The Final Constitutional Option

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Having been dormant for centuries, a potent section in the U.S. Constitution is now in the minds and on the lips of a new generation of reformers who are determined to keep the nation out of an abyss. As America stares hard at the darkness ahead, the new reformers have begun to popularize this forgotten constitutional provision that might well become Official Washington's undoing.

The problem, which hardly needs stating, is that the federal government has become the very monster the founders anticipated. Quite likely, the beast we face is far beyond anything that could have been imagined by the founding generation. Even today it is hard to adequately comprehend the omnipresent and, thanks to the NSA, omniscient federal menace that overhangs every aspect of life in 21st-century America.

The founders' concern that power would be consolidated at the federal level is dealt with in Article V of the U.S. Constitution.

Author Mark Levin, in his blockbuster best-seller, *The Liberty Amendments: Restoring the American Republic*, based his ideas for reform on this less well-known means by which amendments may be proposed -- a process that entirely outflanks Washington's fixed fortifications. Levin cogently argues that attempts at reform from within Washington are futile.

Obviously, what is needed is a way to trump the Beltway ruling class from without.

Enter Article V, which prescribes the amendment process. Article V establishes the amendment process as a two-phase affair: proposal, followed by ratification of three fourths of the states. The states have no way to ratify that which has not first been proposed. From the beginning, the states have relied on congressional super-majorities to do the proposing.

But the founders knew that Congress would be loath to propose anything that would limit federal power, so they included a way for the states to propose amendments in an ad hoc assembly Article V styles as "A Convention for Proposing Amendments."

The idea of using the amendments convention assembly has surfaced from time to time in U.S. history -- most recently in the 1980s, with the movement to propose a Balanced Budget Amendment (BBA). The effort peaked with 33 states passing resolutions -- just one shy of the required two-thirds of state legislatures, which would have compelled Congress to issue a call for the amendments convention.

That's when the effort took a bizarre detour -- into oblivion.

The BBA advocates of the 1980s, including then-President Reagan, were decidedly of the political right. The last thing anyone in the movement expected was for "friendlies" from elsewhere on the right to object to the idea in near hysterics as a plot to render the Constitution null and void. The unlikely opponents, while not necessarily opposed to a BBA, condemned in no uncertain terms the use of the amendments convention to propose it. It quickly became evident, from the critics' rhetoric, that they had conflated the Convention for Proposing Amendments assembly with a so-called plenary (full authority) Constitutional Convention.

BBA advocates attempted to clarify the difference between the types of conventions by pointing out that, as sovereigns, the states have never needed permission from the Constitution to call an actual Constitutional Convention. Indeed, the only reason to invoke Article V would be to self-limit the

convention's authority to "proposing amendments," as the assembly's name indicates.

Even more restrictive was the scope of the states' resolutions, which sought to limit discussion to the consideration of a single amendment -- a BBA. The argument was that, during the amendments convention, if a majority of the states, each represented by a delegation of state legislators, voted for a BBA, the proposal would be transmitted to Congress and then to the states for ratification -- just as every other amendment proposal in U.S. history.

The BBA advocates argued that if the delegates were to propose anything other than a Balanced Budget Amendment, Congress would be barred from forwarding the proposal to the states.

The critics would have none of it.

In appeals to the public, the critics insidiously left out any mention of the ratification process by three fourths of the states -- the implication being that once the proceedings began, there was nothing that could be done to hold it back when, inevitably, extreme elements moved to dissolve the Constitution. When challenged on this, the foes weaved the assertion into their conspiracy theory, adding that the out-of-control assembly would simply declare its own sovereignty and dispense with the ratification process altogether!

As preposterous as this notion was, the accompanying slogan was more effective: "We don't need a new Constitution!" Gobsmacked, the BBA proponents could only look on as state legislators made for the tall grass. One by one, states began rescinding BBA resolutions.

As a postscript to this sad chapter, it should be noted that by the late 1980s, the national debt had just topped $2 trillion. An effective BBA at that time could have stopped the bleeding that, by any objective measure, has become an existential threat.

The Professor

In 2009, an academic from the University of Montana was surveying opportunities for research. Of particular interest to Professor Robert G. Natelson were areas of constitutional scholarship characterized by a scarcity of research, poor research, or, optimally, both.

Intrigued by the vestigial Convention for Proposing Amendments mentioned in Article V, Natelson was struck by the paucity of modern-day scholarship on the topic despite an abundance of original source material.

Quietly, he set to work.

Before long, Natelson had acquired nearly all of the journals of founding-era conventions. This was added to his existing collection of material from each state's ratification convention as each considered whether or not to approve the proposed 1787 constitution. A picture of early American convention tradition began to emerge.

Casting a wider net, he pulled in over 40 generally neglected Article V court decisions, some of which had been argued before the Supreme Court. In a series of publications, Natelson churned out his findings (here, here, and here), which surprised many -- including himself.

The research quickly became the gold standard of scholarship about the process, known formally as the "State-Application-and-Convention" method of amending the Constitution.

Natelson held that, far from being a self-destruct mechanism, the founders meant for the process to be used in parallel to the congressional method as yet another "check and balance" within the framework of

the newly constituted federal government.

Most importantly, Natelson drew a strong distinction between the assembly mentioned in Article V and the oft-mentioned Constitutional Convention. For this reason, he is quick to correct anyone mistakenly referring to the Convention for Proposing Amendments as a "Constitutional Convention."

Natelson's research trove smashed the conspiracy theories of the 1980s and has become the intellectual base of the resurgent Article V movement that has been joined by Levin and other prominent reformers. When the history is written, it will record that this was the moment the Article V movement achieved critical mass.

The new reformers would do well to press on with the case for state-initiated amendments and ignore the tired conspiracy theories of the past. Having been marginalized to an almost comic degree, the foes of yesterday have been effectively dispatched.

When a battle is won, it is wise to move to the next battle, for the waiting opponent is formidable and lives on Capitol Hill.

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