Who’s Afraid of an Article V Convention?

May 20, 2018

American Affairs Journal

Summer 2018 / Volume II, Number 2
May 20, 2018

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There it is, on a platform in Independence Hall in Philadelphia—George Washington’s chair, the very one he planted his bottom on while presiding over the Constitutional Convention that gave birth to our republic in 1787. The wooden chair, with its carving of a gilded sun, is a relic, the only piece of furniture from the convention still on display in the hall. And not only is the chair a relic but the convention, too, can feel like one—a unique event, held 231 years ago, the likes of which are never to be seen again.

Not so fast. Have a careful look at Article V of the framers' document, at the language crafted back then and still in effect today. The familiar part states that Congress, with the two-thirds approval of both the House and the Senate, can propose amendments to the Constitution, subject to ratification by three-fourths of the states. But this is not the only means, according to Article V, by which the Constitution can be amended, for there is a second path: "on the application of the legislatures" of two-thirds of the states, Congress "shall call a convention for proposing amendments," the amendments, as in the first avenue, subject to ratification by three-fourths of the states.

A convention instigated by the states for the purpose of altering the Constitution has never taken place. Not even once. But America once came very close to one, and nowadays the question is again ripe. This past November, Wisconsin became the twenty-eighth state to apply to Congress for a convention, per Article V, with thirty-four needed to cross the two-thirds threshold requiring Congress to act. Wisconsin and the other applicants are asking for a convention for the specific and limited purpose of crafting an amendment to require the federal government to balance the budget. But a convention called for any one particular purpose could become a convention to consider any number and any variety of changes to the Constitution. An Article V convention, in this fashion, could be a vehicle for a comprehensive rewriting of the Constitution, even for an altogether new Constitution.

Largely for this reason, opponents warn that an Article V convention must be resisted as a "Dangerous Path," in the title of a brief prepared by Common Cause, the self-styled civic watchdog group based in Washington, D.C. Such a convention would be "alarming for democracy," the constitutional scholar David Super of the Georgetown University Law Center says, and many of his colleagues agree.

The pitfalls of a "convention of the states" deserve close scrutiny, of course. Still, the warnings can sound overwrought. The times are indeed tumultuous, but must we adopt a defensive, frightened crouch in our politics? There is a case to be made on behalf of a convention as a means to galvanize fresh thinking, fresh debate, on any number of vital but seemingly insoluble issues, from guns to big money in politics. And history shows, too, that the mere threat of a convention can have, hammer-like, a salutary effect on balky legislators in Washington.

To understand the potential value of an Article V convention, it is essential to grasp how this seeming curiosity made its way into the original Constitution. What were the Founders thinking?

"If the Government Should Become Oppressive"

The credit—or blame—attaches to George Mason. The framers of the Constitution began meeting in Philadelphia on May 25, 1787, and their work was very nearly done when Mason, almost four months later, on September 15, rose to address his fellow delegates. At this point, in the draft contemplated by delegates, only Congress had the power to propose amendments to the Constitution, for ratification by the states. Not good enough, Mason felt.

Even amongst a crew with a keen appreciation of the possible ways in which a government could attain an overweening power over the citizenry, Mason stood out in this assemblage. Col. Mason, as his fellow Virginian James Madison called him, arrived in Philadelphia at the age of sixty-one, fifth oldest of the delegates (though a good deal younger than Benjamin Franklin, at eighty-one, the senior statesman of the lot). Born on a farm in Dogue's Neck, largely self-educated with books from his uncle's library, he helped draft a Declaration of Rights for the Virginia Constitution of 1776—a precursor to the federal Bill of Rights. In Philadelphia, he fought for the inclusion of a Bill of Rights in the draft Constitution, offering, on September 12, to write the bill himself. But the delegates, eager to complete their work and fearful of a poison pill, spurned his offer.

Three days later, when an unbowed Mason again rose to speak, Madison was on hand to take notes. Mason insisted that the states must have the power to call for conventions for the purpose of proposing amendments, because Congress, if left as the sole generating authority, would never propose amendments counter to its interests. And that would mean, as Madison conveyed Mason's argument, that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he [Mason] verily believed would be the case."

In Mason's way of thinking, then, the "states' option" as a means of giving birth to amendments was a safety valve—an alternative way for the voice of the people to be heard, should Congress prove deaf. The delegates accepted his proposal. He must have been pleased—but not pleased enough to accept the new Constitution which, still lacking a Bill of Rights, he refused to sign, as one of only three holdouts, two days afterwards.

In principle, a constitution need not contain any procedure at all foramendment—this foundation document might have been presented as etched in stone. In *Federalist* no. 43, Madison drew back and offered a broad-based explanation for the dual path provided for in Article V for amendments. His argument was of a utilitarian sort, the stress not on the peril of domineering government, as envisioned by Mason, but on the positive value of trial-and-error lessons that might be gained from actual democratic practice:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors, as they may be pointed out by the experience on one side or on the other.

An allowance for "the amendment of errors"—this was the essential Madisonian interpretation of Article V and the interpretation that has reigned ever since. Congress might point out the flaws in the framers' design—so might the states. In his *Commentaries on the Constitution of the United States*, published in 1833, Joseph Story— appointed by President Madison in 1811 to serve on the Supreme Court, and still serving, as an associate justice, two decades later—

elevated the rationale behind Article V to an eternal principle of prudent government. “It is obvious, that no human government can ever be perfect,” Story noted. “It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people.” Article V, then, embraced the notion of the Constitution as a living, breathing document.

“Whereas the Failure of Congress . . . ”

The Constitution contains twenty-seven amendments, and the rite of passage has always been the same: Congress proposes and the states ratify amendments, and in this manner, slavery has been outlawed, women have been given the right to vote, and term limits have been imposed on presidents (who have no role in the amendments process). Doesn’t this history suggest that George Mason’s add on—the tool by which states, not Congress, originate proposals for amendments—is not needed for good republican government and at this juncture is simply a vestige? But that position, advanced today by opponents of a convention of the states, contains a glaring flaw in failing to recognize how the threat of a convention can on its own spur productive congressional action. The passage of the Seventeenth Amendment, providing for direct, popular election of U.S. senators, is the telling case in point—and an account of how this amendment came to be illustrates the continuing relevance of the “states’ option” as a hammer to Congress.

At first glance, the path to the Seventeenth Amendment might seem unexceptional. It was approved by Congress in May 1912 and ratified by the states less than a year later, in April 1913. But congressional action was an unenthusiastic coda to a grassroots movement that had begun long before, in the states, to change the founders’ handiwork. The federal power acceded to the states—and to the clear will of the people—only because it was left with no other choice.

At Philadelphia, the delegates certainly didn’t think they were making a mistake in agreeing that senators, two to a state, should be “chosen by the Legislature thereof,” as stated in Article I, Section 3 of the ratified document. With senators also given longer terms of service than House members “chosen . . . by the People,” and with the additional requirement that a senator be at least thirty years of age, compared to twenty-five for a Representative, the delegates aimed to establish an upper body of senior statesmen, able to deliberate, with a layer of insulation from “the People,” on the great matters of the day. There also was the thought, expressed in *Federalist* no. 62, probably written by Madison, that this particular method for the selection of senators would give state governments “an agency in the formation of the federal government” and in this way “may form a convenient link between the two systems.” The forging of such bonds was a vital concern for the delegates in Philadelphia, as they were trying, in the first instance, to improve on America’s first constitution, the Articles of Confederation, ratified in 1781, which failed to establish a sufficiently strong federal power to unify the nation.

On these considerations, the logic for the selection of senators by state legislatures was impeccable, but in practice, the method was exposed as defective in three respects, as noted by constitutional scholar Robert G. Natelson at the Independence Institute in Denver. First, state legislatures frequently deadlocked on their top choices for the position and could find compromise only by sending a relative mediocrity to Washington. Second, the competition for these prizes was so intense that the task of selecting a senator could overwhelm all the other, more mundane but nonetheless essential, responsibilities of the legislatures. Third, and most importantly, the arrangement became a prime nexus of corruption in the Gilded Age following the Civil War, a period of pell-mell industrialization that placed intense, often untoward, pressures on every level of government.

The problem was one of capture. State legislators became prey for unscrupulous, backroom politicos with various means, including outright bribery, to dictate the choice of a senator. The politicos served as the agents of the true powers of the era, the barons of industry, determined to have a compliant government of their liking. In the popular mind, and with good reason, the U.S. Senate of the Gilded Age was viewed as an emblem of a rigged political system. In Joseph Keppler's muckraking cartoon "The Bosses of the Senate," published in *Puck* in 1889, the senators are shown seated haplessly at their desks. To the rear are the strutting rulers of the body, depicted as bloated moneybags in top hats, this pernicious gaggle assigned sobriquets like Steel Beam Trust, Nail Trust, Copper Trust, Sugar Trust, and Salt Trust. On the wall behind the moneybags is a placard: "This is a Senate of the monopolists by the monopolists for the monopolists!"

Amending Article I, Section 3 to provide for election of senators by the people, the same as for Representatives, became a cause of the populist Granger movement, made up of collectives of farmers, opposed to the rapacious practices of the railroads and other trusts. Progressives for clean government joined the drive for this reform, and state governments took up the cry, as in this "memorial" dispatched by the legislature of Utah to the U.S. Congress in 1897:

> Whereas, The Legislators of the several States are often unable to make a choice of Senators without long and continued balloting, resulting in "deadlock," to the detriment of legislation and injury of the people of the State, and
>
> Whereas, it has been charged that corrupt influences are sometimes introduced to assure the election of incompetent men having little qualification for the high position, thereby causing degeneracy in the personnel of the most honorable legislature of the World, and
>
> Whereas, the World is advancing to a higher plane of civilization, and what was found to meet the needs of the Union a century ago is now demonstrated to be inadequate to the needs of a great republic . . .
>
> Resolved, That the Senate and House of Representatives of the United States be and are hereby respectfully urged to submit to the Legislatures of the Several States a proposition to amend Section 3, Article I, of the Constitution of the United States. . . .

This was a plea, not for a convention of the states, but for passage by Congress of an amendment for direct election of senators, subject to ratification by the states. In Washington, the House paid heed, at several times in the 1890s passing resolutions providing for just such

an amendment. But the Senate refused even to take a vote on the resolutions. How could its members be expected to amend themselves out of a job? Why would their patrons, the trusts, support this reform? The states countered by petitioning Congress for a convention under Article V to fix the matter. “Whereas, The failure of Congress to submit such amendment to the States has made it clear the only practicable method of securing a submission of such amendment to the States is through a Constitutional Convention,” Louisiana’s state government, among the petitioners, resolved in 1907, Louisiana was thereby “making application” to the Congress for a convention.

It was only when the “several states” were on the brink of the two-thirds threshold for forcing Congress to call a convention that the federal power acted, in submitting a direct elections amendment to the states for ratification. The history of the Seventeenth Amendment thus validates George Mason’s conception of the states’ path for changing the Constitution as a means to thwart arrogant federal government. Together with the broader amendments process, as embraced by James Madison and Joseph Story, it was a way for a republic to adjust for error. The states’ option had proven not to be a vestige.

The Convention Tool as a Prod

One hundred and five years after its ratification, the Seventeenth Amendment also stands nearly forgotten. No one alive has personal memory of the time when state legislatures chose senators. There is no holiday to thank Louisiana, or Utah, or any other state, for making the Senate, if something far short of deliberative perfection, at least better than it once was. As ever, America does a poor job of civic education. The problem, too, is that the role that the states can play, and were meant to play, in our framework as “laboratories of democracy” tends to be overlooked amid Washington’s dominance of so many facets of political life.

There is virtue, then, in renewing awareness of the part that states can play in forcing constitutional issues onto the national agenda. This most neglected of constitutional muscles, withered from disuse, is in want of exertion. In the first instance, as suggested by the experience of the Seventeenth Amendment, citizens of any political stripe can profit from an understanding of how the threat of an Article V convention, on its own, might elicit a positive response from Washington.

Consider term limits for members of Congress, a populist standby. By the Twenty-Second Amendment, ratified in 1951, a president can serve only two terms in office. The notion of likewise keeping U.S. senators and representatives, holding the advantage of incumbency, from being able to stand for election until they can barely stand at all is not a wild proposition. But how can members of Congress be expected to back an amendment aimed at ejecting them from their cherished positions one day, no matter what? As in the case of direct election of senators, the solution could lie in a broad state push for an Article V convention, currently backed by some states, to amend the Constitution. In one such version, an amendment would give state legislators the power to enact term limits for service in Congress. Even if a term-limits amendment passed by Congress, anxious to avoid a convention, failed to win ratification in the states, the country would benefit from a full-throated debate on the matter.

This strategy could yet pay dividends in the drive for a balanced budget amendment. A requirement that federal spending not exceed revenues may be a bad idea. Still, if states follow Wisconsin, at twenty-eight, in bringing the number of applicants for a convention closer to the trigger of thirty-four, Congress might be forced to rein in spending—giving proponents of an amendment a partial triumph on the matter. Or, a larger public debate on the nature and purpose of federal spending might refocus the budget process on constituents' needs and priorities.

On guns, Congress appears to be captive to lobbies, like the National Rifle Association, opposed to new restrictions on sales of firearms, even as public support for tighter limits, as seen in a Gallup poll taken in March 2018, is at its highest level in a quarter century, with more than two-thirds of Americans saying laws on sales "should be made more strict." Having exhausted all other avenues for change at the federal level, gun-control proponents might gain traction by mounting a coast-to-coast movement for an Article V convention to rewrite the Second Amendment, with its opening clause, "A well regulated Militia, being necessary to the security of a free State," vulnerable to criticism as archaic. Former U.S. Supreme Court justice John Paul Stevens recently called for repeal of the Second Amendment as a "more effective and more lasting reform" to gun regulation than mere legislation.

Possibly it could take years, even more than a decade, for an Article V effort of this sort to become sufficiently intense to force Congress either to enact meaningful gun-control legislation or propose its own new draft of the Second Amendment, for ratification by the states. But this is the nature of constitutional politics. Change tends to come in long waves, sometimes at a rush after a period of quiescence. The rhythm, the pacing, is nothing like the oscillations of a two-year or four-year election cycle. The victory is very much to the tortoise, not to the hare.

The convention tool could also help break the logjam in efforts to curb the role of money in politics. The Supreme Court narrowed the scope for congressional legislation with its landmark 2010 ruling, in the *Citizens United* case, barring the government from setting limits on political spending by corporations. So it probably would take a constitutional amendment, rolling back *Citizens United,* to achieve a remedy. So far, proponents have not been able to muster two-thirds support in the House and Senate for an amendment to be sent to the states. Faced with the prospect of an Article V convention, a "nuclear option," legislators might discern a reason for speedier action.

How Would a Convention Work?

Suppose, though, that it happens. An Article V convention is called, a first for the republic. How would it work? Depending on one's perspective, the beauty of the framers' design—or the defect—is that there is no set of instructions for "a convention for proposing amendments," in the spare language of the article.

That said, reasonable presumptions can be made. First, the essential actors in an Article V convention are state governments. After all, a convention is called as a result and only as a result of petitions by the legislatures of the states, at least two-thirds of them. The point is for the federal power, Washington, to step back to the sidelines.

The states on their own would choose delegates to attend the convention. State legislators undoubtedly would be prominent in numbers but there would be nothing, in principle, to prevent states from looking outside of the ranks of legislators and other elected officials for delegates, to the likes of educators, business people, and labor unionists, say. A state could hold a special election for the purpose of choosing a slate of delegates.

In 1787, each state delegation (twelve altogether, with Rhode Island declining to attend), possessed one vote to cast, no matter the size of the delegation. One state, one vote is apt to be the standard, too, for a convention held under Article V—especially considering that the article grants each state an equal vote in the filing of applications for a convention.

The states could decide that a simple majority of the delegations is sufficient for a proposed amendment to pass muster for the convention—or they could set the bar higher than that. But whatever the threshold, a proposed amendment, per Article V, could not take effect without the ratification of three-quarters of the states, just as for an amendment proposed by Congress.

As for location, Article V and the musings of the framers are silent on this point. Anywhere in the country is acceptable. Philadelphia looms as the obvious choice. There can be found within an area of a few blocks not only Independence Hall—formerly the Pennsylvania State House, where both the Constitution and, eleven years earlier, the Declaration of Independence were adopted—but also the Liberty Bell and the National Constitution Center, the last chartered by Congress “to increase the awareness and understanding of the Constitution” amongst the American people. “I offer the National Constitution Center as a venue for a convention,” Jeffrey Rosen, president and CEO of the organization, told me over lunch at his office, just downstairs from Signers’ Hall, featuring bronze statues of the framers, George Mason included, despite not being a signer.

Philadelphia, though, may be too obvious a setting; it is one thing to be reminded of the example of the 1787 convention and another to risk being overpowered and even misled by its majestic precedent. A convention “for proposing amendments,” per Article V, is not, at least not necessarily, a “constitutional convention” à la 1787, aimed at crafting a radically new framework for the country. In any case, Philadelphia made sense three centuries ago not least because the city, the largest in America at that time, was midway ground for the delegates, with all of the states of the infant republic situated along the eastern seaboard. The history of America ever since is growth and development largely in a westward direction. A helpful tone for a convention might be established by the choice of a spot, not in a blue state on either coast or in a solidly red state, but in a purple state in the heartland. Wisconsin, say, with its tradition of inventive state government, could furnish its felicitously named capital city as a fitting setting.

The Perils

What *could* go wrong in an Article V convention? The honest answer, if the question is posed in this stark way, is everything. The scariest prospect is for a “runaway convention.” In this scenario, the proposed amendments are decidedly not of a limited nature, as in a balanced budget amendment, say, to be affixed to the existing Constitution. Instead, the proceeding

turns into a true constitutional convention, with the proposed “amendment” offered in the nature of a substitute, top to bottom, for our current framework. Summon your favorite part of the Constitution—whether the Preamble, the First Amendment, the Fifth Amendment, or perhaps the impeachment power—and imagine it gone. Even the requirement in Article V for three-quarters of the states to ratify a proposed amendment conceivably could be relaxed to a simple majority.

A viper’s nest of special interests could contribute to this nightmare. As much as these snakes already infest Washington and state houses across the land, they are apt to slither to the site of an Article V convention with all sorts of nefarious purposes in cunning mind. And into whose ears would the scaly beasts be whispering? Mediocrities, say critics of the convention idea. “George Washington, Benjamin Franklin, James Madison and Alexander Hamilton will not be available to serve as delegates if a second constitutional convention is called,” Fred Wertheimer, a former president of Common Cause, asserted last year on behalf of a letter signed by more than two hundred organizations, including labor unions, environmental groups, and women’s rights groups, in opposition to an Article V convention. Wertheimer is currently president of Democracy 21, a nonprofit “dedicated to making democracy work for all Americans.”

Add to this witches’ brew the furies of “the People” in our age of polarized politics, sometimes redolent of a civil war, the pistols barely holstered. “It’s hard to imagine a worse time to amend the Constitution than now. We are a nation of anger,” Georgetown’s David Super declared at a debate held in New York City in 2016, cosponsored by the National Constitution Center, on the question of holding an Article V convention.

Or perhaps a convention, in our era of reality-television-like politics, would be not so much a nightmare as a circus, a final proof for the world that twenty-first-century, decadent America has migrated so far from its founding promise as to have lost its senses. In Philadelphia 1787, there was, blessedly, no cable television and no Twitter. In a convention circa 2018, cameras undoubtedly would be everywhere, the selfie ubiquitous, the closed-door bargain, often a necessity for compromise, perhaps impossible to achieve.

An Act of Faith

The perils cannot be dismissed, but opponents of an Article V convention appear to be deliberately exaggerating them. For example, Common Cause’s “Dangerous Path” paper insists on labeling such a proceeding a “constitutional convention,” planting the notion that the intended purpose of a new convention is, Philadelphia-like, to craft an entirely new constitution. Hardly anyone, though, is calling for that. Moreover, the chances of a runaway convention are remote. Professor Lawrence Lessig of the Harvard Law School, an advocate of an Article V convention, sees the Supreme Court as a virtually insurmountable barrier to a fugitive proceeding. The Court would never permit delegates of a convention to abrogate the Constitution’s stated requirement for three-fourths of the states to ratify a proposed amendment, he told me in our talk in Cambridge late last year.

Just as it is possible to conjure worst-care scenarios, best-case scenarios can be thought of as well. An Article V convention would be of such magnitude that it might give the special-interest snakes less scope than usual for their nocturnal maneuvers. In the bright lights, delegates could discover the better angels of their natures or at least check at the gate their seamier inclinations. Madisons and Hamiltons might be in short supply, but contemporary America, of some 325 million, is hardly bereft of a delegate pool of intelligent, principled deliberators. The door would be open wide to a varied lot laboring to make the Union more perfect, as in blacks and women, Jews and declared atheists, none of whom could be found in Philadelphia. States, for once experiencing a moment in the national sun, might compete with each other in assembling delegations of their "best and brightest." Former president and ex-constitutional law professor Barack Obama, say, might represent Illinois; the president of Notre Dame, and an ordained Catholic priest, John Jenkins, Indiana; and the outgoing president of Harvard, and a renowned historian of America, Drew Gilpin Faust, Massachusetts.

Our political times are raucous, but to wait for tranquility for a convention is to wait possibly forever, and tranquility, which can breed sloth, is not necessarily a condition for a wise convention. It can be recalled that the delegates in Philadelphia gathered in an atmosphere of crisis, amid angst that the republic could not survive under the Articles of Confederation.

Whether the public at large can be persuaded that an Article V convention is worthy of serious consideration is a difficult question, given the slight notice, to date, paid to this possibility. In a straw poll taken of the audience attending the 2016 debate on this matter in New York, 44 percent said they were in favor of the motion to call an Article V convention, 43 percent against, and 13 percent undecided, this result reached after the arguments were heard.

Attitudes toward a convention are apt to divide along three dimensions. One is ideology. As can be seen in the progress towards a balanced-budget amendment, voices on the right, amplified on Fox News, are the most vigorous advocates of a convention. Still, there are supporters on the left, reproving of Congress as endemically unresponsive to progressive concerns and viewing a convention as the last, best hope for eradicating evils like the chokehold of big money over our politics. Revived attention to the Article V path as a states-centered technique for reforms is apiece with current liberal calls for a "new progressive federalism," a counterpart to the "new federalism" that has been an article of conservative faith since the dawn of the Reagan Revolution.

Elites and the masses are apt to cleave on the question of a convention, too. The dire warnings of an Article V convention as a road to ruin come overwhelmingly from elites, invested in the status quo. The inclination of elites generally is to look to the federal power for remedies for our political ills. The push for a convention, not surprisingly, is centered in "flyover country," with a venerable populist, anti-Washington tinge to the movement. National media outlets, which tend both to embody and reflect elite opinion, have predictably paid scant attention to the movement for an Article V convention.

Less obviously, attitudes are prone to divide on the axis of risk. Any procedure with such a thin record of experience in our democracy is apt to arouse the more risk-averse among us. Risk should be taken into account, but in so doing, it needs to be understood that while there is a risk to a convention under Article V, there also is an appreciable risk in doing nothing, of leaving the political situation to fester as it is.

Every act in a democracy entails an element of faith. The Gilded Age, the crucible for the most serious Article V convention movement in our history, was even more corrupt than our present time. And yet populists and progressives had faith that George Mason's wrinkle, this peculiar feature of the Constitution, offered a cure for a deeply felt grievance. Even though an actual convention proved unnecessary, a recalcitrant system responded to the people's demands, so rewarding their faith.

The convention mechanism is not a panacea for all that ails American politics. For example, given the stake that small states have in the Electoral College system, a fixture of the Constitution, state delegations assembled at a convention are unlikely to discard that system for election of the president by national popular vote, a reform many Americans favor.

Still, the idea of a convention of the states offers a jolt to our worn political habits. Sometimes it is best to turn to the radical, in the Latin sense of the term, a digging to the root, the base of things. Knowing not what the result might be, the framers invited us to be pioneers by bequeathing this path to the alteration of their work. We should take up the invitation.

This article originally appeared in American Affairs *Volume II, Number 2 (Summer 2018): 137–51.*

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