TREATISE ON CONSTITUTIONAL LAW

SUBSTANCE AND PROCEDURE

Fifth Edition

by

RONALD D. ROTUNDA

Doy and Dee Henley Distinguished Chair
in Jurisprudence,
Chapman University School of Law

JOHN E. NOWAK

Raymond and Mary Simon Chair in Constitutional Law,
Loyola University of Chicago School of Law

VOLUME 2

Chapters 9 to 16

WEST®
A Thomson Reuters business

For Customer Assistance Call 1-800-328-4800

like technicalities than substantive restraints.[3] Similarly, in spite of the constitutional requirement that there be a regular public accounting of all federal receipts and expenditures, various national security exceptions have grown around this requirement, and the courts have ruled that this clause is not subject to control by judicial review.[4]

The framers, however, had enough foresight to realize that there were limits to their ability to foresee. Thus, in Article V, they provided two procedures for enacting constitutional amendments.

§ 10.10(b) The Two Methods of Constitutional Amendment

§ 10.10(b)(i) Introduction

Article V outlines two methods of constitutional amendment. Two thirds of both Houses of Congress could propose amendments; or, the legislatures of two thirds of the states could call for a convention to propose amendments. In either case, no proposal could become part of the Constitution unless three quarters of the states would ratify it. It is up to Congress to decide whether the ratification would be by state conventions or by the state legislatures.

§ 10.10(b)(ii) Amendments Proposed by Congress

In practice, it is Congress that has proposed constitutional amendments. And, the Court has generally ruled that any issues regarding the constitutionality of Congress's proposals and the ratification of those proposals are political questions, not subject to judicial review.[5]

---

[3] On the technicalities of the requirement that revenue bills originate in the House, see, e.g., Rainey v. United States, 232 U.S. 310, 34 S.Ct. 429, 58 L.Ed. 617 (1914); Flint v. Stone Tracy Co., 220 U.S. 107, 143, 31 S.Ct. 342, 345–346, 55 L.Ed. 389 (1911); Millard v. Roberts, 202 U.S. 429, 26 S.Ct. 674, 50 L.Ed. 1090 (1906).

On the time limit for military appropriations, see 25 Opinions of the Attorney General, 105, 108 (1904); 40 Opinions of the Attorney General 555 (1948).

[4] United States v. Richardson, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), holding that taxpayers have no standing to challenge a statute allegedly violating U.S. Const. art. I, § 9, cl. 7; plaintiffs had claimed that the challenged statute was unconsti-tutional in that it allowed the Director of the Central Intelligence Agency to avoid the public reporting require- ment. **[Section 10.10(b)(ii)]**

[5] See generally § 2.16(c)(2), supra.

Constitutional Amendment Outside of Article V? See Amar, Philadelphia Revisited Amending the Constitution Outside Article V, 55 U.Chi.L.Rev. 1043 (1988), arguing for "a third, usually ignored, possibility: constitutional amendment by direct appeal to, and ratification by, We the People of the United States. The alternative to the standard question is then: Do We the People of the

§ 10.10(b)(iii) State Calls for a Constitutional Convention

The framers provided for the alternative route of allowing the state legislatures to call for amendments as a political check in case Congress was unresponsive to any felt need for change. As Abraham Lincoln noted in his First Inaugural Address:

> I will venture to add that to me the Convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse.[6]

There has never been a situation where a sufficient number of states have called on Congress to convene a Constitutional Convention in order to consider a particular proposed amendment or for broader purposes. However, proponents of a Conventional Convention have gotten close to the required number of states. In the drive for the direct election of U.S. Senators, proponents were only one state short of the requisite number;[7] Congress responded by proposing the Seventeenth Amendment.[8] Proponents of an effort to place a constitutional limit on income tax rates fell only two states short; and proponents of an effort to restrict the Supreme Court's legislative reapportionment decisions fell only one state short.[9]

Because there has never been a Constitutional Convention

1980's—or more specifically a majority of us—enjoy an unenumerated right to amend our Constitution in ways not explicitly set out in Article V?" 55 U.Chi.L.Rev. at 1044. The author contends:

> My answer to this new question may at first seem fanciful, for I believe that the first, most undeniable, inalienable and important, if unenumerated, right of the People is the right of a majority of voters to amend the Constitution—even in ways not expressly provided for by Article V . . . . Indeed, my unavoidably sweeping argument here has been that legal scholars have fundamentally misunderstood the most important features of our Constitution.

55 U.Chi.L.Rev. at 1044, 1102. Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside of Article V, 94 Colum.L.Rev. 457 (1994) .

[Section 10.10(b)(iii)]

[6]A. Lincoln, The Collected Works of Abraham Lincoln 269 (Roy P. Basler, ed., 1953). Cf. Lynn A. Baker, Constitutional Change and Direct Democracy, 66 U.Colo.L.Rev. 144 (1995); Thomas E. Baker, Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto," 22 Hastings Const.L.Q. 325 (1995).

[7]C. Brickfield, Problems Relating to a Federal Constitutional Convention, 85th Cong., 1st Sess. at 7, 89 (Comm.Print, House Judiciary Comm. 1957); Federal Constitutional Convention, Hearings Before the Senate Judiciary Subcomm. on Separation of Powers, 90th Cong., 1st Sess. (1967).

[8]Corwin & Ramsey, The Constitutional Law of Constitutional Amendment, 26 Notre Dame Lawyer 185, 196 (1951).

[9]C. Brickfield, Problems Relating to a Federal Constitutional Convention, 85th Cong., 1st Sess. at 8 to 9, 89 (Comm.Print, House Judiciary Comm. 1957); Federal Constitutional Convention, Hearings Before the Senate

since the great Convention of 1787 that gave birth to the present Constitution, some commentators have raised various legal questions that the Court has not decided (and that the Court may never decide, to the extent that these issues are political, nonjusticiable questions). For example, can Congress ignore the states and refuse to call the Convention; if the states call for a Convention on a particular issue, can the Convention go beyond that issue in proposing amendments; can Congress, by legislation, limit the Convention to a particular issue?[10] Should Congress, as some have proposed, enact legislation that provides for procedures to implement a call for a Constitutional Convention?[11] The fact that there are no certain answers to these questions—just as there are no absolute answers about any events that will take place in the future, hardly means that a constitutional convention will be a hit or miss proposition.[12]

However one resolves these questions, it is important to bear in mind that a Constitutional Convention cannot, by itself, change the present Constitution, for Article V provides that no proposal (either from Congress or from the Convention) can become part of the Constitution unless three quarters of the states ratify it. Thus, Article V, when it created the amendment process, also created a built-in democratic check.

In addition, even if the Constitutional Convention process is never used, its very existence supplies another built-in check on an unresponsive Congress. This political check became very important in the enactment of the Seventeenth Amendment. That Amendment, as we all know, provides for the direct election of United States Senators by the people. The story behind its enactment illustrates how the Article V Constitutional Convention route can be used to prod a reluctant Congress.

Judiciary Subcomm. on Separation of Powers, 90th Cong., 1st Sess. (1967).

[10]See William Van Alstyne, The Limited Constitutional Convention—The Recurring Answer, 1979 Duke L.J. 985, and William Van Alstyne, Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague, 1978 Duke L. J. 1295, for a very thoughtful discussion of these issues and concludeing that a subject-specific, limited convention is not only wholly appropriate but the *more* appropriate use of Article V procedures. See also Ronald D. Rotunda & Steven Safranek, An Essay on Term Limits and a Call for a Constitutional Convention, 80 Marquette U. L. Rev. 227 (1996).

[11]See, e.g., Report of the Committee of the Judiciary on the Constitutional Convention Implementation Act of 1985, Report 99-135, 99th Cong., 1st Sess. (1985).

[12]Weber, The Constitutional Convention: A Safe Political Option, 3 J. of Law & Politics 51, 65 (Winter, 1986).

§ 10.10(b)(iv) The Seventeenth Amendment as a Response to State Calls for a Constitutional Convention

The push for the Seventeenth Amendment became part of our Constitution because of the Progressive Movement of the early part of this century. This reform, though, has much more ancient origins. The House of Representatives proposed such an amendment as early as 1828,[13] but the Senators, as we might predict, were not anxious for the change. Over the years, the House kept proposing the amendment, and the Senate kept opposing it.[14] As the Progressives became a more powerful political force, various state legislatures, particularly in the West, allowed the people to choose their U.S. Senator directly by election, with the state legislators pledged to automatically ratify the voters' choice. Senators chosen in this way supported the proposed Constitutional amendment.[15]

The process leading to the direct election of U.S. Senators offers a particularly interesting example of how the people, de facto, informally "amended" the Constitution prior to the actual ratification of the Seventeenth Amendment. Originally, the Constitution provided, "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."[16] In 1913, the Seventeenth Amendment became law. It provided that the voters would elect the Senators directly.

At first blush, it might appear to be amazing that the Senate joined the House in 1912 in proposing this Amendment. As early as 1828, the House of Representatives had considered a constitutional amendment to provide for direct election of the Senators. The House actually voted in favor of such an amendment in 1893,

---

[Section 10.10(b)(iv)]

[13]E.g., A. Kelly & W. Harbison, The American Constitution: Its Origins and Development 629 (4th ed. 1970). For an interesting historical and legal analysis, see Kris W. Kobach, Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, 103 Yale L. J. 1971 (1994).

William T. Mayton, Direct Democracy, Federalism & the Guarantee Clause, 2 The Green Bag, 2d Series 269 (1999) discusses the role of the Initiative on the state level and the efforts of some courts to curtail it.

[14]The House passed the proposed amendment in 1893, 1894, 1898, 1900, and 1902. The Senate, in each case, voted against the proposal or ignored it.

[15]By 1912, the year Congress proposed the Seventeenth Amendment, 29 states had "elections" for their U.S. Senators. See discussion in, Ronald D. Rotunda, The Aftermath of *Thornton*, 13 Constitutional Commentary 201, 206–210 (1996).

[16]U.S. Const., At. I, s 3, cl. 1 (emphasis added).

1894, 1898, 1900, and 1902.[17] Each time, the Senate refused, but in 1912, it finally joined the House.

Why would the Senators, whom the state legislators chose, and who had previously never supported direct elections, change their minds? The answer is that by 1912, 29 of the 48 states already picked their Senators by direct election of the people, notwithstanding the language of Article I. As Senator William E. Borah said in 1911, in support of the Seventeenth Amendment: "I should not have been here [in the U.S. Senate] if it [direct election] had not been practiced, and I have great affection [for this system]."[18]

The story of how the people, by direct vote, elected U.S. Senators at a time when Article I clearly mandated that the state legislatures choose the Senators starts with strong public rejecttion of the procedure that provided for selection by the state legislature. When the members of the state legislature chose their U.S. Senator, they often were divided among themselves. Until this deadlock could be broken, no Senatorial candidate secured the election. These deadlocks deprived the State of any representation for a period of time that ranged up to a year or more.[19]

In addition, when state legislators picked the U.S. Senator, it was easier for candidates to buy elections, since the number of votes they had to buy were few in number, and the state legislators voted by open ballot, so those buying votes could be sure that their state legislators stayed bought. Major corporations paid Senators stipends, and corrupt political bosses, who could not win an election by the public at large, could more easily win an election by the state legislators.[20]

It should be no surprise that the U.S. Senate, the product of this corrupt system, would not allow any constitutional amendment to change it. As early as 1874 California and Iowa requested Congress to propose such an amendment, but Congress was unmoved.[21] In 1893 and in 1902, two-thirds of the House of Representatives voted for an amendment providing for direct

---

[17]Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development 629, 631 (W.W. Norton & Co., 4th ed. 1970).

[18]46 Cong. Rec. 2647 (Feb. 16, 1911).

[19]George H. Haynes, 1 The Senate of the United States: Its History and Practice 91-95 (Houghton Mifflin Co., 1938).

[20]Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development 630-31 (W.W. Norton & Co., 4th ed. 1970).

[21]George H. Haynes, 1 The Senate of the United States: Its History and Practice 97-98 (Houghton Mifflin Co., 1938). For earlier examples of states urging Congress to provide for direct elections of U.S. Senators, see, e.g., Election of United States Senators, H.R. Rep. No. 88, 56th Cong., 1st Sess. 1-2 (1900); Wilkinson Call, S. Doc. No. 236, 55th Cong., 2d Sess. 1, 5 (1898) (requesting Congress to pass legislation ensuring that Senate elections not be left to political forces brib-

election, but the Senate did not allow the measure to come to a vote.[22]

The people then turned to primary elections. This "primary" was not binding in a Constitutional sense, because Article I still provided that the state legislature would choose the Senator. However, voters in a party primary could register their choice for U.S. Senator, and then urge members of the state legislature of that party to vote for the person who won that election.[23] At first, this system worked in the one-party southern states, with strong party discipline. The voters, in effect, were actually choosing a Senatorial candidate in the special primary election. The state legislators of the dominant Democratic Party would then vote for the candidate who had won the primary.[24]

States that were not one-party states were, initially, less effective in circumventing the requirements of Article I. Reform that was more effective began in the western states. In 1904, the people of Oregon, by use of the Initiative, created a remedy that would allow the virtual direct election of Oregon's Senators. First, the voters would pick their party's Senatorial candidates in a primary. The people would then vote for their Senator by choosing among the primary winners at a general election. To make the new system work, the voters relied on state legislators taking official, state-sanctioned pledges.

The new state law authorized candidates for the state legislature to sign one of two pledges. In Pledge Number 1, the candidate for the state legislature solemnly pledged to vote--

> for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress, without regard to my individual preference.[25]

In Pledge Number 2, the state legislative candidate promised that, if elected to the state legislature, he would --

> consider the vote of the people for United States Senator. . . *as*

---

ing state legislators).

[22]George H. Haynes, 1 The Senate of the United States: Its History and Practice 96-97 (Houghton Mifflin Co., 1938).

[23]George H. Haynes, 1 The Senate of the United States: Its History and Practice 99 (Houghton Mifflin Co., 1938).

[24]This procedure was not limited to the one-party states, but it was less effective in the other states. For example, in 1890 in Illinois, the voters in the Democratic "primary" voted for John M. Palmer. Then, the state legislature, which the Democrats controlled, selected Palmer as the Senator. However, party discipline was not that great, and the Illinois legislature was still deadlocked for several weeks before accepting the people's choice. George H. Haynes, 1 The Senate of the United States: Its History and Practice 99-100 (Houghton Mifflin Co., 1938).

[25]Ronald D. Rotunda, The Aftermath of *Thornton*, 13 Constitutional Commentary 201, 208 (1996) (emphasis added).

> *nothing more than a recommendation*, which I shall be at liberty *to wholly disregard* if the reason for so doing seems to me to be sufficient.[26]

The Oregon legislature had to choose a U.S. Senator shortly after this pledge system went into effect. A majority of the state legislators had signed Pledge Number 1, and on the first ballot, they duly picked the candidates that the people had earlier chosen in the general election. In previous instances, the state legislature had often deadlocked for weeks or more. This time, the politicians kept their promise and Oregon, in effect, avoided and bypassed the Article I requirement that the state legislature, not the people should choose Oregon's U.S. Senators.

Two years later, it was again time for the Oregon legislature to choose a U.S. Senator. The people had picked a Democrat, but the Republicans controlled the legislature. However, nearly 58% of the legislators had signed Pledge Number 1. The politicians kept their promise: the Republican state legislators promptly voted for the Democratic candidate, because they had promised to vote for the winner of the election.

Other states followed Oregon's example, but went even farther. Nebraska required that on the official election ballot, next to the names of the candidates for the state legislature, would be printed either--

> *Promises to vote* for people's choice for United States Senator
>
> Or,—
>
> Will *not promise* to vote for people's choice for United States Senator.[27]

Other states copied the Nebraska system. The states printed on the ballots the candidates' promise (or refusal to promise), just like ballots printed the candidate's party affiliation. Thus, it was easy for the voters to know which candidates would promise to follow the people's desire for direct election to the U.S. Senate.[28]

As early as December 1910, so many states followed the Oregon/Nebraska example that 14 of the 30 U.S. Senators whom state legislatures were to select at the next election were already known, although the state legislatures had not even yet begun to convene. In all 14 cases, the people had chosen the Senators by

---

[26] Ronald D. Rotunda, The Aftermath of *Thornton*, 13 Constitutional Commentary 201, 208 (1996) (empha-sis added).

[27] George H. Haynes, 1 The Senate of the United States: Its History and Practice 96-103 (Houghton Mifflin Co., 1938) (emphasis added), quoting 1909 Neb. Laws s 253.

[28] Eventually, the Oregon state constitution required that the state legislature choose as U.S. Senator the person whom the people had chosen in the direct election. Comment, Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism, 10 Harv. J. L. & Pub. Pol. 189, 208 (1987).

direct election, and the state legislators had bound themselves to respect that choice.[29] By 1912, when the Senate finally approved the Seventeenth Amendment, virtual elections already chose about 60% of the Senators.

In addition to the state elections and ballot promises, a large number of states helped bring matters to a head by proposing a Constitutional Convention for the purpose of drafting an amendment providing for the direct election of U.S. Senators.[30] From 1895 to 1910, 31 out of 46 states petitioned Congress to call a Convention for this purpose.[31] The Senate finally agreed to the inevitability of the Seventeenth Amendment, which was proposed to the legislatures of the states on May 16, 1912, and promptly ratified by May 31, 1913. The Senate's agreement to the proposed amendment obviated the need for a Constitutional Convention.

The Seventeenth Amendment demonstrated that the Constitutional Convention method can be an important safety valve which the framers provided as a check to an unresponsive Congress.

---

[29]The Supreme Court will prevent the state from placing information about a candidate on the ballot when doing so violates the U.S. Constitution. Thus, the state violates the equal protection clause when it places the race of the candidate on the ballot in order "to require or encourage its voters to discriminate upon the grounds of race." Anderson v. Martin, 375 U.S. 399, 402 (1964) (state may not require that nomination papers and ballots designate the race of the candidate for elective office).

See also, Cook v. Gralike, 531 U.S. 510, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001). In this case, Prospective congressional candidate sued to enjoin a provision of the Missouri Constitution that "instruct[s]" U.S. Congressmen from Missouri use all their powers to pass the federal amendment supporting term limits. This clause also stated that the phrase, "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" must be printed on ballots by the names of Missouri Congressmen who failed to take certain legislative acts to support the proposed amendment. In addition, it provided that the phrase, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," be printed by the names of non-incumbent candidates for the U.S. Congress who refused to take a "Term Limit" pledge to perform those acts if elected. The Court held that this provision of the Missouri Constitution violates the U.S. Constitution. The state lacks the power to impose conditions on the election of U.S. Senators and Representatives, except for neutral provisions as to the time, place, and manner of elections pursuant to Article I, § 4.

Earlier, in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995), the Elections Clause is a "grant of authority to issue procedural regulations," and not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. 779, 833-834, 115 S.Ct. 1842, 1869.

[30]See Sprague, Shall We Have a Federal Constitutional Convention, and What Shall It Do?, 3 Maine L.Rev. 116 (1910).

See also Sherman, The Recent Constitutional Amendments, 23 Yale L.J. 129 (1913).

[31]3 Maine L.Rev. at 123.