

# Amending the U.S. Constitution

## Article V of the US Constitution:

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. (emphasis supplied)

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LWVUS has asked all local leagues to furnish answers to its Constitutional Amendment Consensus Questions by December 1, 2015. This study does not address any particular proposal for an amendment. It is asking questions about how to evaluate proposals for constitutional amendments; considers aspects of an Article V Constitutional Convention; and finally wonders whether the League should consider supporting a Constitutional amendment that will advance a League position.

This packet contains the Consensus questions and some excerpts from materials on the LWVUS site. To access the entire site where you will find a lot of material that will be very useful in understanding and evaluating the Consensus questions: go to <http://forum.lwv.org/category/member-resources/our-work/constitutional-amendment-study> or <http://forum.lwv.org>, and select CONSTITUTIONAL AMENDMENT STUDY from the menu under OUR WORK (see image, right). We strongly urge you to access that site and read the material there, as the LWVUS posts new information periodically. An important link on the site is the one that takes you to the **constitutional amendment study guide**. There you'll find background, points of view and specific study references for each question.



These study materials are posted with our September Forum announcement on our website with active links where you now see underlined text. We recommend that you use that electronic copy to access the specific readings in this document.

Our plan is to reach consensus at the October Unit meetings as that will allow us to send responses to LWVUS on time.

HAVE FUN!

## **Guidelines For Constitutional 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?
2. Does the proposed amendment make our system more politically responsive or protect individual rights?
3. Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?
4. Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?
5. Does the proposed amendment embody enforceable, and not purely aspirational, standards?
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?
7. Has there been full and fair debate on the merits of the proposed amendment?
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?

—*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, p. 7. (61 pages total, 25 primary text) Louis Michael Sidman, Legal Advisor; Virginia Sloan, Executive Director.

The next several pages in that paper evaluate the various guidelines listed above.

## **Constitutional Amendment Study Summary of Articles Dealing with Article V Constitutional Conventions**

Authors hold strong, but very opposite views regarding how an Article V Constitutional Convention would actually be conducted, and what limits, if any, there would be on its ability to offer amendments to the constitution.

In a **University of Florida law review article (pp. 618-621 and pp. 680-690)**, **Robert G. Natelson**, an attorney affiliated with ALEC (American Legislative Exchange Council) believes there is no uncertainty about the rules and procedures governing such a convention. He relies on historical precedent from the years preceding the 1787 convention related to the Articles of Confederation to support his conclusion that the states are in charge of the process from beginning to end.

He is joined in the view that there is no uncertainty about the operations of a Convention by **Milton Eisenhower**, who was writing in support of a balanced budget amendment in 1985. He calls fears of a “runaway” convention “extreme nonsense,” based on the contention that Congress can regulate the process.

On the other hand, **The Center on Budget and Policy Priorities** produced a position paper on Article V Constitutional Conventions in 2014. Their conclusion is that since the convention would write its own rules and set its own agenda, no other body including Congress or the courts would have authority over it.

**Larry Greenlee**, writing for the John Birch Society in 2013 agrees that there would be no way to control a constitutional convention. He is critical of the Natelson position because it is based on customs and procedures of 200 years ago, and he believes the Declaration of Independence would further support the position that the convention could take whatever steps it wished.

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### **Excerpt (pp. 622-623) from Robert G. Natelson, Florida Law Review, 65:615-710, 2013:**

“It was well for the Constitution that the state application and convention procedure was added. Without it, the document may never have been ratified. This is because many believed the Constitution could lead to congressional abuse and overreaching, and that Congress would be unlikely to curb itself. The state application and convention procedure of Article V provided the Constitution’s advocates with a basis for arguing that the system was a balanced one, and that Congress could be bypassed, if appropriate.”

This article (96 pages) discusses in considerable detail the history leading up to the form Article V finally took.

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### **Excerpt from Michael Leachman, States Likely Could Not Control Constitutional Convention Balanced Budget Amendment or Other Issues, Center on Budget and Policy Priorities, July 16, 2014** (10 pages):

“A number of prominent jurists and legal scholars have warned that a constitutional convention could open up the Constitution to radical and harmful changes. For instance,

Justice Antonin Scalia recently said, “I certainly would not want a constitutional convention. Whoa! Who knows what would come out of it?” Similarly, former Chief Justice of the United States Warren Burger wrote in 1988:

[T]here is no way to effectively limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don’t like its agenda.

This 10-page article is much shorter than the Natelson article.

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## **Synopsis of *Constitutional Amendmentitis***

Prepared by the LWVUS Study Committee on Constitutional Amendments, July, 2015. This short paper presents a synopsis of the article, *Constitutional Amendmentitis*, by Kathleen Sullivan that first appeared in the December 19, 2001, issue of *The American Prospect*.

Writing in 2001, Sullivan notes a flurry of activity, with more Constitutional amendment proposals active then (and now) than at any time since the 1970s. The Constitution is very difficult to amend. Of the 11,000 amendments that have been proposed since the Constitution was adopted, only 27 have actually passed. As a result, the Constitution remains a “relatively pristine document.”

Those that have passed have little altered the overall structure of the Constitution. According to Sullivan:

The first ten amendments, the Bill of Rights, were added in one fell swoop by the First Congress and ratified in 1791 as part of a bargain that had induced reluctant states to ratify the Constitution. And the 13th, 14th, and 15th Amendments, which abolished slavery and gave African Americans rights of equal citizenship, were essentially foisted on the southern states by the Reconstruction Congress as a condition of readmission to the union in the wake of the Civil War.

The remaining amendments have tinkered little with the original constitutional design. Four expanded the right to vote in federal elections: The 15th Amendment eliminated racial classifications in voting, the 19th extended the franchise to women, the 24th abolished the poll tax, and the 26th lowered the voting age. Only two tried outright to govern social policy: The 18th Amendment imposed Prohibition and the 21st repealed it. Only two amendments worked significant structural changes in the original constitutional framework: The 17th Amendment provided for popular election of senators and the 22nd imposed a two-term limit on the presidency. And only four amendments were enacted to overrule decisions of the Supreme Court: The 11th Amendment barred suits in federal court by citizens of one state against another state, the 14th recognized the United States citizenship of African Americans, the 16th permitted Congress to impose an income tax, and the 26th lowered the voting age to 18—all in contrast to what the Supreme Court had said the Constitution permitted or required. The remaining handful of amendments were national housekeeping measures, the

most important of which was the 25th Amendment's establishment of procedures for presidential succession.

Against this backdrop, the current enthusiasm for amending the constitution is concerning in that “there are strong structural reasons for amending the Constitution only reluctantly and as a last resort.”

1. Stability. It has stood the test of time. “If it ain’t broke, don’t fix it.” Stability is one of the key virtues of having a Constitution in the first place. Amending it too often undercuts that purpose and undermines public confidence in the basic structure of our government.

2. The Rule of Law. 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.

3. Coherence. The Constitution was written as a unified document; amendments are piecemeal and can affect other parts of the whole. For instance, a balanced budget amendment could affect taxing, borrowing, and spending currently accomplished by a simple majority vote by imposing supermajorities on these actions, thereby transferring so much power to the minority that they may extort concessions in other areas, with the potential for significant spill-over effects. This is only one example, but it is clear that amendments can create conflicts within the document as a whole and thus have repercussions beyond their specific subject matter.

4. Generality. The Constitution is purposefully drafted in general terms. Specifics are to come through judicial interpretation. However, generally worded amendments can be problematic. Either by what it specifies or does not specify, an amendment can have the potential to effect a major change to our fundamental governing document such as a redistribution of powers among the three branches of government. Striking the appropriate balance is incredibly difficult to get right.

5. The Role of the Court. We have granted the Supreme Court broad interpretive powers. Constitutional amendments, especially those that overturn Court decisions, undermine respect for the legitimacy of the Court. It also erodes the social benefits of peaceful conflict resolution. Remember that we have amended the Constitution only four times in order to overrule the Supreme Court. The Court itself can squander public respect by so abruptly changing interpretations of the Constitution that they appear more politics than law. But that fact does not strengthen the case for more readily amending the Constitution. Rather, it illustrates the very pitfalls of constitutional mutability that amendment fever would exacerbate.

In summary, this does not mean that the Constitution should never be amended. But for all the reasons outline above, there should be a strong presumption against doing so except when changes consistent with the Constitution’s broad purposes are unlikely to be enacted by ordinary legislative means.

## 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 can not 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)**