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Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution

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by

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Republican capture of majorities in both the Senate and the House of Representatives at the November 8, 1994, election assured that the 104th Congress would address the question of a balanced budget amendment to the United States Constitution. Six and a half weeks before the election nearly every Republican congressional incumbent and aspirant pledged to seek enactment of what they called a "Contract with America" if their party gained control of Congress. The balanced budget amendment figured prominently in this campaign declaration.[1] Thus the 1994 Republican electoral victory revived a perennial constitutional debate and demanded that anyone interested in the Constitution and American government reexamine the history and intent of this seemingly simple and straightforward, but actually subtle and potentially transformative reform proposal. A review of the history of the balanced budget amendment makes evident that support for the measure grew not from desires to refine modern government but rather from fundamental hostility to it. For two-thirds of a century the amendment's core architects and advocates have believed that it possessed the potential to reverse evolving federal government practice. An understanding of the history of constitutional amendment and particularly of the balanced budget measure's past, or a failure to comprehend such matters, may significantly affect the public policy decision facing the nation.

Discontent with existing United States constitutional arrangements, although a notable feature of current political culture, is hardly new. Such unhappiness precipitated the replacement of the Articles of Confederation with the 1787 Constitution. The same sentiment confronted the First Congress when it convened in April 1789. Dozens of proposals to amend the newborn Constitution came before that first session of the national legislature. Twelve amendments, championed by James Madison, received two-thirds endorsement. By December 1791 ten of the twelve gained the necessary ratification of three-fourths of the states. The adoption of the Bill of Rights, an

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1. Kenneth J. Cooper, *GOP Offers 'Contract' to Revive Reagan Years,* WASH. POST, Sept. 28, 1994, at A1, A4.

immediate demonstration of the workability of the new Constitution's innovative amending mechanism set forth in Article V, established a pattern for further expressions of dissatisfaction with American governmental arrangements.[2]

Nearly every Congress subsequent to the First saw the introduction of further constitutional amendments. During the two centuries after the ratification of the Bill of Rights, representatives and senators offered over ten thousand amendment resolutions. Significantly, over that span of time only seventeen amendments gained the broad consensus of support required for adoption. Seldom could proposals for reform satisfy the founders' belief that, while a simple majority should be able to bind the polity temporarily through a statute, permanent agreements about constitutional arrangements ought to have the widest sanction of any republican act. Even when Article V action did not occur, however, the ongoing conversation about authority to be granted the federal government and restraints to be placed upon it revealed a great deal about American constitutional thought and practice.[3] Those interested in the political and constitutional culture of the United States would do well to extend their focus beyond the terms of the existing Constitution and judicial interpretation thereof so as to give thoughtful attention to efforts at constitutional change, both failed and successful.

The past two dozen years have spawned an unusually large number of proposals to alter the Constitution of the United States. Some of them, seeking to reverse Supreme Court rulings regarding abortion,[4] school prayer,[5] and

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2. *See* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit et al. eds., 1991). For the best account of the adoption of the first ten amendments, *see generally* ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 (1955).

3. Constitutional scholars have given limited attention to the subject of amendment. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (providing a stimulating theoretical analysis); RICHARD B. BERNSTEIN AND JEROME AGEL, AMENDING AMERICA (1993); MARY F. BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION (1986); ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION (1978); JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT (1992).

4. *See generally Constitutional Amendments Relating to Abortion, 1983: Hearings on S.J. Res. 110 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1983); *Proposed Constitutional Amendments on Abortion, 1976: Hearings on 66 Related Joint Resolutions Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. (1976); *Abortion, 1974: Hearings on S.J. Res. 119 & 130 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 93rd Cong., 2d Sess. (1974) (part 1 & part 2). *See also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (Rev'd ed., 1992).

5. *See Voluntary School Prayer Constitutional Amendment, 1983: Hearings on S.J. Res. 73 & 212 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,*

flag burning,[6] stirred brief but limited enthusiasm. Two, those stipulating legal equality for women[7] and federal representation for the District of Columbia,[8] gained the requisite two-thirds congressional approval but not the necessary ratification by three-fourths of the states. One, a bar on Congress raising its own pay, first offered in 1789 by James Madison, even achieved ratification in 1992.[9] But, with the possible exception of the Equal Rights Amendment, no constitutional change has been more persistently advocated or widely debated during the past twenty-four years than an amendment to require an annually balanced federal budget.

The balanced budget amendment has shown itself to be the constitutional equivalent of the Energizer bunny. Despite repeated defeats in Congress, it just keeps going, and going, and going. The amendment gained little support when introduced in Congress in the 1930s, 1950s, or 1970s. It then began acquiring political momentum as state legislatures started calling for its adoption. Finally achieving the required two-thirds approval in the United States Senate in 1982, the amendment was thereafter quickly derailed in the House of Representatives. Brought before the Senate anew in 1986, the amendment once more gained majority support but this time slipped and fell short of two-

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98th Cong., 1st Sess. (1983); *Proposed Constitutional Amendment to Permit Voluntary Prayer, 1982: Hearings on S.J. Res 199 Before the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. (1982).

6. *See Measures to Protect the American Flag, 1990: Hearings on S.J. Res 332 Before the Senate Comm. on the Judiciary,* 101st Cong., 2d Sess. (1990); *Measures to Protect the Physical Integrity of the American Flag, 1989: Hearings on S. 1338, The Biden-Roth-Cohen Flag Protection Act of 1989, and S.J. Res. 180 Before the Senate Comm. on the Judiciary,* 101st Cong., 1st Sess. (1989). *See also* Murray Dry, *Flag Burning and the Constitution,* SUP. CT. REV. 1990, at 69-103.

7. *See generally* JANET K. BOLES, THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS (1979) (providing an excellent discussion on the ERA); JANET J. MANSBRIDGE, WHY WE LOST THE ERA (1986); DONALD G. MATTHEWS & JANE S. DEHART, SEX, GENDER, AND THE POLITICS OF THE ERA (1990); Berry, *supra* note 3.

8. The District of Columbia Representation Amendment has received relatively little scholarly attention. Any inquiry should start with *D.C. Representation in Congress, 1967: Hearings Before the House Comm. on the Judiciary,* 90th Cong., 1st Sess. (1967); *See also Representation of D.C. in Congress, 1975: Hearings Before the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975); Clement E. Vose, *When District of Columbia Representation Collides with the Constitutional Amendment Institution,* 9 Publius 105 (1979); *D.C.'s Amendment at Two,* WASH. POST, Aug. 22, 1980, at A14; Kent Jenkins, Jr., *The Long Road to New Columbia,* WASH. POST MAG., July 4, 1993, at 19; Joseph L. Rauh, Jr., *D.C. Voting Rights: Shall We Give Up? Nonsense!,* WASH. POST, Aug. 22, 1982, at C8; Steve Twomey, *The 51st State,* WASH. POST MAG., July 4, 1993, at 11; Juan Williams, *History Lessons,* WASH. POST MAG., July 4, 1993, at 14.

9. *See* Richard B. Bernstein, *The Sleeper Awakes: The History and Legacy of the Twenty-Seventh Amendment,* 61 FORDHAM L. REV. 497 (1992).

thirds. In 1990 and 1992 amendment advocates brought the measure before the House, both times failing by slim margins to obtain two-thirds endorsement. Offered once more in the Senate in March 1994, the amendment resolution lost again. Within six months, however, it resurfaced yet another time in the Republican "Contract with America."

While often characterized as merely a device to restore some fiscal discipline to Congress, the balanced budget amendment would, in fact, fundamentally alter the nature of the modern United States federal government. Examination of the history of the campaign for the amendment helps to clarify the forces that have propelled it forward and the intended consequences of its adoption. Placing arguments for the measure in historical context rather than treating them as abstractions brings into sharp relief the profoundly important changes that the balanced budget amendment would, by design, impose on American constitutional government. The remarkable fervor and persistence of balanced budget advocates become explicable when the full dimensions of this constitutional reform crusade are perceived.

The remarkable resilience of the balanced budget amendment despite repeated rejection reflects ongoing opposition to the governmental reforms of the New Deal and World War II. Some amendment advocates desired to reverse the turn toward more active national government while others wished at least to retain pre-Keynesian practices of managing the federal budget. The appeal of balanced budget arguments, especially in the 1980s, mirrored the public's difficulty in understanding the complex economics of modern, post-New Deal government. The balanced budget campaign displayed as well the willingness of politicians to use the symbol of constitutional change to finesse problems that at the moment seemed intractable. The history of the balanced budget amendment, therefore, casts light on notable aspects of the nation's evolving constitutionalism, as well as contributes insight on a measure that remains on the nation's agenda.

The balanced budget amendment is rooted in the oldest and most fundamental concept of constitutionalism: constitutions are needed to define and confine the powers of government. Much of the controversy that swirled around the creation of the 1787 United States Constitution involved the articulation and limitation of the authority of the new federal government.[10] Debate in state ratification conventions centered on the question of the necessity, adequacy, or excesses of federal power.[11] Not until the adoption of the Bill

10. A host of works have illuminated this debate over the years. For recent insights, *see* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); RICHARD B. MORRIS, THE FORGING OF THE UNION, 1787-1788 (1987).

11. *See generally* THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION (Patrick T. Conley

of Rights were skeptics persuaded that the new government was satisfactorily restrained.[12] During the next 150 years the nature of federal power was debated again and again. For the most part circumstances produced narrow interpretations of constitutional limits, in particular through a strict reading of the Tenth Amendment. A more expansive view of federal responsibility followed the constitutional revolution of 1937.[13] Those uncomfortable with the New Deal philosophy of government constructed under the leadership of Franklin D. Roosevelt began to seek relief through, among other things, new constitutional restrictions on federal taxation and spending.

The national government's greatly augmented authority in domestic and international affairs during the New Deal and World War II caused the annual federal budget to grow twentyfold. Federal spending increased under circumstances that made prompt equivalent revenue collection virtually impossible. Indeed deficit spending and the Roosevelt administration became synonymous in some minds. Previous federal expenditure and debt had remained comparatively tiny except during brief and infrequent times of war. No unified federal budget had even been developed before the 1920s. Then during the Harding administration one was constructed in an unusual fashion, without sharp distinctions being drawn between capital and operating expenditures.[14] This accounting method, a contrast to most state and local government as well as private budgeting, called maximum attention to annual deficits and minimum notice to the long-deferred benefits of (and perhaps appropriately delayed billing for) some current spending.[15] Thus the extraordinary growth in government spending during the New Deal and World War II to produce benefits that would be reaped in the years ahead created an exaggerated image of Rooseveltian federal budget deficits that critics would point to as evidence of imprudence and irresponsibility.

& John P. Kaminski eds., 1988); ROBERT A. RUTLAND, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788 (1966) (providing an excellent survey of the ratification debate).

12. *See generally* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES (Patrick T. Conley & John P. Kaminski eds., 1992); For the best overview, see RUTLAND, *supra* note 2.

13. *See* ACKERMAN, *supra* note 3 (placing the New Deal constitutional revolution in perspective).

14. *See* JAMES D. SAVAGE, BALANCED BUDGETS AND AMERICAN POLITICS (1988).

15. Using the same accounting system, a homeowner would either pay for a house the year it was built, or consider mortgage interest a huge and dangerous financial burden. In practice, however, most American homeowners treat mortgage interest as a part of normal housing costs and expect to spread hose payment over the years of occupancy. They regard only each year's mortgage principal and interest payments as part of their annual household budget. Federal tax policy acknowledges the legitimacy of this view as well as the social and economic value of such cost-spreading practices by allowing taxpayers to make an annual deduction of mortgage interest from adjusted gross income. *See* I.R.C. § 163(h)(3).

Substantial budgetary imbalance in the 1930s and 1940s resulted not only from depression and wartime spending but from changes in economic thinking as well. New economic beliefs downplayed traditional annual budget balancing in favor of long term stabilization of the economy through government fiscal manipulation. British economist John Maynard Keynes posited that cyclical economic declines could be checked through increased government expenditure and lower taxes, while excessive, inflationary growth could likewise be moderated through reduced spending and higher taxation. Keynes assumed that the ultimate governmental objective of a balance between tax revenues and expenditures would be achieved over the course of a natural economic cycle, not the brief, artificial calendar of a fiscal year.[16]

However sound otherwise, Keynes' theory did not anticipate the inherent political difficulties of central economic management in a democratic republic. Maintaining an equipoise between revenues and appropriations had been an accepted constitutional responsibility of Congress, though not an articulated mandate, for a century and a half. Once the connection between annual spending and taxation was loosened, however, elected officials found it much easier to authorize expenditures and reduce taxes than to lower spending or increase levies. In Keynesian terms, additional taxes should be imposed and government spending diminished to balance accounts when the nation's economy was surging, but politically this proved difficult. A balanced federal budget either in annual terms or in longer cycles, turned out to be virtually unreachable in the post-Keynes era, whether because of economic sluggishness, national security apprehensions, or political distaste. As federal deficits became endemic, a search for constitutional solutions began.

Whether of not balanced budgets are economically important, and the debate on that issue remains unsettled, they have long carried great weight as political symbols.[17] Alexander Hamilton was willing to incur debt to build a strong economy and national government, provoking his opponent Thomas Jefferson to express an 1798 wish for a constitutional amendment to prohibit federal borrowing. Jefferson abandoned this view after he became president and the opportunity arose in 1803 to purchase the Louisiana Territory. For more than a century, the only constitutional reform involving federal fiscal authority to receive serious attention was an amendment to permit the levying of an income tax, adopted as the Sixteenth Amendment in 1913.[18] Not

16. *See generally* ROBERT LEKACHMAN, THE AGE OF KEYNES (1966).

17. *See* SAVAGE, *supra* note 14 (providing a well developed argument that discounts the economic importance of budget balancing and finding the American concern with it both unusual and politically symbolic).

18. *See* David E. Kyvig, *Can the Constitution be Amended? The Battle Over Income Tax*

until 1936 was a budget-restraining amendment first placed before Congress.

At the height of New Deal legislative activity, Minnesota Representative Harold Knutson, a Republican, suggested setting a peacetime per capita limit on federal debt. Knutson's proposal stirred little enthusiasm at the time.[19] Two years later in 1938 the American Taxpayers Association offered a constitutional amendment to limit federal taxes to twenty-five percent of income and, when Congress showed no interest, encouraged states to petition for a constitutional convention.[20] The emergency of World War II soon swept aside these calls for arbitrary limits on federal spending. Cost mattered little when national survival was perceived to be at stake.

During the post-World War II conservative resurgence, constitutional restraints on New Deal innovations gained popularity. Conservative opponents of what the Roosevelt administration had done and what its successors might do in matters such as economic regulation, social reform, and race relations looked for ways to check the power of government. The Twenty-second Amendment, limiting a president to two terms and designed to block accretions of power in the executive office, won adoption through the combined support of Republicans and southern Democrats.[21] Among other suggestions for confining the federal government through constitutional amendment, income tax limitation and required annual budget balancing stood out.[22] The most discussed proposal, submitted in 1954 by Republican Senator Styles Bridges of New Hampshire and Democrat Harry Byrd of Virginia, required the President each year to present an estimate of expected revenues and a proposed balanced budget; Congress could not adjourn for more than three days until adopting such a budget, unless three-fourths of the members agreed otherwise. Nebraska Republican Senator Carl Curtis, like Bridges and Byrd a critic of federal spending on social programs, offered an amendment similar in most respects, but authorizing Congress to levy an added tax to reduce existing debt. The Eisenhower Treasury Department, hardly a bastion of

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1895-1913, PROLOGUE 181 (1989).

19. SENATE COMM. ON THE JUDICIARY, BALANCED BUDGET: TAX LIMITATION CONSTITUTIONAL AMENDMENT, S. REP. NO. 151, 97th Cong., 1st Sess. 17 (1981).

20. RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 69 (1988); *See also* Frank E. Packard, *Problems Arising From an Attempt to Amend the Constitution by Convention Concerning the Limitation of Income Tax Rates to 25 Percent,* 31 NEB. L. REV. 407 (1952).

21. Grimes, *supra* note 3, at 114-15; *See also* Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy of a Partisan Maneuver?,* 7 CONST. COMMENTARY 61 (1990); Frederick D. Zucker, The Adoption or the Twenty-Second Amendment (1958) (unpublished Ph.D. dissertation, Penn. State University); Paul G. Willis & George L. Willis, *The Politics of the Twenty-Second Amendment,* 5 W. POL. Q. 469 (1952).

22. *See* Clement E. Vose, *Conservatism by Amendment,* 46 YALE REV. 176 (1956).

Keynesian enthusiasm, recommended against adopting such "relatively inflexible" budgeting methods.[23] Neither measure achieved substantial support, and both faded from view, although every Congress thereafter witnessed the introduction of at least a few balanced budget amendment resolutions.[24]

The 1960s brought increases in federal spending for both military and domestic social purposes together with a modest tax reduction, one of the most popular initiatives of the Kennedy administration. Budgetary imbalances grew precipitously as the Vietnam war escalated. First Lyndon Johnson and later Richard Nixon avoided seeking tax increases to pay for the war's rising costs, not wishing to provide their opponents leverage over the conduct of the war. Various groups, each with its own political agenda, began showing interest in constitutionally required, annually balanced budgets. Since they tended to be lumped together as "balanced budget advocates," their dissimilar objectives often remained obscure.

In 1969 a group of libertarians, unhappy with recent developments in particular but philosophically opposed to government in general, formed the National Taxpayers Union. This Washington-based body regarded government as a hobble on individualism and taxes as the life blood of government. The NTU's newsletter, *Dollars and Sense,* attacked government not merely for liberal social programs but for everything from Defense Department waste to corporate bailouts, rail and postal subsidies, and tax-supported municipal trash collection. Assuming that Congress would be unwilling to levy taxes if required to do so to fund all appealing spending programs, the Union embraced a balanced budget amendment as a means of shrinking the federal government. By the late 1970s, it claimed 100,000 members.[25]

Others of a libertarian bent soon took up the cause. In 1973 Jack Kemp, a young Republican congressman from Buffalo, New York, proposed a constitutional amendment limiting federal tax receipts and expenditures to a percentage of the previous year's national income.[26] The measure would force federal spending gradually to decline in proportion to the nation's overall economy. Kemp believed that increasing the profitability of private business was necessary to provide incentives for expansion. In his view, existing opportunities for enrichment offered insufficient motivation for investment that would eventually benefit the entire society. He became a vocal and

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23. *See Balancing of the Budget, 1956: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 84th Cong., 2d Sess. (1956).

24. S. REP. NO. 151, *supra* note 19, at 18.

25. ROBERT KUTTNER, REVOLT OF THE HAVES: TAX REBELLIONS AND HARD TIMES 280-81 (1980).

26. S. REP. NO. 151, *supra* note 19, at 19.

energetic promoter of balanced and shrinking federal budgets as a means of achieving his objectives.

Concurrently some of California Governor Ronald Reagan's libertarian-minded advisors also took up the balanced budget cause. They, too, aimed at restricting the government's resources in order to reduce its role in American life. Lewis Uhler, a one-time John Birch Society member who for a time headed Reagan's tax reduction task force, subsequently, in 1975, established the National Tax Limitation Committee. Within four years Uhler enlisted prominent economists Milton Friedman and William Niskanen, law professor Robert Bork, and over 300,000 paid members. The NTLC advocated an amendment that not only required a balanced budget but specifically limited tax increases to the rate of gross national product growth or, if inflation exceeded three percent, three-fourths of such growth. The NTLC plan gained a bipartisan cadre of congressional sponsors by the end of the decade. Under its provisions, if inflation continued as expected, federal spending would decline as a portion of gross national product.[27] Martin Anderson and David Stockman, both of whom would become influential White House advisors during the early Reagan presidency, independently developed similar views about constricting the federal government. Anderson by 1979 was advocating a single constitutional amendment that would limit federal spending, require a balanced budget, prohibit wage and price controls, authorize the president to veto individual items in appropriations bills, and require a two-thirds congressional vote to approve expenditures.[28] Stockman, too, wanted to achieve permanent structural change in government and saw budget reduction as a promising path to his goal.[29]

Other Republicans embraced the balanced budget cause, not in a deliberate and systematic effort to stifle government, but primarily as a device to insure fiscal responsibility regardless of the level of government activity. They tended not to think of the federal budget as an economic policy statement in which one legitimate option might be inflation and another might be shifting to future beneficiaries the costs of programs whose results would not be achieved for years to come. Instead, they regarded the federal budget as akin to the family checkbook where failure to limit household spending to income courted disaster in short order. This family analogy, formulated in terms of the need to live within the bounds of current resources, ignored the reality that large-scale borrowing, especially for home mortgages, was a central feature of American family economies.

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27. *Id.* at 277-86.

28. MARTIN ANDERSON, REVOLUTION 120 (1988).

29. DAVID A. STOCKMAN, THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED 51-54 (1986).

Annual federal budget balancing, the fiscally conservative view held, would remedy inflation and require Congress to confront the costs of new programs. Indeed, under some circumstances, budget balancing might reasonably compel tax increases, a notion anathema to libertarians. In 1975 Senate veteran Carl Curtis, bemoaning "the rapidly deteriorating fiscal integrity of our nation" and declaring the Byrd-Bridges plan of preventing congressional adjournment no longer adequate in an era of almost continuous sessions, offered a complicated amendment proposal that mandated an immediate surtax to cover estimated federal revenue shortages for the year. This "pay as we go" amendment was hardly in keeping with the libertarian idea of absolutely capping taxes, much less a device certain to reduce government. Instead it reflected Curtis's simple distaste for "spendthrift politicians," the cost of interest on the federal debt, and the current high inflation, which he blamed largely on federal budgetary imbalances. Faced with the choice of spending restraint or tax increases, Curtis believed Congress would normally, though not invariably, opt for the former. Thirteen of his Senate colleagues as well as other witnesses agreed with Curtis that only a constitutional requirement would give Congress the needed discipline to check its spending habits.[30]

Not all who advocated a balanced budget amendment by the mid-1970s were libertarians eager to dismantle government or traditional conservatives happy to dispense with one or another federal social program but primarily concerned with overall fiscal restraint. Paul Simon of Illinois, a liberal Democrat, supported the Curtis proposal as a means of insuring that Congress would reestablish the linkage between authorizing expenditures and providing adequate revenues. Although he did not say so at the hearing, Simon elsewhere suggested that he regarded a balanced budget requirement as a device to restrain presidents from proposing more politically popular spending than they were prepared to advocate funding through taxes. Greater fiscal responsibility could reduce military spending and possibly free resources for other purposes. At the very least, it avoided diversion of public funds into debt service. Simon's belief in the amendment, although not widely shared by those pursuing similar social reform agendas, would endure. Testifying in its behalf as a freshman Representative in 1975, he remained a principal sponsor as an experienced Senator in the 1990s.[31]

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30. *See Balancing the Budget, 1975: Hearings on S.J. Res. 55 & 93 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 3-13 (1975).

31. *See id.* at 182-85; Helen Dewar & Guy Gugilotta, *Hill Pressure to Outlaw Deficits Builds,* WASH. POST, Apr. 30, 1992, at A1, A14; Michael Kinsley, *The Liberal Case for a Balanced Budget Amendment,* WASH. POST, May 14, 1992, at A23; Paul Simon, *Why We Need a Balanced Budget Amendment,* WASH. POST, Nov. 25, 1993, at A30.

None of the various rationales moved Congress to embrace a balanced budget amendment in the mid-1970s. Chairman Birch Bayh allowed Senate Constitutional Amendments Subcommittee conservatives to hold 1975 hearings on the Curtis proposal, but did not himself attend. Congressional inaction led proponents to employ alternative amendment tactics. Urged on by the National Taxpayers Union, the Maryland and Mississippi legislatures in 1975 launched an effort to circumvent Congress and obtain constitutional change through a never-used Article V procedure. The legislatures requested a federal constitutional convention to propose a balanced budget amendment for state ratification. Article V mandated that, if two-thirds of the states so petitioned, Congress would have to provide for such a convention. The NTU campaign went ahead quietly and quickly as legislators found convention calls both painless and popular. By March 1978 twenty-two states had filed convention petitions. In June, when California voters approved a state property tax reduction measure known as Proposition 13, a sense of popular discontent with increasing rates of inflation and government spending at all levels spurred further interest in a balanced federal budget requirement in state capitols from California to Arkansas to New Hampshire.[32]

Advocacy of a balanced federal budget became increasingly attractive to politicians in the midst of the stagnant but inflationary economy of the late 1970s. It is noteworthy that specific steps to achieve a balanced budget, whether tax increases or spending reductions, did not have equivalent popularity. Public opinion surveys repeatedly showed two-thirds or more (sometimes substantially more) of Americans favoring a balanced federal budget.[33] Whether or not they understood the implications of such a measure was doubtful, however. One early 1979 poll probed further and found that substantial majorities opposed reductions in every major area of federal spending.[34] The opportunity symbolically to embrace the balanced budget principle without having to explain how one would implement it, much less immediately do so, attracted a variety of politicians to the cause of constitutional amendment. Most notable among them was Ronald Reagan's successor as California governor, Jerry Brown, who decided to make the balanced budget amendment a centerpiece of his second inaugural address in January 1979.

Endorsement of the convention petition drive by Brown, a Democrat, albeit a frequently unconventional one, drew press attention and, in the words

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32. CAPLAN, *supra* note 20, at 79; KUTTNER, *supra* note 25, at 282.

33. GEORGE H. GALLUP, THE GALLUP POLL 124-27 (1982); *Id.* at 81 (1979); *Id.* at 198-99 (1978); Associated Press - NBC Poll, Washington Star, Feb. 13, 1979; ABC News-Harris Survey, February 8, 1979.

34. ABC News-Harris Survey, Feb. 8, 1979. A May 14-17, 1982, Gallup survey confirmed these results. GALLUP, *supra* note 33 at 124-27.

of the National Taxpayer Union's leader, "Blew our cover!"[35] Congressional Democrats began saying that a good way to start balancing the federal budget would be to eliminate federal revenue sharing with the states, while their Republican counterparts suggested that Congress submit an amendment limiting federal spending as a means to avoid an unpredictable constitutional convention. Citizens for the Constitution, an organization to oppose the state petition drive, sprang quickly to life, declaring "The last President who used the balanced budget as a fiscal remedy was Herbert Hoover," and "The same folks who brought you the 'Great Depression' of the 1930s now want to rewrite your Constitution." Headed by Massachusetts Lieutenant Governor Thomas P. O'Neill, III, son of Speaker of the House "Tip" O'Neill, and supported by organized labor as well as the Carter administration, the ad hoc coalition moved rapidly and lobbied strenuously to defeat petition resolutions in the Montana senate and the Massachusetts house. In February 1979 California held the first state legislative hearings on the amendment and a constitutional convention but then chose to proceed no farther. The Ohio legislature killed the convention petition as well. Although New Hampshire submitted the thirtieth convention request, by mid-1979 the state initiative confronted significant resistance for the first time.[36]

The prospect of a constitutional convention, a phenomenon unknown since 1787 (unless one counted an irregular gathering of state representatives in Washington on the eve of the Civil War), generated considerable anxiety among political leaders. While lawyers debated whether such a convention could be confined to the subject for which it was ostensibly called, politicians and historians easily recalled that, once in session, the 1787 body had acknowledged no restrictions on its mandate. From President Jimmy Carter, who proclaimed a convention "extremely dangerous" because "completely uncontrollable," to conservative Republican Senator Barry Goldwater, who labeled convention calls "foolhardy," a wide spectrum of national figures denounced the state petition drive.[37] Expressions of concern about a balanced budget amendment itself took second place as apprehensions grew regarding the unpredictable possibilities of a constitutional convention.

Birch Bayh's staff at the Senate Judiciary subcommittee on the Constitution carefully examined the state petitions. Some proposed very strict budget balancing requirements; others permitted exceptions under various circumstances. Most had been formally filed with Congress, but, as it turned

35. KUTTNER, *supra* note 25, at 282.

36. Citizens for the Constitution brochures, Linda Rogers-Kingsbury office files, U.S. Senate Judiciary Subcommittee on the Constitution (copies on file with author); CAPLAN, *supra* note 20 at 79-82; KUTTNER, *supra* note 25, at 282-89.

37. CAPLAN, *supra* note 20, at 81-82.

out, at least six had not, and Indiana's had been filed by mistake, not actually having been adopted by the state legislature. Another half dozen petitions requested submission of a balanced budget amendment but failed to specify that this be done by convention.[38] While the review suggested that considerably fewer than the reported number of petitions could pass the test of asking for the same thing and doing so in a proper fashion, Bayh's staff did not relax. Acknowledging the political appeal of the balanced budget idea, the staff assembled arguments against it. They focused on the adverse effect it would have on efforts to remedy economic recession. With the economy in decline, federal revenues shrinking, and required outlays for unemployment compensation and public assistance increasing, Congress would be compelled to reduce other expenditures and perhaps raise taxes as well rather than prime the pump of recovery. "In this situation," a staff memo concluded, "the budget might end up chasing the economy down its own slide."[39]

Meanwhile, the Carter White House staff consulted with Harvard law professor Laurence Tribe about dealing with a possible constitutional convention. Tribe thought the balanced budget amendment a bad idea on various grounds but counseled the administration not to take the anti-democratic position of resisting the right of the people to alter their Constitution. While he provided a long list of unsettled questions about the operation of a convention, he urged emphasis instead on "the folly of engraving the policy of fiscal austerity in the Constitution." Point to slavery and prohibition, he advised, as the only specific policies endorsed in the Constitution, both unwisely so. Tribe argued that if a balanced budget was desirable, it was nevertheless too complex a matter to deal with in constitutional generalities. "Needlessly amending the Constitution injures our political system at its core. Once the amendment device had been transformed into a fuzzy substitute for the more focused legislative process, not only would the lawmaking function of Congress be eroded, but the Constitution itself would lose its unique significance as the ultimate expression of fundamental and enduring national values." To Tribe, unless the Constitution became "easier to alter than it has ever been or should ever become, it will remain the least appropriate instrument for American economic policy" with its need for "flexibility and raped responsiveness to changing circumstances."[40]

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38. Linda Rogers-Kingsbury to Senator Bayh, July 19, 1978, and petition files, Linda Rogers-Kingsbury office files, U.S. Senate Judiciary Subcommittee on the Constitution (copies on file with author).

39. Balanced Budget Group to Senator Bayh, January 16, 1979, Linda Rogers-Kingsbury office files, U.S. Senate Judiciary Subcommittee on the Constitution (copies on file with author).

40. Laurence H. Tribe to Timothy E. Kraft, Assistant to the President, Jan. 17, 1979, Linda

Such economic and constitutional arguments failed to persuade those who sought the balanced budget amendment precisely because it would impose a particular economic policy upon the government and significantly restrict presidential and congressional discretion. The National Taxpayers Union kept up its petition drive, undaunted by questions about the validity of petitions or their continued validity once the Congress to which they were addressed had adjourned. The Supreme Court's 1939 *Coleman v. Miller* ruling that the validity of a state act under Article V was a political question, thus one for Congress, not the courts, to decide, established a legal basis for ignoring disputed state petitions.[41] However, should the Congress come to believe that the overwhelming majority of states and constituents desired a balanced budget amendment, it would not be likely to withstand the demand regardless of technicalities. A similar petition drive had broken Senate resistance to the Sixteenth Amendment, motivating senators to approve an amendment on their own rather than risk a convention that might propose a radically different measure, not to mention other reforms.[42] The perception of a widespread desire for amendment, even in the absence of a completed convention application, had been sufficient to produce congressional action in 1912 and might well suffice again.

Even though federal spending remained relatively steady throughout the 1970s, rising inflation, declining public economic confidence, and spreading disenchantment with government by the end of the decade all added force to the balanced budget campaign. Despite the resistance of subcommittee liberals, Republicans and conservative Democrats on the Senate Judiciary Subcommittee on the Constitution adopted a balanced budget amendment resolution by a vote of 5 to 2 in December 1979. Three months later the full Judiciary Committee narrowly defeated the resolution, 9 to 8, as one Republican, Charles Mathias of Maryland, joined eight Democrats in voting against it. Disappointed Republican Senator Alan Simpson of Wyoming warned his colleagues that the issue was far from dead. He disparaged the ability of Congress to discipline itself on spending and said the only way to balance the budget was "to shrivel the pie so we don't have so much pie to play with."[43]

Ronald Reagan's 1980 presidential campaign further strengthened the balanced budget crusade. Deriding government as oversized, inefficient, and

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Rogers-Kingsbury office files, U.S. Senate Subcommittee on the Constitution (copies on file with author).

41. Coleman v. Miller, 307 U.S. 433 (1939).

42. CAPLAN, *supra* note 20, at 65.

43. Richard L. Lyons, *Senate Panel Kills Constitutional Plan on Balanced budget,* WASH. POST, Mar. 19, 1980, at A12.

corrupt, itself the problem rather than a problem solver, Reagan built on resentments toward federal civil rights and social welfare reforms of the 1960s, the Vietnam war, the scandals of the Nixon administration, and the perceived ineptitude of its successors. Reagan's call for tax cuts to free investment capital and thereby stimulate growth, lately termed supply-side economics, seemed at odds with his pledges to reduce inflation and increase military spending. Yet he repeatedly offered assurances that he intended to be a fiscally conservative president, underscoring such statements with enthusiastic endorsements of the balanced budget amendment. His message exuded responsibility and rectitude: "Balancing the budget is like protecting your virtue: all you have to do is learn to say no."[44]

In 1980 the Democratic party platform and its presidential candidate opposed the balanced budget amendment. Such a position was consistent with the Democrats' economic approach of the previous half century but awkward to defend in light of a poorly performing economy and a sixty billion dollar annual deficit. The Carter administration struggled to produce a balanced budget for the election year but found itself unable to keep pace with the falling revenues and rising costs of a deteriorating economic climate. Ultimately the administration proved unwilling to sacrifice other objectives in order to achieve the illusive goal. Thus balanced budget advocates hailed the election verdict of 1980, complex and ambiguous though the reasons for Reagan's 51 percent victory might have been, as demonstrating a public preference for their position.

The first months of the Reagan presidency further invigorated the balanced budget amendment campaign. Libertarian expectations of reducing government grew apace. At the same time, the new administration and Congress engaged in the very sort of political performance that had helped fuel the demand for a constitutional balanced budget requirement. Together they demonstrated the relative political ease of approving tax cuts and spending increases and the comparative difficulty of endorsing levies to pay the government's bills. While the new president endorsed the balanced budget principle in his inaugural address, his first legislative requests were for a ten percent tax cut each of the next three years and a large increase in defense spending. Reagan's electoral victory, his confident rhetoric, and even the sympathy generated by the attempt on his life ten weeks into his term made a politically popular vote to reduce taxes even simpler for members of Congress. Congress found it just as easy to support the request for a larger military budget.[45]

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44. ELIZABETH DREW, PORTRAIT OF AN ELECTION: THE 1980 PRESIDENTIAL CAMPAIGN 113 (1981).

45. *See generally* HAYNES JOHNSON, SLEEPWALKING THROUGH HISTORY: AMERICA IN

The inevitable consequences of these actions appalled Reagan's libertarian-minded budget director, David Stockman. Without the difficult additional step of reducing other government spending, the federal deficit would skyrocket, he predicted.[46] It did. Whether Reagan blindly maintained his long-standing single-minded determination to reduce taxes he considered too high, unwisely embraced unsound economic advice, or deliberately executed a libertarian plan to make federal spending on new domestic social programs virtually impossible, his initiatives rapidly accelerated the growth of the federal debt. Either to excuse their own 1981 fiscal decisions or check a president from putting them in a politically difficult situation, more and more members of Congress began finding merit in a constitutionally-required balanced budget.

Orrin Hatch, who became chairman of the Senate Judiciary Subcommittee on the Constitution when the Republicans acquired a Senate majority in 1981, quickly convened hearings on balanced budget proposals. With Democratic liberal Birch Bayh defeated for reelection and the more conservative Dennis DeConcini of Arizona now the subcommittee's ranking minority member, Hatch enjoyed a congenial forum. Rather than question state petitions as Bayh and his staff had done, Hatch argued that they made prompt congressional action imperative. He treated existing petitions as valid and noted that in their current session one house of four more legislatures had already adopted petitions. To avoid a constitutional convention, he urged adoption of a "consensus" amendment that he, DeConcini, and Judiciary chairman Storm Thurmond had fashioned. The "consensus" amendment required Congress to balance each year's budget unless war was declared or three-fifths of Congress approved additional expenditures. Furthermore, federal tax revenues could not increase as a portion of national income without specific congressional authorization. Hatch presented this amendment as a modest proposal "to restore accountability and honest to a decision making process that is today characterized by illusion and legerdemain," one that would merely reduce access to borrowing and tax increases. However, the "consensus" amendment's restraint on tax levies positioned it much closer to the version of budget balancing sought by libertarians eager to shrink government than to the more neutral alternative preferred by "pay as you go" fiscal responsibility advocates. The enthusiastic witnesses Hatch paraded before the subcommittee, conservative economists, bankers, and attorneys as well as spokesmen for the National Taxpayers Union and National Tax Limitation Committee, underscored the government reduction agenda of

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THE REAGAN YEARS (1991) (providing an excellent overview of the Reagan presidency).

46. *See* William Greider, *The Education of David Stockman,* ATLANTIC MONTHLY, Dec. 1981, at 27-54; STOCKMAN, *supra* note 29, at 269-76.

the amendment.[47]

After his subcommittee and the Judiciary Committee approved the "consensus" amendment in May 1981, Hatch justified it to the Senate as a reasonable solution to greater pressures on Congress to authorize spending than to provide sufficient tax revenue.[48] In light of the concurrent Reagan tax cut and spending proposals, the argument may have represented a sincere concern. It disregarded, however, any Keynesian justification for longer budgetary cycles. It ignored the case for temporary deficit spending to stimulate an ailing economy and meet welfare needs that would increase precisely at the moment that declining employment reduced income tax revenues. Nor, or course, did it advance any argument of behalf of ongoing budget deficits. None of the phalanx of conservative economists quoted in support of the balanced budget-tax limitation amendment thought budgetary flexibility worthy of mention, much less referred to it in positive terms. Instead, they drew attention to "bracket creep," the gradual increase of tax rates as inflation moved incomes to higher levels. This represented, critics charged, an additional tax that Congress did not have to justify imposing.[49]

Ronald Reagan's central economic message in the early 1980s was that United States taxation and government spending were high and getting higher. The balanced budget-tax limitation amendment campaign rested firmly on this premise. The comparatively low taxes that Americans paid and the relatively modest progressivity of U.S. tax rates as judged by the standards of other advanced industrial nations went unnoted. So, too, did universal availability of pensions, health care, and other social services in more heavily taxed but nevertheless thriving capitalist nations from Japan to Canada to Germany and other western European democracies. The repeated libertarian assertion that Americans were too heavily taxes by too big a government became widely accepted. Similarly, the image of a burdensome United States debt obscured the higher per capita national indebtedness of thriving Japan and western Europe.[50] Furthermore, Reagan's rhetorical skill in blaming Congress for unbalanced budgets based upon his own tax reduction and spending proposals underscored the prevalence of political posturing rather than fiscal realism in the balanced budget campaign.

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47. *Balanced Budget: Tax Limitation Constitutional Amendment, 1981: Hearings on S.J. Res. 9, 43 & 58 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. 3-6 (1981) (statement of Sen. Orrin Hatch).

48. S. Rep. No. 151, *supra* note 19, at 3. *See also* Richard L. Lyons & Ward Sinclair, *Constitutional Amendment On Balanced Budget Is Reported Out,* WASH. POST, May 20, 1981, at A7; *Panel Backs Balanced Budget Amendment,* WASH POST, May 8, 1981, at A3.

49. S. REP. NO. 151, *supra* note 19, at 5-8; *id.* at 26-33.

50. SAVAGE, *supra* note 14, at 2.

Over a year passed before the "consensus" amendment came to the Senate floor. By the summer of 1982, however, Reagan's supply side economic theories had failed to produce the predicted new tax revenues from tax cuts, and the administration had set forth the first federal budget with a deficit in excess of $100 billion. Both the executive branch and legislators were eager to demonstrate before the fall elections that they were seeking remedies. Presidential aides stressed to reporters the difficulty of campaigning for a balanced budget amendment after submitting a prodigiously unbalanced budget, though in fact doing so provided an easy means of symbolically embracing principles being violated in practice. Reagan demonstrated this by proclaiming in a White House rose garden press conference that "Americans understand that the discipline of a balanced budget amendment is essential to stop squandering and overtaxing," and then ignoring questions about his apparent inconsistency.[51] A week later he told 5,000 supporters at a noon rally on the Capitol steps, an event crafted for television, that the amendment was needed to bring "to heel a federal establishment which has taken too much power from the states, too much liberty with the Constitution and too much money from the people."[52] Presumably, this federal establishment did not include Reagan's own administration.

Many members of Congress were ready to embrace the amendment as a way of demonstrating that they opposed deficits. Supporting the amendment was attractive although, or perhaps because, any need actually to balance the budget would await ratification. Sensing that the drive for the amendment was gathering momentum, opponents began warning that it might lead to dishonest revenue forecasts, requirements for individual or business payment instead of government funding for such items as universal health care, and other deceptive and regressive budgetary practices.[53] Such arguments failed to slow the amendment's progress in the Senate where on August 4, 1982, with every member voting, the balanced budget amendment won approval 69 to 31.[54]

The political pressures of the moment led some Senators who had earlier stood in opposition to support the measure. In 1979 Democratic majority leader Robert Byrd of West Virginia had stated unequivocally that the amendment "would not be in the nation's best interest," while influential Democrat William Proxmire of Wisconsin sternly warned that the nation could be "locked into a rigid budgetary straight jacket that could plague our

51. Herbert H. Denton & William Chapman, *Reagan Backs Balanced-Budget Amendment*, WASH. POST, July 13, 1982, at A3.

52. Herbert H. Denton & William Chapman, *Reagan Leads Cheers For Balanced Budget*, WASH. POST, July 20, 1982, at A1 & A6.

53. John M. Berry, *In a Time of Big Deficits, Balanced-Budget Plan is Good Politics*, WASH. POST, July 25, 1982, at A6.

54. CONG. REC. S19229 (daily ed. Aug. 4, 1982).

nation with years of deepening recession."[55] In 1982, however, both voted for the amendment. Republican John Tower of Texas did not even wait three years to retreat. After declaring that the measure "should not really be in the fundamental law of this land," Tower immediately bowed to popular opinion. He would vote to submit the amendment to the states, he said, to provide "a referendum of the people as they are represented in their respective states legislatures." Having thus taken political refuge in Article V, Tower then further exposed his waffling by announcing that "if invited by any state legislature in the country, I would be deeply delighted to testify against [the amendment's] ratification."[56]

The nation's governors were not impressed by the Senate's action. Meeting a week later in Afton, Oklahoma, the National Governors' Association discussed the amendment in a twenty-one hour closed session. Arizona Democrat Bruce Babbitt emerged castigating it as "a sloppy piece of constitutional draftsmanship," and scornfully adding, "It's beginning to look like the constitution of a banana republic."[57] A less predictable and thus more devastating evaluation came from Illinois Republican James Thompson. "The way you balance the budget is you balance the budget," he said.[58] "It doesn't take a constitutional amendment. It just takes guts."[59]

As the half-passed amendment resolution moved to the Democratically-controlled House of Representatives, different concerns emerged than those that prevailed in the Republican-dominated Senate. Not wishing to appear fiscally irresponsible but seeking to render the amendment harmless, Democrats on a judiciary subcommittee struck out the tax limitation section that Republican Representative Henry Hyde of Illinois called "the heart of the bill." The Democrats also shifted budget balancing responsibility from an annual basis to a far more flexible "fixed period" and reduced the majority required to approve an unbalanced budget from three-fifths of the body to three-fifths present and voting. These revisions gave Democrats a measure they could endorse during the fall election campaign without furthering the libertarian goals of the amendment's original sponsors. At the same time, the changes reduced Republican enthusiasm for immediate passage of the resolution.[60] Stalled for the moment, the amendment died altogether when the

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55. Nicholas Kristof, *Just How Would You Balance the Budget, Senator?,* WASH. POST, Aug. 8, 1982, at C5.

56. *Id.*

57. Dan Balz & David S. Broder, *Governors Question Balanced Budget Bill,* WASH. POST, Aug. 10, 1982, at A5.

58. *Id.*

59. *Id.*

60. William Chapman, *Anti-Deficit Bid Comes Up Lame in House,* WASH. POST, Aug. 19,

November 1982 election increased the Democratic majority in the House by twenty-six.

The 1982 Senate approval of the "consensus" amendment turned out to be the high point of the congressional balanced budget campaign during the 1980s, though far from its final gasp. A rapidly deteriorating economy increased political resistance to the economic policies of the Reagan administration, not to mention called attention to the rising costs of unemployment relief at the very time tax revenues were declining. However, while enthusiasm for the balanced budget amendment slipped slightly in Congress, the state response was more complicated. In March 1983 Missouri became the thirty-second state to request a constitutional convention for the purpose of proposing a balanced budget amendment.[61] With only two more state petitions apparently needed to force a convention call, attention shifted from the amendment itself to the matter of an Article V convention.

Questions arose as to whether or not a constitutional convention could address topics beyond those for which it was called, reconsidering the entire structure of United States government as had the 1787 Philadelphia convention and becoming, in the words of those who feared the prospect, a "runaway convention."[62] Orrin Hatch championed a bill to limit the scope and life span of state petitions and the power of any convention they might call into being. The balanced budget controversy enabled Hatch to focus the Judiciary Committee's attention on the convention bill by the spring of 1984.[63] Hatch opened hearings on the matter contending that Article V provided symmetrical procedures for proposing amendments so that states would have "substantial, although not unlimited, autonomy." He acknowledged a convention as "a temporary and independent branch of the National Government," but then drew a disputable conclusion. "While [a convention] is free to act within its authority to propose amendments to the Constitution," Hatch contended, "it is also subject to checks and balances designed to ensure that its actions are contained within the proper and limited scope of its authority. In other words,

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1982, at A9.

61. SENATE COMM. ON THE JUDICIARY, CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1985, S. REP. NO. 135, 99th Cong., 1st Sess. 57 (1985).

62. *See e.g.*, Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L. J. 189 (1972); Arthur E. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1968); Walter E. Dellinger, *The Recurring Question of the 'Limited' Constitutional Convention*, 88 YALE L. J. 1623 (1979); Gerald Gunther, *The Convention Method of Amending the U.S. Constitution*, 14 GA. L. REV. 1 (1979); Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903 (1968); William W. Van Alstyne, *Does Article V Restrict The States to Calling Unlimited Conventions Only?*, Vol. 1978, No. 6 DUKE L. J. 1295 (1979).

63. CAPLAN, *supra* note 20, at 76-77; S. REP. NO. 135, *supra* note 57, at 13-15.

as with any other institution of Government, the powers of the convention are defined and limited powers and subject to check by other institutions of Government."[64] The Utah Senator denied that the balanced budget amendment prompted his efforts, but left no doubt that restricting a constitutional convention to a single subject would undermine one of the most frequent objections to holding one.

Apprehensions about an impending convention prompted interest in Hatch's convention procedures proposal by, among others, Democratic Senator Patrick Leahy of Vermont.[65] He asked two constitutional scholars to rehearse arguments over whether a constitutional convention could be limited in the subjects it addressed or the procedures it chose. They could not agree.[66] While the Judiciary Committee then unanimously recommended the convention procedures bill to the Senate, the central issue remained unresolved. Senator Leahy, along with Senators Charles Mathias of Maryland, Joseph Biden of Delaware, and Max Baucus of Montana, expressed concern about having no convention procedures in place but doubted whether, once in session, a convention could be restricted.[67] Entangled in insoluble controversy, the bill went no farther.

In the summer of 1984 the contrasting positions of the major political parties further confounded the balanced budget amendment and convention questions. The Republican platform pledged the party to work for an amendment, declaring "If Congress fails to act on this issue, a constitutional convention should be convened to address only this issue in order to bring deficit spending under control." The Democratic platform decried "the artificial and rigid Constitutional restraint of a balanced budget amendment" and the attempt to call a constitutional convention. The mixed results of the national elections, a Reagan presidential victory but a renewed Democratic majority in the House of Representatives and a reduced Republican margin in the Senate, offered no clear indication of voter preference.[68]

The prospect of an unpredictable constitutional convention created nervousness in some quarters. In September 1984 the Michigan senate approved a balanced budget amendment convention petition, but the measure then died in a house committee after a Republican legislator turned against it, saying she "realized I don't want the Constitution tampered with." Referendums on

64. *Constitutional Conventions Procedures, 1984 Hearings on S. 119 The Constitutional Convention Implementation Act of 1981, Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 98th Cong., 2d Sess. 2 (1984).

65. *Id.* at 21-22.

66. *See id.* at 28-54.

67. S. REP. NO. 135, *supra* note 57, at 62-78.

68. CAPLAN, *supra* note 20, at 83.

compelling legislators to petition for a convention failed to get on the 1984 ballot in California and Montana. Then a petition resolution failed after intense debate in the Republican-controlled Connecticut state senate in March 1985. Further state setbacks followed.[69] By August, a new Gallup poll registered a sharp decline in public support for the balanced budget amendment and a rise in uncertainty, though not clear-cut opposition.[70]

Reduced enthusiasm for a balanced budget amendment became evident when the issue again came before the United States Senate in March 1986. During the previous year differences among balanced budget advocates had surfaced in the Senate Judiciary Subcommittee on the Constitution as Chairman Orrin Hatch led a majority of members to endorse a version limiting spending increases to the previous year's rate of national income growth, thus preventing any overall expansion of government programs or services. Paul Simon of Illinois, now a Senator, unsuccessfully fought this blanket restriction, warning that it could "create real mischief."[71] Despite losing this argument within the subcommittee, Simon nevertheless continued to support the amendment. Other Senators, however, had more doubts about this latest libertarian-learning balanced budget amendment. Although four years earlier the Senate had mustered more than the required two-thirds majority, on March 25 it failed to approve by a one-vote margin.[72] In part, the 1986 defeat appeared to be due to the recent passage of ordinary legislation to limit deficits. The Balanced Budget and Emergency Deficit Control Act of November 1985, commonly known as the Gramm-Rudman-Hollings act, prescribed gradual deficit reduction until achievement of a balanced federal budget in 1991. Perhaps a balanced budget could be realized without a constitutional amendment.

Enthusiasm for a balanced budget amendment flagged further as the Reagan administration neared its end. The bicentennial of the 1787 convention reminded Americans of the power such a body possessed. Support for another waned. Although during the bicentennial year Ronald Reagan vaguely endorsed a convention if necessary to obtain a balanced budget amendment, the Montana senate refused to accept its lower house's support

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69. *Id.* at 86.

70. In June 1983, 53 percent of respondents had heard or read about the amendment, 71 percent favored it, 21 percent opposed it, and 8 percent offered no opinion. GEORGE H. GALLUP, THE GALLUP POLL, 126 (1983). By August 1985, 57 percent knew about it, 49 percent favored, 27 percent opposed, and 24 percent remained neutral. *Id.* at 211-12 (1985). Two years later the 1985 pattern persisted. *Id.* at 184 (1987).

71. George Lardner, Jr., *Senate Subcommittee Approves Amendment for Balanced Budget,* WASH. POST, May 16, 1985, at A4.

72. 132 CONG. REC. S3324 (daily ed. Mar. 25, 1986).

for a petition.[73] In May 1988 Alabama formally withdrew its petition for a balanced budget amendment convention, ignoring White House appeals not to do so and overriding Governor Guy Hunt's veto of the measures. A wide spectrum of organizations, from the liberal People for the American Way to the Daughters of the American Revolution to the John Birch Society, urged the Alabama action, as they had the Montana senate vote. Phyllis Schlafly, a leader of the anti-equal rights amendment movement, was among those who thought a convention "a very bad idea," saying "We have a wonderful Constitution that has lasted for 200 years, and we don't think anybody should play games with it."[74] The Alabama legislature had, she declared, dealt "a death blow" to the convention movement. While NTU president James Davidson discounted apprehensions about a convention and decried Schlafly as "the Mad Hatter of American society," the divisions in conservative ranks did not bode well for the amendment campaign.[75]

Ronald Reagan's successor, George Bush, emulated his predecessor's advocacy of a balanced budget amendment with no greater success. Like Reagan, Bush proposed budgets with large deficits during each year of his presidency, renewing questions as to whether his calls for constitutional budgetary restraints amounted to anything other than posturing to offset political images of fiscal irresponsibility. Whatever Bush's motives, the House of Representatives twice considered and twice narrowly rejected balanced budget amendments sponsored by conservative Democrat Charles Stenholm of Texas. On July 17, 1990, the measure passed 279 to 150 but fell seven votes short of the two-thirds requirement, and on June 11, 1992, it passed 280 to 153, nine short.[76] These amendment proposals slightly altered the language, but retained the tenor of the Reagan-era libertarian measures that made it more difficult to increase taxes than reduce spending. Congress would be required to estimate revenues, then confine expenditures to that level unless a majority of all members in each house of Congress (not just those present and voting) agreed in a recorded vote to increase federal taxes. Only a three-fifths majority could authorize deficit spending or increase the national debt ceiling. In May 1992, Stenholm thought he had 305 votes for his measure, and Paul Simon believed the Senate would likewise pass it. However, opposition from Democratic leaders in both houses; outspoken criticism from a group of economists including seven Nobel laureates; the specter of deep budget cuts; the possibility that the judiciary would have to resolve presidential-congres-

73. CAPLAN, *supra* note 20, at 85-89.

74. Martha M. Hamilton, *Blow to Balanced Budget Amendment: Alabama Rescinds Its Call for Constitutional Convention,* WASH. POST, May 9, 1988, at A6.

75. *Id.*

76. 135 CONG. REC. H4870 (daily ed. Aug. 2, 1989); CONG. REC. H4670-71.

sional disagreements over revenue estimates, spending, or taxation; and the doubts of wavering Representatives again thwarted the amendment.[77] One House member who initially cosponsored the resolution but ultimately turned against it revealed the cause of his apostasy. After asking Bush how he would balance the budget and receiving an evasive answer, frustrated South Carolina Democrat Robin Tallon exclaimed, "[T]here was not the wisp of a plan between the President and Congress to actually make the hard choices, to do the heavy lifting, to balance the budget." A nonfunctioning symbolic amendment did not appeal to Tallon, so he, along with others, abandoned it.[78]

When efforts to constrain current federal spending became more determined after the 1992 election of Bill Clinton as President, at least two state legislatures abandoned petitions to force a constitutional convention.[79] However, perceptions of need for a balanced budget amendment did not fade altogether. Independent presidential candidate Ross Perot had made criticism of budgetary deficits and congressional "gridlock" centerpieces of his unexpectedly successful insurgent campaign in 1992. Clinton's first budget, combining substantial spending cuts with modest tax increases, significantly reduced but far from eliminated the annual deficit. Paul Simon, Stenholm's ally in 1990 and 1992, reemerged as the chief advocate of a balanced budget amendment and obtained a Senate vote on it in March 1994. Conservatives from both major parties aided Simon. He also received backing from a few professed liberal who believed that continued federal deficits in good times as well as bad undermined the economic stimulus impact of Keynesian policies and blocked new government activities however beneficial.[80]

In 1994 critics of Simon's views countered that government finances were now being dealt with more responsibly, that the economy was responding favorably, and that constitutionally requiring a balanced budget would hamstring the government in the future. Falling revenues in a recession would

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77. *See* Roy L. Ash, *The I.O.U.S.A. Amendment,* WASH. POST, June 11, 1992, at A27; Helen Dewar, *Byrd vs. Balanced-Budget Amendment; Senator Lobbies Colleagues - And Lobbyists - To Reject Proposal, Id.* at A8; Steven Mufson, *As Bush Backs Amendment Cure, Prospects for Balanced Budget Fade,* WASH. POST, June 6, 1992, at A12; Eric Pianin, *House Prepares to Vote on Balanced-Budget Amendment Today,* WASH. POST, June 11, 1992, at A6; Eric Pianin, *Byrd: Balanced Budget Amendment Will Fall,* WASH. POST, June 3, 1992, at A4.

78. Michael Ross, *Amendment Tough Choices for Lawmakers,* L.A. TIMES, June 12, 1992, at 1 (quoted in BERNSTEIN & AGEL, *supra* note 3, at 183-85).

79. The two states that had repealed their calls for a constitutional convention were Michigan and New Jersey. David S. Broder, *Balanced-Budget Amendment Drive Falters; Concern Rises in Two State Legislatures About Constitutional Convention,* WASH. POST, Feb. 10, 1993, at A22.

80. George F. Will, *Political-Class Bloat,* WASH. POST, Nov. 12, 1993, at A25. *See* Simon, *supra* note 31, at A30.

force spending reductions or tax increases precisely at the time when the reverse was needed to revive the economy. An amendment, they said, would shift spending responsibilities to state governments and business. It would also inhibit outlays for unanticipated natural disasters such as had just been approved to compensate victims of Midwestern floods and a California earthquake, not to mention discourage funding of long-term projects with uncertain results, cancer research for instance. New federal undertakings, such as a national health care program, would become impossible. Worst of all, in the eyes of some, requiring a three-fifths vote to waive the balanced budget requirement would allow a 41 percent congressional minority to override a 59 percent majority. Rather than just restrain the budget, this amendment would fundamentally alter basic arrangements of constitutional authority and responsibility.[81]

On March 1, 1994, the United States Senate again defeated a balanced budget amendment, in this instance by a vote of 63 to 37.[82] Although the positive vote was the smallest in a dozen years, it demonstrated the amendment's continued appeal. Libertarian desires to shrink federal government, "pay as you go" fiscal conservatism, and broad-based concern with striking a constitutional balance between the authority to spend and the less politically appealing obligation to raise revenues all contributed to its enduring popularity. The relative ease of justifying to one's constituents a vote in favor of compelling a balanced budget, compared to the difficulty of explaining a contrary vote, no doubt played a role.[83]

After the March 1994 vote, balanced budget amendment proponents signaled their intention to continue their quest. On September 27 all but five of the 157 Republican congressmen together with more than 185 candidates to join them signed the Grand Old Party's "Contract with America." They gathered on the west steps of the Capitol building to announce a ten-point political agenda. Reintroduction of the balanced budget amendment would be one of their highest legislative priorities for the next Congress if they were victorious in the upcoming election, they pledged.[84] In the following weeks, Republican congressional office-seekers continued to tout the "Contract with America" despite the scorn of critics who described it as a threadbare set of

81. *See Simon's Simple Pie,* 70 N. YORKER 6 (Feb. 28, 1994); 120 CONG. REC. S1590-2158 (daily eds. Feb. 22 - Mar. 1. 1994); Lloyd N. Cutler, *An Unbalanced Constitution,* WASH. POST, Feb. 16, 1994, at A19; Helen Dewar & Clay Chandler, *Imbalanced Balanced-Budget Hearings Offer Stark Views of Amendments, Id.* at A18; Ruth Markus, *Balanced Budget Bill is Opposed; Scholars Warn of Mistake,* WASH. POST, Feb. 13, 1994, at A5.

82. 120 CONG. REC. S2158 (daily ed. Mar. 1, 1994).

83. *Id.*

84. Cooper, *supra* note 1.

discredited ideas from the Reagan years. The outcome of the November 1994 balloting encouraged them to press ahead with the balanced budget amendment and the other items of the "Contract."

As long as the political culture persists that has prevailed since the New Deal, the balanced budget amendment will likely keep resurfacing. It could conceivably win congressional approval and state ratification. The concept has, after all, retained an appeal over the course of more than fifty years despite substantive arguments against it and occasional admissions from advocates such as Charles Stenholm that "they might be right."[85] It continues to attract support because it offers politicians a convenient way to demonstrate their fiscal integrity even when they persist in approving spending in excess of tax revenues. The symbolic value of the balanced budget amendment has kept it alive despite the observation of opponents such as Maryland Senator Paul Sarbanes that "Tampering with the Constitution is not way to restore a sense of fiscal responsibility to our system."[86]

The political effect of prolonged constitutional amendment agitation was one of the few ramifications of the balanced budget crusade not to be noted during the 1994 debate. However, fifteen years of constant discussion and repeated demonstrations of support for balanced budget and tax limitation amendments produced evident consequences. The Clinton administration, the first administration in a quarter of a century with aspirations to expand federal government services to the American people, felt obliged to avoid any action that might appear to increase, much less even temporarily further unbalance, the federal budget, even if the result might ultimately benefit the nation. In seeking to reform health care, for instance, the administration steadfastly avoided policy options that might give the appearance of major spending or tax increases. Many liberal Democrats argued that a "single payer system" of government-provided universal health care funded by a general tax would be most equitable and economical, achieving efficiencies and cost controls by funneling health care spending through government rather than through business or individuals. Advocates of a "single payer system" pointed to Canada as a nearby example of high quality health care for every citizen at significantly lower per capita cost than the United States currently bore. The administration ignored its natural political allies, opting instead for a complicated proposal for employer mandates that would, whatever its other merits or flaws, require employers to fund medical coverage and keep revenues and expenditures for health care outside the federal budget. Health care

85. Eric Pianin, *Stenholm's Fiscal Notion Reaches Back to Roots,* WASH. POST, June 6, 1992, at A14.

86. Steven Greenhouse, *Congress; Risking an Amendment to Balance the Budget,* N.Y. TIMES, May 17, 1992, at 4:2.

reform, enormously complicated in any event, was rendered more problematic by the long shadow of constitutional debate over limiting and balancing the federal budget.

Reviewing more than a half century of discussion over a balanced budget amendment to the Constitution ought to make evident that the core of support for the amendment has come from libertarian advocates of reduced government. This reality tends to be obscured by the amendment's disparate advocates with their dissimilar agendas. Doubts persist as to whether libertarian expectations would be fulfilled by the addition of a balanced budget requirement to the Constitution. Some observers, taking their cue from Carl Curtis or Paul Simon, imagine that the amendment would encourage acceptance of additional tax levies to fund desired programs and services. Others, recalling recent congressional actions, anticipate more mandates to individuals, private institutions, or state and local government to carry out obligations at their own expense so that the cost would not appear in the federal budget. Finally, the most sanguine predict that the likely result of an amendment would also be the least traumatic: book-keeping changes to obfuscate government spending or at least distinguish between single-year operating costs and capital expenditures with benefits spread over a longer span. The apparent uncertainty of a balanced budget amendment's effect on the functioning of government makes it easy to dismiss the measure as inconsequential. Given the amendment's history, however, such a conclusion would be unwise.

If installed in the Constitution, the balanced budget amendment would almost certainly limit the activity of the federal government. Practically speaking, new federal undertakings would be barred unless others, however worthwhile, were abandoned. Core advocates of the balanced budget amendment expect such an outcome. They would no doubt pursue judicial action to prevent any application of the amendment other than one that would achieve their goal of reducing government. The outcome of such judicial action is, of course, uncertain, but rulings following previous amendments suggest that the Supreme Court would feel bound to implement the new amendment fully and effectively.[87] Since never has an amendment sought to restrain the operation of the federal government quite like the balanced budget amendment, it is difficult to predict the nature or extent of restrictions that might be devised. It is not hard, however, to imagine their being upheld by the Court as constitutional.

Beyond the specific attributes of the balanced budget amendment lie broader issues of constitutional revision. In setting a high standard of congressional and state consensus in Article V for modification of the Constitution, the founders demonstrated their belief that broad agreement of opinion

87. *See* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 32-35 (1979).

ought to be required to define further the reach and limit of government authority. At the same time, by departing from the requirement of unanimity for constitutional change established by the Articles of Confederation, the founders made clear that a few doubters should not be allowed to block the remodeling of the structure of government. Establishing the operating rules for government was, in the founders' eyes, the most significant decision for a republic and ought not to be taken lightly. But if a broad consensus chose to implement a new constitutional provision, it should then be binding on all.

If the Article V process is completed to install a balanced budget amendment in the Constitution, and the courts regard it as a restriction upon federal government activity, as they certainly must, then the amendment will no doubt become, for better or ill, a binding constitutional obligation, reversible only by another constitutional change. While such a reversal was once accomplished, when national alcohol prohibition was installed and then removed from the Constitution, such a turnabout is extraordinarily difficult and unlikely. Were a balanced budget amendment to be adopted, it would, in all likelihood, remain in place, effectively confining the federal government more than it has been for at least the last two-thirds of a century. The amendment would continue to restrict the scope of federal authority, regardless of changes in thinking regarding the proper role of the federal government in economic management, provision of services to the people, or other matters.

Those supporting or opposing a balanced budget requirement should never forget it is a constitution they are amending, to paraphrase John Marshall. Striking postures regarding constitutional change may have short-term political advantages, but ultimately the society must live with the consequences of the constitutional choices it makes. In the case of the balanced budget amendment, those consequences would amount to much more than the imposition of discipline on the congressional budgeting process. They would involve the rejection of modern approaches to government economic management and provision of desired services.

The balanced budget amendment would fundamentally alter the constitutional structure of the United States. It would significantly reduce the power of the federal government to act as an agent for the American people. The centripetal forces of individualism would gain a signal victory over the centrifugal power of community. That is exactly what the amendment's main proponents have intended since the 1930s. Anyone concerned about American law, government, and politics should carefully examine and consider the history of the balanced budget amendment debate as to the wisdom of such a profound constitutional reform. Adopting or avoiding the balanced budget amendment is likely to be the most important constitutional choice of the current era.