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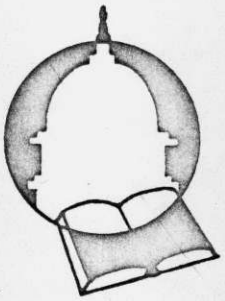
PROCEDURES FOR AMENDING THE UNITED STATES CONSTITUTION, 1965



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PROCEDURES FOR AMENDING THE UNITED STATES CONSTITUTION

Article V [1] of the Constitution now provides two methods for effecting alterations and additions to the provisions thereof: (1) Amendment procedure originating with, or initiated by Congress; (2) Amendment procedure originating with the States. Only the former has been used thus far.

(a) Amendment procedure originating with, or initiated by, Congress

A resolution proposing a constitutional amendment may be introduced in either the House or the Senate (H.J. Res. __; S.J. Res. __;)and upon being approved by a vote of two-thirds in each House, a quorum being present, the proposed amendment is submitted to the States for ratification.

(i) Exclusion of the executive from the amending process

Neither the President nor the governors of the States are accorded any participation in the amending process. Upon approval by the two Houses of Congress, a resolution proposing an amendment to the Constitution is submitted directly to the States for ratification. Unlike ordinary legislative proposals, such a resolution is not submitted to the President for his signature or veto. Likewise, at the State level, the governor is

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1/ See the Appendix for the text of Article V.

not accorded the privilege of either signature or veto of a resolution adopted by the State legislature recording its approval or rejection of a proposed amendment submitted by the Congress for ratification (Hollingsworth v. Virginia, 3 Dall. 378 (1798)). Moreover, when Congress designates State legislatures as the ratifying agency, the legislatures must discharge this responsibility directly and are not at liberty to rest their ultimate decision on the vote of the people recorded via referral of the issue of ratification or rejection to the electorate by way of referendum (Hawke v. Smith, 253 U.S. 221 (1920)).

(ii) Two methods available for effecting ratification of a proposed amendment originating with the Congress

By the terms of Article V, Congress is empowered to stipulate that ratifications of a submitted amendment shall be effected either by State legislatures, or by conventions in the States selected for the performance of the sole function of recording a State's approval or rejection of the amendment proposed by the Congress. When three-fourths of the State legislatures, or conventions, are recorded as approving (or 38 out of the present 50 states) the proposed amendment becomes effective as a part of the Constitution. On only one occasion, however, has the Congress

specified conventions rather than State legislatures as the ratifying agency, namely, when it submitted the Twenty-First amendment for approval repealing the Eighteenth (Prohibition) Amendment.

(b) Amendment procedure originating with the States

When, by the terms of Article V, the legislatures of two-thirds of the States (or now 34 out of the present 50), petition Congress to call a convention "for proposing Amendments", presumably Congress is obligated to provide by law for such a convention whose recommendations, in the form of proposed constitutional amendments, do not become operative as part of the Constitution until approved by legislatures or conventions in three-fourths of the States, with the right reserved to Congress to designate "one or the other mode of ratification."

Hitherto, none of the petitions for the calling of such a convention have received the requisite vote of approval of two-thirds of the State legislatures; and consequently, Congress has never been confronted with the necessity of enacting legislation providing for the holding of a convention and the submission of its proposals for constitutional amendment. Therefore, a number of questions relevant to the composition, functioning,

and disposition of the conclusions of such a convention have never been authoritatively resolved.

As a prelude to consideration of many of these issues, a distinction should be made between "memorials" and petitions (or "applications") adopted by State legislatures. 2/ The former are merely exhortations to the Congress to exercise its power to originate, approve, and submit for ratification a specific proposal as an amendment to the Constitution. As an exhortation, such memorials are deemed to give rise to no more than a moral obligation on the part of Congress to respond affirmatively thereto when tendered by a substantial number, or even by as many as two-thirds, of the States (74 Cong. Rec. 2924, 2926; 17 A.B.A.J. 143 (1931)). Whether, on the other hand, petitions for calling a constitutional convention addressed to Congress by a like number of States are possessed of greater significance or of binding legal effect presents a question which also has never been definitively resolved. At least two subsidiary issues are embraced within the question whether Congress is legally obligated, or

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2/ Article V reads, in pertinent part: "The Congress, . . . or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments . . . .".

is amenable to judicial proceedings to compel it, to adopt legislation calling a constitutional convention into being.

1. To merit counting, for purposes of determining when the requisite two-thirds of the States have acted, must the petitions tendered by the States be received within a specific time limit?

2. To merit counting, for purposes of determining that two-thirds of the States have acted, must the petitions be identical as to content: that is, must they request Congress to call a convention limited solely to the consideration of one, two, or three specific amendments, the draft of which has been set forth in identical language in each of the petitions tendered; or is it sufficient that the petitions, however disparate as to content, reflect merely a widely entertained desire for substantial revision of the Constitution to be effected, in whole or in part, by congressional provision for bringing a convention into being?

As to the first question, a substantial number of commentators are agreed that Congress is not obligated to act in response to petitions unless they are "reasonably contemporaneous with one another" and are "expressive of similar views respecting the nature of amendments to be sought." Moreover, they are able to cite one

instance in which Congress ignored a reminder from one State that more than the requisite two-thirds of the States had submitted applications, albeit disparate as to content, for the convening of a constitutional convention.

"It appears from Madison's Journal that the framers intended this provision for the calling of a convention to be mandatory. Conceding that proposition, there remains a question as to when the condition on the Application of the Legislatures of two thirds of the several States' shall be deemed to have been fulfilled. In 1929 the Legislature of Wisconsin reminded Congress that 35 States had filed applications for a constitutional convention and called upon it to 'perform the mandatory duty . . . and forthwith call a convention to propose amendments to the Constitution' [71 Cong. Rec. 3369]. The 35 States listed in this memorial included every State but one which had ever petitioned Congress to call a convention for any purpose-even Virginia, Alabama, and Georgia, which had filed no such applications since 1788, 1832 and 1833, respectively. This resolution was ignored, no doubt on the theory approved in Dillon v. Gloss, 256 U.S. 368, 374 (1921), that the successive steps in the process of constitutional amendment should not be widely separated in time."

(Edward S. Corwin and Mary Louise Ramsey. The Constitutional Law of Constitutional Amendment, 26 Notre Dame Lawyer 195-196 (1951). In accord is Lester B. Orfield, The Amending of the Federal Constitution, pp. 41-43 (1942), as well as Wayne B. Wheeler, Is a Constitutional Convention Impending, 21 Ill. L. Rev. 782, 792-795 (1927)).

In formulating answers to the second question, pertaining to the form that the petitions must take in order to merit counting, the commentators are not in agreement. According to Orfield, "when one legislature desires a convention for one purpose, as to prohibit polygamy, another legislature for another purpose, as to adopt the initiative and referendum, and a third legislature for a general purpose, there is some doubt whether the prerequisite for a call has been met." Not entirely in harmony with this underscored conclusion is his own suggestion that "the better view would seem to be that the ground of the applications would be immaterial, and that a demand by two-thirds of the states would conclusively show a widespread desire for constitutional changes" (op. cit., p. 42). In an unpublished thesis, entitled The Application Clause of the

Amending Provision, p. 155 (1951), William R. Pullen, Documents Librarian at the University of North Carolina, also considered it "'logical' that a petition setting forth one amendment should be included for the purposes of calling a convention with those containing diverse proposals."

In a Staff Report submitted to the House Committee on the Judiciary in 1952, the last-mentioned conclusions were rejected as unsound. "To argue that Congress must launch the cumbersome, costly, and confusing proceedings of a national convention whenever [34] . . . States fortuitiously submit resolutions requesting a convention for one purpose or another does not seem sound when viewed from a realistic standpoint. In the first place, should there be a widespread demand for substantial revision existing in the several States, there is nothing to prevent the State legislatures from submitting petitions requesting that a general convention be invoked by the Congress. But to transform every petition asking for a specific remedial amendment into a request for a general convention by classifying it with every other application asking for constitutional change would constitute a strained interpretation of Article V wholly at variance with the present needs and desires of the States.

"Perhaps the framers themselves envisioned that nothing but general conventions would be summoned pursuant to Article V. At any rate, the first two calls for a convention, which were contained in applications made in 1788 and 1789 by the States of Virginia and New York . . ., were demands for a convention of a general nature. The paucity of petitions, as well as the contents of succeeding applications, submitted to Congress during the first century of our Government indicates that the application process was originally regarded as a grave and serious procedure, to be employed only for significant and large scale overhaulings of the Constitution.

"But latterly, general satisfaction with our fundamental document has led petitions to contain enumerated grievances for which concrete relief through specific constitutional amendment is sought. Since 1899, there have been comparatively few applications for a general convention, with a preponderant number of petitions requesting a convention to propose only amendments frequently set forth verbatim in the text of the application itself. More and more the application process has been utilized either to prod a reluctant Congress into proposing amendments itself or to relieve abuses through the enactment of remedial legislation.

"In view of the transformation of applications from general requests, which were familiar to the framers in 1787, to those now most frequently submitted asking only for a limited reformation, there would seem to be no logical reason whatever for overlooking the language contained in the petitions of the States and forcing a general convention upon those States requesting nothing more than a single amendment to the Constitution. A contrary determination would oftentimes be at variance with the very wishes of those States submitting applications to the Congress as well as constitute a very narrow and restrictive interpretation of Article V itself. The provision would be reduced almost to the point of absurdity if Congress were forced to call a general convention to revise the entire Constitution upon the application of 10 States seeking a limit on taxes, 12 States a limit on wives, and [12] . . . more States a limit on the number of new States to be admitted to the Union.

"Accordingly, the views of Corwin and Ramsey with respect to the subject matter of petitions seems much preferable to those of the writers cited previously. These authors have suggested a sensible rule-of-thumb guide as follows:

"'To be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought to be expressive of similar views respecting the nature of the amendments to be sought.'" (emphasis supplied) (26 Notre Dame Lawyer 195-196).

"Conversely, in accordance with the above rule, there appears no valid reason to suppose that the language of the amendments requested in State applications must be identical with one another in wording. It should be enough that the suggested amendments be of the same general subject matter in order to be included in a congressional count of applications for a constitutional convention, bearing in mind, of course, that any or all of the States may at any time request a general convention should strong sentiment for such proceedings prevail" (Problems relating to state applications for a convention to propose constitutional limitations on federal tax rates. House Committee on the Judiciary, 82d Congress, 2d session, House Committee Print, pp. 11-12 (1952)).

By way of concluding the aspect of constitutional revision considered in the preceding paragraph, it may be helpful to note that the following view has been informally advanced at academic meetings. It is contended that the two procedures for amending the Constitution set forth in Article V were intended to subserve different purposes; namely, piecemeal amendment on the initiative of Congress, and substantial revision by recourse to constitutional convention; and that Congress accordingly is relieved of any legal obligation to take affirmative action when in receipt of State applications which uniformly embody the draft of a single proposed amendment or group of amendments. Were Congress to call a convention in response to applications in such form, the result, it is asserted, would be to rob the convention of the deliberative functions normally exercisable by such an agency and reduce it to the status of a messenger boy with but one duty to perform; specifically, to take a single vote approving the draft contained in the applications, coupled, perhaps, with a request that Congress submit the same for ratifications; and thereafter promptly adjourn. That States

hitherto have intended to limit a convention called in obedience to their petitions is borne out by the terms of applications previously forwarded to Congress. Thus, in 1903 California included within its application a stipulation to the effect that the convention assembled in response thereto be "limited to the consideration and adoption of such amendments to said Constitution as herein mentioned and no other" (Cal. Stat. 1903, p. 683; Orfield, op. cit., p. 45 n. 18; 21 Ill. L. Rev. 794 n. 20).

Although Constitutional conventions, as used by the States, generally have been reserved for wholesale, as distinguished from piecemeal, constitutional revision, there is nothing in the record of the debates at the Philadelphia Convention which discloses any comparable intention on the part of the framers. On the contrary, the latter refrained from any evaluation or differentiation of the two procedures for amendment incorporated into Article V; and tended to view the convention merely as an alternative safeguard available to the States whenever Congress ceased to be responsive to popular will and persisted in a refusal to originate and submit constitutional amendments for ratification. Thus, the record is devoid of any evidence of an intention to preclude the use of conventions for effecting a specific alteration

of the Constitution (Cyril F. Brickfield, State applications asking Congress to call a Federal constitutional convention, House Committee on the Judiciary, Committee print, p. 7, 86th Congress, 1st Session, 1959; John A. Jameson, The Constitutional Convention, § 540 (1873); Walter K. Tuller, A convention to amend the Constitution--why needed-- how it may be obtained, 193 No. Amer. Rev. 369, 375-378 (1911)).

3. If applications are tendered by two-thirds of the States within a reasonable interval of time and Congress fails to act, is judicial relief to correct such inaction available?

Although it is conceded "that the framers intended this provision for the calling of a convention to be mandatory," most commentators are convinced that the Supreme Court would dismiss as judicially unenforceable a petition for mandamus or mandatory injunction. According to the late Professor Walter F. Dodd, "there is no compulsion upon Congress to call a convention" (Judicially non-enforceable provisions of Constitutions, 80 U. Pa L. Rev. 54, 82 (1932)). "Since Congress is one of the three coordinate branches of the government, there would seem to be no valid method of coercing it to make the call" (Orfield, op. cit.,

p. 41; citing Coleman v. Miller, 307 U.S. 433, 454-456, 457, 459 (1939)). "Nothing in the debates in the Convention that framed the Constitution throws any light on the views of the members on the details of the operation of the plan to adopt amendments by the convention method . . . The most serious objection offered to . . . article [V] as it was finally adopted was that both methods [of amendment] . . . required the assent of Congress and that at any time Congress, by inaction, might defeat the wishes of the States" (Wheeler, op. cit., pp. 785-792). In accord are Brickfield, op. cit., p. 4; Joint Economic Committee, The proposed 23d Amendment to the Constitution to repeal the 16th Amendment to the Constitution, S. Doc. No. 5, 87th Congress, 1st Session, pp. 22-24 (1961); and Westel W. Willoughby, Constitutional Law of the United States (2d ed., 1929), Vol. I, p. 597. To the contrary, however, is Tuller, op. cit., pp. 378-383, who believed that the duty imposed upon Congress being "purely ministerial . . . the form of remedy for compelling Congress to act would seem clearly to be a writ of mandamus."

4. If, in response to applications received from the requisite two thirds of the States, Congress brings a constitutional

convention into being, is the latter bound to consider and approve, if at all, only those proposals for constitutional change as are embraced in such State applications and reiterated in congressional enactments providing for such an assemblage?

Manifestly, if the convention, of its own volition, chooses to confine its deliberations to a consideration of only those proposals contained in State applications, a controversy scarcely would arise. However, according to the great weight of authority, constitutional conventions, once created, become relatively free agents whose final determinations are constitutionally tenable as long as they fall within the scope of the power conferred on such conventions by Article V. Consistently with such a view a convention could not be restricted as to the subjects of its deliberations by instructions emanating either from the States or from Congress.

"On general principles it would seem that it is not within the power of state legislatures to limit the action of a federal constitutional convention . . . The nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the

right of petition. The statements of the purposes and objects underlying the petition would have no legal effect except as they indicated to any convention assembled the wishes of the people in regard to proposed changes . . . .

"Congress [also] would have no authority to restrict the subjects of the amendments proposed by the convention. Congress is the judge of the nature and text of the amendment submitted in the usual way, by resolution. The state legislatures must either ratify such amendment or ignore it. They cannot change its context. The alternative convention method was intended, apparently, to provide a method of securing amendments in a form or upon subjects which Congress might not approve. The only limitation to such a convention would be those imposed by the Constitution itself, such as the one in article V that no state shall be deprived of equal suffrage in the Senate (Wheeler, op. cit., pp. 793-796; accord: Tuller, p. 384; William A. Platz, Article Five of the Federal Constitution, 3 Geo. Wash. L. Rev. 17, 45-46 (1934); Orfield, op. cit., pp. 44-45).

"The earliest view seems to have been that a convention was absolute (Walter F. Dodd, The Revision and Amendment of State Constitutions, ch. 3 (1910)). The convention was sovereign and

subject to no restraint. On the other hand, Jameson, whose views have been most frequently cited in decisions, viewed a convention as a body with strictly limited powers, and subject to the restrictions imposed on it by the legislative call (Jameson, op. cit., §§ 382-389). A third and intermediate view is that urged by [Walter F.] Dodd--that a convention, though not sovereign, is a body independent of the legislature; it is bound by the existing constitution, but not by the acts of the legislature, as to the extent of its constituent power (Dodd, op. cit., pp. 73, 77-80). This view has become increasingly prevalent in the state decisions. Accepting this view, it would seem that no restrictions can be placed on the scope of its constituent activity . . . ." (Orfield, op. cit., pp. 45-46).

Relying largely on the opinion of four Supreme Court Justices in Coleman v. Miller (supra, p. 459), that all controversies arising out of the amending process are political and non-litigious, and that "undivided control of that [amending] process has been given by the Article [V] exclusively and completely to Congress," the staff of the House Committee on the Judiciary in the report, previously cited herein, which was prepared in 1952,

adopted a contrary conclusion to the effect that "it would appear consonant with the duty imposed upon Congress to call a convention, that it have a hand in determining within what area its deliberations shall be confined.

" . . . To hold Congress strictly to the perfunctory duties of issuing a call for a constitutional convention while at the same time encumbering it with all of the onerous burdens inherent in making final decisions governing the remainder of the amending process is an inconsistent concept of congressional control over the amending process under Article V . . . It is obvious that if the States request a general convention in their applications, it is incumbent upon Congress under Article V to convene such a gathering. But if the States themselves seek in their petitions only a specific amendment, it would certainly appear anomalous were Congress powerless to limit the scope of proceedings to the general subject matter in the text of the applications received from the legislatures of the several States" (Problems relating to state applications for a convention to propose constitutional limitations on federal tax rates, op. cit., pp. 15-16).

Upon reappraisal of these two conflicting views of congressional power, it would seem that any restraints which Congress might attempt to impose on a convention with reference to amendments to be considered could be effectuated obliquely rather than directly. Insofar as the Supreme Court remains disposed to view controversies arising from the amending process as presenting non-litigious, political questions, Congress thereby would be enabled to have its own views prevail by recourse to the expedient of refusing to submit to the States for ratification any amendment drafted by the convention contrary to its wishes. Thus, if Congress directed a convention to consider only proposals A and B, and the convention concluded its deliberations by recommending additional proposals C, D, and E, Congress merely would refrain from submitting the latter for ratification. Of course, if the convention incorporated all five proposals in a single package or draft, inaction by the Congress manifestly would have the effect of nullifying in its entirety the endeavors of the convention. However, as long as the Court chooses not to entertain controversies originating in the amending process, such inaction could be remedied or corrected only at the ballot box. This conclusion rests on a premise supported by Article V; namely,

that a constitutional convention is without the power to submit its recommendations directly to the States for approval or rejection, but is dependent upon the intervention of Congress to effect the latter result (Orfield, op. cit., p. 46).

5. Questions relating to the selection of delegates to, and the internal organization of, a constitutional convention.

If Congress issues a call for a convention, "a number of issues would still remain unsettled. When and where could the convention meet? How would the delegates be elected? Would they represent the states or the people as an aggregate? The debates of the Constitutional Convention throw no light on these problems. Logically it would seem that Congress could regulate all these matters . . . It might reasonably be argued that under its power to call a convention it has implied authority to fix the time and place of meetings, the number, manner, and date of the election of delegates, and that it also may determine whether the delegates shall represent the states or the nation at large. If the precedent of the Constitutional Convention were followed, the call would be addressed to the states; and would leave to them the method of selecting delegates, and the convention would vote by states" (Orfield, op. cit., pp. 43-44).

Speculating further on the latter problem, another commentator concluded that "it would be possible for Congress to disregard the states entirely and have the delegates apportioned on the basis of population. The Constitution guarantees to each State equal suffrage in the Senate so that in the adoption of amendments through congressional resolutions submitted to the states the small states have an equal or greater voice in making constitutional changes than the larger and more populous states. If, however, Congress by the convention method could fix the basis of apportionment of delegates for a constitutional convention on the ratio of population, an entirely different situation would result in the initiation of amendments . . . .

"Two factors would operate to prevent Congress from attempting to apportion delegates on the basis of population: the senators from small states would be unlikely to vote for a resolution which would deprive their states of the power they hold under the Constitution, and the influence of precedent. In the Convention of 1787 . . . the delegates were elected by states and voted by states. This precedent would probably be followed in a future constitutional convention if one should be held. As a

matter of political expediency, a convention call would probably be addressed to the states and leave to them the method of selecting delegates" (Wheeler, op. cit., pp. 798-799; Tuller, op. cit., p. 386).

As to its internal functioning, the convention presumably would be free of domination either by the Congress or the States in the matter of "selecting its own officers, fixing its own rules of procedure, passing on the qualifications and election of its members, and from proposing any alterations it chooses. While it is in existence it is a separate arm of the nation, coordinate with Congress in its sphere" (Orfield, op, cit., p. 47). Being "independent of Congress in all respects," the convention, according to another commentator, would have inherent power to appropriate funds for its own subsistence in the event Congress failed to make available moneys for the performance of its duties (Platz, op. cit., p. 47; Orfield, op. cit., p. 46).

6. Scope of a convention's power to revise the existing Constitution

Absent any refusal on the part of Congress to submit for ratification the proposals emanating from a convention or

reluctance on the part of legislatures or specially chosen conventions, of three-fourths of the States to approve the same, a convention called into being by Congress potentially is capable of rewriting the existing Constitution or of supplanting it with an entirely new one. If the procedural requirements of Article V for effecting constitutional change are faithfully observed, then any reform which emerges from a convention and is duly approved becomes a valid part of the Constitution. Since the Constitution is the supreme law of the land (Article VI), any addition thereto or revision thereof, if adopted in conformity with its terms, also partakes of the attributes of supreme law.

To be sure, if, for example, the clause of Article V, stipulating that "no State, without its Consent, shall be deprived of equal Suffrage in the Senate," were to be deleted by a duly approved amendment, a radical alteration of our Federal system will have been effected; but the latter fact, it may fairly be argued, scarcely can detract from the validity of the amendment whereby such deletion was consummated. Can there be such a thing as an unconstitutional constitutional amendment?

Would not this be a contradiction in terms? Questions such as these have of course never been resolved.

Moreover, as long as the Supreme Court regards the written Constitution as the supreme law of the land, it is hardly likely that it would deign to hold invalid a duly approved constitutional amendment. The Court did of course pass on the merits of contentions challenging the validity of the Eighteenth and Nineteenth Amendments, but only to the extent of rejecting such contentions summarily (United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922)). These decisions are viewed by Westel W. Willoughby as definitively disposing of the notion "that there are inherent limitations upon the amending power [or] that there are some matters which cannot legally be justified even by a constitutional amendment" (Fundamental Concepts of Public Law, pp. 250-251 (1931)). Elsewhere the latter author concluded that "the fundamental error of all those who have sought to place inherent limitations upon the amending power . . . is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the States, or that it implies an understanding between them, or between them

and the National Government, that the allocation of powers as provided for in the original instrument shall not be changed in any of its more important or essential features. It is suprising to this writer that this theory which, since the Civil War, has been so decisively rejected by the American people and by the courts, should again be brought forward to support a constitutional argument" (The Constitutional Law of the United States, Vol. I, p. 600 (2d ed., 1929); accord, Wheeler, op. cit., p. 801; Platz, op. cit., pp. 25, n. 41, 26).

A model bill establishing the procedure for calling a constitutional convention and regulating the composition thereof is contained in Problems relating to state applications for a convention to propose constitutional limitations on federal tax rates, op. cit., pp. 21-24.

APPENDIX

United States Constitution, Article V

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; 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.