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AMENDING THE CONSTITUTION

AMENDING THE CONSTITUTION; How Hard It Is To Change

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ARTICLE V. The Congress ... propose Amendments to this Constitution, or ... shall call a Convention....

I WORKED HARD FOR MANY YEARS TO change the United States Constitution - and I failed. Like so many others, I wanted the Constitution to assert the principle of equal rights without regard to gender. I had high hopes for the equal rights amendment, but I knew from the beginning that a constitutional amendment is difficult to obtain. So I was not surprised when the measure failed.

I was disappointed at the defeat but no less glad that the Constitution is so hard to change. I appreciate even more deeply now the obstacles the framers of the Constitution put in the way of the amendment process. The reason is simple: even though my efforts were unsuccessful, and there is no E.R.A. in the Constitution, there is also no official school prayer amendment or anti-abortion amendment.

Article V of the Constitution - the amending article - plays no favorites. It disciplines even the most ardent proponents to its commands and occasionally turns opponents into allies. There is an irony of sorts, for instance, that Phyllis Schlafly, who did so much to stop the E.R.A., and I now find ourselves in agreement in opposing a constitutional convention that has lately been proposed to consider a balanced budget amendment. I'll get to our unlikely alliance a little later.

The makers of the Constitution wanted to create a firm basis for the exercise of governmental power. However, they were wise enough to know that if they made their document too rigid, if they wrote it so that it could not be revised to suit future times and events, they were inviting future revolution. They would be creating a situation in which the only method to effect change would be to cast aside the Constitution itself. As George Mason noted at the 1787 convention, changes would be necessary, and it would be "better to provide for them in an easy, regular and constitutional way than to trust to chance and violence."

So they made it open to change - but not open to change without great effort. James Madison was among those who warned against making things too easy. It was important, he said, to guard "against that extreme facility which would render the Constitution too mutable." For if it could be altered easily, the Constitution would be mere temporary law, not a document for the ages.

The great idea in Article V is that change requires two elements: consensus and necessity. There must be substantive national agreement, as well as agreement in most of the states, that an urgent problem exists that cannot be remedied by the courts, legislatures or Congress, and which can be solved only if the Constitution is changed.

THE PUBLIC EXPRESSION OF CONSENSUS and necessity that Article V requires can come to light in two ways.

In the first, an amendment may be proposed by a two-thirds vote in each house of Congress. The approved amendment then must be ratified by majority votes in the legislatures or conventions of three-fourths of the states before it can become part of the Constitution. The second way is that, if two-thirds of the states ask for a constitutional convention to consider amendments, Congress should be obliged to call one. Any changes such a convention passes must then be ratified by three-fourths of the states. This second path has, so far, gone untried in United States history: no constitutional convention, since the first one in 1787, has ever been called.

Meanwhile, the first route to constitutional amendments has been well traveled. Almost 10,000 of them have been proposed in the Congress since Article V became law. Only 26 have been ratified. Of these, the Bill of Rights, the 13th, 14th and 15th Amendments resulting from the Civil War, and the 19th, permitting women to vote, remedied major defects in the original document. Most of the others smoothed out procedural difficulties. One, Prohibition, was the result of an artificial consensus and was soon repealed.

Six other amendments have been approved by Congress but not ratified by the states. These include the E.R.A., an amendment to prohibit child labor and an amendment that would have given the District of Columbia a voting member of the House and two Senators. It is easy to see why so many amendments have been proposed in Congress.

For politicians, advocating solution by amendment is a convenient response to hot political problems. For instance, whenever the Supreme Court makes a widely publicized decision on a controversial issue, there are Congressional proposals to limit the power of the Justices. The legislator can thereby show concerned voters back home that action, however ineffectual, has been taken, something has been done.

It is clear that a strong effort to gain an amendment can influence government even when it fails. It acts as a brooding omnipresence in the sky, signaling to politicians that they must act. Some proposals that fail as amendments result in legislation. Proposed amendments reflecting public opposition to busing for desegregation purposes led to a 1972 education law restricting Federal involvement in busing. More recently, official school prayer amendment proposals led to the passage of the Equal Access Act of 1984, which provides that religious activities may not be excluded from among any extracurricular activities allowed on a public school's premises. Instead of passing an amendment requiring the balancing of the Federal budget, Congress in 1985 tried the expedient of enacting the Gramm-Rudman-Hollings Act to achieve a balanced budget in stages. In each of these cases, the

stringent requirements for ratification of an amendment have prevented changing the Constitution. But politicians who needed to do so could show constituents that they were responding to their concerns.

In the case of an amendment calling for a balanced budget, however, apprehensions about the Federal deficit have created a feeling of necessity that may not be satisfied by legislation. The issue may well bring about the first constitutional convention since 1787. Already, 32 states (only two fewer than required) have called for a convention to consider a budget-balancing amendment, and President Reagan supports the idea. Proponents of the convention say it would be a fast, easy assembly that would simply meet, adopt an amendment, send it to the states to ratify, and then go home.

Those who oppose the convention, including myself, are not sure. Ordinarily disparate forces such as Phyllis Schlafly's Eagle Forum, the National Organization for Women, the American Civil Liberties Union and the John Birch Society are all opposed, because they fear the convention has the potential of putting the Constitution at risk.

The fact is, nothing in the language of Article V limits the subjects to be considered at a constitutional convention, nothing establishes rules of procedure to be followed or precludes scrapping the entire Constitution. The sole convention we have had, in 1787, was called only for the purpose of amending our first constitution, the Articles of Confederation. But the Founding Fathers discarded the Articles altogether and drafted a new document. They even modified the ratification procedure to insure success. That could happen again.

The purpose of Article V's convention provision is to make it possible for amendments to be proposed that Congress does not want proposed, and it would be illogical indeed to assume that Congress could bind a convention's agenda. Even if the Congress decided to call a convention for the sole purpose of proposing amendments to balance the budget, and even if the convention agreed to this overall goal, the gathering would still have great freedom. The participants might decide that Congressional budgetary authority should be limited to support for the national defense. They could delete support for the general welfare from the Constitution, thus precluding such items as Social Security, Medicaid and Medicare. They could decide to amend Congressional power to regulate commerce, which now allows for such activities as environmental regulation, labor regulation and antitrust enforcement. This would, after all, abolish a whole series of Federal agencies and decrease the budget.

BUT IF THE PARTICIPANTS DECIDED TO IGNORE any instructions controlling their agenda - and who could stop them - they could decide to ban abortion and void the First Amendment, require the government to provide jobs, housing and education for all Americans, or any other proposal that gained approval by whatever majority they decided to require. Any proposals that gained ratification by three-fourths of the states would become part of the nation's fundamental law. However, the convention might decide, as the original convention did, to change the mode of ratification, perhaps to require only a simple majority of the states. Given this very real possibility for wide-ranging action and unprecedented mischief, the pertinent question is not whether we want a constitutional convention to require a balanced budget, but whether we want to risk a convention at all.

I AM TEMPTED BY THE ARGUMENT THAT BELIEVERS in pure democracy and majoritarian rule ought to favor a convention in order to let the people reign and make whatever decisions they choose. However, the Founding Fathers created not pure democracy, but a republican form of government in which the people govern through their representatives and with checks and balances, including a check on the majority's impulses.

I am reminded in my service on the United States Commission on Civil Rights, whenever issues such as voting rights or affirmative action come before us, of how dangerous it would be to define civil rights by the will of an administration elected by a political majority. In our system of government, the rights of all, liberals and conservatives, people of all races and both sexes, the majority and minority groups, are accorded constitutional protection.

The amendment process set up in Article V allows our government to adapt itself to social change. At the same time, it gives us a check against beliefs that may be strongly held but are not widely approved. Because our Constitution can be amended, we can repair tears in our social fabric and try different strategies and tactics to resolve problems. Because our Constitution cannot be amended easily, we can preserve the stability and continuity that lasting republican government requires.

Photo of Declaration of Independence and Constitution at National Archives (Peter Aaron/Esto); Chicagoans celebrating end of Prohibition, Dec. 5, 1933 (Frederic Lewis) (pg. 96); anti-abortion protestor at Supreme Court (Jeff Jacobsen/Arhive) (pg. 98)
