Voting Rules at a Convention of the States

www.americanthinker.com/articles/2015/10/voting_rules_at_a_convention_of_the_states_.html

In a recent post, I examined suggestions that a convention of the states for proposing amendments adopt a supermajority rule for proposing any amendment. Most commonly suggested is that the convention replace the traditional "majority of states decides" standard with a two-thirds requirement.

I explained that this departure from history was politically unnecessary, would make it very difficult for the convention to propose anything, and likely would destroy the convention's popular support.

This post answers other questions about the issue -- including the possibility of a convention that fails to propose because it chokes on its own rules. No statesman will want to be part of such a convention.

In this Q&A I assume the supermajority is two thirds.

Q. Does the convention have the power to adopt a two-thirds rule?

A. Yes. Contrary to ill-informed claims that Congress can write rules for the convention, in fact the convention controls its own rules. A simple majority of states present and voting have power to impose, or remove, a two thirds requirement. The issue here is not the power of the convention to require two thirds, but the advisability.

Q. Have earlier conventions altered the "majority of states decide" rule?

A. Many conventions have permitted a bare plurality to make committee assignments, but on substance they have stuck to the "majority of states decides" principle. My previous post lists four efforts to alter that principle, but all of them failed.

Q. The Constitution mentions a two thirds vote (of Congress to propose) and a three-fourths vote (of the states to ratify). Why shouldn't the convention also be subject to a supermajority?

A. Except in specific cases where the Constitution provides for a supermajority, the constitutional rule for assembly decision-making is a simple majority of a quorum present and voting. This is based on the Founders' understanding of parliamentary practice and court decisions such as *Rhode Island v. Palmer* and *Dyer v. Blair.*

The Constitution requires an amendment to clear many different hurdles. It balances that by requiring (unless there is a local rule to the contrary) only a majority to clear most of those hurdles. Thus: All stages of congressional proceedings except the final proposal vote require only a simple majority. If two thirds of the states apply for a convention, then Congress calls it by a simple majority. Congress chooses the "Mode of Ratification" by a simple majority. State legislatures voting on applications do so by a simple majority. State legislatures and conventions ratify or reject amendments by a simple majority. An interstate convention can propose by a simple majority. Clogging the process further with supermajority requirements in addition to those already specified would upset the constitutional balance.

Q. Are there other constitutional reasons for not subjecting the interstate convention to the two thirds rule?

A. Yes. The Founders told us that for proposing amendments, the Congress and the states were supposed to be in a roughly equal position. The Constitution requires Congress to muster two thirds on the final vote, but it does not require two thirds for Congress to consider the issue. On the other hand, the Constitution

does not mandate that the states muster two thirds on the final vote, but it does require two thirds of them to agree before they are allowed to consider the issue in a proposing convention (the application process).

If we impose a two-thirds requirement on the states to at both stages -- consideration and final vote -- then that leaves them in an inferior position compared to Congress. This also undercuts the constitutional design.

Q. Isn't it unlikely that a proposed amendment with only majority support will be ratified by three quarters of the states?

A. No one knows in advance. The proposal and ratification processes have very different dynamics. Proposal is centralized in a single body, occurs in a relatively short period of time, and tends to reflect public opinion at that time. Ratification is decentralized over many assemblies and the process takes a much longer time. It also requires long-term public agreement. You simply cannot use the same standard to predict the results of two such very different procedures.

For example, Congress repeatedly rejected the 17th amendment (direct election of Senators), but once it was proposed the states ratified it very quickly. On the other side, Congress proposed the Equal Rights Amendment by stunning majorities, but over time public opinion turned against it and the states rejected it.

Prior interstate conventions preparing proposals for the states have operated on a "majority decides" procedure. Sometimes the states have accepted their proposals, and sometimes not.

Intervening elections also influence ratification. A proposed amendment can become a campaign issue (as the 14th amendment did), and the ensuing elections can serve as an informal referendum on the subject.

Q. We don't want a failed convention. If, say, only 29 states vote for a proposed amendment and it is not ratified, won't that be seen as a failure?

A. You are right -- we don't want a failed convention. But as explained above, you cannot predict ratification by the vote at the proposal stage.

And if failure is a possibility, remember that some "failures" become historical successes while others earn only contempt.

Which would be a better precedent: (1) A convention that proposes an amendment that ultimately fails to win approval by 38 states, or (2) a convention that chokes on its own rules, deadlocks, and doesn't propose anything at all?

I'd be much prouder to be part of the first kind of convention.

History offers some illustrations: The 1861 Washington Convention proposed an amendment that was never ratified, but its proceedings were generally dignified and they provided us with a "beginning-to-end" pattern for future use. On the other hand, the 1780 Philadelphia "price convention" deadlocked with no resolution. Its members haplessly adjourned to a future time, and when that time came, no one bothered to show up.

In retrospect, the Washington Convention was a respectable effort and a useful precedent. The 1780 Philadelphia Price Convention invites contempt.

Contempt will be the fate, too, of a modern convention that accomplishes nothing because it has choked on its own rules.