

REDISCOVERING *the* CONSTITUTION



The Jefferson Foundation

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Rediscovering the Constitution

A Reader for Jefferson Meeting Debates

The Jefferson Foundation

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Congressional Quarterly Inc.
1414 22nd Street N.W.
Washington, D.C. 20037

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Printed in the United States of America

Acknowledgments appear on page 221, which constitutes an extension of the copyright page.

Library of Congress Cataloging in Publication Data

Rediscovering the Constitution.

1. United States—Constitutional law. I. Jefferson
Foundation (Washington, D.C.)

KF4550.A2R43	1987	342.73'029	86-32852
ISBN 0-87187-407-5		347.30229	

Preface

While working recently on a videotape about the Jefferson Meeting on the Constitution, I asked a number of citizens on the streets of Washington, D.C., "Who does the Constitution belong to?" Among the answers: "the government," "the Congress," "the president," and "I just read that in my book, do you want me to look it up for you?" The most frequent answer, though, and the one given with the greatest conviction, was that the Constitution belongs to "the people of the United States."

While Americans assert that the Constitution belongs to them, it is clear that many do not know very much about how it was made, what is in it, and how it has changed over the course of two hundred years. Americans, moreover, have a tendency to think of the Constitution not as a living document that shapes every aspect of our national political life, but as a gift from great men, long dead, that is now being safely preserved under glass at the National Archives.

The Jefferson Foundation

In 1983 a group came together to find a way to give a fresh and real meaning to the assertion that the Constitution belongs to the people of the United States. We wanted to enhance citizens' understanding of the Constitution and its history. And we wanted to enlarge Americans' sense of ownership of the Constitution by involving them in discussions that take the Constitution out from under glass for an examination of how it shapes the contemporary performance of our government.

We thought these goals of education and involvement made it appropriate to adopt the name the Jefferson Foundation. Thomas Jefferson wrote this of the connection between government and education:

I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

Jefferson also emphasized that it was important for each generation of Americans to review the Constitution and its plan for government to

ensure that it provides them a proper government. Jefferson was not afraid of the results of such a review. He wrote,

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. . . . I am certainly not an advocate for frequent and untried changes in laws and constitutions. . . . But . . . laws and institutions must go hand in hand with the progress of the human mind.

The Jefferson Meeting on the Constitution

With these ideals in mind, Alice O'Connor, the first director of the Jefferson Foundation, designed the Jefferson Meeting on the Constitution. The Jefferson Meeting brings students and adults together to study and discuss the Constitution. Among the questions raised and debated are the following:

- Would abolishing the electoral college be a desirable change in the presidential selection process?
- Would a single six-year presidential term make the chief executive more or less effective?
- Would the performance of Congress be improved by setting constitutional limits on length of service?
- Would Congress perform better if members of the House of Representatives had longer terms?
- Is the separation of powers, so carefully crafted by the Constitution's framers, an asset or hindrance to the effective performance of government today?
- Would the judicial system be improved by establishing terms of office or a retirement age for Supreme Court justices and federal judges?
- Should the processes by which citizens make laws by direct popular votes in many states be adopted at the national level?
- Would it be advisable to call a constitutional convention, as provided by Article V, for the purpose of proposing amendments to the Constitution?
- Can the expenses of political campaigns be curbed without endangering rights of free speech and association?

The Jefferson Foundation does not advocate any changes in the Constitution, but experience at Jefferson Meetings has vindicated our expectations that debating the pros and cons of concrete proposals for constitutional change would inspire participants to learn about the

Constitution and to rationally evaluate the performance of the national government.

The Jefferson Meeting on the Constitution opens with discussion in "issue committees," each of which examines a particular proposal for changing the Constitution. After some discussion members of each issue committee divide naturally into "pro" and "con" groups, with the pro group favoring a proposed change and the con group opposing it. These groups work to prepare a series of brief speeches that will set out the key arguments supporting their point of view.

During the plenary session all the participants from the various issue committees come together for debate and discussion. Each issue is called to the floor in turn. Members of the pro and con groups from the relevant issue committee kick off the debate by giving a series of alternating pro and con speeches setting out their points of view. The floor is then opened to comments and questions. No motions or parliamentary maneuvers are used. No vote is taken at the end of the debate. The object of discussion is not to win, but to learn.

The Jefferson Meeting is for everyone because the Constitution belongs to everyone. It reflects our belief that the average citizen has both the ability and the interest to participate in a meaningful discussion of the Constitution. One of the great treats of attending a Jefferson Meeting is to see homemakers, farmers, and small-business owners more than hold their own in discussions.

The results of the Jefferson Meetings held so far have been spectacular. Not only do participants report that their involvement was a stimulating experience, but they also leave the Jefferson Meeting determined to share that experience with their fellow citizens. Such enthusiasm, combined with the 1987 bicentennial of the Constitution, has spread the Jefferson Meeting across the country.

About This Book

The Jefferson Foundation has prepared discussion guides on the constitutional issues that are debated during the Jefferson Meeting. These guides, furnished before the meeting begins, provide participants with a shared pool of knowledge that they can use in discussing the Constitution.

The Jefferson Foundation is pleased that Congressional Quarterly has published the texts of these guides, which are presented here as separate chapters. At the end of the book is a brief guide to organizing a Jefferson Meeting. Also included is the text of the U.S. Constitution as amended. You have in your hand, then, all the basic ingredients you will need to begin planning for a Jefferson Meeting. Jefferson Founda-

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tion staff members would be happy to talk with you about your plans and offer any additional information or assistance we can. Our address is: The Jefferson Foundation, 1529 18th Street, N.W., Washington, D.C., 20036; phone (202) 234-3689. Even if you do not plan to organize or become involved in a Jefferson Meeting, we think the substantive chapters of this book will stimulate and challenge you.

Charles L. Bartlett
President of the Jefferson Foundation

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To Make and to Alter Their Constitutions of Government

1. Article V and Amendment by Convention

Introduction

Constitutional conventions played a singular role in the creation of American government. Americans held the first national assembly to determine the fundamental law of the land. Nowhere since then has the right been so steadfastly upheld or, as the number of state constitutional assemblies shows, so frequently practiced.

The principle of popular consent to government dates back to colonial days. With their declaration of independence from Great Britain, the colonists claimed the additional right to make their own laws, and exercised it in the revolutionary state constitutional conventions. The Philadelphia Convention and the ratifying bodies of 1787-89 officially recognized the convention as a basic tenet of American republicanism. The founding generation thereby established a tradition that has been as much a source of fear and controversy as it has been a symbol of liberty.

The convention has historically been the expression of the people's right to create their own governing authority and to consent actively to that authority. It is also one way to make fundamental changes in the government. In addition to giving Congress the power to propose amendments, Article V of the Constitution says the Congress shall call a convention for the purpose of amending the Constitution whenever two-thirds of the states request it. The right has never been exercised even though Congress has received over three hundred petitions calling for a national convention.

The prospect of a national amending convention is frightening to some, remote to others, and unknown to many people. But reform groups throughout history have looked to Article V for the key to constructive change. Today supporters of the balanced budget amendment have succeeded in making a second constitutional convention too

by Alice O'Connor and Mary L. Henze

imminent to ignore. Already, thirty-two of the required thirty-four states have petitioned Congress to call a convention to consider an amendment requiring a balanced federal budget.

Amending the Constitution by convention is a much larger issue over and above the issue of a balanced budget. As a fundamental right it is always relevant. But realizing it in practical terms has been elusive because it is not entirely clear what the founders intended when they included the convention method in the amendment clause. The unanswered questions arouse debate over the very principles of the Union. Does Article V give the people the power to rewrite the fundamental law of the land? Or does the supremacy of the Constitution prevent an amending convention from changing it completely? What is actually the source of the right to change the Constitution? Does it come from the Constitution itself or does it come from a source outside the Constitution? The answers to these questions will determine the meaning of the convention to Americans today—is it revolutionary or can it be controlled?

Historical Roots of the Convention

We can understand the controversy over the power of the amending convention by tracing its development in the American revolutionary and constitutional traditions.

The Convention and Revolution

In the American revolutionary tradition, set forth in the Declaration of Independence and the writings of eighteenth century republican agitators, the popular constitutional assembly was the most basic expression of the people's supremacy over the governing body. Thomas Paine wrote that

government has no right to make itself a party in any debate respecting the principles or modes of forming, or of changing, Constitutions. It is not for the benefit of those who exercise the powers of government that Constitutions, and the governments issuing from them, are established. In all these matters the right of judging and acting are in those who pay, not those who receive. (Paine, *The Rights of Man*)

Paine's distinction between the day-to-day governing body and the principles underlying government was a very important one to the framers of the American Constitution. It challenged the traditional relationship between the ruler and the ruled to rest ultimate authority with the people. The revolutionary potential of making the people the supreme authority is nowhere more eloquently expressed than in the Declaration of Independence. To read beyond the famous first lines is to

see how the right to join together to realize self-government could become the right to overthrow the existing government:

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, *it is the right of the people to alter or abolish it, and to institute a new government*, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. *But when a long train of abuses and usurpation, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security.* (Declaration of Independence, emphasis added)

Americans exercised the right to “institute new government” by mutual consent when they met to frame the state constitutions that overthrew the colonial charters. These first constitutional bodies were indeed revolutionary.

Article V made this revolutionary right part of the Constitution itself. It stands as a constant reminder to government officials that they are bound by the people through the Constitution:

The important distinction so well understood in America, between a constitution established by the people, and unaltered by the government; and a law established by the government and altered by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of the legislature has resided, has been supposed to reside also, a full power to change the form of the government. (*Federalist* No. 53)

The United States Constitution is supreme law because it stands above government. By leaving the people with the right to change the Constitution, the framers provided a defense against “usurpation” and reconfirmed the ultimate authority of the governed.

The Convention and Stability

The founders’ inclusion of an amendment provision was also a reaction to the inflexibility of the Articles of Confederation, where it is stated that

the Articles of Confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any

time hereafter be made in any of them, unless such alteration is agreed to in a Congress of the United States, and be afterward confirmed by the legislature of every state. (Articles of Confederation, Article 13)

While they may not have called themselves "radicals," most of the delegates to the Philadelphia Convention believed that radical changes were necessary to make the Union work. The proposals they made undermined the fundamental law they had pledged to uphold, without requiring the approval of every state to do it.

Their frustration with the Articles could only convince the framers that good government required flexibility and room for growth. An institutional avenue for change acted as a safety valve; desire for reform could be satisfied systematically instead of through revolution. Thomas Paine praised the amending clauses of the state constitutions because of their stabilizing effect:

One of the greatest improvements that has been made for the perpetual security and progress of constitutional liberty, is the provision which the new constitutions make for occasionally revising, altering, and amending them.

... The Rights of Man are the rights of all generations of men, and cannot be monopolized by any. That which is worth following will be followed for the sake of its worth, and it is in this that security lies, and not in any conditions with which it may be encumbered. When a man leaves property to his heirs, he does not connect it with an obligation that they shall accept it. Why then, should we do otherwise with respect to the Constitution? (Paine, *The Rights of Man*)

By institutionalizing the people's right to change parts of the fundamental law, the founders were protecting the Constitution and avoiding future upheavals. In effect, they took what was the most revolutionary aspect of the new republic—the power to call a convention—and tamed it.

The Genesis of Article V

The Virginia Plan, submitted by Edmund Randolph to the Philadelphia Convention, contained the first recommendation for an amendable constitution:

Resolved, that provision ought to be made for the amendment of the articles of the union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not be required thereto. (Pole 1970, 172)

The purpose of the amending provision was clear: to provide against future upheaval and to keep the legislature in check. But the actual procedure was more difficult to determine. The major question faced by the delegates was whether the power to initiate change should rest with

the national government or with the state governments. They were aware that the power to amend could be as much a weapon against a protection of liberty.

Until September 10, one week before the Convention approved the Constitution, the framers' position on amendment procedure was not fully formulated. The provision that emerged from final debate was a compromise between those who thought revision should be strictly in the hands of federal government and those who wanted to leave it to the states. While Congress could propose specific amendments, the states could petition for a convention of unspecified powers to consider amendments. The national legislature would not have exclusive control over the Constitution. In addition, the state government could not make specific proposals that might increase their power. In either case, Article V of the Constitution makes it clear that the people would have the final word.

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. (U. S. Const. Art. V)

The framers made no judgment as to which amending procedure was the better one. But tradition and the language of the Virginia Plan suggest that they considered the need to establish a peaceful way for the people to bypass the national legislature as their primary concern. It is also interesting to note that Article VI, which binds all officials of the government—judges, senators, representatives, and both judicial and executive officers—to uphold the Constitution, leaves the people and their conventions free of such restraint:

2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all the executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States. (U. S. Const. Art. VI)

The "Runaway Convention"?

The Anti-Federalists objected to many of the particulars of the proposed Constitution, but one of the most powerful arguments against it was a challenge to the legitimacy of the Philadelphia Convention itself. The very phrase "We the People," which opened the Preamble, offended those who believed that the convention had overstepped its bounds and ignored its instruction to the point where it violated the trust of the people and therefore had no right to pretend to speak for them.

The original resolutions calling for a constitutional convention supported the Anti-Federalist argument over legitimacy. Alexander Hamilton made the original suggestion at the Annapolis Convention of 1786, which had been called by Virginia to discuss commercial matters between the states. The Convention recommended

... the appointment of Commissioners ... to take into consideration, the situation of the United States, to devise such further provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislature of every State, will effectually provide for the same. (Pole 1970, 163)

This recommendation led to the congressional resolution that formally mandated and instructed the Philadelphia Convention:

Resolved that in the opinion of Congress, it is expedient, that on the second Monday in May next a Convention of delegates, who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures, such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal constitution adequate to the exigencies of Government and the preservation of the Union. (Pole 1970, 166)

Congress called for a revision of the existing Articles of Confederation. The Convention delivered an entirely new government. Taken on these terms, the Philadelphia Convention might be called a "runaway convention." William Grayson, arguing at the Virginia ratifying debates, accused the framers of just that:

How were the sentiments of the people before the meeting of the Convention at Philadelphia? They had only one object in view. Their ideas reached no farther than to give the general government the five per centum impost, and the regulation of trade. When it was agitated in Congress, in a committee of the whole, this was all that was asked, or was deemed necessary. (Kenyon 1966, 280)

Not only had the founders violated the Articles' sacred trust, Grayson went on, they were creating "phantoms" to justify their violation:

Since that period, their views have extended much farther. Horrors have been greatly magnified since the rising of the Convention. We are now told by the honorable gentleman [Governor Randolph] that we shall have wars and rumors of wars, that every calamity is to attend us, and that we shall be ruined and disunited forever, unless we adopt this Constitution. Pennsylvania and Maryland are to fall upon us from the north, like the Goths and Vandals of old; the Algerines, whose flat-sided vessels never came farther than Madeira, are to fill the Chesapeake with mighty fleets, and to attack us on our front; the Indians are to invade us with numerous armies on our rear, in order to convert our cleared lands into hunting grounds; and the Carolinians from the South (mounted on alligators, I presume) are to come and destroy our cornfields, and eat up our little children! These, sir, are the mighty dangers which await us if we reject—dangers which are merely imaginary, and ludicrous in the extreme! Are we to be destroyed by Maryland and Pennsylvania? What will democratic states make war for, and how long since they have imbibed a hostile spirit? But the generality are to attack us. Will they attack us after violating their faith in the first Union? Will they not violate their faith if they do not take us into their confederacy? Have they not agreed, by the old Confederation, that the Union shall be perpetual, and that no alteration should take place without the consent of Congress, and the confirmation of the legislatures of every State? I cannot think that there is such depravity in mankind as that, after violating public faith so flagrantly, they should make war upon us, also, for not following their example. (Kenyon 1966, 280-81)

Alexander Hamilton, writing as "Publius" in *The Federalist Papers*, replied to these objections with an appeal to the larger duty of the delegates to overcome the restrictions of the Articles in order to secure the happiness of the people. He expressed the revolutionary tradition of the convention: overthrow laws to attain the higher good.

... if [the framers] exceeded their powers, they were not only warranted but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed, and that finally, if they had violated both their powers, and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America. (*Federalist* No. 40)

The Unanswered Questions

The framers left a myriad of troublesome questions buried within Article V. James Madison pointed this out at the Philadelphia Convention when it considered the article in September 1787. How, he asked, was a convention to be formed? And what would be the force of its acts?

CONSTITUTIONAL CONVENTION: THE STATE EXAMPLES

The convention has been called the "American style" of constitution-making, even though there is only one example of a federal constitutional convention in our history. It gets its reputation from the states where conventions have been used to write and subsequently rewrite many state charters. Thousands of amendments have been proposed and adopted; some state constitutions even require periodic review by convention. The history of these state conventions reveals both the significance and the potential of the people's right to make and remake their fundamental governing document.

- During the formative years of the Union, 1776-98, eleven of the thirteen states wrote and revised a total of twenty-one constitutions. (Rhode Island and Connecticut kept their colonial charters until 1818 and 1842, respectively.) These early state constitutions contained the seeds of the federal republic, for time and again the founders turned to them for guidance.

- The trend in pre-Civil War America was toward creating more democratic state constitutions. Conventions extended popular sovereignty and in some states provided for universal male suffrage. State judges, executive branch officials, and even the prison inspector of New York became subject to election. Conventions were clearly being used to control the power of state governments and to assert the power of the people, as a statement from the Illinois Constitutional Convention of 1847 demonstrates:

We are here, the sovereignty of the state. We are what the people of the state would be if they were congregated here in one mass meeting. We are what Louis XIV said he was—"We are the state."

But the delegation never addressed the vagueness of the provision to "call a convention for the purpose," leaving it to future generations to clarify. Debate has raged over what, exactly, the framers intended—how much change they wanted to open the Constitution to, and whether they would have approved of the prospect of another convention. The controversy stems from what is unspoken in Article V. It is clear that Congress has the duty to call the convention when the specified number of states petition for a convention. But can Congress exercise any control

We can trample the constitution under our feet as waste paper, and, no one can call us to an account save the people. (*Politics Today* 1979, 31)

● The major conflicts of the Civil War and Reconstruction period were, to some extent, played out in the state conventions held during 1860-80. The secession from the Union and the subsequent confederation of the southern states were accomplished by conventions, as was their initial restoration to the Union. The Reconstruction Congress imposed strict requirements on the southern states to revise their constitutions to reflect federal policy. In reaction against this, state conventions of the 1870s revised their constitutions to return power to the state governments. State constitutions in the north also reflected changing attitudes toward the central government. Initially supportive of the activist role that government took in engineering social change, by the 1870s northern states were calling conventions in reaction against activist policy.

● By the late nineteenth and early twentieth centuries, an increasingly diverse population made it more difficult for a convention to reflect a popular mandate, and fewer states looked to the convention method of proposing amendments. In an interesting contrast to the democratizing trends of the early nineteenth century, conventions of this period instituted restrictions on suffrage, such as the poll tax, and some even refused to submit their proposals to the electorate for approval.

● In recent years, state constitutional revision has taken alternate routes. While there have been several conventions, the interpretation of the courts, legislative alternatives, governor's commissions, and mechanisms such as the initiative and referendum have proven more successful in securing change.

over the convention after it is called into existence? Important questions come up every time a movement to call a convention gains momentum.

● Can Congress limit the convention to an agenda of proposals specified in the state petitions?

● How will delegates to a convention be chosen and who will set the procedures for choosing them?

● How long does a state's petition for a convention remain valid and can a state rescind its petition?