THE AMERICAN CONSTITUTION: BASIC CHARTER OR FIRST DRAFT?

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Several years ago, I was asked by the Prime Minister of one of the newly independent nations emerging from the former Soviet Union to prepare for consideration by his government and Parliament a new constitution. Emphasizing to him that my international practice did not make me a constitutional scholar, I accepted on condition that it be a two-step process; that he and his key government colleagues first review a comprehensive options paper that my firm and I would prepare outlining the hundreds of choices that had to be made in formulating such a document; and that he then inform me of their decisions with respect to those choices; and then, only then, based on their decisions and not my theorizing, I would prepare for his review a draft constitution reflecting those decisions. Somewhat to my surprise, he not only accepted this condition and procedure, but subsequently implemented it.

In more than thirty-two years of private practice, this was one of my most fascinating and challenging assignments. My associates and I, in preparing for the Prime Minister a comprehensive options paper that would reflect a far wider range of legal and cultural systems than did our own experience, undertook the review of a large number of constitutions from countries around the world, new and old, large and small, rich and poor, religious and secular, East and West. In that process, I gained a new appreciation for an old document that I already revered: the American Constitution.

Ours is the oldest constitution still in effect in the world today. The very concept of basing a nation's existence and organization on a written national charter is said to have originated with the American example; now all but a handful of countries in the world have written constitutions. Most of the other early

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constitutions have been scrapped or replaced, some of them repeatedly. Some three-fourths of the others have been drafted in the last three decades. Many—perhaps most of them—draw upon ours as a model, including even the opening words "We the people...".[1]

In one crucial aspect, however, other countries have not followed our example. Our Constitution, I believe, is the shortest in the world, the most difficult to amend, and the least amended. That, I also believe, is one major reason for its success. Because it is a succinct statement of basic structures and enduring principles, not current policies or ideologies, it has been accepted, respected, and relevant throughout the land and throughout two centuries of enormous change in this country. Other nations have too often adopted long, detailed, highly political constitutions governing every aspect of their lives, representing the views of a particular group or moment in history—constitutions that are easily and frequently outmoded, revised, amended, and ultimately discarded. This contrast in fates and effectiveness, between our far-sighted document and those lengthy prescriptions for ultimate instability and failure, ought to be uppermost in the minds of those who have responsibility for initiating constitutional change in this country today, but the lesson appears to have been forgotten by too many.

Unlike many of those failures, the American Constitution is not a partisan document embodying any particular economic theory, any party's political agenda, or any specific legislative directions. It is instead a lean, flexible repository of our sovereignty, our highest expression of fundamental law, ideologically neither liberal nor conservative. It is so far-sighted, so brilliantly crafted a charter of our basic governmental structure and principles, that it has required, since the original Bill of Rights was added soon after its enactment, only seventeen additional amendments in more than two hundred years.

Of those seventeen, fifteen involved major questions going to the very heart of our national existence. Three grew out of the states' rights, race and slavery issues defined by the Civil War;[2] five further expanded the voting franchise, essentially to groups previously excluded;[3] four governed the election and tenure of Presidents;[4] and one each dealt with court jurisdiction,[5] congressional compensation,[6] and the taxing power[7]—in short, fifteen fundamental corrections or additions that recognized exceptional needs or defects that even a constitution as broad and flexible as ours could not be interpreted to accommodate.

The other two, and only two, dealt with social policy: the Eighteenth Amendment establishing Prohibition during the anti-saloon fervor in 1919,[8] and the

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1. U.S. CONST. preamble.
2. U.S. CONST. amend. XIII, XIV, XV.
3. U.S. CONST. amend. XVII, XIX, XXIII, XXIV, XXVI.
4. U.S. CONST. amend. XII, XX, XXII, XXV.
5. U.S. CONST. amend. XI.
6. U.S. CONST. amend. XXVII.
7. U.S. CONST. amend. XVI.
8. U.S. CONST. amend. XVIII (repealed 1933).

Twenty-First Amendment repealing the Eighteenth in 1933,[9] long after it had proved to be an unworkable disaster based upon the ill-considered emotional wishes of a passionate but temporary majority, wishes that never should have been enshrined in this majestic charter of fundamental long-term national authorizations and limitations of public governance, not private conduct. That was a painful lesson in American constitutional history; but today that lesson too appears to have been forgotten by too many.

The members of the current United States Congress, the 105th Congress, have introduced nearly one hundred proposed amendments to the Constitution. Keep these figures in perspective: seventeen amendments in the last two hundred years, and nearly one hundred proposed amendments in the last seventeen months. Many of these are duplicates or variations on a theme; but at least thirty deal with separate subjects, and at least nine of those thirty have either reached the floor of one or both Houses of Congress in the last three years (which includes the 104th Congress) or could easily do so before this Congress adjourns next fall.

What are all these proposed changes supposedly required in our national charter? I would divide those thirty into two categories:

1. Proposed constitutional amendments in the first category, roughly two-thirds of those introduced, would fundamentally alter the original design of the Founding Fathers. They would undermine or at the very least seriously curb or dilute, among other things, the representative nature of our government, majority rule for legislative enactments, the separation of powers, the First Amendment's freedoms of speech and religion, and the tenure, immunity and authority of Congress, including its authority to raise revenue, borrow money, limit the flood of guns in this country, and initiate the constitutional amendment process itself. These proposals range all the way from authorizing the popular vote recall of federally elected officials to the congressional review of federal and state judicial actions (apparently to match judicial review of congressional actions). There are proposals to abolish life tenure for federal judges, abolish the two-term limit on the Presidency, abolish the Electoral College, abolish the birthright of native-born Americans to citizenship, abolish the elevated legal status of treaties, abolish the federal income tax, abolish the separation of church and state, and prohibit a woman's private right to choose how to deal with her pregnancy, much as we once tried to prohibit constitutionally the manufacture, sale, and consumption of alcohol.

Clearly, adoption of these proposals, most of them hastily conceived and inadequately considered, would result in a very different constitution and a very different United States. It would damage if not destroy, with unpredictable consequences, for insufficient motives, and with insufficient regard for the extent to which their wording was consistent with the wording of the original Framers, a covenant that has served this nation well for over two hundred years.

2. Proposed constitutional amendments in the second category, in addition to being (like those in the first category) mostly impractical or ill-conceived or both, have no business being permanently enshrined in the

9. U.S. CONST. amend. XXI, repealing U.S. CONST. amend. XVIII.

Constitution when, for better or worse (and I believe worse), they could be promulgated through federal or state legislation, executive orders, or even lawsuits—and in most cases already have been sought or achieved through those other channels. (One possible exception is the presidential line-item veto authority, which the Supreme Court has recently ruled cannot be achieved merely by statute.[10])

This second category includes the highly publicized and extravagantly lionized balanced budget amendment. (As it turns out, the federal budget is being balanced this year, as with sufficient willpower and a sufficiently strong economy it could be balanced in any year, without a constitutional amendment.) This second category also includes proposals that would guarantee every American the right to a home, the right to a clean environment, and rights for crime victims, which all sound good to me symbolically but are not consistent with the nature and design of this Constitution, and which all can be (or already have been) proclaimed by the Congress or state legislatures. Then there are proposed constitutional bans on the premature release of violent criminals (who could oppose that?), on the retroactive levying of taxes, on the imposition on states of unfunded mandates, and on the imposition of English as the official language, all of which Congress can legislate. Even federal campaign finance reform—the subject of another constitutional amendment proposal—could be legislated, despite an adverse Supreme Court decision and without risking the First Amendment, if Congressional incumbents of both parties were genuinely willing to do it—just as equal rights for women, still being offered as a constitutional amendment after many decades of effort, have largely been achieved through a variety of statutes and judicial decisions.

For years, even decades, a proposed constitutional amendment to bar child labor was a major political issue and effort in this country, but its goal was fully achieved by statute three generations ago. Has that lesson also been forgotten? Why do members of Congress today seek to achieve so many legislative goals by proposing constitutional amendments, which require a long and arduous ratification process, instead of proposing legislation? In some cases, it is because ideological or political zealotry triumphs over common sense. In other cases, it is because it sounds better, grander, more impressive on the campaign trail; or because its authors know such a measure could never be enacted in Congress in statutory form but can be called a "long-term effort" as a proposed constitutional amendment; or because they know no Presidential veto can prevent the Congress from sending a proposed constitutional amendment to the states for ratification. Sometimes such a proposal's authors want to go on record for a proposition they know will never be put to a vote in Congress, or will never be put to a practical test of implementation by surviving the long constitutional amendment ratification process. Sometimes they simply want to force their political or ideological opponents to take an unpopular, controversial stand; or they know the proposed amendment will never apply to themselves (twelve-year term limitations for Members of Congress which do not apply to prior service, for example, by the time the typical seven-year ratification period has passed, can give an already veteran

10. Clinton v. City of New York, 118 S. Ct. 2091 (1998).

congressional sponsor of that measure another nineteen or twenty years before his noble sacrifice applies to him).

Above all, this plethora of proposals reflects a distressingly casual attitude toward the Constitution. Many, not all, but many, of these amendment sponsors (some of whom take great pride in reminding us that they are not lawyers) seem to look upon the Constitution as just another piece of paper waiting to be remolded to the current political mood. By their actions and attitudes they are trivializing the Constitution as if it were "a rough draft," in the words of one Member of Congress[11]—or, as other commentators put it, as "just another sound bite" or just "another implement in the lawmaker's toolbox to fix life's everyday problems."[12]

No one questions the right of these national legislators in both parties to pursue their political and legislative goals. However, they should pursue them through the normal political and legislative processes, and not clutter up and politicize our nation's permanent charter. The legislative package of any one particular Congress, reflecting the political whims and passions of that day, should not bind future generations for all time. It should instead be a package that, even after enactment, is subject to modification or repeal in a later Congress if opinions or circumstances change or passions cool, as happened with Prohibition, and not permanently locked into our basic legal structure. A constitution originally designed, among other things, to preserve for all time the rights of political and other minorities against the "tyranny of the majority" should not and must not be changed every time a new majority is elected to office.

Most, not all, of these proposed amendments are radical in nature, yet they have been proposed by those calling themselves conservative. Suppose they succeed in pushing these amendments through both Houses of Congress by a two-thirds vote and then ratification by three-quarters of the states. Should ideological liberals, if and when they get the upper hand politically, then act to adjust the Constitution to their political agenda? Should they not only repeal these conservative constitutional amendments but also insert a few of their own—for example, adding specific social and economic entitlements to the Bill of Rights, as many other countries have done, or broadening the ban on governmental interference with free speech and assembly to cover private interference as well? No, they should not, and I hope they would not. Comity, continuity, and confidence in this country require what constitutional scholar Kathleen Sullivan has called a clear "boundary between law and politics. The more you amend the Constitution, the more it seems like ordinary legislation [and] the less it looks like a fundamental charter of government."[13]

This separation of the realm of law and the realm of politics was emphasized in both *Federalist Number 78*[14] and in *Marbury v. Madison*.[15] Frequent constitutional amendments at the federal level can only blur that distinction and

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11. *See* THEODORE C. SORENSEN, WHY I AM A DEMOCRAT 144–45 (1996).
12. *Id.*
13. *Id.*
14. THE FEDERALIST NO. 78 (Alexander Hamilton).
15. 5 U.S. 137 (1803).

subject the realm of law to an excessive dose of politics. I say "at the federal level" because our state constitutions have never been accorded the same reverence or significance; one major reason for this is that most state constitutions in this country can be easily altered by simple majority referendum—and have been, with bewildering if not comical frequency. The New York Constitution, for example, has been amended more than two hundred times, almost like ordinary legislation, the California Constitution almost five hundred times, and the Alabama Constitution more than California and New York combined. Too often these state constitutional amendments are adopted simply as a matter of political popularity, and popularity is a dangerous test at the federal level, when you consider the poll that reportedly showed eighty percent of the American people willing to eliminate the constitutional right against self-incrimination.

I am not maintaining that our Constitution should never be changed again. Exceptional circumstances affecting our long-term governing ability—which cannot be dealt with by statutory formulation, executive action, or judicial interpretation—may well arise again. Nor would I argue that the present document (or any document prepared by mere mortals) is perfect and beyond improvement. Nor, according to critics, is the Mona Lisa perfect; but who among us would try to improve it? Jefferson himself opposed any notion that constitutions in general are "like the ark of the covenant, too sacred to be touched."[16] I would not want us to go back to the old Articles of Confederation provision that no amendment was possible without the approval of every state, which produced stalemate. After all, the American Constitution itself in Article V provides for its own amending.

Article V, perhaps the one part of the Constitution least applied and interpreted by our courts (although Chief Justice Marshall's views in *McCulloch v. Maryland*[17] are worth re-reading) and perhaps the least studied in our law schools, contains a key opening premise, a condition, an obligation on the Congress, that is apparently overlooked by those introducing what a former Chief Justice of the United States once called "junk amendments."[18] The Congress shall propose amendments to this Constitution, Article V reads, "whenever two-thirds of both Houses shall deem it necessary."[19]

Necessary? It is surely not necessary to propose a change in policy by constitutional amendment that could be achieved by federal statutes, executive orders, or even lawsuits. If the voters want to limit the number of terms served by any Congressman not representing their interests, they can vote him out, and have done so and will continue to do so without any need to amend the Constitution. If the Congress wishes to balance the budget, or reform campaign spending, or provide homes for all, or tie the government up in fiscal knots, or go to hell (to

16. *Letter from Thomas Jefferson to Samuel Kercheveal* (July 12, 1816), *in* THE PORTABLE THOMAS JEFFERSON 552, 558–59 (Merrill D. Peterson ed., 1975).

17. 17 U.S. 316 (1819).

18. Lloyd N. Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 44 (1985) (discussing Chief Justice Owen J. Roberts's feelings towards excessive amendments to the Constitution).

19. U.S. CONST. art. V.

paraphrase a former Supreme Court Justice),[20] it is free to do so now, without any need to amend the Constitution. If the Congress does not wish to borrow money, or to levy income taxes, or to impose unfunded mandates on the states, or to include indefensible pork barrel projects as line items in an Appropriations Bill, it is free to refrain from doing so now, without any need to amend the Constitution. Nor is it necessary to propose a constitutional change to assure victims' rights, or to prevent the premature release of violent criminals, or to clean up the environment.

It is certainly not necessary, in my view, to change the fundamental balance of governance arrangements that have superbly served this country for over two hundred years, from the separation of powers to the separation of church and state. It is not necessary—popular, no doubt, but surely not necessary—to alter the Bill of Rights and First Amendment, for the first time in our history, in order to overturn a sound and courageous United States Supreme Court decision and authorize punishment of the five or six fanatics in an average year who seek to draw attention to their views by defacing, burning, ridiculing, or in some other way abusing our national symbol, the American flag. Once we start banning offensive, provocative expression, where do we stop?

It is not necessary, here in one of the most religious countries in the world, where denominational membership and church attendance are at the highest levels, where all genuine religious faiths are treated with equality, neutrality and respect, to amend the Constitution by tearing down the wall that has kept politics out of religion and religion out of politics to the benefit of both in this country. Nor is it necessary to amend the Constitution to enable any school child to say any prayer he or she wishes to say in his or her own way and words, whether before a meal, before an exam, or before a basketball game, or any other time—because that child already has the right to say, or not say, that prayer today.

It is certainly not necessary to amend Article V itself to make the initiation of constitutional amendments still easier by authorizing additional sources. But, for the sake of the nation, it is necessary—not by constitutional amendment or statute of Congress, but by increased public and congressional reflection—to return to the historical presumption against amending the Constitution except, in the words of James Madison, "for certain great and extraordinary occasions";[21] to require once again that any proposed amendment be subjected to the utmost scrutiny and time-consuming examination; to make certain that all of its potential consequences are known; to make certain that it would not infringe on individual rights, minority protection, or well-established legal doctrine; to make certain that its text and impact are clearly comprehensible, meaningful, practical, enforceable and not merely a political symbol; and to make certain that that draft amendment is

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20. J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 357 (1968) (discussing that the inquiry into the legislative intent may produce the conclusion that Congress had intended a broad expansion of federal crimes, and "to hell with state courts").

21. THE FEDERALIST No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

consistent with the cohesive design, spirit, and wording of the existing Constitution and would not diminish its unifying role.

It is necessary for Congress and both political parties to return to the tradition of self-restraint that encouraged the proposing of constitutional amendments only under exceptional, not routine, conditions, and to put an end to these facile, even frivolous attempts to tinker with that solemn document as a political tactic or rallying cry, to score political debating points, or to advance a political agenda.

It is necessary, in short, for all of us to remember when facing any major governmental controversy, that amending the constitution should be a last resort, not a first step; that proposed constitutional matters that can be resolved by legislation or other remedies should be left to those remedies, particularly if those matters may prove to be only the immediate concerns or even whims of a temporary majority whose current political, economic, or social policies should not be permanently imposed upon future generations. It is necessary for all of us to treat our remarkable and uniquely successful national charter, not as a static document, never to be altered again, that is clear, but as an abiding framework of this country's higher law and enduring values, a precious document that must transcend ordinary politics and temporary issues if we are to preserve for posterity the long-term stability and continuity that have helped make this country the most successful in history.