# *Amending the U. S. Constitution ----HOW?*

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*by*

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Probably not a year goes by without another legal case that again demonstrates the far-seeing wisdom of the men who wrote the Constitution of the United States.

Some contemporary opinion — in high places — to the contrary, our forebears managed somehow to express provisions so fundamental that many of them will still apply centuries from now.

And, usually, their ideas were expressed in such simple, clear language that doubt as to their meaning has been raised in the minds of only those opposed to principles of freedom.

One of the best of their ideas, of course, was in admitting that they were not infallible, and that eventually some changes might have to be made in their provisions.

## Article V

To this end, they provided that the Constitution could be amended; and by legal processes rather than by armed revolt or rebellion or actual war.

This provision, Article V, was typically short and, on the surface, appeared simple. And to them, knowing exactly what they intended, it probably was simple.

> But, as most authors know, it is easy to read between your own lines, and read into your own writings things that will not be clear to others—or, for that matter, clear to the author a few months later!

This, apparently, has been the case with Article V. For many years, now, there has been considerable disagreement as to just what some of its phrases meant.

As a result, of the two methods provided for proposing an amendment to the Constitution, only one has ever been used — and there is some confusion about it! Getting down to cases, let's look at 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 one or the other Mode of Ratification may be proposed by the Congress . . . ."

(There were a few more words at the end, but they applied to actions prior to 1808).

## Two Methods

Dissecting the paragraph, it seems to provide two methods of proposing amendments:

(1) By a two-thirds vote of both Houses of Congress, and

(2) By application of Legislatures of two-thirds of the states.

Method (1), action by Congress, has been used successfully 22 times.

Method (2), action by state legislatures, has been tried many times, never with success, although it would seem to be the one which would come nearer to expressing the wishes of the people.

Failures of the legislative route seem to have been the result of technicalities or confusion or both.

In some cases, it seems, action has been halted when there have been differences in language used by the various legislatures to express their wishes.

In others, the length of time required to get action by the required number of state legislatures has resulted in the effort simply dying out.

## "Convention?"

There seems, too, to be some confusion over the word "Convention." Article V says that if petitioned by legislatures of two-thirds of the states, Congress "shall" call a "Convention for proposing amendments."

"Convention" of whom? Where? When? "Proposing" to whom? Under what ground rules?

As a legal matter, some astute constitutional students seem uncertain whether a national constitutional convention could be limited to certain subjects, by either Congress or the state legislatures; since the Constitution itself imposes no limits.

## Congress Controls

Supreme Court decisions have held consistently that the entire amending process is under control of Congress, so that body presumably would have control of the scope of such convention, as well as the time, place, delegates, and expenses and compensation.

Then, suppose the proposal submitted by the states was one opposed by the political party in power in Congress? What would prevent that body from amending the proposal, possibly to the extent of having just the opposite of the intended effect?

*For that matter, how could even a request by legislatures of all fifty states make a reluctant or controlled Congress take any action?*

(Note that Article V uses the word "shall," which commands Congress to take such action. But what if Congress takes no action at all — what can be done about it?)

The last phrase, providing for ratification by legislatures or conventions in three-fourths of the states, adds "as the one or the other mode of ratification may be proposed by the Congress."

## "Discretion"

There has been a ruling on this. Courts have held that "The choice of methods of adoption rests solely in the discretion of Congress."

And there have been court rulings on several other points — but none that would seem to clear up the basic confusion.

One, for instance, leaves amendment-voting power strictly in the hands of legislatures, excluding individual voters.

Another notes that ratification of proposed amendments by a state legislature is not "legislation," and requires no proclamation for introduction in either a regular or special session.

Another holds that the two-thirds vote of Congress means — if a quorum is present — two thirds of those attending, and not of total membership.

Others hold that action by a state legislature shall be "certified" to the U. S. Secretary of State, that a governor has no veto power in such matters.

## But How?

All of which, of course, are interesting angles, but fail to furnish answers to the basic question: How can two-thirds of the states, now 34, directly call for and get submission of a proposed amendment?

The question has come under increasing discussion for several years, especially recently and especially by the National Council of State Governments.

It was discussed in theory at meetings in Florida, Mississippi and Alabama, in which the Louisiana State Sovereignty Commission participated.

There was action, finally, at the Council's 1962 meeting in Chicago, attended by Chairman Frank Voelker, Jr., of the Louisiana Sovereigny Commission, a member of the Council's Board of Governors.

## Three Proposals

The council adopted resolutions urging state sponsorship of three proposed amendments, and sent copies to all states with the hope that at least two-thirds would adopt them in the same form.

The first would simply clear up some of the questions listed above about amendment procedures under Article V.

The second would preclude federal consideration of matters relating to reapportionment of state legislatures.

The third proposes creation of a "Court of the Union," which would have the final say in matters of conflicting state-federal claims of powers under the Constitution.

Under the first proposal, under discussion here, Article V would read:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which 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. Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of amendments to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress . . ."

Briefly, then, the change would eliminate necessity for Congressional vote on an identical proposal submitted by 34 or more states; and require submission to all states for the required approval of 38 states.

## Without Congress

In other words, if 34 states approved a proposed amendment, it could become part of the Constitution if ratified by these 34, say, and four additional of the remaining 16 states — all without any action by Congress.

Sponsors of the idea admit that it has a possible weakness, in the requirement for "identical texts." It may be difficult, they say, to prepare "texts" that will satisfy, word-for-word, a majority of members of 34 state legislatures, let alone 38.

But something has to be tried.

## Louisiana Tried

Louisiana tried, in 1960, to invoke the doctrine of "Interposition" — to appeal to the other 49 states from a U. S. Supreme court decision on public school integration; which, Louisiana held, violated freedom of choice of association.

This failed, and the Louisiana Legislature adopted resolutions which (1) asked Congress to propose an appropriate amendment to the Constitution, and (2) applied to Congress for a Constitutional convention.

But, as Voelker said in a speech in 1961, these steps were taken "knowing full well how reluctant the Congress has always been to take the initiative in amending the Constitution."

## "Public Opinion"

He added, however, that "public opinion, and, ultimately, the ballot box, are the only realistic means by which Congress can be persuaded to act," and announced that the Louisiana State Sovereignty Commission would continue its efforts along that line.

Continue it did, and some of its work showed up in a report to the National Council of State Governments in December, 1962, by the council committee on federal-state relations.

This committee reported flatly that *"some federal judicial decisions involving powers of the federal and state governments carry a strong bias on the federal side, and consequently are bringing about a strong shift toward the extension of federal powers and the restraint of state powers."*

The National Council, composed of official representatives of each state, adopted a resolution proposing the three amendments and offering services of the council in their promotion.

## Some Hope

As of this writing, all three proposals have been approved by the legislatures of several states. There were plans to submit all three to the Louisiana Legislature.

There seems, then, to be reason for some hope that before too many years it will be possible for the people, through their elected state representatives, to amend the U. S. Constitution to express *their* views.


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We solicit your thoughts, comments and recommendations.

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