article V process to adopt 12 separate amendments—the Bill of Rights and the 11th and 12th amendments. Since the Founders’ time, Americans have continued to address some problems with amendments. But for many years there have been no proposed amendments to deal with federal dysfunction because Congress refuses to propose anything to curb itself.

That is why there has been a recent surge in interest in Article V’s mechanism for *bypassing* Congress.

HOW THE AMENDMENT PROCEDURE WORKS

The Constitution’s amendment procedure⁴ relies on action by certain designated assemblies: Congress, state legislatures, and special conventions. When amending the Constitution, each assembly must respect the rules prescribed by the Constitution.

To become effective, a proposed amendment must be ratified by legislatures or conventions in three fourths of the states (i.e., 38 of the 50 states). But to be ratified, an amendment first must be duly *proposed*. There are only two ways to propose an amendment: (1) by a two-thirds vote of each house of Congress or (2) by what the Constitution calls a “Convention for proposing Amendments.” The latter is a meeting of commissioners (delegates) from the state legislatures. It is a kind of gathering called a “convention of the states.”

The Founders added the convention method of proposal as a crucial check-and-balance: It empowers the people, through their state legislatures, to correct federal dysfunctions that Congress might refuse to address.⁵

THE CONVENTION PROCEDURE:

FACTS AND MYTHS

Article V is relatively short because there was no need to repeat information that everyone knew. It does not explain the rules of the convention, because those rules were universally understood: There had been many “conventions of the states,” and all had followed much the same procedures. Conventions of the states met during the 19th and early 20th centuries, also—and they followed standard procedures as well.

During the 1960s, however, opponents of reform began a disinformation campaign designed to discourage citizens from demanding a “Convention for proposing Amendments.” Among the disinformation claims were that the gathering would be a “constitutional convention,” that it couldn’t be controlled, and (inconsistently) that it would be controlled by Congress. None of these claims had legal or historical merit.

Rather, the facts are clear: A convention for proposing amendments is a meeting of representatives (“commissioners”) from the 50 state legislatures. The convention is called by Congress, but that call is mandatory when two thirds (now 34) of the state legislatures pass “Applications” demanding a convention on a particular topic or topics. In issuing the call, Congress acts as an agent of the state legislatures. Congress’s power extends only to adding up the calls by topic and specifying the initial time and place of meeting.

The state commissioners then convene to discuss whether they think amendments on the assigned topics are needed. If the commissioners conclude that amendments are needed, they write them and propose them to the states for ratification. Voting at the convention is on a one-vote per state basis. No convention proposal becomes an amendment unless three fourths of the states ratify.

WILL AMENDMENTS CURE FEDERAL DYSFUNCTION?

The record of constitutional amendments as reform vehicles is very strong. More than two centuries after adoption, most of the Bill of Rights still has considerable force. Few Americans today would agree with those who argued that a Bill of Rights would be futile. In addition, the 11th amendment, ratified in 1795 to overrule a self-serving Supreme Court opinion, is in full effect. To cite a more recent example: The 22nd amendment (adopted in 1951) still limits the President to two terms in office.

In sum: Experience shows that constitutional amendments work. In fact, amendments get more respect than much of the original Constitution.

WHAT YOU CAN DO

There are now several active national Article V movements. The most vigorous are those (1) for a balanced budget amendment, (2) for a single-subject rule in Congress, and (3) for an application to limit the size and scope of the federal government and impose term limits. The third is called the “convention of states” movement.

The contact information for each of these convention movements is as follows:

- Balanced Budget Amendment Task Force:
<http://www.bba4usa.org/>
- Single Subject Amendment:
<http://singlesubjectamendment.com/>
- Convention of States, a project of Citizens for Self-Governance:
<http://www.conventionofstates.com/>

The Independence Institute’s Article V Information Center provides non-partisan and accurate information about the amendment process. Contributions are tax-deductible.

ENDNOTES

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² The Article V facts in this Backgrounder come from Professor Natelson’s nationally-published studies of the amendment process. They can be accessed at <http://constitution.i2i.org/articles-books-on-the-constitution-by-rob-natelson/>. See especially his treatise, STATE INITIATION OF CONSTITUTIONAL AMENDMENTS: A GUIDE FOR LAWYERS AND LEGISLATIVE DRAFTERS 33-34 (2014), available at <http://constitution.i2i.org/files/2014/11/Compendium-3.01.pdf>.

³ JOHN SAMPLES AND EMILY MCCLINTOCK EKINS, PUBLIC ATTITUDES TOWARD FEDERALISM: THE PUBLIC’S PREFERENCE FOR RENEWED FEDERALISM (Cato Inst., 2014), <http://www.cato.org/publications/policy-analysis/public-attitudes-toward-federalism-publics-preference-renewed>.

⁴ Article V provides:
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 Convention 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.

⁵ As George Mason of Virginia said at the constitutional convention:
Amendments therefore will be necessary. . . It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account.

¹ FARRAND’S RECORDS at 202-03 (Jun. 11, 1787). See also 2 *id.* at 629 (Sept. 15, 1787).