

Resolved, Article V Should Be Revised to Make It Easier to Amend the Constitution and to Call a Constitutional Convention

PRO: Sanford Levinson

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The Articles of Confederation required that any change to the document must have the consent of the legislature in each state. Unanimous consent meant, in practice, that institutional deficiencies could not be corrected. Unable to amend the Articles of Confederation, those who were dissatisfied were forced to overthrow them instead. And that is precisely what happened in Philadelphia in 1787, when those whom we now call the framers or the Founding Fathers ripped up the existing constitution and wrote a new one.

The starting point for the constitutional convention's business was not the Articles of Confederation but the Virginia Plan, authored principally by James Madison and presented to the delegates at the outset of the convention by Virginia governor Edmund Randolph. The Virginia Plan's thirteenth resolution read, "Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." Madison and his Virginia colleagues were determined to avoid a situation in which a single recalcitrant state could prevent the rest of the nation from amending the federal constitutional charter.

When the convention took up the Virginia Plan's thirteenth resolution on June 5, only two delegates spoke, one against and one in favor. South Carolina's Charles Pinckney "doubted the propriety" of excluding the national legislature from the amendment process. Massachusetts Governor Elbridge Gerry offered his support, arguing that the "novelty and difficulty of the experiment" on which his colleagues were embarking suggested the wisdom of allowing for "periodical revision." Gerry argued that they were

unlikely to get everything right and so would need an amendment process to fix their missteps and miscalculations. The delegates were in no mood, however, to contemplate how to change a constitution they had not yet created, and so they voted to put off consideration of the resolution.

Nearly two months later the delegates were no closer to resolving the question, and so the task of devising an amendment procedure fell to the five-man Committee of Detail. This committee worked for ten days from the end of July to the beginning of August to compose a rough draft of the Constitution. On August 6 the committee presented its handiwork to the convention, including Article XIX, which read, "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose." On August 30 the delegates unanimously approved Article XIX.

The question of how the new constitution should be amended was reopened on September 10, only a week before the delegates affixed their signatures to the final document. New York's Alexander Hamilton asked the delegates to make it easier to remedy "the defects which will probably appear in the new System." In Hamilton's view, those defects were most likely to be spotted by the national legislature, so he proposed that the article be modified to allow Congress, contingent on a two-thirds vote in each house, to call a constitutional convention. Madison also urged the delegates to take a second look at the article. He was particularly bothered by the "vagueness of the terms." How would the convention be formed, he asked, and what rules would govern its decisions?

Doubts about the article were sufficiently widespread that nine of the eleven state delegations voted to reconsider. Connecticut's Roger Sherman suggested amending the article to allow the national legislature to propose amendments but to require that any such change be "consented to by the several States." Pennsylvania's James Wilson proposed requiring the approval of only two-thirds of the states. That proposal narrowly lost, but a compromise proposal of three-fourths of the states was agreed to without a dissenting vote. Madison then offered wording that incorporated both Hamilton's earlier proposal and the three-fourths approval mechanism. The delegates overwhelmingly approved it, although only after adding a provision that forbade any amendment relating to the slave trade for the next two decades.

The Committee of Style was charged with polishing the final draft of the Constitution, and on September 15 the committee presented to the delegates the wording of what had become Article V. Several delegates remained dissatisfied, however. Sherman wanted a guarantee that no change could be made to the Constitution that deprived states of "equality in the Senate." Initially, the convention rejected the change, prompting an angry Sherman to propose that Article V be struck altogether. "Circulating

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murmurs” of discontent moved Gouverneur Morris to play peacemaker; he proposed that Article V be amended so that “no State, without its consent, shall be deprived of its equal suffrage in the Senate.” Eager to bring their proceedings to a close and to avoid jeopardizing the carefully crafted compromises between large and small states, the delegates agreed to Morris’s proposal.

One further change was made to the work of the Committee of Style. The committee’s Article V included no method for calling a constitutional convention, and Morris and Gerry proposed remedying this by requiring a constitutional convention on application of two-thirds of the states. Their proposal was endorsed unanimously, and the opening sentence of Article V was revised into its final form: “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.” Two days later the delegates—although not Gerry, Mason, or Randolph—signed the Constitution. Their work was done, but the debate over the wisdom of Article V had just begun.

Sanford Levinson and David E. Kyvig renew this centuries-old argument. Levinson seconds the complaint that was first voiced by Patrick Henry at the Virginia ratifying convention in 1788: “The way to amendment,” Henry thundered, had been “shut.” Levinson agrees that Article V is “an iron cage” and fundamentally undemocratic. Kyvig, in contrast, thinks that Article V gets it just about right, endorsing Madison’s judgment in *Federalist* No. 43: “It guards equally against the extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.” Twenty-seven amendments later, we are still debating the question of whether the framers got it just right or made constitutional reform too difficult.

PRO: Sanford Levinson

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The United States has the hardest-to-amend national constitution in the world, at least among democratic nations.¹ It is not merely that the U.S. Constitution stands out among world constitutions; with some exceptions, the fifty state constitutions within the United States also have much easier amendment procedures than does the federal constitution. The exception arises in those states that require that two separate legislatures in successive sessions propose an amendment before it can be submitted to the

electorate for ratification. But most states require only that an amendment be passed by a simple majority of both houses of the legislature followed by a majority vote of the people. Some states, especially in the American West, permit an initiative process that enables a majority of voters to change the states' constitutions while bypassing the legislature entirely. There is, then, no American consensus that foundational documents should be extremely difficult to change. In fact, judging by what John Dinan has aptly called America's state constitutional tradition, there is arguably an American consensus in favor of relatively easy constitutional change.²

Be that as it may, we are stuck with Article V and all its difficulties. It sets out two paths toward amendment, with one going through Congress (and requiring the assent of two-thirds of both the House and the Senate), and the other going through a convention that at least according to the text of the Constitution shall be called by Congress upon a petition of two-thirds of the states. No one knows, of course, what Congress would do in that situation if, as is probable, at least one House is opposed to any such convention. Nor is it clear how such a convention would in fact operate and, in particular, whether Congress could set basic rules involving, say, choice of delegates and the voting rules that would be operative within a convention—one-vote/one-delegate or one-vote/one-state (as at the Philadelphia Convention).

The text also establishes two paths for ratification: approval by three-fourths of the state legislatures or by three-fourths of specially convened state conventions. Which mode of ratification shall be used is left up to Congress to decide, and with one exception (the Twenty-first Amendment), Congress has always opted for approval by state legislatures. Since all state legislatures, save for Nebraska's, are bicameral, any amendment needs to be approved by a minimum of seventy-five legislative houses in thirty-eight states, whereas any proposed amendment can be defeated by the negative vote of only thirteen legislative houses in separate states.

Congress is far too busy to spend its time reflecting on the inadequacy of our eighteenth-century Constitution to our twenty-first-century reality. Even if one sets aside the obscene amount of time that legislators must spend raising money for the next election, Congress has too much on its plate as it seeks to address pressing issues such as national security, the environment, and the economy, both domestic and global. Not only does Congress have insufficient time to think fully about possible changes in our basic political structures, but there would also be obvious conflicts of interest because some proposed changes would require changing the political system under which present members of Congress have prospered. An example is that the current practice of electing every member of the House in a single-member district is the result of congressional legislation passed in 1842 and reaffirmed in 1967. One might well believe that we would be better off with multi-member districts elected by some form

of proportional representation. But it is unthinkable that present members of the House would ever vote to adopt such a proposal, which would be perfectly constitutional, let alone vote for a constitutional amendment requiring such districts. Only a convention might seriously consider such a proposal. I therefore strongly support a new constitutional convention. I also hope that any such convention will modify Article V and make its own handiwork easier to amend.

The United States is stuck with Article V not because of a nonexistent national commitment to the idea that constitutions should be close to unchangeable but instead because of decisions made in the waning days of the Philadelphia convention of 1787 when delegates were eager to wrap things up and return to their respective homes. The convention was a ringing repudiation of Article XIII of the Articles of Confederation, which required the unanimous assent of the state legislatures to amend the Articles. No one at the convention defended this change-prohibiting system. So a key question is, Did those who wrote the Constitution decide, after significant debate, that two-thirds of each house plus ratification by three-quarters of the states was the right decision rule, the Goldilocks-style just right between a method of change that would be too hot (by being too flexible) and one that would be too cold (by emulating the Articles)? The answer is no. Almost all the debate in Philadelphia and thereafter about Article V concerned the roles of states and Congress in the amendment process. Wariness about entrusting the process exclusively to Congress is what accounts for the ability of the states to trigger a new constitutional convention should two-thirds of them petition Congress to do so. Most of the framers of the Constitution would likely be surprised that this part of Article V has seemingly become moribund and that constitutional change now, realistically, must go through Congress. To be sure, there are currently attempts as of 2019, sponsored largely by conservative political groups but with some left-wing support (almost entirely from academics rather than practicing politicians), to trigger a so-called Article V Convention by going through state legislatures. It is, however, unlikely that the constitutionally required thirty-four states will accept the need for a new constitutional convention, especially given the results in many of the states in the 2018 elections. (There is a significant debate whether the thirty-four states would have to sign completely identical petitions, including reference to the presumed subjects of such a convention, rather than simply agreeing that a convention should be called through setting out potentially different agendas.) Congress will almost certainly remain the only practical source of constitutional amendment. In any event, no one at the constitutional convention addressed why the formula of two-thirds for either proposing new amendments or triggering a new convention and then three-quarters for ratification was just right for the new United States.

The first discussion in the Philadelphia convention of the numbers required for amendment took place on September 10, a mere week before the tired delegates signed the final document. Elbridge Gerry of Massachusetts was among those who pointed out that one of the major defects of the Articles of Confederation was the unanimity requirement of Article XIII. "It was," said Gerry, "desirable now that an easy mode should be established for [correcting] defects which will probably appear in the new System." Article V reflected the delegates' view that the new constitution would in fact be more flexible than the one it was replacing. This is truly faint praise.

At least one leading critic of the Constitution condemned it for making change still too difficult. At the Virginia ratifying convention, Patrick Henry warned his fellow citizens that only one-tenth of the American people might be able to block necessary changes. "It will be easily contrived," he suggested, "to procure the opposition of one tenth of the people to any alteration, however judicious." Interestingly, James Madison, who was the Constitution's primary defender at the Virginia ratifying convention, chose not to confront Henry directly on this point. One searches in vain for any ringing endorsement of Article V. All that its defenders were willing to say in its behalf was that it was better than the disastrous Article XIII.

It is worth elaborating on Henry's reference to the one-tenth who could block needed change. His calculation was based on the fact that the total population (including slaves) of the four smallest states at the time (Delaware, New Hampshire, Rhode Island, and Georgia, with approximately 325,000 people) could block an amendment supported by the nation's other 3.6 million people. Consider the contemporary reality. The population of the United States as of the 2010 census was 308,143,815; the thirteen smallest states had a combined population of approximately 13,750,000. The 2020 census will probably take the total population up to at least 330 million; the population of the thirteen smallest states is likely to be around 15 million people, reflecting the relatively small growth rate of smaller, more rural, states compared with larger states containing America's major cities and greater economic opportunities. So the decision of a single legislative house in thirteen states constituting less than 5 percent of the nation's population would be sufficient to veto an amendment desired by states with 95 percent of the American population. Even if this constellation of votes is unlikely, it takes little effort to imagine a coalition of a blocking minority of, say, 20 percent of the national population. No system that pretends to be based on the principle of one person, one vote, and the belief that majorities (or even reasonably sized supermajorities, such as, say, 60 percent of the population) should rule should take any pride in Article V, which in almost every respect resembles the justly despised Article XIII of the Articles of Confederation.

Perhaps one should place Article V alongside other unfortunate compromises made in Philadelphia, such as reinforcing the power of slave

states and acquiescing to Delaware's demand for equal representation in the Senate, which were the price of gaining the Constitution in the first place. This may explain the decision reached in 1787, but it would be as crazy to embrace Article V because that is what the framers decided as it would be to embrace the sanctity of recognizing property rights in other human beings, as was done by the notorious Three-Fifths Compromise and the Fugitive Slave Clause.

For those who think it is important to remain faithful to the specific decisions made by the founders, consider the closing lines of James Madison's *Federalist* No. 14: "Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? . . . They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate."

We should, then, turn to the lessons of our own experience—including the history of American state constitutions and, for that matter, the history of every other country that is committed to the principles of liberal democracy—in deciding whether improvement of the great Confederacy designed in 1787 requires radical surgery on what is, in significant respects, its most important article: Article V.

Any discussion of the present adequacy of Article V requires that we answer two quite different questions: First, how does one evaluate the possible gains attached to risking changes in the status quo against the fear that such changes will generate negative costs? It is obvious that Article V has a tremendous bias toward the status quo and places an extremely high burden on anyone who believes that change is desirable. Second, can we develop some way of measuring, over our 230-year history, whether we have procured enough gains from this bias that any costs attached to the near impossibility of amending the Constitution are worth it?

I will return to those questions. A third question, however, needs to be considered first: How important are constitutional amendments? A number of distinguished law professors, including Bruce Ackerman, Stephen Griffin, and David Strauss, have argued that most important changes in the American constitutional order have taken place outside Article V.³ If they are right, then this debate is much ado about relatively little. Although I believe that much important constitutional change has occurred outside Article V, I also believe that many needed changes have not. Much of the Constitution is hardwired against interpretive cleverness.

Perhaps the easiest, and least controversial, example has to do with when we inaugurate new presidents. A recurrent feature of the American political system is the election of a new president who has run on a platform repudiating key policies of the incumbent. A hiatus of about eleven weeks

ensues between the repudiation of the sitting president and the inauguration of the successor on January 20. The United States pays a real cost in having simultaneously a legal president who has been repudiated by the electorate and a politically legitimate president without any legal authority to act. This is surely not the most serious defect in our Constitution, but it is perhaps the clearest example of a hardwired feature that cannot be worked around, at least in the absence of an unusually public-spirited incumbent president and vice president, both of whom must be willing to resign their offices immediately after the election in order to pave the way for their perhaps despised successors. This example should prove chastening to those who proclaim the irrelevance of formal amendment.

So let me return to the first two questions, which are more central to the debate. In his defense of Article V, David Kyvig remarks that the rigors of Article V have “contributed to a stable but not cripplingly inflexible government for more than two centuries.” The appropriate response to this is, Says who? What, precisely, are the proper tests of flexibility and, for that matter, of stability? Indeed, whatever the test, could any reasonable person believe that we really have had two centuries of stability? A significant amount of selective amnesia is necessary to make such a statement. Consider most obviously the Civil War, a conflagration that was to a significant degree generated by the Constitution of 1787. William Lloyd Garrison described that Constitution as a “covenant with Death and agreement with Hell” because of the hardwired support it gave to slavery. It is difficult to argue that he was wrong. The Three-Fifths Compromise, for example, gave slave states enhanced representation in the House of Representatives and directly contributed, through the electoral college, to the election of American presidents who either owned slaves or were part of national political coalitions dedicated to protecting the interests of slave owners. This also helps to explain why the Supreme Court, consisting of presidential appointees, was so consistently pro-slavery prior to the Civil War.

As for the Fourteenth Amendment, which became part of the Constitution after the war, Bruce Ackerman has demonstrated that it is almost impossible to shoehorn its provenance into a plausible Article V framework.⁴ Proposal of the amendment by Congress was made possible only by the refusal of the Republican Congress in December 1865 to seat most Southern representatives and senators whose elections were viewed as valid by President Andrew Johnson. Had they been seated it would have been impossible to procure the needed two-thirds majorities in each house. As for ratification, military reconstruction was established to engage in the kind of regime change that would generate approval by the South. Moreover, the defeated states were told that their representatives and senators would not be seated unless they had ratified the amendment.

No historian should pretend that the Fourteenth Amendment is evidence of the flexible operation of Article V. Constitutional reform grew

out of the barrel of a gun. One must, therefore, reject Kyvig's notion that the Fourteenth Amendment reflects in any unproblematic sense "the high threshold of consensus required for amendment." Indeed, precisely because it reflected no such consensus in 1868 and because the so-called Compromise of 1877 signaled the beginning of a *de facto* capitulation to the return of White rule in the ostensibly defeated Confederate states, the Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth) went into hibernation, as far as racial justice was concerned, for at least three-quarters of a century.

At this point, invariably, defenders of Article V will play the risk aversion card, suggesting that the wonderful thing about a functionally unamendable Constitution is that it prevents bad amendments. That it certainly does. An anti-flag burning amendment, for example, would have been a terrible addition to the Constitution, as would, I believe, the addition of a balanced budget amendment that is behind the current efforts to achieve an Article V Convention by petition of thirty-four states. The possibility of such amendments being enacted would certainly count as a cost of a more flexible system of amendment. What those who endorse such arguments never do, however, is ask about the potential risks (and costs) of our *not* being able to make desirable changes. Are we better off, for example, not having the Equal Rights Amendment in the Constitution, even though it received the support of both House and Senate and two-thirds of the states with well over a majority of the national population? Nor do proponents of Article V address the cost of having a political system in which there is no serious discussion of our hardwired structures because of an altogether rational belief that it is impossible to change them in our era. Kyvig proffers the Seventeenth (direct election of senators), Twentieth (moving up the inauguration date), and Twenty-second (two-term limit for the president) Amendments as examples of change, and they are. But they were added between sixty and one hundred years ago.

Although we were close to third party-induced electoral train wrecks in 1948 and 1968, and many people believe that such train wrecks occurred in 2000 and 2016, there has been no serious attempt to amend the electoral college, even though every poll taken since 1944 indicates that a majority of the American public prefers direct election by popular vote to the bizarre system by which we select the president. Indeed, the House passed a proposed constitutional amendment in the aftermath of the 1968 election, but it went down to all-too-predictable defeat in the Senate. And even if by some miracle an amendment escaped Congress, it is virtually certain that at least one-fourth plus one of the states would view any change as negatively affecting their parochial interests. It is even more utopian to suggest changing the indefensible allocation of power in the Senate, by which Wyoming gets the same voting power as California, which has seventy times the population, because Article V at that point

mirrors the Articles of Confederation in functionally requiring unanimity for amendment.

One of the worst features of Article V is that it infantilizes our entire political dialogue. We are totally unlike the founders in our systematic refusal to discuss the adequacy of our institutions and to think of needed improvements, in part because the founders imprisoned us in an iron cage that makes change nearly impossible. And the success of Article V is in part our refusal to perceive ourselves as trapped in such a cage! Proponents of Article V basically argue, "Article V is not broken and therefore does not need fixing." I am far more pessimistic. I think it is one of the most important parts of a broken Constitution. And, what is worse, precisely because most of us believe, perhaps rationally, that Article V works to stave off any realistic possibility of fixing what is wrong, we adopt the classic mechanism of denial: "If it cannot be fixed, then it really is not broken to begin with." We are, as a citizenry, much like a battered spouse who perceives no real possibility of exit and therefore is inclined to put the best spin on what might well be described, by an objective outsider, as a situation that merits escape.

Thus, I enthusiastically support a new constitutional convention that would, as one of its most important actions, significantly modify Article V. It is possible that most Americans, even in a world that made constitutional change easier, would disagree with me and conclude that things are basically fine as they are. That would disappoint me, but at least one might say, "Well, at least We the People have really thought about our polity, and one can respect the process by which the conclusion was reached even if one disagrees with the ultimate decision." In our present reality, however, there is only a deafening silence regarding the adequacy of our political institutions, save for discussion among some Democratic presidential candidates running for the 2020 nomination of the deficiencies of the electoral college. But the purported "revolutionary" Bernie Sanders, despite his remarkably ambitious hopes to fundamentally reform our economy and our health-care system, has failed to suggest even once that enacting these reforms would require changing our constitutional system, which by design created multiple veto points to block changes to the status quo.

Most Americans today, regardless of their place on the political spectrum, express little faith in their national government and believe the country is going in the wrong direction. No one seems to see a way out of the malaise that some political scientists view as threatening the maintenance of the American democratic order. Simply suggesting getting involved in elections is fruitless if elections are less consequential than we have been led to believe because of the rigidity of American institutions in privileging the status quo.

Because Article V generates, in the minds of most rational people, the perception of impossibility of change, there is no serious debate about the article at all. Some people may be cheered by this. I obviously am not. I see it as cause

for alarm, and perhaps even despair, if the policy changes we need (and desire) are thwarted by an outdated and undemocratic Constitution that is kept that way by the barriers to institutional change created by Article V.

CON: David E. Kyvig

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When the men who would frame the U.S. Constitution first met in Philadelphia in May 1787, a fundamental question faced them: How should they design a government to strike an effective balance among competing desires for popular sovereignty, functional effectiveness, stability, and adaptability to changing circumstances? The framers were committed to establishing a government that would ultimately reflect the will of the people while at the same time not be so sensitive to momentary public enthusiasms that it would constantly change its character or direction and thus be considered unsteady. The solution that they devised for balancing the competing pressures of democratic responsiveness and government stability, the mechanism of constitutional amendment embodied in Article V of the Constitution, was a vast improvement over previous constitutional arrangements and has since proven its worth over the course of more than two centuries.

The question at hand is whether Article V still serves America's best interests or whether its rules for constitutional reform should be relaxed. No doubt, Article V is a daunting obstacle to those eager for change. Taken as a whole, however, the history of efforts to use Article V suggests that its high standards have not been an insurmountable barrier to needed reform. At the same time, Article V has saved the United States from adopting some momentarily popular but fundamentally imprudent measures. Dramatic declines in approval of the conduct of a president, such as confronted Richard Nixon between his overwhelming reelection in 1972 and his resignation to avoid impeachment twenty-one months later, or as George W. Bush experienced between his high point after the terrorist attacks of September 11, 2001, and the lows of his last months in office, should remind us that temporary enthusiasm for or unhappiness with those leading government should not be confused with endorsement of or dissatisfaction with the design of government itself. The functional utility and simplicity of a structure have more lasting importance than does the conduct, for good or ill, of its temporary occupants.

The idea of constitutions—legal instruments defining the responsibilities, powers, and limitations of governments—originated in 1215 with the English Magna Carta, a negotiated agreement between King John and the principal peers of the realm regarding the limits of royal authority. In a series of further agreements over the next five hundred years, British monarchs and Parliament refined their definition of governmental structures

and powers in a series of acts collectively, if not entirely accurately, referred to as an unwritten constitution. The distinguishing feature of Great Britain's master plan of government was less its haphazard manner of construction in several parts and more the fact that it could be and several times was radically altered by a simple parliamentary majority. Allowing a bare majority to define the law and thus the rules of government proved to be a prescription for sudden, dramatic shifts in government.

Britain's North American colonies developed on the basis of less flexible, more precisely defined instruments; for the most part, corporate or royal charters set forth the terms by which the colonies operated. The colonies grew more comfortable with such specific written instruments of government as they observed the erratic evolution of British government through the English Civil War, the Restoration of the monarchy, and the Glorious Revolution of 1689. By the time of the 1776 Declaration of Independence, the newly independent American states had all opted for written constitutions, either modeled on earlier instruments or created anew. The idea of a charter delegating the authority of the sovereign people to a government functioning under agreed-on rules was widely embraced not only at the state level but also in the creation of a confederation of the states. A written constitution that could be read and comprehended by all seemed necessary and valuable for maintaining a well-defined and limited government under democratic control. Yet written constitutions carried with them the question of how they should be altered if experience proved they needed reform.

Any change to the Articles of Confederation required the unanimous agreement of all thirteen states. This system of amendment quickly proved unworkable, since it allowed a single state to thwart any constitutional reform, something that happened repeatedly and quickly rendered the Articles unpopular. Dissatisfaction with a rigid and unsatisfactory government of too few powers led to the call for states to send delegations to a constitutional convention in Philadelphia in the summer of 1787. Once the delegates gathered, every aspect of the Articles of Confederation was regarded as eligible for reform.

High on the agenda of the Philadelphia convention—along with the creation of a more effective national government with a balance of structures to carry out necessary legislative, executive, and judicial tasks without any one of them being able to exercise unlimited power—was the objective of devising a workable amending mechanism. The founders repeatedly demonstrated a concern for protecting minority interests while still respecting majority preferences. The Constitution won approval from every sector of the new nation by reassuring each sector that its interests would not be abused. Important decisions, that is, those with long-lasting consequences, would require the greatest degree of consensus to take effect. To ratify an international treaty, one with the highest legal status,

or to remove from office a properly chosen but subsequently impeached president or judge, required a two-thirds vote by the Senate. Adoption of laws that Congress had passed but the president had vetoed required a two-thirds vote in each house of Congress. The most significant change, an alteration of the powers or procedures of government, should require the highest degree of consensus, the founders believed. Thus, they agreed that an amendment should be approved by two-thirds of Congress or by a constitutional convention called by two-thirds of the states. But to make such a basic change in the rules of government, the amendment would also have to be ratified or approved by legislatures or democratically elected conventions of three-fourths of the states. The founders did not insist on unanimity for constitutional change. However, they clearly feared that allowing the fundamental rules of government to be too easily altered could lead to changes being made without sufficient thought or agreement. Were they too cautious? More than two hundred years of experience offer evidence that they were not.

Article V, the amending provision, proved one of the Constitution's great selling points. As the original states considered whether to ratify the Philadelphia convention's proposal, many had doubts about one aspect or another. A common complaint was the absence of a bill of rights providing specific protections for individuals against overweening governmental power. The ratifying convention in Massachusetts was the first to call for the immediate addition of a bill of rights, and it showed its confidence in the functionality of the new amending process by proceeding to approve the Constitution on the assumption that it would be promptly amended. Several other states did likewise, affirming their faith that the amending system would work by accompanying their ratifications with calls for a bill of rights. The two late ratifications critical to putting the Constitution into effect, those of Virginia and New York, were both obtained on the basis of pairing ratification with calls for amendment. Without the presence of a method of amendment that the founding generation regarded as workable, it is unlikely that the Constitution would have won approval.

James Madison, one of the Constitution's principal architects elected to the first Congress, perceived that the new framework of government would not be fully accepted until its amending system could assuage the concerns of various ratifying conventions. He devoted himself to drafting a set of amendments that would constitute a bill of rights on the basis of the host of proposals emanating from state ratifying conventions. Madison's amendments were approved by the House, modified by the Senate, and emerged from the first session of the first Congress. Ten of Madison's package of twelve amendments gained ratification within two and a half years. The incorporation of the Bill of Rights into the Constitution brought about the full acceptance of the new charter of government, an affirmation made possible only by the successful functioning of Article V.

The early discovery of oversights and flaws in the original Constitution led to two more amendments in short order, a further indication that the amending process could function when needed. Otherwise, the Constitution remained unaltered until the end of the Civil War. It is hardly surprising that this would be the case, since the matter most likely to provoke amendment—slavery—was what most deeply and evenly divided the country. A consensus on fundamental changes in the nature of government was hardly possible until one side or the other in the slavery debate gained a firm upper hand, as occurred only with the South's surrender in 1865. The amendments that ended slavery (the Thirteenth), guaranteed equal treatment and due process of law regardless of race (the Fourteenth), and secured black suffrage (the Fifteenth) reversed the terms of the racial settlement in the original Constitution and demonstrated the power of Article V to transform the entire government and society. Such authority, as the framers had foreseen, was not to be used lightly. The high threshold of consensus required for amendment anchored the fundamental reorientation of the United States from a confederation of powerful states to a centralized national government—not a transformation to be taken lightly.

Following the Civil War amendments, no more constitutional reform occurred until the early twentieth century, and the belief grew that the requirements for amendment might be insurmountable. But then the image of amendment as difficult under the terms of Article V was repeatedly refuted. Progressive reformers, unhappy with a Supreme Court ruling that a federal income tax was unconstitutional and disenchanted with the process for selecting U.S. senators, found constitutional amendments effective and achievable remedies. Indeed, as a growing number of states demanded a constitutional convention to draft a direct senatorial election amendment, and as Congress began to contemplate that such a convention would be as unrestrained as its 1787 predecessor in proposing changes to the basic terms of government, the House and Senate moved quickly to adopt a direct election amendment and send it to the states for ratification. As soon as the amendments establishing an income tax (Sixteenth Amendment) and direct election of senators (Seventeenth Amendment) were ratified in 1913, advocates of women's suffrage and national prohibition of alcoholic beverages launched amendment campaigns. By the end of the decade, organized political crusades for each of these reforms achieved success. Once the belief that amendment was impossible was overcome, these fundamental changes in income distribution, democratic participation, and social practice were rapidly achieved. Two more amendments followed in little more than a decade—one an important speeding up of the presidential and congressional transition after a national election (Twentieth Amendment) and the other a reversal of the national ban on alcohol (Twenty-first Amendment).

The prohibition amendment (Eighteenth Amendment) delivered several lessons about the nature of constitutional amendment. First, it

demonstrated that the threshold for adoption of even a radical constitutional reform was not beyond reach. The required two-thirds of each house of Congress and majorities in three-fourths of state legislatures were not merely assembled but also exceeded. Events of the next decade demonstrated that the adoption of an amendment did not guarantee that it would be universally embraced; widespread violation of the liquor ban suggested that there were limits to public respect for the Constitution. The most important lesson may have been provided by the repeal of the Eighteenth Amendment only fourteen years after its adoption. Passage of the Twenty-first Amendment showed that the high standards of Article V were not an insurmountable obstacle to the construction of a public consensus overwhelming enough to reverse a previous constitutional agreement, even one of fairly recent standing. The Twenty-first Amendment, the one constitutional reform that directly reversed another, was a measure whose ratification Congress removed from the hands of state legislatures and gave to popularly elected state conventions. The use of bodies of delegates chosen solely on the basis of their position on this one issue underscored the democratic intentions of the Constitution. Prohibition and its repeal also made clear the liabilities of dramatic shifts in fundamental government practice, a cost that would increase if standards for achieving amendment were relaxed. At the same time, the episode demonstrated the capacity of a democratic polity operating under the terms of Article V to repair a constitutional error.

The prohibition episode is not the only evidence of the possibility that questionable amendments may be adopted, despite the elevated standards of Article V. The Twenty-second Amendment, limiting a president to two terms in office, was speedily approved by a conservative coalition of Republicans and southern Democrats following the death of Franklin Roosevelt, who had been elected four times to the presidency. The anti-Roosevelt sentiment that spawned the amendment produced a situation that thereafter politically hobbled every second-term president, ironically many of them conservatives, by barring them from running again. As a result, Presidents Dwight Eisenhower, Richard Nixon, Ronald Reagan, Bill Clinton, George W. Bush, and Barack Obama all found themselves politically weaker in their second terms. The Twenty-second Amendment stands as a reminder that constitutional change can restrict democratic choice. Such reform ought to be approached cautiously and adopted only if a substantial national consensus is supportive.

Four amendments adopted during the 1960s demonstrated once again that the Article V process could work effectively. As public attention became focused on various issues, the necessary degree of consensus was attained for measures broadly perceived as worthwhile: racially progressive steps to prohibit poll taxes and grant electoral votes to the District of Columbia, a complex measure to replace departed or disabled presidents, and a grant

of voting rights for eighteen- to twenty-year-old citizens. At the same time, certain measures that divided the society were unable to attain the political support necessary to move forward. Reaction against various Supreme Court decisions also led in the 1960s to proposals for amendments that would strengthen the authority of states while restricting that of the federal government, overturn the requirement of equal representation of citizens in state legislatures, and authorize state-sponsored school prayer composed by a local majority. Adoption of these amendments, each of which enjoyed support—in the last two cases substantial support—would have had significant, arguably antidemocratic and liberty-restricting, consequences. Advocates of anti-equal representation and prayer amendments once again proposed a constitutional convention and stirred concern that such a convention could produce radical change. As a result, interest in such measures rapidly declined. A lower threshold for amendment approval could have conceivably facilitated the adoption of such measures.

The battle for women's rights showed both sides of the Article V question. The Equal Rights Amendment (ERA), first proposed to Congress in 1923, did not achieve two-thirds support in both houses until 1972. It was ratified by thirty-five states, 70 percent of the necessary total but not the required three-quarters. The failure of the ratification effort did not prevent the Supreme Court from repeatedly during the 1970s and 1980s deciding to extend women's rights to due process and equal protection under the law. At the same time, widespread opposition to the Court's *Roe v. Wade* decision acknowledging a woman's right to choose whether to have an abortion spurred calls for an amendment to invalidate the ruling. In this case, the same high Article V standard that frustrated ERA supporters prevented abortion foes from achieving an antiabortion amendment even though they had the support of President Reagan. The framers' notion that a high degree of consensus should be required for constitutional empowerment kept either side in an ongoing social debate from imposing its will on a still fundamentally divided society.

A lower threshold for adoption of constitutional amendment combined with the momentary enthusiasm displayed in the 1980s for proposed amendments to ban flag burning and require balanced annual federal budgets might well have facilitated adoption of imprudent amendments. The anti-flag burning amendment would have overturned a Supreme Court ruling that such acts represent symbolic free speech and would have constituted the first significant constriction of the free speech guarantees of the First Amendment. Such an outcome might have encouraged attempts to restrict through amendment other provisions of the Bill of Rights, ranging from gun possession to criminal justice protections. The so-called Balanced Budget Amendment would have posed difficulties for the federal government in responding to an economic or military emergency with large-scale economic stimulus or defense spending. While the anti-flag burning

and balanced budget amendments enjoyed wide support at the moments they were introduced, enthusiasm gradually faded as their consequences became evident. Had the Article V threshold for adoption of such amendments been lower, they might well have been installed in the Constitution, to the detriment of effective government.

The original constitutional principle that the fundamental rules governing the conduct of government should be based on a widespread public consensus is a concept that has served the United States well for more than two centuries. Each adoption of a constitutional amendment, the most recent in 1992, has represented a reaffirmation of the consensus that in other respects the terms of the existing Constitution remain acceptable. The repeated unwillingness to embrace a new constitutional convention offers additional evidence that easier amendment is not widely sought. Even the high standards of Article V have allowed such amendments as national prohibition and presidential term limits to win approval. Easier requirements for constitutional change might well allow other ill-considered measures to be installed in the basic framework of government, measures that would then be difficult to remove. While it is certainly possible to think of possible attractive changes to the Constitution—from electoral college reform to broader protection of individual human rights to clearer articulation of federal government responsibilities—it is hard to imagine continued confidence in the Constitution and the steady functioning of the federal government in the absence of a high degree of consensus on the terms of constitutional design. Article V, with its requirements of two-thirds congressional agreement and three-quarters state approval for constitutional change, has contributed to a stable but not cripplingly inflexible government for more than two centuries. Article V has served the nation well and deserves to be retained.

ENDNOTES

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1. Donald S. Lutz, "Toward a Theory of Constitutional Amendment," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*, ed. Sanford Levinson (Princeton, NJ: Princeton University Press, 1995), 237–74. It is true that several constitutions, the most important being Germany's, include certain sections that are unamendable. Save for this caveat, it remains true that the U.S. Constitution is the most difficult constitution to amend in the democratic world; in

fact, it is easier to amend the unamendable provisions of the German constitution than it is to amend any provision of the U.S. Constitution.

2. John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2006). It should be noted, however, that several American state constitutions, by requiring that two successive legislatures propose an amendment before sending it out for popular ratification, make it harder to engage in rapid amendment than is the case with the U.S. Constitution. The difficulty with the latter is surmounting the two-thirds requirements in both the House and the Senate, and then gaining the approval of three-quarters of the states. But, as the history of several amendments has demonstrated, the time from proposal to ratification can be relatively quick, which is impossible in, say, Massachusetts or Iowa, both of which have the double-legislature requirement.
3. See Bruce A. Ackerman, "Higher Lawmaking," in Levinson, *Responding to Imperfection*, 63–88; Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University Press, 1996); and David Strauss, "The Irrelevance of Constitutional Amendments," *Harvard Law Review* 114 (2001): 1457–505. See also Sanford Levinson, "How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change," in Levinson, *Responding to Imperfection*, 13–36.
4. Bruce A. Ackerman, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998), 99–252.