

## **League Study of Key Structures of Democracy**

The LWV of Falls Church is joining Leagues from across the nation to take part in this national League study.

Adopted at the 2014 LWVUS Convention, this involves the study and arriving at a national consensus about the most consequential questions facing our democracy today: 1) The process of amending the U.S. Constitution; 2) Money in Politics Review -- Updating the League's position on campaign finance for the purpose of addressing the lack of member understanding and agreement as to whether financing a political campaign is protected speech under the First Amendment.

Our participation in these studies and in arriving at a consensus is our opportunity to impact the resulting national League's positions, and indeed shape the national conversation on these questions vital to our democracy.

**This is Part 1 of a 3-part Fact Sheet to help you participate in the national League's Consensus Study on the Process of Amending the Constitution.**

Part 1 deals with Part 1 of the Constitutional Amendment Consensus Questions that are intended to develop guidelines for evaluating amendment proposals.

Part 2 will be emailed next week. Part 3 will be emailed in two weeks.

### **Dates to remember:**

**Sunday, Nov. 8**, LWVFC Informational meeting on Constitutional Amendment Study, FC Community Center 3:00-4:30p.m.

**Sunday, Nov. 15**, LWVFC Consensus meeting on Constitutional Amendment Study, FC Community Center 3:00-4:30p.m.

*CONSENSUS: WHAT IT IS, WHAT IT IS NOT AND HOW IT IS DETERMINED.*  
LWV-VA [Read Here](#).

Here's what **Article V of the U.S. Constitution** says about amending the Constitution:

"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; . . ."

So Article V provides two ways of proposing amendments to the nation's fundamental charter. Congress, by a two-thirds vote of both chambers, may propose constitutional amendments to the states for ratification. OR, the legislatures of two-thirds of the states (34 at present) may ask Congress to call a convention to propose amendments to the Constitution; this is commonly called an Article V Convention. Amendments proposed by either method must be ratified by three-fourths of the states, 38 at present.

### **League Background**

Perhaps it goes without saying that the League of Women Voters believes it is right and permissible to amend the Constitution of the United States when circumstances demand. The League was born from the successful, decades-long effort to pass the 19th Amendment.

The question for us today is: what are the shared values and beliefs within the League – what consensus do we have – regarding the circumstances that might allow or compel the League to endorse a constitutional amendment or an Article V Convention?

If we do find that we have consensus on some of the principles that should guide us, mobilizing the organization to advocacy for or against a particular

amendment would fall under the established protocol by which the League determines its advocacy agenda

## **Part I**

### Considerations for Evaluating Constitutional Amendment Proposals

In determining whether to support or oppose a particular constitutional amendment or the Article V Constitutional Convention process, the first and most important question is whether the League supports or opposes the subject of the amendment based on League public policy positions. Once League public policy positions are applied, Part I asks, “What are the other values that League members share regarding the purpose of the Constitution and its malleability?” Many believe the Constitution to be a near-sacred document, only to be amended in the most serious circumstances. Do we agree? Under what circumstances is it appropriate to amend the Constitution? What makes a sound and well-crafted amendment proposal?

Synopsis of “Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change,” The Constitution Project at the Century Foundation, <http://www.constitutionproject.org/wp-content/uploads/2012/09/32.pdf> , pp. 1-11:

“As James Madison, a principal author of both the Constitution and the Bill of Rights, argued in The Federalist No. 49, the constitutional road to amendment should be “marked out and kept open,” but should be used only “for certain great and extra-ordinary occasions.”

“In the Guidelines that follow, we pose some general questions that, we hope, participants in debates about constitutional change will ask themselves. We do not pretend that the answers to these questions will always be dispositive or that the Guidelines can be mechanically applied. If the circumstances are extraordinary enough, all of these warnings might be overcome. Nor do we imagine that the Guidelines alone are capable of resolving all disputes about currently pending proposals for constitutional change. We ourselves are divided about some of these proposed amendments, and no general Guidelines can determine the ultimate trade-offs among the benefits and costs of change in individual cases.”

## “GUIDELINES FOR CONSTITUTIONAL AMENDMENTS

Does the proposed amendment address matters that are of more than immediate concern and that are likely to be recognized as of abiding importance by subsequent generations?

Does the proposed amendment make our system more politically responsive or protect individual rights?

Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?

Is the proposed amendment consistent with related constitutional doctrine that the amendment leaves intact?

Does the proposed amendment embody enforceable, and not purely aspirational, standards?

Have proponents of the proposed amendment attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?

Has there been full and fair debate on the merits of the proposed amendment?

Has Congress provided for a non-extendable deadline for ratification by the states so as to ensure that there is a contemporaneous consensus by Congress and the states that the proposed amendment is desirable?”

## **Foundation Readings**

According to LWVUS, these two short articles are the most important to read in preparation for Part I:

[Synopsis of “Constitutional Amendments and the Constitutional Common Law” by Adrian Vermeule.](#)

The gist of the paper is that we should not be predisposed against using the Article V constitutional amendment process. The alternative to the amendment process is continuous reinterpretation of the Constitution left to the courts – that is, “to an ongoing constitutional convention whose delegates are all judges (and hence all lawyers).” He points out that no member of another profession has ever been appointed to the Supreme Court, although no law prohibits the appointment of others. Whatever the other advantages or disadvantages of the amendment process, it would presumably involve a more diverse group of actors.

Continual judicial updating of the Constitution often produces as bad or worse results than the constitutional amendment process does.

#### [Synopsis of “Constitutional Amendmentitis” by Kathleen Sullivan.](#)

The gist of the paper is that there should be a strong presumption against amending the Constitution except when changes consistent with the Constitution’s broad purposes are unlikely to be enacted by ordinary legislative means.

The author argues that the Constitution remains a “relatively pristine document,” and she includes some useful history about amendments. “More than 11,000 amendments have been proposed, but only 33 have received the necessary congressional supermajorities and only 27 have been ratified by the states. Half of these amendments were enacted under extraordinary circumstances. The first ten amendments, the Bill of Rights, were added in one fell swoop by the First Congress and ratified in 1791 as part of a bargain that had induced reluctant states to ratify the Constitution. And the 13th, 14th, and 15th Amendments, which abolished slavery and gave African Americans rights of equal citizenship, were essentially foisted on the southern states by the Reconstruction Congress as a condition of readmission to the union in the wake of the Civil War.

“The remaining amendments have tinkered little with the original constitutional design. Four expanded the right to vote in federal elections: The 15th Amendment eliminated racial classifications in voting, the 19th

extended the franchise to women, the 24th abolished the poll tax, and the 26th lowered the voting age. Only two tried outright to govern social policy: The 18th Amendment imposed Prohibition and the 21st repealed it. Only two amendments worked significant structural changes in the original constitutional framework: The 17th Amendment provided for popular election of senators and the 22nd imposed a two-term limit on the presidency. And only four amendments were enacted to overrule decisions of the Supreme Court: The 11th Amendment barred suits in federal court by citizens of one state against another state, the 14th recognized the United States citizenship of African Americans, the 16th permitted Congress to impose an income tax, and the 26th lowered the voting age to 18--all in contrast to what the Supreme Court had said the Constitution permitted or required. The remaining handful of amendments were national housekeeping measures, the most important of which was the 25th Amendment's establishment of procedures for presidential succession.

“Nearly a quarter of a century has elapsed since a constitutional amendment emerged successfully from the Congress. A 1978 D.C. statehood proposal emerged but was never ratified by the states. The last amendment to emerge from Congress and be ratified was the 26th Amendment, which lowered the voting age in 1971. The most recent amendment--the 27th, which bars congressional pay raises until after the subsequent election--is actually a relic of the founding era. Proposed by the First Congress in 1789, it was finally ratified and promulgated only in 1992.”

See also, “When the Supreme Court is this wrong, it’s time to overrule them,” Doris Kearns Goodwin & Jeff Clements, Reuters Blog Post June 2, 2015 <http://blogs.reuters.com/great-debate/2015/06/02/when-the-supreme-court-is-this-wrong-its-time-to-overrule-them/>

According to Goodwin and Clements, “[M]any people argue that it would be “too hard,” even “impossible” [to amend the Constitution]. This argument lacks historical perspective. Every step on the path to fulfill the promise of the American Revolution was “too hard,” but Americans did it anyway. Hard, yes; yet constitutional amendments have come in waves during times of challenge — and Supreme Court obstinacy — much like our own.

“The Bill of Rights and the post-Civil War amendments may be the most well-known examples, but this pattern has recurred. A generation after the Civil War renewed the promise of American equality and democracy, for example, the Supreme Court began elevating money to a privileged place in the Constitution. It struck down basic public-interest laws, including the minimum wage, worker safety, the federal income tax and even child labor laws.

“The American public took matters into their own hands during the Progressive era at the turn of the 20th century. With the 16th amendment in 1913, Americans reclaimed the power to levy a progressive income tax, without which many of President Franklin D. Roosevelt’s New Deal social programs would not have been possible.

The 17th amendment that same year provided for popular election of U.S. senators. This replaced the old system of election by state legislatures, in which, according to the New York Times, a millionaire, either by outright bribery or contributions to a party’s campaign coffers, could buy a Senate seat “just as he would buy an opera box, or a yacht or any other luxury in which he could afford to indulge himself.” Finally, with the ratification of the 19th amendment in 1920, women gained the right to vote after a struggle that had lasted for more than half a century.

“Four decades later, two additional constitutional amendments removed further barriers to political equality. The 24th amendment in 1964 protected the right of all Americans to vote in federal elections, regardless of the ability to pay a poll tax. President Lyndon B. Johnson hailed “the triumph of liberty over restriction, declaring “there can be no one too poor to vote.” The 26th amendment in 1971 reduced the voting age from 21 to 18, which ensured that young adults eligible to serve in the armed forces were able to vote.

“Each of these fights required hard work, tough challenges and resilience. This is as it should be. Constitutional amendments are warranted only by what James Madison called “extraordinary occasions.” That is why enacting and ratifying an amendment to the U.S. Constitution is no easy matter.”

**Here are the Consensus Questions posed in Part I.**

**Part I - Considerations for Evaluating Constitutional Amendment Proposals**

**1. Which of these should or should not be a consideration in identifying an appropriate and well-crafted amendment?**

a) Whether the public policy objective addresses matters of such acute and abiding importance that the fundamental charter of our nation must be changed. Should    Should not    No consensus

b) Whether the amendment as written would be effective in achieving its policy objective.  
Should        Should not    No consensus

c) Whether the amendment would either make our political system more democratic or protect individual rights. Should    Should not    No consensus

d) Whether the policy objective can be achieved by a legislative or political approach that is less difficult than a constitutional amendment. Should  
Should not    No consensus

e) Whether the public policy objective is more suited to a constitutional and general approach than to a statutory and detailed approach. Should  
Should not    No consensus

We wish to acknowledge the work of the LWV of Montgomery County, MD, for portions of this fact sheet. Some material was obtained from LWVUS Constitutional Amendment Study Guide <http://forum.lwv.org/member-resources/article/constitutional-amendment-study-guide>.

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