

The Lamp of Experience: Constitutional Amendments Work



americanthinker.com/articles/2014/03/the_lamp_of_experience_constitutional_amendments_work.html

Opponents of a Convention of States long argued that there was an unacceptable risk a convention might do too much. [It now appears they were mistaken](#). So they increasingly argue [that amendments cannot do enough](#).

The “too much” contention was first promulgated in modern times by apologists for the liberal, ultra-activist Earl Warren/[Warren Burger](#) Supreme Court. Specifically, these apologists feared a convention might propose amendments to reverse their favorite judicial decisions. Their tactic was to claim that an amendments convention, even if legally limited, could turn into a “con-con” that disregarded its limits, repealed the Bill of Rights, and restored slavery. (Yes, some of them really said that.)

The liberals who promoted this scenario must have been amused when some deeply conservative groups fell into the trap and began using the same argument to kill conservative amendments.

The “too much” line, however, has been losing its persuasiveness. [New research](#) shows it to be legally and historically weak, and Americans increasingly are pondering the very real dangers of *not* resorting to the convention process the Founders bequeathed to us.

Hence the shift to the “too little” argument. Its gist is that amendments would accomplish nothing because federal officials would violate amendments as readily as they violate the original Constitution.

Opponents will soon find their new position even less defensible than the old. This is because the contention that amendments are useless flatly contradicts over two centuries of American experience -- experience that demonstrates that *amendments work*. In fact, amendments have had a major impact on American political life, mostly for good.

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The Framers inserted an amendment process into the Constitution to render the underlying system less fragile and more durable. They saw the amendment mechanism as a way to:

- * correct drafting errors;
- * resolve constitutional disputes, such as by reversing bad Supreme Court decisions;
- * respond to changed conditions, and
- * correct and forestall governmental abuse.

The Framers turned out to be correct, because in the intervening years we have adopted amendments for all four of those reasons. Today, nearly all of these amendments are accepted by the overwhelming majority of Americans, and all but very few remain in full effect. Possibly because ratification of a constitutional amendment is a powerful expression of popular political will, amendments have proved more durable than some parts of the original Constitution.



Following are some examples:

Correcting drafting errors

Although the Framers were very great people, they still were human, and they occasionally erred. Thus, they inserted in the Constitution qualifications for Senators, Representatives, and the President, but omitted any for Vice President. They also adopted a presidential/vice presidential election procedure that, while initially plausible, proved unacceptable in practice.

The founding generation proposed and ratified the [Twelfth Amendment](#) to correct those mistakes. The [Twenty-Fifth Amendment](#) addressed some other deficiencies in Article II, which deals with the presidency. (My reference to a particular amendment does not mean I agree with every provision in it.)

Both the Twelfth and Twenty-Fifth Amendments are in full effect today.

Resolving constitutional disputes and overruling the Supreme Court

The Framers wrote most of the Constitution in clear language, but they knew that, as with any legal document, there would be differences of interpretation. The amendment process was a way of resolving interpretative disputes.

The founding generation employed it for this purpose just seven years after the Constitution came into effect. In [Chisholm v. Georgia](#), the Supreme Court misinterpreted the wording of Article III that defines the jurisdiction of the federal courts. The [Eleventh Amendment](#) reversed that decision.

In 1857, the Court issued [Dred Scott v. Sandford](#), in which it erroneously interpreted the Constitution to deny citizenship to African Americans. The Citizenship Clause of the [Fourteenth Amendment](#) reversed that case.

In the 1970, the Court decided [Oregon v. Mitchell](#), whose misinterpretation of the Constitution created a national election law mess. A year later, Americans cleaned up the mess by ratifying the [Twenty-Sixth Amendment](#).

All these Amendments are in full effect today, and fully respected by the courts. Some argue, in fact, that the Supreme Court actually over-enforces the Eleventh Amendment -- a contention with which I do not agree.

Responding to Changed Conditions

The [Twentieth Amendment](#) is the most obvious example of a response to changed conditions. Reflecting improvements in transportation since the Founding, it moved the inauguration of Congress and President from March to the January following election.

Similarly, the [Nineteenth Amendment](#), which assured women the vote in states not already granting it, was passed for reasons beyond simple fairness. When the Constitution was written, overwhelming domestic duties and very short female life expectancies effectively disqualified most women from politics. During the 1800s, medical and technological advances made possible by a vigorous market economy improved the position of women immeasurably and rendered their political participation far more feasible. Without these changes, I doubt the Nineteenth Amendment would have been adopted.

Needless to say, the Seventeenth, Nineteenth, and Twentieth Amendments all are in full effect many years after they were ratified.

Correcting and forestalling government abuse

Avoiding and correcting government abuse was a principal reason the Constitutional Convention unanimously inserted the state-driven convention procedure into Article V. Our failure to use that procedure helps explain why the earlier constitutional barriers against federal overreaching seem a little ragged. Before looking at the problems, however, let's look at some successes:

* In 1992, we ratified the [Twenty-Seventh Amendment](#), 203 years after James Madison first proposed it. It limits congressional pay raises, although some would say not enough.

* In 1951, we adopted the [Twenty-Second Amendment](#), limiting the President to two terms. Eleven Presidents later, it remains in full force, and few would contend it has not made a difference.

Now the problems: Because we have not used the convention process, the first ten amendments (the [Bill of Rights](#)) remain almost the only amendments significantly limiting congressional overreaching. I suppose that if the Founders had listened to the "amendments won't make any difference" crowd, they would not have adopted the Bill of Rights either. But I don't know anyone today who seriously claims the Bill of Rights has made no difference.

In fact, the Bill of Rights continues to have a huge impact more than two centuries after adoption. The courts enforce, to at least some extent, all of the original ten except, arguably, the Ninth. Some, such as the First Amendment, have been "super enforced." Others, such as the Second and Fourth are under relentless pressure, but remain far better than nothing at all.

What about the Ninth and Tenth? They are certainly under-enforced today, but we must remember that they enjoyed full effect for nearly 150 years. No reasonable person would classify 150 years of effect as anything but a stellar political success. Even today, the Tenth retains some of its power, as Congress learned when the Supreme Court upended its effort to corral all the states into the Obamacare Medicaid expansion.

"I have but one lamp by which my feet are guided; and that is the lamp of experience," Patrick Henry said. "I know of no way of judging of the future but by the past."

In this case, the lamp of experience sheds light unmistakably bright and clear: Constitutional amendments work.

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