"Great and Extraordinary Occasions"

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The Constitution Project

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"Great and Extraordinary Occasions"

Developing Guidelines *for* Constitutional Change

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PREFACE

The nation's Founders purposely wrote a Constitution that would be difficult to amend. They believed that our nation had to be based on a stable constitutional structure that would create respect for the rule of law, and thus foresaw a limited need for amendments. James Madison, in *The Federalist* No. 49, argued that the U.S. Constitution should be amended only on "great and extraordinary occasions." And indeed, this nation has followed his advice, proceeding with extreme caution in altering its founding charter. Since the ratification of the U.S. Constitution and Bill of Rights over two hundred years ago, only seventeen proposed amendments have received the necessary congressional supermajorities and been ratified by three-fourths of the states, thus making them a part of our Constitution.

In recent years, however, there has been an explosion in the number of proposed constitutional amendments on almost every conceivable topic. Amendment proposals now often seem to be the favored first-step panacea for all societal ills. These proposals frequently deal with matters of social policy that are more appropriately the subject of legislation than of constitutional amendment. In the 105th Congress alone, nine amendments—on flag desecration, a balanced budget, term limits, tax increases, facilitation of state-proposed constitutional amendments, victims' rights, religious equality, the electoral college, and campaign finance—received subcommittee, committee, or floor consideration. The 106th Congress promises more of the same.

In contrast to the fundamentally conservative approach envisioned by the Founders, the current spate of constitutional amendments seems to stem from the unfounded notion that the Constitution is an obstacle to the current public interest and that our most vexing

problems can be solved easily by changing the principles that have guided the nation for more than two hundred years. Our Constitution is durable precisely because it sets up a delicately balanced system, based upon enduring principles, for governing a complex and diverse country. While briefer than that of any other country's charter, it permits us a wide range of policy choices, leaving it to us, as members of a democratic republic, to debate and judge the wisdom of opposing ideas and to offer solutions that meet our present needs without locking us into a policy choice for all time. And yet, the Constitution has also been an effective constraint on the exercise of government power, enabling a wise people to pursue the wishes of the majority while still holding essential individual liberties sacred. Experience demonstrates that a constitution cannot solve all societal ills, and that "we the people" must tackle these issues head-on. Those who fail to make hard but necessary legislative choices and instead falsely imply to the American people that constitutional amendments will solve our country's problems only increase the public cynicism that is often the real obstacle to solving these problems.

Citizens for the Constitution, an initiative of The Century Foundation's Constitution Project, is an action-oriented public education effort. Its members comprise a bipartisan blue-ribbon committee of former public officials, scholars, journalists, and other prominent Americans. Two distinguished Americans of very different political views chair the project: the Honorable Mickey Edwards, John Quincy Adams Lecturer in Legislative Politics, John F. Kennedy School of Government, Harvard University; former Member of Congress (R-OK); and former Chair, House of Representatives Republican Policy Committee; and the Honorable Abner Mikva, Distinguished Visiting Professor of Law, University of Illinois College of Law; Senior Fellow, Institute of Government and Public Affairs; former Member of Congress (D-IL); former Chief Judge, U.S. Court of Appeals for the D.C. Circuit; and former White House Counsel, Clinton administration. A renowned constitutional scholar, Professor Louis Michael Seidman of Georgetown University Law Center, serves as legal advisor.

The Century Foundation established Citizens for the Constitution as part of its Constitution Project, the goal of which is to promote public education on controversies with significant legal and social

justice implications. The Constitution Project seeks long-term consensus on the roots of these controversies and on the best way to address and defuse them.

"Great and Extraordinary Occasions": Developing Guidelines for Constitutional Change is the seminal work of Citizens for the Constitution. Members of Citizens for the Constitution do not believe that our Constitution is a static document that should never be amended. However, no matter what our individual views about the merits of a particular amendment, we are united in the conviction that the Constitution should be amended only with the utmost care, and in a manner consistent with the spirit and meaning of the entire document.

VIRGINIA E. SLOAN

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Introduction

When the Constitution's framers met in Philadelphia, they decided to steer a middle course between establishing a constitution that was so fluid as to provide no protection against the vicissitudes of ordinary politics and one that was so rigid as to provide no mechanism for orderly change. An important part of the compromise they fashioned was embodied in Article V.

The old Articles of Confederation could not be amended without the consent of every state—a system that was widely recognized as impractical, producing stalemate and division. Accordingly, Article V provided for somewhat greater flexibility: the new Constitution could be amended by a proposal adopted by two-thirds of both Houses of Congress or by a convention called by two-thirds of the states, followed in each case by approval of three-fourths of the states.[1]

In the ratification debate that ensued, Article V played an important role. The new, more flexible amendment process served to reassure potential opponents who favored adding a bill of rights, or who worried more generally that the document might ultimately prove deficient in unanticipated ways. It also reassured the Constitution's supporters by making it more unlikely that a second constitutional convention would be called to undo the work of the first.

Precisely because the legal constraints on the amendment process had been loosened somewhat from those contained in the old Articles, many of the framers also believed that the legal constraints should be supplemented by self-restraint. Although the new system made it legally possible to change our foundational document even when there was opposition, the framers believed that even dominant majorities should

hesitate before using this power. 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 extraordinary occasions."

For the first two centuries of our history, this reliance on self-restraint has functioned well. Although more than 11,000 proposed constitutional amendments have been introduced in Congress, only thirty-three received the requisite congressional supermajorities, and only twenty-seven have been ratified by the states. The most significant of these amendments, accounting for half of the total, were proposed during two extraordinary periods in American history—the period of the original framing, which produced the Bill of Rights,[2] and the Civil War period, which produced the Reconstruction amendments. Aside from these amendments, the Constitution has been changed only thirteen times.

Most of these thirteen amendments either expanded the franchise or addressed issues relating to presidential tenure. Only four amendments have overturned decisions of the Supreme Court, and the only amendments not falling within these categories—the Prohibition amendments—also provide the only example of the repeal of a previously enacted amendment.[3]

In recent years, however, there have been troubling indications that this system of self-restraint may be breaking down. To be sure, no newly proposed amendment has been adopted since 1971. Nonetheless, there has been a sudden rash of proposed amendments that have moved further along in the process than ever before and that, if enacted, would revise fundamental principles of governance such as free speech and religious liberty, the criminal justice protections contained in the Bill of Rights, and the methods by which Congress exercises the power of the purse. Within the past few years, six proposed constitutional amendments—concerning a balanced budget, term limits, flag desecration, campaign finance, religious freedom, and procedures for imposing new taxes—have reached the floor of the Senate, the House, or both bodies. Two of these—the balanced budget amendment and the flag desecration amendment—passed the House, and a version of the balanced budget amendment twice failed to win Senate passage by a single vote. Still other, sweeping new amendments—including a "victims' rights" amendment, an amendment redefining United States citizenship, and even an amendment

to ease the requirements for future amendments—have considerable political support.

There are many explanations for this new interest in amending the Constitution. Some Republicans, in control of both Houses of Congress for the first time in several generations, want to seize the opportunity to implement changes that many of them have long favored. Some Democrats, frustrated by a political system they view as fundamentally corrupted by large campaign contributions, want to revisit the relationship between money and speech. Some members of both parties have blamed what they consider to be the Supreme Court's judicial activism for effectively revising the Constitution, thereby necessitating resort to the amendment process to restore the document's original meaning.[4] There may well be merit to each of these views. Unfortunately, however, very little attention has been devoted to the wisdom of engaging in constitutional change, even to advance popular and legitimate policy outcomes. We believe that the plethora of proposed amendments strongly suggests that the principle of self-restraint that has marked our amending practices for the past two centuries may be in danger of being forgotten.

There are several good reasons for attempting to reaffirm this self-restraint.

- Restraint is important because constitutional amendments bind not only our own generation but future generations as well. Constitutional amendments may entrench policies or practices that seem wise now, but that end up not working in practice or that reflect values that cease to be widely shared. Contested policy questions should generally be subject to reexamination in light of the experience and knowledge available to future generations. Enshrining a particular answer to these questions in the Constitution obstructs that opportunity. Our experience with three previously proposed amendments, one that was adopted and later repealed, and two others that moved far along in the process but were not adopted, serve to illustrate these points:

  First, when the Prohibition Amendment was adopted in 1919, many Americans thought that it embodied sensible social policy. Yet within a short time, there was broad agreement that the experiment had failed, in part because enforcing it proved enormously expensive in terms of dollars and social cost. Had Prohibition advocates been content to implement their policy by

legislation, those laws could have been readily modified or repealed when the problems became apparent. Instead, the country had to undergo the arduous and time-consuming process of amending the Constitution to undo the first change. This is an experience we should be eager not to repeat.

The second example might have had far more serious consequences. On the eve of the Civil War, both Houses of Congress adopted an amendment that would have guaranteed the property interest of slaveholders in their slaves and would have forever prohibited repeal of the amendment. Fortunately, the proposed amendment was overtaken by events and never ratified by the states. Had it become law, the result would have been a constitutional calamity.

Finally, in our own time, there is the failed effort to add to the Constitution an equal rights amendment, prohibiting denial or abridgment of rights on account of sex. Within three months of congressional passage in 1972, twenty states had ratified the amendment. Thereafter, the process slowed, and even though Congress extended the deadline, supporters ultimately fell short of the three-fourths of the states necessary for ratification. The struggle for and against ratification produced much dissension and consumed a great deal of political energy. Yet today, even some of the amendment's former supporters would concede that it may not have been necessary. Moreover, the amendment would have added to the Constitution a controversial and broadly worded provision of uncertain and contested meaning, with the Supreme Court given the unenviable job of providing it content. Instead of years of judicial wrangling concerning its application, we have seen Congress pass ordinary legislation, and the Court engage in the familiar process of explicating existing constitutional and statutory text, to achieve many of the goals of the amendment's proponents. This process has been more sensitive and flexible, while also less contentious and divisive, than what we could have expected had the amendment become law.

- Restraint is also important in order to preserve the Constitution as a symbol of our nation's democratic system and of its cherished diversity. In a pluralistic democracy, in which people have many different religious faiths and divergent political views, maintaining this symbol is of central importance. The

Constitution's unifying force would be destroyed if it came to be seen as embodying the views of any temporarily dominant group. It would be a cardinal mistake to amend the Constitution so as to effectively "read out" of our foundational charter any segment of our society.

- The Constitution's symbolic significance might also be damaged if it were changed to add the detailed specificity of an ordinary statute in order to control political outcomes. The Constitution's brevity and generality serve to differentiate it from ordinary law and so allow groups that disagree about what ordinary law should be to coalesce around the broad principles it embodies.

- Finally, restraint is necessary because proposed amendments to the Constitution often put on the table fundamental issues about our character as a nation, thereby bringing to the fore the most divisive questions on the political agenda. Two centuries ago, James Madison warned of the "danger of disturbing the public tranquility by interesting too strongly the public passions" through proposed constitutional change. It is not only wrong to trivialize the Constitution by cluttering it with measures embodying no more than ordinary policy; it is also a mistake to reopen basic questions of governance lightly. Occasional debates about fundamental matters can be cleansing and edifying, but no country can afford to argue about these issues continuously. Our ability to function as a pluralistic democracy depends upon putting ultimate issues to one side for much of the time, so as to focus on the quotidian questions of ordinary politics. As Madison argued shortly after the Constitution's drafting, changes in basic constitutional structure are "experiments . . . of too ticklish a nature to be unnecessarily multiplied."

None of this is to suggest that the Constitution should never be amended or that its basic structural outlines are above criticism. There have been times in our history when arguments for restraint have been counterbalanced by the compelling need for reform. Some individuals may believe that this is such a time, at least with regard to particular issues, and if they do, there is nothing illegitimate about urging constitutional change.

Some constitutional amendments are designed to remedy perceived judicial misinterpretations of the Constitution. Some earlier amendments—for example, the Eleventh Amendment establishing state sovereign immunity and the Sixteenth Amendment authorizing an income tax—fall into this category. There is nothing *per se* illegitimate about amendments of this sort, although here, as elsewhere, their supporters need to think carefully about the precise legal effect of the amendment in question and about how it will interact with other, well-established principles of constitutional law.

More generally, advocates of amendments of any kind should focus not only on the desirability of the proposed change, but also on the costs imposed by attempts to achieve that change through the amendment process as contrasted with other alternatives. 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.[5]

Instead, our hope is that the Guidelines will draw attention to some aspects of the amending process that have been ignored too frequently, will provoke discussion of when resort to the amending process is appropriate, and will suggest an approach that ensures that all relevant concerns are fully debated. At the very moment when this country was about to embark on the violent overthrow of a prior, unjust constitutional order, even Thomas Jefferson, more friendly to constitutional amendments than many of the founders, warned that "governments long established should not be changed for light and transient causes." In the calmer times in which we live, there is all the more reason to insist on something more before overturning a constitutional order that has functioned effectively for the past two centuries. The Guidelines that follow attempt to raise questions about whether such causes exist and how we should respond to them.

Guidelines for Constitutional Amendments

1. **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?**

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

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

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

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

6. **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?**

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

8. **Has Congress provided for a nonextendable 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?**

Commentary on the Guidelines

The following commentary explains each of the Guidelines and illustrates how each might be applied in the context of some previous and pending proposals for constitutional amendment. It is significant that the Guidelines are written in the form of questions to think about, rather than commands to be obeyed. The Guidelines alone cannot determine whether any amendments should be adopted or rejected. Instead, most of the Guidelines are designed to raise concerns that those considering amendments might want to weigh against the perceived desirability of the changes embodied in the amendments. The last three Guidelines—concerning the need to articulate consequences, the fairness of the procedure, and the requirement of a nonextendable deadline—are in a somewhat different category. Although each of the other concerns might be overcome if one were sufficiently committed to the merits of a proposed amendment, it is hard to imagine the circumstances under which adopting an amendment would be appropriate without an articulation of its consequences, a full and fair debate, and measures designed to assure that it reflects a contemporary consensus.

1. 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?

James Madison, one of the principal architects of Article V, cautioned against making the Constitution "too mutable" by making constitutional amendment too easy. Hence his insistence that any constitutional amendment command not only majority, but supermajority, support. Implicit in Madison's caution is the view that stability is a key virtue of our Constitution and that excessive "mutability" would

undercut one of the main reasons for having a constitution in the first place. As Chief Justice John Marshall observed in *McCulloch v. Maryland,* the Constitution was "intended to endure for ages to come." Similarly, in his prophetic dissent in *Lochner v. New York,* Justice Oliver Wendell Holmes cautioned that the Constitution ought not be read to "embody a particular economic theory" that might be fashionable in a particular generation. It is crucial to our constitutional enterprise to preserve public confidence—over succeeding generations—in the stability of the basic constitutional structure.

Thus, the Constitution should not be amended solely on the basis of short-term political considerations. Of course, no one can be certain whether future generations will come to see a policy as merely evanescent or as truly fundamental. Still, legislators have an obligation to do their best to avoid amendments that are no more than part of a momentary political bargain, likely to become obsolete as the social and political premises underlying their passage wither or collapse.

To be enduring, constitutional amendments should usually be cast, like the Constitution itself, in general terms. Both powers and rights are set forth in our basic document in broad and open-ended language. To quote Marshall in *McCulloch* again, an enduring Constitution "requires that only its great outlines should be marked," with its "minor ingredients" determined later through judicial interpretation in each succeeding generation. Of course, sometimes specificity will be necessary, as in changing the date of the presidential inauguration. But in general, the nature of our Constitution is violated if amendments are too specific in the sense that they reflect only the immediate concerns of one generation, or if they set forth specifics more appropriate in an implementing statute.

To illustrate this point, contrast the experience of the state constitutions with our sparse tradition of federal constitutional amendments. While the federal Constitution has been amended only twenty-seven times in more than two hundred years, the fifty state constitutions have had a total in excess of six thousand amendments added to them.[6] Many are the products of interest group politics and are characteristic of ordinary legislation. State constitutions thus suffer from what Marshall called "the prolixity of a legal code"—a vice he praised the federal Constitution for avoiding.[7]

Even when amendments are not overly detailed, they may be inappropriate because they focus on matters of only short-term concern. For example, consider various proposals that seek to carve specific new

exceptions out of the broad concept of freedom of speech set forth in the First Amendment. The proposed flag desecration amendment would rewrite the Constitution to say that while the government generally may not prohibit speech based on dislike of its message, it may do so in the case of flag desecraters. The proposed campaign finance amendment would alter the First Amendment to say that the quantity of speech may never be diminished—except in modern election campaigns.

Each of these amendments is a response to contemporary political pressures. Future generations, like Americans today, can easily perceive the broad purposes and enduring legacies underlying the majestic generalities of our original guarantee of freedom of speech: the quest for truth, for self-government, and for individual liberty. But future generations may not understand, let alone revere, the motivations behind a flag desecration or campaign finance amendment. Such particularized amendments may instead be perceived as the political victory of one faction in a particular historical moment. Flag desecration is not an immortal form of political protest; we cannot know whether political dissidents will have the slightest interest in this gesture generations from now. Similarly, the campaign tactics used by candidates today might change in ways that we cannot now imagine as we enter an age of instantaneous global communication over new electronic and digital media. Thus, there may be legitimate questions about the enduring nature of the perceived problem, as well as about the proposed solution.

In general, we should not embed in the Constitution one generation's highly particular response to problems that a later generation might view as ephemeral. To add such transient amendments to the Constitution trivializes and undermines popular respect for a document that was intended to endure for the ages.

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

Of the twenty-seven amendments to the Constitution, seventeen either protect the rights of vulnerable individuals or extend the franchise to new groups. With the notable exception of the failed Prohibition Amendment, none of the amendments simply entrenches a substantive policy favored by a current majority.

There are good reasons for this overwhelming emphasis either on individual rights or on democratic participation. In a constitutional

democracy, most policy questions should be decided by elected officials, responsible to the people who will be affected by the policies in question. It follows that the Constitution's main thrust should be to ensure that our political system is more, rather than less, democratic. Many amendments serve this function. For example, the Fifteenth, Seventeenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments all broaden the franchise.

Of course, the Constitution is also designed to shield vulnerable individuals from majority domination, whether temporary or permanent. Hence, many amendments guarantee minority rights. For example, the First Amendment protects the rights of religious and political minorities; the Fifth Amendment protects the rights of property holders whose property might be seized by legislative majorities without compensation or due process; the Fourth, Fifth, Sixth, and Eighth Amendments all protect the rights of criminal defendants, who were deemed especially vulnerable to majority hatred and overreaching; and the Thirteenth, Fourteenth, and Fifteenth Amendments were all motivated by the desire to protect former slaves.

There is an obvious tension between the twin goals of majority rule and protection for individuals, and this Guideline does not seek to resolve it. On some occasions, it is important to provide constitutional guarantees for individuals against government overreaching; yet on others, it is equally important to allow majorities to have their way. Although the protection of individual rights is a central aim of the Constitution, it is not the only aim, and it is emphatically not true that every group that comprises less than a majority is entitled to constitutional protection because of its minority status.

One need not determine when majority rule should trump minority rights to see the problem with amendments that do no more than entrench majority preferences against future change. Amendments of this sort can be justified by neither majoritarianism nor a commitment to individual rights. On the one hand, they restrict the scope of democratic participation by future generations. On the other, they entrench the will of a current majority as against minority dissenters.

Amendments of this sort should not be confused with power-granting amendments. To make possible ordinary legislation, favored by a current majority, it is sometimes necessary to enact amendments that eliminate constitutional barriers to its passage. For example, the Sixteenth Amendment eliminated a constitutional obstacle to the enactment of a federal income tax, and the Fourteenth Amendment

eliminated federalism objections to civil rights legislation. Such amendments may be legitimate when they widen the scope of democratic participation, although, as noted above, they may also raise difficult issues regarding the appropriate trade-off between majority control and minority rights.

In contrast, amendments that merely entrench majority social or economic preferences against future change make the system less rather than more democratic. They narrow the space for future democratic deliberation and sometimes trammel the rights of vulnerable individuals. It is a perversion of the Constitution's great purposes to use the amendment process as a substitute for ordinary legislative processes that are fully available to groups proposing popular changes and will be equally available to future majorities that may take a different view.

This Guideline raises important questions concerning a number of proposed constitutional amendments. Consider first the victims' rights amendment, which would grant a number of rights in the trial process to the victims of crime. Congress should ask whether crime victims are a "discrete and insular minority" requiring constitutional protection against overreaching majorities or whether they can be protected through ordinary political means. Congress should also ask whether it is appropriate to create rights for them that are virtually immune from future revision.

The balanced budget amendment poses a close question under this Guideline. On the one hand, the amendment can be defended as democracy-enhancing by protecting the interests of future generations, or by counterbalancing the power of narrow interest groups that have succeeded in gaining a disproportionate share of the public fisc for themselves. On the other hand, these gains are achieved at the cost of dramatically shrinking the area of democratic participation. Discussions of economic theory and the size of the federal budget deficit are central to democratic politics. Americans' views concerning the propriety of deficit financing have changed dramatically over time, and there is no reason to think that this evolutionary process has come to a sudden end. Locking in a currently popular position against future change, including perhaps turning the problem of remedies over to unelected federal judges, would significantly alter the democratic thrust of the Constitution and obstruct the ability of future generations to make their own economic judgments.

Finally, consider the flag desecration amendment. In form, the amendment is power granting: it opens previously closed space for democratic decisionmaking without requiring any particular result. In general, such power-granting amendments pose no problems under this Guideline. Yet the flag desecration amendment grants power at the behest of an already dominant majority and at the expense of an extremely unpopular and utterly powerless minority. True, current constitutional doctrine prevents the majority from working its will with regard to one particular matter—the criminalization of flag desecration. But the majority on this issue has considerable power and is hardly disabled from expressing its views in a wide variety of other fora. Granting to the majority the power to prohibit an overwhelmingly unpopular form of expression may serve to entrench currently popular views, at the expense of an unpopular minority, without providing any real gains in terms of democratic participation.

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

The force of the Constitution depends on our ability to see it as something that stands above and outside of day-to-day politics. The very idea of a constitution turns on the separation of the legal and the political realms. The Constitution sets up the framework of government. It also sets forth fundamental political ideals—equality, representation, and individual liberties—that limit the actions of a temporary majority. This is our higher law. All the rest is left to day-to-day politics. Those who lose in the short run of ordinary politics obey the winners out of respect for the long-run rules and boundaries set forth in the Constitution. Without such respect for the constitutional framework, the peaceful operation of ordinary politics would degenerate into fractious war.

Accordingly, the Constitution should not be amended to solve problems that can be addressed through other means, including federal or state legislation or state constitutional amendments. An amendment that is perceived as a surrogate for ordinary legislation or executive action breaks down the boundary between law and politics that is so important to maintaining broad respect for the Constitution. The more the Constitution is filled with specific directives, the more it resembles ordinary legislation. And the more the Constitution looks

like ordinary legislation, the less it looks like a fundamental charter of government, and the less people will respect it.

A second reason for forgoing constitutional amendments when their objectives can be otherwise achieved is the greater flexibility that political solutions have to respond to changing circumstances over time.[8] Amendments that embody a specific and perhaps controversial social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be more easily revisable by future generations in light of their own circumstances. Such amendments convert the Constitution from a framework for governing into a statement of contemporary public policy.

For these reasons, advocates of a constitutional amendment should consider whether they have exhausted every other means of political redress before they seek to solve a problem by amending the Constitution. If other action under our existing constitutional framework is capable of achieving an objective, then writing that objective into the Constitution is unnecessary and will clutter that basic document, reducing popular respect. One might wonder why anyone would resort to the difficult and time-consuming effort to secure a constitutional amendment if the same goals could be accomplished by ordinary political means. Unfortunately, some now believe that a legislator is not serious about a proposal unless he or she is willing to amend the Constitution. Experience has also demonstrated that the amendment process (and even the mere sponsorship of an amendment, if the sponsor suspects that actual passage is unlikely) can be a tempting way to make symbolic or political points or to prevent future change in policy despite the availability of nonconstitutional means to achieve current public policy objectives.

For example, our experience with the failed equal rights amendment suggests the virtues of using ordinary political means to effect desired change. Today, many of the objectives of the amendment's proponents have been achieved without resort to the divisive and unnecessary amendment process.

The proposed victims' rights amendment raises troubling questions under this Guideline. Witnesses testifying in Congress on behalf of the federal amendment point to the success of state amendments as reason to enact a federal counterpart. But the passage of the state amendments arguably cuts just the other way: for the most part, states are capable of changing their own law of criminal procedure in order to accommodate crime victims, without the necessity of federal

constitutional intervention. While state amendments cannot affect victims' rights in federal courts, Congress has considerable power to furnish such protections through ordinary legislation. Indeed, it did so in March 1997 with Public Law 105-6 (codified as 18 U.S.C. §3510), which allowed the victims of the Oklahoma City bombing to attend trial proceedings. If this generation's political process is capable of solving a problem one way, then future generations' political processes should be free to adjust that solution over time without the rigid constraints of a constitutional amendment.

This Guideline does not caution against resort to constitutional change when there are significant legal or practical obstacles to ordinary legislation. Consider in this regard the proposed flag desecration amendment. After the Supreme Court invalidated a state statute prohibiting flag desecration, Congress responded by attempting to draft a federal statute that proscribed desecration without violating the Court's interpretation of the First Amendment. This effort to exhaust nonconstitutional means is precisely the course of conduct this Guideline recommends. Now that the Supreme Court has also invalidated the federal statute, use of the amendment process in this context would fully comport with this Guideline unless a different statute could be devised that would pass constitutional muster.

Closer questions arise when there are practical rather than legal obstacles to ordinary legislation. The balanced budget amendment provides an interesting example. On the one hand, experience prior to 1997 suggested that there might have been insurmountable practical difficulties in dealing with budgetary problems through ordinary legislation, that interest group politics would inevitably stymie efforts to cut expenditures through the ordinary budget process, and that perhaps interest group politics could be transcended only by use of a general, constitutional standard. To the extent that this was true, utilization of the constitutional amendment process might well have been justified under this Guideline.

On the other hand, a constitutional amendment is a far cruder instrument than is congressional or presidential action to address the issue of federal spending, for it lacks the flexibility to permit tailoring fiscal policy to the nation's changing economic needs. There are no formal legal barriers to solving the problem through existing legislative and executive means, and recent success in achieving budgetary balance suggests that it is sometimes a mistake to overestimate the practical obstacles to change. This example counsels caution before resort to the amendment process in any context.

In any event, advocates of constitutional change should be certain that they have exhausted other means before resorting to the amendment process. Our history counsels that the federal Constitution should continue to be altered sparingly and only as a last resort. Only amendments that are absolutely necessary should be proposed and enacted. And amendments are not necessary when there are no legal or practical barriers to pursuing solutions to problems through existing political means.

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

Because the Constitution gains much of its force from its cohesiveness as a whole, it is vital to ask whether an amendment would be consistent with constitutional doctrine that it would leave untouched. Does the amendment create an anomaly in the law? Such an anomaly is especially likely to occur when the proposed amendment is offered to overrule a Supreme Court decision, although the danger exists in other circumstances as well.

To be sure, every amendment changes constitutional doctrine. That is, after all, the function amendments serve. A difficulty occurs only when the change has the unintended consequence of failing to mesh with aspects of constitutional doctrine that remain unchanged.

This problem does not arise when whole areas of constitutional law are reformulated. For example, the Sixteenth Amendment, permitting Congress to enact an income tax, was necessitated by the Court's ruling in *Pollock v. Farmers Loan & Trust Co.* that a specific limitation on the taxing power in the Constitution precluded a tax on income. That provision was grounded in our history as colonies and in concerns among slaveholding states that the federal government would impose a "direct tax" on slaves. With passage of the Thirteenth Amendment, ending slavery, the tax limitation itself became anomalous, and a constitutional amendment was deemed necessary to remove the anomaly. The Sixteenth Amendment reflected a repudiation of the original decision of the framers in light of changed circumstances, which is precisely the kind of broad change in policy for which the amendment process was designed.

It does not follow, however, that an amendment must always overrule an entire body of law in order to comport with this Guideline. Although the *Dred Scott* decision, which struck down the

federal government's attempts to restrict slavery, was embedded in the law of property, Congress did not revisit all of property law when it enacted the Thirteenth Amendment, and its failure to do so in no way damaged the coherence of constitutional doctrine.

In contrast, some proposed amendments make changes that are difficult to reconcile with underlying legal doctrine that the amendments leave undisturbed. This problem arises most often when framers of amendments focus narrowly on specific outcomes without also thinking more broadly about general legal principles.

The proposed flag desecration and campaign finance amendments illustrate this difficulty. The Supreme Court's flag desecration decisions, although commanding only five-to-four majorities, were consistent with several lines of the Court's well-established First Amendment decisions. In those cases, the Court had recognized both that some forms of conduct are primarily symbolic speech, and hence are entitled to full First Amendment protection, and that laws designed to suppress a particular point of view are almost never permissible, especially when the speech is a form of protest against the very government that is seeking to prohibit the activity.

If an amendment were enacted to permit the government to criminalize flag desecration, it would create the first exception to the First Amendment by specifically allowing government to censor only one type of message—one that expressed an antigovernment point of view.[9] This result is difficult to reconcile with other principles that the amendment's drafters would apparently leave intact. One wonders, for example, whether the amendment would permit legislation outlawing only those flag burnings intended as a protest against incumbent officeholders.

Similarly, the campaign finance amendment presents at least two sets of anomalies in First Amendment jurisprudence. The amendment would overrule that portion of *Buckley v. Valeo* that struck down a limitation on the amount of money that candidates for elected office can spend, either from lawfully raised contributions or from their own personal funds.[10] The theory of the *Buckley* decision is that money is the means by which candidates amplify their messages to the electorate and that placing limits on spending is equivalent to a limit on speech, which violates the First Amendment, particularly in the context of an election.

The proposed amendment would allow Congress and the states to set limits on the amount a candidate could spend on elections, but

would not alter the law regarding governmental attempts to control the amounts spent on other types of speech. If the amendment were narrowly construed to apply only to express advocacy for or against a candidate, it would have the effect of shifting money to issue advocacy, which is often not so subtly designed to achieve the same ends—election of a particular candidate. For example, the advertisements against cuts in Medicare and Social Security in the 1996 campaign were plainly efforts to aid Democratic candidates, and those against certain abortion procedures were intended to aid Republican candidates. On the other hand, if the amendment were broadly construed, it would have the anomalous effect of placing a greater limit on speech in the context of elections than in the context of commercial products or cultural matters, a result that is difficult to square with the core notion of what the First Amendment is intended to protect.

One of the underlying reasons for the result in *Buckley* is the fear that statutory spending limits would be set by incumbents, who would make those limits so low that challengers would, as a practical matter, be unable to succeed. But the amendment would allow legislatures to set "reasonable" spending limits. The Court would therefore find itself in the anomalous and unenviable position of deciding whether the amounts chosen by incumbents, or perhaps by state ballot initiatives, met the new constitutional standard, instead of doing what it does in all other First Amendment cases: forbidding the government from setting any limits on the amount of speech, whether reasonable or not.

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

The United States Constitution is not a theoretical enterprise. It is a legal document that spells out a coherent approach to government power and processes while also guaranteeing our most fundamental rights. More than two centuries of experience underscore the wisdom of continuing that approach. The addition of purely aspirational statements, designed solely for symbolic effect, would lead interest groups to attempt to write their own special concerns into the Constitution.

It follows that advocates of amendments should think carefully about how the amendments will be enforced. In *Common Sense*, Thomas Paine expressed the revolutionary notion that was the founding

wisdom of our nation: in America, "the law is King." Everyone, regardless of social station or political rank, must follow the law. A provision susceptible of being ignored because no one can require its observance permits the kind of executive or legislative lawlessness that our founders wished to prevent. A provision that may be willfully ignored when those charged with observing it find the result inconvenient or undesirable undermines the rule of law, the government's own legitimacy, and the Constitution's special stature in our society.

The proposals for a balanced budget amendment illustrate the need to think carefully about means of enforcement. The amendment itself does not specifically set forth the means by which it would be enforced. A Congress that has had difficulty reaching a balanced budget without a constitutional amendment might have similar difficulties if it was not subject to a judicial or presidential check. Without such a check, a balanced budget amendment might be nothing more than an aspirational standard.

Of course, most existing constitutional amendments are also silent regarding the means of enforcement. Since *Marbury v. Madison,* however, there has been a presumption that judicial enforcement will generally be available. If its proponents intend and the courts find the balanced budget amendment to be similarly enforceable, it raises no issues under this Guideline. But it is not clear that the proponents so intend. Granting to courts the right to determine when outlays exceed receipts and to devise the appropriate remedy for such a constitutional violation would arguably constitute an unprecedented expansion of judicial power. If proponents of the amendment do not intend these consequences, there is a risk that the amendment will be purely aspirational or that it will be enforced in ways they might find objectionable.

Questions also arise about other means of enforcement. Could the President refuse to spend money in order to remedy a looming unconstitutional deficit? The practice, known as impoundment, is generally thought to be unavailable to the President unless specifically authorized by Congress. However, an official from the Department of Justice testified in hearings before the Senate Judiciary Committee that, if the amendment were enacted, the President would be duty-bound to impound money or take other appropriate action to prevent an unbalanced budget.[11] Moreover, in such event, and absent some controlling statute, the choice of which programs to cut and in which amounts would be entirely up to the President.

6. 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?

When the original Constitution was drafted, the delegates to the Constitutional Convention regarded the new document as a unified package. Much energy was directed to considering how the various parts of the Constitution would interact with each other and to the political philosophy expressed by the document as a whole. The amendment process is necessarily much more ad hoc. Consequently, proponents of new amendments need to be especially careful to think through the legal ramifications of their proposals, considering, for example, how their proposals might shift the balance of shared and separated powers among the branches of the federal government or affect the distribution of responsibilities between the federal and state governments. They should also explore how their proposals mesh with the Constitution's fundamental commitment to popular sovereignty and to the guarantees of liberty, justice, and equality.

Consider an example: a proposed textual limitation on some forms of free speech might provide a rationale for limiting other speech. The campaign finance proposal would authorize Congress and the states to place limits on political campaign spending. While purportedly aimed at limiting the influence of wealthy donors, the amendment might establish as constitutional law that the government could ration core political speech to serve a variety of legitimate government interests. If the amendment were broadly construed, not only could a legislature then act to equalize participation in political debate by limiting spending, but it could also curtail expenditures relevant to a particular issue in order to secure greater equality in the discussion of that issue.

Moreover, even though its sponsors do not intend to impose financial limits on the press, the proposed amendment itself contains no such restriction. Certainly, the value of a newspaper endorsement, at least equivalent to the cost of a similarly sized and placed advertisement, could easily violate an expenditures limit. Traditional jurisprudence treats freedom of the press no more expansively than freedom of speech. Rather than maintain the uninhibited, robust, and wide-open dialogue that the Constitution presently guarantees, the proposed amendment arguably permits the rationing of

speech in amounts that satisfy the most frequent targets of campaign criticism—current officeholders, who would have a self-interest in limiting the speech of those who disagree with them. It is also not unreasonable to anticipate that officeholders would attempt to apply such restrictions to a wide range of press commentary, or to other areas where wealth or access enhance the speech opportunities of their political opponents—on the theory of equalizing speech opportunities. The result would be yet another advantage for incumbents, who already enjoy advantages due to higher name recognition, greater free media opportunities as officeholders, and a well-developed fund-raising network.[12]

The failed attempt to add an amendment to the Constitution expressly prohibiting gender discrimination provides another example. Proponents of the equal rights amendment were never able to satisfy some who questioned the specific legal effects of the amendment. Questions were raised, for instance, about whether the amendment would completely prohibit the government from making gender distinctions in assigning troops to combat or individuals to military missions. This failure to explain its legal implications caused many to doubt the wisdom of the amendment.

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

The requirement that amendments be approved by supermajorities makes it more difficult to amend the Constitution than to enact an ordinary law. In theory, this requirement should produce a more deliberate process, which, in turn, should mean that the issues are more fully ventilated in Congress. Unfortunately, reality does not always comport with theory. The result is that the process becomes more like voting to approve a symbol than deciding whether to enact a binding amendment to our basic charter. Congress should thus adopt procedures to ensure that full consideration is given to all proposals to amend the Constitution before votes are taken either in committee or on the floor.

For most amendments, there are two types of questions: the policy questions, which include whether the basic idea is sound and whether the amendment is the type of change that belongs in the Constitution, and the operational questions, including whether there

are problems in the way that the amendment will work in practice. If the answer to either part of the policy inquiry is "no," then the operational questions need not be asked. Even when there is a tentative "yes" to the policy questions, the answer may become "no" if operational problems are identified. Thus, in general, it is appropriate that Congress hold at least two sets of hearings, one for each set of issues. At each, both the prime hearing time (normally at the start of the day) and overall hearing time should be equally divided between proponents and opponents.

The balanced budget amendment illustrates this need for dual-track consideration. Proponents and opponents of the amendment have debated the policy questions at length. These include whether the existing statutory avenues have failed, whether Social Security and perhaps other programs should be excluded, and whether minorities in one House should be given the absolute power to block both tax increases and increases in the debt ceiling.

Unfortunately, there has been less consideration of operational questions. For example, how is the amendment to be enforced? How would the exception for declarations of war be triggered? Would the use of cash receipts and disbursements be subject to evasion, and would it lead to uneconomical decisions, such as to enter into leases rather than purchases for federal property in order to bring the budget into balance for the current year?

Similarly, campaign finance proposals illustrate the need for a two-track approach. Most of the debate in Congress concerning constitutional reform of campaign finance practices has centered on the "big picture" issues. Members of Congress deserve praise for their efforts to come to grips with these issues. They have debated whether First Amendment rights are necessarily in tension with the integrity of our political campaigns, whether the First Amendment should be amended at all, and whether spending large amounts of money in campaigns is bad. However, members have spent relatively little time considering operational problems created by ambiguity in the language of a proposed amendment. For example, what are "reasonable" limits and who would determine them? What effect would the amendment have on issue advocacy and on educational and "get out the vote" efforts of parties and civic groups?

These examples demonstrate that careful deliberation by congressional committees is essential. Committees should not move

proposed amendments too quickly, and they should ensure that modifications to proposed amendments receive full consideration and a vote before they reach the floor, with a committee report explaining the options considered and the reasons for their adoption or rejection. Perhaps a two-thirds committee vote should be required to send a proposed constitutional amendment to the floor, thereby mirroring the requirement for final passage. If two-thirds of those who are most knowledgeable about a proposed constitutional amendment do not support it, the amendment probably should never be considered by the full House or Senate.

Although the relevant committees may have the greatest expertise regarding a proposed constitutional amendment, because its enactment will have far-reaching impact, floor debates should not be cut short even if there has been previous floor debate on an amendment in the current or a previous Congress. There should be opportunities for full discussion and votes on additions, deletions, and modifications to the reported language. The handling of the flag desecration amendment highlights the need for safeguards. At the end of the 105th Congress, the Senate Majority Leader sought unanimous consent for consideration of the amendment, with a two-hour limit on debate equally divided between proponents and opponents and with no amendments or motions in order.

To ensure that floor votes are taken only on language that has been previously scrutinized, each House should adopt rules requiring that only changes to a proposed constitutional amendment that have been specifically considered in committee be eligible for adoption on the floor, with one exception: votes on clarifying language should be permitted with the consent of the committee chair and ranking member, or by a waiver of the rules passed by a supermajority vote. Otherwise, substantive changes not previously considered, but approved by a majority vote on the floor, should be referred back to committee for such further proceedings, consideration, and possible modification as needed to ensure that they have been thoroughly evaluated, followed by a second vote on the floor.

8. Has Congress provided for a nonextendable 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?

The Constitution should be amended only when there is a contemporaneous consensus to do so. If the ratification process is lengthy, ultimate approval by three-quarters of the states may no longer reflect such a consensus. Accordingly, there should be a nonextendable time limit for the ratification of all amendments, similar to the seven-year period that has been included in most recent proposed amendments.

If extensions are permitted at all, they should be adopted by the same two-thirds vote that approved the amendment originally. Moreover, states that ratified the amendment during the initial time period should be allowed to rescind their approvals, thereby assuring a continuing consensus.

Congress's decision to extend the ratification period for the equal rights amendment on the eve of the expiration of the allotted time illustrates the problems that this Guideline addresses. Although many states ratified the amendment in the period immediately after initial congressional approval, there had been a shift in public opinion by the time that Congress extended the deadline. It was therefore far from clear that the legislatures in all the ratifying states would have approved the amendment if it had been presented to them again after the ratification extension. The perception that the amendment might be adopted despite the absence of a contemporary consensus supporting it contributed to the divisiveness that characterized the campaign for its adoption.

Appendix A

A Compendium of Constitutional Amendments

I. The Original Amendments

Amendment I (1791). Prohibits establishment of religion; guarantees freedom of religion, speech, press, and assembly.

Amendment II (1791). Prohibits infringement of the right of the people to keep and bear arms.

Amendment III (1791). Prohibits the quartering of soldiers in any house during times of peace without consent of owner or during time of war in manner not prescribed by law.

Amendment IV (1791). Guarantees security against unreasonable searches and seizures; requires that warrants be particular and be issued only on probable cause supported by oath or affirmation.

Amendment V (1791). Requires presentment to grand jury for infamous crimes; prohibits double jeopardy; prohibits compelled self-incrimination; guarantees due process of law; requires that property be taken only for public use and that owner be justly compensated when taken.

Amendment VI (1791). Guarantees right to speedy and public trial by impartial jury, compulsory process, and counsel in criminal prosecutions.

Amendment VII (1791). Guarantees right to jury trial in suits at common law where value in controversy exceeds twenty dollars.

Amendment VIII (1791). Prohibits excessive bail or fines; prohibits cruel and unusual punishment.

Amendment IX (1791). Guarantees unenumerated rights that are retained by the people.

Amendment X (1791). Reserves to the states or the people rights not delegated to the United States by the Constitution.

Amendment XXVII (1992).[1] Provides that no law changing compensation for members of Congress shall take effect until after next House election.

II. Reconstruction Amendments

Amendment XIII (1865). Prohibits slavery; authorizes congressional enforcement of Amendment's provisions.

Amendment XIV (1868). Defines U.S. and state citizenship and prohibits state abridgment of privileges and immunities of U.S. citizens; guarantees due process of law and equal protection of law against state infringement; requires reduction of representation in Congress when right to vote infringed; prohibits public officers who participated in rebellion from holding public office; prohibits questioning of public debt; makes void any debt incurred in aid of rebellion against the United States; authorizes congressional enforcement of Amendment's provisions.

Amendment XV (1870). Prohibits abridgment of the right to vote on account of race; authorizes congressional enforcement of Amendment's provisions.

III. OTHER AMENDMENTS

A. *Extensions of the Franchise*

Amendment XVII (1913). Provides for popular election of Senators.

Amendment XIX (1920). Prohibits denial of right to vote on account of sex; authorizes congressional enforcement of the Amendment's provisions.

Amendment XXIII (1961). Grants right to vote in presidential elections to citizens of the District of Columbia; authorizes congressional enforcement of the Amendment's provisions.

Amendment XXIV (1964). Prohibits poll taxes for federal elections; authorizes congressional enforcement of the Amendment's provisions.

Amendment XXVI (1971). Prohibits denying right to vote on account of age to citizens over eighteen; authorizes congressional enforcement of the Amendment's provisions.

[*Note:* two reconstruction amendments also relate to the franchise:

Amendment XIV (1868). Requires reduction in representation in Congress for states that deny the right to vote to male citizens over the age of twenty-one.

Amendment XV (1870). Prohibits denying the right to vote on account of race, color, or previous condition of servitude.]

B. *Regulation of Election and Tenure of President*

Amendment XII (1804). Provides for separate electoral college voting for President and Vice President.

Amendment XX (1933). Provides that presidential term ends on January 20; provides rules covering situations where President-elect or Vice President-elect dies before inauguration.

Amendment XXII (1951). Prohibits President from serving more than two terms.

Amendment XXV (1967). Provides that in case of removal or death of President, Vice President shall become President; provides mechanism for filling vacancies in office of Vice President; provides mechanism for dealing with Presidential disability.

C. *Amendments Overruling Supreme Court Decisions*

Amendment XI (1798). Prohibits suits in U.S. courts against state by citizen of another state (overruling *Chisholm v. Georgia,* 2 U.S. [2 Dall.] 419 [1793]).

Amendment XVI (1913). Authorizes income tax (overruling *Pollock v. Farmers Loan & Trust Co.,* 157 U.S. 429 [1895]).

[*Note*: two other amendments, one a Reconstruction amendment and one dealing with the right of eighteen-year-olds to vote—listed above under extending the franchise—also overruled Supreme Court decisions:

Amendment XIV (1868). Grants U.S. citizenship to all persons born or naturalized in the United States (overruling *Dred Scott v. Sandford,* 60 U.S. [19 How.] 393 [1857]).

Amendment XXVI (1971). Prohibits abridgment of right to vote on account of age for citizens who are eighteen and over (overruling *Oregon v. Mitchell,* 400 U.S. 112 [1971]).]

D. *The Prohibition Amendments*

Amendment XVIII (1919). Establishes Prohibition; grants to Congress and the states concurrent power to enforce the Amendment's provisions.

Amendment XXI (1933). Repeals Prohibition; prohibits importation of intoxicating liquors into a state in violation of the laws of that state.

Appendix B

Constitutional Amendments Considered in the 104th and 105th Congresses

Constitutional Amendments Considered in the 104th Congress
(excludes introduced amendments that did not have subcommittee, committee, or Floor consideration)

- **Balanced Budget Amendment:** passed in the House; defeated in the Senate.
- **Congressional Term Limits Amendment**: defeated in the House; defeated in the Senate.
- **Flag Desecration Amendment**: passed in the House; defeated in the Senate.
- **Tax Increase Amendment (requiring two-thirds vote for tax increase)**: defeated in the House; reported by the Senate Judiciary Constitution Subcommittee.
- **Campaign Finance Amendment**: defeated in the Senate.
- **Religious Equality Amendment**: hearings held before the House

Judiciary Constitution Subcommittee.

- **Line Item Veto Amendment**: hearings held before the Senate Judiciary Constitution Subcommittee.

- **Birthright Citizenship Amendment**: hearings held before the House Judiciary Constitution and Immigration Subcommittees.

- **Victims' Rights Amendment**: hearings held before the House and Senate Judiciary Committees.

Constitutional Amendments Considered in the 105th Congress
(excludes introduced amendments that did not have subcommittee, committee, or Floor consideration)

- **Balanced Budget Amendment**: defeated in the Senate; hearings held before the House Judiciary Committee.

- **Congressional Term Limits Amendment**: defeated in the House.

- **Campaign Finance Amendment**: defeated in the Senate and in the House.

- **Tax Increase Amendment (requiring two-thirds vote for tax increase)**: defeated twice in the House; referred to the Senate Judiciary Constitution Subcommittee.

- **Victims' Rights Amendment**: reported to the Senate after hearings before the Senate Judiciary Constitution Subcommittee; hearings held before the House Judiciary Constitution Subcommittee.

- **Flag Desecration Amendment**: passed by the House and sent to the Senate.

- **Religious Equality Amendment**: defeated in the House.

- **Amendment facilitating state-proposed Constitutional amendments**: hearings held before the House Judiciary Constitution Subcommittee.

- **Electoral College Amendment**: hearings held before the House

Judiciary Constitution Subcommittee.

Appendix C

Excerpts from *The Federalist* No. 85 Concluding Remarks

by Alexander Hamilton

To the People of the State of New York:

. . . Let us now pause and ask ourselves whether, in the course of these papers, the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it; and whether it has not been shown to be worthy of the public approbation, and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. 'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party; let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation; and let him remember that a majority of America has already given its sanction to the plan which he is to approve or reject.

I shall not dissemble that I feel an entire confidence in the arguments which recommend the proposed system to your adoption, and that I am unable to discern any real force in those by which it has been opposed. I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.

Concessions on the part of the friends of the plan that it has not a claim to absolute perfection have afforded matter of no small triumph to its enemies. "Why," say they, "should we adopt an imperfect thing? Why not amend it and make it perfect before it is irrevocably established?" This may be plausible enough, but it is only plausible. In the first place I remark that the extent of these concessions has been greatly exaggerated. They have been stated as amounting to an admission that the plan is radically defective and that without material alterations the rights and the interests of the community cannot be safely confided to it. This, as far as I have understood the meaning of those who make the concessions, is an entire perversion of their sense. No advocate of the measure can be found who will not declare as his sentiment that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such a one as promises every species of security which a reasonable people can desire.

I answer in the next place that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs and to expose the Union to the jeopardy of successive experiments in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

The reasons assigned in an excellent little pamphlet lately published in this city[1] are unanswerable to show the utter improbability of assembling a new convention under circumstances in any degree so favorable to a happy issue as those in which the late convention met, deliberated, and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worthy the perusal of every friend to his country. There is, however, one point of light in which the subject of amendments still remains to be considered, and in which it has not yet been exhibited to public view. I cannot resolve to conclude without first taking a survey of it in this aspect.

It appears to me susceptible of absolute demonstration that it

will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State. To its complete establishment throughout the Union it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine[2] in favor of subsequent amendment, rather than of the original adoption of an entire system.

This is not all. Every Constitution for the United States must inevitably consist of a great variety of particulars in which thirteen independent States are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole in such a manner as to satisfy all the parties to the compact; and hence, also, an immense multiplication of difficulties and casualties in obtaining the collective assent to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties.

But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point—no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution.

In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part, I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applica-

ble to the organization of the government, not to the mass of its powers; and on this account alone I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing THIRTEEN STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity will, in my opinion, constantly *impose* on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt that the observation is futile. It is this: that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* "on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments which *shall be valid,* to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the states, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air. Nor however difficult it may be supposed to unite two thirds or three fourths of the State legislatures in amendments which may affect local interests can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.

If the foregoing argument is a fallacy, certain it is that I am myself deceived by it for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration. Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption as the most direct road to their own object.

The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious: "To balance a large state or society [says he], whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by

the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into in their first trials and experiments." [3] These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a defect of political fortitude but I acknowledge that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle. The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen States, and after having passed over so considerable a part of the ground, to recommence the course. I dread the more the consequences of new attempts because I know that POWERFUL INDIVIDUALS, in this and in other States, are enemies to a general national government in every possible shape.

PUBLIUS.

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Appendix D

WHAT'S WRONG WITH CONSTITUTIONAL AMENDMENTS?

by Kathleen M. Sullivan

Most things Congress does can be undone by the next election. Amendments to the U.S. Constitution cannot. And yet recent Congresses have been stricken with constitutional amendment fever. More constitutional amendment proposals have been taken seriously now than at any other recent time. Some have even come close to passing. An amendment calling for a balanced budget passed the House twice and came within one and then two votes of passing in the Senate. An amendment allowing punishment of flag burners easily passed the House and fell just three votes short in the Senate. These and other proposed amendments continue to circulate including amendments that would impose term limits on members of Congress, permit subsidies for religious speech with public funds, confer procedural rights upon crime victims, denaturalize children of illegal immigrants, or require a three-fifths vote to raise taxes, to name a few.

Many of these amendments are bad ideas. But they are dangerous apart from their individual merits. The Constitution was, as Chief Justice John Marshall once wrote, "intended to endure for ages to come." Thus, it should be amended sparingly, not used as a chip in short-run political games. This was clearly the view of the framers, who made the Constitution extraordinarily difficult to amend. Amendments can pass only by the action of large supermajorities. Congress may propose amendments by a two-thirds vote of both houses. Or the legislatures of two-thirds of the states may request that Congress call a constitutional convention. Either way, a proposed amendment becomes law only when ratified by three-fourths of the states. Once an amendment clears these hurdles into the Constitution, it is equally difficult to remove.

Not surprisingly, the Constitution has been amended only twenty-seven times in our history. Half of these arose in exceptional circumstances. Ten made up the Bill of Rights, added in one fell swoop by the First Congress and ratified in 1791 as part of a bargain that induced reluctant states to accept the Constitution. And the Thirteenth, Fourteenth, and Fifteenth amendments, which abolished slavery and gave African-Americans rights of equal citizenship, were passed by the Reconstruction Congress in the wake of the Civil War.

The remaining amendments have tinkered little with the original constitutional design. Four extended the right to vote in federal elections to broader classes of citizens: the Fifteenth to racial minorities, the Nineteenth to women, the Twenty-fourth to voters too poor to pay a poll tax, and the Twenty-sixth to persons between the ages of eighteen and twenty-one. Only two amendments ever tried to impose a particular social policy: the Eighteenth Amendment imposed Prohibition and the Twenty-first repealed it. Only two amendments changed the original structure of the government: the Seventeenth Amendment provided for popular election of senators, and the Twenty-second imposed a two-term limit on the presidency. And only four amendments have ever been enacted to overrule decisions of the Supreme Court. The remaining handful of amendments were national housekeeping measures, the most important of which was the Twenty-fifth Amendment's establishment of procedures for presidential succession. We have never had a constitutional convention.

Our traditional reluctance to amend the Constitution stands on good reason today, the will of the framers aside. This is not because the Constitution deserves idolatry—Thomas Jefferson cautioned in 1816 that we should not treat it "like the ark of the covenant, too sacred to be touched." It is rather because maintaining stable agreement on the fundamental organizing principles of government has a number of clear political advantages over a system whose basic structure is always up for grabs. As James Madison cautioned in *The Federalist* No. 43, we ought to guard "against that extreme facility" of constitutional amendment "which would render the Constitution too mutable." What are the reasons this might be so?

First, it is a bad idea to politicize the Constitution. The very idea of a constitution turns on the separation of the legal and the political realms. The Constitution sets up the framework of government. It also sets forth a few fundamental political ideals (equality, representation, individual liberties) that place limits on how far any temporary

majority may go. This is our higher law. All the rest is left to politics. Losers in the short run yield to the winners out of respect for the constitutional framework set up for the long run. This makes the peaceful conduct of ordinary politics possible. Without such respect for the constitutional framework, politics would degenerate into fractious war. But the more a Constitution is politicized, the less it operates as a fundamental charter of government. The more a constitution is amended, the more it seems like ordinary legislation.

Two examples are instructive. The only modern federal constitutional amendment to impose a controversial social policy was a failure. The Eighteenth Amendment introduced Prohibition, and, fourteen years later, the Twenty-first Amendment repealed it. As Justice Oliver Wendell Holmes, Jr., once wrote, "a constitution is not meant to embody a particular economic theory," for it is "made for people of fundamentally differing views." Amendments that embody a specific and debatable social or economic policy allow one generation to tie the hands of another, entrenching approaches that ought to be revisable in the crucible of ordinary politics. Thus it is not surprising that the only amendment to the U.S. Constitution ever to impose such a policy is also the only one ever to be repealed.

Now consider the experience of the states. In contrast to the spare federal Constitution, state constitutions are typically early voluminous tomes. Most state constitutions are amendable by simple majority, including by popular initiative and referendum. While the federal Constitution has been amended only twenty-seven times in more than two hundred years, the fifty state constitutions have suffered a total of nearly six thousand amendments. They have thus taken on what Marshall called in *McCulloch v. Maryland* "the prolixity of a legal code"—a vice he praised the federal Constitution for avoiding. State constitutions are loaded with particular provisions resembling ordinary legislation and embodying the outcome of special interest deals. As a result, they command far less respect than the U.S. Constitution.

A second reason to resist writing short-term policy goals into the Constitution is that they nearly always turn out to have bad and unintended structural consequences. This is in part because amendments are passed piecemeal. In contrast, the Constitution was drafted as a whole at Philadelphia. The framers had to think about how the entire thing fit together. Not so for modern amendments. Consider congressional term limits, for example. Term limits amend-

ment advocates claim that rotating incumbents out of office would decrease institutional responsiveness to special interests and make the federal legislation more responsive to popular will. But would it? There's a better chance that term limits would shift power from Congress to the permanent civil service that staffs the executive branch and agencies, where special interest influence would remain untouched.

To take another example, advocates of the balanced budget amendment focus on claims that elimination of the deficit will help investment and growth. But they ignore the structural consequences of shifting fiscal power from Congress to the president or the courts. The power of the purse was intentionally entrusted by the framers to the most representative branch. As Madison wrote in *The Federalist* No. 58, the taxing and spending power is "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." The balanced budget amendment, however, would tempt the president to impound funds, or at least threaten to do so in order to gain greater leverage over Congress. And it would tempt the courts to enter a judicial quagmire for which they are ill-equipped. When is the budget in balance? Whose estimates should we use? What if growth turns out faster than expected? Lawsuits over these questions could drag on for years. Such redistribution of power among the federal branches surely should not be undertaken lightly, especially not under the pressure of an election year.

A third danger lurking in constitutional amendments is that of mutiny against the authority of the Supreme Court. We have lasted two centuries with only twenty-seven amendments because the Supreme Court has been given enough interpretive latitude to adapt the basic charter to changing times. Our high court enjoys a respect and legitimacy uncommon elsewhere in the world. That legitimacy is salutary, for it enables the Court to settle or at least defuse society's most ideologically charged disputes.

Contemporary constitutional revisionists, however, suggest that if you dislike a Supreme Court decision, mobilize to overturn it. If the Court holds that free speech rights protect flag burners, just write a flag-burning exception into the First Amendment. If the Court limits student prayer in public schools, rewrite the establishment clause to replace neutrality toward religion with equal rights for religious access

instead. Such amendment proposals no doubt reflect the revisionists' frustration that court packing turns out to be harder than it seems—Presidents Reagan and Bush, as it turned out, appointed more moderate than conservative justices. But undermining the authority of the institution itself is an unwise response to such disappointments.

In any event, it is illusory to think that an amendment will somehow eliminate judicial discretion. Most constitutional amendment proposals are, like the original document, written in general and open-ended terms. Thus, they necessarily defer hard questions to ultimate resolution by the courts. Does the balanced budget amendment give the president impoundment power? Congress settled this matter by statute with President Nixon, but the amendment would reopen the question. Does splattering mustard on your Fourth of July flag napkin amount to flag desecration? A committee of senators got nowhere trying to write language that would guarantee against such an absurd result. Would unisex bathrooms have been mandated if the Equal Rights Amendment had ever passed? Advocates on both sides debated the issue fiercely, but only the Supreme Court would ever have decided for sure.

For the most part we have managed to keep short-term politics out of the rewriting of the fundamental charter. Now is no time to start. Of course, on rare occasions, constitutional amendments are desirable. We have passed various structural amendments to tie our hands against short-term sentiments, for example, through the amendments expanding the right to vote. But unless the ordinary give-and-take of our politics proves incapable of solving something, the Constitution is not the place to go to fix it.

NOTES

1. Article V provides:

> 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; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

2. The Twenty-seventh Amendment, relating to changes in congressional compensation, was part of the original package of amendments proposed by the first Congress, but was not ratified by the states until 1992.

3. A list and brief description of all twenty-seven ratified amendments, grouped according to category, may be found in Appendix A.

4. Issues concerning the appropriate techniques of constitutional interpretation are beyond the scope of this project. Some, but by no means all, of our members believe that, in some cases, the Supreme Court has inappropriately "amended" the Constitution through a strained reading of its text. We believe that it is entirely appropriate for Congress to respond to what it perceives as erroneous constitutional interpretation by passing corrective amendments. However, we also believe that, even in the face of perceived judicial overreaching, Congress should not compound the problem by responding with poorly drafted or ill-considered amendments.

5. As an organization, we generally take no position on the merits of proposed amendments. We have made a single exception in the case of an amendment that would itself make the amendment process less arduous. This proposal runs afoul of our core commitment to restraint, and we strongly oppose it.

6. Council of State Governments, *The Book of the States,* 1998–99 ed. (Lexington, Ky.: Council of State Governments, 1998).

7. It may be that differences between the state and federal governments justify more detailed constitutions on the state level. Detailed constitutional structures that might work well at the state level might work poorly at the