**Civics 101**

**Episode 4: How to Amend the Constitution**

**Virginia Prescott:** [00:00:29] I'm Virginia Prescott and this is Civics 101, the podcast refresher course on some basics you may have forgotten from middle and high school. Today we tackle Article 5 of the U.S. Constitution which outlines how to change the U.S. Constitution. So far there have been 27 amendments to the document laying out the supreme law of our nation. Some are still considered controversial. Many reflect the political debates of their era. Others are more practical concerns and it's been a while. The last amendment about congressional salary was ratified 25 years ago the one before that more than 45 years ago. There is no shame if you don't know who has to vote and by what margin in order to pass an amendment. Because we're about to get schooled. Walter Olson is a senior fellow at the Cato Institute and he's been called the intellectual guru of tort reform which I understand is a scintillating title in legal circles. Walter runs the blog overlawyered.com and today he's our guide to Article 5. Hello Walter.

**Walter Olson:** [00:01:31] Hello Virginia.

**Virginia Prescott:** [00:01:32] Nice to have you with us. Now I happen to have been prepped on the fact that there are actually two ways to pass an amendment. So let me start by asking how do is a constitutional amendment usually get passed?

**Walter Olson:** [00:01:45] The way we have always wound up doing it in the past is Congress proposes an amendment and drafts the wording sends it to the states. And at that point the states individually decide whether they want to approve or not, some succeed some fail.

**Virginia Prescott:** [00:02:04] By which margins did the states have to pass it.

**Walter Olson:** [00:02:07] They have to pass it by a very wide margin as far as number of states three quarters. And that means that everything that has passed has been if not quite uncontroversial then at least overwhelmingly popular on the one side.

**Virginia Prescott:** [00:02:21] So three quarters of states two thirds in the House and Senate have I got that right?

**Walter Olson:** [00:02:26] Yes. And the founders did not want to make it too easy to change the constitution and if you allow a majority to propose that you would be getting lots and lots of proposals. To get two thirds of each house, generally you need at least the national mood in favor of something.

**Virginia Prescott:** [00:02:44] So two thirds in the House and Senate nut three quarters of the states. What happens if an amendment does pass in the House and Senate but only say 20 states ratify it?

**Walter Olson:** [00:02:57] Then it is dead. It has no legal effect whatsoever and of course we've seen that happen to certain proposed amendments over the years. The battle that some listeners will still remember which set a lot of the interesting precedent for the handling of constitutional amendments with the battle over the Equal Rights Amendment, women's rights. And it came very close. It was a very hard fought matter. It involved such things as rescissions in which states that it said yes went back and said we've changed our mind. No. It involved extensions in which they extended the time limit for ratification. And those issues are of great interest to constitutional scholars because they shed light on some of the areas that the Constitution doesn't, the Constitution actually says only in very terse terms how it expects this to work. And so whole questions what time limits do they have to have the process finished within a certain period of time are not really addressed.

**Virginia Prescott:** [00:03:52] First constitutional convention when the first ten amendments were passed, right there were how many states 15 maybe?

**Walter Olson:** [00:03:59] Something like that yes.

**Virginia Prescott:** [00:03:59] Ok so it's three quarters of the states today. That's a pretty high bar to hit. Do you think that ratio holds up.

**Walter Olson:** [00:04:08] Well it was always high. The question that scholars have had in the the drought of non amendments in the last couple of decades is is it too hard to use. And I will say there's no one historical answer to that because these tend to come in waves. The progressive period brought a wave of interest in amending the Constitution, the 1960s brought a wave of interest. Of course the post Civil War period likewise, so when the nation gets interested in fundamental change, this tends to be part of the constitutional amendments usually are part of such a wave. And then in the other quieter call them what you will conservative the periods in which there is less of a consensus that we need to change all the old rules then the barriers to ratification are perceived as so high that nothing much can get passed unless it's a technical kind of change.

**Virginia Prescott:** [00:05:04] OK so that is the first way to do it. Go through the legislative process go through the states and ratify it state by state to pass an amendment. How about the other way to pass an amendment which is a convention, a constitutional convention. Has this happened since the founding?

**Walter Olson:** [00:05:20] This has never happened. And I should start by saying that the second half of that process is really much the same as the second half of the more familiar process. In both cases the states have to ratify in both cases the states have to get up to three quarters ratification.

**Virginia Prescott:** [00:05:36] So what's the difference in how it gets raised.

**Walter Olson:** [00:05:39] Right exactly. In the process we've been talking about before now it is Congress that does the proposing. And you take your ideas to Congress and see if you can get a large enough majority there. In the convention process the states themselves call for a convention.

**Walter Olson:** [00:05:56] And here is where we get into some.

**Virginia Prescott:** [00:06:02] OK I'm going to save you five minutes and stop things right here because it gets complicated. Here is how the whole convention option works.

**Virginia Prescott:** [00:06:15] Say you're a lawmaker from New Hampshire who thinks that the federal government should be legally obligated to maintain a balanced budget. First you go to the state legislature and you propose an article 5 resolution calling for a constitutional convention. Let's say the New Hampshire legislature votes to pass your resolution. Hurray for you.

**Virginia Prescott:** [00:06:37] Now you reach out to all of the other states and you ask them to pass the same resolution.

**Virginia Prescott:** [00:06:44] If two thirds of the states that's 34 states do it then Congress is obligated to hold a constitutional convention. But don't celebrate yet, lone New Hampshire legislator because nobody really knows how this convention thing would work. Theoretically each state would send some sort of representative will call them delegates and those delegates would then vote on whether or not to pass your balanced budget amendment. Maybe they would propose some other amendments while they're at it. Scholars aren't sure whether they could or not but if they agree on the language and they pass your amendment then it goes back to the states. And this time you need the full three quarters that's 38 states to ratify your amendment.

**Virginia Prescott:** [00:07:32] And if they do then finally your amendment becomes part of the U.S. Constitution. Got it? GOOD. Onward.

**Walter Olson:** [00:07:45] Let me start out if I could with one issue, many people who favor a constitutional convention called by the states say that after two thirds of the states called for it and it meets in let's say Philadelphia. Many people believe that it will be one state one vote so that an amendment is proposed if it gets support from enough individual states. Other people are just as sure that convention will be assembled by population and that California will have many more votes than South Dakota. And we don't know the answer because the Constitution doesn't tell us the answer as to which of those two was the convention would work.

**Virginia Prescott:** [00:08:22] Well I'm thinking also you know getting to the process through all the states have including the same wording just imagine that in all 50 states. It doesn't seem like a real option. It's never been used even close. Never?

**Walter Olson:** [00:08:36] Oh yes but it has come close. Yes. And let's go back to one of the most famous changes in American government which is the change in how we send senators to Washington. Of course it started out with states having the option which they would typically use of having their state legislature pick who Senator would be. And in the progressive era that was perceived as one of the key obstacles because so many state legislatures were very corrupt and before Congress finally buckled. And you can imagine how hard it was to get the U.S. Senate to go along with this but enough states had called for a convention on this issue that they were very close to getting the number they needed. And it was at that point that the U.S. Congress sort of went kicking and screaming and said All right clearly the country wants this. And here it is we're proposing it and it was ratified. We chess players have a statement. The threat is always stronger than the execution.

**Virginia Prescott:** [00:09:36] So a hypothetical here could a constitutional amendment pass that changes Article 5 which governs how to amend the Constitution and make it easier or even more difficult to make amendments?

**Walter Olson:** [00:09:48] It definitely could. And in fact many of us think that's one of the best ideas because you've heard me complain that the process is not well defined. There have been a number of ideas to make it more carefully defined. And you know I get asked why isn't it spelled out some of these basic questions. And my answer which is not entirely flip is they ran out of time. They were debating a lot of constitutional ideas. Madison had some ideas that did not get fully put into this. And if they'd had an extra week maybe they would have. But we have the time to consider improving this amendment process in a way that doesn't get caught up in the emotions of one particular proposal. And just think what would be the right procedure for the next century. Do we put a time limit on if we retain the convention mechanism. Is it one state one vote or is it set up in some other way. All these questions we can answer with a constitutional amendment devoted to the amendment process itself.

**Virginia Prescott:** [00:10:52] So follow up on that the text of the Constitution is often held up as sacred and voluble by both political parties. And yet the Framers created a framework for change right. Thomas Jefferson frequently quoted for supporting rewriting the Constitution every 19 years lest we be enslaved to the prior generation.

**Walter Olson:** [00:11:13] So we knew that circumstances would change and they knew that they occasionally would have made mistakes.

**Virginia Prescott:** [00:11:17] Do you think we should consider the constitution to be a little less sacred or the nation be more willing to amend it.

**Walter Olson:** [00:11:24] We are respecting it as sacred precisely when we do acknowledge that they intended it to be changed. I think that we shouldn't veer over to the opposite extreme of changing it too lightly. But then the system protects us very well against that danger. I think people are right that we wind up with a little bit too much anchor and not enough sail on the boat. The difficulty of amending it means that basically you wait around once or twice in people's lifetime. There is enough of a sense of public crisis that people will consider serious amendment ideas. And yet by that point too often a lot of time has gone by with a bad rule or an outdated rule.

**Virginia Prescott:** [00:12:10] Walter Olson senior fellow at the Cato Institute created the blog over lawyer dot com. Thank you so much for parsing that out with us.

**Walter Olson:** [00:12:17] Thank you Virginia.

**Virginia Prescott:** [00:12:18] OK. Class dismissed. This episode was produced by Taylor Corindi and edited by my very music by Blue Dot sessions and broke free. I'm Virginia Prescott Civics 101. It's the production of new Hampshire Public Radio.