

## AMENDING THE CONSTITUTION

### Article V

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.

\*\* Obsolete

At the 2014 convention of the League of Women Voters of the United States (LWVUS) the delegates adopted a three-part study: (1) Amending the Constitution, (2) Money in Politics, and (3) Redistricting. How are these three studies connected? The decision of the LWVUS convention delegates was to focus on the procedural issues within each of these topics.

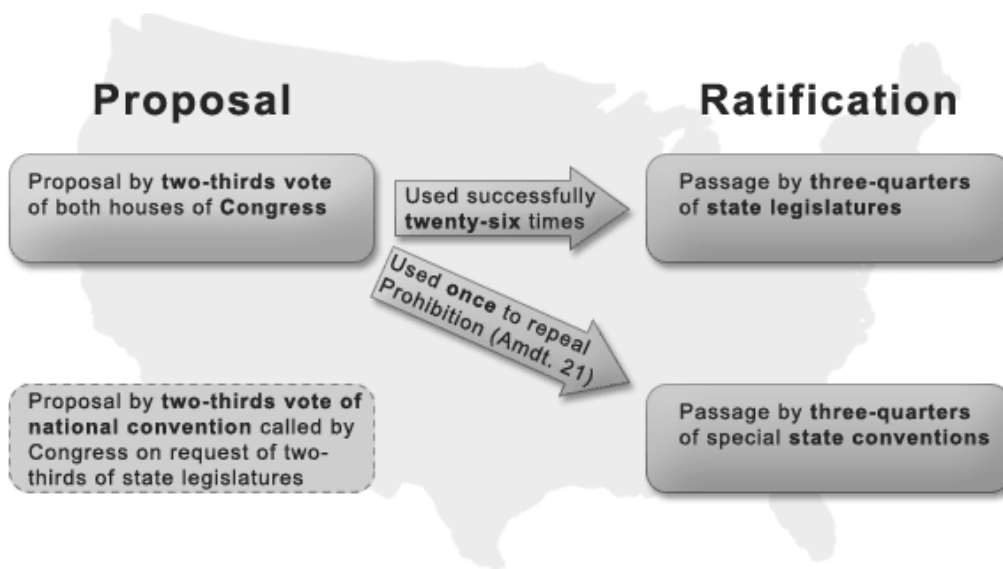
Today's part of the LWVUS study, Amending the Constitution, has also been divided into three parts: (1) guidelines for evaluating constitutional amendment proposals, (2) considerations of Article V that may be important in conducting a Constitutional Convention, and (3) balancing the process for amending the Constitution with LWVUS's issue positions. The consensus questions we will be covering on amending the Constitution do not deal specifically with any one topic. They instead solicit opinions on preferred choices for the process of amending the Constitution.

### THE US CONSTITUTION AND THE AMENDMENT PROCESS

Article V of the Constitution authorizes two procedures for proposing amendments and two methods for ratifying the proposed amendment. The two procedures for **proposing amendments** are: 1) **Congress may propose amendments with a two thirds vote of both houses** or 2) **a special Constitutional Convention may be called to propose amendments**. The two processes for **ratifying amendments** are: 1) **approval by three-fourths of the state legislatures** or 2) **approval by conventions in three-fourths of the states**.

ORGANIZATIONS AND INDIVIDUALS ARE INVITED TO DUPLICATE THIS FACT SHEET WITH ATTRIBUTION GIVEN TO LWVMC. BEFORE REPRODUCING, PLEASE CONTACT THE LEAGUE OFFICE AT 301-984-9585 OR LWVMC@EROLS.COM FOR CORRECTIONS OR UPDATED INFORMATION, OR CHECK OUR WEBSITE, LWVMOCOMD.ORG, FOR THE MOST UP-TO-DATE VERSION.

The Constitution has been amended 27 times, with 10 of those amendments passed by the Founding Fathers. Amendment 18 was repealed by Amendment 21, which means that in a span of more than two centuries, there have been only 15 amendments to the Constitution. From 1789 to 1914, the number of proposed amendments was approximately 11,623. Of these, only 33 garnered the necessary two-thirds vote in both houses of Congress and, of those, only 27 received the necessary ratification of three-fourths of the states.



[texaspolitics.utexas.edu/archive/html/cons/features/0405\\_03/slide1.html](http://texaspolitics.utexas.edu/archive/html/cons/features/0405_03/slide1.html)

It is important to note that the President has no role in this process and the Supreme Court has ruled in several cases that the primary responsibility for amending the Constitution lies with Congress. The Supreme Court so far has refused to play a role in the process. Justice Black stated that “control of [the amending] process has been given by [Article V] exclusively and completely to Congress. The process itself is ‘political’ in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.”

Since the adoption of the Constitution, all amendments have been proposed by Congress (with a two-thirds majority of both houses); none have been proposed by a national Constitutional Convention, which must be convened on the application of two-thirds of the state legislatures.

In either case, the amendment or amendments emerging would still have to be ratified by three-fourths of state legislatures either at their regular sessions or at state-ratifying conventions called by the state legislatures specifically for ratifying the particular amendment. The first process, ratification by approval of three-fourths of state legislators, has been used for all the amendments except one. The second process, approval by conventions in three-fourths of the states, was used only once; to repeal prohibition. The requirements for approval by two-thirds of each house of Congress and by legislatures or Conventions in three-fourths of the states are intended to ensure that there is a national consensus in support of the amendment.

### **Unratified Amendments**

There have been six amendments that were adopted by Congress, but not ratified by the states. Although the Constitution does not set a time limit for ratification of amendments by the states, Congress has set a limit of seven years for ratification by the states ever since it proposed the 18<sup>th</sup>

amendment. The wisdom of setting a time limit is illustrated by the 27<sup>th</sup> Amendment, which was submitted to the states for ratification on September 25, 1789, but was not ratified until May 7, 1992--a record-setting ratification period of 202 years, 7 months, and 12 days. (That amendment provides that any change in the salaries of members of Congress does not take effect until the beginning of the next Congress.) It seems likely any amendment proposed by Congress will contain a seven-year time limit in which the States must ratify it. In *Dillon v. Gloss* (1921), the Supreme Court affirmed that Congress, if it so desires, could provide a deadline for ratification.

Two fairly recent examples of amendments that were passed by Congress or proposed by the states, but failed to gain the required levels of approval, were the Equal Rights Amendment (ERA) and the Balanced Budget Amendment.

**The Equal Rights Amendment**, designed to give equal rights to women, passed Congress in 1972. Congress set their usual seven year limit for ratification by the states. By 1977 35 states had ratified the amendment. Nearing the ratification deadline several states rescinded their support. In 1978 Congress, through a joint resolution, extended the date to June 30, 1982. However, no additional states ratified it and the amendment failed. Interestingly, many of the arguments against the ERA are now moot points, as women have won rights—from unisex bathrooms to service in combat roles.

**The Balanced Budget Amendment** would have limited total government spending to be less than or equal to total tax collections and was introduced during the time when our country was facing huge budget deficits. Beginning in the mid-1970s, state legislatures began the process of applying to Congress for the calling of a Convention to propose a Balanced Budget Amendment. By 1983, this effort had reached 32 out of the necessary 34 applications to trigger such a convention. Between 1988 and 2010, however, lawmakers in 16 of those 32 states rescinded their prior applications for a convention. During the process, 8 of those states went from applying, to rescinding, to re-applying. Another question that arose on the Balanced Budget Amendment was disagreement among economists about the benefits of a balanced budget.

During the ratification process for the ERA, and the calls for a Convention to propose a Balanced Budget Amendment, several state legislatures passed and then rescinded their support. Seven years can be a long time legislatively. Legislators who voted for the amendment could be replaced by ones that opposed the amendment. This creates another challenge for supporters of an amendment.

Other topics that have been proposed for a Constitutional Convention: requiring direct election of senators (which was later proposed by Congress) and to permit the states to consider factors other than population in creating legislative districts (effectively reversing the Supreme Court's "one man, one vote" decision.)

### **CONSTITUTIONAL CONVENTION OPTION**

One reason that none of the calls for a Convention have succeeded is that the Constitution specifies no rules to govern a Constitutional Convention once the Convention is called. Article V only sets out the process for calling the Convention. Article V does not include any guidelines for the Convention once it is convened, such as choosing delegates or limiting the type of amendments it may propose, or deciding on a timeline for the Convention's work. Another fundamental question to be resolved is who would establish the rules of the Convention. Should the delegates establish their own rules or should Congress set some parameters once it gets the call from the state legislators?

It is important to note that our current Constitution was written by a Convention called by Congress to propose amendments to the Articles of Confederation – instead, the Convention proposed an entirely new constitution. Article V lacks guidelines for such a new Convention because the delegates were unable to agree on the balance of power between the national legislature and the state legislatures. The rules that would govern a new Constitutional Convention might follow those of the Constitutional Convention that met in Philadelphia in 1787. Delegates were chosen by the state legislatures and the Convention then proceeded to adopt its own voting and procedural rules. One rule that might be regarded as controversial today was the decision to keep the proceedings secret.

Since the ratification of the Constitution in 1788, the nation has grown geographically and in numbers. Our population is more diverse, more urban and, due to development of forms of commerce, transportation, and communication that the Founders could never have imagined, is far more diverse in its interests and perspectives on political questions.

## **REPRESENTATION**

Article V of the Constitution does not define how states would select their delegates, or even how many would be sent from each of the states. Delegates could be appointed or elected. Accordingly, it is possible that delegates could be appointed by the state legislatures or elected directly by the people, either by legislative districts or at large. There could also be guidelines for the composition of a delegation. The method of selection of delegates would determine many critical issues, such as the balance of political party interests, ethnic and gender diversity, and the balance of rural vs. urban interests.

Another question concerning representation is how votes should be tabulated for the Convention. The Constitutional Convention of 1787 had no restrictions on the number of delegates a state could send. One way would be for each state to have the same number of delegates. An alternative is that states would receive a number of delegates based on their population. Using either method of selection, how would votes be tabulated; according to states or by the total number of delegates, without regard to which states those delegates represented?

## **LIMITING THE SUBJECT**

Article V states that a Convention can be called for proposing amendments. Since the word is plural it has been argued that a Convention cannot be limited. However, the wording for Congress proposing amendments also uses the plural. Therefore, some scholars have argued that a Convention may be called to propose multiple amendments or a single amendment. Even though the calls for a Convention have not succeeded, they have at times played an important role in spurring legislation that might not have otherwise been introduced and/or passed by Congress. There is some concern about a "runaway Convention," meaning one that exceeds the purpose for which it was called. A review of constitutional amendments considered by Congress might be some guide as to the potential scope of amendments that a Convention could propose. These have included proposals to limit the federal government's treaty-making power, to prohibit polygamy, to authorize Congress to prohibit flag-burning, to overturn the decision in *Roe v. Wade*, to prohibit same-sex marriage, to authorize school-sponsored prayer, and to repeal the 17<sup>th</sup> amendment and provide that senators would be elected by state legislatures. It might be difficult to secure ratification of such amendments by the legislatures or Conventions of three-fourths of the states, but the passion that some voters feel on these issues could well result in a Convention proposing them.

Whether amendments are proposed by Congress or by a Convention, an important question is the nature of the amendment itself: Does it affect the structure of the government or the procedures it must follow? Does it limit or expand the power of the federal government? Does it define who may participate in the process of electing the federal government, as in the case of the 15<sup>th</sup> Amendment granting the right to vote without regard to race or the 19<sup>th</sup> Amendment, granting women the right to vote, or the 26<sup>th</sup> Amendment, granting the right to vote to all those over the age of 18? Nearly all the amendments that have been adopted address these types of government structure or process questions. The two notable exceptions are the 18<sup>th</sup> Amendment, which enacted Prohibition, and the 21<sup>st</sup>, which repealed it. Although it can be argued that the 18<sup>th</sup> Amendment granted power to the federal government to control the sale of alcohol, both amendments primarily dealt with a political issue that had aroused great passions but did not alter the form of the federal government.

### CONSTITUTIONAL AMENDMENT GUIDELINES

There have been two main categories of constitutional amendments ratified and/or proposed during the past 200 years.

1. Amendments that have something to do with the structure of the government (like direct election of Senators and Presidential term limits)
2. Amendments that are policy matters inserted into the Constitution to make it difficult to reverse a decision, such as Prohibition or a ban on same sex marriage. Many of the latter deal with civil and/protection of the minority against a majority; the 13th Amendment abolished slavery, the 14th Amendment required states to grant equal protection under the law to all citizens and the 19th Amendment gave women the right to vote.

Following are two guidelines scholars have discussed for proposed amendments:

1. Will the amendment: \*Protect individual and minority rights \*Strengthen our democracy  
\*Be of importance to future generations \*Be enforceable
2. Instead of cluttering the Constitution with amendments, could this issue be better dealt with through legislation?

**Pro:** The Constitution is our fundamental charter of government. It should not be cluttered up with the sorts of directives found in legislation. The point of having a constitution is to establish a separation between the legal and the political realms. The constitution lays down those fundamental political ideals (equality, representation, individual liberties) that place limits on how far any short-term, political majority may go. The Constitution is our higher law. The rest is politics. Too-frequent amendments erode the boundary between our higher law and politics, making support for the Constitution a matter of political preference.

**Con:** The real alternative to lengthy text in the Constitution is to have a complex and tangled underbrush of judicial decisions. "A complex society will produce complex constitutional law; the only real question is whether it is good to outsource ... complexity... to the adjudicative process." ("Constitutional Amendments and the Constitutional Common Law," Adrian Vermeule, 2004)

A special thanks to Barbara Diztler, Eva Feder, Luella Mast, Judy Morenoff and Ralph Watkins for their guidance in preparing this Fact Sheet - Elaine Apter.

**References:**

The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress, Thomas H. Neale Congressional Research Service , April 11, 2014 (43 pages)

The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress, Thomas H. Neale Congressional Research Service, October 12, 2012 (22 pages)

“Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change,” The Constitution Project at the Century Foundation, <http://www.constitutionproject.org/wp-content/uploads/2012/09/32.pdf>

“Constitutional Amendments and the Constitutional Common Law,” Adrian Vermeule, 2004, <http://www.law.uchicago.edu/files/files/73-av-amendments.pdf>

“Constitutional Amendmentitis,” Kathleen Sullivan, The American Prospect, December 19, 2001, <http://prospect.org/article/constitutional-amendmentitis>

Towards a "More Perfect Union", Baker, Thomas E. Insights on Law and Society 1.1 Fall, 2000, American Bar Association

**CONSTITUTIONAL AMENDMENT CONSENSUS QUESTIONS**

The following consensus questions will be divided into 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

**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.

Should     Should not     No consensus

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

Should     Should not     No consensus

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

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.

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.

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.

Agree       Disagree       No consensus

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

Agree       Disagree       No consensus

c) State delegates must be elected rather than appointed.

Agree       Disagree       No consensus

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

Agree       Disagree       No consensus

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

Agree       Disagree       No consensus

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

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.

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?

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?

Should consider       Should not consider       No consensus

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

Should consider       Should not consider       No consensus

### Comment Section (max. 500 words)