

Non-constitutionality the Levin Way and Other Considerations

Edward R. Long, Ph.D.

ConservativeVirginian@Solanqui.com

(This document is blessed with a copyright. Any use of its part(s) or whole requires reference be made to it and where it may be found: www.ConservativeVirginian.Solanqui.com/Content.html, item 10 under “Essays and Documents”)

Soon after Mark Levin’s book “The Liberty Amendments” went on sale he was [interviewed by Breitbart News](#) during which he stated in reference to Article V of the U. S. Constitution “. . . In the second process, which is every bit as legitimate, two-thirds of the states decide to convene a meeting for the purpose of proposing amendments, which are then sent to the states for three-fourths ratification. It is a process that essentially bypasses Congress” Our intent here is to comment on that statement and several aspects of the proposition in Mr. Levin’s book. We will not embark on still another discourse on the particular dangers of a Constitution Convention because [Phyllis Schafly](#), among others, has addressed the matter well. Nor will we focus on Article V in particular for consideration of Mark Levin’s error in understanding because anything considered here would be anemic in comparison to that said by [Publius Huldah](#).

What we will address are four questions:

- 1 – What are the legislative and consenting powers granted to Congress and what do they mean in regards to Article V?
- 2 – What might be unexpected consequences of multiple amendments to explicitly remedy particular governmental ailments?
- 3 – Would States agree to specific Amendments and common language?
- 4 – What might be required for a Constitutional Convention of States that potentially accomplishes Mr. Levin’s proposition?

1 - What are the legislative and consenting powers granted to Congress and what do they mean in regards to Article V?

Legislative - Article I, Section 1 grants Federal legislative power only to the Congress. It states, “All legislative Powers herein shall be vested in a Congress of the United States,” Clearly legislative power in regards to the Constitution and its Amendments resides with Congress. So there should be no doubt that for either of Article V’s amendment processes that Congress is the portal for consideration of Amendments. Congress cannot be bypassed. To attempt any consideration of an Amendment that “bypasses” Congress is not constitutional.

Consenting – Article I, Section 10, Clause 3 grants Congress control of any compacts between portions or the whole of the several States outside that of the Constitution. It states, “No State shall, without the Consent of Congress, . . . , enter into any Agreement or Compact with another State,” In his

[Commentaries on the Constitution of the United States \(1833\) Joseph L. Story](#), SCOTUS Justice 1811 – 1845, provided an interpretation of this Clause. He said “agreements, and compacts is nowhere explained; and has never as yet been subjected to any exact judicial, or other examination.” He did cite an example pertaining to matters of mutual convenience between States but also noted the relevance of the Clause into matters that cause “any infringement of the rights of the national (sic) government”, including those of “mischief.” A recent treatment by the Heritage Foundation cites in an [essay on this Clause](#) that “Agreements between the states pose threats to federal powers, to states not party to the agreement, and even to individual rights. By requiring such agreements to have the consent of Congress, other states would be informed of the agreement and able to protect their interests and the rights of their citizens.” This is the interpretation of the Clause taken here. Though perhaps far-fetched, consider a consensus of purpose between two-thirds of the several States to hold a Constitutional Convention to consider Amendments to the Constitution of the United States that severely limit the ability of Congress to borrow money. Do you not think that Congress would consider such an Amendment a threat to federal powers? And even though Article V appears to force Congress to initiate a Convention to consider such an Amendment do you not think Congress would find some manner to not consent to the consideration or to perhaps corrupt its purpose? Thus, however you choose to view the matter Congress is granting its consent, “bypassing” Congress is not constitutional.

2 – What might be unexpected consequences of multiple amendments to explicitly remedy particular governmental ailments?

During the drafting and ratification of the Constitution there was a call for a Bill of Rights because as it stood the Constitution did not necessarily protect the rights of the people against federal impositions other than a specific few, Article I, Sections 9 and 10. Those who opposed such a measure in the Constitution believed that an explicit listing of rights of the People limited rights to those listed and thus denied all rights inherently belonging to the People. It is to this last consideration that similar concern could be expressed for enacting a set of Amendments intended to remedy specific issues pertaining to the Federal Government.

The specific issues are those that have evolved with time because of departure from the fundamental intent of the Constitution, the intent being based on values. The Constitution was to define what the Federal Government could do and to provide a set of checks and balances between the three branches of the Federal Government and between the Federal Government and the several States. The intent and the underlying values were to restrain the size and power of the Federal Government, to inherently limit the associated bureaucracy, and to provide a judiciary free of political ideology. But something happened along time’s way. The very things the Constitution was to protect against have been manifested anyway. Each appears like a gathering hoard on the horizon coming toward us. Every time we stop one another appears or the same one is resurrected on our flanks. So why would anyone expect that a set of

amendments aimed at particulars, such as bureaucracy, would prevent the same from appearing in another set of clothing? Why would anyone expect any set of Amendments to be an-end-all-to-end-all? The reality of experience should inform us that without a more fundamental change there is no stopping the imagination of those in power from inventing new means to satisfy their thirst for power and control. We would simply have to invent still another Amendment to remedy the latest threat. The problem is that the values of the American Public and of the Government is not the same as they were in 1787. Morals and Values cannot be legislatively dictated. The solution, like the problem, is fundamental and has to come from the roots of the society.

3 – Would States agree to specific Amendments and common language?

It is difficult to imagine that the legislative bodies of 34 States could arrive at one or more proposed Amendments for which there is agreement for the language of each. Yet that would be one of several requirements that would be necessary for those who object to a Convention of States, because of perceived dangers. It is difficult to believe that unless each and all of the several States were to have identical restraints on their appointed delegates that those delegates could legally be restrained. Moreover, State Restraint assumes a Convention is not entitled to writing its own rules after its formation.

4 – What might be required for a Constitutional Convention of States that potentially accomplishes Mr. Levin’s proposition?

Those who wrote the Constitution were able to do so in relatively few words. For the most part they wrote with clarity. What they wrote has been durable, except as late, and encompassing. In contrast today’s legislation tends to be tediously long and difficult to understand. The desire, at least mine, would be for any Amendment be made using the mold of those who wrote the Constitution.

In order to have a clear Amendment process, other than that historically employed, the first and most relevant Amendment would be that of Article V. James Madison’s [notes on the Philadelphia Convention](#), such as on Page 531, clearly express his feeling that Article V was vague in some of its parts. That vagueness is the center of much of today’s discussions. A proposal has been put forth for an Amendment that may be the foundation for a remedy. It is called the [Madison Amendment](#). However, it is not sufficiently encompassing in view of [Publius Huldah’s discussion of Levin’s proposal](#) and the matters addressed by [Phyllis Schafly](#). In the spirit of opening a more general and inquiring debate consideration might be given to the following six suggestions.

1 – A requirement that the amendment convention be that of all of the several States, an “Amendment Convention of The States”

2 – A requirement that the delegates to the Amendment Convention of The States be selected by the legislative bodies of the respective Several States.

3- That the considerations of the Amendment Convention of States be limited to only those Amendment(s) submitted by at least two-thirds of all the several States.

4 – That the Amendment(s) from each of the several submitting States be the same and of the same wording.

5 – That the Operational Guidelines for the Amendment Convention of States be submitted to all the Several States for approval of no less than two-thirds in no more than a certain period of time.

6 – That the process be conducted through the Congress of the United States

A strawman Amendment for departure of discussion might look like:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on application for Amendments by the Legislatures of two thirds of the several States, **all applications containing identical Amendments,** shall call ~~a Convention for proposing Amendments~~ an Amendment Convention of The States consisting of 2 Delegate seats for each State, to be filled by the respective State Legislatures of the respective several States, and having operational guidelines approved within XX weeks after receipt by at least two-thirds of all the several States to consider only those Amendments for drafting and submission for ratification 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; 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.