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PROPOSED AMENDMENT: AMENDING ARTICLE V TO MAKE THE CONSTITUTIONAL AMENDMENT PROCESS ITSELF LESS ONEROUS

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LEXISNEXIS SUMMARY:

... The subject of this symposium is original, important, and timely. ... The Article V Framework The framers of the Constitution knew full well that they were incapable of creating a perfect legal charter. ... The procedure that they devised is set forth in 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; . . . although no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. ... During the Virginia ratification debates, Patrick Henry argued that the supermajority requirement for amendments was too high a threshold: To suppose that so large a number as three-fourths of the States will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous. ... The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government are "reserved to the States respectively, or to the people." ... Is there any violent crime that doesn't affect interstate commerce on you r rationale? ... As that exchange makes clear, the stakes in Lopez went well beyond the constitutionality of the Gun-Free School Zones Act. ... In his concurring opinion, Justice Clarence Thomas noted that, if Congress had been given authority over matters that simply "affect" interstate commerce, much, if not all, of the enumerated powers set forth in Article I, § 8 would be unnecessary. ... It seems plain that our courts and policymakers are not seriously committed to the original understanding of the charter. ... But instead of the two-thirds vote necessary for Congress to propose amendments or for the states to call a convention, we should lower the threshold to a simple majority.

HIGHLIGHT: The subject of this symposium is original, important, and timely. n1 In my view, too much energy in the legal community has been devoted to determining whether a Supreme Court ruling was correct or not. Such work is necessary and helpful, of course, but we should stand back from current events more often and ask the basic questions

that are the subject of this symposium. Among these questions is: How can our fundamental legal charter be improved?

To be sure, some deficiencies in the constitutional design were inevitable. Thus, the real question is whether such deficiencies are so bad that they require amendments to our Constitution. I can think of several amendments that would benefit our polity. Many of the amendments that I would support-such as making it more difficult for the American military to go to war-can be fairly characterized as an attempt to "restore" the original understanding of the Constitution. n2 However, for purposes of this symposium, I want to propose a change to the Constitution as it was understood in 1787. My thesis is that the procedure for amending the Constitution in Article V is defective and should be changed. I am, in short, calling for amending the amendment process itself. n3

TEXT:
[*823]

I. The Article V Framework

The framers of the Constitution knew full well that they were incapable of creating a perfect legal charter. n4 They appreciated the fact that times change and that it may be necessary and desirable to amend the Constitution as various problems and situations arose. n5 Under the Articles [*824] of Confederation, all thirteen state legislatures had to approve any proposed amendment. n6 Many have viewed that high threshold as a terrible defect because badly needed reforms too often languished. n7 The amendment process created by the framers in the new Constitution relaxed the unanimity requirement but kept the bar high by requiring a supermajority among the states. n8 The procedure that they devised is set forth in 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; . . . [although] no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. n9

In The Federalist No. 43, James Madison made the case that Article V strikes the right balance between two possible errors: "It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." n10

Over the past 224 years, the Constitution has been amended seventeen times. n11 There have been twenty-seven amendments, but the first ten amendments-the Bill of Rights-were a package proposed by the very first Congress. n12 There has never been a successful call for a constitutional convention. n13 However, the movement favoring the direct election of senators did come close. n14 Congress proposed the Seventeenth Amendment when it became clear that a sufficient number of states would call a convention to enact that reform. n15

[*825]

II. The Problem

Article V was criticized from the start. During the Virginia ratification debates, Patrick Henry argued that the supermajority requirement for amendments was too high a threshold:

To suppose that so large a number as three-fourths of the States will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous. It would indeed be miraculous that they should concur in the same amendments, or, even in such as would bear some likeness to one another. For four of the smallest States, that do not collectively contain one-tenth part of the population of the United States, may obstruct the most salutary and necessary amendments n16

According to Henry, "the way of amendment" was, effectively, "shut." n17 The early experience under the new Constitution seemed to dispel Henry's fears. As noted, the first Congress proposed the Bill of Rights, and those safeguards were promptly ratified. n18 Thus, the amendment procedure appeared to work just fine. And as the years passed, Americans became accustomed to the amendment process and the new constitutional regime in general.

Nowadays, journalists, historians, and others express awe at the relative paucity of amendments to the American Constitution. n19 They marvel at how a charter drafted in 1787 could bring America into the twenty-first century with so few changes. n20 This paucity is offered as evidence of the genius of the Constitution's overall design. But that claim is wrong-and profoundly so. The truth of the matter is that the original understanding of the Constitution has eroded over time. Disheartened by the chances of successfully amending the Constitution, political activists, reformers, and politicians began embracing a strategy of accomplishing their objectives by outwardly voicing respect for the Constitution while working assiduously for a "reinterpretation" of the document to allow for the laws and powers that they deemed beneficial to the country. n21

This is not the place for a wide-ranging examination of the erosion, but the extraordinary interpretation that academics, lawyers, elected officials, and jurists have given to Congress's power "[t]o regulate commerce" should suffice for present purposes. n22 To begin with, the Constitution [*826] creates a federal government of limited and enumerated powers. n23 In The Federalist No. 45, Madison observed, "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments, are numerous and indefinite." n24 Most of the federal government's "delegated powers" are specified in Article I, § 8. n25 The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government are "reserved to the States respectively, or to the people." n26

Today, the federal government consists of dozens of regulatory agencies and spends trillions of dollars-activities that would have been unimaginable to the people who debated and ratified the Constitution. n27 Few people claim that the Constitution is inadequate. n28 Instead, others have claimed that the language in Article I, § 8 was phrased in such broad terms as to allow for the expansion of federal power. n29

Consider the landmark case United States v. Lopez. n30 The facts in the Lopez case are straightforward. Alphonso Lopez was a high school student who was caught carrying a handgun on school premises. n31 He was initially arrested under a Texas law that prohibited the possession of firearms on school property, but federal agents took over the case and prosecuted Lopez for violating the "Gun-Free School Zones Act of 1990." n32 After his conviction, Lopez's attorney argued on appeal that Congress had exceeded its constitutional authority when it passed the law. n33 When a federal appeals court agreed with Lopez and overturned his conviction, the Justice [*827] Department appealed the case to the Supreme Court, which agreed to hear the case. n34

In his brief to the Supreme Court, Solicitor General Drew Days argued that the Gun-Free School Zones Act could be justified under Congress's power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." n35 Days argued that possession of a gun in a school zone: (a) might lead to violent crime, which (b) might threaten the learning process, which (c) might ultimately produce less productive citizens, which (d)

might, cumulatively, impair the national economy and interstate commerce. n36

When Days appeared before the Court for oral argument, the justices pressed him on the implications of his constitutional theory:

QUESTION: General Days, just to understand what we're talking about, do I correctly understand your position to be, your rationale for this-

GENERAL DAYS: Yes.

QUESTION: -that all violent crime, if Congress so desired, could be placed under a Federal wing, could be placed in the Federal court for prosecution, all violent crime, or is there any stopping point? Is there any violent crime that doesn't affect interstate commerce on you[r] rationale?

GENERAL DAYS: Well, Your Honor, I think the answer is that it may be possible for Congress to do that under the commerce power. . . .

QUESTION: [So] there is no question that Congress has the power, in effect, to take over crime, because I-

GENERAL DAYS: I do not-

QUESTION: -presume there's no limitation on your rationale, or on Congress' rationale, that would preclude it from reaching any traditional criminal activity.

GENERAL DAYS: That's correct. n37

[*828]

As that exchange makes clear, the stakes in Lopez went well beyond the constitutionality of the Gun-Free School Zones Act. n38 Attorneys for the federal government outlined a radically expansive theory of federal power. n39 Solicitor General Days maintained that the federal government could not only fight all types of violent crime, but could regulate any activity that might lead to violent crime. n40 Days also argued that he could discern no limit on Congress's power to regulate commerce-it was, for all intents and purposes, "plenary." n41

The Supreme Court recoiled from the federal government's position: "[i]f we were to accept [Days's] arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." n42 In his concurring opinion, Justice Clarence Thomas noted that, if Congress had been given authority over matters that simply "affect" interstate commerce, much, if not all, of the enumerated powers set forth in Article I, § 8 would be unnecessary. n43 Indeed, it is difficult to dispute Justice Thomas's conclusion that an interpretation of the commerce power that "makes the rest of § 8 superfluous simply cannot be correct." n44

Much of what the federal government does today is inconsistent with what is supposed to be the supreme law of the land. n45 The danger was acknowledged early on: Thomas Jefferson wrote, "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." n46 Unfortunately, the original

understanding of the [*829] Constitution has been corrupted by construction. By making the Constitution difficult to amend, the framers thought they could preserve it, but the design failed. It seems plain that our courts and policymakers are not seriously committed to the original understanding of the charter. n47

III. Amending Article V

In the previous section, I showed that the Constitution of 1787 is not working as it was designed to work. In many key aspects, this charter has been reinterpreted to allow the federal government to expand beyond the limited powers in the original design. This is not a new development. We have been on this course for some time and can continue to muddle along in this fashion. In my view, however, this is a profoundly unsettling state of affairs. In light of the erosion in the original design of the Constitution, how can anyone be confident that other constitutional safeguards will not be lost?

I also maintain that the difficult amendment procedure laid out in Article V is primarily responsible for our current predicament. Admittedly, that is hard to prove, but the political scientist Donald Lutz has studied constitutional charters from around the world and has shown that the American Constitution is among the most difficult to amend. n48

Given the extraordinary growth of the federal government, one would have to heavily discount any claim that the low rate of amendment has been due to a general satisfaction with the Constitution of 1787. A more plausible explanation, I submit, is that the fervor for change in the role of government has followed the path of least resistance, which has essentially meant finding like-minded jurists, fighting over nominations to the Supreme Court, and mounting legal defenses when federal powers have been challenged in the courts. n49

[*830]

If Article V is indeed primarily responsible for the problem, the next question concerns the remedy. While I am firmly convinced on the need for some relaxation in the threshold necessary to secure the adoption of an amendment, I am less committed to any particular proposal that would accomplish that end. With that caveat, let me advance a specific proposal in the hope of generating more thought and discussion in this direction.

First, Article V divides the amendment procedure into two distinct phases. n50 Phase one initiates the amendment process, and phase two concerns the ratification process. n51 This division seems prudent and ought to be retained. But instead of the two-thirds vote necessary for Congress to propose amendments or for the states to call a convention, we should lower the threshold to a simple majority. And instead of the three-fourths vote necessary for the states to ratify an amendment, we should lower that threshold to two-thirds.

A skeptic might reasonably ask whether my proposed amendment could bring a different set of problems into American politics. Of course it could. First, we could see an uptick in the number of amendments proposed and ratified. Second, many of us might dislike or even deplore some of these amendments. The key question, however, is whether these problems will be worse than the predicament in which we find ourselves in 2011. To that question, my answer is "No." An easier amendment process will bridge the gulf that presently exists between the constitutional text and the government we actually have. Also, an easier amendment process will bring more candor and less cynicism to constitutional discourse. In the long run, I would also expect an easier amendment process to enliven our politics in a way that would be healthy for our republic.

Legal Topics:

FOOTNOTES:

n1 See, e.g., Robert Barnes, Scholars Debate Whether Time is Right for Amending the Constitution, Wash. Post (Nov. 28, 2010, 6:43 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/28/AR2010112803275.html.

n2 See Gene Healy, The Cult of the Presidency 30-32 (2008).

n3 Other scholars have reached the same conclusion. See, e.g., Stephen M. Griffin, The Nominee is . . . Article V, *12 Const. Comment. 171 (1995);* Michael B. Rappaport, Reforming Article V: The Problems Created by the National Convention Method & How to Fix Them, *96 Va. L. Rev. 1509 (2010).*

n4 This is demonstrated by the mere fact that the framers included Article V in the Constitution, which outlines the manner in which to amend the Constitution. See U.S. Const. art. V.

n5 See Douglas Linder, What in the Constitution Cannot be Amended?, *23 Ariz. L. Rev. 717, 719 (1981).*

n6 See Articles of Confederation of 1788, art. XIII.

n7 See, e.g., The Federalist No. 43, at 245 (James Madison) (E.H. Scott ed., 1898).

n8 See U.S. Const. art. V.

n9 Id.

n10 The Federalist No. 43, at 245 (James Madison) (E.H. Scott ed., 1898).

n11 See Griffin, supra note 3, at 172.

n12 See Stephen M. Griffin, The Problem of Constitutional Change, *70 Tul. L. Rev. 2121, 2135 (1996).*

n13 See id.

n14 See Gerard N. Magliocca, State Calls for an Article Five Convention: Mobilization and Interpretation, 2009 Cardozo L. Rev. de novo 74, 79-81 (2009).

n15 See id.

n16 Speeches of Patrick Henry (June 5 and 7, 1788), in The Anti-Federalist Papers and the Constitutional Convention Debates 204 (Ralph Ketcham ed., 1986).

n17 Id. at 203.

n18 See Griffin, supra note 12, at 2135.

n19 See id. at 2122-23; Magliocca, supra note 14, at 74-76.

n20 See Griffin, supra note 12, at 2122-23.

n21 See generally Richard A. Epstein, How Progressives Rewrote the Constitution (2006).

n22 U.S. Const. art. 1, § 8.

n23 See U.S. Const. amend. X (limiting the federal government's powers to those "delegated to the United States by the Constitution").

n24 The Federalist No. 45, at 258 (James Madison) (E.H. Scott ed., 1898).

n25 See U.S. Const. art. 1, § 8.

n26 U.S. Const. amend. X.

n27 See, e.g., Randy E. Barnett, Restoring the Lost Constitution 316-17 (2004).

n28 There are a few exceptions. See generally Sanford Levinson, Our Undemocratic Constitution (2006) (assessing the defects of the Constitution); Larry J. Sabato, A More Perfect Constitution (2007) (suggesting twenty-three proposals to revitalize the Constitution).

n29 Interestingly, Rexford Tugwell, a "principal member of President [Franklin] Roosevelt's 'Brain Trust,'" admitted that the Supreme Court rulings upholding the constitutionality of the New Deal programs "were 'tortured interpretations of a document intended to prevent them.'" Roger Pilon, Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles, *68 Notre Dame L. Rev. 507, 516 n.36 (1993)* (quoting Rexford G. Tugwell, Rewriting the Constitution: A Center Report, Center Mag., Mar. 1968, at 20).

n30 *United States v. Lopez, 514 U.S. 549 (1995);* see also Richard A. Epstein, Constitutional Faith and the Commerce Clause, *71 Notre Dame L. Rev. 167 (1996)* (discussing Lopez and its potential impact on the Commerce Clause).

n31 *Lopez, 541 U.S. at 551.*

n32 Id.

n33 See *id. at 552.*

n34 See id.

n35 See *Brief for the United States at 2-6, United States v. Lopez, 514 U.S. 549 (1995)* (No. 93-1260) [hereinafter Lopez Brief].

n36 See id. at 19-25.

n37 *Transcript of Oral Argument at 10-13, United States v. Lopez, 514 U.S. 549 (1995)* (No. 93-1260) [hereinafter Lopez Oral Argument]; see also Lyle Denniston, Going Overboard for a Federal Law, 17 Am. Lawyer 94-95 (1995) (describing Solicitor General Days's "daring claim of power for Congress").

n38 See *Lopez Oral Argument, supra* note 37, at 10-13.

n39 See generally *Lopez Brief, supra* note 35 (arguing that the United States used Article 1, Section 8, Clauses 3 and 18 of the Constitution to demonstrate that Congress has the power to legislate under the Commerce Clause.).

n40 See id. at 18 n.11.

n41 In oral argument before the Supreme Court, Solicitor General Days stated, "Congress was legislating for the entire Nation pursuant to its plenary powers under the Constitution." *Lopez Oral Argument, supra* note 37, at 4.

n42 *United States v. Lopez, 514 U.S. 549, 564 (1995).*

n43 See *id. at 589* (Thomas, J., concurring).

n44 Id. (Thomas, J., concurring).

n45 See generally Gary Lawson, The Rise and Rise of the Administrative State, *107 Harv. L. Rev. 1231 (1994)* (detailing the history of the administrative state and arguing that it is unconstitutional). One other example that is worth a brief mention concerns the modern "war on drugs." See *Gonzalez v. Raich, 545 U.S. 1, 10 (2005).* Note that the Constitution was amended to permit the federal government to police a ban on the manufacture of liquor. See Roger Pilon, The Illegitimate War on Drugs, in After Prohibition: an Adult Approach to Drug Policies in the 21st Century 23, 26-27 (Timothy Lynch ed., 2000). Instead of seeking an amendment to

permit federal agents to police a ban on narcotics, the Commerce Clause was simply stretched to accommodate the policy. See id. (discussing the history of the Commerce Clause and its relation to the war on drugs); see also *Gonzales, 545 U.S. at 57* (Thomas, J., dissenting) (discussing the authority and the limits of the Commerce Clause).

n46 Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in 10 The Writings of Thomas Jefferson 417, 419 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903).

n47 See generally Gary Lawson, Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan, in Cato Supreme Court Rev. 119 (2004) (explaining how the Supreme Court used faulty constitutional principles in deciding Sabri v. United States); Timothy Lynch, A Smooth Transition: Crime, Federalism, and the GOP, in The Republican Revolution 10 Years Later 213 (Chris Edwards & John Samples eds., 2005) (discussing the Republicans' treatment of the Constitution while in power from 1994 through 2004); Ilya Somin, Taking Stock of Comstock: The Necessary and Proper Clause and the Limits of Federal Power, in Cato Supreme Court Review 239 (2010) (discussing how the Supreme Court interpreted the Constitution in United States v. Comstock).

n48 According to Lutz, the United States has one of the lowest rates of amendment worldwide. See Donald Lutz, Toward a Theory of Constitutional Amendment, 88 Am. Pol. Sci. Rev. 355 (1994).

n49 See generally Roger Pilon, How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees, 446 Cato Inst. Policy Analysis (Aug. 6, 2002) (portraying how Americans are more concerned that the Supreme Court justices' views are consistent with the views of the American people, rather than whether they will apply the law).

n50 See U.S. Const. art. V.

n51 See id.