



Delegate Selection, Representation Problems, and the Difficulties of an Article V Convention

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Article V of the U.S. Constitution describes two processes for amending the Constitution. The first method gives Congress the power to propose an amendment with two-thirds support in both the House and the Senate. Once proposed, an amendment requires ratification by three fourths of state legislatures (38 of 50) to take effect. All twenty-seven amendments to the U.S. Constitution have followed this first path. The second method allows two thirds of state legislatures (34 of 50) to instruct Congress to call for a constitutional convention for proposing amendments.

The country's last constitutional convention to propose a constitutional change was in 1787 – when the Framers drafted the Constitution. We have had a constitutional convention once to ratify (the Twenty-First, which ended Prohibition), but those individual state ratifying conventions were hardly analogous to the single convention now contemplated to propose amendments.

Because the United States have not held a constitutional convention to propose amendments since 1787, there are many uncertainties about how a convention would play out. Crucially, there are unanswered questions about delegate selection, eligibility, and responsibility.

Who Chooses Delegates to a Convention?

It is not clear who would select the delegates to a convention. State legislatures may assume they would select the delegates, as some states' current Article V bills suggest. However, some argue that the Constitution leaves such matters to Congress. After all, Article V leaves it to *Congress* to “call a convention for proposing amendments” once two-thirds of state legislatures have applied for a convention. The Constitution could have stipulated that a convention is automatically triggered once two-thirds of state legislators request one, but instead it provides a role for Congress. While it is unclear what this role entails, one could argue that when Congress calls the convention, it should also have the power to define the rules, including the selection of delegates.

If that were the case, Congress would have several options for how to design a delegate-selection process. One option would be to let the state legislatures choose their own delegates. Another would be for Congress to require elections for delegates. Such elections could occur in nationwide races, statewide races, or House district races. Congress could also leave it to each state to design its own method of selecting delegates, or choose to select delegates itself, or even appoint its own members (senators and representatives) to serve as delegates. Of course, the political composition of Congress would significantly impact the nature of the delegate-selection process.

Further complicating delegate selection, it is unclear how changes in the political composition of state legislatures or Congress would affect the appointment of delegates once the process has begun. For example, if a Democratic-majority state legislature selected delegates but then Republicans gained back the majority before the Convention commenced (or even during the Convention), would the new Republican majority have the authority to recall the initial delegates and replace them with its own slate? What if Congress selected the delegates and a similar transition occurred? What if a new party captured the majority of one, but not both Houses of Congress (or of a state legislature)? Neither the Constitution nor historical precedent answers these questions.

How Would Representation and Voting Work at a Convention?

A related issue deals with how convention representation and voting would work. Would each state be represented equally at the convention or proportionately based on population? Or would voting be allocated on an entirely different basis without regard to states at all? Procedurally, what sort of vote would trigger an amendment proposal that could be sent to the states for ratification? The 1787 Convention resolved issues by majority vote, so that would be one possibility. The 1787 Convention also revisited issues after they had already supposedly been decided, so this precedent might suggest that votes on matters could be revisited again and again.

Some constitutional language, however, suggests that the 1787 precedent ought not to apply to amendments. Article V requires that two-thirds of each House of Congress vote to propose a constitutional amendment. Given that Article V requires a supermajority for amendments proposed in Congress, a convention's rules may also require a supermajority before an amendment was officially proposed. If this were the case, there would remain questions about whether two-thirds of all delegates or two-thirds of all states would be necessary to propose an amendment. Once again, no clear rules govern.

Can State Legislatures Limit A Convention and Its Delegates?

It is also unclear whether state legislatures or Congress could limit the convention to a pre-assigned topic, or whether a convention, once called, could propose any constitutional amendment, or even replace the Constitution with an entirely new charter of government.

Some states have passed resolutions calling for an amendment to limit and control federal government spending. Other states have passed resolutions calling for term limits for federal representatives. It is doubtful that state resolutions on different topics would collectively count towards Article V's two-thirds threshold. However, if they do, a collection of vague resolutions expressing different goals would best be understood as inviting an open-ended convention, rather than one limited to a single topic.

Even assuming that thirty-four states passed identical resolutions, once a convention convenes, there is no guarantee that the convention would limit itself to a preassigned topic. Conservatives and liberals could try to use a constitutional convention to advance their partisan agendas. Conservatives may try to limit federal legislative power, require a balanced budget, outlaw abortion, or even abolish the federal income tax. Liberals may try to overturn the Supreme Court's decision in *Citizens United v. Federal Election Commission*, replace the Electoral College with a national popular vote for president, protect voting rights, and prohibit partisan gerrymandering.

State legislatures, of course, may anticipate this possibility and suggest mechanisms to constrain delegates. However, it is not clear that state legislatures could so constrain their convention delegates. State legislatures may lack the constitutional authority to select the delegates or even the method of their appointment. If state legislatures could not select delegates, it is highly unlikely that they would then be able to control the actions of or replace rebellious delegates.

Additionally, even if state legislatures select delegates, their degree of control would be uncertain. Congress could arguably preempt any such efforts by issuing its own instructions. Indeed, delegates to a convention to propose amendments to the U.S. Constitution may well be performing a *federal*, rather than state, responsibility. U.S. senators and representatives are elected in state elections, but the law considers them federal officials. If convention delegates were legally federal officials, state legislatures would be unable to constrain the delegates' choices. Moreover, even if the delegates were technically state officials, a state attempt to constrain those delegates' speech would raise First Amendment questions.

Furthermore, even if they have legal authority to remove or replace rogue delegates, state legislatures may be unable to do so in a timely way. The delegates, following the example of 1787, may choose to work behind closed doors. If they did so, delegates could officially propose an amendment before state legislatures learned of their plans. At that point, it would be too late to remove them.

Risking a Runaway Convention

History teaches that attempts to limit convention delegates were spectacularly unsuccessful during the United States' first Constitutional Convention. The states sent delegates to Philadelphia in 1787 with instructions only

to revise the Articles of Confederation. Of course, the delegates (acting in secret) decided to scrap the Articles altogether and draft a new charter of government. Some state legislators were unhappy that the delegates had exceeded their mandate, but it was too late. There would be no guarantees that a new convention would not unfold similarly. Thus, it is entirely possible that a constitutional convention, following the example of 1787, could end up proposing a document quite different from what the state legislatures originally envisioned.

The most likely outcome is that a constitutional convention would deepen the country's political dysfunction and partisan divisions. There are no constitutional rules defining a convention's processes and the absence of legal rules could result in the convention's "losers" deeming any resulting changes as illegitimate. Regardless of the ultimate outcome, the process itself could plausibly worsen our already vicious national politics.