A Fork in the Road

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A few years ago, activists seeking reform of the federal government through constitutional amendments (the "Reformers") made an unfortunate choice that is plaguing them today. But to understand and appreciate their dilemma, we need some background information.

First we might ask: Why were they seeking constitutional amendments? Why not rely on legislation, which would be less complicated? There are two answers to that question, one general and one issue-specific. Reformers will generally rule out legislative solutions because they are subject to change after every election cycle; a new administration taking office can act to nullify the reforms and all of the work that went into their adoption. Or in some issue-specific cases there is disagreement over the meaning of a constitutional provision, which can require an amendment to clarify it. So amendments are the most durable and surest way to implement reforms.

Having settled on amendments as the preferred method of reform, we find that the writers of the Constitution gave us two ways in Article V to initiate this action: (1) it can be started in Congress by a two-thirds majority vote in both the House and Senate, or (2) it can be started by the states if two-thirds of them (34) agree to call a convention of states to consider amendments. In either case, a proposed amendment must be ratified by 75% of the states (38) to become law.

It is obvious that the quickest and most direct option is through Congress; the state option was provided to ensure that the People have a way to redress their grievances if Congress is unwilling or unable to act. But because of changes that have occurred in the workings of Congress in recent years, it appears that the congressional option is not viable and Reformers must work through the state legislatures. As a consequence of these dynamics, the state approach has been adopted by virtually all of the Reformers.

Historically, we have never needed to resort to a convention of states to accomplish desired reforms. Whenever Congress saw that the mood of the country favored a reform they jumped to the head of the parade and initiated the

amendment action; they have done this for all of our 27 amendments. But the evidence does not indicate that Congress will do so in today's political climate.

That gives us the background; now for the drama.

We know that any proposal for change, including reforms, will meet with opposition. Some people are happy with the status quo and are skeptical that a change would be an improvement. But the strongest resistance comes from groups that would lose a position of prestige and power if reforms were adopted. There are many examples, but most opposition will come from a political party or an organization that is politically active (we'll call them "Threatened Interests").

Some 60 or more years ago, suggestions were made to convene a convention of states to consider reform of the government through constitutional amendment, and the Threatened Interests came up with a clever defense: they began a campaign to instill fear in the public mind that a convention could do irreparable harm to the country. They preached that a convention could be commandeered by nefarious forces and run amok; it could destroy the Constitution and our freedoms. The irony of this situation was that it was the goal of some of the reform proposals to protect the country against the damage being done by those same Threatened Interests! While their campaign was based on a spurious claim that had no foundation in our history, it struck a nerve among some stalwart defenders of the Constitution, adding to the opposition to a convention. This argument was resurrected in recent years as the foundations of the republic were crumbling and interest in reform grew again.

Some proponents of reform reacted to this development by creating what they believed was an effective solution: They advocated that the threat of a runaway convention could be eliminated by defining the convention agenda in advance and barring the introduction of any matters not previously approved. To support this recommendation, scholars searched the historic record to look for evidence that the founders not only favored limited-agenda conventions but mandated them. But their "findings" are not convincing.

So we have now identified the fork in the road that we cited earlier. The decision of how to combat the opposition of the Threatened Interests was the fork, and many of the Reformers chose the path of the limited-agenda convention. It turned out to be a contentious path and consumed reform efforts in unresolved debates. Reformers were forced to play defense, losing the initiative; their programs stalled.

The purpose of this essay is to question that choice, and we offer three exhibits that we believe to be compelling:

Exhibit A. The Threatened Interests ignore a key provision of the Constitution that completely neutralizes the runaway convention threat: the convention does not have the power to approve amendments; it can only recommend them to the states for their consideration. At least three fourths of the states (38) must ratify a proposed amendment for it to become law; this is a very high bar and requires a strong consensus of citizens across the country to achieve ratification. This is ample protection against any threat of a runaway convention.

Exhibit B. The language of Article V of the Constitution is very direct and clear. It does not require academic interpretation of what it means; common sense is sufficient. This argues against the rationale advanced for a limited-agenda convention.

Exhibit C. Some scholars suggest that attempts to limit the agenda of a convention of states are not proper because a convention of this type would have the inherent authority to consider any ideas that might be presented to it. If they are correct, any attempt to limit the agenda would be frustrated, but the high bar for ratification would still supply ample protection to neutralize dangerous rogue actions.

From this evidence, we conclude that the case for an open convention (a "plenary" convention in legal terms) is strong. But having established that, let's also consider the following practical matter that argues strongly for an open convention.

The work of calling, organizing, and conducting a convention of states is prodigious. It will require substantial funding, hard work for many weeks and months by our political leaders, and hours, days, and weeks of debate of the reform proposals. Going to all that work to deal with a single (or just a few) reform ideas defies common sense. While it is true that holding the first of these meetings will be a learning process that makes subsequent meetings easier, it seems likely that the exercise will be an exhausting national experience that would not be welcomed again for many, many years.

In this light, shouldn't we try to clear the table of reform proposals in an open convention of states? Let's trust our democracy to successfully deal with all threats, whether real or imagined, in a forum that encourages our best thinking on our national problems.