

## THE NOMINEE IS . . . ARTICLE V

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In any list of least favorite constitutional provisions, we should not ignore the provisions protecting slavery, such as Article I § 9 cl. 1 (providing that the slave trade could not be prohibited prior to 1808) and Article IV § 2 cl. 3 (the fugitive slave clause). These provisions may have been superseded, but they have not been expunged from the text and they should not be forgotten.

That said, there are a number of constitutional provisions that have always struck me as questionable. Article I § 4 leaves the procedures for holding federal elections in the hands of the states.<sup>1</sup> This has meant that there has never been a uniform law of voter registration (contributing to election fraud and lower turnout in the twentieth century) or a uniform federal ballot (leading to voter confusion in some states). The method of presidential election specified in Article II § 1 was an unstable compromise, resulting in the need for the Twelfth Amendment only fourteen years after the Constitution was ratified. It would also have been better had the Framers tried to define at least a minimal conception of the “judicial power” in Article III § 1 (or, for that matter, the “executive power” in Article II § 1).

My nominee, however, is Article V, which has historically operated to make the Constitution very difficult to amend.<sup>2</sup> It is true that the question of how to provide for change poses difficult choices for those who create a constitution. If the constitution makes change too easy, there is a risk that the constitution will not structure politics, but will be hostage to it. But making change too difficult may cause political instability or force change to occur through a non-constitutional process. The procedure for change that the Framers provided in Article V appears to reflect a judgment that making change too easy is the greater danger.

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1. See the contribution of Jeffrey Rosen to this symposium.

2. On matters of amendment and much more, see Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton U. Press, 1995).

The Framers were successful in making formal constitutional change very difficult. Since 1791, the Constitution has been amended only sixteen times (or seventeen, depending on your view of the validity of the Twenty-Seventh Amendment). The provisions of Article V have undoubtedly played a role in causing this low rate of amendment. The second round of approval by a supermajority of state legislatures or conventions seems especially daunting. By requiring the concurrence of both national and state legislatures, Article V comes close to requiring unanimity to approve any amendment as a practical matter.

An important study by Donald Lutz confirms what many commentators have long suspected—that the U.S. Constitution is one of the most difficult constitutions in the world to change.<sup>3</sup> This creates a serious problem for American constitutionalism. Since the Framers chose to err on the side of making amendment difficult, they ran the risk that Article V might make the Constitution irrelevant as circumstances changed. Most commentators would concede that the Constitution has changed a great deal through non-Article V means, primarily judicial interpretation. It must also be stressed, however, that the Constitution has changed through ordinary political means, that is, without formal amendment or a Supreme Court decision. The development of political parties in the nineteenth century and the establishment of independent regulatory agencies and a different conception of the presidency in the twentieth century are familiar examples of this kind of change.

By making it difficult to change the Constitution, the Framers forced a significant amount of constitutional change off the books and thus limited the ability of the Constitution to structure political outcomes. To the extent that we believe that constitutionalism should play this role, we should favor making change through Article V easier. It is not clear that there is a real need, for example, for the supermajority requirement for approval by state legislatures or conventions. If the concurrence of only a majority of states were required, some of the amendments approved by Congress but never ratified by the required supermajority would have become part of the Constitution. It appears that this includes the 1789 Reapportionment amendment, the 1810 Titles of Nobility amendment, the 1924 Child La-

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3. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 Am. Pol. Sci. Rev. 355, 362 (1994), in Levinson, *Responding to Imperfection* at 237-74 (cited in note 2).

bor amendment, and the 1972 Equal Rights amendment.<sup>4</sup> I am sure that different scholars would have different opinions as to whether these amendments were desirable. I confine myself to two observations: that approval of the Child Labor amendment might have given additional constitutional legitimacy to the New Deal and that we would be better off with the ERA.

The crucial point, however, is that making amendment easier would have the effect of encouraging additional amendments to keep the Constitution up to date. Perhaps a supermajority of Congress should be sufficient to approve any amendment. While the contrary view that amending the Constitution must be done with caution is understandable, this view is in some tension with the goals of American constitutionalism. Making amendment difficult does not avoid constitutional change, it simply encourages change to occur through other means. If we value deliberative change, we should favor making constitutional amendment less difficult.

A final questionable aspect of Article V is the provision "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." For practical purposes, this makes it impossible to change representation in the Senate to a population basis. The power the present system of representation gives to states with small populations increasingly appears to be an anachronism.

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4. Here I rely on the very useful study by Richard Bernstein. See Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 45-46, 140-43, 177-81, 301-03 (Times Books, 1993).