CONSTITUTIONAL CONVENTION PROCEDURES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 3, S. 520, and S. 1710

BILLS TO PROVIDE PROCEDURES FOR CALLING CONSTITUTIONAL CONVENTIONS FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, ON APPLICATION OF THE LEGISLATURES OF TWO-THIRDS OF THE STATES, PURSUANT TO ARTICLE V OF THE CONSTITUTION

NOVEMBER 29, 1979

Serial No. 96–77

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

59-609 O WASHINGTON : 1980

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[96th Congress]

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CONSTITUTIONAL CONVENTION PROCEDURES

THURSDAY, NOVEMBER 29, 1979

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:55 a.m., room 318, Russell Senate Office Building, Hon. Birch Bayh (chairman of the subcommittee) presiding.

Present: Senators Bayh, Thurmond, and Hatch.

Staff present: Kevin O. Faley, chief counsel and executive director; Mary K. Jolly, staff director and counsel; Linda Rogers-Kingsbury, deputy staff director and chief clerk; Christie F. Johnson, clerk; John Minor, counsel to Senator Kennedy; Mike Klipper, counsel to Senator Mathias; Tom Perry, minority chief counsel; Steve Markman, minority counsel; Dennis Shedd, counsel to Senator Thurmond; Chip Wood, counsel to Senator Simpson.

OPENING STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator BAYH. Today we will begin to consider an important issue and legislation which could lead to profound alteration in the method by which we amend our Constitution—the hitherto unused provisions of article V of the Constitution providing that the States may petition Congress for a Constitutional Convention. The legislation which is the subject of these hearings would establish procedures both for calling such a Convention and for conducting its business.

Throughout these hearings I believe we should keep one thought in mind—calling a Constitutional Convention is the single most significant step our Government could take. We should not underestimate the consequences of this act or the possible unforeseen result of an event such as a Convention, to rewrite the basic law of our land.

As we know, the original and only Constitutional Convention, which was held in Philadelphia in 1787, met "for the sole and express purpose of revising the Articles of Confederation". Our country had just concluded a war for our independence and the Government at that time, had no power under the Articles of Confederation to defend the country, collect taxes, or encourage and engage in trade and commerce. The Government for which many fought and suffered was in the midst of another crisis, different from previous experiences, but no less

critical. Our country was fighting for its very survival, and as we know, the Articles of Confederation were not amended, but rather replaced with the Constitution of the United States embodying our Bill of Rights.

My purpose as a Senator, is to guard and protect this Constitution, to uphold its integrity and to weigh the impact of suggested revisions or amendments in terms of not only our lifetime, but that of our children and grandchildren. The Constitution has endured and survived for almost 200 years and it has succeeded in keeping secure our basic liberties throughout our history. Our responsibility to this document is one of much gravity and one which cannot be dealt with frivolously or without much thought and consideration.

As chairman of this subcommittee, I am of course, aware of the petitions which have been received by the Congress calling for a Constitutional Convention on a variety of subjects. I am somewhat concerned that some of these petitions have apparently been adopted by State legislatures with no hearings, and no debate. While I believe there can be little question that the receipt of 34 valid petitions for a convention places an obligation on the Congress to call one, I would hope that our legislatures would carefully consider the consequences of these petitions.

I personally do not believe that this is the time to have the wrenching experience of a convention. I recognize however, that we should begin an examination of the questions raised by proposed procedures legislation, before a convention is threatened, to deal with a specific topic, lest views on the substantive issue color what should be neutral decisions about fair procedures.

I am on record that we ought to take the middle ground in framing such a bill—avoiding both those procedures which make constitutional change too easy and those which stifle needed reform altogether.

Let us recognize that if we establish a procedure whereby a Constitutional Convention can propose a constitutional amendment, that convention will be writing the chapter and verse of a proposed constitutional amendment, just as Congress does and has historically done.

The purpose of these hearings is to investigate the many questions that have remained uresolved. In the opinion of some constitutional scholars, some of these questions are unanswerable, even if that is true, we must still make an attempt, we must also make the citizens of the United States aware of the startling realities of the situation. Hopefully these hearings will serve not only that purpose, but also the Constitution.

Without objection I will submit copies of S. 3, S. 520, S. 1710, and a prepared statement by Senator Pryor for the record.

[Text of S. 3, S. 520, S. 1710, and the prepared statement of Senator David Pryor follows:]

96TH CONGRESS
1ST SESSION

S. 3

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1979

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Constitutional Convention Procedures Act".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article

V of the Constitution of the United States, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and stating the nature of the amendment or amendments to be proposed.

APPLICATION PROCEDURE

SEC. 3. (a) For the purpose of adopting or rescinding a resolution pursuant to section 2 or section 5 of this Act, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, but without the need for approval of the legislature's action by the Governor of the State.

(b) Questions concerning the adoption of a State resolution cognizable under this Act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or, if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the appli-

cation, one addressed to the President of the Senate and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution;

(2) the exact text of the resolution signed by the presiding officer of each house of the State legislature; and

(3) the date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States.

EFFECTIVE PERIOD OF APPLICATION

SEC. 5. (a) An application submitted to the Congress by a State, unless sooner rescinded by the State legislature, shall remain effective for seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 6 of this Act, calling for a constitutional convention.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission in conformity with the procedure specified in sections 3 and 4 of this Act, except that no such rescission shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject.

(c) Questions concerning the rescission of a State's application shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever applications made by two-thirds or more of the States with respect to the same subject have been received, the Secretary and the Clerk shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention, and (2) set forth the nature of the

amendment or amendments for the consideration of which the convention is called. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than one year after adoption of the resolution.

DELEGATES

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each congressional district in the manner provided by law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate

in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefor in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

CONVENING THE CONVENTION

SEC. 8. (a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not named or described in the concurrent resolution of the Congress by which the convention was called. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in

accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) There are hereby authorized to be appropriated such sums as may be necessary for the payment of the expenses of the convention.

(c) The Administrator of the General Services shall provide such facilities, and the Congress and each executive department, agency, or authority of the United States, including the legislative branch and the judicial branch, except that no declaratory judgment may be required, shall provide such information and assistance as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall trans-

mit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of a majority of the total number of delegates to the convention.

(b) No convention called under this Act may propose any amendment or amendments of a nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b)(1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General

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Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (A) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or (B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called, or because the procedures followed by the convention in proposing the amendment were not in substantial conformity with the provisions of this Act. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligation imposed upon them by the first sentence of this paragraph.

(2) For the purposes of paragraph (1) of this subsection, (A) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of ninety days.

(c) Upon receipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, a copy of any concurrent resolution agreed to by both Houses of the Congress which prescribes the time within which and the manner in which such amendment shall be ratified, and a copy of this Act.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the State legislatures shall adopt their own rules of procedure. Any State action ratifying a proposed amendment

to the Constitution shall be valid without the assent of the Governor of the State.

(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amendment to the Constitution shall become valid when ratified by the legislatures of three-fourths of the several States within seven years from the date of the submission thereof to the States, or within such other period of time as may be prescribed by such proposed amendment.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States, shall be determined solely by the Congress of the

United States, and its decisions shall be binding on all others, including State and Federal courts.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

Calendar No. 64

96TH CONGRESS
1ST SESSION

S. 520

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

IN THE SENATE OF THE UNITED STATES

MARCH 1 (legislative day, FEBRUARY 22), 1979

Mr. HELMS introduced the following bill; which was read the first time

APRIL 9, 1979

Read the second time and ordered placed on the calendar, by unanimous consent

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A BILL

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Constitutional Convention Procedures Act".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and stating the nature of the amendment or amendments to be proposed.

APPLICATION PROCEDURE

SEC. 3. (a) For the purpose of adopting or rescinding a resolution pursuant to section 2 or section 5 of this Act, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, but without the need for approval of the legislature's action by the Governor of the State.

(b) Questions concerning the adoption of a State resolution cognizable under this Act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be no such officer, the person who is

charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution;

(2) the exact text of the resolution, signed by the presiding officer of each house of the State legislature, and

(3) the date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each House of the legislature of every

other State and to each member of the Senate and House of Representatives of the Congress of the United States.

EFFECTIVE PERIOD OF APPLICATIONS

SEC. 5. (a) An application submitted to the Congress by a State, unless sooner rescinded by the State legislature, shall remain effective for seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 6, of this Act calling for a constitutional convention.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission in conformity with the procedure specified in sections 3 and 4, except that no such rescission shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject.

(c) Questions concerning the rescission of a State's application shall be determined solely by the Congress of the

United States and its decisions shall be binding on all others, including State and Federal courts.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever applications made by two-thirds or more of the States with respect to the same subject have been received, the Secretary and the Clerk shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such con-

current resolution shall (1) designate the place and time of meeting of the convention, and (2) set forth the nature of the amendment or amendments for the consideration of which the convention is called. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each House of the legislature of each State.

(b) The convention shall be convened not later than one year after the adoption of the resolution.

DELEGATES

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each Congressional district in the manner provided by law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during

their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefore in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

CONVENING THE CONVENTION

SEC. 8. (a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not named or described in the concurrent resolution of the Congress by which the convention was called. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention.

Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) There are hereby authorized to be appropriated such sums as may be necessary for the payment of the expenses of the convention.

(c) The Administrator of the General Services shall provide such facilities, and the Congress and each executive department, agency, or authority of the United States, including the legislative branch and the judicial branch except that no declaratory judgment may be required shall provide such information and assistance as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of a majority of the total number of delegates to the convention.

(b) No convention called under this Act may propose any amendment or amendments of a nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b)(1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the

Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (A) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or (B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called, or because the procedures followed by the convention in proposing the amendment were not in substantial conformity with the provisions of this Act. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligation imposed upon them by the first sentence of this paragraph.

(2) For the purposes of paragraph (1) of this subsection, (A) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and (B) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of ninety days.

(c) Upon receipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, a copy of any concurrent resolution agreed to by both Houses of the Congress which prescribes the time within which and the manner in which such amendment shall be ratified, and a copy of this Act.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to

this Act the State legislatures shall adopt their own rules of procedure. Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amendment to the Constitution shall become valid when ratified by the legislatures of three-fourths of the several States within seven years of the date of the submission thereof to the States, or within such other period of time as may be prescribed by such proposed amendment.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

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(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

96TH CONGRESS
1ST SESSION

S. 1710

To provide procedures for calling Federal constitutional conventions under article V for the purpose of proposing amendments to the United States Constitution.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 5 (legislative day, JUNE 21), 1979

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide procedures for calling Federal constitutional conventions under article V for the purpose of proposing amendments to the United States Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Constitutional Convention Implemention Act of 1979".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. (a) The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, shall adopt

a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more specific amendments to the Constitution of the United States and stating the general subject of the amendment or amendments to be proposed.

(b) The procedures provided by this Act are required to be used whenever application is made to the Congress, under article V of the Constitution of the United States, for the calling of any convention for the purposes of proposing one or more specific amendments to the Constitution of the United States, each applying State stating in the terms of its application the general subject of the amendment or amendments to be proposed.

APPLICATION PROCEDURE

SEC. 3. (a) For the purpose of adopting or withdrawing a resolution pursuant to section 2 and section 5 of this Act, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, except that the action shall be valid without the assent of the Governor of the State.

(b) Questions concerning the State legislative procedure and the validity of the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or, if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution, the exact text of the resolution signed by the presiding officer of each house of the State legislature, the date on which the legislature adopted the resolution, and a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution; and

(2) to the extent practicable, a list of all State applications in effect on the date of adoption whose subject or subjects are substantially the same as the subject or subjects set forth in the application.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the

House of Representatives shall report to the House of which he is presiding officer, identifying the State making application, the general subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States.

EFFECTIVE PERIOD OF APPLICATION

SEC. 5. (a) An application submitted to the Congress by a State, unless sooner withdrawn by the State legislature, shall remain effective for the lesser of the period specified in such application by the State legislature or for a period of seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same general subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 6 of this Act, calling for a constitutional convention.

(b) A State may withdraw its application calling for a constitutional convention by adopting and transmitting to the

Congress a resolution of withdrawal in conformity with the procedures specified in sections 3 and 4 of this Act, except that no such withdrawal shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same general subjects.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each general subject. Whenever applications made by two-thirds or more of the States with respect to the same general subject have been received, the Secretary and the Clerk shall so report within five days, in writing to the officer to whom those applications were transmitted, and such officer within five days thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall then be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same general subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed

to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same general subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that general subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention, and (2) set forth the general subject of the amendment or amendments for the consideration of which the convention is called. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than six months after adoption of the resolution.

DELEGATES

SEC. 7. (a) Each State shall appoint, in such manner as the legislature thereof may direct, a number of delegates, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed as delegate. Any vacancy occurring in a State delegation shall be filled by appointment of the legislature of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the President of the Senate and the Speaker of the House of Representatives the name of each delegate elected or appointed by the legislature of the State pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

CONVENING THE CONVENTION

SEC. 8. (a) Of those persons serving as chief justices of the State supreme courts, the person who is senior in years of service as such a chief justice shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to comply with the Constitution of the United States and the provisions of this Act. Further proceedings of the convention shall be conducted in accordance with such

rules, not inconsistent with this Act as the convention may adopt.

(b) No Federal funds may be appropriated specifically for the purposes of payment of the expenses of the convention.

(c) The Administrator of the General Services shall provide such facilities, and the Congress and each executive department, agency, or authority of the United States, including the legislative branch and the judicial branch, except that no declaratory judgment may be required, shall provide such information and assistance as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. No convention called under this Act may propose any amendment or amendments of a general subject different from that stated in the concurrent resolution calling the convention.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b)(1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of thirty days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (A) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the mode of ratification in which such amendment shall be ratified, or (B) a concurrent resolution stating that the Congress disapproves

the submission of such proposed amendment to the States because such proposed amendment relates to or includes a general subject which differs from or was not included as one of the general subjects named or described in the concurrent resolution of the Congress by which the convention was called. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligation imposed upon them by the first sentence of this paragraph.

(2) For the purposes of paragraph (1) of this subsection, (A) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and (B) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of thirty days.

(c) Upon receipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, a copy of any concurrent resolution agreed to by both Houses of the Congress which prescribes the mode in which such amendment shall be ratified, and a copy of this Act. Such concurrent resolution may also prescribe the time within

which such amendment shall be ratified in the event that the amendment itself contains no such provision. In no case shall such a resolution prescribe a period for ratification of less than four years.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified consistent with the provisions of article V of the Constitution of the United States.

(b) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

JUDICIAL REVIEW

SEC. 15. (a) Any State aggrieved by any determination or finding, or by any failure of Congress to make a determination or finding within the periods provided, under section 6 or section 11 of this Act may bring an action in the Supreme Court of the United States against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. Such an action shall be given priority on the Court's docket.

(b) Every claim arising under this Act shall be barred unless suit is filed thereon within sixty days after such claim first arises.

(c) The right to review by the Supreme Court provided under subsection (a) does not limit or restrict the right to judicial review of any other determination or decision made under this Act of such review as is otherwise provided by the Constitution or any other law of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 16. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

PREPARED STATEMENT OF HON. DAVID PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Thank you, Senator Bayh, for this opportunity to testify before your Subcommittee on the Constitution. I must state at the outset that I strongly oppose the use of a constitutional convention to amend our Constitution. Some of my concerns are expressed in these remarks. The bottom line of my concern is that attempting to amend our Constitution by the conventional method would be opening a Pandora's Box.

That does not mean, however, that this discussion is not important. At the present time a number of states have submitted resolutions calling for a convention. To ignore these is to court danger. It is important that we discuss the possibility of a constitutional convention in an environment free from the pressures surrounding the current issues which may be topics of future constitutional conventions. I was pleased to hear of efforts to limit narrowly the testimony on these bills, and not deal with particular issues which might be before a constitutional convention. Earlier attempts have been bogged down in these pressing but side issues.

Prior to the preparation of my testimony, the staff of the Subcommittee submitted numerous questions for my consideration. Though I may not address each and every one, I will attempt in my testimony to comment on those I feel are of major importance or I have personal experiences which may be beneficial to the Subcommittee.

Article V of the Constitution provides two procedures for amending that document. Two-thirds of both Houses of Congress may propose amendments or two-thirds of the states may request the Congress to call a constitutional convention. Under the second method, Congress has two obligations: (1) to call the convention and (2) to select the mode of ratification. But its responsibility is more complex than that. The duty to call a constitutional convention contains the responsibility of Congress to determine the validity of the state resolutions. I do not believe this determination can be delegated to the states as is proposed in S. 1710. What is needed is a uniform review by Congress of the state resolutions. Congress should explore the intent of the resolutions submitted by each state legislature. I see no problem in each state applying procedures consistent with the normal passage of resolutions. States may differ in these procedures, but this should not be grounds to reject resolutions regardless of the use or exclusion of certain officials, votes or referendums.

I do not believe, however, that efforts, either by the states or by the Congress, to limit the scope of the convention are constitutional. While I was Governor of Arkansas, I proposed and the legislature adopted legislation calling for a limited state constitutional convention. The convention never convened, however, because the Supreme Court of Arkansas struck down this attempt to hold a limited convention. The Court held in *Pryor* v. *Lowe*, "delegates to a constitutional convention are exercising that * * * power inherent in the people * * *" 523 S.W.2d 202. The attempt of the Arkansas Legislature to limit the scope of the convention was viewed by the Court to be a usurpation of the power of the citizens of the state. The Court left open the situation when the electorate passed on the limitations placed on a convention.

This country's only experience with a constitutional convention supports, I believe, my position. The constitutional convention of 1787 exceeded its purported call. The call was for the "sole and express purpose of revising the Articles of the Confederation." The result of the convention was the Constitution by which we rule ourselves today. Their drafting of a new constitution was justified by those who now seek a limited convention as valid due to the impending dissolution of the republic. The unity of the republic is a subjective opinion, and should not be confused with the right of the people to propose a new constitution or amendments to the present constitution.

Proponents of a limited convention cite the language of the Constitutional Convention of 1787. The American Bar Association quoted proposed language which contained specific wording inferring the calling of a limited convention. This language was omitted from the resulting Constitution; however, the ABA contends that the intent is still embodied in the Constitution. I would suspect this to be just the reverse, removing the wording removes the option to hold a limited convention. Assuming a limited convention cannot be called, then no

limiting oath or other means to accomplish this end can be permitted. Even though it would not be required, I would hope that the delegates to the convention would do their best to heed the advisory comments and instructions contained in their state resolution.

Many of the state resolutions before Congress are worded to be effective only if a limited convention is called. If a limited convention may not be called, as I think it cannot, then it is only appropriate that these state resolutions are invalid. If the state legislature's resolution will permit a general convention, although recommending only a single subject of consideration, there appears to be no problem in these continuing in force.

Both S. 3 and S. 1710 address the selection of delegates to a constitutional convention. The act which authorized the 1976 Arkansas Constitutional Convention provided for the appointment of delegates by the governor. Since the Arkansas Supreme Court in *Pryor* v. *Lowe* held the call for a convention void on other grounds, it did not review the selection of delegates. The dissent, however, did address the issue of selection of delegates. The dissenters indicated a preference for a direct election of delegates, but found no provisions in the state constitution or statutes prohibiting the appointment of delegates. As to whether public officials should be allowed to serve as delegates, the 1970 Arkansas case of *Harvey* v. *Ridgeway* would seem to be instructive. The court in that case held participation in the convention was not similar to employment in any other office in the state. A constitutional convention is equal to and independent from existing branches of government. The Court found no conflict in any dual employment as a delegate and employee of a particular branch of government. I see no reason why any individual needs to be excluded from the pool of minds available to assist in the drafting of a new amendment.

Some provisions will be necessary to address the convening of a constitutional convention. Article V provides for the calling of the convention and the selection of the mode for ratification of amendments by the states. Congress may provide under the power granted by Article I's "Necessary and proper clause" for procedures necessary for the convention. I believe Congress possesses the power to provide for such matters as the time and place of the convention, financing of the convention, and to provide for the initial opening procedures.

While I believe that Congress should appropriate funds to finance a constitutional convention, there seems to be no obligation to do so under Article V. If Congress did not appropriate funds in the call for the constitutional convention, it would be necessary for the states to pay the expenses on some proportioned basis. I do not support the requirement of annual authorization by Congress. Congress should not be in a position to use the authorization process to influence the work of the convention.

S. 1710 provides for the nation's senior State Supreme Court Justice to convene the convention. I have no objection to such a procedure but fail to see the reason for doing so. Senator Helms' bill provides for the Vice President to preside on the opening day. This method appears to be simpler and more practical than the use of a state justice.

The vote on final passage of any amendment submitted by the Convention should parallel the two-thirds requirement imposed on Congress in submitting amendments to the States. Some who seek lower voting requirements feel the three-fourths vote by the States needed for ratification is a sufficient check. I can see no reason, however, to exempt the convention from the two-thirds requirement. On procedural matters and amendments to the proposed amendments, I would allow the convention itself to determine the required percentage.

I do not support the provisions in these bills which remove the constitution convention from judicial review. Congress has discretion in interpreting Article V, but neither Congress, the convention nor the states should be the final arbitration in every situation involving the convention.

The final responsibility of Congress under Article V is to propose the method of ratification. Automatic submission by the Administrator of the General Services Administration to the states is inappropriate and will not likely prove binding on future Congresses.

Mr. Chairman, these are a few of my thoughts on the bills before your Subcommittee. I appreciate your inviting me to testify. Let me end my statement as I began it—that is by restating my strong opposition to using the convention method to amend our Constitution.

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OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, today we begin hearings on an uncharted area of our Constitution. We are here to discuss that portion of article V which authorizes a Constitutional Convention. While we have come close to such a convention in the past, we have never used this approach to amend the Constitution. However, we are now faced with the very real possibility of convening such a body, because 30 of the required 34 States have requested one.

The possibility of a convention invokes mixed feelings. While some people fear that a convention would be uncontrollable, others see it as limited to one or two very specific, well-defined amendments. While some believe that the risks involved in a convention outweigh any possible benefit, others think that it represents a needed check on an unresponsive Federal Government.

Whatever one's feelings are on the usefulness of the convention method for amending the Constitution, there appears to be a consensus on what the fundamental questions are. First, we must consider the validity of State applications for a convention. This discussion includes the issue of a State's ability to rescind its application. Second, we must consider the scope of the deliberations at the convention. This discussion must focus on whether these deliberations can be limited, and if they are to be limited, then how those limits are to be enforced.

Since there is very little precedent to guide us, we have no hard and fast answers to these tough questions. We must look to the reasoning and interpretation by the Framers of the Constitution for assistance. We must fully consider all the possible ramifications of a convention and attempt to find the best solutions to any problems which we can foresee. Hopefully, these hearings will help us find those solutions.

We are fortunate to have such distinguished witnesses with us today. By their presence, they indicate their desire to help fashion reasonable solutions. I look forward to participating in these very important discussions.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Let's call this session of the Subcommittee on the Constitution to order. We have an impressive list of witnesses here today, and I apologize for being a little bit late, but we had a conflict that I had to resolve before I could get down here.

I wish to congratulate our chairman, Senator Bayh, for convening hearings on the subject of procedures for article V Constitutional Conventions. I am well aware of the chairman's long interest in this matter, and the leadership role he played in this issue several sessions ago.

In considering this isue, this committee is embarking upon a complex issue of the first constitutional magnitude. The question that this committee will be deciding are threshold questions, for the most part. There is no precedent that will guide our decisions. There is no tradition and no experience to which we can look for example. And

there is surprisingly little in the way of documentary material to provide insight into the expectations of those who drafted our Constitution.

Each of us, in my opinion, must look carefully to the plain language of the Constitution, to provide whatever guidance of which it is capable. We must look to the actions of the Philadelphia convention to discern what we can from it. And we must look to the policies that the founders hoped to achieve through article V and conform our procedures legislation appropriately. I am extremely enthusiastic about the quality of witnesses that our subcommittee will have before it today, and I am confident that each of them will enable us to make wiser and more informed decisions on this legislation.

At the outset, I would like to state my strong hope that each of us, committee members, witnesses, the media, and the public, will be able to view this issue apart from the issues that seem immediately to be compelling some States to seek a Constitutional Convention. Several years ago, the issue was reapportionment; today it is a balanced budget; tomorrow it will be something else. To the best of our abilities, we must place aside the merits of these individual amendment efforts.

What this committee is considering, rather, is legislation to establish neutral procedures to guide the conduct of Constitutional Conventions generally. While the imminence of a convention on the matter of a balanced budget has obviously created the urgency for this legislation, this committee's burden is to produce procedures legislation designed neither to facilitate nor to obstruct the achievement of a balanced budget amendment, or any other amendment. This legislation will remain applicable to convention initiatives long after a balanced budget amendment has been disposed of one way or the other.

Before we begin, I would very quickly like to summarize the premises that underlie S. 1710, my Constitutional Convention Implementation Act. First, it supposes that an article V convention can be limited. That is, if the States have a narrow or precise grievance of a constitutional sort, it is not necessary that they place the entire Constitution in jeopardy in order to remedy their concerns. A convention may, in fact, be limited in the scope of its considerations.

Second, I sense that the founders in establishing the convention alternative were concerned that the strong desires of the States should not be obstructed permanently by the will of an intransigent Congress. Congress, as with any other institution, is sometimes less than enthusiastic about limiting its own power and authority. Thus, I have sought in my bill to limit opportunities for congressional obstruction in the Constitutional Convention process. It would be dubious policy in my opinion, and inconsistent with the objectives of article V, to permit Congress to loom over this process in such a way that the legitimate concerns of the States could not, at some point, be pursued through the alternative amendment process.

We will begin today by hearing from the Secretary of the Senate, Mr. Stanley Kimmitt.

Stan, I apologize for being late. I know you are very busy, and we appreciate hearing from you.

TESTIMONY OF J. S. KIMMITT, SECRETARY OF THE SENATE

Mr. KIMMITT. Thank you, Senator Hatch. Thank you for providing me an opportunity to appear before your subcommittee today to discuss the method employed by the Office of the Secretary of the Senate in processing petitions and memorials received by the Senate.

It is my understanding that before I became Secretary of the Senate original petitions or memorials from State legislatures, rather than copies, were referred to committees. Apparently, this procedure was adopted because of difficulties in duplicating these documents at that time.

The original petitions or memorials were delivered to the committees, and receipt cards were signed and returned to the Office of the Secretary where they were retained on file. Thus, a record was kept on the referral and receipt of all documents.

Upon becoming Secretary of the Senate, I undertook a review of the procedures within the Office. It was during this review that I noted original petitions and memorials were being forwarded to committees. In some cases, they were lost or unaccounted for. Since rule VII, paragraph 6 of the Standing Rules of the Senate states that original petitions and memorials are to be retained within the files of the Office of the Secretary, the procedure was promptly changed.

However, the Senate rules were revised on November 14 of this year, by the adoption of Senate Resolution 274 and now contain no provision to this effect. It is still my intention, unless otherwise directed, to continue the same procedure now in effect.

The current procedure for processing petitions and memorials is as follows:

The documents are received by the Senate Parliamentarian from the Office of the Vice President. The Parliamentarian reads and endorses them with the date and committees to which they are to be referred.

They are then hand delivered to the assistant reported within my office where they are numbered, recorded in the Journal, printed in full in the Congressional Record, and entered in the computer records system. The documents are numbered consecutively, beginning anew with each Congress, a process which was instituted recently so that they could be included in the computer system.

After proper entries have been completed, the communications are then Xeroxed and copies sent to the appropriate committees, together with receipt cards which are signed and returned. The original documents and receipt cards are then retained in the files of this Office.

The Secretary's Office never kept records of States making application for a Constitutional Convention. However, I directed my staff to conduct a search of those original communications in our possession, beginning with 1978, to determine from which States we have received petitions or memorials relating to a balanced Federal budget. The attached table details those States which have forwarded communications to the Senate.

As to petitions and memorials prior to 1978, it is my understanding that originals are in the possession of the Committee on the Judiciary.

That completes my statement.

Senator HATCH. We appreciate your testimony, Stan, and for bringing us up to date on your procedures.

There are 30 States that have called for a Constitutional Convention on the subject of the balanced budget amendment, or something

approximating that. Yet, your list contains the names of only 24 States. Among those that your list does not include are Delaware, 1975; Georgia, 1976; Maryland, 1975; Nevada, 1977; and Virginia, 1976. If I could ask, why is there this discrepancy, and in view of the fact that the constitutional convention effort was so close to success several years ago in the area of reapportionment, why have we not adopted housekeeping procedures that would have resolved these problems in the past?

Mr. KIMMITT. I can only assume, Senator Hatch, that those petitions that are not on our list are in the possession of the committee. The previous procedure that I outlined, was not a tight one and our Office apparently dropped the ball in not keeping track of those petitions.

Senator HATCH. I would think you ought to get your files up to date so the reports can be made more accurately. Can we do that?

The subcommittee has the copies, so why don't we get them to you so that you have them all.

Mr. KIMMITT. That would bring us up to date.

Senator HATCH. Apparently, Nevada has not yet formally sent us their convention application so that only 29 should presently be on file.

I think that is the way to do it. I think it is better for you to keep them and send copies to the committee, because we have lost them in the past. I commend your efforts in this regard, and appreciate your testimony.

Thank you so much, Senator, any questions?

Senator THURMOND. We are glad to have you with us, and thank you for your statement. I wanted to ask you this question: Are these petitions generally sent to the Archives, or the Secretary of the Senate, or to the committees? Where is the official place it should be sent?

Mr. KIMMITT. They come first to the Vice President, as the President of the Senate, and he transmits them to my Office, specifically to the Office of the Parliamentarian. The Parliamentarian reviews them and determines to which committee they should be referred. Entries are then prepared for the Senate Journal, the Congressional Record, and the Senate computer system. After being properly recorded, the documents are then duplicated, and copies forwarded to the committees.

The original, under the rules, should have been kept and it is now being kept in the Office of the Secretary. As long as the item is active, the original remains in the Office of the Secretary and a copy in your committee. When the matter has been disposed of, it will then be transferred to the Archives which is the permanent repository.

Senator THURMOND. Then the petitions should be sent to the Secretary of the Senate, and he would keep them and send copies to the committees, and it would remain on Capitol Hill as long as it is active, and after it becomes inactive, it would be sent to the Archives.

Mr. KIMMITT. Yes.

Senator THURMOND. Thank you very much.

[Mr. Kimmitt's prepared statement with an attachment follows:]

PREPARED STATEMENT OF J. S. KIMMITT

Mr. Chairman, thank you for providing me an opportunity to appear before your Subcommittee today to discuss the method employed by the Office of the Secretary of the Senate in processing Petitions and Memorials received by the Senate.

It is my understanding that before I became Secretary of the Senate original Petitions or Memorials from state legislatures, rather than copies, were referred to committees. Apparently, this procedure was adopted because of difficulties in duplicating these documents at that time.

The original Petitions or Memorials were delivered to the committees, and receipt cards were signed and returned to the Office of the Secretary where they were retained on file. Thus, a record was kept on the referral and receipt of all documents.

Upon becoming Secretary of the Senate, I undertook a review of procedures within the Office. It was during this review that I noted original Petitions and Memorials were being forwarded to committees. In some cases, they were lost or unaccounted for. Since Rule VII, paragraph 6 of the Standing Rules of the Senate states that original Petitions and Memorials are to be retained within the files of the Office of the Secretary, the procedure was promptly changed. However, the Senate Rules were revised on November 14 of this year (see S. Res. 274) and now contain no provision to this effect. It is still my intention, though, unless otherwise directed, to continue the same procedure now in effect.

The current procedure for processing Petitions and Memorials is as follows:

The documents are received by the Senate Parliamentarian from the Office of the Vice President. The Parliamentarian reads and endorses them with the date and committees to which they are to be referred.

They are then hand delivered to the Assistant Reporter within my office where they are numbered, recorded in the Journal, printed in full in the Congressional Record, and entered in the Computer Records System. The documents are numbered consecutively, beginning anew with each Congress, a process which was instituted recently so that they could be included in the computer system.

After proper entries have been completed, the communications are then xeroxed and copies sent to the proper committees, together with receipt cards which are signed and returned. The original documents and receipt cards are then retained in the files of the Office.

The Secretary's Office never kept records of states making application for a Constitutional Convention. However, I directed my staff to conduct a search of those original communications in our possession, beginning with 1978, to determine from which states we have received Petitions or Memorials relating to a balanced Federal budget. The attached table details those states which have forwarded communications to the Senate.

As to Petitions and Memorials prior to 1978, it is my understanding that originals are in the possession of the Committee on the Judiciary.

PETITIONS

State	Date received, Secretary of Senate	Assigned POM No.	Legislative Doc. No.
Alabama	Mar. 13, 1979	91	H.J. Res. 227.
Arizona	Apr. 10, 1979	149	S.J. Res. 1002.
Arkansas	Mar. 8, 1979	78	H.J. Res. 1.
Colorado	Apr. 5, 1978	579	S.J. Mem. No. 1.
Florida	Mar. 1, 1979	59	S. Mem. 234.
	do	60	H. Mem. 2801.
Idaho	do	64	H. Con. Res. 7.
Indiana	May 1, 1979	192	S.J. Res. 8.
Iowa	June 18, 1979	301	S.J. Res. 1.
	June 25, 1979	316	S.J. Res. 1.
Kansas	May 18, 1979	657	S. Con. Res. 1661.
Louisiana	July 13, 1978	739	S. Con. Res. 73.
	July 19, 1979	394	S. Con. Res. 4.
Nebraska	Mar. 7, 1979	67	L. R. 106.
New Hampshire	May 15, 1979	223	H. Con. Res. 8.
New Mexico	Mar. 1, 1979	62	S.J. Res. 1.
North Carolina	Feb. 6, 1979	37	S.J. Res. 1.
North Dakota	May 3, 1979	205	S. Con. Res. 4018.
Oklahoma	May 2, 1978	629	H.J. Res. 1049.
Oregon	Mar. 21, 1979	104	S.J. Mem. 2.
Pennsylvania	Mar. 12, 1979	85	H. Res. 236.
South Carolina	May 26, 1978	673	S. 1024.
South Dakota	Mar. 1, 1979	61	S.J. Res. 1.
Tennessee	Apr. 25, 1978	613	H.J. Res. 22.
Texas	Aug. 15, 1978	776	H. Con. Res. 13.
	Mar. 1, 1979	51	Do.
	Mar. 15, 1979	95	H. Con. Res. 31.
Utah	Mar. 8, 1979	80	H.J. Res. 12.
Wyoming	May 15, 1978	641	H.J. Res. 1.

Senator HATCH. Our second witness today will be Mr. John Feerick of the American Bar Association.

John, we are happy to welcome you here, and we appreciate the effort you have put forth in preparing to come here and assist us on these issues.

TESTIMONY OF JOHN D. FEERICK, ESQ., REPRESENTING THE AMERICAN BAR ASSOCIATION, NEW YORK, N.Y.

Mr. FEERICK. Thank you. I would like to say that the American Bar Association is deeply privileged to be invited to appear before this committee once again to speak on an issue which we believe is of considerable importance.

I would like, with the subcommittee's permission, to file with the committee my written statement and, in my testimony, to present brief highlights of the written statement.

Senaor HATCH. Your statement will be admitted to the record.

Mr. FEERICK. Thank you very much, Senator.

In 1971, members of the committee, the American Bar Association set up a special committee to examine the many questions of law associated with the subject of a National Constitutional Convention.

This particular study committee was established as a result of experiences we had had in the late 1960's with respect to the subject of legislative reapportionment that focused considerable attention on the National Constitutional Convention provision of the Constitution.

The American Bar Association, as it has done from time to time, called together a committee of people to give objective and careful study to the subject with a view to developing a position to the bar.

This particular study committee consisted of two Federal judges. Our chairman was Federal Judge Clyde Atkins from Florida. We also had Federal Judge Sarah Hughes from Texas, and the committee included two law school deans, Dean Albert Sacks of Harvard and David Dow, former dean of the Nebraska Law School. We had the benefit of two former presidents of State constitutional conventions, Adrian Foley of New Jersey, and Sam Witwer of Illinois.

We also had as a member of the committee, a former Deputy Attorney General of the United States, who now serves as Deputy Secretary of State, Warren Christopher. In addition, we had the assistance of a judge here in the District of Columbia, Judge William Thompson. I rounded out the committee.

The committee met for 2 years, met often, to study the questions associated with this particular article of the Constitution. We were aided in our study by a dozen law students from six or seven law schools. Those law school students put together several volumes of work papers on these issues before the committee, and I would like to say to the committee that we would be more than welcome to make available those unpublished work papers to the committee and its staff as it proceeds with its study of this issue.

Senator HATCH. We would be very grateful if you would. We would appreciate that.

Mr. FEERICK. Our study concluded in the summer of 1973. It eventuated in a printed report. It was presented to the house of delegates

of the American Bar Association and it was approved as a position of the American Bar Association in the summer of 1973 and remains the position of the Bar Association at this point in time.

I realize it is a rather lengthy document, but it may be of use to the committee, and I would like, with the committee's permission, to offer as part of the committee record, a copy of our final printed report on this subject.

Senator HATCH. Without objection, it will be admitted.

Mr. FEERICK. Thank you, Senator.

Getting to the conclusions reached by the American Bar Association on this subject, we concluded, Senators, that it would be highly desirable for the Congress to enact legislation with respect to this alternative method of amending the Constitution. I might add, parenthetically, that in terms of our study, we took as a given article V. It was not part of our study to deal with the issue of whether or not there should be an alternative method of amending the Constitution. We took it as a given, and we tried to understand it and tried to cope with legal issues that were put before us concerning this particular provision, and it was our conclusion that it would be highly desirable for the Congress to adopt legislation to regulate this particular process, as Congress had done in a number of other areas, such as handling contested elections to the Congress, with respect to the treatment of the electoral vote returns from the States, and with respect to certain ministerial functions of the amending article in terms of the Office of General Services Administration.

It is our view that it is better governmental technique, and more faithful to the integrity of the amending process, to avoid the type of crisis we could have in the absence of procedures to deal with the issues of the alternative method of amending the Constitution.

It was our view that if we don't have legislation, we could be faced with a very serious crisis where applications were put before the Congress on a particular issue and a debate ensued as to how those applications should be dealt with in terms of the obligations that this body has under article V of the Constitution.

In addition to concluding that there should be legislation on the subject, we then approached one of the basic issues, and that is whether or not a convention called pursuant to article V, could be limited.

It was the view of our committee that if two-thirds of the States called for a National Constitutional Convention, limited to a particular subject matter, that that Constitutional Convention had to be called by the Congress and that Constitutional Convention had no more authority than to deal with the subject matter giving rise to the call for a convention.

In other words, it was our conclusion that legislation could limit a Constitutional Convention to a particular subject matter. We felt that the State legislatures that have the power under article V to call for a Constitutional Convention, could exercise a limited amount of its authority and call for a limited-purpose convention, and we felt that if two-thirds of the States concurred in a particular limited way, that Congress duty under article V was clear, and that was to call such a limited convention.

We felt that article V, when the conditions giving rise to such a call were present, imposed on the Congress a mandatory duty to call a convention, and we set forth in our report the evidence that we found to support that conclusion.

We also felt that if a limited purpose convention was called by the Congress, Congress had the power to limit that convention to such a call, and we suggested in our report that if a convention exceeded the limitations placed on it, Congress had the power to refuse to submit that excess to the States for ratification as a proposed constitutional amendment.

We also dealt with a number of important subsidiary issues that we believe have to be confronted in the context of legislation, such as the content of applications.

We felt that under article V, Congress had the power not only to call a convention, but to make a judgment as to whether or not the conditions for such a call were present, and we felt that there was power in the Congress to make a judgment with reference to the validity of applications, at least initially.

That is not to say—it is not our conclusion—that Congress could get involved in the substantive aspects of applications, but could make a judgment as to whether or not a proper application was present under article V.

It seemed to us that an application which simply expressed the States' position on a given problem or requested Congress to propose an amendment would not be sufficient for purposes of article V, nor would, in our view, an application be proper if it called for a convention with no more authority than to vote a specific amendment set forth therein up or down, since as we saw it, the convention under such circumstances would be effectively stripped of its deliberative function with respect to that particular subject.

As we saw it, a convention should have latitude to amend, as the Congress does, by evaluating the problem, as Congress does.

Our committee felt that an application expressing the results sought by amendment should be proper. We also felt that another issue that should be confronted is the timeliness of an application. We have no view as to what time limit should be placed in such legislation concerning the timeliness of an application, although our report reflects the view that if there was a rule of 4 or 7 years for States to file applications on a particular subject, that that time certainly would be consistent with our view of what is reasonable.

We also felt that legislation should deal with the subject of whether or not a State can withdraw an application once submitted, and it was our conclusion that a State could withdraw an application that was submitted if it subsequently felt that for any reason it should not have been submitted.

We also expressed the view that with reference to the delegates to a National Constitutional Convention, such delegates should be elected by the people rather than appointed.

With reference to the subject of apportionment, with respect to delegates, it was our conclusion that the Constitutional Convention would perform a governmental function, and that the one-person-one-

vote standard would be applicable to the selection of delegates to a Constitutional Convention.

With respect to what vote would be required at a Constitutional Convention for purposes of proposing an amendment, we felt that that issue should be decided by the convention itself, because it would involve very much an essential deliberative type of aspect of the function of the convention.

We have set forth in our report more detail as to our conclusions on that subject. With reference to the involvement of the President and the Governors in the process, we felt that under article V, the President and the State Governors did not have a constitutional role to play with respect to the substantive functioning of the amendment process, and our report contains considerable detail on our conclusions on those subjects.

Finally, and very importantly, we felt that if legislation were adopted, as we hope this Congress will adopt on this subject, that that legislation should provide for limited judicial review of determinations made in the process.

Finally, and reflecting, Senator, the comments that you made earlier, we feel that if legislation is adopted, the legislation should strike a balance between not making it too easy to amend the Constitution, but not making it impossible to amend the Constitution, if the States feel that they must resort to the alternative method on a paricular subject.

I would be very happy to answer, perhaps in a little more detail, any of the subjects that I have commented on and any of the other subjects that our association has taken a position on. Thank you.

Senator HATCH. We thank you for your testimony. I would like to congratulate you and your committee for the landmark work that you have done in this particular area. Although there are differences, as you know, between your committee's proposal and my own, I have to acknowledge that I am deeply indebted to your committee for many of the ideas that are in this bill.

Mr. FEERICK. Thank you, Senator.

Senator HATCH. Could you please comment upon the relationship between the alternative amending processes in the Constitution? Is it your view that the provisions in article V were designed to be symmetrical in their application?

Mr. FEERICK. We pointed out that the framers intended that the two methods be equal methods. How far you carry that equality, when we get into the area of procedure, I think can be debated. I can see certain types of legislation, or obstacles, that would render the convention method unequal with respect to the congressional method, and would seem to do violence to at least the spirit of what was intended by the Constitution.

What I am really saying is that we certainly had a view that there was to be equality with respect to the methods, which is not to say that every aspect of the congressional method has to be mirrored in every aspect of how you deal with the alternative method.

For example, the Constitution specifically provides for a two-thirds vote on a congressional proposal, and it has no provision as to what the vote should be at the Constitutional Convention in terms of proposing

an amendment. So we have internal evidence in the Constitution itself of inequality, so to speak. The Constitution doesn't specify in that particular procedural, substantive area, the same vote it does specify with respect to the congressional method.

So I would not want to leave the committee with our view as that whatever the rule is under the congressional method, that that should be the rule under the alternative method.

Senator HATCH. You suggest that "consensus" is the critical consideration in calling a convention, as it has traditionally been in ratifying congressionally proposed amendments.

Would you say that Congress, in making its aggregation decisions, should, in effect, be asking itself, "Is this State application part of the same consensus that is being expressed in other State applications?"

How do we translate this into statutory language? How do we develop criteria by which we can give meaning to all this?

Mr. FEERICK. I think we are suggesting that Congress initially make a judgment whether or not the applications before it concur on a particular purpose. In terms of the type of standard that should be placed in legislation, our report indicates that we gave a lot of thought to that and we felt that the standard of the same subject matter, was perhaps as best as we could achieve in terms of language. We also felt that, at least initially, Congress, under a same-subject type of standard, would have the responsibility—as it does in many other areas—to make a judgment whether or not there is concurrence on a subject. Under our suggested scheme for legislation, that particular judgment would be subject to judicial review. We thought judicial review in this particular area would be particularly appropriate because here we have State legislatures and Congress in a relationship with each other, State legislatures presumably seeking a convention to make some change maybe opposed by Congress, and that type of potential confrontation can best, we think, be resolved by our judiciary. It can function in a very impartial, arbitrator type role with such questions.

Senator HATCH. I believe that it is important we limit opportunities for potential congressional interference in the convention process based on nothing other than Congress' own policy preferences. Would you agree that this is something that merits significant attention? What suggestions would you have in this area as well?

Mr. FEERICK. We certainly expressed in our study the view that there are a number of areas where it would be inappropriate for the Congress to seek to dominate the States in the functioning of article V. And we did express in our report the sense that this particular method of amending the Constitution was intended as an alternative to the congressional method, and that it was important in terms of legislation that our approach not be congressionally dominated, because that would seem to us to run inconsistent with some of the thinking behind the alternative method with respect to having a means of dealing with abuse, perhaps, at the Federal level.

That is not to say that Congress doesn't have a very important role in the process. It certainly was our view that the Constitution gave Congress a very important managerial, supervisory role with respect to the integrity of the amendment process, and so under our approach, we would have a role for the Congress, an important role.

We would suggest to the Congress that there are areas, such as the convention vote, for example, where the Congress should leave it to the convention to decide. There are areas, with respect to the matter of the content of applications, where we would suggest that the standard be such that even though Congress disagreed with the subject of what the State legislatures were seeking to have a convention on, that if the necessary concurrence were present, Congress should call such a convention. The standard should be a tight standard with respect to the calling of the convention.

So, under our approach, it would be a balance in terms of the roles. We have a role for the courts, a role for Congress, of course, an important role, and an important role for the State legislatures.

Senator HATCH. Do I understand you to be saying in your statement, and also in the questioning, that——

Mr. FEERICK. I missed the thrust of your remarks. I couldn't hear you.

Senator HATCH. —issues concerning the propriety of State application and convention procedures are not really political questions?

Mr. FEERICK. The whole political question issue is one that our committee spent a good deal of time with, and it is certainly a troublesome issue, and we certainly felt that the role of the courts should be a limited role.

On the other hand, we thought that there were areas where the courts did have a role, and properly should have a role, and I think the suggestions we have advanced specifically in our report reflect a recognition of a primary role to be played by Congress and, in certain respects, by the State legislatures, and, at the same time, a role for the courts.

Senator HATCH. In the event this committee rejects the interpretation of those who believe in the concept of a limited convention, has the convention method of amendment become an effective dead letter in your opinion?

Mr. FEERICK. A dead letter, the view being that it only sanctions general conventions?

Senator HATCH. That is right.

Mr. FEERICK. I don't think I could say a dead letter. There is always the possibility, I suppose, of the States calling for a general convention—how much you credit that possibility answers, in my view, how dead it would be.

Senator HATCH. Senator Bayh?

Senator BAYH [presiding]. Thank you, Mr. Feerick.

I enjoyed hearing your testimony, and I apologize for not being here at the outset. I was trying to find how efficiently the deregulated airline service is functioning. I was sort of a captive of Eastern Airlines, so I apologize for not being here.

I think the record should show, and I would like to ask unanimous consent, that my brief opening statement be submitted at the beginning of todays proceedings.

Senator THURMOND. Mr. Chairman, I would ask unanimous consent that my opening statement follow yours.

Senator BAYH. Fine. That is perfectly in order.

I think the record should show that our witness, John Feerick, has been a long and faithful witness before the committee for perhaps

more years than either of us would like to remember. There have been a number of opportunities over a good number of years to bring his personal expertise, as well as collecting the expertise of the American Bar Association to bear on the decisions of this committee.

Particularly, the country owes him a debt of gratitude. He was one who was very instrumental for the process by which the 25th amendment was created. We are grateful for that effort, and I think the country was well served, and because of that work and the work by legislatures and others, we were prepared for the resignation of a President, and we moved to the congressional selection process for the first time in history.

I wanted to thank you.

Mr. FEERICK. I thank you for those remarks. I think the country has been extraordinarily well served by your 16 years as chairman of this subcommittee.

Senator BAYH. You are very thoughtful.

Let me ask, if I might, this question: You point out that within the Constitution itself there are specifically enunciated technicalities relative to the ways in which the two constitutional vehicles are to function, which shows they aren't placed on equal footing, at least as far as the words are concerned.

You mentioned the two-thirds requirement in one instance and the omission of it in the other. I assume that is the bar's position—I haven't had a chance to read it fully, but I shall.

Mr. FEERICK. It is a long one.

Senator BAYH. Yes. I assume that the bar reached the conclusion that the seriousness of whatever issues might be addressed and proposed, and perhaps culminated in amendment to the Constitution of the United States, would be of an equally serious nature whether the traditional route or the general or specific National Convention route would be followed.

I am not talking about a second-rate constitutional amendment or a constitutional amendment of less importance being covered by the convention system, whereas the more significant and greater impact amendments would be covered by Congress and the State legislatures.

Mr. FEERICK. We didn't express a view on that subject, Senator. It was not part of our study, how we felt about the type of amendments or a particular amendment that should be subject to that process. In this area of equality, so to speak, we were just talking about the method and procedure.

We were not dealing with, in our own study, the area of whether or not a particular proposal should be a constitutional amendment.

I must say we were fortunate at the time not to have what could have been a particular subject before us, just like when we dealt with the 25th amendment area. When we started that effort, it was after the death of President Kennedy, and we just sort of spoke about the subject in terms of what was in the best interest of our country, without having to get caught up in the politics and the particular events. Our committee did not address that issue, Senator, and I am not able to say that members of the committee as a committee, and we as an association, have a view on a particular amendment or a particular subject that should be subject to the process.

Senator BAYH. I did not in any way intend the question to suggest that you should have, or that you did, but you say the committee did not address itself to that question. As a learned member of the bar and a constitutional scholar of some note, is it reasonable to assume that amendments of equal seriousness could and would perhaps be addressed by both routes?

Mr. FEERICK. Don't know that I can answer that question. I certainly would not want to answer that question as a spokesman for the American Bar Association, because I don't think we addressed it.

Answering for myself, quite apart from the bar association, certainly my view is that amending the Constitution is a very serious business, and that we are talking about something of great permanency and a document of great delicacy, and I think the highest responsibility needs to be paid to that document.

I personally would not like to see the document as an unwieldy, lengthy document that deals with thousands of subjects in detail. My own personal view is a very limited view with reference to amending the Constitution. I haven't studied the subject of the balanced budget amendment, and I can't address myself to that amendment, but I would say that I would hope we would only put an amendment in after we have seen a defect, and it is not something to be done hastily, or out of particular emotion. It is a matter of great seriousness.

So, I suppose, personally, I do reflect that view of the amending process, but I cannot really speak for the American Bar on that subject.

Senator BAYH. It would have the same degree of permanence, would it not?

Mr. FEERICK. The constitutional amendment?

Senator BAYH. Yes.

Mr. FEERICK. Yes, but I suppose that would be subject to how the people felt about a particular amendment. The 18th amendment didn't enjoy the permanence of most of our other amendments.

Senator BAYH. What I am driving at is whether an amendment is passed by the Congress or a convention, it has the same permanence and the same legal requirement on our citizens, regardless of which vehicle is used.

Mr. FEERICK. So long as any amendment that comes out of either process remains part of the Constitution, yes.

Senator BAYH. Because of the impact of a constitutional amendment, wouldn't it be fair to assume that the same need for a general, broad consensus of support for such an amendment should be present whether it was passed through the convention or through the Congress?

Mr. FEERICK. I certainly would say so, and that view of a national consensus for a constitutional amendment is a view that is expressed throughout our report, and we think the amending article is asking for a national consensus before a matter does become part of the Constitution, yes.

Senator BAYH. I certainly salute you for that, and the bar.

I must confess that I am a little surprised at the bar's expressing that we need a strong national consensus before we amend the Constitution. The bar does not recommend that the subject amendment be adopted by a two-thirds vote, but would require only a simple majority.

Mr. FEERICK. No. We say that is a question for the convention to decide.

Senator BAYH. Why should that be a subject for the convention to decide? If we need a broad national consensus and the Congress is setting up guidelines, why should not the Congress require a broad consensus in support of an amendment? Why should it not meet the same test as one that is adopted by the Congress itself?

Mr. FEERICK. Well, it was our view that the subject of the vote requirement could very well be tied into the deliberative area of a convention, that it was something one might say was of a procedural nature, but a lot of our history, in terms of history, has been a history of procedure. We felt that it intruded into the deliberative nature of the convention and that the arguments, such as the arguments you have just eloquently put forth, should be arguments decided by the convention.

With reference to the consensus, the consensus is reflected in a number of ways, specifically, in the process. Two-thirds of the States must ask for a convention, as I have testified earlier, before Congress has, as we see it, a mandatory duty to call a convention. There has to be a concurrence of purpose on the subject of the convention, and the article then calls for ratification by three-fourths of the State legislatures or State ratifying conventions.

So, we have specifically built into the Constitution a number of consensus requirements. We don't have any specificity in this area. We were concerned that the vote requirement did perhaps get very close to the inner core of the convention, and in reaching our own conclusion that legislation should not deal with that subject, we were influenced by the fact that many Constitutional Conventions, the Convention of 1787, many of the territorial conventions that have taken place under acts of Congress with reference to drafting of State constitutions, decided for themselves what the vote should be. So that we felt that our recommendation of leaving that to the convention was consistent with a very strong history of conventions deciding that type of issue for themselves.

I don't know that a simple majority does violence to the consensus requirement against the backdrop of the type of concurrence you need before you get to the convention, or the type of approval you need after you leave the convention.

Senator BAYH. I come down on the other side of that issue.

Mr. FEERICK. We take no position on what the vote should be.

Senator BAYH. Yes; but let me think out loud with you a bit, and I don't want to go into this at too great a length, but this was an issue that was debated on the floor of the Senate. Senator Ervin and I had a little disagreement about the plurality being required, and the Senate adopting a two-thirds requirement. Senator Ervin thought it should be a majority.

So, in judging what standards should be applied, if there is precedent we look to, it should be the precedent of the past experience with the U.S. Constitution, rather than other ratification and convention-call processes.

What concerns me here, Mr. Feerick, is that I have found, and I don't say this critically, that it is a lot easier to find people to say they want something done than it is to get them to agree to specifics, and the specifics are the ones that have the cutting edge, affecting our lives, our country and perhaps the whole world.

So, to suggest that two-thirds of the States might feel we should have a balanced budget as being a sufficient consensus to support whatever that convention might decide upon, I really don't rest easily on that, because it is awfully difficult to conclude that any significant portion of that two-thirds really had in mind what hopefully a convention might come up with.

I find this whole business of how you balance the budget, and this is only one of many amendments, the most complicated kind of subject we have dealt with here. A lot of our good folks are very busy with their normal lives and understandably don't understand the nuances of the budget processes and the impact it would have on our lives. We have been trying to study that in some detail.

The concern I have, goes to the idea which I find—and did find at the time Senator Ervin and I were supporting the Procedcres Act on the floor, and you mentioned the bar takes into consideration—that it is better to consider something of this nature when the normal human tendency is to make a substantive judgment on the basis of whose ox is being gored—when that is not as prevalent as it would be with an amendment before the Congress or before a Constitutional Convention.

So, I think deliberation is required. I can conceive of a Constitutional Convention being called and the proponent delegates of issue X, whatever it may be, getting together and counting noses, and if the majority of the delegates support issue X, but they don't have two-thirds, it is totally unreasonable to expect the convention to adopt a two-thirds rule. That is why I feel that this is something that Congress should accept as its responsibility.

But, I would like to get your judgment, not mine.

Mr. FEERICK. Again, it is a balance. Maybe we struck the balance wrong on this issue. I don't know. But the committee did feel that this was not a matter that we felt we would recommend should be dealt with by the Congress. We had on the one side of the ledger the facts that I gave you about other precedents, even though they weren't article V precedents.

We did have the reason for the convention method, which was to deal with—perhaps in some situations—power abuse at the national level, and we felt that maybe this was an area that, philosophically, given the reason for the alternative method, Congress should exercise restraint over.

The arguments that you have expressed, as all your arguments are, are filled with merit. On the other hand, I appear here as a representative of our study group, and we did not come out the same way on the issue, and our report does set forth the detail.

I just might mention another bit of history on that point. There was a point in the constitutional convention before the ratification provisions were put in that the delegates were suggesting that the Constitution be amended through the convention route. I don't remember whether it was James Madison or some other delegate saying, "Gee, a majority of the States will bind us to innovations that aren't desirable."

In response to that, the framers came up with the ratification provisions. There. at least, was some evidence that they recognized that perhaps a majority vote might take place at a convention, and they

intended the ratification mechanism to deal with maybe some of those concerns you have expressed.

But once again, we struck the balance as I indicated. The arguments that you advance certainly are very merited, and we didn't perhaps have the benefit of those arguments with the same degree of insight and eloquence that you have just put them out with.

Senator BAYH. This was completed in 1974. Is it possible to get an update of the thoughts of the committee?

Mr. FEERICK. Yes; I believe so, even though the committee doesn't any longer have any legal existence within the American Bar Association.

I think, as we have done in the past when a committee has completed its work on a subject, and a member of the committee has been designated to be a continuing representative of that work, it has been my practice to represent the members of the committee on any suggestion that we might be advancing on details.

I can recall vividly on the subject of Electoral College reform that after taking a number of very detailed positions other issues developed, and we subsequently dealt with those issues on an informal basis by tapping back to the people who originally were involved.

So our position is out there. I don't want to be presumptuous. I doubt that we are going to change our position on matters that are specifically contained in our report.

We did not take a position on what the vote should be at the convention. All we took a position on was that the legislation should not specify that vote.

So there is an open issue as to how the members of this committee, as a group of individuals, would feel about what the vote should be at the convention in terms of what the convention should do. I don't know if that is one that our committee would want to speak to, but I certainly will put the question to them.

Senator BAYH. I am not suggesting that you deal with this concern just because I raised it, but if there are other things that you feel might be indicated, the committee would always be glad to have your judgment. Let me move to——

Senator HATCH. Would the Senator yield just on that point for a second?

You know, we elect Members of Congress by a simple majority vote and then they propose amendments by two-thirds votes. How does that differ from calling conventions by applications of two-thirds of the States, and then proposing amendments at the convention by majority vote? Three-fourths of the States ratifying would still be necessary.

As I noted in my opening remarks, I strongly believe that consideration of this bill should be divorced from contemporary constitutional controversies. I am in complete agreement with Senator Bayh.

Senator BAYH. I apprciate the comment of my friend from Utah, but we also elect city clerks by majority vote. We are not talking about a general election. We are talking about amendment of the Constitution of the United States, and we have not amended once by a process of a vote other than two-thirds.

We will work that out in the committee.

Mr. FEERICK. I will circulate the members of our old special committee, and if there are any additional comments in the light of that, I will convey them to you.

Senator BAYH. You are a busy man. I don't want to ask you to do something that will take a lot of time and effort.

Let me ask you: The three-judge panel as arbitrators, how do you recommend that they be appointed, and where do we find the authority for that kind of arbitration?

Mr. FEERICK. There are statutory provisions on the three-judge courts. The American Bar has recommended that there be very limited use of three-judge courts in the past, quite apart from this particular study.

We did not get into the type of issues you just mentioned about appointment of the members of the three-judge court, and frankly, I hadn't personally thought through that in that type of detail, and I would not feel that I would be able to speak with the confidence that this committee is entitled to without a little more thought on that. I would be happy, if I could, to respond to your question in writing.

Senator BAYH. Thank you.

[The information subsequently submitted follows:]

NEW YORK, N.Y., *March 18, 1980.*

Hon. BIRCH BAYH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAYH: This is in response to your inquiry when I testified if I could survey the members of the Association's Special Constitutional Convention Study Committee concerning the vote for proposal of a constitutional amendment by a national constitutional convention. As you know, the Committee recommended that the required vote be left to the convention to decide.

The Committee, as a functioning group within the Association, no longer is in existence. It ceased operating after it had completed its study in 1973 with the publication of its report, entitled "Amendment of the Constitution by the Convention Method Under Article V." However, as you requested, I wrote to the members of the Special Committee subsequent to my testimony inviting them to express any additional views they might have on the question of the vote. No additional views were communicated to me. Since the 1973 recommendations of the Committee were approved by the Association's House of Delegaes, I believe a process of committee study followed by Association action would be required before any new positions could be taken, if such were to be the case.

Although I am not in a position to communicate any additional views of the Association other than those contained in the above-mentioned report, I am, of course, available to assist the Committee on an individual basis with its study of the subject of constitutional convention procedures legislation.

Once again, I would like to thank you and the Committee for affording us the opportunity to testify on this subject.

Sincerely,

JOHN D. FEERICK.

Senator BAYH. One last question.

One of the real issues concerning us, of course, is the question of the ability to limit the jurisdiction. Your committee concludes that this can be done.

Mr. FEERICK. Yes.

Senator BAYH. Do you have any doubts at all that this might be something that could be challenged by a sitting convention, by the first convention called to revise the articles? They might say that the

paraphernalia that the Congress has provided is not listed in the Constitution, and that that body is free and independent to do what it likes. Do you have any doubt in your mind?

Mr. FEERICK. Speaking as a spokesman for our study committee, I do not think there is any type of a committee view on it.

Senator BAYH. Excuse me. The reason I asked that is, and I think we can get almost 100 percent approval, this is what it ought to be, but whether it can be based upon the mandate of authority is the question I raise.

Mr. FEERICK. I guess the way I would answer it for myself in terms of doubt is to say that it is a possibility—maybe more than a possibility under certain circumstances where there is strong emotion about a particular subject.

But if that possibility were to occur, we think there are controls for dealing with it.

On the other hand, I personally do reflect a view that when we are talking about matters of serious business such as amending the Constitution of the United States, my experience as a practicing lawyer and working with this committee and the Congress is that people exercise those responsibilities mindful of the importance of the subject of amending the Constitution. This is similar to so many issues we grappled with in the 25th amendment. In that area, as you recall, we were concerned about what would happen if the President became insane and how the Members of Congress would handle their responsibility. I remember Herbert Brownell saying, "Well, there are those areas where you have to trust to the good faith of the people you put in office," whether it be Members of this body or a Constitutional Convention. Up to now that faith has been honored by the responsibility of people in moments of seriousness and crisis.

Senator BAYH. You know, I think that is something that is true, that we just trust that the Good Lord is watching over us.

I don't for a moment doubt the motivation of delegates, that they would do what they thought was in the best interests of the country, but it is a matter, I think, of general recognition that some of these constitutional amendment issues are very emotional, very deeply felt, and I do not believe it is beyond the realm of reason to suggest that a Constitutional Convention called for balancing the budget would find the very well-organized right to life opponents utilizing this.

They are well-motivated, but they could see that a majority of delegates elected in the States, in addition to wanting to balance the budget just coincidentally want to have a constitutional amendment on the question of abortion. Then when the question of ignoring the specificity is drawn to the convention, say, "We will bring in something else," particularly when you talk about emotional issues.

Mr. FEERICK. I hope I haven't left you with the impression that either I or the American Bar are advocates of a National Constitutional Convention. That is not an issue we addressed.

Senator BAYH. I understand.

Mr. FEERICK. People of experience and the exercise of restraint and reluctance, I think, needs to be part of amending the Constitution. But as I said before, we took article V as given, we put aside what personal views we had about how the Constitution should be amended.

Members of the committee certainly weren't polled as to whether they would prefer the congressional method, but frankly, based on my discussions with them, I doubt that anybody would say anything other than what I said about one's personal preference. But we put aside all that, and groped with these issues, mindful of the trust that the American Bar Association placed in us, and mindful of the fact that we are dealing with the United States Constitution. We went about it as thoroughly and objectively, with the limitations we had as a group, as possible.

Senator BAYH. I would add another adjective—as democratically as the bar association usually proceeds in these matters. There is no question about that at all.

Look, if I might ask your permission to submit some questions to you in writing, because there are some others with respect to congressional delegates to conventions, delegates to the conventions, where a State legislator gets elected to the convention and then goes back and ratifies.

Questions like that may seem extreme, but it seems to me those problems are best anticipated in advance rather than to wait and suffer the consequences.

I apologize for talking so long. I yield to my friend from Utah.

Senator HATCH. I yield to the Senator from South Carolina.

Senator THURMOND. Mr. Chairman, I wonder if we could have 10 minutes each after this round, like they do in the Judiciary Committee. Would that be reasonable, instead of one member taking 30 minutes or 40 minutes? We could each be alloted 10 minutes.

Senator BAYH. That is fine.

Senator THURMOND. That is a rule that has worked pretty well.

Senator BAYH. If I had known the Senator had time constraints, I would have yielded to him all my time at the beginning. He may have that next time.

Senator THURMOND. Mr. Feerick, we are glad to have you here.

Mr. FEERICK. Thank you, Senator.

Senator THURMOND. We appreciate your statement, and as I understand, you have come down on the side of a limited convention; is that correct?

Mr. FEERICK. We have come down with the conclusion that if the States, the State legislatures, asked for a limited convention, that such a convention can be convened under article V, yes.

Senator THURMOND. Article V, as I just read the pertinent portion here, and I would like for it to be in the record at this point, reads this way:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution all on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several states, all by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress.

Now, I can see that a construction might be put on that section to mean that if we were to call a convention, it would have to be open, or I can see where, if you called a convention, that it would not have

to be open. However, it seems to me that if the legislatures of two-thirds of the States so word their petitions that a convention be called and those petitions limit the scope of the convention to one or two items, or whatever it is, then the convention could legally and constitutionally be called in that manner.

I see nothing here in the Constitution, especially in this pertinent portion I just read, that would prohibit it.

Do you know of anything in the Constitution that would prohibit the States from submitting petitions along the line I have indicated so that a convention would be limited?

Mr. FEERICK. No. Assuming in your question that two-thirds of the States concur on a particular item or items so that there is a concurrence of the necessary two-thirds of the States.

Senator THURMOND. Two-thirds of the States?

Mr. FEERICK. Concur on a particular item.

Senator THURMOND. Concur and agree that they want a convention to be limited to one item, say, a balanced budget, for instance, or abortion, or any other subject.

Then, is there any reason why their wishes as expressed in their petitions could not be conveyed to the Congress, and is there any reason why the Congress should not abide by their wishes? I see nothing in the Constitution that would demand that a convention be open to any and all subjects.

Mr. FEERICK. There is no disagreement between us, Senator. I agree with you.

Senator THURMOND. You agree with the same proposition, in other words.

I am of the opinion that there is no logical reason to construe the Constitution otherwise and say that although the legislatures of two-thirds of the States submitted petitions for a limited convention, we are forced to have an open convention.

If the States wanted an open convention, the petitions would have just signified to that effect, or if they wanted to consider two subjects at the convention, the States would so signify. That, to me, makes good sense.

If you didn't follow that construction, then would not the States be discouraged from calling for a convention, for fear that if you do have one, then it could upset the entire system of government and change the entire form of government?

Mr. FEERICK. Our committee expressed similar views in our report, Senator.

Senator THURMOND. I am strongly of the opinion that this committee should take the position that whatever is contained in the petitions, then Congress would be bound by that request, to take up one subject, or two subjects, or have an open convention, or whatever, that the States ask and request, and that we should be limited to that.

If we don't do that, and make any other construction, then we might as well write off this provision of the Constitution of the States calling conventions unless the States wish to take the risk of changing the entire form of government.

Do you agree with that?

Mr. FEERICK. There was a lot in what you said. I think the thrust of what you said is certainly consistent with the views of our association and the committee as expressed in our report.

Senator THURMOND. What I have expressed here is in accordance with the views of your committee of the American Bar Association?

Mr. FEERICK. Essentially, yes.

Senator THURMOND. That is all, Mr. Chairman.

Thank you.

Senator BAYH. Thank you very much.

Mr. FEERICK. Thank you very much.

Senator BAYH. It is a pleasure to have you again before us, and I wish you would pass our compliments on to your colleagues.

Mr. FEERICK. Thank you very much.

[Mr. Feerick's prepared statement, the study submitted by the American Bar Association, and additional material follow:]

PREPARED STATEMENT OF JOHN D. FEERICK ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am John D. Feerick, a practicing attorney from New York City. I appear before you today at the request of Leonard S. Janofsky, President of the American Bar Association, to share with you our views on the issue of legislation to establish procedures for amending the Constitution by means of a national constitutional convention.

I commend the Subcommittee for undertaking these hearings. What once may have seemed an issue of academic interest only has become a matter deserving serious national attention. The recent calls for a constitutional convention on a balanced budget and related issues are but the latest manifestation of a growing trend. While a national constitutional convention has never been held, every state has submitted at least one application for a convention, and there have been several hundred applications submitted in toto. From 1940 to 1942, more than thirty states petitioned for a convention to deal with the federal taxing power, and between 1963 and 1969 thirty-three states submitted petitions on the issue of legislative reapportionment.

The reapportionment petitions in particular brought into sharp focus unsettled questions concerning the convention method or initiating amendments. Does Article V leave it to the discretion of Congress to call a convention? Can a convention be limited to a particular subject or would it be free to roam over the entire Constitution and propose an entirely new document? Do the executive and judiciary have, or should they have, a role in the process? What is a valid application? How long does it remain valid? Can it be withdrawn once it has been submitted?

Prompted by the controversy over the convention method generated by the reapportionment applications, the American Bar Association in 1971 established a special committee to look into the questions of law entailed in the calling of a national constitutional convention. The chairman of the committee was C. Clyde Atkins, a federal district judge, and the committee included two other judges, Sarah T. Hughes and William S. Thompson; a former deputy attorney general of the United States, Warren Christopher, who, of course, is now the Deputy Secretary of State; two law school professors, David Dow of the University of Nebraska Law School and Dean Albert M. Sachs of Harvard Law School; two former presidents of state constitutional conventions, Adrian M. Foley, Jr., of New Jersey, and Samuel W. Witwer of Illinois; and me.

The committee conducted a two-year study on the subject and rendered a series of recommedations that were adopted by the Association at its August, 1973, meeting. Before addressing many of the specific recommendations, I would like to read a passage from the committee's report which I think well summarizes the underlying view of the Association on this issue:

"If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional conven-

tion would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.

"It is far more prudent, we believe, to confront the problem openly and to supply safeguards and general rules in advance. In addition to being better governmental technique, a forthright approach to the dangers of the convention method seems far more likely to yield beneficial results than would burying our heads in the sands of uncertainty. Essentially, the reasons are the same ones which caused the American Bar Association to urge, and our nation ultimately to adopt, the rules for dealing with the problems of presidential disability and a vice-presidential vacancy which are contained in the Twenty-Fifth Amendment. So long as the Constitution envisions the convention method, we think the procedures should be ready if there is a contemporaneously felt need by the required two-thirds of the state legislatures. Fidelity to democratic principles requires no less."

Having concluded that legislation governing the convention method is highly desirable, the Association next addressed the issue of whether an Article V convention can be limited to a specific subject. We concluded in the affirmative.

Article V authorizes the state legislatures to initiate the convention process and imposes no express conditions on the scope of the convention which the states may seek. It was the view of our committee, however, that the state legislatures could exercise only a portion of their authority by calling for a convention limited to a specific subject. In this regard, the committee noted that at the state level, at which there have been more than 200 constitutional conventions, it seemed settled that the electorate may choose to delegate only a portion of its authority to a state convention and so limit it substantively.

With respect to the view that Article V sanctions only general conventions, the committee stated: "Such an interpretation would relegate the alternative method to an 'unequal' method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution."

The committee found support in both the text and history of Article V for its conclusion that a convention could be limited. The text of Article V evidences an intent that there be a national consensus in order to amend the Constitution. A two-thirds vote is necessary in each house of Congress to propose an amendment; there must be applications from two-thirds of the states to call a convention; ratification by three-forths of the states is necessary to ratify an amendment proposed under either method of initiation. This suggested to us that there must be a consensus of purpose among the states to hold a convention. When the states are at odds on the purpose of a convention, it seems wholly inconsistent with Article V to call one. Conversely when two-thirds of the states are in agreement on a particular, limited purpose, the conclusion is strong that a convention should be called, limited to that purpose.

As for the history of Article V, the amendment articles of a number of state constitutions adopted before the U.S. Constitution also suggested to the committee that a constitutional convention can be limited substantially. The language of the earliest draft of Article V submitted to the Constitutional Convention by the committee on detail indicates that a convention limited substantively was within its contemplation. That provision read: "On the application of the Legislatures of two-thirds of the States in the Union, for *an amendment* of the Constitution, the Legislature of the United States shall call a convention *for that purpose*" (emphasis supplied).

Sometimes the Constitutional Convention of 1787 itself is cited for the proposition that an Article V convention may not be limited, but that premise seems wholly inapposite. As the ABA report noted: "While the Constitutional Convention of 1787 may have exceeded the purpose of its call in framing the Constitution, it does not follow that a convention convened under Article V and subject to the Constitution can lawfully assume such authority."

The 1787 convention took place before the adoption of the Constitution when the states were independent and there was no effective national government. In addition, its work was submitted to the Continental Congress, consented to by that congress, and transmitted by it to the states for ratification. Moreover, as Thomas Cooley has observed, the 1787 convention was "a revolutionary proceeding, and could be justified only by the circumstances which had brought the Union to the brink of dissolution."

As for whether Congress is obliged to call a convention when the requisite number of applications have been submitted, the committee had little doubt. The language of Article V is mandatory, and the intent of the framers was made clear in the debate at the Constitutional Convention. Before the convention was a proposed Article V which provided in relevant part:

"The Legislature of the U.S. whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution * * *."

George Mason objected to the proposal, stating that both methods depended on Congress so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive * * *." His notes on the draft article read:

"By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive to the fundamental principles of the rights and liberties of the people."

Gouverneur Morris and Elbridge Gerry then proposed the convention language and it was adopted. Alexander Hamilton, in Federalist paper 85, referred to Article V as contemplating "a single proposition." Congress would be obliged to call a convention, he stated, whenever two-thirds of the states concurred. He added: "The words of this article are peremptory. The Congress 'shall call a convention,' Nothing in this particular is left to the discretion of that body."

In the first Congress, surrounding receipt of the first state application, Mr. Madison stated that when two-thirds of the states had concurred in an application, it would be "out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature."

Once a convention is called for a particular purpose, the committee concluded that the convention would have no authority to act with respect to other subjects. Were it to deviate from the subject that brought it into being and propose amendments on other subjects, the committee suggested that Congress could deal with the deviation by exercising its power over choosing the method of ratification and refusing to submit the amendments to the states. We also felt that judicial relief might be appropriate under such circumstances.

These issues are basic to the legislation you are considering today. But a variety of other issues are raised as one attempts to draft appropriate language.

1. CONTENT OF APPLICATION

Article V explicitly gives Congress the power to call a convention upon receipt of applications from two-thirds of the state legislatures. As a necessary incident of the power to call, the committee reasoned, Congress has the power to determine initially whether the conditions requiring a call have been satisfied. Not every state application, of course, is necessarily valid.

As the committee stated: "A reading of Article V makes clear that an application should contain a request to Congress to call a national convention that would have the authority to propose an amendment to the Constitution. An application which simply expressed a state's opinion on a given problem or requested Congress itself to propose an amendment would not be sufficient for purposes of Article V. Nor would an application seem proper if it called for a convention with no more authority than to vote a specific amendment set forth therein up or down, since the convention would be effectively stripped of its deliberative function. A convention should have latitude to amend, as Congress does, by evaluating and dealing with a problem."

The committee added that an application which expressed the result sought by an amendment (i.e., direct popular election of the President) should be proper since the convention would have the freedom to decide on the terms of the specific amendment. The committee also felt that it should not be necessary that each application be identical or propose similar changes in the same subject matter.

2. TIMELINESS

In *Dillon* v. *Gloss*,[1] the Supreme Court stated that "the fair inference or implication from Article V is that the ratification must be within some reason-

[1] 256 U.S. 368 (1921).

able time after proposal, which Congress is free to fix." It stated that "as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people n iall sections at relatively the same period, which of course ratification scattered through a long series of years would not do."

The committee expressed its view that this reasoning also was applicable to state applications for a constitutional convention. As the committee observed, the convening of a convention to deal with a certain matter certainly should reflect the "will of the people in all sections at relatively the same period * * *."

In the absence of a uniform rule, the timeliness or untimeliness of state applications would vary, it seemed to the committee, from case to case. It would involve, as the Supreme Court suggested with respect to the ratification area in *Coleman* v. *Miller*,[2] a consideration of "political, social and economic conditions which have prevailed during the period since the submission of the [applications]."

3. WITHDRAWAL

Although there is uncertainty over whether a state may withdraw an application, the committee reasoned that there should be a rule allowing withdrawal. "In view of the importance and comparatively permanent nature of an amendment, it seems desirable that state legislatures be able to set aside applications that may have been hastily submitted or that no longer reflect the social, economic and political factors in effect when the applications were originally adopted. We believe Congress has the power to so provide."

4. ELECTION OF DELEGATES

From its study of Article V and conventions generally, the committee was led to the conclusion that in order for a convention to be representative of the people, its delegates should be elected by the people. It felt this was especially appropriate for the extraordinary happening of a national constitutional convention since the method was intended to supply the "people" with an alternative way of obtaining amendments "if the Government should become oppressive * * *," to quote George Mason's remark at the Convention of 1787.

5. APPORTIONMENT OF DELEGATES

On the question of the apportionment of delegates to an Article V convention, the ABA was of the view that in light of the governmental function to be performed, the one-person, one-vote standards should govern. The committee stated its view that an apportionment scheme based on representation in the House of Representatives also would be acceptable compliance, since it would respect existing state and district boundaries and assure each state at least one delegate. It doubted that a formula which afforded each state a number of delegates equal to its total representation in Congress would be held constitutional, since under that formula fifteen states would be over-represented at a convention by 50 percent or more.

6. CONVENTION VOTE

As for the necessary vote at a convention, the committee felt it was unwise and of questionable validity for Congress to prescribe a minimum vote by which the convention might propose an amendment, since such action would intrude into an area touching on the essential characteristic of a convention as a deliberative body and would be inconsistent with the farmers' design that the convention process be as free as possible from congressional control. It is noteworthy that the territorial conventions held under acts of Congress, most state constitutional conventions and the Convention of 1787 have determined their own vote.

7. PRESIDENTIAL INVOLVEMENT

On the question of whether a convention call is required to be presented to the President, the committee concluded that it was not. It believed that the submission of that question to the President would be inconsistent with the mandatory nature of Congress' duty to call a convention when proper applica-

[2] 307 U.S. 433 (1939).

tions had been submitted from the requisite number of states. As the President historically has not had a role in the process by which Congress proposes amendments, it also would alter the parallelism and intended equality between the two methods of initiating amendments. Also supporting the conclusion is the Supreme Court's decision in *Hollingsworth* v. *Virginia*,[3] which held that Article I, Section 7 (the veto provision), applies to "ordinary cases of legislation" and "has nothing to do with the proposition or adoption of amendments to the Constitution." The Court ruled the 11th Amendment to be valid although it had not been presented to the President.

8. GUBERNATORIAL INVOLVEMENT

For somewhat similar reasons as above, the committee concluded that the state governor is not assigned a role in the process by which a state legislature applies for a convention or ratifies a proposed amendment. It believed this followed from the Supreme Court's decisions in *Hawke* v. *Smith*,[4] and *Leser* v. *Garnett*.[5]

In *Hawke* the Court held that it was improper for a state to subject the ratification of a proposed amendment to a popular referendum, declaring that ratification was not ordinary legislation but rather an expression of assent in which "no legislative action is authorized or required." The Court emphasized that the agency for ratification was the "state legislature," that is, the representative lawmaking body of the state. The lawmaking procedures of the state, the Court held, were not applicable to the act of ratification. If the act of ratification does not invoke these procedures, which customarily include the governor's veto, it is hard to see why the application, a task specifically assigned to the legislatures by the Constitution, would do so.

9. JUDICIAL INVOLVEMENT

The committee, in its report, stated that it was desirable and feasible to have in any implementing legislation a limited judicial review of congressional determinations made in the convention process. It was influenced in this regard by the view that the convention process likely would be used to effect a constitutional change opposed by vested interests and against the backdrop of some congressional inaction. Under these circumstances, the committee believed, it was desirable to have our independent judiciary serve as the arbiter and thereby assure the legitimacy of the process.

The committee questioned both the wisdom and validity of legislation excluding the courts from any involvement, stating: "It is questionable whether the power [of Congress to withdraw matters from the jurisdiction of the federal courts] reaches so far as to permit Congress to change results required by other provisions of the Constitution or to deny a remedy to enforce constitutional rights. Moreover, we are unaware of any authority upholding this power in cases of original jurisdiction."

The committee suggested limits on judicial review in any legislation adopted on the subject. First, it suggested that a congressional determination should be overturned only if "clearly erroneous," which would acknowledge Congress' political role and at the same time guard against arbitrary action. Second, it recommended that judicial remedies be limited to declaratory relief so as to diminish actual conflict between the branches of government. Finally, it stated that judicial review should not be allowed to delay the amending process unduly; accordingly, it recommended a short limitation period combined with expedited judicial procedures.

In our view, the confusion about the convention method strongly argues, as long as the convention method remains part of the Constitution, for the establishment of procedures governing the process—procedures which neither facilitate the adoption of any particular constitutional change nor make practically impossible any resort to the convention method. As our committee noted: "The integrity of our system requires that when the convention method is properly resorted to, it be allowed to function as intended."

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[3] 3 U.S. (3 Dall.) 378 (1798).
[4] 253 U.S. 221 (1920).
[5] 285 U.S. 355 (1932).

AMENDMENT OF THE CONSTITUTION

BY THE CONVENTION METHOD UNDER ARTICLE V

AMERICAN BAR ASSOCIATION

SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE

ABA

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Contents

The following resolutions were approved by the American Bar Association House of Delegates in August, 1973, upon the recommendation of the ABA Constitutional Convention Study Committee.

WHEREAS, the House of Delegates, at its July 1971 meeting, created the Constitutional Convention Study Committee "to analyze and study all questions of law concerned with the calling of a national Constitutional Convention, including, but not limited to, the question of whether such a Convention's jurisdiction can be limited to the subject matter giving rise to its call, or whether the convening of such a Convention, as a matter of constitutional law, opens such a Convention to multiple amendments and the consideration of a new Constitution"; and

WHEREAS, the Constitutional Convention Study Committee so created has intensively and exhaustively analyzed and studied the principal questions of law concerned with the calling of a national constitutional convention and has delineated its conclusions with respect to these questions of law in its Report attached hereto,

NOW, THEREFORE, BE IT RESOLVED, THAT, with respect to the provision of Article V of the United States Constitution providing that "Congress . . . on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments" to the Constitution,

1. It is desirable for Congress to establish procedures for amending the Constitution by means of a national constitutional convention.
2. Congress has the power to establish procedures limiting a convention to the subject matter which is stated in the applications received from the state legislatures.
3. Any Congressional legislation dealing with

such a process for amending the Constitution should provide for limited judicial review of Congressional determinations concerning a constitutional convention.

4. Delegates to a convention should be elected and representation at the convention should be in conformity with the principles of representative democracy as enunciated by the "one person, one vote" decisions of the Supreme Court.

BE IT FURTHER RESOLVED, THAT, the House of Delegates authorizes the distribution of the Report of the Constitutional Convention Study Committee for the careful consideration of Federal and state legislators and others concerned with constitutional law and commends the Report to them; and

BE IT FURTHER RESOLVED, THAT, representatives of the American Bar Association designated by the President be authorized to present testimony on behalf of the Association before the appropriate committees of the Congress consistent with this resolution.

Our Committee originated from a suggestion by the Council of the Section of Individual Rights and Responsibilities that a special committee representing the entire Association be created to evaluate the ramifications of the constitutional convention method of initiating amendments to the United States Constitution. The suggestion was adopted by the Board of Governors at its meeting in Williamsburg, Virginia, on April 29, 1971, and was accepted by the House of Delegates at its meeting in July 1971.

In forming the Committee, the Association authorized it to analyze and study all questions of law concerned with the calling of a national constitutional convention, including, but not limited to, the question of whether a convention's jurisdiction can be limited to the subject matter giving rise to its call, or whether the convening of a convention, as a matter of constitutional law, opens a convention to multiple amendments and the consideration of a new constitution.

The Committee thus constituted consists of two United States District Judges, a Judge of the Superior Court of the District of Columbia, a present and a former law school dean, two former presidents of state constitutional conventions, a former Deputy Attorney General of the United States, and a private practitioner with substantial experience in the amending process.

Comprising the Committee are: Warren Christopher, a California attorney, former Deputy Attorney General of the United States, and Vice President of the Los Angeles County Bar Association; David Dow, former Dean and currently Professor of Law, Nebraska College of Law, a

member of Nebraska's Constitutional Revision Commission, and a former member of the Board of Directors of the American Judicature Society; John D. Feerick, a New York attorney who served as advisor to the Association's Commission on Electoral College Reform and a member of the Association's Conference on Presidential Inability and Succession; Adrian M. Foley, Jr., a New Jersey attorney, a member of the House of Delegates, and President of the Fourth New Jersey Constitutional Convention (1966); Sarah T. Hughes, United States District Judge for the Northern District of Texas; Albert M. Sacks, Dean, The Harvard Law School, and former chairman of the Massachusetts Attorney General's Advisory Committee on Civil Rights and Civil Liberties; William S. Thompson, Judge of the Superior Court of the District of Columbia, chairman of the Association's Committee on World Order Under Law, and a member of the Association's Committee on Federal Legislation; and Samuel W. Witwer, an Illinois attorney, a member of the Board of Directors of the American Judicature Society, and President of the Sixth Illinois Constitutional Convention (1969-1970). Robert D. Evans, assistant director of the Association's Public Service Activities Division, has served ably as our liaison.

Throughout our two-year study the members of the Committee have been ever mindful of the nature and importance of the task entrusted to them and they have endeavored to uncover and understand every fact and point of view regarding the amending article. Beginning with our organizational meeting in Chicago on November 20, 1971, the Committee has met frequently and has spent an enormous amount of time studying, discussing and analyzing the questions concerned with the calling of a national constitutional convention. We all have been guided by the hope of rendering to the Association a thorough, objective and realistically constructive final report on a fundamental article of the United States Constitution, as other special committees have done in such fields as presidential succession and electoral college reform.

In August 1972 we filed with the House of Delegates a detailed interim report setting forth certain tentative conclusions reached as a result of

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our research and deliberations since our organizational meeting. Since that report, we have re-examined all of the matters commented upon in it and have studied other questions concerning the amending article which were not specifically discussed in our earlier report.

In our work the Committee has been the beneficiary of substantial quantities of valuable research and background material provided by twelve law students, to whom we express our deep gratitude. These students are: Richard Altabef, Edward Miller, Mark Wattenberg, and Richard Weisberg of Columbia Law School; Joan Madden and Barbara Manners of Fordham Law School; Shelley Z. Green and Henry D. Levine of Harvard Law School; Andrew N. Karlen and Barbara Prager of New York Law School; Michael Harris of St. John's Law School; and Marjorie Elkin of Yale Law School. The memoranda and papers prepared by these students have been filed at the Cromwell Library in the American Bar Center in Chicago.

I take pride in the fact that the conclusions and recommendations set forth in this report are unanimous (in every instance but one*).

C. Clyde Atkins,+
Chairman

*That single instance appears at page 10, *infra*.

+The Committee's Chairman is a United States District Judge for the Southern District of Florida, a former member of the House of Delegates (1960-66), and a past president of the Florida Bar (1960-61).

REPORT OF THE ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE

Introduction

There are few articles of the Constitution as important to the continued viability of our government and nation as Article V. As Justice Joseph Story wrote: "A government which . . . provides no means of change . . . will either degenerate into a despotism or, by the pressure of its inequities, bring on a revolution."[1] James Madison gave these reasons for Article V:

> "That useful alterations [in the Constitution] will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."[2]

Article V sets forth two methods of proposing and two methods of ratifying amendments to the United States Constitution:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ."

Up to the present time all amendments have been proposed by the Congress and all but one have been ratified by the state legislature mode. The Twenty-First Amendment was ratified by conventions called in the various states. Although there

has not been a national constitutional convention since 1787, there have been more than 300 applications from state legislatures over the past 184 years seeking such a convention.* Every state, at one time or another, has petitioned Congress for a convention. These state applications have ranged from applications calling for a general convention to a convention dealing with a specific subject, as, for example, slavery, anti-polygamy, presidential tenure, and repeal of prohibition. The pressure generated by numerous petitions for a constitutional convention is believed to have been a factor in motivating Congress to propose the Seventeenth Amendment to change the method of selecting Senators.

Despite the absence at the national level since 1787, conventions have been the preferred instrument for major revision of state constitutions. As one commentator on the state constitution-making process has stated: "The convention is purely American—widely tested and used."[3] There have been more than 200 conventions in the states, ranging from 15 in New Hampshire to one in eleven states. In a substantial majority of the states the convention is provided for by the state constitution. In the remainder it has been sanctioned by judicial interpretation and practice.[4]

Renewed and greater efforts to call a national constitutional convention have come in the aftermath of the Supreme Court's decisions in *Baker* v. *Carr*[5] and *Reynolds* v. *Sims*.[6] Shortly after the decision in *Baker* v. *Carr*, the Council of State Governments recommended that the states petition Congress for a national constitutional convention to propose three amendments to the Constitution. One would have denied to federal courts original and appellate jurisdiction over state legislative apportionment cases; another would have established a "Court of the Union" in place of the Supreme Court; and the third would have amended Article V to allow amendments to be adopted on the basis of identically-worded state petitions.[7] Twelve state petitions were sent to Congress in 1963 and 1964 requesting a convention to propose an amendment which would remove state legisla-

*These applications are classified by subject and state in *Appendix B*, Part One. They are also discussed generally in Barbara Prager's paper, which is also included in *Appendix B*, Part Two.

tive apportionment cases from the jurisdiction of the federal judiciary. In December 1964 the Council of State Governments recommended at its annual convention that the state legislatures petition Congress for a national constitutional convention to propose an amendment permitting one house of a state legislature to be apportioned on a basis other than population.

By 1967 thirty-two state legislatures had adopted applications calling for a constitutional convention on the question of apportionment. The wording of these petitions varied. Several sought consideration of an amendment to abolish federal judicial review of state legislative apportionment. Others sought a convention for the purpose of proposing an amendment which would "secure to the people the right of some choice in the method of apportionment of one house of a state legislature on a basis other than population alone." A substantial majority of states requested a convention to propose a specific amendment set forth *haec verba* in their petitions. Even here, there was variation of wording among a few of these state petitions.[8]

On March 18, 1967 a front page story in *The New York Times* reported that "a campaign for a constitutional convention to modify the Supreme Court's one-man, one-vote rule is nearing success." It said that the opponents of the rule "lack only two states in their drive" and that "most of official Washington has been caught by surprise because the state legislative actions have been taken with little fanfare." That article prompted immediate and considerable discussion of the subject both in and out of Congress. It was urged that Congress would be under no duty to call a convention even if applications were received from the legislatures of two-thirds of the states. Others argued that the words of Article V were imperative and that there would be such a duty. There was disagreement as to whether applications from malapportioned legislatures could be counted; and there were different views on the authority of any convention. Some maintained that, once constituted, a convention could not be restricted to the subject on which the state legislatures had requested action but could go so far as to propose an entirely new Constitution. Adding to the confusion and uncertainty was the

fact that there were no ground rules or precedents for amending the Constitution through the route of a constitutional convention.

As the debate on the convention method of initiating amendments continued into 1969, one additional state* submitted an application for a convention on the reapportionment issue while another state adopted a resolution rescinding its previous application.[9] Thereafter, the effort to call a convention on that issue diminished. Recently, however, the filing of state applications for a convention on the school busing issue has led to a new flurry of discussion on the question of a national constitutional convention.

The circumstances surrounding the apportionment applications prompted Senator Sam J. Ervin to introduce in the Senate on August 17, 1967 a bill to establish procedures for calling a constitutional convention. In explaining his reasons for the proposed legislation, Senator Ervin has stated:

> "My conviction was that the constitutional questions involved were far more important than the reapportionment issue that had brought them to light, and that they should receive more orderly and objective consideration than they had so far been accorded. Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment—and I am admittedly a partisan on the issue—should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process."[10]

After hearings and amendments to the original legislation, Senator Ervin's bill (S.215) passed the Senate by an 84 to 0 vote on October 19, 1971.[11] Although there was no action in the House of Representatives in the Ninety-Second Session of Congress, comparable legislation is expected to receive attention in both Houses in the future.+

*Making thirty-three in all, including applications from two state legislatures made in 1963.

+S. 215 was re-introduced in the Senate on March 19, 1973, as S.1272 and was favorably reported out of the Subcommittee on Separation of Powers on June 6, 1973, and passed the Senate July 9, 1973. That legislation is set forth and discussed in *Appendix A.*

The submission by state legislatures during the past thirty-five years of numerous applications for a national constitutional convention has brought into sharp focus the manifold issues arising under Article V. Included among these issues are the following:

1) If the legislatures of two-thirds of the states apply for a convention limited to a specific matter, must Congress call such a convention?

2) If a convention is called, is the limitation binding on the convention?

3) What constitutes a valid application which Congress must count and who is to judge its validity?

4) What is the length of time in which applications for a convention will be counted?

5) How much power does Congress have as to the scope of a convention? As to procedures such as the selection of delegates? As to the voting requirements at a convention? As to refusing to submit to the states for ratification the product of a convention?

6) What are the roles of the President and state governors in the amending process?

7) Can a state legislature withdraw an application for a convention once it has been submitted to Congress or rescind a previous ratification of a proposed amendment or a previous rejection?

8) Are issues arising in the convention process justiciable?

9) Who is to decide questions of ratification?

Since there has never been a national constitutional convention subsequent to the adoption of the

Constitution, there is no direct precedent to look to in attempting to answer these questions. In searching out the answers, therefore, resort must be made, among other things, to the text of Article V, the origins of the provision, the intent of the Framers, and the history and workings of the amending article since 1789. Our answers appear on the following pages.*

*While we also have studied a great many related and peripheral issues, our conclusions and recommendations are limited to the principal questions.

General

Responding to our charge, our Committee has attempted to canvass all the principal questions of law involved in the calling of a national constitutional convention pursuant to Article V. At the outset, we note that some, apprehensive about the scope of constitutional change possible in a national constitutional convention, have proposed that Article V be amended so as to delete or modify the convention method of proposing amendments.[12] On the other hand, others have noted that a dual method of constitutional change was intended by the Framers, and they contend that relative ease of amendment is salutary, at least within limits. Whatever the merits of a fundamental modification of Article V, we regard consideration of such a proposal as beyond the scope of our study. In short, we take the present text of Article V as the foundation for our study.

It is the view of our Committee that it is desirable for Congress to establish procedures for amending the Constitution by the national constitutional convention method. We recognize that some believe that it is unfortunate to focus attention on this method of amendment and unwise to establish procedures which might facilitate the calling of a convention. The argument is that the establishment of procedures might make it easier for state legislatures to seek a national convention, and might even encourage them to do so.[13] Underlying this argument is the belief that, at least in modern political terms, a national convention would venture into uncharted and dangerous waters. It is relevant to note in this respect that a similar concern has been expressed about state constitutional conventions but that 184 years' experience at that level furnishes little support to the concern.[14]

We are not persuaded by these suggestions that we should fail to deal with the convention method, hoping that the difficult questions never arise. More than 300 applications during our constitutional history, with every state legislature represented, stand as testimony that a consideration of procedure is not purely academic. Indeed, we would ignore at great peril the lessons of the recent proposals for a convention on legislative apportionment (the one-person, one-vote issue) where, if one more state had requested a convention, a major struggle would have ensued on the adequacy of the requests and on the nature of the convention and the rules therefor.

If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional convention would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.

It is far more prudent, we believe, to confront the problem openly and to supply safeguards and general rules in advance. In addition to being better governmental technique, a forthright approach to the dangers of the convention method seems far more likely to yield beneficial results than would burying our heads in the sands of uncertainty. Essentially, the reasons are the same ones which caused the American Bar Association to urge, and our nation ultimately to adopt, the rules for dealing with the problems of presidential disability and a vice-presidential vacancy which are contained in the Twenty-Fifth Amendment. So long as the Constitution envisions the convention method, we think the procedures should be ready if there is a "contemporaneously felt need" by the required two-thirds of the state legislatures. Fidelity to democratic principles requires no less.

The observation that one Congress may not bind a subsequent Congress does not persuade us that comprehensive legislation is useless or impractical. The interests of the public and nation are better served when safeguards and rules are prescribed in advance. Congress itself has recognized this in many areas, including its adoption of and sub-

sequent reliance on legislative procedures for handling such matters as presidential electoral vote disputes and contested elections for the House of Representatives.[15] Congressional legislation fashioned after intensive study, and in an atmosphere free from the emotion and politics that undoubtedly would surround a specific attempt to energize the convention process, would be entitled to great weight as a constitutional interpretation and be of considerable precedential value. Additionally, whenever two-thirds of the state legislatures had applied for a convention, it would help to focus and channel the ensuing discussion and identify the expectations of the community.

In our view any legislation implementing Article V should reflect its underlying policy, as articulated by Madison, of guarding "equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults."[16] Legislation should protect the integrity of the amending process and assure public confidence in its workings.

Specific

It is our conclusion that Congress has the power to establish procedures governing the calling of a national constitutional convention limited to the subject matter on which the legislatures of two-thirds of the states request a convention. In establishing procedures for making available to the states a limited convention when they petition for such a convention, Congress must not prohibit the state legislatures from requesting a general convention since, as we view it, Article V permits both types of conventions (pp. 11-19 *infra*).

We consider Congress' duty to call a convention whenever two-thirds of the state legislatures have concurred on the subject matter of the convention to be mandatory (p. 17).

We believe that the Constitution does not assign the President a role in either the call of a convention or the ratification of a proposed amendment (pp. 25-28).

We consider it essential that legislation passed by Congress to implement the convention method should provide for limited judicial review of congressional action or inaction concerning a consti-

tutional convention. Provision for such review not only would enhance the legitimacy of the process but would seem particularly appropriate since, when and if the process were resorted to, it likely would be against the backdrop of some dissatisfaction with prior congressional performance (pp. 20-25).

We deem it of fundamental importance that delegates to a convention be elected and that representation at the convention be in conformity with the principles of representative democracy as enunciated by the "one-person, one-vote" decisions of the Supreme Court (pp. 33-37). One member of the Committee, however, does not believe that the one-person, one-vote rule is applicable to a constitutional convention.

We believe also that a convention should adopt its own rules of procedure, including the vote margin necessary at the convention to propose an amendment to the Constitution (pp. 19-20).

Our research and deliberations have led us to conclude that a state governor should have no part in the process by which a state legislature applies for a convention or ratifies a proposed amendment (pp. 28-30).*

Finally, we believe it highly desirable for any legislation implementing the convention method of Article V to include the rule that a state legislature can withdraw an application at any time before the legislatures of two-thirds of the states have submitted applications on the same subject, or withdraw a vote rejecting a proposed amendment, or rescind a vote ratifying a proposed amendment so long as three-fourths of the states have not ratified (pp. 32-33, 37-38).

*We, of course, are referring to a substantive role and not a role such as the agency for the transmittal of applications to Congress, or for receipt of proposed amendments for submission to the state legislature, or for the certification of the act of ratification in the state.

Authority of an Article V Convention

Central to any discussion of the convention method of initiating amendments is whether a convention convened under Article V can be limited in its authority. There is the view, with which we disagree, that an Article V convention would be a sovereign assemblage and could not be restricted by either the state legislatures or the Congress in its authority or proposals. And there is the view, with which we agree, that Congress has the power to establish procedures which would limit a convention's authority to a specific subject matter where the legislatures of two-thirds of the states seek a convention limited to that subject.

The text of Article V demonstrates that a substantial national consensus must be present in order to adopt a constitutional amendment. The necessity for a consensus is underscored by the requirement of a two-thirds vote in each House of Congress or applications for a convention from two-thirds of the state legislatures to initiate an amendment, and by the requirement of ratification by three-fourths of the states. From the language of Article V we are led to the conclusion that there must be a consensus among the state legislatures as to the subject matter of a convention before Congress is required to call one. To read Article V as requiring such agreement helps assure "that an alteration of the Constitution proposed today has relation to the sentiment and felt needs of today . . . ."[17]

The origins and history of Article V indicate that both general and limited conventions were within the contemplation of the Framers. The debates at the Constitutional Convention of 1787 make clear that the convention method of proposing amendments was intended to stand on an equal footing

with the congressional method. As Madison observed: Article V "equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."[18] The "state" method, as it was labeled, was prompted largely by the belief that the national government might abuse its powers. It was felt that such abuses might go unremedied unless there was a vehicle of initiating amendments other than Congress.

The earliest proposal on amendments was contained in the Virginia Plan of government introduced in the Convention on May 29, 1787 by Edmund Randolph. It provided in resolution 13 "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."[19] A number of suggestions were advanced as to a specific article which eventuated in the following clause in the Convention's Committee of Detail report of August 6, 1787:

> "On the application of the Legislatures of two thirds of the States in the Union, for *an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose*."[20]

This proposal was adopted by the Convention on August 30. Gouverneur Morris's suggestion on that day that Congress be left at liberty to call a convention "whenever it pleased" was not accepted. There is reason to believe that the convention contemplated under this proposal "was the last step in the amending process, and its decisions did not require any ratification by anybody."[21]

On September 10, 1787 Elbridge Gerry of Massachusetts moved to reconsider the amending provision, stating that under it "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether." His motion was supported by Alexander Hamilton and other delegates. Hamilton pointed to the difficulty of introducing amendments under the Articles of Confederation and stated that "an easy mode should be established for supplying defects which will probably appear in the new System."[22] He felt that Congress would be "the first to perceive" and be "most sensible to the necessity of Amend-

ments," and ought also to be authorized to call a convention whenever two-thirds of each branch concurred on the need for a convention. Madison also criticized the August 30 proposal, stating that the vagueness of the expression "call a convention for the purpose" was sufficient reason for reconsideration. He then asked: "How was a Convention to be formed? by what rule decide? what the force of its acts?" As a result of the debate, the clause adopted on August 30 was dropped in favor of the following provision proposed by Madison:

> "The Legislature of the U-S- whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S."[23]

On September 15, after the Committee of Style had returned its report, George Mason strongly objected to the amending article on the ground that both modes of initiating amendments depended on Congress so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive . . . ."* Gerry and Gouverneur Morris then moved to amend the article "so as to require a convention on application of" two-thirds of the states.[24] In response Madison said that he "did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application." He added that he had no objection against providing for a convention for the purpose of amendments "except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."[25]

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*Mason's draft of the Constitution, as it stood at that point in the Convention, contained the following notations: "Article 5th — By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." 2 The Records of the Federal Convention of 1787, at 629 n. 8 (Farrand ed. 1937)

Thereupon, the motion by Morris and Gerry was agreed to and the amending article was thereby modified so as to include the convention method as it now reads. Morris then successfully moved to include in Article V the proviso that "no state, without its consent shall be deprived of its equal suffrage in the Senate."

There was little discussion of Article V in the state ratifying conventions. In *The Federalist* Alexander Hamilton spoke of Article V as contemplating "a single proposition." Whenever two-thirds of the states concur, he declared, Congress would be obliged to call a convention. "The words of this article are peremptory. The Congress 'shall call a convention'. Nothing in this particular is left to the discretion of that body."[26]* Madison, as noted earlier, stated in *The Federalist* that both the general and state governments are equally enabled to "originate the amendment of errors."

While the Constitutional Convention of 1787 may have exceeded the purpose of its call in framing the Constitution,* it does not follow that a convention convened under Article V and subject to the Constitution can lawfully assume such authority. In the first place, the Convention of 1787 took place during an extraordinary period and at a time when the states were independent and there was no effective national government. Thomas Cooley described it as "a revolutionary proceeding, and could be justified only by the circumstances which had brought the Union to the brink of dissolution."[27] Moreover, the Convention of 1787 did not ignore Congress. The draft Constitution was submitted to Congress, consented to by Congress, and transmitted by Congress to the states for ratification by popularly-elected conventions.

Both pre-1787 convention practices and the general tenor of the amending provisions of the first state constitutions lend support to the conclusions that a convention could be convened for a specific purpose and that, once convened, it would have no authority to exceed that purpose.

*This is because it was called "for the sole and express purpose of revising the Articles of Confederation and reporting . . . such alterations and provisions therein as shall . . . render the federal constitution adequate to the exigencies of government and the preservation of the Union."

Of the first state constitutions, four provided for amendment by conventions and three by other methods.[28] Georgia's Constitution provided that

> "no alteration shall be made in this constitution without petitions from a majority of the counties, . . . at which time the assembly shall order a *convention to be called for that purpose,** specifying the alterations to be made, according to the petitions referred to the assembly by a majority of the counties as aforesaid."[29]

Pennsylvania's Constitution of 1776 provided for the election of a Council of Censors with power to call a convention

> "if there appear to them an absolute necessity of amending any article of the constitution which may be defective . . . . But the articles to be amended, and the amendment proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."[30]

The Massachusetts Constitution of 1780 directed the General Court to have the qualified voters of the respective towns and plantations convened in 1795 to collect their sentiments on the necessity or expediency of amendments. If two-thirds of the qualified voters throughout the state favored "revision or amendment," it was provided that a convention of delegates would meet "for the purpose aforesaid."

The report of the Annapolis Convention of 1786 also reflected an awareness of the binding effect of limitations on a convention. That Convention assembled to consider general trade matters and, because of the limited number of state representatives present, decided not to proceed, stating:

> "That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstances of so partial and defective a representation."[31]

In their report, the Commissioners expressed the opinion that there should be another convention, to consider not only trade matters but the

*Note the similarity between this language (emphasis ours) and the language contained in the earliest drafts of Article V (p. 12, *supra*).

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amendment of the Articles of Confederation. The limited authority of the Annapolis Commissioners, however, was made clear:

> "If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.
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> • • •
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> "Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to Represent, they have nevertheless concluded from motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States."

From this history of the origins of the amending provision, we are led to conclude that there is no justification for the view that Article V sanctions only general conventions. Such an interpretation would relegate the alternative method to an "unequal" method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution.

Since Article V specifically and exclusively vests the state legislatures with the authority to apply for a convention, we can perceive no sound reason as to why they cannot invoke limitations in exercising that authority. At the state level, for example, it seems settled that the electorate may choose to delegate only a portion of its authority to a state constitutional convention and so limit it substantively.[32] The rationale is that the state convention derives its authority from the people when they vote to hold a convention and that when they so vote they adopt the limitations on the convention contained in the enabling legislation drafted by the legislature and presented on a "take it or leave it" basis.[33] As one state court decision stated:

> "When the people, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention, they are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention."[34]

And another:

> "Certainly, the people, may, if they will, elect delegates for a particular purpose without conferring on them all their authority . . . ."[35]

In summary, we believe that a substantively-limited Article V convention is consistent with the purpose of the alternative method since the states and people would have a complete vehicle other than the Congress for remedying specific abuses of power by the national government; consistent with the actual history of the amending article throughout which only amendments on single subjects have been proposed by Congress; consistent with state practice under which limited conventions have been held under constitutional provisions not expressly sanctioning a substantively-limted convention;[36] and consistent with democratic principles because convention delegates would be chosen by the people in an election in which the subject matter to be dealt with would be known and the issues identified, thereby enabling the electorate to exercise an informed judgment in the choice of delegates.

Power of Congress with Respect to an Article V Convention

Article V explicitly gives Congress the power to call a convention upon receipt of applications from two-thirds of the state legislatures and to choose the mode of ratification of a proposed amendment. We believe that, as a necessary incident of the power to call, Congress has the power initially to determine whether the conditions which give rise to its duty have been satisfied. Once a determination is made that the conditions are present, Congress' duty is clear—it "shall" call a convention. The language of Article V, the debates at the Constitutional Convention of 1787, and statements made in *The Federalist,* in the debates in the state ratifying conventions, and in congressional debates during the early Congresses make clear the mandatory nature of this duty.*

*Upon receipt of the *first* state application for a convention, a debate took place in the House of Representatives on May 5, 1789, as to whether it would be proper to refer that application to committee. A number of Representatives, including Madison, felt it would be improper to do so, since it would imply that Congress had a right to deliberate upon the subject. Madison said that this "was not the case until two-thirds of the State Legislatures concurred in such application, and then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of

While we believe that Congress has the power to establish standards for making available to the states a limited convention when they petition for that type of convention, we consider it essential that implementing legislation not preclude the states from applying for a general convention. Legislation which did so would be of questionable validity since neither the language nor history of Article V reveals an intention to prohibit another general convention.

In formulating standards for determining whether a convention call should issue, there is a need for great delicacy. The standards not only will determine the call but they also will have the effect of defining the convention's authority and determining whether Congress must submit a proposed amendment to the states for ratification. The standards chosen should be precise enough to permit a judgment that two-thirds of the state legislatures seek a convention on an agreed-upon matter. Our research of possible standards has not produced any alternatives which we feel are preferable to the "same subject" test embodied in S.1272. We do feel, however, that the language of Sections 4, 5, 6, 10 and 11 of S.1272 is in need of improvement and harmonization so as to avoid the use of different expressions and concepts.

We believe that standards which in effect required applications to be identical in wording would be improper since they would tend to make resort to the convention process exceedingly difficult in view of the problems that would be encountered in obtaining identically worded applications from thirty-four states. Equally improper, we believe, would be standards which permitted Congress to

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applications of this nature." The House thus decided not to refer the application to committee but rather to enter it upon the Journals of Congress and place the original in its files. 1 Annals of Congress, cols. 248-51 (1789). Further support for the proposition that Congress has no discretion on whether or not to call a constitutional convention, once two-thirds of the states have applied for one, may be found in IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 178 (2d ed 1836) (remarks of delegate James Iredell of North Carolina); 1 Annals of Congress, col. 498 (1796) (remarks of Rep. William Smith of South Carolina during debate on a proposed treaty with Great Britain); Cong. Globe, 38th Cong., 2d Sess. 630-31 (1865) (remarks of Senator Johnson).

exercise a policy-making role in determining whether or not to call a convention.*

In addition to the power to adopt standards for determining when a convention call should issue, we also believe it a fair inference from the text of Article V that Congress has the power to provide for such matters as the time and place of the convention, the composition and financing of the convention, and the manner of selecting delegates. Some of these items can only be fixed by Congress. Uniform federal legislation covering all is desirable in order to produce an effective convention.

Less clear is Congress' power over the internal rules and procedures of a convention.+ The Supreme Court's decisions in *Dillon* v. *Gloss*[37] and *Leser* v. *Garnett*[38] can be viewed as supporting a broad view of Congress' power in the amending process. As the Court stated in *Dillon* v. *Gloss*: "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule." On the other hand, the legislative history of Article V reflects a purpose that the convention method be as free as possible from congressional domination, and the text of Article V grants Congress only two express powers pertaining to a convention, that is, the power (or duty) to call a convention and the power to choose the mode of ratification of any proposed amendment. In the absence of direct precedents, it perhaps can be said fairly that Congress may not by legislation interfere with matters of procedure because they are an intrinsic part of the deliberative characteristic of a convention.[39] We view as unwise and of questionable validity any attempt by Congress to regulate the internal proceedings of a convention. In particular, we believe that Congress should not impose a vote

*See our discussion at pages 30-31, *infra*.

+For a related discussion, see the debates which took place at the time the Twenty-First Amendment was being formulated concerning the extent of congressional power over state ratifying conventions. *See, e.g.*, 76 Cong. Rec. 124-34, 2419-21, 4152-55 (1933); 77 Cong. Rec. 481-82 (1933); 81 Cong. Rec. 3175-76 (1937). Former Attorney General A. Mitchell Palmer argued that Congress could legislate all the necessary provisions for the assembly and conduct of such conventions, a view that was controverted at the time by former Solicitor General James M. Beck.

requirement on an Article V convention. We are influenced in this regard by these factors:

First, it appears from our research that throughout our history conventions generally have decided for themselves the vote that should govern their proceedings. This includes the Constitutional Convention of 1787, the constitutional conventions that took place between 1776 and 1787, many of the approximately two hundred state constitutional conventions that have been held since 1789, and the various territorial conventions that have taken place under acts passed by Congress.[40] Second, the specific intent of the Framers with regard to the convention method of initiating amendments was to make available an alternative method of amending the Constitution—one that would be free from congressional domination. Third, a reading of the 1787 debates suggests that the Framers contemplated that an Article V convention would have the power to determine its own voting and other internal procedures and that the requirement of ratification by three-fourths of the states was intended to protect minority interests.[41]

We have considered the suggestion that Congress should be able to require a two-thirds vote in order to maintain the symmetry between the convention and congressional methods of initiating amendments. We recognize that the convention can be viewed as paralleling Congress as the proposing body. Yet we think it is significant that the Constitution, while it specifies a two-thirds vote by Congress to propose an amendment, is completely silent as to the convention vote.

Judicial Review

The Committee believes that judicial review of decisions made under Article V is desirable and feasible. We believe Congress should declare itself in favor of such review in any legislation implementing the convention process. We regard as very unwise the approach of S.1272 which attempts to exclude the courts from any role. While the Supreme Court's decision in *Ex parte McCardle*[42] indicated that Congress has power under Article III to withdraw matters from the jurisdiction of the federal courts, this power is not unlimited. It is questionable whether the power reaches so far as to permit Congress to change

results required by other provisions of the Constitution or to deny a remedy to enforce constitutional rights. Moreover, we are unaware of any authority upholding this power in cases of original jurisdiction.[43]

To be sure, Congress has discretion in interpreting Article V and in adopting implementing legislation. It cannot be gainsaid that Congress has the primary power of administering Article V. We do not believe, however, that Congress is, or ought to be, the final dispositive power in every situation. In this regard, it is to be noted that the courts have adjudicated on the merits a variety of questions arising under the amending article. These have included such questions as: whether Congress may choose the state legislative method of ratification for proposed amendments which expand federal power; whether a proposed amendment requires the approval of the President; whether Congress may fix a reasonable time for ratification of a proposed amendment by state legislatures; whether the states may restrict the power of their legislatures to ratify amendments or submit the decision to a popular referendum; and the meaning of the requirement of a two-thirds vote of both Houses.[44]

Baker v. *Carr* and *Powell* v. *McCormack* suggest considerable change in the Supreme Court's view since *Coleman* v. *Miller*[45] on questions involving the political process.

In *Coleman*, the Court held that a group of state legislators who had voted not to ratify the child labor amendment had standing to question the validity of their state's ratification. Four Justices dissented on this point. The Court held two questions non-justiciable: the issue of undue time lapse for ratification and the power of a state legislature to ratify after having first rejected ratification. In reaching these conclusions, the Court pointed to the absence of criteria either in the Constitution or a statute relating to the ratification process. The four Justices who dissented on standing concurred on non-justiciability. They felt, however, that the Court should have disapproved *Dillon* v. *Gloss* insofar as it decided judicially that seven years is a reasonable period of time for ratification, stating that Article V gave control of the amending process to Congress and

that the process was "political in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Even though the calling of a convention is not precisely within these time limits and the holding in *Coleman* is not broad, it is not at all surprising that commentators read that case as bringing Article V issues generally within the rubric of "political questions."

In *Baker* v. *Carr*,[46] the Court held that a claim of legislative malapportionment raised a justiciable question. More generally, the Court laid down a number of criteria, at least one of which was likely to be involved in a true "political question," as follows:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question."[47]

Along with these formulas, there was additional stress in *Baker* v. *Carr* on the fact that the Court there was not dealing with Congress, a coordinate branch, but with the states. In reviewing the precedents, the Court noted that it had held issues to be nonjusticiable when the matter demanded a single-voiced statement, or required prompt, unquestioning obedience, as in a national emergency, or contained the potential embarrassment of sitting in judgment on the internal operations of a coordinate branch.

Perhaps the most striking feature of *Baker* and its progeny has been the Court's willingness to project itself into redistricting and reapportionment in giving relief. In addition, some of the criteria stressed by the Court as determinative of "political question" issues were as applicable to Congress as to the states.

In *Powell*,[48] the Court clearly marked out new ground. The question presented was the constitutionality of the House of Representatives' decision

to deny a seat to Congressman-elect Powell, despite his having fulfilled the prerequisites specified in Article I, Section 2 of the Constitution. Even though it was dealing with Congress, and indeed with a matter of internal legislative operation, still it held that the question was a justiciable one, involving as it did the traditional judicial function of interpreting the Constitution, and that a newly elected Representative could be judged as to qualifications only as to age, citizenship, and residence. The Court limited itself to declaratory relief, saying that the question of whether coercive relief was available against employees of Congress was not being decided. But the more important aspect of the decision is the Court's willingness to decide. It stressed the interest of voters in having the person they elect take a seat in Congress. Thus, it looked into the clause on qualifications and found in the text and history that Congress was the judge of qualifications, but only of the three specified.

It is not easy to say just how these precedents apply to judicial review of questions involving a constitutional convention under Article V. It can be argued that they give three different doctrinal models, each leading to a different set of conclusions. We are inclined to a view which seeks to reconcile the three cases. *Powell* may be explained on the theory that specially protected constitutional interests are at stake, that the criteria for decisions were rather simple, and that an appropriate basis for relief could be found. *Baker* is more complex, but it did not involve Congress directly. The state legislatures had forfeited a right to finality by persistent and flagrant malapportionments, and one person, one vote supplied a judicially workable standard (though the latter point emerged after *Baker*). Thus, *Coleman* may be understood as good law so far as it goes, on the theory that Congress is directly involved, that no specially protected interests are threatened, and that the issues are not easily dealt with by the Court.

Following this approach to the three cases, some tentative conclusions can be drawn for Article V and constitutional conventions. If two-thirds of the state legislatures apply, for example, for a convention to consider the apportionment of state legisla-

tures, and Congress refuses to call the convention, it is arguable that a *Powell* situation exists, since the purpose of the convention method was to enable the states to bring about a change in the Constitution even against congressional opposition. The question whether Congress is required to act, rather than having discretion to decide, is one very similar in quality to the question in *Powell*. The difficulty not confronted in *Powell* is that the relief given must probably be far-reaching, possibly involving the Court in approving a plan for a convention. There are at least two answers. The Court might find a way to limit itself to a declaratory judgment, as it did in *Powell,* but if it must face far-reaching relief, the reapportionment cases afford a precedent. In some ways, a plan for a convention would present great difficulties for a court, but it could make clear that Congress could change its plan, simply by acting.[49]

If one concludes that the courts can require Congress to act, one is likely to see the courts as able to answer certain ancillary questions of "law," such as whether the state legislatures can bind a convention by the limitations in their applications, and whether the state legislatures can force the call of an unlimited convention. Here we believe Congress has a legislative power, within limits, to declare the effects of the states' applications on the scope of the convention. Courts should recognize that power and vary their review according to whether Congress has acted.

Consequently, this Committee strongly favors the introduction in any implementing legislation of a limited judicial review.* It would not only add substantial legitimacy to any use of the convention process but it would ease the question of justiciability. Moreover, since the process likely would be resorted to in order to effect a change opposed by vested interests, it seems highly appropriate that our independent judiciary be involved so that it can act, if necessary, as the arbiter.

In view of the nature of the controversies that might arise under Article V, the Committee believes that there should be several limits on judicial

*_Appendix A_ sets forth suggestions as to how such review might be provided for in S.1272.

consideration. First, a Congressional determination should be overturned only if "clearly erroneous." This standard recognizes Congress' political role and at the same time insures that Congress cannot arbitrarily void the convention process.

Second, by limiting judicial remedies to declaratory relief, the possibility of actual conflict between the branches of government would be diminished. As *Powell* illustrated, courts are more willing to adjudicate questions with "political" overtones when not faced with the institutionally destructive need to enforce the result.

Third, the introduction of judicial review should not be allowed to delay the amending process unduly. Accordingly, any claim should be raised promptly so as to result in an early presentation and resolution of any dispute. We favor a short limitation period combined with expedited judicial procedures such as the selection of a three-judge district court. The possibility of providing original jurisdiction in the Supreme Court was rejected for several reasons. Initiation of suit in the Supreme Court necessarily escalates the level of the controversy without regard to the significance of the basic dispute. In addition, three-judge district court procedures are better suited to an expedited handling of factual issues.

We do not believe that our recommendation of a three-judge court is inconsistent with the American Bar Association's position that the jurisdiction of such courts should be sharply curtailed. It seems likely that the judicial review provided for will occur relatively rarely. In those instances when it does, the advantages of three-judge court jurisdiction outweigh the disadvantages which the Association has perceived in the existing three-judge court jurisdiction. In cases involving national constitutional convention issues, the presence of three judges (including a circuit judge) and the direct appeal to the Supreme Court are significant advantages over conventional district court procedure.

Role of Executive
(i) President

There is no indication from the text of Article V that the President is assigned a role in the amending process. Article V provides that "Congress" shall propose amendments, call a convention for proposing amendments and, in either case, choose the mode for ratification of amendments.

Article I, Section 7 of the Constitution, however, provides that "every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President" for his approval and, if disapproved, may be repassed by a two-thirds vote of both Houses.

It has, we believe, been regarded as settled that amendments proposed by Congress need not be presented to the President for his approval. The practice originated with the first ten amendments, which were not submitted to President Washington for his approval, and has continued through the recently proposed amendment on equality of rights. The question of whether the President's approval is required was passed on by the Supreme Court in *Hollingsworth* v. *Virginia.*[50] There, the validity of the Eleventh Amendment was attacked on the ground that it had "not been proposed in the form prescribed by the Constitution" in that it had never been presented to the President. Article I, Section 7 was relied upon in support of that position. The Attorney General argued that the proposing of amendments was "a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the President with a qualified negative on the Acts and Resolutions of Congress." It was also urged that since a two-thirds vote was necessary for both proposing an amendment and overriding a presidential veto, no useful purpose would be served by a submission to the President in such case. It was argued in reply that this was no answer, since the reasons assigned by the President for his disapproval "might be so satisfactory as to reduce the majority below the constitutional proportion." The Court held that the amendment had been properly adopted, Justice Chase stating that "the negative of the President applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the Constitution."[51] What was not pointed out, but could have been, is that had the President's approval been found necessary, it would have created the anomaly that only amendments proposed by Congress would be subject to the requirements inasmuch as Article I, Section 7 by

its terms could not apply to action taken by a national constitutional convention.

Subsequent to *Hollingsworth,* the question of the President's role in the amending process has been the subject of discussion in Congress. In 1803 a motion in the Senate to submit the Twelfth Amendment to the President was defeated.[52] In 1865 the proposed Thirteenth Amendment was submitted to President Lincoln and, apparently through an inadvertence, was signed by him. An extensive discussion of his action took place in the Senate and a resolution was passed declaring that the President's signature was unnecessary, inconsistent with former practice, and should not constitute a precedent for the future.[53] The following year President Andrew Johnson, in a report to the Congress with respect to the Fourteenth Amendment, made clear that the steps taken by the Executive Branch in submitting the amendment to the state legislatures was "purely ministerial" and did not commit the Executive to "an approval or a recommendation of the amendment."[54] Since that time, no proposed amendment has been submitted to the President for his approval and no serious question has arisen over the validity of amendments for that reason. Thus, the Supreme Court could state in 1920 in *Hawke* v. *Smith* that it was settled "that the submission of a constitutional amendment did not require the action of the President."

While the "call" of a convention is obviously a different step from that of proposing an amendment, we do not believe that the President's approval is required. Under Article V applications from two-thirds of the state legislatures must precede a call and, as previously noted, Congress' duty to issue a call once the conditions have been met clearly seems to be a mandatory one. To require the President's approval of a convention call, therefore, would add a requirement not intended. Not only would it be inconsistent with the mandatory nature of Congress' duty and the practice of non-presidential involvement in the congressional process of initiating amendments but it would make more difficult any resort to the convention method. The approval of another branch of government would be necessary and, if

not obtained, a two-thirds vote of each House would be required before a call could issue. Certainly, the parallelism between the two initiating methods would be altered, in a manner that could only thwart the intended purpose of the convention process as an "equal" method of initiating amendments.

While the language of Article I, Section 7 expressly provides for only one exception (*i.e.*, an adjournment vote), it has been interpreted as not requiring presidential approval of preliminary votes in Congress, or, as noted, the proposal of constitutional amendments by Congress, or concurrent resolutions passed by the Senate and the House of Representatives for a variety of purposes.* As the Supreme Court held in *Hollingsworth,* Section 7 applies to "ordinary cases of legislation" and "has nothing to do with the proposition or adoption of amendments to the Constitution." Thus, the use of a concurrent resolution by Congress for the issuance of a convention call is in our opinion in harmony with the generally recognized exceptions to Article I, Section 7.

(ii) State Governor

We believe that a state governor should have no part in the process by which a state legislature applies for a convention or ratifies a proposed amendment. In reaching this conclusion, we are influenced by the fact that Article V speaks of "state legislatures" applying for a convention and ratifying an amendment proposed by either Congress or a national convention. The Supreme Court had occasion to focus on this expression in *Hawke*

*The concurrent resolution is used to express "the sense of Congress upon a given subject," Watkins, C.L., & Riddick, F.M., *Senate Procedure: Precedents and Practices* 208 (1964); to express "facts, principles, opinions, and purposes of the two Houses," Deschler, L., *Jefferson's Manual and Rules of the House of Representatives* 185-186 (1969); and to take a joint action embodying a matter within the limited scope of Congress, as, for instance, to count the electoral votes, terminate the effective date of some laws, and recall bills from the President, Evins, Joe L., *Understanding Congress* 114 (1963); Watkins and Riddick, *supra* at 208-9. A concurrent resolution was also used by Congress in declaring that the Fourteenth Amendment should be promulgated as part of the Constitution. 15 Stat. 709-10. Other uses include terminating powers delegated to the President, directing the expenditure of money appropriated to the use of Congress, and preventing reorganization plans taking effect under general powers granted the President to reorganize executive agencies. For an excellent discussion of such resolutions, see S. Rep. No. 1335, 54th Cong., 2d Sess. (1897).

v. *Smith*[55] *(No. 1)* in the context of a provision in the Ohio Constitution subjecting to a popular referendum any ratification of a federal amendment by its legislature. The Court held that this requirement was invalid, reasoning that the term "legislatures" had a certain meaning. Said the Court: "What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people."[56] The ratification of a proposed amendment, held the Court, was not "an act of legislation within the proper sense of the word" but simply an expression of assent in which "no legislative action is authorized or required." The Court also noted that the power to ratify proposed amendments has its source in the Constitution and, as such, the state law-making procedures are inapplicable.

That the term "Legislature" does not always mean the representative body itself was made clear by *Smiley* v. *Holm.*[57] That case involved a bill passed by the Minnesota legislature dividing the state into congressional districts under Article I, Section 4. The bill was vetoed by the governor and not repassed over his veto. As for the argument that the bill was valid because Article I, Section 4 refers to the state "Legislatures," the Court stated:

> "The use in the Federal Constitution of the same term in different relations does not always imply the same function .... Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view ...."[58]

The Court found that the governor's participation was required because the function in question involved the making of state laws and the veto of the governor was an integral part of the state's legislative process. In finding that Article I, Section 4 contemplated the making of laws, the Court stated that it provided for "a complete code for congressional elections" whose requirements "would be nugatory if they did not have appropriate sanctions." The Court contrasted this function with the "Legislature's" role as an electoral body, as when it chose Senators, and a ratifying body, as in the case of federal amendments.

It is hard to see how the act of applying for a convention invokes the law-making processes of the state any more than its act of ratifying a

proposed amendment. If anything, the act of ratification is closer to legislation since it is the last step before an amendment becomes a fundamental part of our law. A convention application, on the other hand, is several steps removed. Other states must concur, a convention them must be called by Congress, and an amendment must be proposed by that convention. Moreover, a convention application, unlike legislation dividing congressional districts, does not have the force of law or operate directly and immediately upon the people of the state. From a legal point of view, it would seem to be contrary to *Hawke* v. *Smith* and *Leser* v. *Garnett* to require the governor's participation in the application and ratification processes.[59]

The exclusion of the governor from the application and ratification processes also finds support in the overwhelming practice of the states,[60] in the views of text-writers,[61] and in the Supreme Court's decision in *Hollingsworth* v. *Virginia* holding that the President was excluded from any role in the process by which amendments are proposed by Congress.[62]

Article V Applications (i) Content

A reading of Article V makes clear that an application should contain a request to Congress to call a national convention that would have the authority to propose an amendment to the Constitution. An application which simply expressed a state's opinion on a given problem or requested Congress itself to propose an amendment would not be sufficient for purposes of Article V. Nor would an application seem proper if it called for a convention with no more authority than to vote a specific amendment set forth therein up or down, since the convention would be effectively stripped of its deliberative function.* A convention should have latitude to amend, as Congress does, by evaluating and dealing with a problem.

On the other hand, an application which expressed the result sought by an amendment, such as providing for the direct election of the President, should be proper since the convention itself would be left free to decide on the terms of the specific

*In commenting on the ratification process, the Supreme Court stated in *Hawke* v. *Smith (No. 1)*. "Both methods of ratification, by legislatures or conventions, *call for action by deliberative assemblages* representative of the people, which it was assumed would voice the will of the people." 253 U.S. at 226-27 (emphasis added).

amendment necessary to accomplish that objective. We agree with the suggestion that it should not be necessary that each application be identical or propose similar changes in the same subject matter.[63]

In order to determine whether the requisite agreement among the states is present, it would seem useful for congressional legislation to require a state legislature to list in its application all state applications in effect on the date of its adoption whose subject or subjects it considers to be substantially the same. By requiring a state legislature to express the purpose of its application in relation to those already received, Congress would have additional guidance in rendering its determination. Any such requirement, we believe, should be written in a way that would permit an application to be counted even though the state involved might have inadvertently but in good faith failed to identify similar applications in effect.

(ii) Timeliness

In *Dillon* v. *Gloss,* the Court upheld the fixing by Congress of a period during which ratification of a proposed amendment must be accomplished. In reaching that conclusion the Court stated that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal, which Congress is free to fix." The Court observed that

> "as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[64]

We believe the reasoning of *Dillon* v. *Gloss* to be equally applicable to state applications for a national constitutional convention. The convening of a convention to deal with a certain matter certainly should reflect the "will of the people in all sections at relatively the same period . . . ." In the absence of a uniform rule, the timeliness or untimeliness of state applications would vary, it seems, from case to case. It would involve, as the Supreme Court suggested with respect to the ratification area in *Coleman* v. *Miller,* a consideration of "political, social and economic conditions

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which have prevailed during the period since the submission of the [applications] . . . ."[65]

A uniform rule, as in the case of ratification of proposed amendments since 1918,[66] would add certainty and avoid the type of confusion which surrounded the apportionment applications. Any rule adopted, however, must take into account the fact that some state legislatures do not meet every year and that in many states the legislative sessions end early in the year.

Although the suggestion of a seven year period is consistent with that prescribed for the ratification of recent proposed constitutional amendments, it can be argued that such a period is too long for the calling of a constitutional convention, since a long series of years would likely be involved before an amendment could be adopted. A shorter period of time might more accurately reflect the will of the people at a given point in time. Moreover, at this time in our history when social, economic and political changes frequently occur, a long period of time might be undesirable. On the other hand, a period such as four years would give states which adopted an application in the third and fourth year little opportunity to withdraw it on the basis of further reflection. This is emphasized when consideration is given to the fact that a number of state legislatures do not meet every year. Hence, a longer period does afford more opportunity for reflection on both the submission and withdrawal of an application. It also enables the people at the time of state legislative elections to express their views. Of course, whatever the period it may be extended by the filing of a new proposal.

The Committee feels that some limitation is necessary and desirable but takes no position on the exact time except it believes that either four or seven years would be reasonable and that a congressional determination as to either period should be accepted.

(iii) Withdrawal of Applications

There is no law dealing squarely with the question of whether a state may withdraw an application seeking a constitutional convention, although some commentators have suggested that a withdrawal is of no effect.[67] The desirability of having a rule on the subject is underscored by the fact that state legislatures have attempted to withdraw applica-

tions, particularly during the two most recent cases where a large number of state legislatures sought a convention on a specific issue.* As a result, uncertainty and confusion have arisen as to the proper treatment of such applications.

During the Senate debates of October 1971 on S.215, no one suggested any limitation on the power to withdraw up to the time that the legislatures of two-thirds of the states had submitted proposals. Since a convention should reflect a "contemporaneously-felt need" that it take place, we think there should be no such limitation. In view of the importance and comparatively permanent nature of an amendment, it seems desirable that state legislatures be able to set aside applications that may have been hastily submitted or that no longer reflect the social, economic and political factors in effect when the applications were originally adopted. We believe Congress has the power to so provide.

From a slightly different point of view, the power to withdraw implies the power to change and this relates directly to the question of determining whether two-thirds of the state legislatures have applied for a convention to consider the same subject. A state may wish to say specifically through its legislature that it does or does not agree that its proposal covers the same subject as that of other state proposals. The Committee feels that this power is desirable.

Finally, we can see no problem with respect to a state changing a refusal to request a convention to a proposal for such a convention. All states, of course, have rules of one sort or another which restrict the time at which a once-defeated proposition can be again presented. If these rules were to apply to the call of a federal convention and operate in a burdensome manner, their validity would be questionable under *Hawke* v. *Smith*.

The Article V Convention

(i) Election of Delegates

We believe it of fundamental importance that a constitutional convention be representative of the people of the country. This is especially so when it is borne in mind that the method was intended to make available to the "people" a means of remedying abuses by the national government. If the

*That is, the reapportionment and tax limitation applications.

convention is to be "responsive" to the people, then the structure most appropriate to the convention is one representative of the people. This, we believe, can only mean an election of convention delegates by the people. An election would help assure public confidence in the convention process by generating a discussion of the constitutional change sought and affording the people the opportunity to express themselves to the future delegates.

(ii) Apportionment of Delegates

Although there are no direct precedents in point, there is authority and substantial reason for concluding, as we do, that the one-person, one-vote rule is applicable to a national constitutional convention. In *Hadley* v. *Junior College District*, the Supreme Court held that the rule applied in the selection of people who carry on governmental functions.[68] While a recent decision, affirmed without opinion by the Supreme Court, held that elections for the judiciary are exempt from the rule, the lower court stated that "judges do not represent people."[69] Convention delegates, however, would represent people as well as perform a fundamental governmental function. As a West Virginia Supreme Court observed with respect to a state constitutional convention: "[E]ven though a constitutional convention may not precisely fit into one of the three branches of government, it is such an essential incident of government that every citizen should be entitled to equal representation therein."[70] Other decisions involving conventions differ as to whether the apportionment of a state constitutional convention must meet constitutional standards.[71]

Of course, the state reapportionment decisions are grounded in the equal protection clause of the Fourteenth Amendment and the congressional decision in *Wesberry* v. *Sanders*[72] was founded on Article I, Section 2. Federal legislation providing for a national constitutional convention would be subject to neither of these clauses but rather to the Fifth Amendment. Yet the concept of equal protection is obviously related to due process and has been so reflected in decisions under the Fifth Amendment.[73]

Assuming compliance with the one-person, one-vote rule is necessary, as we believe it is, what

standards would apply? While the early cases spoke in terms of strict population equality, recent cases have accepted deviations from this standard. In *Mahan* v. *Howell*, the Supreme Court accepted deviations of up to 16.4% because the state apportionment plan was deliberately drawn to conform to existing political subdivisions which, the Court felt, formed a more natural basis for districting so as to represent the interests of the people involved.[74] In *Abate* v. *Mundt*, the Court upheld a plan for a county board of supervisors which produced a total deviation of 11.9%.[75] It did so on the basis of the long history of dual personnel in county and town government and the lack of built-in bias tending to favor a particular political interest or geográphic area.

Elaborating its views on one person, one vote, the Committee believes that a system of voting by states at a convention, while patterned after the original Constitutional Convention, would be unconstitutional as well as undemocratic and archaic. While it was appropriate before the adoption of the Constitution, at a time when the states were essentially independent, there can be no justification for such a system today. Aside from the contingent election feature of our electoral college system, which has received nearly universal condemnation as being anachronistic, we are not aware of any precedent which would support such a system today. A system of voting by states would make it possible for states representing one-sixth of the population to propose a constitutional amendment. Plainly, there should be a broad representation and popular participation at any convention.

While the representation provisions of S. 1272 allowing each state as many delegates as it has Senators and Representatives in Congress are preferable to a system of voting by states, it is seriously questionable whether that structure would be found constitutional because of the great voting weight it would give to people of one state over the people of another.* It can be argued that a representation system in a convention which parallels the structure in Congress does not violate

*Use of an electoral-college-type formula would mean that 15 states would be overrepresented by 50 percent or more, with the representation rising to close to 375 percent for Alaska. California, on the other hand, would be underrepresented by nearly 20 percent.

due process, since Congress is the only other body authorized by the Constitution to propose constitutional amendments. On the other hand, representation in the Congress and the electoral college are explicit parts of the Constitution, arrived at as a result of compromises at the Constitutional Convention of 1787. It does not necessarily follow that apportionment plans based on such models are therefore constitutional. On the contrary, the reapportionment decisions make clear that state plans which deviate from the principle of equal representation for equal numbers are unconstitutional. As the Supreme Court stated in *Kirkpatrick* v. *Preisler*:

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes."[76]

In our view, a system allotting to each state a number of delegates equal to its representation in the House of Representatives should be an acceptable compliance with one-person, one-vote standards.* We reach this conclusion recognizing that there would be population deviations of up to 50% arising from the fact that each state would be entitled to a delegate regardless of population. It would be possible to make the populations substantially equal by redistricting the entire country regardless of state boundaries or by giving Alaska one vote and having every other state elect at large a multiple of 300,000 representing its population or redistrict each state on the new population unit.[77] None of these methods, however, seems feasible or realistic. The time and expense involved in the creation and utilization of entirely new district lines for one election, especially since state election machinery is readily available, is one factor to be weighed. Another is the difficulty of creating districts crossing state lines which would adequately represent constituents from both states. There is also the natural interest of the voter in remaining within his state. Furthermore, the dual nature of our political system strongly supports the position that state boundaries be respected. *Abate*

*We have not studied the District of Columbia question, although we note that the District does not have a role in the congressional method of initiating amendments or in the ratification process.

v. *Mundt,* although distinguishable regarding apportionment of a local legislative body, suggests an analogy on a federal level. The rationale of the Court in upholding the legislative districts within counties drawn to preserve the integrity of the towns, with the minimum deviation possible, could be applicable to apportionment of a convention. The functional interdependence and the coordination of the federal and state governments and the fundamental nature of the dual system in our government parallel the relationship between the county and towns in *Abate.* Appropriate respect for the integrity of the states would seem to justify an exception to strict equality which would assure each state at least one delegate. Thus, a system based on the allocation of Representatives in Congress would afford maximum representation within that structure.

(iii) Members of Congress as Delegates

We cannot discern any federal constitutional bar against a member of Congress serving as a delegate to a national constitutional convention. We do not believe that the provision of Article I, Section 6 prohibiting congressmen from holding offices under the United States would be held applicable to service as a convention delegate. The available precedents suggest that an "office of the United States" must be created under the appointive provisions of Article II[78] or involve duties and functions in one of the three branches of government which, if accepted by a member of Congress, would constitute an encroachment on the principle of separation of powers underlying our governmental system.[79] It is hard to see how a state-elected delegate to a national constitutional convention is within the contemplation of this provision. It is noteworthy in this regard that several delegates to the Constitutional Convention of 1787 were members of the Continental Congress and that the Articles of Confederation contained a clause similar to Article I, Section 6.

We express no position on the policy question presented, or on the applicability and validity of any state constitutional bars against members of Congress simultaneously serving in other positions.

Ratification

As part of our study, the Committee has considered the advisability of including in any statute implementing the convention method a rule as to

whether a state should be able to rescind its ratification of a proposed amendment or withdraw a rejection vote. In view of the confusion and uncertainty which exists with respect to these matters, we believe that a uniform rule would be highly desirable.

The difficult legal and policy question is whether a state can withdraw a ratification of a proposed amendment. There is a view that Article V envisions only affirmative acts and that once the act of ratification has taken place in a state, that state has exhausted its power with respect to the amendment in question.[80] In support, it is pointed out that where the convention method of ratification is chosen, the state constitutional convention would not have the ability to withdraw its ratification after it had disbanded. Consequently, it is suggested that a state legislature does not have the power to withdraw a ratification vote. This suggestion has found support in a few state court decisions[81] and in the action of Congress declaring the ratification of the Fourteenth Amendment valid despite ratification rejections in two of the states making up the three-fourths.

On the other hand, Article V gives Congress the power to select the method of ratification and the Supreme Court has made clear that this power carries with it the power to adopt reasonable regulations with respect to the ratification process. We do not regard past precedent as controlling but rather feel that the principle of seeking an agreement of public support espoused in *Dillon* v. *Gloss* and the importance and comparatively permanent nature of an amendment more cogently argue in support of a rule permitting a state to change its position either way until three-fourths of the states have finally ratified.*[82]

*These views of the Committee are in accord with the rule which is expressed in S.1272 and its predecessor, S.215, which was unanimously passed by the Senate in October 1971. See page 4, *supra*.

Much of the past discussion on the convention method of initiating amendments has taken place concurrently with a lively discussion of the particular issue sought to be brought before a convention. As a result, the method itself has become clouded by uncertainty and controversy and attempted utilization of it has been viewed by some as not only an assault on the congressional method of initiating amendments but as unleashing a dangerous and radical force in our system. Our two-year study of the subject has led us to conclude that a national constitutional convention can be channeled so as not to be a force of that kind but rather an orderly mechanism of effecting constitutional change when circumstances require its use. The charge of radicalism does a disservice to the ability of the states and people to act responsibly when dealing with the Constitution.

We do not mean to suggest in any way that the congressional method of initiating amendments has not been satisfactory or, for that matter, that it is not to be preferred. We do mean to suggest that so long as the convention method of proposing amendments is a part of our Constitution, it is proper to establish procedures for its implementation and improper to place unncessary and unintended obstacles in the way of its use. As was stated by the Senate Judiciary Committee, with which we agree:

> "The committee believes that the responsibility of Congress under the Constitution is to enact legislation which makes article V meaningful. This responsibility dictates that legislation implementing the article should not be formulated with the objective of making the Convention route a dead letter by placing insurmountable procedural obstacles in its way. Nor on the other hand should Congress, in the guise of implementing

legislation, create procedures designed to facilitate the adoption of any particular constitutional change."[83]

The integrity of our system requires that when the convention method is properly resorted to, it be allowed to function as intended.

Respectfully submitted,

SPECIAL CONSTITUTIONAL CONVENTION
STUDY COMMITTEE

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July, 1973

[1] 2 J. Story, *Commentaries on the Constitution of the United States* § 1826 (5th ed. 1905).

[2] *The Federalist No. 43*, at 204 (Hallowell; Masters, Smith & Co. ed. 1852) (J. Madison).

[3] J. Wheeler, *The Constitutional Convention: A Manual on its Planning, Organization and Operation* xiii (National Municipal League Series 1, No. 4 1961); *see* R. Hoar, *Constitutional Conventions* 1-3 (1917).

[4] *See* A. Sturm, *Thirty Years of State Constitution Making: 1938-1968*, at 51-80, 132-37 (National Municipal League 1970).

[5] 369 U.S. 186 (1962).

[6] 377 U.S. 533 (1964).

[7] *See* Black, "The Proposed Amendment of Article V: A Threatened Disaster," 72 Yale L.J. 957 (1963); Fensterwald, "Constitutional Law: The States and the Amending Process – A Reply," 46 A.B.A.J. 717 1960); Oberst, "The Genesis of the Three States-Rights Amendments of 1963," 39 Notre Dame Lawyer 644 (1964); Shanahan, "Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations," 49 A.B.A.J. 631 (1963).

[8] *See* American Enterprise Institute, *A Convention to Amend the Constitution: Questions Involved in Calling a Convention Upon Applications by State Legislatures* (Special Analysis No. 5, 1967).

[9] *See* Martin, "The Application Clause of Article Five," 85 Pol. Sci. Q. 616, 626 (1970).

[10] Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Mich. L. Rev. 875, 878 (1968).

[11] *See* Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967); S. Rep. No. 336, 92nd Cong., 1st Sess. (1971); 117 Cong. Rec. 36803-06 (1971).

[12] The literature in this field deals with various proposals to "reform" Article V by easing, restricting, or otherwise altering the means of proposing amendments to the Constitution through the convention method. *See, e.g.*, L. Orfield, *The Amending of the Federal Constitution*, Chap. VI (1942); McCleskey, "Along the Midway: Some Thoughts on Democratic Constitution-Amending," 66 Mich. L. Rev. 1001, 1012-16 (1968).

[13] On the other hand, some have suggested that state legislatures will be less likely to seek a national constitutional convention if they are more aware of the risks and uncertainties of the convention method. *See, e.g.*, Buckwalter, "Constitutional Conventions and State Legislators," 20 J. Pub. Law 543 (1971).

[14] J. Wheeler, *supra* note 3, at xv. There have been occasions on which state constitutional conventions have successfully exceeded limitations placed upon them. Conventions in Georgia (1789), Illinois (1862 and 1869), Pennsylvania (1872), Alabama (1901) and Michigan (1907) all violated legislative directives – either procedur-

al, substantive, or both. *See* R. Hoar, *supra* note 3, at 111-115.

The Virginia Convention of 1901 and the Kentucky Convention of 1890 both wrote major changes in suffrage into their creations, and then proclaimed the new constitutions as law without holding the legislatively mandated popular referenda. (Referenda conducted under the suffrage provisions of the old constitutions would have resulted in disapproval of the new instruments.)

[15] Article 1, § 5, of the Constitution gives the House of Representatives the authority to judge challenges to the election of its members. Since 1798, the House has seen fit to exercise this power through procedures enacted into law. Act of Jan. 23, 1798, Ch. 8, 1 Stat. 537. Subsequent modifications of that law appear in 2 U.S.C. §§ 201-226 (1970). Precedents for the use of this class of legislation, despite recognition that the rules enacted by one Congress in this area cannot bind a successor Congress, may be found in 1 Hinds, *Precedents of the House of Representatives* §§ 680, 719, 833 (1907).

In 1969 Congress passed the Federal Contested Elections Act, 2 U.S.C. §§ 381-96 (1970). In the House Report Accompanying that legislation appeared the following:

> Election contests affect both the integrity of the elected process and of the legislative process. Election challenges may interfere with the discharge of public duties by elected representatives and disrupt the normal operations of the Congress. It is essential, therefore, that such contests be determined by the House under modern procedures which provide efficient, expeditious processing of the cases and a full opportunity for both parties to be heard. H.R. Rep. No. 569, 91st Cong., 1st Sess. 3 (1969).

Similarly, Congress decided in 1877 to establish procedures for handling electoral vote disputes for President rather than adopt ad hoc procedures, as it did in 1876 to resolve the Presidential election dispute of that year. That ad hoc resolution led to a great deal of criticism of Congress, as many felt the issue had been decided on the basis of political bias rather than facts. *See generally* 3 U.S.C. § 15 (1970); Rosenbloom, *A History of Presidential Elections* 243 (1965).

[16] *The Federalist No. 43*, *supra* note 2.

[17] J. Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding* § 585, at 634 (4th ed. 1887); *cited with approval in Dillon* v. *Gloss*, 256 U.S. 368, 375 (1921).

[18] *The Federalist No. 43*, *supra* note 2, at 204.

[19] 1 *The Records of the Federal Convention of 1787*, at 22 (Farrand ed. 1937) (hereinafter cited as *Farrand*).

[20] 2 *Id.* 188 (emphasis added).

[21] Weinfeld, "Power of Congress over State Ratifying Conventions," 51 Harv. L. Rev. 473, 481 (1938).

[22] 2 *Farrand* 558.

[23] *Id.* 559.

[24] *Id.* 629.

[25] *Id.* 629, 630.

[26] *The Federalist No. 85,* at 403 (Hallowell; Masters, Smith & Co. ed. 1852) (A. Hamilton).

[27] T. Cooley, *The General Principles of Constitutional Law in the United States of America* 15 (2d ed. 1891).

[28] Georgia, Massachusetts, New Hampshire, and Pennsylvania provided for amendments by convention; Delaware, Maryland and South Carolina provided methods of amendment, but not through conventions; New Jersey, New York, North Carolina and Virginia lacked any provisions for amendment; and Connecticut and Rhode Island did not adopt constitutions at that time. The constitution of Vermont (then considered a territory) provided for amendments through convention. Weinfeld, *supra* note 21, at 479.

[29] Ga. Const. art. LXIII (1777), at 1 B. Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 383 (1878) [hereinafter cited as *Poore*].

[30] Pa. Const. § 47 (1776), at 2 *Poore* 1548. Vermont's Constitution of 1786 contained a similar amending article.

[31] "Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Cong., 1st Sess. 41-43 (1927).

[32] A. Sturm, *Methods of State Constitutional Reform* 102 (1954); R. Hoar, *supra* note 3, at 71, 120-1; Dodd, "State Constitutional Conventions and State Legislative Power," 2 Vand. L. Rev. 27 (1948). The following state cases support the proposition: *Opinion of the Justices*, 264 A.2d 342 (Del. 1970); *Chenault* v. *Carter*, 332 S.W.2d 623 (Ky. 1960); *State* v. *American Sugar Refining Co.*, 137 La. 407, 68 So. 742 (1915); *Opinion of the Justices*, 60 Mass. (6 Cush.) 573 (1833); *Erwin* v. *Nolan*, 280 Mo. 401, 217 S.W. 837 (1920); *State ex rel. Kvaalen* v. *Graybill*, 496 P.2d 1127 (Mont. 1972); *Wood's Appeal*, 75 Pa. 59 (1874); *Wells* v. *Bain*, 75 Pa. 39 (1873); *In re Opinion of the Governor*, 55 R.I. 56, 178 A. 433 (1935); *Cummings* v. *Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949); *Quinlan* v. *Houston and Texas Central Ry. Co.*, 89 Tex. 356, 34 S.W. 738 (1896); *Staples* v. *Gilmer*, 183 Va. 613, 33 S.E.2d 158, 158 A.L.R. 495 (1945). *See* Annot. "Power of state legislature to limit the power of a state constitutional convention," 158 A.L.R. 512 (1945).

[33] Roger Hoar has expressed it this way:

> [T]here would be no convention unless the people voted affirmatively, that an affirmative vote would result in holding exactly the sort of convention in every detail provided in the act, and that the people are presumed to know the terms of the act under which they vote. The conclusion drawn from this is that the convention act in its every detail is enacted by the people voting under it. R. Hoar, *supra* note 3, at 71.

[34] *State* v. *American Sugar Refining Company*, 137 La. 407, 415, 68 So. 742, 745 (1915).

[35] *State ex rel. McCready* v. *Hunt*, 20 S.C. (2 Hill's Law) 1,271 (1834).

[36] Nearly 15% of the total number of state constitutional conventions called have been substantively limited in one or more respects. The limited or restricted state constitutional convention has been used frequently since World War II. *See* A. Sturm, *supra* note 4, at 56-60, 113; A. Sturm, "State Constitutions and Constitutional Revision, 1970-1971," in Council of State Gov'ts, *The Book of the States, 1972-1973*, at 20 (1972).

[37] 256 U.S. 368 (1921).

[38] 258 U.S. 130 (1922), where the Court stated: "But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."

[39] As Justice Felix Frankfurter has observed: "The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1945). It is not surprising, therefore, that procedural limitations on conventions have been invalidated. *See Carton* v. *Secretary of State*, 151 Mich. 337, 115 N.W. 429 (1908); *Goodrich* v. *Moore*, 2 Minn. 61 (1858). *See also* Jameson, *supra* note 17, at 364; Dodd, *supra* note 32, at 31, 33.

[40] A number of the Congressional Acts providing for territorial conventions did prescribe that the convention must determine by a majority of the whole number of delegates whether it was expedient for the territory to form a constitution and state government. No such requirement, however, was imposed on the conventions in their

work of framing such constitutions and governments. *See, e.g.*, Act of April 30, 1802, ch. 40, 1 Stat. 173 (Ohio); Act of Feb. 20, 1811, ch. 21, 3 Stat. 641 (Louisiana); Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 3335, 34 Stat. 267 Oklahoma).

Among those few state constitutional conventions, for which the vote needed to govern convention proceedings was established in enabling legislation were the 1967 Pennsylvania convention, and the New Jersey conventions of 1947 and 1966. *See* Law of March 16, 1967, ch. 2 [1967] Pa. Laws 2; Act of Feb. 17, 1947, ch. 8, [1947] N.J. Laws 24; Act of May 10, 1965, ch. 43, [1965] N.J. Laws 101.

When Congress required that the Twenty-First Amendment (ending Prohibition) be ratified by state conventions, rather than legislatures, forty-three states enacted legislation providing for such conventions. Thirty-two of those enabling acts established the vote required of convention delegates for ratification; either a majority of those delegates present and voting (*e.g.*, New Mexico and North Carolina – such acts also established a minimum quorum) or a majority of the total number of delegates (*e.g.* California and Illinois). In no case was the requirement greater than a majority of the total number of delegates. *See* E. Brown, *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws* 515-701 (1938).

[41] To be noted is Gerry's criticism of the August 30, 1787 proposal, specifically, his observation that a "majority" of the states might bind the country in the convention contemplated by that proposal *See* pp. 12-13, *supra.* Gerry's criticism eventually led to the inclusion of ratification requirements. *See* Weinfeld, *supra* note 21, at 482-483.

[42] 74 U.S. (7 Wall.) 506 (1869); *criticized in Glidden Co.* v. *Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

[43] *See* Strong, "Three Little Words and What They Didn't Seem to Mean," 59 A.B.A.J. 29 (1973). *See generally* Fairman, "Reconstruction and Reunion, 1864-88," in VI *History of the Supreme Court of the United States* 433-514 (Freund ed. 1971).

[44] The cases are: *United States* v. *Sprague*, 282 U.S. 716 (1931); *Leser* v. *Garnett*, 258 U.S. 130 (1922); *Dillon* v. *Gloss*, 256 U.S. 368 (1921); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke* v. *Smith (No. 1)*, 253 U.S. 221 (1920); *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798).

[45] 307 U.S. 433 (1939).

[46] 369 U.S. 186 (1962).

[47] *Id.* 217.

[48] 395 U.S. 486 (1969).

[49] *See Butterworth* v. *Dempsey*, 237 F. Supp. 302 (D. Conn. 1965), involving a court-ordered state constitutional convention on the subject of reapportionment. *Cf. Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972).

[50] 3 U.S. (3 Dall.) 378 (1798).

[51] *Id.* 380 n.(a).

[52] III Journal of the Senate 323 (1803) (motion defeated by a vote of 23 to 7).

[53] Cong. Globe, 38th Cong., 2d Sess. 629-33 (1865). Four years earlier a proposed amendment on slavery was presented to and signed by President Buchanan. No discussion took place in Congress concerning this action and the proposed amendment was never ratified.

[54] VI J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 391-392 (1897).

[55] 253 U.S. 221 (1920).

[56] *Id.* 227.

[57] 285 U.S. 355 (1932).

[58] *Id.* 365, 366.

[59] *See Coleman* v. *Miller*, 146 Kan. 390, 71 P.2d 518 (1937), *aff'd*, 307 U.S. 433 (1939), upholding the right of a lieutenant governor to cast the tie-breaking vote in the state senate on the ratification of the proposed child labor amendment. In affirming, the United States Supreme Court expressed no opinion as to the propriety of the lieutenant governor's participation.

[60] The results of a questionnaire-type inquiry which we sent to the fifty states indicate that a substantial majority exclude the governor from participation and that in a number that include him it is not clear whether his inclusion is simply a matter of form. Historically, it appears that the governor generally has not played a role in these processes, although there are exceptions to this rule. *See* Myers, "The Process of Constitutional Amendment," S. Doc. No. 314, 76th Cong., 3rd Sess. 18 n.47 (1940), wherein it is stated that governors gave 44 approvals in the ratifications of 15 amendments. Whether the approvals were simply a matter of form or were required as a matter of state law is not clear. In several cases there were gubernatorial vetoes of ratifications, including the governor of New Hampshire's attempted veto of his state's ratification of the twelfth amendment.

[61] H. Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History," H. Doc. No. 353, pt. 2, 54th Cong., 2d Sess. 298 (1897); Bonfield, "Proposing Constitutional Amendments by Convention; Some Problems," 39 Notre Dame Lawyer 659, 664-65 (1964); Buckwalter, *supra* note 13, at 551; Brickfield, Staff of House Committee on the Judiciary, 85th Cong., 1st Sess., "Problems Relating to a Federal Constitutional Convention" 7-9 (Comm. Print 1957); Note, "Proposing Amendments to the United States Constitution by Convention," 70 Harv. L. Rev. 1067, 1075 (1957). *But compare* 69 Op. Att'y Gen. of Okla. 200 (1969), in 115 Cong. Rec. 23780 (1969), *with In re Opinion of the Justices*, 118 Maine 544, 107 A. 673 (1919). *See generally* Dodd, *The Revision and Amendment of State Constitutions* 148-55 (1910); Hoar, *supra* note 3, at 90-93; Orfield, *supra* note 12, at 50 & n.30, 66 & n.89.

[62] 3 U.S. (3 Dall.) 378 (1798). *See also Omaha Tribe of Nebraska* v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 93 S.Ct. 898 (1973) (governor's approval not required in order for a state to cede jurisdiction over Indian residents); *Ex parte Dillon*, 262 F. 563 (1920) (when the Legislature is designated as a mere agency to discharge some duty of a non-legislative character, such as ratifying a proposed amendment, the legislative body alone may act).

[63] Brickfield, *supra* note 61, at 11-12.

[64] 256 U.S. 368, 375 (1921).

[65] 307 U.S. 433, 453-54 (1939).

[66] Beginning with the proposal of the eighteenth amendment, Congress has, either in the amendment or proposing resolution, included a provision requiring ratification within seven years from the time of the submission to the states.

[67] *See, e.g.*, Note' "Rescinding Memorialization Resolutions," 30 Chi.–Kent L. Rev. 339 (1952).

[68] 397 U.S. 50 (1970).

[69] *Wells* v. *Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 93 S. Ct. 904 (1973).

[70] *Smith* v. *Gore*, 150 W. Va. 71, 143 S.E.2d 791, 794 (1965).

[71] *See Forty-Second Legislative Assembly* v. *Lennon*, 481 P.2d 330 (Mont. 1971); *Jackman* v. *Bodine*, 43 N.J. 453, 470, 476-77, 205 A.2d 713, 722, 726 (1964). In *Butterworth* v. *Dempsey*, 237 F. Supp. 302 (D. Conn. 1965), a federal court ordered, without indicating the basis for it, apportionment of convention delegates on a one-person, one-vote basis. *See also State* v. *State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968), where a section of the state constitution, requiring that any amendments to that constitu-

tion affecting suffrage or apportionment be approved by both 3/4 of the voters of the state as a whole *and* 2/3 of those voting in each county, was found to violate the 'one-person, one-vote' and equal protection principles, and was accordingly declared invalid. *Contra, West* v. *Carr*, 212 Tenn. 367, 370 S.W.2d 469 (1963), *cert. denied*, 378 U.S. 557 (1962), holding equal protection guarantees inapplicable to a state constitutional convention since it had no power to take any final action; *accord, Livingston* v. *Ogilvie*, 43 Ill.2d 9, 250 N.E.2d 138 (1969); *Stander* v. *Kelley*, 433 Pa. Super. 406, 250 A.2d 474 (1969), *appeal dismissed sub nom. mem., Lindsay* v. *Kelley*, 395 U.S. 827 (1969). *West, Stander and Livingston,* in reaching this result, emphasized the fact that the entire electorate would be afforded a direct and equal voice, in keeping with the 'one-person, one-vote' principle, when the convention's product was submitted for ratification.

[72] 376 U.S. 1 (1964).

[73] *See Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). *See also United States* v. *Pipefitters*, 434 F.2d 1116, 1124 (8th Cir. 1971); *United States* v. *Synnes*, 438 F.2d 764, 771 (8th Cir. 1971); *Henderson* v. *ASCS, Macon County, Alabama*, 317 F. Supp. 430, 434-35 (M.D. Ala. 1970). *See generally Griffin* v. *Richardson*, 346 F. Supp. 1226, 1232-33 (D. Md. 1972).

[74] 93 S.Ct. 979 (1973).

[75] 403 U.S. 182 (1971).

[76] 394 U.S. 526, 531 (1968).

[77] The present 1970 census establishes the mean population of congressional districts as approximately 467,000. As Alaska has a population of approximately 302,000, the absolute differential is over 50%. There are similar disparities in some states with two representatives (*e.g.*, South Dakota's two Congressmen each represent 333,000 people), but they are not as great.

[78] *See United States* v. *Germaine*, 99 U.S. 508 (1878); *United States* v. *Mouat*, 124 U.S. 303 (1888); *United States* v. *Smith*, 124 U.S. 525 (1888). *See generally* 1 Hinds, *Precedents of the House of Representatives* § 493 (1907). In *Board of Supervisors of Elections* v. *Attorney General*, 246 Md. 417, 439, 229 A.2d 388, 395 (1967), the court held that a delegate to a state constitutional convention was not an "officer" so that a member of the legislature was not guilty of dual office-holding when he simultaneously served as a delegate; *accord, Livingston* v. *Ogilvie*, 43 Ill.2d 9, 250 N.E.2d 138 (1969). *But see Forty-Second Legislative Assembly* v. *Lennon*, 481 P.2d 330 (Mont. 1971); *State* v. *Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935).

[79] *See 1 Farrand* 376; *Reservists Comm. to Stop the War* v. *Laird*, 323 F. Supp. 833 (D.D.C. 1971).

[80] Jameson, *supra* note 17, at § § 582-584; Dodd, "Amending the Federal Constitution," 30 Yale L.J. 321, 346 (1921).

[81] *Wise* v. *Chandler*, 270 Ky. 1, 108 S.W.2d 1024 (1937) (also holding that state legislative *rejection* of a proposed constitutional amendment cannot be reconsidered); *Coleman* v. *Miller*, 146 Kan. 390, 71 P.2d 518 (1937) (dicta). The issue was discussed, though not passed on by the Court, in Chief Justice Hughes' opinion in *Coleman* v. *Miller*, 307 U.S. 433, 447-50 (1938).

[82] This rule would take precedence over the action of Congress in refusing to permit New Jersey and Ohio to rescind their ratifications of the fourteenth amendment. The right to ratify after a previous rejection would confirm precedents established in connection with the ratifications of the Thirteenth and Fourteenth Amendments. *See generally* Myers, *The Process of Constitutional Amendment,* S. Doc. No. 314, 76th Cong., 3rd Sess. (1940).

[83] S. Rep. No. 336, 92nd Cong., 1st Sess. 2 (1971).

Appendix A

This appendix is designed to capsulize our comments regarding various principles reflected in S. 1272 and to cross-reference pertinent parts of our report. The underlining, insertions (noted by brackets) and deletions which appear in S. 1272 have been supplied by us for the purpose of illustrating our comments.

93rd Congress
1st Session
S. 1272

IN THE SENATE OF THE UNITED STATES
March 19, 1973
Referred to the Committee on the Judiciary
Passed the Senate July 9, 1973

COMMENTS

A BILL

Our views as to the desirability of legislation implementing the convention method of initiating amendments appear at pages 7 to 9.

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Federal Constitutional Convention Procedures Act".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

Sec. 2 Our views as to the limitability of a convention are set forth at pages 9 to 17.

The phrase "nature of the amendment or amendments" is unclear and differs from the phraseology contained in Sections 4, 5, 6, 8, 10 and 11. Our discussion of this item appears at pages 18, 19, 30 and 31.

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States on and after the enactment of this Act, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and *stating the nature of the amendment or amendments to be proposed.*

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APPLICATION PROCEDURE

Sec.3
(a) For the reasons set forth at pages 28 to 30, we believe that a state governor should have no part in the process by which a state legislature applies for a convention. This section is unclear as to whether a state may on its own initiative assign a role to the governor. The phraseology concerning the governor also is different from that employed in Section 12(b) with respect to ratification. Additionally, the requirement that state statutory procedures "shall" apply to applications differs from the terminology of Section 12(b) as well as raises questions under *Hawke v. Smith,* No. 1, 253 U.S. 221 (1920), and *Leser v. Garnett,* 258 U.S. 130 (1922). See *Trombetta v. Florida,* 393 F. Supp. 575 (D. Fla. 1973).

SEC. 3. (a) For the purpose of adopting or rescinding a resolution pursuant to section 2 and section 5, the State legislature *shall follow the rules of procedure that govern the enactment of a statute* by that legislature, but without the need for approval of the legislature's action by the governor of the State.

(b) As discussed at pages 20 to 25, the Committee believes that limited judicial review is necessary and desirable and has specifically so provided in a new proposed Section 16. The introduction of such review requires the deletion of the language regarding the binding nature of congressional determinations. The "clearly erroneous" standard suggested in our proposed Section 16 acknowledges the appropriateness of initial congressional determinations in this area but withdraws the finality of such decisions.

(b) Questions concerning the adoption of a State resolution cognizable under this Act shall be [determined]
~~determinable~~ by the Congress of the United States ~~and its decisions thereon shall be binding on all others, including State and Federal courts~~.

TRANSMITTAL OF APPLICATIONS

SEC. 4 (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the

application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution;

[(2) *to the extent practicable a list of all state applications in effect on the date of adoption whose subject or subjects are substantially the same as the subject or subjects set forth in the application;*]

(2) *New.* Inasmuch as each legislature receives a copy of all valid applications pursuant to Section 4(d) [4 (c) in S.1272], preparation of the list would be a simple task. In doing so, the state would be able to express the purpose of its application in relation to those already received, thereby assisting Congress in rendering its determination pursuant to Section 6 (a) as to whether the requisite number of applications have been received on "the same subject."

[3]

~~(2)~~ the exact text of the resolution signed by the presiding officer of each house of the State legislature; and

[4]

~~(3)~~ The date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

[(c) Upon receipt, an application shall be deemed valid and in compliance with article V of the Constitution and this Act, unless both Houses of Congress prior to the expiration of 60 days of continous session of Congress following the receipt of such application shall by concurrent resolution determine the application is invalid, either in whole or in part. Failure of Congress to act within the specified period is a determination subject to review under section 16 of this Act. Such resolution shall set forth with particularity the ground or grounds for any such determination. The 60-day period referred to herein shall be computed in accordance with section 11(b) (2) of this Act.]

(c) *New.* The adoption of judicial review requires that courts be able to define the accrual of grievances with particularity. S.1272 leaves uncertain the status of an application or rescission absent specific congressional action. Our proposed new Section 4(c) limits the period of uncertainty to 60 days. If Congress does not act upon a state transmittal within that period, it is deemed valid. The period for judicial review thus begins to run no later than 60 days after receipt of the application.

The possibility of a Senate filibuster blocking rejection of a patently defective application, thus causing the application to be deemed valid under Section 4(c), is offset by the fact that an action would lie under Section 16(a) for declaratory relief. Section 4(c) expressly notes that such a failure to act is subject to review under Section 16. State legislators as well as

members of Congress would appear to qualify as "aggrieved" parties. See *Coleman v. Miller*, 307 U.S. 433 (1939).

Section 4(c) thus results in an early determination of the application's procedural aspects. Only the question of the similarity of an application's subject to the subject of other applications is reserved for later determination by Congress.

(d) Same as present Section 4(c) of S.1272 except for the suggested insertions, which are designed to reflect the introduction of judicial review. The requirement for transmittal of applications to state legislatures is limited to valid applications.

[d]
~~(e)~~ Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is the presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. [Within the 60-day period provided for in Section 4(c),] the President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States, [provided, however, that an application declared invalid shall not be so transmitted.]

EFFECTIVE PERIOD OF APPLICATION

(a) For the reasons set forth at pages 31 and 32, the Committee agrees that some time limitation is necessary and desirable but takes no position on the exact time, except believes that four or seven years would be reasonable and that a congressional determination as to either should be accepted.

The Committee's views as to the use of the "same subject" test appear at pages 18, 19, 30 and 31.

SEC. 5 (a) An application submitted to the Congress by a State, unless sooner rescinded by the State legislature shall remain effective for seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the *same subject* all such applications shall remain in effect until the Congress has taken action on a concurrent resolution pursuant to section 6, calling for a constitutional convention.

(b) We believe that it is desirable to have a rule such as that contained in this section permitting the withdrawal of an application. See our discussion of this point at pages 32 and 33.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission *in conformity with the procedure specified* in sections 3 and 4, except that no such rescission shall be effective as to any valid application made for a

As for the requirement respecting the procedures to be followed, see our comments to Section 3(a).

constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subjects.

(c) See our comments to Section 3(b).

Questions concerning the recission of a State's application shall be determined by the Congress of the United States ~~and its decisions shall be binding on all others including State and Federal courts~~.

CALLING OF A CONSTITUTIONAL CONVENTION

With regard to "the nature of the amendment or amendments" phraseology, see our comments to Section 2.

The concurrent resolution calling the convention may also have to deal with such questions as to when the election of delegates will take place.

The position that the President has no place in the calling process is discussed at pages 25 to 28.

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever applications made by two-thirds or more of the States with respect to the same subject have been received, the Secretary and the Clerk shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. *Each such concurrent resolution shall* (1) designate the place and time of meeting of the convention, and (2) *set forth the nature of the amendment or amendments for the consideration of which the convention is called.* A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than one year after adoption of the resolution.

DELEGATES

The Committee believes that the principle of one person, one vote applies and that Section 7(a) violates that principle. The Committee is of the view that an apportionment plan which allotted to each state a number of delegates equal to its representation in the House of Representatives should be an acceptable compliance with those standards. This subject is discussed at pages 34 to 37.

The persons entitled to vote for delegates could be more clearly stated to include all persons entitled to vote for members of the House of Representatives. The manner of nominating persons for delegate election might, as provided by S.1272, best be left to each state.

The question of the eligibility of members of Congress to be delegates is discussed at page 37.

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each congressional district in the manner provided by State law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of each state.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefor in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

CONVENING THE CONVENTION

SEC. 8. (a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not

named or described in the concurrent resolution of the Congress by which the convention was called. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) There is hereby authorized to be appropriated such sums as may be necessary for the payment of the expenses of the convention.

(c) The Administrator of General Services shall provide such facilities, and the Congress and each executive department and agency shall provide such information and assistance, as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

The Committee agrees with the principle that each delegate have one vote.

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

(a) The Committee believes that Congress should not impose a vote requirement on a convention. It views as unwise and of questionable validity any attempt to regulate the internal pro-

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of *two-thirds of the total number of delegates to the convention*.

cedures of a convention. It also notes that the vote requirement in S.1272 based on the total number of delegates is more stringent than that required for amendments proposed by Congress. See pages 17 to 20 of this report.

(b) See our comments to Section 2 with regard to the underlining and our comments to Section 3(b) as for the deletions.

(b) No convention called under this Act may propose *any amendment or amendments of a nature different from that stated* in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined ~~solely~~ by the Congress of the United States ~~and its decisions shall be binding on all others, including State and Federal courts~~.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b) The position that the President has no place in this process is discussed at pages 25 to 28.

(b) (1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (a) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or (B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment *relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution* of the Congress by which the convention was called, or because the procedures followed by the convention

As for the language "relates to or includes a subject" in (B), see our comments to Section 2.

in proposing the amendment were not in substantial conformity with the provisions of this Act. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligations imposed upon them by the first sentence of this paragraph.

(2) For the purposes of paragraph (1) of this subsection, (A) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and (B) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of ninety days.

(c) Upon receipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, a copy of any concurrent resolution agreed to by both Houses of the Congress which prescribes the time within which and the manner in which such amendment shall be ratified, and a copy of this Act.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) It is not clear whether this section would accept any special limitation adopted by a state with respect to ratification, other than the assent of the governor or any other body. See our comments to Section 3(a).

The exclusion of the governor from the process, with which we agree, is discussed at pages 28 to 30.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the *State legislatures shall adopt their own rules of procedure.* Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amend-

ment to the Constitution shall become valid when ratified by the legislatures of three-fourths of the several States within seven years from the date of the submission thereof to the States, or within such other period of time as may be prescribed by such proposed amendment.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

RECISSION OF RATIFICATIONS

(a)-(b) As discussed at pages 37 and 38, the Committee agrees with the principle permitting a state to rescind a ratification or rejection vote.

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendments by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) See our comments to Section 3(b).

(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States, shall be determined ~~solely~~ by the Congress of the United States ~~and its decisions shall be binding on all others, including State and Federal courts.~~

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified,

then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

JUDICIAL REVIEW

[SEC. 16. (a) Determinations and findings made by Congress pursuant to the Act shall be binding and final unless clearly erroneous. Any person aggrieved by any such determination or finding or by any failure of Congress to make a determination or finding within the periods provided in this Act may bring an action in a district court of the United States in accordance with 28 U.S.C. § 1331 and 28 U.S.C. § 2201 without regard to the amount in controversy. The action may be brought against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. The district courts of the United States shall have exclusive jurisdiction of any proceedings instituted pursuant to this Act, and such proceedings shall be heard and determined by three judges in accordance with 28 U.S.C. § 2284. Any appeal shall be to the Supreme Court.]

New. The purpose of our proposed Section 16 is to provide limited judicial review of controversies arising under S.1272. The procedural framework of the bill sets forth clear standards for adjudication of many of the potential controversies, and to this extent judicial interpretation of the act does not differ from the normal role of the courts. Moreover, determinations such as the similarity of applications or the conformity of proposed amendments to the scope of the convention call are no more difficult than, say, interpretation of the general language of the antitrust laws or the securities acts. The fact that these questions occur in a constitutional context does not diminish the skill of the Bench to interpret and develop the law in light of the factual situations of a given controversy.

Selection of a three-judge district court as the initial forum for controversies acknowledges that many controversies may be essentially state questions. For example, Congress might reject an application because of a defect in the composition of the state legislature. *Cf., Petuskey v. Rampton,* 307 F. Supp. 231, 235 (D. Utah 1969), *aff'd,* 431 F. 2d 378 (10th Cir. 1970), *cert. denied,* 401 U.S. 913. In this instance, it seems preferable to provide that the district court, schooled in state matters, make the initial review. Appeal from three-judge courts would lie in the United States Supreme Court.

New. This subsection would establish a short limitation period. Since the introduction of judicial review should not be allowed to delay the amending process unduly, any claim must be raised promptly. The limitations period combined with expedited judicial procedures is designed to result in early presentation and resolution of any dispute.

[(b) Every claim arising under this Act shall be barred unless suit is filed thereon within sixty days after such claim first arises.]

Appendix B

Article V Applications Submitted Since 1789

PART ONE: A Tabulation of Applications by States and Subjects

By Barbara Prager and Gregory Milmoe*

A Note on the Table:

This table is offered as a comprehensive compilation of Article V applications categorized by state and by application content. The table maximizes the number of applications, *i.e.*, whenever any source recognizes an application, it has been included in this table. For this reason it must be emphasized that the totals are valuable only as an overview and not for the purpose of determining whether two-thirds of the states have applied for a convention on any given category.

Allowing for slight semantic differences among the authorities consulted, the categories used are, for the most part, generally accepted. Any readily discernible differences are set forth in the notes below. A more serious problem is the sometimes sharp disparity among the sources consulted with regard to what should be recognized as an application. Rather than attempt to make definitive judgments as to what applications should be treated as such, we have set out in the notes below the generally recognized applications followed by the applications recognized by particular sources.

A total of six sources were selected for consultation in the preparation of this table. They are:

(continued on page 62)

*Barbara Prager is a student at New York Law School and Gregory Milmoe a student at Fordham Law School. We are deeply grateful to them for their time and efforts in preparing these documents for our Committee and are pleased to have them accompany our report. We believe they present an excellent overview of the types of applications which have been submitted to Congress since the adoption of the Constitution.

MISSISSIPPI					1					1		1						2		2	7
MISSOURI	1	3							1			2								1	8
MONTANA		6	1		1		1					2			1					1	13
NEBRASKA		4	1		1							1			1	1					9
NEVADA		6		1	1							3						1			12
NEW HAMPSHIRE			1		2							1					1				5
NEW JERSEY	1	1		1	1	1											1			1	7
NEW MEXICO					1							1									2
NEW YORK	1		1	1																2	5
NORTH CAROLINA	1	2				1						1									5
NORTH DAKOTA		1	1									2		1			1				6
OHIO	1	2	1														2				6
OKLAHOMA		1	1		1				1			2			1			1			8
OREGON	1	6	1														1			1	10
PENNSYLVANIA		1	2		1															1	5
RHODE ISLAND					1							1					1			1	4
SOUTH CAROLINA	1		1		1				1			2	1								7
SOUTH DAKOTA		3	1		1				3			2			1		1				12
TENNESSEE		4	1		1							1							1	1	9
TEXAS	1	2	1		1				2			2			1		1	1		3	15
UTAH		1			1							2			1						5
VERMONT			1																		1
VIRGINIA	2				1				1	1		2				1			1	1	10
WASHINGTON	1	1	2									1									5
WEST VIRGINIA			1														1				2
WISCONSIN	2	3	1	1	1		1								1					1	11
WYOMING		1			2				1			1	1							1	7
TOTAL APPLICATIONS BY SUBJECT	18	75	30	5	42	8	5	3	19	6	4	54	5	4	11	3	21	7	4	36	356

Twenty Categories of Applications:	GENERAL	DIRECT ELECTION OF SENATORS	ANTI-POLYGAMY	REPEAL OF PROHIBITION 21ST AMEND.	LIMITATION OF FED. TAXING, REPEAL 16TH AMEND.	WORLD FEDERAL GOVERNMENT	LIMIT PRESIDENTIAL TENURE	TREATY MAKING	REVISION OF ARTICLE V	EXCLUSIVE STATE JURISDICTION OVER SCHOOLS	SUPREME COURT DECISIONS	APPORTIONMENT	COURT OF THE UNION	PRAYER IN SCHOOLS	REDISTRIB. OF PRES. ELECTORS	PRESIDENTIAL DISABILITY & SUCCESSION	REVENUE SHARING	FREEDOM OF CHOICE OF SCHOOLS	PROHIBIT STATE OR MUNI. BOND TAX	MISC.	TOTALS BY STATE
ALABAMA					1							2	1				1			3	8
ALASKA												1									1
ARIZONA												1		1							2
ARKANSAS		3			1				1		1	2	1		1					1	11
CALIFORNIA		3	1			1						1				1				3	9
COLORADO		1			1							2				1				1	7
CONNECTICUT			1			1											1			1	3
DELAWARE			1		1												1				3
FLORIDA					1	3		1	1		1	1	1				2			1	12
GEORGIA	1				1			1		3	1	1					1				9
HAWAII								1											1		1
IDAHO		2			1				2			2								2	9
ILLINOIS	1	3	1		1		1		2			2			1		1			1	14
INDIANA	1	1			2			1	1			2					1			1	9
IOWA		4	1		2		1					1				1					10
KANSAS		4			1				1			2			1						9
KENTUCKY	2	1			1						1	1									5
LOUISIANA		1	1		2					1	1	1				1	2	1	1	2	13
MAINE		1	1		2	1											1				6
MARYLAND			2		1							1		1			1				6
MASSACHUSETTS				1	1									1						3	6
MICHIGAN		1			2		1		1									1			7
MINNESOTA		2	1									1									4

(continued from page 59)

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It should be noted that certain of the studies consider only limited time periods and, therefore, were consulted only for the time periods indicated: *Buckwalter* (1788-1971); *Graham* (1788-1963); *Library of Congress Study* (1963-73); *1967 Hearings* (1963-67); *1930 S. Doc.* (1788-1911); Pullen (1788-1951).

General

Buckwalter, Pullen, 1930 S. Doc. and *Graham* were consulted. All sources cite: Ga. 1832; Mo. 1907; N.Y. 1789; Tex. 1899; Ga. 1788; Wis. 1929.

Buckwalter, Pullen and *Graham* cite: Ill. 1861; Ind. 1861; Ky. 1861; Ohio 1861; Wash. 1901; Wis. 1911.

Buckwalter and *Graham* cite: Va. 1861.

Pullen cites: Ky. 1863; N.J. 1861; N.C. 1866; Ore. 1864; S.C. 1832.

Buckwalter apparently categorized 15 applications as "General" applications, which he also included in his "Direct Election of Senators" category. They are: Colo. 1901; Ill. 1903; Iowa 1907, 1909; Kan. 1901, 1905, 1907; La. 1907; Mont. 1911; Neb. 1907; Nev. 1907; N.C. 1907; Okla. 1908; Ore. 1901; Wash. 1903.

Direct Election of Senators

Pullen, Graham, 1930 S. Doc., and *Buckwalter* were consulted. All sources cite: Ark. 1901, 1903; Cal. 1903, 1911; Colo. 1901; Idaho 1903; Ill. 1903, 1907, 1909; Ind. 1907; Idaho 1901*; Iowa 1904, 1909; Kan. 1907; Ky. 1902; La. 1907; Me. 1911; Mich. 1901; Minn. 1901; Mo. 1901, 1905; Mont. 1901, 1905, 1907, 1911; Neb. 1893, 1901, 1903, 1907; Nev. 1901, 1903, 1907; N.J. 1907; N.C. 1901, 1907; Ore. 1901, 1903, 1909; Pa. 1901; S.D. 1901, 1907, 1909; Tenn. 1901, 1905; Tex. 1901; Utah 1903; Wash. 1903; Wis. 1903, 1907.

Pullen, Graham and *Buckwalter* cite: Ark. 1911; Iowa 1907; Minn. 1911; Mo. 1903; Mont. 1903; Nev. 1905; N.D. 1903; Ohio 1908, 1911; Okla. 1908 [*1930 S. Doc.* dated this application 1909]; Tenn. 1903; Tex. 1911.

Graham, Buckwalter and *1930 S. Doc.* cite: Kan. 1901; Wyo. 1895.

Graham and *Buckwalter* cite: Kan. 1905, 1909; Mont. 1908; Wis. 1908; Ore. 1907.

Pullen, Graham and *1930 S. Doc.* cite: [as second applications] Ore. 1901, 1903.

1930 S. Doc. cites: [second applications] Iowa 1904.

Pullen cites: [second applications] Cal. 1911; Tenn. 1901; Nev. 1901; Iowa 1911; Ore. 1909.

**Graham, Pullen* and *1930 S. Doc.* note that this application proposed the direct election of the President and Vice President as well as Senators.

Anti-Polygamy

Pullen, Graham, Buckwalter and *1930 S. Doc.* were consulted. All sources cite: Del. 1907; Ill. 1913; Mich. 1913; Mont. 1911; Neb. 1911; N.Y. 1906; Ohio 1911; S.D. 1909; Tenn. 1911; Vt. 1912; Wash. 1909; Wis. 1913.

Pullen, Graham, and *Buckwalter* cite: Cal. 1909; Conn. 1915; Iowa 1906; La. 1916; Me. 1907; Md. 1908, 1914; Minn. 1909; N.H. 1911; Okla. 1911; Ore. 1913; Pa. 1907, 1913; S.C. 1915; Tex. 1911; W. Va. 1907.

Graham and *Buckwalter* cite: N.D. 1907; Wash. 1910.

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Repeal of Prohibition	*Pullen, Buckwalter* and *Graham* were consulted. All sources cite: Mass. 1931; Nev. 1925; N.J. 1932; N.Y. 1931; Wis. 1931.
Limitation of Federal Taxing Power and Repeal of 16th Amendment	*Graham* and *Buckwalter* were consulted.+ All sources cite: Ala. 1943[r]; Ark. 1943[r]; Del. 1943; Fla. 1951; Ga. 1952[(a)]*; Ill. 1943[r]; Ind. 1943, 1957; Iowa 1941[r] 1951; Kan. 1951; Ky. 1944[r]; La. 1950[r]; Me. 1941, 1951[r]; Mass. 1941[r]; Mich. 1941, 1949; Miss. 1940; Neb. 1949[r]; N.H. 1943, 1951; N.J. 1944[r]; N.M. 1951; Nev. 1960[(a)]; Okla. 1955; Pa. 1943; R.I. 1940[r]; Utah 1951; Va. 1952[(a)]*; Wis. 1943[r]; Wyo. 1939; S.C. 1962[(a)]. +Packard, "Constitutional Law; The States and the Amending Process," 45 A.B.A.J. 161 (1959), limiting his discussion to this subject, lists applications (undated) from: Idaho, Mont., S.D. and Tenn., none of which are cited by any other source. *Graham* cites: Colo. 1963; La. 1960[(a)]; Md. 1939; Tex. 1961[(a)]; Wyo. 1959[(a)]. [(a)] Repeal of 16th Amendment. **Graham* cites these as Repeal applications while *Buckwalter* merely cites them as tax limitation applications. r = Rescinded
World Federal Government	*Pullen, Graham,* and *Buckwalter* were consulted. All sources cite: Cal. 1949*; Conn. 1949; Fla. 1949; Me. 1949; N.J. 1949*; N.C. 1949* *Graham* and *Buckwalter* cite: Fla. 1943, 1945. *Rescinded
Limit Presidential Tenure	*Pullen, Graham,* and *Buckwalter* were consulted. All sources cite: Ill. 1943; Iowa. 1943; Mich. 1943; Mont. 1947; Wis. 1943.
Treaty Making of the President	*Pullen, Graham,* and *Buckwalter* were consulted. All sources cite: Fla. 1945. *Buckwalter* and *Graham* cite: Ga. 1952; Ind. 1957.
Revision of Article V	*Buckwalter, Graham,* and *Library of Congress Study** were consulted. All sources cite: Ark. 1963; Fla. 1963; Idaho 1963; Ill. 1963; Kan. 1963[r]; Mo. 1963; Okla. 1963; S.C. 1963; S.D. 1963; Tex. 1963; Wyo. 1963.

Buckwalter and *Graham* cite: Idaho 1957; Ill. 1953; Ind. 1957; Mich. 1956; S.D. 1953, 1955; Tex. 1955.

*The *Graham* study continued through 1963, while the *Library of Congress Study* began in 1963.

r = Rescinded

Buckwalter and *Library of Congress Study* cite: Va. 1965.

Give States Exclusive Jurisdiction Over Public Schools

Buckwalter, Graham and *Library of Congress Study* were consulted.

Buckwalter and *Graham* cite: Ga. 1955, 1959.

Buckwalter and *Library of Congress Study* cite: Ga. 1965; La. 1965; Miss. 1965.

Graham cites: Va. 1960*

*The *Graham* study continued through 1963, while the *Library of Congress Study* began in 1963.

Supreme Court Decisions

Graham was the only source consulted.

Graham cites: Ark. 1961; Fla. 1957; Ga. 1961; La. 1960.

Apportionment

Buckwalter, 1967 Hearings, and *Library of Congress Study* were consulted. All sources cite: Ala. 1965; Ariz. 1965; Ark. 1963, 1965; Colo. 1965; Fla. 1965; Idaho 1963, 1965; Ill. 1967; Ind. 1967; Kan. 1963[r], 1965[r]; Ky. 1965; Md. 1965; Minn. 1965; Miss. 1965; Mo. 1963, 1965; Mont. 1963, 1965; Neb. 1965; Nev. 1963, 1967; N.H. 1965; N.M. 1966; N.C. 1965; N.D. 1967; Okla. 1965; S.C. 1965; S.D. 1965; Tenn. 1966; Tex. 1963, 1965; Utah 1965; Va. 1964, 1965; Wash. 1963; Wyo. 1963.

Buckwalter and *Library of Congress Study* cite: Ala. 1966; Colo. 1967; Iowa 1969; Ill. 1965; N.D. 1965.

Buckwalter and *1967 Hearings* cite: Ga. 1965; La. 1965; S.C. 1963.

Library of Congress Study and *1967 Hearings* cite: S.D. 1963.

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r = Rescinded

Court of the Union

Graham, Library of Congress Study, and *Buckwalter* were consulted. All sources cite: Ala. 1963; Ark. 1963; Fla. 1963.

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Prayer in Schools

Buckwalter and *Library of Congress Study* were consulted. All sources cite: Mass. 1964.

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Redistribution of Presidential Electors

Buckwalter, Graham, and *Library of Congress Study* were consulted. All sources cite: Ark. 1963; Kan. 1963[r]; Mont. 1963; Utah 1963; Wis. 1963.

Buckwalter and *Library of Congress Study* cite: Neb. 1965; Okla. 1965.

Buckwalter and *Graham* cite: Tex. 1963.

Buckwalter cites: Ill. 1967.

While *Buckwalter* cites Colo. 1965 and S.D. 1965, *Graham* cites those applications as Colo. 1963 and S.D. 1963.

r = Rescinded

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Library of Congress Study was the only source consulted. The study cites: Colo. 1965; Neb. 1965; Va. 1965.

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Buckwalter cites: N.H. 1969.

Library of Congress Study cites: Del. 1971; Fla. 1971; Ga. 1967; Iowa 1972; La. 1970*, 1971; Mass. 1971; N.J. 1970; N.D. 1971; Ore. 1971; S.D. 1971; Ohio 1971; W. Va. 1971.

Received by the Committee from the Attorney Generals of the respective states: Me. 1971; R.I. 1971.

*The La. 1970 application was approved by its House of Representatives only.

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Library of Congress Study was the only source consulted. The study cites: Hawaii 1970; La. 1970; Tenn. 1970; Va. 1970.

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Alabama
1833—Nullification: *1930 S. Doc.* and *Graham.* Because the resolution of the Alabama Legislature was worded "This assembly . . . recommends to the Congress . . ." *Pullen* views it as merely a recommendation rather than a formal application.
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1959—Federal Pre-emption: *Graham.*

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1959—Examination of 14th Amendment Ratification: *Buckwalter* and *Graham.*

California
1935—Federal Regulation of Wages and Hours: *Buckwalter* and *Graham.*
1935—Taxation of Federal and State Securities: *Buckwalter, Graham,* and *Pullen.*
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Colorado
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1972—Replace the Vice President as Head of the Senate: *Library of Congress Study.*

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1927—Taxation of Federal and State Securities: *Buckwalter, Graham,* and *Pullen.*
1963—Federal Debt Limit: *Buckwalter, Graham,* and *Library of Congress Study.*

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Indiana
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Louisiana
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1964—Pensions to Persons Over 65: *Buckwalter* and *Library of Congress Study.*
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Oregon
1939—Townsend Plan: *Buckwalter, Graham,* and *Pullen.*

Pennsylvania
1943—Prohibition of Conditions in Grants—in—Aid: *Buckwalter, Graham,* and *Pullen.*

Rhode Island
1790—Revision of Constitution: *Graham.*

Tennessee
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Texas
1949—Tidelands Problem: *Buckwalter, Graham,* and *Pullen.*
1957—Oil and Mineral Rights: *Graham*
1957—Preservation of States' Rights: *Graham*

Virginia
1973—Prohibiting Deficit Spending: *Library of Congress Study.*

Wisconsin
1973—Right to Life: Received by the Committee from the Attorney General of the state.

Wyoming
1961—Balancing of Budget: *Buckwalter*

PART TWO: A History of Applications

by Barbara Prager

Introduction

Article V of the Constitution provides that "The Congress on the Application of the Legislatures of two-thirds of the Several States shall call a Convention for proposing Amendments . . ." Since 1788, despite a total of more than 300 applications from every state in the Union, there has never been a convention convened by this process. The purpose of this paper is to analyze the unsuccessful attempts made to amend the Constitution by this procedure. When applicable, the following factors will be discussed: description of the problem, reasons for the use of the application process, nature of the requests, reasoning of the states declining to make application to Congress, and the resolution of the problem.

Bill of Rights

The first group of applications was provoked by dissatisfaction with the scope of the Constitution. The Anti-Federalists felt that the Constitution had not provided for certain basic rights of mankind. During the ratification of the Constitution, the Virginia and New York legislatures submitted separate resolutions to Congress applying for a convention. The text of the Virginia resolution read in part:

> that a convention be immediately called . . . with full power to take into their consideration the defects of this constitution that have been suggested by the State conventions . . . and secure to ourselves and our latest posterity the great and unalienable rights of mankind.[1]

Madison and Jefferson opposed the idea of a second convention. Madison expresssed the view that a second convention would suggest a lack of confidence in the first. Others believed that proposing amendments to the Constitution might better be accomplished by Congress. These sentiments found support in the state legislatures. Pennsylvania and Massachusetts explicitly rejected the idea of a second convention, and the remaining states took no final action in making application to Congress.[2]

The underlying issue was resolved in 1789 when Congress proposed the Bill of Rights.

The Nullification Applications

South Carolina was in severe economic difficulty in the eighteen-twenties. Believing that this problem was a result of the high protective tariff levied by the federal government, the state developed the nullification theory, *i.e.*, that a sovereign state could declare an act of Congress null and void. James Hamilton, Jr. advocated a convention of the states to resolve this conflict and recommended to the South Carolina legislature that they apply to Congress for such a convention. South Carolina's petition and a similar application from Georgia took the form of resolutions that Congress call a convention for the purpose of resolving questions of disputed power.[3] Alabama recommended to her co-states and to Congress that a convention be called to resolve the nullification problem and to make "such other amendments and alterations in the Constitution as time and experience have discovered to be necessary."[4]

No other state petitioned for a convention. The problem was considered and the idea of a convention rejected in eight states.[5] Opposition to the South Carolina proposal was manifold. Some objecting to the terminology of the proposal, maintained that an article V convention must be a convention of the people's delegates, and not a convention of the states' representatives. Others, disagreeing with South Carolina's statement that the convention would have the power to determine the constitutional issue, asserted that the conven-

tion was limited to proposing amendments. Still others feared the potentially disastrous effects of a convention or considered the call of a convention impolitic, inexpedient, unnecessary, or an appalling task.

The states that declined to apply to Congress during this period apparently were not reaching the merits of the issue. Rather, they rejected the idea of a convention on two main grounds: (1) that South Carolina hoped to invest the convention with arbitration power not provided for by the Constitution; and (2) that such a body would not be subject to sufficient control and might therefore upset the existing governmental structure.

Slavery

The devisive issue of slavery was the next issue to provoke state applications. In 1860 the secession of the lower southern states seemed probable. Seeking to effect a reconciliation, President Buchanan proposed that an explanatory amendment to the Constitution be initiated either by Congress or by the application procedure. In support of this suggestion several Congressmen introduced resolutions in Congress to encourage the legislatures of the states to make applications for the call of a convention. This represented the first attempt by Congress to stimulate the application process. The process received further support from newly elected President Lincoln who in his inaugural address stated:

> the convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse. . . .[6]

The states, however, were less enthusiastic. During the entire Civil War period, only seven states took affirmative action.[7] The applications tended to be broad in scope, requesting a convention to propose amendments to the Constitution. Several resolutions were merely recommendations that Congress call a convention, while others favored a convention only as a last resort and preferred to rely on Congress to propose any amendments. Many resolutions were tabled in the state legislatures or were referred to a committee which failed to report them back to the legislature. The state of Iowa observed that since eleven states were in open

rebellion against the Union, no amendment could be ratified without the votes of at least two rebel states.[8]

Procedural problems played a large role in the states' failure to make successful use of the application process during the Civil War period. Given the frenetic pace of the times, the states failed either to act in strict conformity with article V or to direct their energies to the completion of the process.

Modern Period

Since the turn of the twentieth century, the application process has been used primarily to encourage Congress to propose specific amendments.

Direct Election of Senators

In the eighteen-nineties public sentiment grew for an amendment providing for the direct election of U.S. Senators. On several occasions from 1893 to 1902, the House passed resolutions proposing such an amendment which never came to a vote in the Senate.

In 1906, motivated by the inaction of Congress, a conference of twelve states met and decided to initiate a campaign to urge applications on the direct election issue from the requisite number of states. Thirty states adopted sixty-nine applications for the call of a convention during the period from 1901 to 1911.[9] Opposition came primarily from two sources: (1) those who objected to the substance of the amendment; and (2) those who feared the potential power of such a convention. The latter group expressed the view that a convention would open the door to recommendations for amendments on a wide variety of sectional interests. The issue was resolved in 1912 when Congress proposed the seventeenth amendment.

Polygamy

Utah was admitted into the Union in 1896, on the condition that her constitution included an irrevocable prohibition of polygamous marriages. Later, when it was brought to public attention that the state was not enforcing this provision, an anti-polygamy amendment to the Constitution which would give the United States jurisdiction of the matter was proposed as a possible solution. However, the amendment was opposed on several grounds: it would interfere with the sovereignty of

the states; the subject was not of sufficient importance to merit a constitutional amendment; and the problem was susceptible of resolution by other means. The state legislatures, however, did not dismiss the problem as quickly as Congress did. From 1906 to 1916, twenty-six states made almost identical applications requesting a convention to propose an amendment prohibiting polygamous marriages.[10] But after this surge of applications, polygamy ceased to be an issue.

Repeal of Prohibition

A movement for the repeal of prohibition began in the nineteen-twenties. Eleven states considered applications to Congress for a constitutional convention. Five adopted resolutions for a limited convention to propose the specific amendment. Congress responded to the pressure by proposing the twenty-first amendment.

Limitation of Federal Taxes

Federal taxes were greatly increased during the mid-nineteen-thirties. The American Taxpayers Association failed in its efforts to exert pressure on Congress for an amendment to limit the federal taxing power. The group then began a quiet campaign to apply pressure by use of the application procedure of article V. By 1945, seventeen states had submitted resolutions for the call of a convention.[11] The movement lost momentum but was revived again at the end of the decade. Representative Wright Patman from Texas attacked the advocates of the amendment, claiming that their purpose was to make the rich richer and the poor poorer. He advised the states to rescind their applications. By 1963, there were claims that thirty-four states had made applications to Congress, thus meeting the constitutional requirements for a convention.[12] Opponents of the amendment pointed to deficiencies in these claims: twelve states had rescinded their applications;[13] some resolutions had not requested a convention, but merely had asked Congress to propose the amendment; some applications were for other purposes; and the validity of resolutions passed fifteen or twenty years earlier was questionable.

Limitation of Presidential Tenure

When Franklin D. Roosevelt was elected to a third term, the belief that the tenure of the office of President should be limited gained adherents. In 1943, four states submitted applications to Congress requesting a national convention to propose

an amendment to that effect. A few years later, an additional state adopted a similar resolution. Congress then proposed an amendment limiting the number of successive presidential terms.

World Federal Governments

At the beginning of the second world war, there was some support for the idea that the United States should commit itself to a world organization aimed at preserving peace. Twenty-three states adopted resolutions urging their representatives in Congress to support such a commitment. In 1949, six states made formal applications to Congress for a constitutional convention to propose an amendment authorizing the United States to participate in a limited world government. Within the following two years, half of the states rescinded their applications.[14]

Apportionment

The Supreme Court decisions establishing the "one-person-one-vote" principle and applying it to state legislature apportionment sparked the latest bout of serious interest in a national constitution convention.

The Council of State Governments in 1962 suggested a constitutional convention to propose amendments a) removing apportionment cases from federal jurisdiction, b) establishing a "Court of the Union" to hear certain appeals from the Supreme Court, and c) easing the process whereby states themselves may initiate constitutional amendments under article V.

In 1964, the Council of State Governments suggested an amendment exempting one house of any state legislature from the "one-person-one-vote" rule. When an amendment to that effect failed in the Senate in 1965 (gaining a majority of the votes but not the constitutionally required two-thirds), the Council and Senator Everett Dirksen initiated a national campaign to convene a constitutional convention to deal with the apportionment problem.[15]

By 1967, thirty-two states had applied for a constitutional convention, although their applications differed in form, content, and specificity. In the following years, one more state petitioned for a convention, and one withdrew its original application. Since 1969, no further applications have been submitted on this issue.

Throughout the 1960's and into the present decade particularly salient issues have at one time or another provoked scattered applications for a constitutional convention; *e.g.*, school prayer in the early 1960's, revenue sharing and busing of school children to achieve integration more recently. None of these issues, however, has produced applications totalling near the two-thirds required by article V.[16]

Conclusion

It is submitted that the majority of applications presented issues of potentially national concern. In some instances, such as the nullification or the slavery issues, the question was initially a sectional concern, but national ramifications developed.

Another generalization that emerges from an historical analysis of the application process is that the majority of concerns raised in state applications have been resolved in some way other than by convention. In a large number of situations Congress took over the initiative and proposed the requested amendment to the Constitution. Numerous examples are readily available. The 1788 and 1789 applications of Virginia and New York for a general convention were resolved by congressionally proposed amendments—the Bill of Rights. Similarly, in the twentieth century, state applications that advocated direct election of senators, the limitation of presidential tenure, presidential disability and succession and the repeal of prohibition were resolved by congressionally proposed amendments. The problems raised by the state applications during the slavery period were resolved in a more revolutionary way. The Civil War and ultimately the thirteenth, fourteenth, and fifteenth amendments rendered the applications moot.

However, there are a number of situations in which there has been no resolution of the problem. In some instances, such as the issue of polygamy, a change in social attitudes over time led to the abandonment of the issue.

This example highlights a problem which may be inherent in the procedure itself: sluggishness. The problem has its roots in a fundamental distinction between the ratification process and the amendment process. While the former only requires the state legislatures to respond to an already form-

ulated amendment the latter requires affirmative action. This is time-consuming since typically before drafting a resolution both houses of each state legislature consider all the other applications on the subject submitted to Congress by other states. The slavery period provides numerous examples of potential applications that were tabled in the state legislatures or were never reported back from committees. Action on the resolution is further delayed by the fact that state legislatures convene at different times during the year. Additional problems arise because Congress has not provided for adequate machinery to handle the applications presented to them. Thus, with the passage of time, new interests tend to replace the proposed interests, so that the issue is eventually resolved by a means other than the convention method or not resolved at all.

It is further evident that the issues that have called for a convention have been popular ones. Historically, although an individual state did not petition Congress for a convention on a particular issue, the state more often than not considered submitting a resolution. The states declining to submit applications generally did not reject the application procedure based on the substantive merits of the problem. Rather, the states expressed fear of the power of a constitutional convention and its potential for revolutionary change.

Notes

1 37 American State papers 6-7.

2 [redacted]. Pullen, *The Application Clause of the Amending Provision of the Constitution* 22-28 (1951) (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as *Pullen*].

3 *Id.* at 38-39.

4 Massachusetts General Court Committee on the Library, *State Papers on Nullification* 223 (1834). The quote is from the resolution addressed to her co-states. The recommendation to Congress varies slightly.

5 *Pullen* at 66.

6 S. Jour., 36th Cong., Spec. Sess. 404 (1861).

7 *Pullen* at 102.

8 1861 *Iowa S. Jour.* 68-69.

9 *Pullen* at 108.

10 *Id.* at 115.

11 *Id.* at 119.

12 Graham, *The Role of the States in Proposing Constitutional Amendments,* 49 A.B.A.J. 1175, 1176-77 (1963).

13 See Appendix B.

14 *Pullen* at 126.

15 See Dirksen, *The Supreme Court and the People,* 66 Mich. L. Rev. 837 (1968).

16 See Appendix B, Part One, for a complete listing.

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[American Bar Association Journal, March 1974]

AMENDING THE CONSTITUTION THROUGH A CONVENTION

(By John D. Feerick)

The murky procedures and processes of amending the Constitution by means of a convention requested by the states present many questions and could become the reason for a constitutional crisis. An American Bar Association committee has completed a two-year study of the legal and constitutional problems, and the Association has approved its report. Several of the key questions are dealt with in the report.

In times of confrontation and crisis a heavy strain is placed on our system of government. It is especially severe if there are no procedures for dealing with the problem at hand. The temptation is strong to be result oriented, sometimes at the risk of bending constitutional principles. Whether our constitutional system satisfactorily provides in advance for situations of fundamental stress is a basic measure of its ultimate viability.

One source of potential crisis that has not been dealt with is the provision of Article V of the Constitution "that Congress, on the application of the legislatures of two-thirds of the Several States, shall call a Convention for proposing amendments. . . ." Although Congress has never convened a convention, more than three hundred applications for a convention have been submitted to Congress since 1789. Every state has submitted at least one application. In the period since 1940 there have been almost two hundred applications. From 1940 to 1962 more than thirty states petitioned for a convention to deal with the federal taxing power, and between 1963 and 1969 thirty-three states, one less than two thirds, submitted petitions on the issue of legislative reapportionment, although one rescinded its application.

The reapportionment petitions in particular brought into sharp focus unsettled questions concerning the convention method of initiating amendments. Does Article V leave it to the discretion of Congress to call a convention? Can a convention be limited to a particular subject or would it be free to roam over the entire Constitution and propose an entirely new document? Do the executive and judiciary have, or should they have, a role in the process? What is a valid application? How long does it remain valid? Can it be withdrawn once it has been submitted?

Prompted by the controversy over the convention method generated by the reapportionment applications, the American Bar Association in 1971 established a special committee to look into the questions of law entailed in the calling of a national constitutional convention. The chairman of the committee was C. Clyde Atkins, a federal district judge, and the committee included two other judges, Sarah T. Hughes and William S. Thompson; a former deputy attorney general of the United States, Warren Christopher; two law school professors, David Dow and Dean Albert M. Sachs; two former presidents of state constitutional conventions, Adrian M. Foley, Jr., of New Jersey, and Samuel W. Witwer of Illinois; and the writer, a practicing lawyer.

The committee conducted a two-year study on the subject and rendered a series of recommendations that were adopted by the Association at its August, 1973, meeting. These recommendations, some of which take strong issue with features of the legislation that passed the Senate unanimously in October, 1971, and July, 1973, under the sponsorship of Senator Ervin, deserve the attention of Congress and the bar.

CONGRESS SHOULD ESTABLISH SAFEGUARDS AND GUIDELINES

First, the committee concluded that it was desirable for Congress to establish procedures governing the call of a convention. While recognizing that this would focus attention on the process and thereby possibly have the effect of encouraging states to resort to it, the committee felt that it was prudent and better governmental technique to confront the subject forthrightly and supply guidelines and safeguards in advance of specific petitions and their attendant political issues. To defer the establishment of procedures to a time when their use was imminent, it was felt, would court a constitutional crisis by encouraging result-oriented approaches.

As for the argument that procedures should not be adopted in advance because a subsequent Congress could change them, the committee was of the view that legislation, fashioned after objective and intensive study, would be entitled to great weight as a constitutional interpretation and be of considerable precedential value. It also would assist in focusing and channeling the discussion at a future time when many applications were pending. The committee also noted that Congress has adopted legislation in other areas of a similar type—for example, electoral vote disputes and contested elections to the House of Representatives.

After concluding that legislation is highly desirable, the committee turned to the critical question of whether an Article V convention can be limited to a specific subject. Answering in the affirmative, the committee noted that the text of Article V authorizes only the state legislatures to initiate the process and that the origins and history of the article indicate that the authority of the state legislatures reaches as far as calling for a convention general in scope. On the other hand, the committee expressed its opinion that the state legislatures could exercise only a portion of their authority by calling for a convention limited to a specific subject. Under these circumstances, the committee reasoned, Congress is empowered—indeed obliged—to convene a convention limited to the subject stated in the petitions. This conclusion finds support in both the text and history of Article V.

ARTICLE V SUGGESTS NEED FOR CONSENSUS

The text of Article V evidences an intent that there be a national consensus in order to amend the Constitution. A two-thirds vote is necessary in each house of Congress to propose an amendment; there must be applications from two-thirds of the states to call a convention; ratification by three fourths of the states is necessary to ratify an amendment proposed under either method. This suggests that there must be a consensus of purpose among the states to hold a convention. When the states are at odds on the purpose of a convention, it seems inconsistent with Article V to call one. Conversely, when two thirds of the states are in agreement on a particular, limited purpose, the conclusion is strong that a convention should be called, limited to that purpose.

As for the history of Article V, the amendment articles of a number of state constitutions adopted before the United States Constitution suggest that a constitutional convention can be limited substantively. The language of the earliest draft of Article V submitted to the Constitutional Convention by the committee of detail indicates that a convention limited substantively was within its contemplation. That provision read: "On the application of the Legislatures of two thirds of the States in the Union, for *an amendment* of the Constitution, the Legislature of the United States shall call a convention *for that purpose*" (emphasis supplied).

Sometimes the Constitutional Convention of 1787 itself is cited for the proposition that an Article V convention may not be limited, but that premise seems wholly inapposite. The 1787 convention took place before the adoption of the Constitution when the states were independent and there was no effective national government. In addition, its work was submitted to the Continental Congress, consented to by that congress, and transmitted by it to the states for ratification.

As for whether Congress is obliged to call a convention when the requisite number of applications have been submitted, the committee had little doubt. The language of Article V is mandatory, and the intent the framers in this regard was made clear in numerous ways. On August 30, 1787, the convention rejected a proposal that would have given Congress the discreation as to whether to call a convention. In the House of Representatives debate of May 5, 1789, surrounding receipt of the first state application, Madison stated that when two thirds of the states had concurred in an application, it would be "out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature." In *The Federalist* (No. 85) Hamilton stated that the words of Article V "are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body."

Once a convention is called for a particular purpose and delegates are elected by the people to that limited convention, it would seem unreasonable and out of line with Article V for the convention to have the power to act with respect to other subjects. Were it to deviate from the subject that brought it into being and

propose amendments on other subjects, Congress should be able to deal with the deviation by exercising its control over the ratification process and refusing to submit the amendments to the states. A mechanism to accomplish this is contained in the legislation that passed the Senate.

"IF THE GOVERNMENT SHOULD BECOME OPPRESSIVE . . ."

The debates at the Constitutional Convention are silent as to other matters concerning a convention. With his usual foresight, Madison noted that with the convention method "difficulties might arise to to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."

From its study of the Article V process and conventions generally, the American Bar Association's committee was led to the conclusion that in order for a convention to be responsive to and representative of the people, its delegates must be elected by the people. This seems especially appropriate since the method was intended to supply the "people" with an alternative way of obtaining amendments "if the Government should become oppressive . . . ," to quote George Mason's remark at the Convention of 1787.

On the question of the apportionment of delegates to an Article V convention, the committee was of the view that in light of he governmental functions to be performed, the one-person, one-vote standards should govern. It doubted that the formula contained in the pending federal legislation, which affords each state a number of delegates equal to its total representation in Congress, would be held constitutional, since under that formula fifteen states would be overrepresented at a convention by 50 percent or more. For example, Alaska would be overrepresented by close to 375 percent, and California would be underrepresented by nearly 20 percent. The committee stated its view that an apportionment scheme based on representation in the House of Representatives would be acceptable compliance, since it would respect existing state and district boundaries and assure each state at least one delegate.

As for the necessary vote at a convention, the committee felt it was unwise and of questionable validity for legislation to prescribe a minimum vote by which the convention might propose an amendment, as does S. 1272, since it would intrude into an area touching on the essential characteristic of a convention as a deliberative body and would be inconsistent with the framers' design that the convention process be as free as possible from congressional control. S. 1272 requires a two-thirds vote of the total number of delegates to the convention. It is noteworthy that the Constitutional Convention of 1787, the territorial conventions held under acts of Congress, and most state constitutional conventions have determined their own vote.

As for the involvement of the judiciary in the convention process, the committee was of the strong belief that legislation should provide for limited judicial review of congressional determinations made in the process. It recommended that review would be appropriate only if a congressional determination were "clearly erroneous" and relief would be limited to declaratory relief. It was influenced in this regard by the view that the convention process likely would be used to effect a constitutional change opposed by vested interests and against the backdrop of some congressional inaction. Under these circumstances, the committee believed, it was desirable to have our independent judiciary serve as the arbiter and thereby assure the legitimacy of the process.

The committee questioned both the wisdom and validity of the pending legislation's thrust excluding the courts from any involvement stating: "It is questionable whether the power [of Congress to withdraw matters from the jurisdiction of the federal courts] reaches so far as to permit Congress to change results required by other provisions of the Constitution or to deny a remedy to enforce constitutional rights. Moreover, we are unaware of any authority upholding this power in cases of original jurisdiction."

Since the convention process was intended to deal with situations involving an "oppressive Congress," to remove from judicial review congressional determinations such as whether to call a convention and whether a convention has proposed an amendment on another subject is contrary to the intent of the framers and dangerous.

On the question of whether a convention call is required to be presented to the president, the committee concluded that it was not. It was of the opinion that the submission of that question to the president would be inconsistent with the mandatory nature of Congress duty to call a convention when proper applications have been submitted from the requisite number of states. As the president historically has not had a role in the process by which Congress proposes amend-

ments, it also would alter the parallelism and intended equality between the two methods of initiating amendments. Also supporting the conclusion is the Supreme Court's decision in *Hollingsworth* v. *Virginia*, 3 Dallas 378 (1798), which held that Article I, Section 7 (the veto provision), applies to "ordinary cases of legislation" and "has nothing to do with the proposition or adoption of amendments to the Constitution." The Court ruled the Eleventh Amendment to be valid although it had not been presented to the president.

For somewhat similar reasons, the committee concluded that the state governor is not assigned a role in the process by which a state legislature applies for a convention or ratifies a proposed amendment. This conclusion is supported by the Supreme Court's decision in *Hawke* v. *Smith*, 253 U.S. 221 (1920), and *Leser* v. *Garnett*, 258 U.S. 130 (1922).

In *Hawke* the Court held that it was improper for a state to subject the ratification of a proposed amendment to a popular referendum, declaring that ratification was not ordinary legislation but rather an expression of assent in which "no legislative action is authorized or required." The Court emphasized that the agency for ratification was the "state legislature," that is, the representative lawmaking body of the state. The lawmaking procedures of the state, the Court held, were not applicable to the act of ratification. If the act of ratification does not invoke these procedures, which customarily include the governor's veto, it is hard to see why the application, a task specifically assigned to the legislatures by the Constitution, would do so.

TIME LIMIT COULD AVOID CONFUSION

On other questions, such as the length of time during which an application remains valid, the committee recommended that a limitation of some period should be adopted in the interests of certainty, to avoid the type of controversy and confusion that surrounded the apportionment applications, and to help determine the existence of a consensus of purpose among the states. The committee also expressed itself in favor of a statutory rule allowing a state the opportunity to withdraw an application before two thirds have submitted applications on the same subject, as well as a rule permitting a state to rescind a ratification of a proposed amendment so long as three fourths of the states have not ratified. These are desirable, given the relative permanency of an amendment, and they help assure that an amendment will be the result of a "contemporaneously felt need" existing from the inception of the process through its conclusion.

Although the ratification rule would represent a departure from precedents established in connection with the Fourteenth Amendment, the committee believed that the principle of seeking an agreement of public support reflected in *Dillon* v. *Gloss*, 256 U.S. 368 (1921), favored the rule. In *Dillon* the Court held that Congress has the power to fix a reasonable time for ratification of an amendment proposed to the state legislatures.

LEGISLATION SHOULD REFLECT INTENT OF ARTICLE V

The committee took the present text of Article V as the foundation for its study. While members of the committee expressed individual preferences for the congressional method of initiating amendments, the committee was strongly of the conviction that regardless of preferences, fidelity to democratic principles required wholly objective consideration of the subject entrusted to it. The committee unanimously agreed with these views of the Senate Judiciary Committee in 1971 in Senate Report No. 336:

"The committee believes that the responsibility of Congress under the Constitution is to enact legislation which makes Article V meaningful. This responsibility dictates that legislation implementing the article should not be formulated with the objective of making the convention route a dead letter by placing insurmountable procedural obstacles in its way. Nor on the other hand should Congress, in the guise of implementing legislation, create procedures designed to facilitate the adoption of any particular constitutional change."

So long as Congress continues to be responsive to the people, there is little likelihood of a convention's being called. But if there should come a time in our history when two thirds of the states apply for a convention on the same subject, the process should be allowed to function as intended. If special circumstances cause that event to occur, there is no reason why a convention, functioning pursuant to the Constitution and in the context of appropriate federal legislation, cannot be an orderly mechanism for constitutional change.

[The National Law Journal, March 2, 1979]

CONSTITUTIONAL LAW

(By John D. Feerick)*

ABA REPORT: RULES NEEDED TO GOVERN CALLING OF CONSTITUTIONAL CONVENTION

If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional convention would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.

"It is far more prudent, we believe, to confront the problem openly and to supply safeguards and general rules in advance ... So long as the Constitution envisions the convention method, we think the procedures should be ready if there is a 'contemporaneously felt need' by the required two-thirds of the state legislatures. Fidelity to democratic principles requires no less." [1]

These views were expressed several years ago in a 100-page report by a special Constitutional Convention Study Committee of the American Bar Association. The committee was composed of two federal judges, one superior court judge, a present and a former law school dean, two former presidents of state constitutional conventions, a former deputy attorney general of the United States, and a practicing attorney.[2]

After a two-year study, the committee, whose recommendations were adopted by the ABA, concluded that it is desirable for Congress to establish procedures to govern the process for amending the Constitution by the convention method.

Although the Senate twice unanimously passed measures that would have established procedures for the calling of a national constitutional convention,[3] no action was ever taken by the House of Representatives, with the result that our nation must deal on an ad hoc basis with the growing number of state applications calling for a convention to propose an amendment regarding a balanced federal budget.

Article V of the Constitution sets forth two methods of initiating and of ratifying constitutional amendments: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for prosposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

In Federalist No. 43, James Madison explained the reasons for Article V: "That useful alterations [in the Constitution] will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."

The Virginia Plan of government introduced in the Convention on May 29, 1787 provided "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." [4]

After a number of suggestions were advanced, the following clause was included in the Committee of Detail's report of Aug. 6, 1787: "On the application of the Legislatures of two-thirds of the States in the Union for *an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*" [5]

This clause for amending the Constitution was adopted by the Convention on Aug. 30, which rejected a suggestion that day by Gouverneur Morris that Congress be free to call a convention "whenever it pleased." [6] It appears that the

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*Mr. Feerick was a member of the ABA's Special constitutional convention study committee (1971–73).

For footnotes, see "References" on pp. 175–76.

Convention contemplated under the proposal adopted on Aug. 30 "was the last step in the amending process, and its decision did not require any ratification by anybody." [7]

On Sept. 10, Elbridge Gerry moved to reconsider this action. He observed that under the Aug. 30 proposal "two-thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether." [8] Alexander Hamilton and other delegates agreed with Mr. Gerry's motion. Mr. Hamilton noted that it was difficult to introduce amendments under the Articles of Confederation and suggested that "an easy mode should be established for supplying defects which will probably appear in the new System." [9] Mr. Hamilton stated that Congress would be the "first to perceive" and be "most sensible to the necessity of Amendments," and ought, therefore, to be authorized to call a convention whenever two-thirds of each House agreed on the need for a convention.

Also critical of the Aug. 30 proposal was James Madison. During the debate of Sept. 10 he asked: "How was a Convention to be formed? by what rule decide? what the force of its acts?" Mr. Madison thereupon successfully proposed the following provision in lieu of that adopted on Aug. 30: "The Legislature of the U.S. whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S." [10]

The debate on the amending article, however, was not over. On Sept. 15, George Mason expressed his objection to the Sept. 10 proposal. He stated that both modes of initiating amendments depended on Congress so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive. . . ." [11] Mr. Mason's draft of the Constitution, as it stood at that point in the Convention, contained the following notations:

"Article 5th—By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." [12]

As a result of Mr. Mason's attack on the amending article, Messrs. Gerry and Morris moved to modify the provision "so as to require a convention on application of" two-thirds of the states.[13] In response, Mr. Madison said that he "did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a Convention on the like application." He added that he had no objection against providing for a convention for the purpose of amendments "except only that difficulties might arise as to the form, the quorum, etc., which in Constitutional regulations ought to be as much as possible avoided." [14]

The Gerry-Morris motion, however, was passed so as to include the convention method as it now reads.

Little discussion of Article V occurred in the state ratifying conventions. In Federalist paper 85, Mr. Hamilton referred to Article V as contemplating "a single proposition." Congress would be obliged to call a convention, he stated, whenever two-thirds of the states concurred. He added: "The words of this article are preemptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body."

In the first Congress, surrounding receipt of the first state application, Mr. Madison stated that when two-thirds of the state had concurred in an application, it would be "out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature." [15]

Through the present time all amendments have been proposed on single subjects by the Congress and all but the 21st Amendment (repealing Prohibition) were ratified by the state legislative method. Although there has never been a national constitutional convention since the adoption of the federal constitution, there have been several hundred applications from state legislatures calling for a convention on various subjects.[16] Rarely have the applications on any specific subject been sufficient to raise the question of whether Article V has been triggered.

In the aftermath of the Supreme Court's one person, one vote decisions, however, an effort was made for a constitutional convention to modify this principle of representative democracy, which culminated in more than 30 states submitting applications calling for a convention of the question of apportionment. Although the effort failed, it served to emphasize the existence of the constitutional convention vehicle of proposing amendments.

In earlier periods of American history the application clause of Article V was resorted to by the states primarily to encourage Congress to propose specific amendments. Particularly effective was a campaign at the turn of the century for an amendment providing for the direct election of U.S. Senators. It is reported that more than 30 states submitted applications for the call of a convention on that subject. The issue, however, was rendered academic when Congress proposed the 17th Amendment. In the 1930's and 1940's an effort was made to pressure Congress for an amendment to limit the federal taxing power; but it failed.

Almost invariably whenever the application clause of Article V has been resorted to by the states in any significant manner questions have been raised as to the meaning of Article V, including among these questions are the following:

1. Is Congress under a duty to call a convention when two-thirds of the state legislature apply for one on a specific matter?
2. If called, is the convention limited to that matter or free to propose amendments on other matters?
3. What constitutes a valid application which Congress must count?
4. What rules apply as to the selection of convention delegates and as to the voting at a convention?
5. What are the roles of the President, state governors and courts in the process?
6. Can a state withdraw an application once it has been submitted to Congress?
7. How much power does Congress have as to the scope of a convention?

In its study of the subject, which was aided by 12 law students, the ABA Study Committee attempted to answer these questions. It took the present text of Article V as the foundation for its study. While members of the committee expressed individual preferences for the congressional method of initiating amendments, the committee was strongly of the conviction that regardless of preference, fidelity to principle required wholly objective consideration of its assignment from the ABA's governing body. In seeking the answers to the questions of law raised, the committee studied, among other things, the text and origins of the amending provision, the intent of the Framers, and the history and workings of the amending Article since 1789. Since I am in complete agreement with the conclusions of the Committee, of which I was a member, the ensuing discussion focuses on those conclusions.[17]

After concluding, as previously noted, that legislation governing the convention process is highly desirable, the ABA committee addressed the question of whether an Article V convention can be limited to a specific subject. Answering in the affirmative, the committee noted that the text of Article V authorizes only the state legislatures to initiate the process and that the origins of the Article indicate that the authority of the state legislatures reaches as far as calling for a convention general in scope.

On the other hand, the committee expressed its view that the state legislatures could exercise only a portion of their authority by calling for a convention limited to a specific subject. In this regard, the committee noted that at the state level, at which there have been more than 200 constitutional conventions, it seemed settled that the electorate may choose to delegate only a portion of its authority to a state convention and so limit it substantively.[18]

With respect to the view that Article V sanctions only general conventions, the committee stated: "Such an interpretation would relegate the alternative method to an 'unequal' method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution." [19]

The committee found support in both the text and history of Article V for its conclusion that a convention could be limited. The text of Article V evidences an intent that there be a national consensus in order to amend the Constitution. A two-thirds vote is necessary in each house of Congress to propose an amendment; there must be applications from two-thirds of the states to call a conven-

tion; ratification by three-fourths of the states is necessary to ratify an amendment proposed under either method of initiation. This suggests that there must be a consensus of purpose among the states to hold a convention. When the states are at odds on the purpose of a convention, it seems wholly inconsistent with Article V to call one. Conversely when two-thirds of the states are in agreement on a particular, limited purpose, the conclusion is strong that a convention should be called, limited to that purpose.

As for the history of Article V, the amendment articles of a number of state constitutions adopted before the U.S. Constitution also suggested to the committee that a constitutional convention can be limited substantively.[20] The language of the earliest draft of Article V submitted to the Constitutional Convention by the committee on detail indicates that a convention limited substantively was within its contemplation. That provision read: "On the application of the Legislatures of two-thirds of the States in the Union, for *an amendment* of the Constitution, the Legislature of the United States shall call a convention *for that purpose* (emphasis supplied).

Sometimes the Constitutional Convention of 1787 itself is cited for the proposition that an Article V convention may not be limited, but that premise seems wholly inapposite. As the ABA report noted: "While the Constitutional Convention of 1787 may have exceeded the purpose of its call in framing the Constitution, it does not follow that a convention convened under Article V and subject to the Constitution can lawfully assume such authority.[21]

The 1787 convention took place before the adoption of the Constitution when the states were independent and there was no effective national government. In addition, its work was submitted to the Continental Congress, consented to by that congress, and transmitted by it to the states for ratification. Moreover, as Thomas Cooley has observed, the 1787 convention was "a revolutionary proceeding, and could be justified only by the circumstances which had brought the Union to the brink of dissolution." [22]

As for whether Congress is obliged to call a convention when the requisite number of applications have been submitted, the committee had little doubt. The language of Article V is mandatory and the intent of the Framers was made clear in the debate of Aug. 30, 1787, the Federalist, in the First Congress upon receipt of the first state application, and during other discussions.

Once a convention is called for a particular purpose, the committee concluded that the convention would have no authority to act with respect to other subjects. Were it to deviate from the subject that brought it into being and propose amendments on other subjects, the committee suggested that Congress could deal with the deviation by exercising its power over choosing the method of ratification and refusing to submit the amendments to the states. Judicial relief might also be appropriate under such circumstances.

Content. Article V explicitly gives Congress the power to call a convention upon receipt of applications from two-thirds of the state legislatures. As a necessary incident of the power to call, the committee reasoned, Congress has the power to determine initially whether the conditions requiring a call have been satisfied. not every state application, of course, is necessarily valid.

As the committee stated: "A reading of Article V makes clear that an application should contain a request to Congress to call a national convention that would have the authority to propose an amendment to the Constitution. An application which simply expressed a state's opinion on a given problem or requested Congress itself to propose an amendment would not be sufficient for purposes of Article V. Nor would an application seem proper if it called for a convention with more authority than to vote a specific amendment set forth therein up or down, since the convention would be effectively stripped of its deliberative function. A convention should have latitude to amend, as Congress does, by evaluating and dealing with a problem." [22]

The committee added that an application which expressed the result sought by an amendment (i.e., direct popular election of the President) should be proper since the convention would have the freedom to decide on the terms of the specific amendment. The committee also felt that it should not be necessary that each application be identical or propose similar changes in the same subject matter.

Timeliness.—In *Dillon* v. *Gloss*, the Supreme Court stated that "the fair inference or implication from Article V is that the ratification must be within some

reasonable time after proposal, which Congress is free to fix." It stated that "as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do." [24]

The committee expressed its view that this reasoning also was applicable to state applications for a constitutional convention. As the committee observed, the convening of a convention to deal with a certain matter certainly should reflect the "will of the people in all sections at relatively the same period. . . ." [25]

In the absence of a uniform rule, the timeliness or untimeliness of state applications would vary, it seemed to the committee, from case to case. It would involve, as the Supreme Court suggested with respect to the ratification area in *Coleman* v. *Miller*,[26] a consideration of "political, social and economic conditions which have prevailed during the period since the submission of the [applications]." [27]

Withdrawal. Although there is uncertainty over whether a state may withdraw an application, the ABA committee reasoned that there should be a rule allowing withdrawal. "In view of the importance and comparatively permanent nature of an amendment, it seems desirable that state legislatures be able to set aside applications that may have been hastily submitted or that no longer reflect the social, economic and political factors in effect when the applications were originally adopted. We believe Congress has the power to so provide." [28]

Election of Delegates.—From its study of Article V and conventions generally, the ABA committee was led to the conclusion that in order for a convention to be representative of the people, its delegates should be elected by the people. It felt this was especially appropriate for the extraordinary happening of a national constitutional convention since the method was intended to supply the "people" with an alternative way of obtaining amendments "if the Government should become oppressive . . .," to quote George Mason's remark at the Convention of 1787.

Apportionment of Delegates. On the question of the apportionment of delegates to an Article V convention, the committee was of the view that in light of the government function to be performed, the one-person, one-vote standards should govern. The committee stated its view that an apportionment scheme based on representation in the House of Representatives also would be acceptable compliance, since it would respect existing state and district boundaries and assure each state at least one delegate. It doubted that a formula which afforded each state a number of delegates equal to its total representation in Congress would be held constitutional, since under that formula fifteen states would be overrepresented at a convention by 50 percent or more.

Convention Vote.—As for the necessary vote at a convention, the committee felt it was unwise and of questionable validity for Congress to prescribe a minimum vote by which the convention might propose an amendment, since such action would intrude into an area touching on the essential characteristic of a convention as a deliberative body and would be inconsistent with the framers' design that the convention process be as free as possible from congressional control. It is noteworthy that the territorial conventions held under acts of Congress, most state constitutional conventions and the Convention of 1787 have determined their own vote.

Presidential Involvement.—On the question of whether a convention call is required to be presented to the President, the committee concluded that it was not. It believed that the submission of that question to the President would be inconsistent with the mandatory nature of Congress' duty to call a convention when proper applications had been submitted from the requisite number of states. As the President historically has not had a role in the process by which Congress proposes amendments, it also would alter the parallelism and intended equality between the two methods of initiating amendments. Also supporting the conclusion is the Supreme Court's decision in *Hollingsworth* v. *Virginia*,[29] which held that Article I, Section 7 (the veto provision), applies to "ordinary cases of legislation" and "has nothing to do with the proposition or adoption of amendments to the Constitution." The Court ruled the 11th Amendment to be valid although it had not been presented to the President.

Gubernatorial Involvement.—For somewhat similar reasons as above, the committee concluded that the state governor is not assigned a role in the process

by which a state legislature applies for a convention or ratifies a proposed amendment. It believed this followed from the Supreme Court's decisions in *Hawke* v. *Smith*,[30] and *Leser* v. *Garnett*.[31]

In *Hawke* the Court held that it was improper for a state to subject the ratification of a proposed amendment to a popular referendum, declaring that ratification was not ordinary legislation but rather an expression of assent in which "no legislative action is authorized or required." The Court emphasized that the agency for ratification was the "state legislature," that is, the representative lawmaking procedures of the state, the Court held, were not applicable to the act of ratification. If the act of ratification does not invoke these procedures, which customarily included the governor's veto, it is hard to see why the application, a task specifically assigned to the legislatures by the Constitution, would do so.

Judicial Involvement.—The committee, in its report, stated that it was desirable and feasible to have in any implementing legislation a limited judicial review of congressional determinations made in the convention process.[32] It was influenced in this regard by the view that the convention process likely would be used to effect a constitutional change opposed by vested interests and against the backdrop of some congressional inaction. Under these circumstances, the committee believed, it was desirable to have our independent judiciary serve as the arbiter and thereby assure the legitimacy of the process.

The committee questioned both the wisdom and validity of legislation excluding the courts from any involvement, stating: "It is questionable whether the power [of Congress to withdraw matters from the jurisdiction of the federal courts] reaches so far as to permit Congress to change results required by other provisions of the Constitution or to deny a remedy to enforce constitutional rights. Moreover, we are unaware of any authority upholding this power in cases of original jurisdiction." [33]

The committee suggested limits on judicial review in any legislation adopted on the subject. First, it suggested that a congressional determination should be overturned only if "clearly erroneous," which would acknowledge Congress' political role and at the same time guard against arbitrary action. Second, it recommended that judicial remedies be limited to declaratory relief so as to dimnish actual conflict between the branches of government. Finally, if stated that judicial review should not be allowed to delay the amending process unduly; accordingly, it recommended a short limitation period combined with expedited judicial procedures.

In my view, the confusion about the convention method strongly argues, as long as the convention method remains part of the Constitution, for the establishment of procedures governing the process—procedures which neither facilitate the adoption of any particular constitutional change nor make practically impossible any resort to the convention method. As the ABA Committee noted: "The integrity of our system requires that when the convention method is properly resorted to, it be allowed to function as intended." [34]

REFERENCES

(1) See Report of the ABA Special Constitutional Convention Study Committee, entitled "Amendment of the Constitution By the Convention Method Under Article V (1974), p. 8.

(2) The committee consisted of U.S. District Court Judge C. Clyde Atkins, as chairman; Warren Christopher, a former U.S. Deputy Attorney General and now Deputy Under Secretary of State; Professor David Dow, a former Dean of Nebraska Law School; Adrian M. Foley, Jr., President of the Fourth New Jersey Constitutional Convention; U.S. District Court Judge Sarah T. Hughes; Dean Albert M. Sachs of Harvard Law School; JudgeWilliam S. Thompson of the Superior Court of the District of Columbia; Samuel W. Witwer, President of the Sixth Illinois Constitutional Convention; and the writer of this article.

(3) 117 Cong. Rec. 36803-06 (1971) (84 to 0 vote); 119 Cong. Rec. S 12728 (July 9, 1973).

(4) The Records of the Federal Convention of 1787, at 22 (Farrand ed. 1937) (hereinafter cited as Farrand).

(5) 2 Id. 188 (emphasis added).

(6) 2 Id. 468.

(7) Weinfeld, "Power of Congress over State Ratifying Conventions," 51 Harv.L.Rev.473, 481 (1938).

(8) 2 Farrand 557-58.

(9) 2 Farrand 558.
(10) Id. 559.
(11) Id. 629.
(12) Id. 629 and n. 8.
(13) Id. 629.
(14) Id. 629, 630.
(15) 1 Annals of Congress, Cols. 248–51 (1789). See also IV Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 178 (2d ed. 1836) (remarks of delegate James Iredell of North Carolina) ; 1 Annals of Congress, col. 498 (1796) (remarks of Rep. William Smith of South Carolina during debate on a proposed treaty with Great Britain) ; Cong. Globe, 38th Cong., 2d Sess. 630–31 (1865) (remarks of Senator Johnson).
(16) See ABA Report 60–61 for a tabulation by subject matter.
(17) I should note that I have adapted to this article parts of my article entitled "Amending the Constitution Through a Convention," 60 A.B.A.J. 285 (1974), and parts of the ABA Report.
(18) See ABA Report 16 and authorities cited.
(19) ABA Report 16.
(20) Thus, Georgia's Constitution of 1777 provided that "no alteration shall be made in this constitution without petitions from a majority of the counties, . . . at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions referred to the assembly by a majority of the counties as aforesaid."

Pennsylvania's Constitution of 1776 provided for the election of a Council of Censors with power to call a convention "if there appear to them an absolute necessity of amending any article of the constitution which may be defective. . . . But the articles to be amended, and the amendment proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."

For other precedents on the early awareness of the binding effect of a limitation on a convention, see ABA Report 15–16.
(21) ABA Report 14.
(22) T. Cooley, The General Principles of Constitutional Law in the United States of America 15 (2d ed. 1891).
(23) ABA Report 30.
(24) 256 U.S. 368, 375 (1921).
(25) ABA Report 31.
(26) 307 U.S. 433 (1939).
(27) 307 U.S. 433, 453–54 (1939).
(28) ABA Report 33.
(29) 3 U.S. (3Dall.) 378 (1798).
(30) 253 U.S. 221 (1920).
(31) 285 U.S. 355 (1932).
(32) ABA Report 24.
(33) ABA Report 20–21.
(34) ABA Report 40.

Senator BAYH. We will now move to our first panel, if I might. I will ask Prof. Charles Black of Yale Law School and Prof. Walter Dellinger of Duke University Law School to join us.

Professor Dellinger, is that your budding constitutional expert?

Mr. DELLINGER. Yes, sir. That is my son, Hampton. He said, "Senator Bayh has been chairman of the committee for 16 years?" And I said, "Yes," and he said, "In all that time there wasn't a single constitutional convention?"

I explained to him that the committee had other duties.

Senator BAYH. I appreciate his perception.

Professor Black, it is good to have you with us. Why don't you start first since you have a constraint in time.

Mr. BLACK. Yes.

I have a statement, which I shall condense. I have it and copies of certain publications of mine for the record.

Senator BAYH. We will put them in the record at the end of your testimony.

TESTIMONY OF PROF. CHARLES L. BLACK, JR., YALE LAW SCHOOL, NEW HAVEN, CONN.

Mr. BLACK. Now, we all know what we are talking about, so I will not go through the preliminaries again, but I do want to talk to one point which I think is important; that is that, as far as I or anyone else has been able to discover, all of the few applications, pursuant to this provision we are talking about, that were submitted by State legislatures, for more than 100 years after the adoption of the Constitution, were drawn on the assumption that the provisions in article V authorized the legislatures to apply only for a general convention. At least that is all they applied for.

It was apparently not until 1893 that any legislature sent in an application based on the assumption that such applications were valid, when they sought to dictate the agenda, or perhaps I should say the agendum, in the singular, of the "convention for proposing amendments."

Mr. Chairman, think what this means. Through the controversies over the alien and sedition laws in the latter part of the 18th century, over the embargo, the War of 1812, the internal improvements bills, over the Bank of the United States, over the appellate jurisdiction of the Supreme Court, over the early fugitive slave laws—not one single legislature acted as though it had the power to force Congress to call a convention limited to one of those topics.

It did not even occur to Kentucky and Virginia, when they were busying themselves with attempted interposition against what they considered to be unconstitutional acts of Congress, to go after an article V convention. Even in the great nullification and slavery controversies in the 1830's and 1860's; the States that submitted applications made them general.

Just twice, in the 1890's, long after any original understanding, and then with growing frequency, as we know, down to our own times, legislatures have submitted applications so drawn as to reflect the assumption that the article V language authorizes the State legislatures to force the calling of a convention limited to a subject, or even an amendment whose text is dictated by the State legislatures.

I shall soon go into my reasons for believing that this assumption, though obviously convenient for the State legislatures, is a wrong assumption, one that mistakes the meaning of the article V language, "for proposing amendments." But I bring this historical point up front, because, as I have fought tenaciously now for nearly 17 years on this very battlefield, I have found that the very hardest thing to overcome is the tacit—and I am afraid often unconsidered—assumption that applications to a subject-limited, or text-limited, convention would be valid and could so force Congress to call such a convention. This assumption, I wanted to stress at the very beginning, arises from and only from the actions of the State legislatures themselves, as good as entirely in our own century.

There is no precedent anywhere outside of that, no authoritative precedent. The assumption that this power lies in the State legislatures is based altogether on their own implied claims, which are obviously in the nature of self-serving declarations, and which began to be put forward 105 years after the going into effect of the Constitution—on these and nothing else.

My hope is that this will clear the way for our seeing this question for what it is, a new question, coming before us in 1979, without any presumption.

Senate bill S. 3, now before you, is drawn on the theory that these limited applications are valid. My own position is that they are not valid, because they are not, in my view, applications for the thing that article V authorizes the States legislatures to apply for, and so they do not place Congress under any legal or moral obligation to do anything.

This view, if right, has two important and obviously connected consequences. First, it compels the judgment that S. 3 and similar bills are not in pursuance of the Constitution because that bill, in its crucial section 2 and throughout its length, rests upon and only upon the assumption that the article V language refers to a convention restricted as to the "the nature of the amendment or amendments to be proposed."

Second, my view means that most, if not all, the convention applications now pending before the Congress are nullities and that Congress, whatever their number, neither need nor constitutionally may act upon them. Thirty-four times zero is zero. That will be just as true in January, 1980, as it is now. The question whether S. 3 is in pursuance of the Constitution is therefore the very same question as the question whether the applications now before the Congress are valid article V applications. The bill and the applications are drawn exactly on the same theory, and stand or fall together.

I have defended this view in a number of published writings which I have placed on the record, but I will try orally, now, to hit the high spots.

Now, the question, first and last, alpha to omega, is "what is meant in Article V by the words, 'a convention for proposing amendments?' "

I suggest to you, Mr. Chairman, and Senators, that the best approach to ascertaining the plain meaning of these words is to ask what they would mean without modification in the very procedural context in which they are intended and anticipated to be used.

Now, as you know, in their pleadings, lawyers sometimes do what we call "track the statute," phrazing allegations or prayers in the exact statutory language, and no more.

Suppose a State legislature, tracking article V in this way, were to transmit to Congress a paper saying, "Application is hereby made, by the legislature of this State that Congress call a convention for proposing amendments," period, end of application, signature of the officer, and stopping right there.

Now two and only two questions could be moved in that situation: First, would such an application be valid? Second, what would it mean?

First, the application so worded would, of course, be valid. Thirty-four such applications would oblige Congress to call a convention for proposing amendments, providing Congress could agree on constituency and so forth, and I think every Member of Congress would be under a duty to try so to agree.

That would be true exactly because article V is tracked. How could it be that an application in the very words of the article would not be valid?

Second, the words used would mean a general, unlimited convention, to propose such amendments as it thinks ought to be proposed. Since I see no possible basis for doubting this, I can't think how to support the contention other than by saying just that.

Observe, Mr. Chairman, how putting the matter this way transforms the plain meaning and textual issues. We are not talking any longer, if one buys my conclusion about this tracking application, we are not talking any longer about which of two plain meanings, among two mutually exclusive alternatives, the article V language has—unless one is prepared to contest these two conclusions regarding the tracking applications, and I don't see how anyone could. Then one must start with and stick with the position that article V language has one plain meaning that is beyond all doubt, that the words "a convention for proposing amendments," whatever else they may mean, plainly do mean a general, unlimited convention.

Let me put into the record the observation that there is here an important legislative fact. The astonishing fact is that S. 3, in its crucial section 2, and throughout, would actually make impermissible and ineffective the filing of the only kind of application that is certainly valid under article V of the Constitution; namely, an application that tracks the article verbatim.

I urge you to consider, Mr. Chairman, and Senators, whether such a glaring and plan constitutional defect in a bill that has been around as long as this one has does not suggest some respectful skepticism about the soundness of the constitutional counseling that went into its drafting?

Establishment of this crucial point, about the tracking application for a general convention, quite changes the focus of inquiry. When we inquire now whether a State application for a limited convention asks for what article V means, we are inquiring whether, in addition to its incontestably plain conferral, on the legislatures, of what is beyond all doubt a most significant power, very nearly an ultimate power, the power to force the call of a general constitutional convention, article V is to be taken to give them, as well, a different power, not at all obviously meant by article V—the power to force the call of a subject- or text-limited convention. In an inquiry concerning correct amendment procedure, where, more than anywhere else, very clear legitimacy is requisite, great clarity of justification should be looked for before one adds, to a fixed plain meaning, another meaning far from plain. There is, I submit, no justification at all for this addition of a second and different meaning, except the very late but now long-continued self-serving assumptions of the legislatures themselves.

I think I might usefully refer here to the 1974 American Bar Association committee report on this subject, for a sampling of some of

the reasons that have been put forward for adding something else to the plain and obvious meaning of the article V words.

The prestigeful report, for example, invokes the always appealing concept of equality. The convention method, it says, was intended to stand on an "equal footing" with the congressional method. I don't know why they raise that issue, because so it stands, if and only if article V be taken to refer only to a general convention with full freedom of proposal. Such a convention, as one of the two proposing bodies in article V, would stand exactly on an "equal footing" with Congress, the other proposing body under article V. Is not the equality as to national concerns, an equality between the two national bodies to which the proposing function is given?

This symmetrical equality is exactly what my own view leads to.

The bar report puts forward a "greater includes the lesser" argument, seeing "no sound reason as to why they—the State legislatures—cannot invoke limitations on exercising * * *" their authority to procure a convention call. This argument ignores the fact—which underlies much of the bar report's other reasonings, and which underlies, indeed, the most crucial provisions of S. 3 itself—that a general convention on the one hand, and, on the other, a subject- or text-limited convention, are different not in degree but in kind. They are as different in kind as: (1) The freedom to marry; and (2) the freedom to marry 1 of 2 or 3 or even 100 people designated by somebody else. The power to force the call of a convention, and to dictate its agenda, is, if anything, a greater power than the power to force the call of a convention without dictating its agenda. That is exactly why the State legislatures are so eager to claim it.

Now, I urge upon you that these general considerations do not reach at all to the length of justifying an addition to the uncontestedly plain meaning of article V.

I would turn to another aspect of the bar committee report which has come to be a sort of "law and the prophets" in this field. They go through the records of the Constitutional Convention of 1787, and bring in some material from the State constitutions in the late 18th century. Quite obviously these historical matters are not for oral argument, even to such a patient committee as this. I am a man of mercy. But I do want to draw this committee's attention to my full, but I think not terribly prolix argument in my letter of June 1 to Senator Kennedy, to which I have already referred. This letter has been published in the Oklahoma Law Review, and is one of the documents which I have, with your permission, handed up for the record.

These passages in that letter—and I, of course, invite you to read it—do, I think, succeed in justifying to the hilt my statement, elsewhere in the same letter, that the bar committee report, which now exerts a powerful influence, is "deeply flawed, and entirely fails to make its case." I stand firmly by that statement, and if you doubt its rightness, then I do invite your particular attention to those passages in my Kennedy letter in which I deal with their handling of the 1787 Convention, and particularly of the earlier State constitutions.

I believe you will be surprised. I believe that, after the first surprise is over, you never will feel quite the same about this bar committee report. And I make that statement, of course, with the material

in your hands. I am not simply boasting without having it there. I am simply omitting it through mercy given the time.

Neither "plain meaning," then, nor context nor history—as I have tried to develop it in the material which you have—will permit our reading into these simple words, "a convention for proposing amendments," a power in the State legislature, a power unsuspected for a full century after the Constitution came to light, to propose amendments at which the nominally "proposing" body is merely to ratify.

But I think one thing more needs to be said. It is the genius of American constitutional interpretation to read our Constitution in a sensible way, as responsive to need. The following of this master maxim of interpretation is an expression of fidelity, the deepest possible fidelity, to the overriding and dominated intent of the summer of 1787 in Philadelphia, the intention that the document be so read as to work well.

It is not irrelevant, then, even as a matter of law, to point out how thoroughly all national needs for constitutional amendment are already provided for without our straining words to give the State legislatures the power, in effect, to "propose amendments."

The other House of Congress stands every 2 years for election, and represents the American people in their proportion. The Senate was so designed as to represent the States, one by one; each Senator represents and must answer to the people of a whole State.

These two bodies can set in motion and send out to the States any amendment their constituencies want. There is a strange mythical world—familiar to political cartoonists, for example—in which Congress so carefully built to represent the American people by numbers and by States, is looked on as though it were some kind of alien power.

In fact, the constituencies of Congress and the State legislatures are exactly the same people by Constitutional command, and the difference—and it is a distinct though an intangible one—is in the conception of office. The same people are represented here as in the State legislatures, but it would be utterly impossible for a constitutional amendment to be whooped and hollered through these two Houses as they have been in a great many State legislatures. The State legislator ought not to be expected to form just that blend of constituency concern and national concern which ideally characterizes the Congressman and the Senator, and which is, in my observation and judgment, often approximated in congressional and senatorial reality. But that difference between Congress and the legislatures suggests that by far the better place for the origination of piecemeal amendments is Congress, where the overall interest, as well as the constituency interest, is always in view. In refusing to put the new gloss that S. 3 would put on the words of article V, we would not be shutting off a road in any way demonstrated to be needed, or likely to be needed. The whole history of the country fails to show any serious trouble that resulted from difficulty about amending the Constitution.

The route opened up by S. 3 is one which it is very hard to think of as either symmetrical with the traditional route, and its broad consensus among the whole people—well, the way to talk in these high political questions is in numbers. Let's talk for a moment in numbers. States containing considerably less than 40 percent of the whole

population could force a convention limited to proposing a given amendment, if S. 3 is judged to be pursuant to the Constitution and passed.

Under the electoral college plan in the bill, delegates representing less than a majority of the people could implement these proposals. These delegates could be people who, unlike all of you here, and all those across the Capitol, never have to face another election.

Then States containing as few as 40 percent of the people could ratify—a condition, by the way, which did not obtain in 1789, and which I find sometimes astounds people to whom you state it. Three-quarters of the States can be put together that contain 40 percent of the people.

Of course these extremes would not probably ever be reached, but they mark the end of a continuous range of possibility, within which it could easily happen that amendment after amendment could be passed without anything like that heavy preponderance of affirmative desire that the other method, the always-used method, requires.

Of course, that is exactly why this method of amendment is being pressed so hard.

Now, these last considerations would not suffice to overcome a clearly-expressed constitutional command. But there is no such command.

I mention these things to show the utter fallaciousness of any argument that says that any text limitation must be imported in the words of article V, because the importation of such language is politically desirable.

There is no historical warrant, no warrant in common sense, no warrant at all for our seeing in the article V language, which so plainly refers to a general convention, reference to limited conventions as well.

This conclusion, if you come to accept it, must lead not only to the rejection of S. 3, as not in pursuance of the Constitution, but also to the judgment that most of the pending applications are invalid, for the simple and sufficient reason that they do not ask what article V means.

I have argued here for the conclusion that an article V convention must be entirely general, and that if a State application asks for something other than that, it is void. I fully believe in this view, and I have persevered in it a long time, Mr. Chairman. I think if I am wrong about it, it is what the theologians call "invincible ignorance."

I am prepared to argue from any stump. Tom O'Neill asked me if I would go on the road, and I said I sure would.

But would be quite sufficient now to hold to the more modest, and I should think reasonably self-evident proposition that, at the least, an application for the assembling of a national constitutional convention for the purpose of proposing a textually set out or minutely described amendment is a mere travesty of grown-up constitutionalism. Assembling a national convention from Maine, Alaska, Florida, and Hawaii, and reserving the rooms and getting the requisite three chaplains, one from each of the major faiths, deciding who is going to get the gavel, or which pieces of it, after it is over, people coming in to perform such a ministerial or rigorously channeled function, is a bit of foolish pageantry that no one can think the Constitution calls for.

It reminds me of Henry VIII's congés d'élire, which gave cathedral chapters leave to elect a bishop, namely, the bishop designated by Henry VIII.

The differences here—since the tactics have changed somewhat—the differences between a directly quoted amendment to be proposed, and a minutely described amendment to be proposed, is utterly trivial. I hope at least that the Congress will not be intimidated by these. They cannot possibly be what article V means, because article V was drawn by serious people, and they should be regarded as without force. I have heard it said that, while these narrowly-drawn applications, for proposing one amendment described in advance may be invalid, in that their attempt at limitation fails, nevertheless, that Congress ought to treat them hospitably and call a convention anyhow. After all, what is constitutional law among friends? I think such thoughts must proceed from people who have not read the applications that are coming in.

As to the applications with the words, "sole and exclusive purpose," and a self-destruct clause in some of them, if that purpose is departed from at all, as to these, the suggested hospitality, Mr. Chairman, is the hospitality which says that we are strong for you and love you, and please come right in, but leave your left leg outside. It is the hospitality of the spider to the fly.

In the main, it is entirely clear that the applying legislatures very much desire not to have any but the severely limited convention applied for. That would be nothing but irony in the concept of deference to the State legislatures, when that deference consists in giving them what they have said they very much don't want.

I have in my statement a number of specific points which are of importance, but not of this dominating overall importance, concerning defects which I first noted in the bill that was one of Senator Ervin's bills, which was antecedent to this, and which still exist in this bill, but I believe I will stop there for time purposes.

I very gladly will answer, or deal with, any questions that anybody wants to ask.

Senator BAYH. Thank you very much, Professor Black, for your well thought out and enthusiastically given testimony.

Are you under a time limitation, so that we should perhaps ask questions now?

Mr. BLACK. I am not under that kind of time line. I have to be in New York at 6:30 for a testimonial dinner for Jack Greenberg of the NAACP defense funds. I will be there in plenty of time.

Senator BAYH. Is it all right to let Professor Dellinger go now, then?

Mr. BLACK. Certainly.

[Mr. Black's prepared statement and additional material follow:]

PREPARED STATEMENT OF PROFESSOR L. BLACK, JR.

Mr. Chairman and Senators, I thank you for the chance to appear before you on this occasion. My remarks will be directed formally at S. 3, but my scanning of the staff analysis of the House bills tells me they differ very little among themselves or from S. 3, and not at all on the principal point I shall try to make.

The Constitution's Article V provides for a method of amendment never yet used. "On Applicaton of the Legislatures of two-thirds of the States * * * Con-

gress shall call a Convention for proposing Amendments * * *" The proposals emanating from such a convention, to become effective as Amendments, must be ratified by three-fourths of the States, just as is true of proposals passing through Congress, the method of proposing always used up to now.

So far as I or anyone else can discover, all of the few applications pursuant to this provision that were submitted by state legislatures, for more than one hundred years after the adoption of the Constitution, were drawn on the assumption that the language I have quoted authorized these legislatures to apply for a general constitutional convention. It was apparently not until 1893 that any legislature sent in an application based on the assumption that such applications were valid when they sought to dictate, usually very narrowly, the agenda—or I should say the agendum, in the singular—of the "convention for proposing amendments."

Think what this means. Through the controversies over the Alien and Sedition Laws, over the Embargo and the War of 1812, over the "internal improvements" bills, over the Bank of the United States, over the appellate jurisdiction of the Supreme Court, over the early fugitive slave laws, not one single state legislature acted as though it thought it had the power to force Congress to call a convention limited to one of these topics. It did not even occur to Kentucky and Virginia, in the late 1790's, when they were busy with "interposition" against what they held to be unconstitutional actions of Congress, to go at the matter via application for a subject-liimted Article V convention. Even in the great nullification and slavery contests, of the 1830's and 1860's respectively, the states that submitted applications made them "general," according to all sources and tabulations I have seen.

Just twice in the 1890's, long after any original understanding can have survived, and then with growing freqeuncy down to our own times, legislatures have submitted applications so drawn as to reflect the assumption that this Article V language authorizes the state legislatures to force the call of a convention limited to a subject, or even to a particular amendment's text, dictated by the state legislatures.

I shall soon go into my reasons for believing that this assumption, though obviously a more than convenient one for the state legislatures, is a wrong assumption, one that quite mistakes the meaning of the Article V phrase, ". . . a Convention for proposing Amendments . . . ." But I chose to bring this roughly striking historical point up front because, having fought tenaciously for nearly seventeen years on this very battlefield, I have found that the hardest thing to overcome is the tacit and, I am afraid often unconsidered assumption that applications for a subject-limited or even a text-limited convention are valid, and place Congress under an obligation to call such a limited convention, if such applications come in from the legislatures of two-thirds of the states. This assumption, I wanted to stress at the beginning, arises from and only from the actions of the state legislatures themselves, as good as entirely in our own century. No judicial court of any kind has ever held anything bearing in any way on this question; as far as I know, not so much as a judicial obiter dictum, in all the years between 1789 and 1979, faintly supports it. There is no precedent, so much as arguably, in any action taken by the Congress. The assumption that this power lies in the state legislatures is based altogether on their own implied claims, which are obviously in the nature of self-serving declarations, and which first began to be put forward 105 years after the going into effect of the Constitution—on these and on nothing else.

My hope is that this preliminary consideration will clear the way for the treating of this question for what it is—a new question, coming before us in 1979 without any presumption.

Senate Bill S. 3, now before you, is drawn on the theory that these limited-convention applications are valid. My own position is that they are not valid, because they are not applications for the thing Article V, properly interpreted, authorizes the state legislatures to apply for—and that, consequently, state legislative applications for subject-limited conventions, being applications for something other than what Article V means, are not capable, whatever their number, of placing the Congress under any legal or moral obligation to do anything.

This view, if it is right, has two important consequences. First, it compels the judgment that S. 520 is not in pursuance of the Constitution, because that bill (in its crucial Section 2 and through all its length) rests upon and only upon

the assumption that the Article V language refers to a convention restricted as to the "nature of the amendment or amendments to be proposed." [S. 3, sec. 2] Secondly, my view, if correct, means that most if not all the convention applications now pending before Congress are nullities, and that Congress neither need nor constitutionally may act in obedience to them, whatever their number. 34 times zero is zero, and that will be just as true in January 1980 as it is now. The quetsion whether S. 3 is in pursuance of the Constitution is the very same question as the question whether the "applications" now before Congress are valid Article V applications; the bill and the applications are drawn on exactly the same theory, and stand or fall together.

Now I have defended this view of mine in a number of places, but principally in three writings—a 1963 article in the Yale Law Journal, a 1972 publication (in the same Journal) of a letter to former Chairman Celler of House Judiciary, concerning the Ervin bill of that day (a bill substantially the same, on this point at least, as the present S. 3) and a letter this year to Senator Kennedy—a letter very recently published in the Oklahoma Law Review. Being one who loves to show mercy, I am happy to be able to tell you that these writings, products of a controversy spanning 16 years, add up to just 53 pages. I am herewith submitting photocopies of these three writings, for inclusion in the record. This is no hour for mock humility; I hope some of you will have time to read them. [Formal citations: (1) The Proposed Amendment of Article V: A Threatening Disaster, 72 Yale L.J. 957 (1963); (2) Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189 (1972); (3) Amendment By National Constitutional Convention; A Letter to a Senator, 32 Okla.L.Rev. 626 (1979).] Recently, writings by others have supported my position—notably articles by Professor Walter Dellinger of Duke University Law School, and by Professor Bruce Ackerman of the Yale Law School. The Chairman of this Committee has had a letter, I believe, from the distinguished constitutionalist Professor Charles Alan Wright, of the University of Texas Law School, dated 24 August of this year, and agreeing substantially with my position. I don't feel as lonesome as I used to.

But let me try here, orally, to hit the high spots, drawing on my own publications, and so marching on my own feet.

The question, first and last, is what is meant, in Article V, by the words, "* * * a Convention for proposing Amendments * * *" I suggest to you, Senators, that the best approach to ascertaining the plain meaning of these words is to ask what they would mean, without modification, in the procedural context in which they are intended to be used. As you know, in their pleadings lawyers sometimes "track the statute," phrasing allegations or prayers in the exact statutory language. Now suppose a state legislature, "tracking" Article V, were to transmit to Congress a paper saying: "Application is hereby made, by the legislature of this state, that Congress call a Convention for proposing Amendments"—the exact language of Article V—and stopping there. Two and only two questions could arise: First, would such an application be valid? Secondly, what would it mean?

First, the application, so worded, would of course be valid. Thirty-four such applications would oblige Congress to call a convention for proposing amendments (provided Congress could agree on the procedural and constituency specifications—and there would be a duty resting on each member of Congress to try so to agree). That would be true exactly because Article V is "tracked." How could it be that an application for the very thing the Article mentions, in the very words of the Article, would not be valid?

Secondly, the words used would mean, "a general, unlimited convention, to 'propose' such amendments as it thinks ought to be proposed." Since I can think of no possible basis for doubting this, I cannot know how to support this conclusion, beyond pointing to its obviousness. Perhaps one might go so far as to ask, "If not that, what would these words, mean, occurring alone in an application?"

Observe how putting the matter this way transforms and organizes the "plain meaning" and contextual issues. We are not talking, any longer, about which to two "plain meanings" the Article V language has. Unless one is prepared to contest the answers to my two questions regarding this "tracking" application, one must start with and stick to the position that the Article V language has one plain meaning that is beyond all doubt—that the words, "a Convention for proposing Amendmens," whatever else they may mean, plainly means "a general, unlimited convention."

(Let me put in a parenthesis here. The astonishing fact is that S. 3, in its crucial Section 2 and throughout, would actually make impermissible and ineffective the filing of the only kind of application that is certainly valid under Article V of the Constitution—namely, the application that "tracks" the Article verbatim. I urge you to consider, Senators, whether such a glaring and plain constitutional defect, in a bill that has been around as long as this one has, does not suggest some respectful skepticism about the soundness of the constitutional counsel that underlay its drafting.)

Establishment of this crucial point, about the "tracking" application for a general convention, quite changes the focus of inquiry. When we inquire now whether a state application for a limited convention asks for what Article V means, we are inquiring whether, in addition to its incontestably plain conferral, on the legislatures, of what is beyond all doubt a most significant power, very nearly an ultimate power, the power to force the call of a general constitutional convention, Article V is to be taken to give them, as well, a different power, not at all obviously meant by Article V—the power to force the call of a subject- or text-limited convention. In an inquiry concerning correct amendment procedures, where, more than anywhere else, very clear legitimacy is requisite, great clarity of justification should be looked for before one adds, to a fixed plain meaning, another meaning far from plain. There is, I submit, no justification at all for this addition of a second and different meaning, except the very late but now long-continued self-serving assumptions of the legislatures themselves.

I think I might usefully refer here to the 1974 American Bar Association Committee Report on this subject, for a sampling of some of the reasons that have been put forward for adding something else to the plain and obvious meaning of the Article V words.

That prestigeful Report, for example, invokes the always appealing concept of equality: "[T]he convention method (it says) * * * was intended to stand on an equal footing with the congressional method." But so it stands, if (and I think only if) Article V be taken to refer only to a general convention, with full freedom of proposal. Such a convention, as one of the two "proposing" bodies under Article V, would stand exactly on an "equal footing" with Congress, the other "proposing" body under Article V. Is not the equality to be sought, as to national concerns, an equality between the two national bodies to which the "proposing" function is given? This symmetrical equality is just what my own interpretation leads to.

The Bar Report puts forward a "greater includes the lesser" argument, seeing "no sound reason as to why they [the state legislatures] cannot invoke limitations on exercising * * * " their authority to procure a convention call. This argument ignores the fact—which underlies much of the Bar Report's other reasonings, and which underlies, indeed, the most crucial provisions of S. 3 itself—that a general convention on the one hand, and on the other a subject- or text-limited convention, are different not in degree but in kind. They are as different in kind as (1) the freedom to marry; and (2) the freedom to marry one of two or three or even a hundred people designated by somebody else. The power to force the call of a convention, and to dictate its agenda, is if anything a greater power than the power to force the call of a convention without dictating its agenda. That is exactly why the state legislatures are so eager to claim it.

I urge upon you that no such general considerations come close to being sufficient for our adding, to the plain meaning of the words, "a Convention for proposing Amendments," another meaning of great dubiety.

The Bar Committee Report goes through the Records of the Constitutional Convention of 1787, and brings in some material from state constitutions of the late eighteenth century. Quite obviously these historical matters are not for oral argument, even to such a patient Committee as this. I remain a man of mercy. But I do not want to draw this Committee's attention to my full (but I think not terribly prolix) argument of these historical points, in my letter of 1 June to Senator Kennedy, to which I have already referred. In those passages in that letter, I think I succeed in justifying to the hilt my statement, elsewhere in the same letter, that the Bar Committee Report, which "now exerts a powerful influence * * * is deeply flawed, and entirely fails to make its case * * *" I stand firmly by that statement; if you doubt its rightness—and of course you must—then I do invite your particular attention to those passages in my Kennedy letter in which I deal with the Bar Committee's handlings of the 1878 Convention, and of the early state constitutions. I believe you will be surprised.

I believe that, after your first surprise is over, you will never feel quite the same about this Bar Committee Report. I would refer you also to the historical analysis in Professor Dellinger's article, to which I have alluded; he and I, writing quite independently, seem to have wound up at about the same place at the same time.

Neither plain meaning, then, nor context, nor history permit our reading into these simple words, "a Convention for proposing Amendments," a power in the state legislatures, a power unsuspected for a good century after the Constitution began its life, to propose, in effect, amendments which the convention, nominally the proposing body, is merely to ratify. But I think one thing more needs to be said. It is the genius of American constitutional interpretation, to read our Constitution in a sensible way, as responsive to need. The following of this master maxim of interpretation is an expression of fidelity to the overriding and dominating intent of the summer of 1787 in Philadelphia—the intention that the document be so read as to work well. It is not irrelevant then, even as a matter of law, to point out how thoroughly all national needs for constitutional amendment are already provided for without our straining words to give the state legislatures this power, in effect, to propose amendments.

The other House of the Congress stands every two years for election, and represents the American people in their proportion. The Senate was so designed as to represent the states, one by one; each Senator represents and must answer to the whole people of one separate state. By the extraordinary majorities sensibly to be required for constitutional amendment, these two bodies can set in motion, and send out to the states, any amendment their constituencies want.

There is a strange mythical world in which Congress, so carefully built to represent the American people, by numbers and by states, is looked on as though it were an alien power. In fact, the constituencies of Congress and of the state legislatures are exactly the same, by constitutional command. The difference, and it is a distinct though an intangible one, is in the conception of office; though exactly the same people are represented here as in the legislatures, it is utterly impossible to imagine a proposal of an amendment to the Constitution being whooped and hollered through these Houses in the way in which that has happened in a good many legislatures.

The state legislator ought not to be expected to form just that blend of constituency concern and national concern which ideally characterizes the Congressman and the Senator, and which is, in my observation and judgment, often approximated in congressional and senatorial reality. But that difference between Congress and the legislatures suggests that by far the better place for the origination of piecemeal amendments is Congress, where the overall interest, as well as the constituency interest, is always in view. In refusing to put the new gloss that S. 3 would put on the words of Article V, we would not be shutting off a road in any way demonstrated to be needed, or likely to be needed. The whole history of the country fails to show any serious trouble that resulted from difficulty about amending the Constitution.

The route opened up by S. 3, and by the theory underlying it, is one which it is very hard to think of as either symmetrical with the traditional route, or as other than dangerous, if broad consensus, among the whole people, is what is wanted. States containing considerably less than 40 percent of the population could force a convention limited to proposing a given amendment. Under the "electoral college" plan of delegate apportionment in this bill, delegates representing less than a majority of the people could obediently do the nominal "proposing"; these delegates—and this is very important indeed in a democracy—could be people who (unlike all of you here, and all those across the Capitol) never have to face another election. Then, States containing as few as 40 percent of the people could ratify—a condition, by the way, which did not obtain in 1789. Of course, these extremes would not probably often be reached. But they mark the end of a continuous range of possibility, within which it could easily happen that amendment after amendment could be passed without anything like that heavy preponderance of affirmative desire that the other and always used method requires. Of course, that is exactly why this method of amendment is being pressed so hard.

Now these last considerations would not suffice to overcome or to nullify a clearly expressed constitutional command that state legislature applications, though subject- or text-limited, be given the Article V effect. That, however, is not the situation at all. I have mentioned these things only to show the utter fallaciousness of any argument which, in one form or another, says that a power of subject or text limitation must be imported into the words of Article V, because the importation of such a power, into that language, is politically desirable.

In summary on this principal point, there is no contextual warrant, no functional warrant, no historical warrant, no warrant in common sense, no warant at all, for discerning, in that Article V language which so plainly and inevitably refers to a general convention, an added and exceedingly dubious reference to something qualitatively different—a convention led in with blinders put on by the state legislatures. This conclusion, if you come to accept it, must lead not only to the rejection of S. 520, as not in pursuance of the Constitution, but also to the judgment that most or all of the pending applications are invalid, for the simple and sufficient reason that they do not ask for what Article V means to be asked for by the state legislatures, if they are to put Congress under the obligation to take the almost ultimately solemn step of summoning a national constitutional convention.

Let me add one final word: I have argued here (and more amply elsewhere) for the conclusion that an Article V convention must be entirely general, and that a state application asking for something other than that is void. I fully believe in this view. But it would be quite sufficient, for now, to hold to the far most modest (and I should think reasonably self-evident) proposition that, at the least, an application for the summoning of a national constitution convention, "for the purpose of proposing" a textually set-out or minutely described amendment, is a mere travesty of grown-up constitutionalism. Assembling a national convention, from Maine and Alaska, from Florida and Hawaii, for such a ministerial or rigorously channelled function is a bit of foolish pageantry one can by no stretch of fancy think the Constitution calls for. It reminds me of Henry VIII's congés d'élire, which gave cathedral chapters "leave to elect" a bishop—namely, the bishop designated by Henry VIII in the document in which "leave to elect" was given. The difference between a directly quoted amendment to be "proposed," and a minutely described amendment to be "proposed," is trivial. Many—I think most—of the current applications are of this kind. I hope at least Congress will not be intimidated by these. They cannot possibly be what Article V means, for Article V was drawn by serious people, and they should be regarded as obviously without force.

One more thought just here: I have heard it said, though I have not yet seen it printed, that, while these narrowly drawn applications, dictating strict limits to so-called "convention for proposing" one amendment described in advance, are not valid, in the sense that the attempted limitation is futile, nevertheless, Congress ought to treat them "hospitably" and call a convention anyway. After all, what is constitutional law between friends? Such thoughts must proceed from people that have not really read the applications that have been coming in. As to these real applications, the suggested "hospitality" is a hospitality that says, "Come right in, make yourself at home, but please leave your left leg outside." It is the "hospitality" of the spider to the fly. In the main the real applications we have make it entirely clear that the applying legislature very much desires not to have any but the severely limited convention applied for. (There would be nothing but irony in a "deference" to the state legislatures, that consisted in giving them what they have said they don't want.)

This bill, S. 520, founded as it is on an altogether wrong constitutional theory, has many smaller but still enormously important things wrong with it. In my 1972 published Letter to a Congressman, referred to and cited above, I discussed a number of these defects, in a virtually identical bill then pending before House Judiciary. Obviously, I cannot here go into these matters thoroughly, and there is perhaps little use going into them less than thoroughly. I think, however, that I ought just barely to allude to the principal ones among these defects, most respectfully asking that this Committee, before passing out such a bill, consider the very short supporting arguments which I have put in writing and put on this record:

1. This bill, as to the convention-summoning vote commanded in its pivotal Section 6, rests on the constitutionally impossible assumption that this Congress can bind the consciences of successor Congressmen and Senators, on questions of constitutional law and of policy.

2. Even if (as is not the case) the 96th Congress could bind its successors, it would be foolish to settle great constitutional and prudential questions at a time when public and professional attention are not focused on them, and when (with respect to the prudential questions) the conditions of the future are unknowable.

3. Quite without warrant, the bill gives maximum control over the whole process to the state legislatures, including presumptive referral to them, for ratification, of the very amendment they have already, in the normal colloquial sense, "proposed." This comes out very clearly in Section 12(c) of S. 520.

4. The bill's plan of representation at the convention is wholly indefensible. S. 250, Section 7(a) rests on analogy with the electoral college, which I have strongly defended in its own field of operation, but which has no contribution to make here. Generally, this bill fails to provide for that heavily preponderant consensus which ought to precede amendment of the Constitution.

5. The exclusion of the President from the process of calling a convention is flatly and obviously unconstitutional under Article I, Section 7, and the only question about this is how it could be that some who claim to be "strict constructionists" could espouse such a position.

6. The exclusion of state governors from the application process has no rational basis, and invades the normal powers of the states over their own procedures. (S. 520, Section 3(a))

7. The bill's withdrawal of questions of law from the judiciary is unwarranted, dangerous, impractical, and inconsonant with our system of government. Sections 3(b), 5(c), 10(b) and 13(c).

8. The provision for virtually automatic submission of amendments is reckless. Section 11(b) not only makes submission automatic unless within 90 days both Houses direct otherwise, but goes to the astounding length of providing that even this contrary direction shall be valid only if rested on the ground of the amendment's touching the wrong subject, or the convention's not following this one Act. Under this provision, however grossly and notoriously defective and corrupt the proceedings of a convention might have been, however catastrophic the effect of submission might be, the Congress can do nothing at all about it. If you doubt this reading of Section 11(b) in S. 520, please read it for yourself. Now of course no sensible Congressman or Senator of the future would regard such a provision as binding on him or her. The 96th Congress has no power to bind the 99th Congress. But the Administrator of General Services, to whose usually harmless routines this ticking atom bomb is committed by this bill, might very well feel obliged to act, if a resolution could be blocked for just ninety days, or perhaps even if the wrong ground were assigned by the Congress for its action. I ask you, Senators, to consider whether a bill that, after many drafts, over many years, contains such a reckless provision, can be looked on as anything but an attempt to strew flowers in the path of amendments taking this convention route, and to make their passage much easier than passage through the Houses of Congress by two-thirds votes.

I will permit myself one more word. I don't want to win this fight on any other ground than rightness. But it is fair to point out to you the solemn importance of the questions here. The national House of Representatives is the only body, anywhere on earth, wherein the whole American people are represented in proportion to their numbers. The waves of pseudo-populist rhetoric, that would somehow identify the state legislatures with "the people," break against this rock. (This identification, moreover, would have seemed absurd to the delegates in 1787 Philadelphia, who often, in their deliberations, contrasted the legislatures and the people.) About half the American people live in nine states. Three-quarters of the states (the ratifying number) can contain as few as forty percent of the people, and a ratifying combination might therefore easily contain less than half the people. Anything that builds up the power of the state legislatures, counted one by one, is not a facilitation of democracy but strongly in derogation of the American national democracy.

I am not attacking the senatorial system, which I believe in, and have recently defended against attack from another quarter. Nor do I wish to deny to the state legislatures any power that is legitimately theirs. But the population-ratio among states now runs as high as 65 or 70 to one, between five and six times as high as the highest ratio at the coming into effect of the Constitution. A nation believing in democracy ought to think a long time, and weigh evidence and argument very carefully, before it makes a new precedent, or passes a new law, that moves further toward equating the one to the 65. And a nation that believes itself to be a nation ought likewise to hesitate before acquiescing in the flow of new and crucially important power, as to national concerns, out to 50 legislatures meeting in 50 places.

There exists now, as I have shown, not the faintest hint of precedent for this step, whether as to this bill or as to action upon the pending applications. For the reasons I have given, I intensely hope that Congress will not now, after almost 200 years, proceed to make one.

I should be glad to try to deal with any questions anyone may have.

Thank you, Mr. Chairman and Senators.

Statement on Constitutional Convention Applications

(By Charles L. Black, Jr.)

(Excerpt from "The Constitution and the Budget", American Enterprise Institute (1980))

INTRODUCTORY

The Constitution's Article V provides for a method of amendment never till now used. "On Application of the Legislatures of two-thirds of the States . . . Congress shall call a Convention for proposing Amendments . . . " These proposals, to become effective, must be ratified by three-fourths of the States, just as is true of proposals passing through Congress, the method of proposing always used up to now.

Recently, many State Legislatures have passed resolutions asking Congress to call a Convention "for the purpose of proposing" some specific amendment, spelled out in detail. It now seems possible that one or more of these proposals will be the subject of convention applications from 34 States, the magic two-thirds.

We must separate our judgment on the merits of any particular amendment from our judgment on the legitimacy of the procedure. If we make a wrong precedent now, as to the meaning of Article V, we will open wide a door probably never to be closed. Before we pack our bags for this Convention, let's stop and ask "Is this trip really necessary?"

I think that the applications now on file are nullities, imposing no obligation on Congress. I think the Article V language means a "general Convention," to propose such amendments as seem good to that Convention. And I think that the state applications, to be effective, have to ask for that, and not for something radically different—a severely limited Convention. Applications asking for something other than what is meant by Article V are nullities, and thirty-four times zero is zero.

At the very least—and this is all that really must be decided now—each pending application for a Convention "for the purpose of proposing" some minutely described amendment is a travesty of anything the Framers of Article V could have conceived. Absolutely nothing faintly supports such an absurd distortion of a provision for a deliberative process. I hope Congress will not be intimidated by such "applications"; they place Congress under no obligation whatever.

The state of the controversy on these matters has been heavily affected by a Report by a Special Constitutional Convention Study Committee of the American Bar Association, "Amending of the Constitution by the Convention Method Under Article V" (1974) [hereinafter cited as Bar Report]. This Report commits itself to the view that applications for a subject-limited convention are valid.

I have reason to believe that this Report now exerts a powerful influence. It is my view that it is deeply flawed, and entirely fails to make its case on this issue. I shall cast this statement partly in the form of answers to some of its points. All the most important issues will thus be raised, and their current status indicated.

"PLAIN MEANING" AND CONTEXT

The question, first and last, is what is meant, in Article V, by the words, ". . . a Convention for proposing Amendments . . . " The best approach to ascertaining the plain meaning of these words is to ask what they would mean, without modification, in the procedural context in which they are intended to be used. Lawyers sometimes "track the statute," phrasing allegations or prayers in the exact statutory language. Suppose a state legislature, "tracking" Article V, were to transmit to Congress a paper saying: "Application is hereby made that Congress call a convention for proposing amendments"—the exact language of Article V. Two and only two questions could arise: First, would such an application be *valid?* Secondly, what would it *mean?*

I am tempted to say that these critical questions answer themselves. But there has been so much confusion on this that I will—though embarrassed by the obviousness of what I shall have to say—go a little further.

First, the application, so worded, would of course be valid. Thirty-four such applications would oblige Congress to call a convention (provided Congress could agree on the procedural and constituency specifications—and there would be a duty resting on each member of Congress to try so to agree). That would be true exactly because Article V is "tracked." How could it be that an application for the very thing the Article mentions, in the very words of the Article, would not be valid?

Secondly, the words used would mean "a general, unlimited convention, to 'propose' such amendments as it thinks proper." Since I can think of no possible basis for doubting this, I cannot know how to support this conclusion, beyond pointing to its obviousness. Perhaps one might go so far as to ask, "If not that, what *would* they mean?

Observe how putting the matter this way transforms the "plain meaning" and contextual issues. We are not talking, any longer, about *which of two* "plain meanings" the Article V language has. Unless one is prepared to contest the answers to my two questions regarding this "tracking" application, one must start from the position that the Article V language has *one* plain meaning that is beyond doubt—that "a Convention for proposing Amendments," whatever else it may mean, plainly means "a general, unlimited convention."

Establishment of this crucial point quite changes the focus of inquiry. When we inquire now whether a state application for a *limited* convention asks for what Article V means, we are inquiring whether, *in addition* to its incontestably plain conferral, on the legislatures, of a very significant power, the power to force the call of a general constitutional convention, Article V is to be taken to give them, as well, a *different* power, not at all obviously meant by Article V—the power to force the call of a *limited* convention. In an inquiry concerning correct amendment procedure, where, more than anywhere else, very clear legitimacy is requisite, great clarity of justification should be looked for before one *adds*, to plain meaning, another meaning far from plain.

The Bar Committee Report adopts, perhaps unconsciously, the rhetorical device of conceding that the general, unlimited convention is a possibility, but of doing so rather off-handedly, after having fully stated its case for the limited convention. But this order of presentation has to be reversed. We start with the plain fact that Article V means *at least* "a general convention." Seen from that perspective, the Report brings forth nothing near sufficiently weighty to support the addition of a second and far from plain meaning.

The Report invokes the concept of equality: "[T]he convention method . . . was intended to stand on an equal footing with the congressional method." But so it stands, even if Article V be taken to refer only to a general convention. Such a convention, as one of the two "proposing" bodies under Article V, would stand exactly on an "equal footing" with Congress, the other "proposing" body under Article V. The equality to be sought, as to national concerns, is an equality between the two national bodies to which the "proposing" function is given.

The Bar Report [p. 16] puts forward a "greater includes the less" argument, seeing "no sound reason as to why they [the state legislatures] cannot invoke limitations on exercising . . ." their authority to procure a convention call. This argument ignores the fact—which underlies much of the Bar Report's other reasonings—that a general convention and a limited convention are different not in degree but in kind. They are as different in kind as (1) the freedom to marry; and (2) the freedom to marry one of two or three people designated by somebody else.

The Report argues [p. 16] that Article V must mean a limited convention, because otherwise the state legislatures would be "discouraged" from applying for conventions. This argument rests on a poorly concealed begging of the question. Only if we assume in advance that limited conventions are meant by Article V is there anything improper or regrettable in legislatures' being "discouraged" by their not being available. We are all "discouraged" in some ways by the state of the law.

But—more fundamentally—what are the legislatures being "discouraged" from doing? From asking for a *general* convention? But the assumption of the Bar Report is that they are "discouraged" from that already, by the very nature of the general convention. From asking for *limited* conventions? But if that is what is meant the argument is a squirrel-cage; the very thing we are talking about is whether the legislatures are entitled at all, as a matter of law, to force the call of limited conventions. The Committee seems to be saying that, if it be held that

the sound law of the matter is that Article V does not empower the legislatures to force the call of limited conventions, they will be discouraged from asking for these. Quite.

Rember, too, that the supposed "discouragement" is to arise from a fear of the very thing—a general convention—that is incontestably meant by the Article V language, provided one agrees with the arguments with which I began this section.

(There is, by the way, a startling paradox here. Since three-quarters of the state legislatures must, under the usual procedure, ratify any amendment "proposed" by a general convention, it is a little hard to explain a great fear, on the part of these same legislatures, that they may be overwhelmed by unwanted amendments. Whom are they afraid of? I leave the resolving of this paradox to those who are so vigorously supporting these state-legislature applications. The problem is only shifted by the thought, doubtless not likely of frequent realization, that state conventions may be designated by Congress as the ratifying bodies; fear of the headlong folly of such conventions is a fear of the people who will elect them. Why, indeed, is one so afraid of the general *national* convention? Is it well to trust any part at all of the amendment process to people who, you think, would go wild if you turned them loose?)

These Bar Report arguments are poor stuff in themselves. To put them in the context I believe to be established by the opening paragraphs of this section they are obviously not of a weight sufficient to support a second meaning, far less than plain, in addition to the quite plain meaning of the phrase, ". . . a Convention for proposing Amendments . . ."

I stress once again that, if I am right about the meaning of the Article V language, applications for a limited convention are *not* application for the thing meant by Article V, are therefore *not* valid Article V applications, and so impose *no* obligation on Congress.

THE DEBATES IN THE 1787 CONVENTION

The Bar Report's treatment of these should be set out in full:

"The debates at the Constitutional Convention of 1787 make clear that the convention method of proposing amendments was intended to stand on an equal footing with the congressional method. As Madison observed: Article V 'equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.' The 'state' method, as it was labeled, was prompted largely by the belief that the national government might abuse its powers. It was felt that such abuses might go unremedied unless there was a vehicle of initiating amendments other than Congress.

"The earliest proposal on amendments was contained in the Virginia Plan of government introduced in the Convention on May 29, 1787 by Edmund Randolph. It provided in resolution 13 "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislatiure ought not to be required thereto." A number of suggesstions were advanced as to a specific article which eventuated in the following clause in the Convention's Committee of Detail report of August 6, 1787:

> "On the application of the Legislatures of two thirds of the States in the Union, for an *amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*"

"This proposal was adopted by the Convention on August 30. Gouverneur Morris's suggestion on that day that Congress be left at liberty to call a convention 'whenever it pleased' was not accepted. There is reason to believe that the convention contemplated under this proposal 'was the last step in the amending process, and its decisions did not require any ratification by anybody.'

"On September 10, 1787 Elbridge Gerry of Massachusetts moved to reconsider the amending provision, stating that under it 'two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether.' His motion was supported by Alexander Hamilton and other delegates. Hamilton pointed to the difficulty of introducing amendments under the Articles of Confederation and stated that 'an easy mode should be established for supplying defects which will probably

appear in the new System.' He felt that Congress would be 'the first to perceive' and be 'most sensible to the necessity of Amendments,' and ought also to be authorized to call a convention whenever two-thirds of each branch concurred on the need for a convention. Madison also criticized the August 30 proposal, stating that the vagueness of the expression 'call a convention for the purpose' was sufficient reason for reconsideration. He then asked: 'How was a Convention to be formed? by what rule decide? what the force of its acts?' As a result of the debate, the clause adopted on August 30 was dropped in favor of the following provision proposed by Madison:

> "The Legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several states, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S."

"On September 15, after the Committee of Style had returned its report, George Mason strongly objected to the amending article on the ground that both modes of initiating amendments depended on Congress so that 'no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive. . . .' Gerry and Gouverneur Morris then moved to amend the article 'so as to require a convention on application of' two-thirds of the states. In response Madison said that he 'did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application.' He added that he had no objection against providing for a convention for the purpose of amendments 'except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.'

"Thereupon, the motion by Morris and Gerry was agreed to and the amending article was thereby modified so as to include the convention method as it now reads. Morris then successfully moved to include in Article V the proviso that 'no state, without its consent shall be deprived of its equal suffrage in the Senate.' "

As to the first paragraph: I have already dealt with the "equal footing" point. I don't know of anything in the 1787 debates at Philadelphia that supports the statement with which the above quotation opens. I dare say the Bar Committee didn't either, for the Madison quote is not from the Philadelphia records, but from the Federalist. Nor does it weigh very much on either side of the present controversy; the origination "of the amendment of errors" might be accomplished by forcing the call of a general convention. As to what "prompted" the "state" method, or who on earth "labeled" it that, there is little or no evidence; the Bar Report cites none. The last sentence of the paragraph weighs nothing on the present scale; a general convention would of course be a "vehicle of initiating amendments other than Congress," quite as well as would a limited convention. More so.

For whatever reason, the Bar Report, in mentioning the Virginia Plan's provision for amendment without the assent of the "National Legislature, does not tell us that this latter provision, excluding Congress, was repeatedly postponed, by vote after vote, and never passed, so that the Committee of Detail went into session with nothing resolved on except that there should be "Provision . . . for the Amendment of the Articles of Union . . ." [2 Farrand's Records 133]. The suggestion that any policy at all emerges from all this would be (or is?) simply ridiculous.

The rest of the Bar Report's just-quoted treatment of the 1787 Philadelphia debates is of a not unknown genre of "legislative history"—the kind that tells you a few things here and there, but never quite gets down to explaining why they prove what they are obviously put forward to prove. Marching on my own feet, I will discuss first the most critical juncture, the action on September 15, 1787, by which the language now under scrutiny was added. I think it well to put before your eyes the whole (very short) episode, as reported by Madison, beginning with the provision as it stood before the final change:

"Art— V. The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents

and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the (1 & 4 clauses in the 9.) section of article I .

"Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.

"Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

"Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of ⅔ of the Sts

"Mr Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.

"The motion of Mr. Govr Morris and Mr. Gerry was agreed to nem: con (see: the first part of the article as finally past)." [2 Farrand Records, 629–30] (footnotes omitted)

You will note that not only Mason but also Sherman objected to the amending article, as it then stood. The Bar Report mentions only Mason; I can't think why. While Mason, broadly, thought amendment was too *difficult* under the article as it stood, Sherman thought, broadly, that it was too *easy*, and therefore dangerous. He feared, specifically, the amending power of the *States*. Why does the Bar Committee think the immediately following alteration (which was to the present form) was proposed by Morris and Gerry to meet Mason's fears, and not to meet Sherman's fears. As Madison immediately saw and said, the Morris-Gerry proposal did not respond to Mason's fears at all, so far as Congress's role went. The proposal, instead, put another body, the convention, between the state legislatures and the passage of an amendment to the Constitution. This interposition of another, nationally-oriented body might more plausibly be seen as a response to Sherman's fears of "the States."

In only one way was this change possibly responsive to Mason's speech. He was, you will note, afraid that "the people" could not obtain amendments they wanted. If any one thing is certain about 1787 thinking, it is that "the people" and "the legislatures" were not thought to be the same thing—as some recent blusterings seem to assume they are. On the other hand, it was *conventions* that were seen as the organs of "the people." This is why the Constitution was sent out for ratification by conventions rather than by the legislatures. I am not guessing; this thought occurs at many points, but is best expressed by Madison, on June 5, 1787, in defending this submission to conventions: ". . . [H]e thought it indispensable that the new Constitution should be ratified in the most unexceptional form, and by the supreme authority of the people themselves." [1 Farrand's Records 123] *That* is what he thought a *convention* embodied.

It is possible then, that the insertion of a *convention* mode of proposal may have been conceived as a partial satisfaction of Mason's concern about "the people." But if that is true, then the suggestion is not that such a body, the visible organ of "the people," was to be led in with blinders put on by the legislatures, who were *contrasted* with "the people" in the discussion of the mode of ratification to be chosen for the new Constitution. Mason's fears, if they concerned the power of "the people," would be best answered by a provision for a *general convention*, wherein "the people" would have most ample scope of authority.

It is to be noted, moreover, that Gerry (who co-proposed the present language) and Mason (whom it was supposed to mollify) were both, *some minutes later* on the same day, going to refuse to sign the new Constitution on the ground that a

new "general Convention" was not to be absolutely mandatory, as they thought it should be. How likely is it that people so minded would be pushing on the same day for subject-limited conventions? Is it not more likely that, disappointed in not getting an absolutely mandatory second general convention, they were pushing for the next best thing—the chance to get such a general convention by legislative applications?

The only other passages of any importance concern the Committee of Detail's August 6 provision (quoted by the Bar Report, above) and the September 10 change therein.

The Bar Report rightly sees that the August 6 proposal was for a convention, to be summoned on application of two-thirds of the legislatures, that would have *final power to amend*, without "ratification by anybody." [Bar Report p. 12] What the Bar Committee seems not to have seen is that, even if this provision did allow the legislatures to limit such a convention to a particular subject or proposal, the propriety of that dispensation, in the case of a convention with *final power*, needing no ratification, is a different thing, by light-years, from the propriety or necessity of limiting a convention whose proposals do have to be ratified. The two things have nothing to do with each other.

Above all, the Bar Committee does not seem impressed by the fact that this August 6 proposal, on which they seem to be placing some sort of reliance, was rejected and thrown out, on September 10, on the grounds that it gave too much power to two-thirds of the states (Gerry) and that "The State Legislatures will not apply for alterations but with a view to increase their own powers" (Hamilton). [2 Farrand's Reports 557–558] (Gerry, be it remembered, was a co-mover of the language now in Article V.)

The most curious thing, confounding confusion, is that the phrase "for an amendment of this Constitution" (see the August 6 provision, quoted in the Bar Report, above) probably meant "for a process of amendment of . . ."—using the word "amendment" to mean this process of amending or its general result, rather than what we would call, in a different phrase, "an amendment *to*" the Constitution. I have three contemporary examples of this usage. Williamson, a delegate, wrote James Iredell, on July 22, 1787, from Philadelphia, that he hoped the whole "system" agreed on in Philadelphia "may fairly be called an *amendment* of the Federal Government." [3 Farrand's Records 61] Charles Pinckney, in the South Carolina ratification debates, spoke of the aim in Philadelphia as "the formation of a new, or the amendment of the existing system." [3 Farrand's Records 248]. In Federalist No. 40, Madison refers to the Virginia proposal of the Annapolis Convention as being "toward a *partial* amendment of the confederation." The use of the word "partial" implies that "an amendment of the confederation," without that word, would have meant "an unlimited process of alteration." By no possibility does even the phrase "toward a partial amendment," applied to the Virginia initiative for Annapolis, refer to a specific alteration. "An amendment *of* the Constitution" did not mean the same thing to these people as "an amendment *to* the Constitution"; I would be interested in seeing examples to the contrary.

Now what does all this prove? Of course, next to nothing. I have been through all this material only because the Bar Committee seem somehow to be assuming it helps their case, without ever saying how or why. I submit that my discussion destroys that assumption. And I think that some of the points I have made may help my own case a little. But the over-riding fact is that, however desperately we would like to, we don't know very much about what underlay each vote in Philadelphia in 1787. The records are obviously fragmentary; it is known they became more so as the summer wore on, toward that September 15 on which the crucial vote was taken, two days before fatigued adjournment.

THE NINETEENTH CENTURY RECORD

In an earlier writing of mine on this subject, in the Yale Law Journal, I said that the notion that state legislatures may limit the subject-matter in their applications for conventions was nothing but a product of the creative imagination of the state legislatures themselves in the twentieth century. I used Brickfield's tables, there cited, to establish that, until around the turn of our cenury, through all the turmoils until that time, nothing but general-convention applications were transmitted to Congress by the States. This, if true, is very important, because it shows that, for more than a century after the Constitution went into effect, his

Article V provision was *not* generally understood to empower the state legislatures to set the agenda of any convention they applied for, or to apply for a convention so limited in agenda.

The Bar Report [pp. 59–69] presents data on former state applications that confirm my former statement. As far as these eyes can make out, *all* applications are classified as "general" by the Bar Report, until 1893. There was one that year for direct election of Senators, and another such in 1895. The next subject-matter limited application was in *our own century.* (The Bar Report cites a source of their own, an unpublished thesis not previously known to me, which agrees with my own conclusion [82 Yale L.J. at p. 202] that the 1833 Alabama memorial, dealing with "nullification" was not really an Article V application at all. And for some reason they do not put a 1790 application for "revision of the Constitution" under the "general" category, where of course it belongs.)

Think what this means. Through the controversies over the Alien and Sedition Laws, over the Embargo, over the "internal improvements" bills, over the Bank of the United States, over the early fugitive slave laws, *not one single state legislature* acted as though it thought it had the power to force Congress to call a convention limited to one of these topics. It did not even occur to Kentucky and Virginia, in the 1790's, when they were busy with "interposition" against what they felt to be unconstitutional actions of Congress, to go at the matter *via* a limited Article V convention. Even in the great nullification and slavery contests, of the 1830's and 1860's respectively, the states that submitted applications made them "general," according to the Bar Report's own sources and tabulations.

This is powerful evidence of an original and long-continued understanding, broken (except for the two 1890's applications mentioned above) only in this century, when some state legislatures thought up a bright (and entirely self-serving) notion.

CONCLUSION

There is no good argument and no solid evidence to support the Bar Report. Nothing so much as tends to sustain their conclusion except the prestige of the Committee's members, and that is not enough to be decisive on a fundamental question regarding ultimate constitutional power.

Let me add one final word: I have argued here for the conclusion that an Article V convention must be entirely general, and that a state application asking for something other than that is void. I fully believe in this view. But it would be quite sufficient, for now, to hold to the far more modest proposition that, at the least, an application "for the purpose of proposing" a minutely described amendment is a mere travesty of grownup constitutionalism. Assembling a national convention for such a ministerial or rigorously channelled function is a bit of foolishness one can by no stretch of fancy think the Constitution calls for. It reminds me of Henry VIII's *congés d'elire,* which gave cathedral chapters the "right to elect" a bishop—namely, the bishop designated by Henry VIII. The difference between a directly quoted amendment to be "proposed," and a clearly described amendment to be "proposed," is trivial. Many of the current applications are of this kind. I hope at least Congress will not be intimidated by these. They cannot possibly be what Article V means, and should be regarded as obviously without force.

THE PROPOSED AMENDMENT OF ARTICLE V: A THREATENED DISASTER

By

CHARLES L. BLACK, JR.

Reprinted from the Yale Law Journal
Volume 72, Number 5, April 1963

THE PROPOSED AMENDMENT OF ARTICLE V: A THREATENED DISASTER

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THREE proposals for amending the Constitution have recently come from the Council of State Governments, and are being propelled down the never before used alternative route of article V—the route *via* state applications to Congress for the calling of a convention.[1] Of the three, one (which would establish a Court of the Union, composed of the state Chief Justices in all their multitude, to meet on extraordinary occasions to review judgments of the Supreme Court)[2] is so patently absurd that it will probably sink without trace. Another, eradicating[3] *Baker v. Carr*[4] concerns a special subject, and hence does not generally affect the federal power or the whole shape of the Union. The third is of supreme interest to students of constitutional law. Its adoption would effect a constitutional change of a higher order of importance than any since 1787—if one excepts (and that only doubtfully) the *de facto* change implicit in the result of the Civil War.

It is wonderful that this proposal—which has already commended itself to a number of state legislatures[5]—has been so little noticed. This is doubtless because the proposed change is in procedure. But a change in the procedure of constitutional amendment—unless it is purely formal, and this one is not—is a change in the distribution of ultimate power. The proposed article V, if adopted, would make it easily possible for a proportion of the American people no greater than that which supported Landon in 1936 to impose on the rest of the country any alteration whatever in the Constitution. The people who could do this would be, by and large, those inhabitants of the less populous states

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1. All are set out in full, with an account of their espousal by the Council, in *Amending the Constitution to Strengthen the States in the Federal System*, 36 STATE GOV'T 10 (1963).

2. *Id.* at 13-14.

3. By abolishing all substantive federal guarantees against malapportionment, thus making action by Congress as well as by Court impossible, and by withdrawing the subject entirely from federal judicial power. 36 STATE GOV'T at 12.

4. 369 U.S. 186 (1962) (fourteenth amendment claim against state legislative malapportionment held within federal judicial jurisdiction).

5. According to information informally received, the legislatures of Arkansas, Florida, Missouri, Oklahoma, Kansas, and Wyoming have already passed the Resolution set out in text accompanying note 13 *infra*. In about an equal number of states, one house has passed it.

who reside in the districts that are over-represented in their own state legislatures. "Unto him that hath it shall be given." This component of the population—to which we are all accustomed to conceding a veto power on constitutional amendment, as on many other matters—would under the proposed plan have something very different from a veto power. It would have the affirmative power of forcing its will on the majority, as to anything which may be the subject of constitutional amendment—that is to say, as to everything. Such a proposal ought to be scrutinized with the very greatest care, and the same careful scrutiny should be given to the method by which its proponents hope to coerce its submission to the state legislatures for ratification as an amendment.

The Proposed New Article V.

If this proposal were to win its way through, article V would read as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states. *Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress.* No State, without its consent, shall be deprived of its equal suffrage in the Senate.[6]

It may be convenient to the reader to have set out the text of the present article V:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[7]

The proposed plan, it will be seen, abolishes the (never used) "convention" way of amendment, and puts in its place a method wholly under the control, as to substance and procedure, of the state legislatures. It does this by making it mandatory that Congress submit for ratification any amendment called for by the legislatures of two-thirds of the states, and by simultaneously taking away Congress' power to elect the state convention mode of ratification.

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6. 36 State Gov't 11-12 (1963); see text accompanying note 13 *infra*.
7. U.S. Const. art. V.

At present, an amendment may be passed (and all have actually passed in this way) if two-thirds of each national house wants it, and if it is ratified by three-fourths of the states in the manner chosen by Congress. One might also pass if (on proper application of two-thirds of the states) a convention, summoned by Congress and having such structure as Congress thought wise to give it, proposed the amendment, and if it were then ratified in the manner chosen by Congress.

Along the new route opened by the proposed article V, Congress would control neither substance nor procedure. Three-fourths of the state legislatures, without the consent of any other body, could change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment, make Catholics ineligible for public office, and move the national capital to Topeka. These are (in part at least) cartoon illustrations. But the cartoon accurately renders the *de jure* picture, and seems exaggerated only because we now conceive that at least some of these actions have no appeal to anybody. Some amendments—*e.g.*, something like the Bricker Amendment—would be very likely of early passage. At present the main dangers would be to civil and political rights, to national conduct of foreign relations, and to the federal taxing power. But (particularly since the proposed change would be absolutely irreversible, thirteen states being enough to block its reversal) the cartoon does not exaggerate the possibilities of the long future. A country in which the large majority would have to dread and sometimes submit to constitutional innovations appealing only to a minority could not call itself, even poetically, a democracy, and the possible tensions between consensus and Constitution would be dangerous in the extreme.

At present, when an amendment passes the House and the Senate by two-thirds, there is fair ground for the inference that there is national consensus upon it; at least the means of ascertaining that crucial fact, though rough, are fairly well adapted to the end. If the national convention method, under the present article V, were ever to be used, Congress, in setting up the convention, could ensure that it be so representative as to be likely to express a national consensus. Congress even retains control over the ratification process; if the state legislatures were in its view to come to be dangerously unrepresentative, Congress could provide for ratification by state conventions so chosen as accurately to reflect the views of each state's people. Properly used, the present article V can ensure that no constitutional change be effected which is disliked, deplored, or detested by a distinct majority of the American people.

What is the situation under the proposed new article V? Here one must talk numbers—even statistics of a rough kind. Let us note first that the thirty-eight least populous states, whose legislatures could under the proposed article V repeal the full faith and credit clause, contain about 40 per cent of the country's population.[8] That really ought to be enough. That these particular people should, in the name of federalism, have a veto power, is acceptable; at least it

8. Calculated from the 1960 Census, 1963 WORLD ALMANAC 255. The author is ill at reckoning, but the figures given here are not far off.

is accepted beyond change. What rational ground could there be for giving them, in addition, the power affirmatively to govern the rest of the people?

But of course one cannot stop there. The power given by the new article V is not in the states but in their legislatures. It cannot be too strongly stressed that one need not approve of *Baker v. Carr* [9] in order to accept the fact, as a fact, that the state legislatures do not accurately represent the people of their states—that a majority in each house of most state legislatures can be made up of votes representing a distinct minority of the state's people. This situation may have a certain romantic appeal;[10] even if one does not appreciate its beauty, one may not think the remedying of it a fit job for the federal courts. But neither of these judgments supports the conclusion that the uncontrolled power of federal constitutional amendment should be turned over to bodies so constituted.

So back to numbers: In the best table accessible,[11] relevant data are given for thirty-four of the thirty-eight least populous states of the Union. On the average, it takes 38 per cent of the people in one of these states to form the constituencies of enough state senators or representatives to pass a measure through the *more* accurately representative house of the state legislature. Taking this figure as good enough for present purposes, if the proposed article V were in force, the income tax could be abolished, by repeal of the sixteenth amendment, if about 15 per cent of the American people were represented by legislators who desired that result.[12]

Now of course it can be replied that such a coalition cannot be formed without the implication that a good many other people are like-minded with it. Granted. But the margin is enormous. If the right 30 per cent of the people favored some amendment, its chance of passage would be very great indeed, whatever the other 70 per cent might think. And it is very important that the distortion is not random but systematic—it is a distortion operating steadily in favor of rural districts and small towns. It is not too much to say that the proposed article V would enable the inhabitants of such districts to effect any change they persistently wanted in the Constitution of the United States. They may be better and wiser than the rest of us; perceptive fiction and the exacter sociology are not clear on this, but let us assume it is so. Does that justify turning the Constitution over to them, affirmatively and negatively, to keep or to change as they will?

Reference was made above to the result of the Civil War. The proposed article V rests on the theory, at least in part, that that result ought to be revised. The several states now have a crucial part in the process of constitutional amendment; the new proposal would (as far as one alternative method is con-

9. 369 U.S. 186 (1962).

10. See Perrin, *In Defense of Country Votes*, 52 YALE REV. 16 (1962), especially at 24.

11. Compiled by The National Municipal League, N.Y. Times, March 28, 1962, p. 22, col. 3.

12. This figure is arrived at by taking 38% (the percentage of people in the relevant states necessary, on the average, to control the legislature) of 40% (the percentage of the American people residing in the thirty-eight least populous states).

cerned) give it entirely into their hands, setting at nothing the concept of national consensus among the American people considered as a whole people. It is a proposal for state rule only, on the basis of state-by-state count only, and through state institutions only, with the popular and national principles altogether submerged. If history has any lessons, our history teaches that such a location of ultimate power would put us in mortal danger.

It should only be added that this proposal, as a corollary to its discard of the concept of national consensus as a prerequisite to amendment, does away with national consideration and debate as a part of the amendment process. Under the present article V, any amendment must be examined and considered in a fully national forum—whether Congress or Convention—before it goes out to the several states. Such debate focusses national attention on something which is above all of national concern. Under the proposal, the only public debate would be in fifty separate state legislatures; the rest of the process would be ministerial only. This short-circuiting of national deliberation is actually one of the most offensive features of the plan.

The Mode of Proposal

The plan of the proponents of this amendment is to see it introduced into each of the state legislatures, in the form of a resolution in the following terms:

> A (Joint) Resolution*
> Memorializing Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States relating to Article V thereof.
>
> Resolved by the House of Representatives, the Senate concurring, that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States.
>
> "Article ———
>
> "Section 1. Article V of the Constitution of the United States is hereby amended to read as follows:
>
> The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states. Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be

*This resolution should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto.[13]

13. 36 State Gov't 11-12 (1963).

deemed to have been proposed, without further action by Congress. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

"Section 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several states within seven years from the date of its submission."

BE IT FURTHER RESOLVED that if Congress shall have proposed an amendment to the Constitution identical with that contained in this resolution prior to January 1, 1965, this application for a convention shall no longer be of any force or effect.

BE IT FURTHER RESOLVED that a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States and to each member of the Congress from this State.

The hope is that, if two-thirds of the legislatures submit such a petition, Congress will consider itself bound, under the present article V, to call the "convention" requested.

QUESTIONS PRESENTED

A number of questions arise; some of these will be considered here—not as judicial questions, but as questions sure to come into the mind of any Congressman or Senator conscientiously seeking to do his duty.

Is the Document Quoted Above an "Application" Within the Meaning of Article V?

Article V lays down that Congress shall "call a Convention for proposing Amendments," on "Application" of the legislatures of two-thirds of the states. The "Application" which can raise a conscientious obligation on Congress' part must be one that asks it to "call a Convention *for proposing Amendments.*" (Emphasis added.) A good case can be made for the proposition that the quoted document is not such an "Application," but an application for something quite different—for a "Convention" to consider whether an amendment already proposed shall be voted up or down.[14]

The process of "proposal" by Congress, contained in the *first* alternative of article V, obviously includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives, as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the *second* alternative, ought to be taken to denote a mechanical take-it-or-leave-it process. Under the procedure followed by the draftsmen and proponents of the present "application," the "convention" would be in true function a part of the process of *ratification.*

14. Even this much is more than the Resolution literally allows; it asks for a convention "for the purpose of proposing" the amendment set out. Is it possible that the sponsors think the convention's role can be made ministerial?

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This doubt is reinforced by the fact that the delegates who approved this language at Philadelphia were just completing the work of a "convention" of their own. Is it not likely that to them the phrase "convention for proposing amendments" meant a convention with a mandate somewhat like the one under which they had worked—a mandate to consider a set of problems and seek solutions?

The difference here is not merely formal, but sounds the deeps of political wisdom. The issue is whether it is contemplated that measures dominantly of national interest should be malleable under debate and deliberation at a national level, before going out to the several states. Such a conception of the "convention" contemplated by article V makes the second route to amendment symmetrical with the first, in the vital respect that, under both, the national problem must be considered as a *problem*, with a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power. The Congressman or Senator persuaded by this distinction would be justified in concluding that the present "applications," even if two-thirds of the states joined, was not of the sort that obliged Congress to call a convention.[15]

Assuming these "applications" are not within article V, it may still be suggested that a sort of "reformation" might be applied—that Congress, even if not persuaded that the present applications asked for the thing contemplated by article V, ought to call such convention as it thinks it would have been obliged to call if the applications had been of the right sort. This seems clearly wrong, for several reasons. Generally, a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all. Congress is given no power to call a constitutional convention when it wants to, or thinks that on the general equities perhaps it should; if Congress desires an amendment, article V very clearly tells how that desire is to be made known. Congress' power as to conventions is not discretionary but strictly conditional, and if the condition is not met Congress not only need not but may not call a valid convention.

It is, moreover, illegitimate to infer, from a state's having asked for a "convention" to vote a textually-given amendment up or down, that it desires some

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15. It should be noted that another and quite independent defect might be thought to vitiate these "applications." They demand the calling of a convention "for the purpose of proposing" an amendment which is, by its own text, to be ratified *by the state legislatures*; Congress can be under a duty to comply with these applications, then, only if such applications in sufficient number can place it under a duty to abdicate its own discretionary function, as clear as anything in the Constitution, of choosing between the modes of ratification, whatever may have been the mode of proposal. It is certain, on the face of Article V, that no applications from any number of state legislatures can put Congress under a moral or legal obligation to do that. This quite patent error ought to lead to some suspicion of the whole theory on which these applications are drawn—the theory that Congress and the desired "convention" can be very narrowly confined in function, and that their work can be done for them in advance by the state legislatures.

other sort of convention. It is not for Congress to guess whether a state which asks for the one kind of "convention" wants the other as a second choice. Altogether different political considerations might govern.

On the whole, then, no member of Congress could be held to have disregarded a conscientious obligation if he took the view that the "application" quoted above, even if sponsored by two-thirds of the state legislatures, did not make obligatory a convention call. Indeed, he might conclude that Congress would be exceeding its powers in calling such a "convention," the condition to such a call, on a fair construction of article V, not having been met.

If Congress is Obligated to Call a Convention, What Sort Must it Call?

The short fact here is that neither text nor history give any real help. When and if the article V condition is met, Congress "shall call a Convention . . ."; that is all we know. Fortunately, that is all we need to know, for the "necessary and proper" clause,[16] and the common sense of *McCulloch v. Maryland*,[17] give all the constitutional guidance required. Since Congress is to call the convention, and since no specifications are given, and since no convention can be called without specifications of constituency, mode of election, mandate, majority necessary to "propose," and so on, then Congress obviously may and must specify on these and other necessary matters as its wisdom guides it. (It may be noted that continuing control by Congress of the whole amendment process must have been contemplated, for Congress is given, under article V, the option between modes of ratification, no matter what the method of proposal.)

If this is accepted, then no Senator or Representative is bound to vote for a convention call which in its form fails to safeguard what he believes to be vital national interests. Specifically, insistence would be thoroughly justified on an allocation of voting power by population rather than by states, on the election at large of a state's delegation or its choice in fairly apportioned districts, and on federal conduct of the election of delegates, to prevent racial and other discrimination. Provision for a "two-thirds" rule might well be thought wise, in order to ensure the same kind of consensus on this branch of article V as on the other. Since the adoption of this proposed amendment would make easily possible the future amendment of the Constitution without anything like popular consent, it is thoroughly reasonable for Congress to insist that this surrender be fully voluntary for at least this generation, unless (as is not true) some positive constitutional command to the contrary prevents.

It will probably be argued that the voting in any convention must be by states, since the voting in the original Constitutional Convention was by states. On this point, the analogy is not persuasive. The states then were in a position of at least nominal sovereignty, and were considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of the new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluble

16. U.S. CONST. art. I, § 8.
17. 17 U.S. (4 Wheat.) 316 (1819).

union; there is a whole American people. The question in an amending convention now would be whether innovations, binding on dissenters, were to be offered for ratification. The propriety of a vote by states in the one convention surely cannot settle its rightness in the other.

Has the President a Part in the Convention Call Process?

Article I, section 7, clause 3 is as plain as language can be:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Clearly, this language literally applies to actions of Congress taken under article V.

In *Hollingsworth v. Virginia*,[18] it was contended that the eleventh amendment had not been validly proposed, since the resolution proposing it had not been sent to the President. Against this and other arguments, the Court, in a brief opinion not touching substance, upheld the amendment. In the course of argument, Justice Chase remarked: "The negative of the president applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution."[19]

Since that time, the practice has been not to send amendment proposals to the President. These precedents apply, of course, only to the first method prescribed by article V, since that is the only method that has been used. *Hollingsworth v. Virginia* is inherently weak, as the unreasoned decision must be. It introduces an exception by fiat into the entirely clear language of article I, section 7. But it need not be unfrocked in its own parish, since it is possible that the Court may have had in mind a ground for taking the first alternative of article V out of the veto process; since the congressional proposal must be by two-thirds in each house, it may have been thought that the requirement for overriding the veto was already met. This is not perhaps a very good ground, but the point about it here is that it would not exist at all if Congress, by simple majorities, called a "convention" under article V. Unless some other ground (better than Justice Chase's mere assertion) be stated for holding the contrary, it would seem that such a congressional action would fall as clearly as may be under the terms of article I, section 7, clause 3.

If this is right, then the grounds upon which the President might exercise his veto need be no less than those proper in the case of a Congressman voting on a convention call. If the President believed the structure and mandate of the "convention" significantly wrong, and dangerous to the national well-being, then he would surely be justified in vetoing the Resolution.

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18. 3 U.S. (3 Dall.) 378 (1798).

19. *Id.* at 380 n.a.

Summary

This proposal for amending article V is dangerous. It is to be hoped that it will be defeated in the state legislatures, but they are, after all, voting for or against increasing their own powers. If "Applications," in the form quoted above, reach Congress in sufficient number to force the issue, there is still authentic constitutional ground on which to stand. It may be that these "applications" call for something not contemplated by the second alternative in article V, and hence need be treated, at most, only as memorials to Congress to propose this amendment, a plea addressed entirely to discretion. It is as certain as any such matter can be that no Congressman or Senator is bound to vote for a convention call, even on impeccably proper application, wherein prudent conditions as to mandate, structure, constituency, voting, proper selection of delegates, and all the rest, are not met. There is no real reason why Presidential veto, on the same grounds, is not proper in this matter.

If all this terrain is fought over, then the American people will surrender this ultimate power into the hands of a minority only if they want to, and if they want to nobody can stop them.

The Yale Law Journal
Volume 82, Number 2, December 1972

Amending the Constitution: A Letter to a Congressman*

Charles L. Black, Jr.†

There was introduced in the Senate, in the 92d Congress, a bill (S.215)[1] *dealing with the procedures to be followed on state applications for a national constitutional convention pursuant to Article V of the Constitution. The bill passed the Senate*[2] *but was still in the House Judiciary Committee when Congress adjourned.*

While it was there, I wrote the following letter to Congressman Emanuel Celler, then Chairman of the Committee, giving my reasons for believing that the passage of a bill such as S.215 would be a national calamity. The letter is reproduced here because I believe the profession ought to be exposed to a full spectrum of opinion on this major question.

There is another reason for its reproduction at this time. The Harvard Law Review, *in a student Note,*[3] *has taken issue with some of the conclusions expressed in the letter. On full reconsideration, I must say that I do not think the authors of this Note have laid a finger on me, but I prefer that the profession be the judge of that, by having access to my own expression of my views, rather than by seeing them through the semi-opaque pane of paraphrase and selective quotation.*

I consider it inappropriate at this time to accompany the letter with specific answers to the Harvard Note; in sum, I feel the

* Ed. Note: The Journal is reproducing this letter not only because we believe it to be a significant constitutional commentary, but also because we believe its contents should be disseminated as widely as possible before a new version of S. 215 (which has been inching ever closer to passage since it was first introduced in 1967) is submitted to the 93d Congress. The letter is reproduced as written and sent, save for the addition of footnotes consisting of citations formerly in the text and the relevant portions of the Bill and Senate reports in question.

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1. S. 215, 92d Cong., 1st Sess. (1971) (Senator Ervin) [hereinafter referred to by section number only]. All citations refer to the version of the Bill which passed the Senate and was before the House Judiciary Committee.

2. 117 CONG. REC. S 16569 (daily ed. Oct. 19, 1971).

3. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972).

Note's arguments are insufficiently distinct and categorical to be of avail when one is considering the legitimization of constitutional amendments, where, perhaps more than anywhere else, square corners should be cut. I wish to note most emphatically, however, that the Harvard editors flatly and unmistakably concede that, "Of course, legislation governing the calling of a constitutional convention would not bind future Congresses."[4] *This concession may be important to future debate; for the present, I shall be content to let the reader judge whether the Harvard editors, having made this concession, follow it with arguments which justify the unexampled step of passing an act known in advance to have no force as law with regard to its principal subject matter.*

February 28, 1972

The Honorable Emanuel Celler
Chairman, Judiciary Committee
The House of Representatives
Washington, D.C.

My dear Congressman Celler:

I understand that S.215 ("An Act to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to Article V of the Constitution"), having passed the Senate, has now been referred to your Committee on the Judiciary. It is my distinct opinion, the result of years of reflection on the very subject, that this bill is, for many reasons, both unconstitutional and unwise. It is also, quite obviously, a most important bill, for it would bring into being new and specific means for amending the Constitution of the United States, in a way that has never before been found needful. Because I think it both a supremely important and a very bad bill, I am taking the liberty of communicating to you at some length my reasons for opposition.

You may, of course, make such use of this letter as you like. I would appreciate its being included in the record of any hearings that might be scheduled on the bill, and would make every effort, if you want me to do so, to attend any such hearings and to testify.

It is hard to know where to begin in criticizing such a thoroughly misconceived piece of legislation as this. Let me first take up two pervading defects, and then go on to particulars. Since my discussion

4. *Id.* at 1616.

must, to be thorough, be rather long, I think it would be a good idea to put in headings summarizing each point.

This bill, as to the vote commanded in its crucial Section 6, rests on the constitutionally impossible assumption that this Congress can bind the consciences of successor Congressmen and Senators, on questions of constitutional law and policy.

The most obvious thing that is generally wrong with the bill is that it attempts to bind successor Congresses to vote in a certain way on controverted questions of constitutionality and policy, a thing which, on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do. The crux of this (and of the bill) is in the language of Section 6(a). The following strange phraseology is used, phraseology which, in form and plain meaning, is a command addressed by the 92d Congress to all its successor Congresses:

> Whenever applications made by two-thirds or more of the States with respect to the same subject have been received, the Secretary and the Clerk shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce on the floor of the House of which he is an officer the substance of such report. *It shall be the duty of such House to determine* that there are in effect valid applications made by two-thirds of the States with respect to the same subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, *it shall be the duty of that House* to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject.[5]

Now as I shall show, the question whether there "are in effect," at any such time, *valid* applications, even if the previously set requirements of S.215 have been met, and whether, in consequence, the Congress is, simply because those requirements have been met, under a constitutional duty to call a convention, is a constitutional question of the first magnitude. It is and will remain a genuinely controverted question; there is much reason on the negative side. A Congressman in, let us say, the 97th Congress might be convinced by

5. § 6(a) (emphasis added).

these reasons; he might conscientiously believe that, although everything has happened which S.215 says must happen to bring into being the obligation declared in the language I have quoted from Section 6, in fact the things which have occurred do not, as a matter of sound constitutional interpretation, as he sees it, bring that obligation into being. How can anyone think that the 92d Congress can settle, for a Congressman in the 97th Congress, this absolutely fundamental issue as to his own constitutional obligation? Where did the 92d Congress get this power? The answer is, of course, that no Congress has the power to bind the consciences of its successors, with respect to grave questions of constitutional law, and that the Congressman in the 97th Congress will not be in the least obligated to cast the vote which Section 6 says he must cast. If I am still alive, or if some of the numerous other constitutional lawyers like-minded with me are still alive, attention will at that time forcefully be called to this plain fact, and it will then, I think, clearly be seen that no obligation whatever is created by Section 6. In this absolutely fundamental sense, the bill is a *brutum fulmen,* a mere futility, because the vote which Section 6 tries to coerce or make a matter of obligation cannot be made, by one Congress, a matter of obligation resting on successor Congressmen and Senators in the near or distant future.

I think this must be known to the sponsors of the bill; certainly it has been drawn to public attention. Anyone must see that there is no way to make a Congressman or Senator in a successor Congress vote against his conscience and against his honest belief on a point of constitutional interpretation. The aim of the bill, therefore—or its only possible effect—must be to create a specious talking-point for use when the time comes, a ground, untenable on full examination, for convincing those who do not think the matter clear through that this obligation exists, though it cannot possibly have been created by the 92d Congress, for the members of the 97th Congress.

A difficulty generically similar to the foregoing is encountered when one reads on past Section 6 into the rest of the bill. The casting of the commanded Section 6 vote not only must rest on the resolution of a prior constitutional question which the 92d Congress has no right or power to resolve for its successors, but would constitute the resolution of both constitutional and policy questions, with respect to the composition and proceedings of the proposed "constitutional convention," and to proceedings thereafter. These questions, again, are questions which the 92d Congress has no right or power to resolve for its successors. Congress, according to Article

V, is to "call a Convention for proposing Amendments . . . on Application of the Legislatures of two-thirds of the several States."[6] The report of the Senate Judiciary Committee on this bill is eloquent, and undoubtedly right, in saying that this language necessarily commits to Congress the duty and the power of resolving many issues of policy and of constitutional propriety with respect to the structure and procedure of such a convention.[7] But it does not commit this duty and power to the 92d Congress in any special way. The obligation to call the convention, when and if it arises, is what creates the duty and the power to define the specifics of the convention, and it is the Congress then sitting that, in the nature of the case, has this duty and power. It is a constitutional impossibility for the 92d Congress to bind a Congressman or Senator in the 97th Congress to vote for a convention of a form he believes to be unconstitutional or unwise, or to vote for any other proceedings he believes to be unconstitutional or unwise. But the vote sought to be commanded and made a matter of duty by Section 6, as quoted above, might well be just such a vote, since it sets in train a series of proceedings of dubious constitutionality and wisdom. A Congressman in the 97th Congress might, for example, think that, under the now unforeseeable circumstances then prevailing, it would be inviting catastrophe to allow delegates to the "convention" to be "elected . . . in the manner provided by State law."[8] Yet his vote, seemingly commanded by Section 6, would be a vote for that procedure. There is no moral or political ground for the conclusion that the 92d Congress may create an obligation, resting on a future Congressman, to vote for what he thinks is an invitation to catastrophe.

Here again, the bill might be looked on as a mere futility. Nobody can make any Congressman in 1992 vote for what the 92d Congress thinks well of, and the Congressman in 1992 will know that and will be advised, I am sure, that he is under no obligation to vote as Section 6 tells him he must—that he stands just where the Constitution puts him, responsible for a fresh choice in the light of current conditions. But here, again, there is the danger of the use of the bill, if it becomes law, as a specious talking-point supporting the assertion of an obligation which, on reflection, cannot be created, morally or practically, by the 92d Congress.

6. U.S. CONST. art. V.
7. SENATE JUDICIARY COMMITTEE, FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. NO. 92-336, 92d Cong., 1st Sess. 7 (1971) [hereinafter cited as SENATE REPORT].
8. § 7(a).

This bill, for the foregoing reasons, might be dismissable as a futility, since it cannot, ethically or in fact, bind a successor Congress. This I believe to be its actual force (or lack thereof) as a matter of law, on the most elementary principles concerning the incapacity of one Congress to bind the consciences or coerce the votes of its successors. I would unhesitatingly advise any Congressman or Senator in the future that Section 6 adds absolutely nothing to his obligation to vote or not to vote for a constitutional convention, as that obligation may be created by Article V, and as determined by his own interpretation of that Article and by his own views on the wisdom of the mode of constituting any convention he might think himself obligated to join in calling. But the bill, for the reason I have given, cannot be regarded as utterly innocuous (because utterly futile) since (unlike a command of the 92d Congress that the wind blow north-northeast on July 2, 1985) the bill might exert a quite unwarranted persuasive influence on some who did not think through the question of the capacity of one Congress to command a later Congress to vote in a certain way, on genuinely controverted constitutional and policy judgments.

Even if (as is not the case) the 92d Congress could bind its successors, it would be foolish to settle great constitutional and prudential questions at a time when public and professional attention are not focused on them, and when (with respect to the prudential questions) the conditions of the future are unknowable.

Now let me make a second and quite separate general point. I believe I have shown that the issues S.215 purports to settle cannot, as a matter of law, be settled in advance for future Congresses. Without for a moment implying any doubt about this, let me say that if *(per impossible)* such advance settlement were possible in law, it would, as a matter of policy, be most unwise to settle these issues for the future at this time. I assert this for two reasons.

First, some of the questions the bill tries to settle are great constitutional questions. It is most unwise to try to settle such questions at a time when national attention is not and cannot be keenly focused upon them, and intense national debate be thus generated. I venture to guess that not one member of the adult public in a thousand has the faintest idea that such a proposal as S.215 exists. Unfortunately, but quite naturally, the only time when public and professional attention can be focused on such a proposal is the time when something substantive is at stake. It is for this reason, *mutatis*

mutandis, that courts do not decide great constitutional questions except when actual present interests are at the bar. True, attitudes toward procedure may be influenced, at such a time, by attitudes toward substance. But to say that Congress would not, when the time came, fairly try to discharge its Article V obligation, is an indictment I refuse to sign (though the authors of the Senate Report are apparently willing to sign it); certainly, I think the risk of that far less than the risk attendant on the impossibility, at a time when nothing is immediately at stake, of focusing public and professional attention sharply on the constitutional and policy questions S.215 tries to settle.

Secondly, the passage now of a bill providing for future proceedings would constitute an attempt to settle for the future a number of prudential questions as to which nothing but knowledge of the conditions of the future can furnish a basis for intelligent action. For example, to take a matter of detail, conditions might arise making one year an unreasonably short time for convening the convention, or, to repeat in this context a far from trivial point made earlier, it might appear from future conditions, quite unknowable now, that the only sound way to select delegates to the convention would be by elections conducted by federal officials, contrary to the requirements of this bill[9]—just as it has been found by Congress that, under some conditions, the only sound way to register voters, even for state elections, is by federal registrars.[10] How can it be thought that 1972 is a good year for deciding what 1995 may require in regard to this or to any other practical question—or, for that matter, what 1974 may require?

(Let me here anticipate and answer the point that the advance setting of procedures for handling controversy is normal. True, for normal, run-of-the-mill procedures. But amendment of the Constitution (let us hope!) will remain a highly unusual thing. If not, then this bill quite plainly greases the path too much. If so, then each occasion will be a separate solemn event, with its own special conditions and problems. These problems can and should be solved when they arise, by the Congress empowered to solve them, and on the basis of all the factors now unknowable and then existing.)

The two general reasons already canvassed—legal and factual—the incapacity of any Congress to bind the consciences of future Congressmen and Senators on judgments of law and policy, and the unwisdom of even trying to settle these questions at a time when public

9. *Id.*
10. *See, e.g.,* 42 U.S.C. 1973(a) (1965).

and professional attention is not and cannot be focused on them, and when the conditions one needs to know about before resolving them wisely are unknowable—quite generally vitiate this bill. Strictly speaking, it ought to be unnecessary to examine its particulars. I shall do so, nevertheless, very largely because such examination copiously illustrates the assertion that important and genuinely debatable issues of constitutional law and of policy are resolved by this bill in at least a questionable manner on the merits. This will give substance to and make more than academic the two general points I have made. It also, I think, will show that the bill, even if it were not a futility, even if it did succeed in imposing an obligation on the Congressmen and Senators of the future, and even if it were necessary or wise to decide all these questions now, would still be a bad bill, because it not only resolves but wrongly resolves a good many issues of constitutional law and policy.

With this framework in view, let me go through the bill point by point.

Section 2 (and therefore the whole bill) rests on the erroneous assumption that the Article V phrase, "a Convention for proposing Amendments," means a convention limited as to the "nature" of the amendments the convention may propose.

Section 2 embodies what is in my view a clear and crucial error in constitutional interpretation, an error which of course carries through the rest of the bill. It requires that a State requesting a convention pass a resolution "stating the *nature* of the amendment or amendments to be proposed."[11] It is my contention that Article V, properly construed, refers, in the phrase "a Convention for proposing Amendments," to a convention for proposing such amendments as to that convention seem suitable for being proposed.

There is authority tending to support something generally like this view—authority developed in connection with an earlier controversy of somewhat different form. Aside from my own statement of something very like it in the Yale Law Journal,[12] that statement was distinctly approved by a committee of the Association of the Bar of the City of New York[13] and was seemingly approved by Professor

11. § 2 (emphasis added).
12. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).
13. COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNED WITH FEDERAL LEGISLATION, THREE AMENDMENTS TO UNITED STATES CONSTITUTION PROPOSED BY THE COUNCIL OF STATE GOVERNMENTS 33 n.2 (1963).

Arthur Bonfield[14] and perhaps others. The Report of the Senate Committee on the Judiciary refers to none of this authority, but instead ignores outside studies and constructs its own argument.[15] It will be well to examine that argument.

First, there are two quotations from the Federalist. On anything like careful reading, neither of them turns out to have any bearing whatever on the question whether a convention called under the second alternative of Article V may be limited in its scope. The one from Madison[16] simply points out that amendment may be set in train by the State Legislatures as well as by Congress—and so it may, whether the convention they may petition for be limited or not. The one from Hamilton[17] restates the obvious meaning of Article V—that the recommendations from such a convention could (and perhaps must) take the form of specific proposals. Both assertions are clearly true. Neither of them has any tendency to establish that the convention could be or was expected to be limited to making proposals only on a certain subject or subjects. Each proposal, Hamilton says, must go through the ratification process separately, and hence, as he says, is "brought forward singly."[18] If Hamilton's quotation were to be taken (as it certainly need not be taken) to prove any more than that, it would have been shown to prove too much, for it would then prove that the Article V convention not only *may* but *must* be limited as to subject matter, a patent absurdity in the interpretation of the phrase "a Convention for proposing Amendments to this Constitution."

The Report next asserts that the theory of the unlimited Con-

14. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAWYER 659, 662 (1964).

15. SENATE REPORT, *supra* note 7, at 8-10.

16. That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors as they may be pointed out by the experience on one side or the other.
THE FEDERALIST No. 43 (J. Madison) as quoted in SENATE REPORT, *supra* note 7, at 8.

17. Every amendment to the Constitution, if one established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point—no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather 10 States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution.
THE FEDERALIST No. 85 (A. Hamilton) as quoted in SENATE REPORT, *supra* note 7, at 8.

18. *Id.*

vention is "*inconsistent* with the *language*"[19] of Article V. What in the world is meant by this? I have just quoted that language. It seems to me that that language most aptly describes a general convention, for proposing such amendments as the convention sees fit. But, at the least, how can it be said that such a meaning is *inconsistent* with the constitutional language? No explanation of this extraordinary statement is tendered.

The next argument is evidently fallacious:

> The argument that the convention must have general power is also unsound from another point of view. If the convention were to be general, then it would seem that appropriate applications for a limited convention deriving in some States from a dissatisfaction with the school desegregation cases, in others from the school prayer cases, and in still others by reason of objections to the Miranda rule, or because of a desire for reapportionment, revenue sharing by the States, tax relief, or for other reasons, should all be combined to make up the requisite two-thirds of the States needed to meet the requirements of article V. The committee does not believe that this is the type of consensus among the States that the Founders thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date—and there are a large number of them—should be added up to see whether, in what is considered an appropriate span of time, two-thirds of the States have made demands for a constitutional convention to propose amendments, no matter the cause for applications or the specifications contained in them. Indeed, under this theory a convention is long overdue. Since the committee believes that State applications should not be treated as a call for a convention unless they deal with the same subject—a conclusion supported by two centuries of practice—it is unreasonable to suggest that the convention resulting from 34 applications on a single subject is nonetheless free to roam at will in offering changes to the Constitution.[20]

The fallacy is clear. If the view that the convention is illimitable is right, as I and others contend, if that is the kind of convention Article V refers to, then in the case stated, *none* of the applications which the Report puts on parade would have called for the thing the Constitution names, properly construed. None, therefore, would be effective; none would create any congressional obligation. Thirty-four times zero is zero. The argument tendered thus begs the ques-

19. SENATE REPORT, *supra* note 7, at 8.
20. *Id.* at 9.

tion. It *assumes* that, when a state asks for a limited convention, it has asked for the thing meant in Article V, for unless this were true, the State's action would be without any juristic effect. Thus the argument quoted leaves the question of the limitability of the convention entirely open.

We touch here on a misunderstanding which so generally pervades discussion of this subject that it is worth spelling the matter out, even at the risk of prolixity and of underlining the obvious. I believe that, in Article V, the words "a Convention for proposing Amendments" mean "a convention for proposing such amendments as that convention decides to propose." This is, to say the least, not a very forced construction, but leave aside for a moment the question whether it is right. Let us consider, rather, what it *implies,* if it is right—for *that* is the thing that seems so widely misunderstood.

It does *not* imply that a convention summoned for the purpose of dealing with electoral malapportionment may kick over the traces and emit proposals dealing with other subjects. It implies something much more fundamental than that; it implies that Congress cannot be obligated, no matter how many States ask for it, to summon a convention for the limited purpose of dealing with electoral apportionment alone, and that such a convention would have no constitutional standing at all. Let us take this step by step.

First, if the quoted words in Article V refer, as I contend, to a convention with power to propose such amendments as it thinks wise, then a State application for a convention limited to one or more proposals or subjects is *not* an application for the "Convention" denoted by the words in Article V. Few conclusions in constitutional law are compelled by pure logic, with no escape possible, but this one seems to be.

Secondly, if a state applies, or if thirty-four states apply, for something *other than what Article V language denotes,* then Article V imposes no obligation on Congress to grant the request, or to do anything. This, too, seems a plainly compelled logical step. If thirty-four States may put Congress under a certain obligation by, and only by, requesting X, and thirty-four States request Y instead, then no congressional obligation arises.

Thus, the position that Article V means "a convention for proposing such amendments as to it seem wise" does not imply that a "runaway" convention is possible, for, if the stated position is right, no convention can be called that has anything to run away from. It implies, instead, that State requests for a limited convention create

no obligation under Article V, since they are not applications for the thing which, and only which, the States may oblige Congress to call, by requesting it.

The only possible escape from this is sometimes sought in the confused idea, which evaporates on clear statement, that a State's request for a *limited* convention ought to be looked on and treated as an application for an *unlimited* convention, if the convention cannot in law be limited.[21] But this paradoxical idea would have to rest on the assumption that a State legislature, by expressing its desire for consideration of amendment with respect to bussing, is expressing its desire for a convention where any amendments, on any subject, may be considered. That is absurd, both logically and politically. The State that asks for a convention on bussing alone is not expressing anything about its views on the desirability of an unlimited convention. The Senate Report seems, obliquely but clearly, to recognize this.[22] If, as I contend, the latter is what Article V means, then the State has taken no action at all under Article V, and has put Congress under no obligation.

The rest of the argument brought forward on this point in the Senate Report is merely conclusory, except that the assertion is made that the construction of Article V to mean "limited convention" is "more desirable and practical than the alternative construction."[23] This passage, very properly, puts desirability and practicality in issue. Where literalism and history are not productive of a conclusive answer, these factors are fitting for consideration; indeed, they are technically legitimate aids to construction, for the users of constitutional language ought to be presumed to have intended the desirable and practical.

I would strongly contend that there is nothing either desirable or practical about building up the power of state legislatures with respect to the initiation of particular amendments to the Constitution, and that there is therefore no validity in attributing such "intent" to the Framers on grounds of desirability and wisdom. The notion that there is always turns out to rest on the absurd mythology of *opposition* between "the States" and "the federal government." In fact, the people are just the same people. They are represented in Congress just as they are represented in the Legislatures. The first-

21. See the passage in the Senate Report apparently resting in part on this notion, *id.*
22. "To suggest that the States could not propose specific amendments without risking a general constitutional convention is, in fact, in the committee's view, to destroy the desire and therefore the power of the States to initiate specific amendments by the convention process." *Id.* at 8-9.
23. *Id.* at 9.

named and hitherto always used method of amendment—passage by two-thirds of each House of Congress and ratification by three-fourths of the States—would seem prima facie adequate to every real need, and entirely likely to be responsive to that clearly predominant popular will which ought to exist before a Constitution be amended. History has confirmed to the hilt this prima facie impression; the American Constitution has proven to be the most successful political instrument ever devised in all history, and piecemeal amendment by the first method named in Article V has proved, as one might easily have predicted, to be entirely adequate to every real need. What catastrophe, what misfortune—what seriously undesirable condition even—has ever resulted from difficulties about amending the Constitution?

In the very earliest days, before it was known that the new government would be so successful, it may have seemed "desirable and practical" for the States, unused to union and uncertain of its benefits, to have some means of compelling a thorough reconsideration of the new plan. That method would be provided by the second of the alternatives of Article V, if one interprets it to denote a general convention. Indeed, one persuasive authority, Professor Swindler, thinks that that was the principal if not the only reason for the inclusion of this alternative, and that the provision has spent its force and is no longer of effect at all.[24] Though Professor Swindler's careful historical arguments are quite persuasive, and should be thoroughly considered by this Committee, I would not go as far as he does; I would not predict now that no crisis could ever arise which would call for the use of this method. But if we are talking about what is "desirable and practical" (and that is what the Senate Report invites), there is not a shred of support for the notion that it ever was or now is more "desirable and practical" to use this alternative machinery for the piecemeal amendment of the Constitution. On the contrary, the hitherto used and time-proven method is quite desirable and practical, responsive enough when one is dealing with so successful a Constitution, and just as obedient to the will of the people, fully represented as they are, State by State, in Congress and in the ratifying legislatures, as any system can be without destroying stability. Nothing "desirable or practical" is to be served by the alternate route, except a possible need, which now seems likely never to arise, to take care of a *general* dissatisfaction with the national government, or a breakdown thereof.

The Senate Report says that "history" supports its conclusion as to

24. Swindler, *The Current Challenge to Federalism*, 52 GEO. L.J. 1 (1963).

the meaning of Article V, but fails so much as to cite any relevant history. This was inevitable, for there is no relevant history to support the Report's conclusion. Congress, the body charged with responsibility in the premises, has never had to decide the question of "limited" as against "unlimited" convention. The hundred years following the adoption of the Constitution show little attempted use of this device by the State legislatures.

However, Brickfield's tabulation[25] of the few applications filed before the closing years of the nineteenth century puts to rout the Senate Report's reliance on history, as fully as fragmentary history can. As far as I can make out from Brickfield's table, the record *up to the Civil War,* is that three states around 1790 submitted applications for a *general* convention, five states submitted applications for a *general* convention in 1861, one state submitted an application for a *general* convention in 1832, and *one state,* Alabama, submitted an application for a convention on the protective tariff, in 1833.[26] This record in overwhelming predominance supports the view that, for about a hundred years after the adoption of the Constitution, the Legislatures themselves thought that Article V required them to ask for the thing, and only the thing, named in Article V—"a Convention for proposing Amendments"—with no limitations unsupported by the text. In the light of these facts, one is stunned by the Senate Report's statement, in the quoted passage, that its conclusion as to the limitability of the convention is "supported by two centuries of practice." The manner in which this assertion got to be made in an official document should, with respect, be looked into.

Even the Alabama resolution does not unambiguously constitute a State claim of *right* to limit the convention, or a State's belief that Congress may do so. The following is the Senate Journal entry in full:

> Mr. King presented proceedings of the Legislature of the State of Alabama, recommending to Congress a speedy modification of the tariff laws so as to equalize their burdens and reduce the revenue to the economical expenditures of the Government, *and the call of a Federal Convention to propose such amendments to the constitution as may be proper to restrain Congress from exerting the taxing power for the substantive protection of domestic manufactures,* and recommending to the State of South Carolina to suspend the operation of her late ordinance,

25. C.F. BRICKFIELD, STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION 11-16 (87th Cong., 1st Sess., Comm. Print 1961).

26. There were three other applications, all in the 1890's. One was for a general convention. *Id.*

> and to abstain from the use of military power in enforcing her ordinance, or in resisting the execution of the revenue laws of the United States, and recommending to the General Government to exercise moderation, and to employ only such means as are peaceful and usual to execute the laws of the Union; and
>
> *Ordered,* That they be laid on the table, and printed.[27]

The underscored words are not in the form of an application under Article V, but in terms of a "recommendation," just as certain actions are "recommended" to South Carolina; they may therefore rest merely on a misapprehension of the general powers of Congress to act in its own right. But, in any case, the understanding of the Alabama legislature is not of noticeable weight, as against the other examples given.

As the most cursory glance at Brickfield's tables[28] will show, the fullblown theory of the convention limited by the tenor of the state petitions is nothing but a child of the *twentieth century,* and carries no prestige of construction contemporary or anywhere near contemporary with the adoption of Article V. Indeed, what early history there is is strongly to the contrary, as I have just shown. The twentieth-century petitions, embodying this theory, are (on the point of law implicitly resolved by them) nothing but self-serving declarations, assertions of their own power by the state legislatures.

Aside from the history available, which all points away from the S.215 theory, there is nothing but text and common sense to resolve the present question. It seems to me that the most natural meaning of the words "a Convention for proposing Amendments" is "a convention for proposing such amendments it decides to propose"—that is, a general convention—and that the importation of a limitation not in the text is quite unwarranted. Common sense would advise me that where one method is entirely satisfactory, has always been used, and fully registers the requisite consensus of the people of the States, the alternative method ought to be construed to cover extraordinary occasions, which may have been feared at first, but which now are quite unlikely to arise—occasions where, by some unforeseeable mischance, there may be urgently needed the very thing the text seems most certainly to refer to—the general convention. The Senate Report contains exactly no cogent argument to the contrary.

I think that, without arguing the point fully, I have said enough to show that the weight of argument and history is on the "unlimited

27. S. JOUR. 194-95 (Feb. 19, 1833) (emphasis added).
28. BRICKFIELD, *supra* note 25, at 11-16.

convention" side. If I am right, the whole bill rests on a false assumption as to the meaning of Article V. The question is at the very least an open one. It will remain an open one, whether S.215 passes or not, because the 92d Congress cannot bind its successors. Let me pass on to another point about this bill.

Quite without warrant, the bill gives maximum control over the whole process to the state legislatures.

Initiation of the convention call is to come from the state legislatures.[29] They are to prescribe the mode of election of the delegates.[30] Then (unless someone wins, in a short time, the uphill fight of passing a concurrent resolution to the contrary—a process easily blocked by an unfriendly Committee in either House) the *legislatures* are to ratify.[31] Why should this latter-named method of ratification be presumptively chosen now, for all future contingencies? It is like taking two opinions on a medical case, but taking them from the same doctor. It would seem quite obvious that, if what you want is broadly expressed consensus from differently structured constituencies, the normal method of ratification should be by *conventions,* selected by means *other than* control by the Legislatures, since the Legislatures will have commenced the process. A broadly based consensus—of Senate, House and State Legislatures or conventions—is achieved by the first of the methods in Article V, the one always hitherto used. In the bill, the aim seems to be to turn as much as possible of the process over to the State Legislatures.

The bill's plan of representation at the convention is wholly indefensible. Generally, this bill fails to provide for that preponderant consensus which ought to precede amendment.

Section 7(a) provides:

> A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress.[32]

This provision results, of course, in over-representation of the less populous States. Such over-representation, one is tempted to say, is grotesque in the context, because the less populated States are

29. § 3(a).
30. § 7(a).
31. § 12(c).
32. § 7(a).

already grossly over-represented in both other phases of the total process contemplated by the bill. Apparently what is wanted is not a balance but a systematic and pervading over-weighting of the influence of the less populous States.

Nevada, with about one-seventieth of New York's population, counts evenly with New York in applying for the convention. Nevada counts evenly with New York in ratification. Under 7(a), this advantage is not balanced but rather enhanced, for the population of Nevada will once again be grossly over-represented, *per capita,* at the convention. There is no use looking for a reason for this: a good reason is impossible. Apparently the authors of the Senate Report realized this, for no explanation is tendered.

What seems to be in mind is a parallel with the Electoral College. I am on record as strongly disapproving all fundamental alterations in the Electoral College method of electing the President, but the Electoral College functions in its own context, and the simulacrum of it constructed in this bill would function in a crucially different context. The Electoral College contributes to the balance of government in two ways. At one end of the scale, because the electors of each state are chosen statewide and cast their votes as a block, it gives some edge to the inhabitants of the more populous states, doubtless to compensate for their under-representation in the Senate. Neither condition exists in S.215. At the other end of the scale, by some over-representation of the thinly populated States, the Electoral College system prevents *their* almost entire obliteration in the process of presidential selection. No such danger exists in the "convention" amendment process; the danger that exists is just the opposite danger.

The rule of representation in Section 7(a) is therefore without any possible defense. It simply loads a little heavier the already loaded dice.

This seems a good place to refer to the Senate Report's presentation of itself as a sort of compromise between making amendment by state-legislature action very easy and making it very difficult.[33] This presentation is emphatically not warranted by the facts.

Here we have a good yardstick of comparison, for we have successfully used another method for almost two centuries. Under the first-named and hitherto used method of amendment, there is required a two-thirds vote of *each* of the national Houses, wherein the States as such and the people as such are respectively represented in pro-

33. *See* SENATE REPORT, *supra* note 7, at 2.

portion to their respective numbers. Then three-quarters of the States must ratify.[34] This is a process of some difficulty. It ought to be, for only thus is genuine and stable consensus assured, for change in a highly successful Constitution.

Under S.215, all that is required is the concurrence of the same three-quarters of the State Legislatures (for, if three-quarters of them would ratify, two-thirds could be brought to petition) and a two-thirds majority of a convention weighted so as not even to provide accurate *per capita* representation of the American people.[35] This is beyond doubt a substantially easier mode of amendment than the other. How can a mode of amendment substantially easier than the one that has worked be presented as a sound compromise?

Actually, this bill would make amendment far too easy. Amendment would easily be possible without that kind of dominant and stable majority which ought to be required for amendment.

The exclusion of the President from the process of calling a convention is flatly and obviously unconstitutional under Article I, Section 7, and the only question about this is how "strict constructionists" could espouse such a position.

The bill excludes the President from participation in the convention call.[36] This is, of course, in absolutely clear contravention of the entirely plain language of Article I, Section 7:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.[37]

The Senate Report's explanation of this disregard of an unmistakably clear constitutional command is tendered with a confidence that is inversely related to its adequacy:

> Moreover, article I, section 7, is not authorized for Presidential assent to the concurrent resolution calling for a convention or for the congressional action of transmitting a proposed amendment to the States for ratification. The short but suffi-

34. U.S. CONST. art. V.
35. § 12.
36. § 6(a).
37. U.S. CONST. art. I, § 7.

cient answer is to be found in Professor Corwin's annotation of article I, section 7:

> The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the House concurrently with a view to expressing an opinion or to devising a common program of action (*e.g.*, the concurrent resolutions by which during the fight over Reconstruction the Southern States were excluded from representation in the House and Senate, the Joint Committee on Reconstruction containing members from both Houses was created, etc.), or to directing the expenditure of money appropriated to the use of the two Houses. Within recent years the concurrent resolution has been put to a new use—the termination of powers delegated to the Chief Executive, or the disapproval of particular exercises of power by him. Most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect. Similarly, measures authorizing the President to reorganize executive agencies have provided that a reorganization plan promulgated by him should be reported to Congress and should not become effective if one or both Houses adopted a resolution disapproving it. Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course. (The Constitution of the United States of America: Analysis and Interpretation) 135-36 (S. Doc. No. 39, 88th Cong., first sess., 1964 ed.) Citations omitted.

> The Constitution made the amendment process difficult. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to attribute to the Founders the concept that amendments originating in the States should have much more difficulty in passage than those proposed by Congress. That issue was fought out in the 1789 Convention and resolved in favor of two originating sources, not one.
>
> Therefore, the committee has concluded that Presidential participation in the operation of article V is not required by the Constitution. Indeed, a strong case is made out that the Constitution, as construed throughout our history, precludes such participation by the Executive in the amendment process.[38]

The murky quotation from Corwin, gruff though it be, offers no instance of congressional action *having juristic force,* and taken without presidential approval; indeed, Corwin concedes that anything having the force of law *must* go to the President. Of course preliminary votes do not have to go to the President; they do not even fall within the literal terms of Article I, Section 7, because, as to them, the concurrence of both Houses is not "necessary." Of course expressions of opinion cannot be vetoed, whether emanating from the House and Senate or from you and me. And so on. But a convention call would have the force of law—significant, vital law, comparable to a law establishing any other body with power to act. (As a contrasting example, S. J. Res. 197,[39] setting up an arbitration board for the dock strike, went to the President in routine obedience to Article I, Section 7. What possible reason could there be for not following this procedure as to the setting up of a constitutional convention, more important by several orders of magnitude than an arbitration board?) Can it be thought that Article I, Section 7, can be evaded by mere *nomenclature*—by merely calling something a "Concurrent" rather than a "Joint" Resolution? How can people put themselves forward as "strict constructionists" and then simply disregard the plain command of Article I, Section 7, on such scarcely even specious grounds as those given in the Senate Report?

There is one matter wherefrom the President is traditionally excluded, and that is the *two-thirds* passage of amendments in House and Senate, under the first and hitherto invariably used method of amendment. The reasons given in the early case upholding this procedure, *Hollingsworth v. Va.,*[40] were merely assertive, but the prac-

38. SENATE REPORT, *supra* note 7, at 12-13.
39. 92d Cong., 2d Sess. (1972).
40. 3 U.S. 378 (1798).

tice is now well established. The only even semirational ground for this is that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is otiose. This is not a good ground, because it denigrates the process of reason by disregarding the possibility that some members of Congress might be convinced by the reasons in the President's veto message; why else should he be required to send it? But, good or bad, it has no application to the convention call vote in Section 6 of this bill, which would be by simple majority. The short obvious truth is that the convention call vote of Section 6 of the bill falls squarely under Article I, Section 7, and that the exclusion of the President, and of the possibility of veto, is flatly and indubitably unconstitutional. "Strict constructionists" should be the first to agree to this, but the loosest constructionist can hardly deny it.

Since Article I, Section 7 speaks so plainly, and since the power it confers on the President obviously cannot be waived for future Presidents by this Congress or by this President, the omission of the President from his plainly mandated role would cast a permanent shadow of illegitimacy over every amendment originating in any convention called without the command of Article I, Section 7, having been followed. To avoid that shadow, well-justified as it will certainly be, ought to be an absolutely prime aim of those who are devising procedures for change in the fundamental law. Fundamental law should be not merely of arguable, but of clear legitimacy. This exclusion of the President, *per contra,* is not even arguably right.

In view of the plain unconstitutionality of the bill at this point, it seems almost supererogatory to add that the provision is also unwise. The President would normally veto a convention call only when he saw something seriously wrong about it; where there is that much presidential doubt, would it not be well to make assurance doubly sure by requiring that at least two-thirds of each House think him wrong? To put the matter another way, why should this bill treat the calling of a constitutional convention as though it were a less serious matter than building a lighthouse? But these policy arguments ought not be allowed to obscure the central point here: the exclusion of the President is plainly unconstitutional.

The exclusion of state governors has no rational basis.

Generically similar is the exclusion of the Governors of the States from the application process. The Senate Report uses some pretty

strong (if not strikingly fresh) rhetoric to justify this, but the authority it cites, *Hawke v. Smith No. 1*,[41] had, with respect, nothing whatever to do with the question, as anyone who reads that opinion can see. The policy reason given—that gubernatorial veto is just too high a hurdle—is more than unconvincing; the amendment process should not be made easy, and the inclusion in it of the governors of the states, popularly elected statewide, would be a desirable further check. We have here, again, an excellent yardstick of comparison. What possible reason can there be for ordaining that so solemn a step as a State's applying for a national constitutional convention is to go through an *easier* process than a state law changing the speed limit? It would seem that the very least that ought to be required is that a state express its desire for constitutional change through procedures as protective as those it uses for ordinary and sometimes quite trivial law.

But the paradoxical thing here is that the sponsors of this bill are, by and large, "States' rights" people. Why not, then, *at least* leave this matter to the States? As it stands, even if Texas very strongly desires that no application be submitted in her name without gubernatorial approval, S.215 says she cannot be indulged in that desire. Why should Congress, now or in the future, tell the States what they are to do to express their own will?

The bill's withdrawal of questions of law from the judiciary is unwarranted, dangerous, impractical, and inconsonant with our system of government.

Another major and, to me, rather sinister defect in the bill should be noted. It withdraws from the state and federal judiciaries all questions concerning applications, rescissions, convention procedures, and ratification.[42] Now the judiciary often does exclude itself from such questions. But insofar as they are not "political questions" (now as always a term of most uncertain meaning) they may arise legitimately in lawsuits, under any branch of state or federal jurisdiction. It seems to me clear beyond doubt, on the most fundamental principles of *Marbury v. Madison*, that no court, state or federal, can be coerced by Congress into acting on the basis of an amendment which that

41. 253 U.S. 221 (1920).

42. Questions concerning the adoption of a State resolution cognizable under this act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts. § 3(b). *See also* §§ 5(c), 10(b), and 13(c) for other preclusions of judicial review.

court believes has not the force of law, where that court conscientiously concludes, as a matter of law, that the tendered issue is justiciable. One cannot foresee what cases will arise, or what issues will be tendered. But this withdrawal of all such issues from judicial cognizance is, in the class of cases I have designated, plainly unconstitutional. As a matter of policy, moreover, why should it be desired?

Since these exclusions of the judiciary rest on quite rudimentarily erroneous constitutional views, I am driven to rehearse the rudiments. Congress has a very wide power over the *jurisdiction* of the federal courts. It has some (presumably lesser) power over the jurisdiction of the state courts, though I am not aware that Congress has ever attempted to deprive state courts of any jurisdiction without creating a corresponding federal jurisdiction.

But the issue here is not one of jurisdiction. This issue is whether Congress may tell the courts, state or federal, that they may not inquire into certain issues of law, in cases where they *do* have jurisdiction. Unless the whole theory of *Marbury v. Madison* is wrong, it is inconceivable that Congress has such power.

Let us take a simple example. The federal district courts have diversity-of-citizenship jurisdiction. Congress could, of course, abolish the jurisdiction. But suppose Congress does not do so; there is no reason to think it will, and even if it did there are other headings of jurisdiction.

Now in a diversity case, one litigant may rely on what purports to be an amendment, and the other litigant may contend that, as a matter of law, the purported amendment is not really such. In many such cases the court itself will, as a matter of law, hold this question "non-justiciable," finding something in the history of purported passage of the amendment which is "conclusive" of its validity. But there is no assurance that this will always be so, or ought always to be so. Where it is not so, can Congress tell the courts that they must decide cases in violation of what they, the courts, find to be right law under the Constitution? If so, then let us rethink the whole foundation of American constitutionalism.

Questions, moreover, may arise at some earlier stage, say the stage of application. In *Hawke v. Smith*[43] (actually cited by the Senate Report), the Supreme Court clearly treated as justiciable a question involving ratification. In *Coleman v. Miller*,[44] the Court divided

43. *See* p. 210 *supra*.
44. 307 U.S. 433, 446 (1939).

equally on whether the question of the propriety of the Lieutenant-Governor's participating in the ratification process was justiciable. Suppose a question were to arise as to the right of a Lieutenant-Governor to break a tie in the State Senate in a vote on an application for a convention. And suppose this question is, in the view of the Supreme Court, a justiciable one—a holding clearly possible in view of the equal division in *Coleman v. Miller*. Having found the question justiciable, can the Court be forbidden to resolve it, one way or another? Has Congress the power to forbid the courts to look into all the law applicable to cases within their jurisdiction? If it does not (and it is shocking to think that it does) then Section 3(b) is unconstitutional, as are all the other sections withdrawing questions of law from the courts of law.

There are other difficulties about this withdrawal. Suppose a *state* court (taking that view of its duty which I think to be right) disregards these "withdrawal" sections as unconstitutional, and utters a judgment based in part on its resolution of some question concerning, say, application, which it regards as justiciable. Let us say that a certiorari petition is filed in the Supreme Court. Should that Court deny certiorari, citing Section 3(b)? Or should it summarily reverse, citing Section 3(b)? If it does the former, then the state judgment stands, Section 3(b) has had no effect, and there has been no federal review. If it does the latter, or even remands with directions to dismiss for want of jurisdiction (a procedure not always practical) the petitioner for certiorari, in effect, prevails on the merits, in every practical sense, though his position may be wrong as a matter of law.

There is another difficulty about these Sections. Congress may not, in rapidly developing political situations, get around to deciding every question concerning, say, the validity of applications, multifarious as these questions may be, and with up to fifty states involved. Indeed, this is likely—perhaps one ought to say certain. If the Sections mean "*exclusively* determinable by Congress," then all the difficulties I have already been through will in such cases arise. If the Sections mean "determinable by Congress, and, if Congress determines them, then that determination binds the courts, but until then judicial business shall be done in a normal manner," then equally great difficulties arise. What are the courts to do if a question about an application or a ratification arises in a lawsuit, and Congress has not determined it? If they determine it, then Congress may soon or much later reach, in the same or in some other case, an opposite conclusion. Meanwhile, the court case will have become res judicata,

and (more important) may have been acted on irreversibly. If they do not determine it, what is the assurance that Congress ever will?

There is not much use in going on with this. The withdrawal of questions of law from the courts of law is absolutely unconformable to the American system and to the Constitution. Of course it will create multiple and in part unforeseeable difficulties, besides being shocking. What is the motive behind the introduction of this exotic provision into the orderly set of relations among the courts, the Congress, and the law of the Constitution? Astoundingly, the Senate Report tenders no reason—I repeat, for it seems incredible, *no* reason—but blandly designates the congressional committees to which law questions withdrawn from the law courts are to go.[45]

The provision for virtually automatic submission of amendments is reckless.

This bill has a good many other defects, but I am going to mention just one more—itself thoroughly unwise and dangerous. Section 11(b)(1) reads as follows:

> Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, *shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to* (A) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or *(B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called, or because the procedures followed by the convention in proposing the amendment were not in substantial conformity with the provisions of this Act.* No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason,

45. SENATE REPORT, *supra* note 7, at 14.

or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligation imposed upon them by the first sentence of this paragraph.[46]

Now let us consider what this means. It means that, however grossly defective or corrupt the proceedings of the convention may have been, or even however fraudulent the certification of the convention's presiding officer may be, and however catastrophic the possible consequences, the proposed amendment nevertheless goes out to the States in ninety days, unless Congress, *in that time,* affirmatively passes a forbidding concurrent resolution. I am writing to and for Members of Congress, and they know perfectly well that such a resolution could sometimes be blocked for ninety days by a small minority strategically placed, even though a large majority in both Houses, when the matter came to a vote, would take note of and act upon the defect. This provision is so clearly reckless that further comment is needless.

SUMMARY

This is a bad bill in so many ways as to boggle the mind. It rests on radical disregard of the fundamental principle that no Congress can bind its successors to vote against their own consciences on issues of constitutional law or of high policy. It proceeds to try to settle such issues of law and policy at a time when public and professional attention cannot be concentrated on them, and when the factors that must affect their wise settlement cannot be known. It proceeds on a strained and unhistoric view of what Article V means in referring to "a Convention for proposing Amendments." It unwisely commits to the State Legislatures the superintendence of election of delegates to the Convention. It sets up a distortive scheme of representation at the convention. In a flatly unconstitutional provision, it excludes the President from the role unmistakably given him by Article I, Section 7 of the Constitution. It excludes State Governors from exercising, in this supremely important matter, as much function as they exercise in regard to every state law, however trivial. Unexplainedly and inexplicably, it makes Congress into a court of law, and forbids the real courts of law to decide legal questions arising

46. § 11(b)(1) (emphasis added).

under the Constitution. It provides for what, practically speaking, could and sometimes undoubtedly would amount to automatic submission of amendments proposed, or certified as having been proposed, by the "convention," however gross and palpable the defects in the convention procedures.

There are other things wrong with this bill, but I believe I have identified its chief defects. I hope your Committee will do everything possible to see that it not become law.

Respectfully,
Charles L. Black, Jr. /s/
Luce Professor of Jurisprudence

ENRICHMENT SERIES

Amendment By National Constitutional Convention: A Letter to a Senator

CHARLES L. BLACK, JR.*

[*Introductory Note:* Article V of the United States Constitution provides that "the Congress,...on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments...." This language, seemingly clear in meaning on the surface, has spawned a constitutional controversy of significant dimensions. In short, does the Article V language authorize state applications for a national Constitutional Convention *limited as to subject matter*, or does the Article solely recognize state applications for a *general convention*, to propose such amendments *as seem proper to the Convention*?

Recently, Professor Black wrote the following letter concerning the controversy to Senator Edward Kennedy (D. Mass.), Chairman of the Senate Judiciary Committee. The letter provides a valuable dissertation on the history and meaning of the applicable language of Article V, according to a leading constitutional scholar. In particular, the letter takes issue with the finding of a special committee of the American Bar Association that Article V authorizes Congress to establish procedures limiting a Constitutional Convention to the subject matter propounded in the state applications. The letter is reproduced as written, save for the addition of footnotes to sources cited in the manuscript.— *Ed.*]

* * *

YALE LAW SCHOOL
New Haven, Connecticut 06520

June 1, 1979

Honorable Edward Kennedy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

My Dear Senator Kennedy:

About seven years ago, Senator Sam Ervin's bill,[1] concerning the

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[1] S. 215, 92d Cong., 1st Sess. (1971) (Senator Ervin). For the version of the bill as it passed the Senate, *see* S. 215, 92d Cong., 1st Sess., 117 CONG. REC. 36804 (1971).

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processing of state-legislative applications for a constitutional convention under Article V, had passed the Senate and was in the House Judiciary Committee. At that time, I wrote a letter to the late Congressman Celler, concerning this bill, which I thought a very bad one, both as to policy and as to constitutionality. This letter was afterwards published by the Yale Law Journal, under the title, *Amending the Constitution: A Letter to a Congressman.*[2] I enclose a copy of this composition as printed.

That letter addressed itself to the whole Ervin bill; much of it is not therefore relevant to any pressing current issue, and will not become so relevant unless some version of this bill surfaces again. But the most important question raised by the bill was the question whether state applications for a convention limited as to subject-matter were valid, and so effectively imposed an obligation on Congress to call a convention. The Ervin bill rested on the assumption that they were valid; my contention was that they were not, and that consequently no number of them could create a legal or moral obligation on Congress's part.[3] This issue, as you have shown yourself to be aware, is today, or may shortly become, a live one.

I have had occasion recently to go very carefully over what I then wrote on this issue, and I stand by every word I said.

One very important development must be noted. The state of this controversy has been heavily affected by the appearance, since my letter to Congressman Celler was written, of a Report by a Special Constitutional Convention Study Committee of the American Bar Association, *Amending of the Constitution by the Convention Method Under Article V* (1974) [hereinafter cited as Bar Report]. This Report commits itself to the view that applications for a subject-limited convention are valid.

I have reason to believe that this Report now exerts a powerful influence. It is my view that it is deeply flawed, and entirely fails to make its case on this issue. I am sure you will agree that such a fateful question as this cannot be decided on the basis of the respective aggregate prestige of the sponsors of the respective views, but must at last be settled, rather, by the weight of argument. I intend, therefore, to give you my grounds for persevering in my former conviction. I shall not reargue the entire case, since my earlier writings are in your hands, but shall confine myself to considering new aspects either directly raised or suggested by the Bar Report.

I shall, for clarity's sake, put headings over my principal topics.

[2] Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972) [hereinafter cited as Black].

[3] *Id.* at 196-204, especially 199.

Introductory

The Constitution's Article V provides for a method of amendment never till now used. "The Congress,...on the Application of the Legislatures of two-thirds of the several states, shall call a Convention for proposing Amendments...."[4] These proposals, to become effective, must be ratified by three-fourths of the States, just as is true of proposals passing through Congress, the method of proposing always used up to now.[5]

Recently, many State Legislatures have passed resolutions asking Congress to call a Convention "for the purpose of proposing" some specific amendment, spelled out in detail. It now seems possible that one or more of these proposals will be the subject of convention applications from 34 States, the magic two-thirds.

We must separate our judgment on the merits of any particular amendment from our judgment on the legitimacy of the procedure. If we make a wrong precedent now, as to the meaning of Article V, we will open wide a door probably never to be closed. Before we pack our bags for this Convention, let's stop and ask "Is this trip really necessary?"

I think that the applications now on file are nullities, imposing no obligation on Congress. I think the Article V language means a "general Convention," to propose such amendments as seem good to that Convention. And I think that the state applications, to be effective, have to ask for that, and not for something radically different—a severely limited Convention. Applications asking for something other than what is meant by Article V are nullities, and thirty-four times zero is zero.

At the very least—and this is all that really must be decided now—each pending application for a Convention "for the purpose of proposing" some minutely described amendment is a travesty of anything the Framers of Article V could have conceived. Absolutely nothing faintly supports such an absurd distortion of a provision for a deliberative process. I hope Congress will not be intimidated by such "applications"; they place Congress under no obligation whatever.

"Plain Meaning" and Context

The question, first and last, is what is meant, in Article V, by the words, "...a Convention for proposing Amendments...." The best approach to ascertaining the plain meaning of these words is to ask what they would mean, without modification, in the procedural context in which they are intended to be used. Lawyers sometimes "track the statute," phrasing

[4] U.S. CONST. art. V.

[5] *Id.*

allegations or prayers in the exact statutory language. Suppose a state legislature, "tracking" Article V, were to transmit to Congress a paper saying: "Application is hereby made that Congress call a convention for proposing amendments"—the exact language of Article V. Two and only two questions could arise: First, would such an application be *valid.* Secondly, what would it *mean.*

I am tempted to say that these critical questions answer themselves. But there has been so much confusion on this that I will—though embarrassed by the obviousness of what I shall have to say—go a little further.

First, the application, so worded, would of course be valid. Thirty-four such applications would oblige Congress to call a convention (provided Congress could agree on the procedural and constituency specifications—and there would be a duty resting on each member of Congress to try so to agree). That would be true exactly because Article V is "tracked." How could it be that an application for the very thing the Article mentions, in the very words of the Article, would not be valid?

Secondly, the words used would mean "a general, unlimited convention to 'propose' such amendments as it thinks proper." Since I can think of no possible basis for doubting this, I cannot know how to support this conclusion, beyond pointing to its obviousness. Perhaps one might go so far as to ask, "If not that, what *would* they mean?"

Observe how putting the matter this way transforms the "plain meaning" and contextual issues. We are not talking, any longer, about *which of two* "plain meanings" the Article V language has. Unless one is prepared to contest the answers to my two questions regarding this "tracking" application, one must start from the position that the Article V language has *one* plain meaning that is beyond doubt—that "a Convention for proposing Amendments," whatever else it may mean, plainly means "a general, unlimited convention."

Establishment of this crucial point quite changes the focus of inquiry. When we inquire now whether a state application for a *limited* convention asks for what Article V means, we are inquiring whether, *in addition* to its incontestably plain conferral, on the legislatures, of a very significant power, the power to force the call of a general constitutional convention, Article V is to be taken to give them, as well, a *different* power, not at all obviously meant by Article V. In an inquiry concerning correct amendment procedure, where, more than anywhere else, very clear legitimacy is requisite, I should think that great clarity of justification should be looked for before one *adds*, to plain meaning, another meaning far from plain.

The Bar Committee Report adopts, perhaps unconsciously, the rhetorical device of conceding that the general, unlimited convention is a

possibility, but of doing so rather off-handedly, after having fully stated its case for the limited convention.[6] (The Report does not, so far as I can tell, explicitly bring out that the very bill before them, the Ervin bill, was unconstitutional root and branch, even on the Bar Committee's own view, because, in its Section 2, it *limited* the state legislatures to asking for subject-limited conventions.[7])

But this order of presentation has to be reversed. We start with the plain fact that Article V means *at least* "a general convention." Seen from that perspective, the Report brings forth nothing near sufficiently weighty to support the addition of a second and far from plain meaning.

The Report invokes the concept of equality: "[T]he convention method...was intended to stand on an equal footing with the congressional method."[8] But so it stands, if Article V be taken to refer only to a general convention. Such a convention, as one of the two "proposing" bodies under Article V, would stand exactly on an "equal footing" with Congress, the other "proposing" body under Article V. The equality to be sought, as to national concerns, is an equality between the two national bodies to which the "proposing" function is given.

The Bar Report puts forward a "greater includes the less" argument, seeing "no sound reason as to why they [the state legislatures] cannot invoke limitations in exercising..." their authority to procure a convention call.[9] (Note here the assumption that the burden of persuasion rests on the adversary, without saying why. This is hardly worthy of the Bar Association!) This argument ignores the fact—which underlies much of the Bar Report's other reasonings—that a general convention and a limited convention are different in kind. They are as different in kind as (1) the freedom to marry; and (2) the freedom to marry one of two or three people designated by somebody else.

The Report argues that Article V must mean a limited convention, because otherwise the state legislatures would be "discouraged" from applying for conventions.[10] This argument rests on a poorly concealed begging of the question. Only if we assume in advance that limited conven-

[6] ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V, (1974) [hereinafter cited as BAR REPORT].

[7] The BAR REPORT, *supra* note 6, at 18, states: "[W]e consider it essential that implementing legislation not preclude the states from applying for a general convention. Legislation which did so would be of questionable validity since neither the language nor history of Article V reveals an intention to prohibit another general convention." *See also* discussion in Black, *supra* note 2, at 189, 196-204.

[8] BAR REPORT, *supra* note 6, at 11-12.

[9] *Id.* at 16.

[10] *Id.*

tions are meant by Article V is there anything improper or regrettable in legislatures' being "discouraged" by their not being available. We are all "discouraged" in some ways by the state of the law.

But—more fundamentally—what are the legislatures being "discouraged" from doing? From asking for a *general* convention? But the assumption of the Bar Report is that they are "discouraged" from that already, by the very nature of the general convention. From asking for *limited* conventions? But if that is what is meant the argument is a squirrel-cage; the very thing we are talking about is whether the legislatures are entitled at all, as a matter of law, to force the call of limited conventions. The Committee seems to be saying that, if it be held that the sound law of the matter is that Article V does not empower the legislatures to force the call of limited conventions, they will be discouraged from asking for these. Quite.

Remember, too, Senator, that the supposed "discouragement" is to arise from a fear of the very thing—a general convention—that is incontestably meant by the Article V language, provided one agrees with the arguments with which I began this section.

(There is, by the way, a startling paradox here. Since three-quarters of the state legislatures must, under the usual procedure, ratify any amendment "proposed" by a general convention, it is a little hard to explain a great fear, on the part of these same legislatures, that they may be overwhelmed by unwanted amendments. Whom are they afraid of? I leave the resolving of this paradox to those who are so vigorously supporting these state-legislature applications. The problem is only shifted by the thought, doubtless not likely of frequent realization, that state conventions may be designated by Congress as the ratifying bodies; fear of the headlong folly of such conventions is a fear of the people who will elect them. Why, indeed, is one so afraid of the general *national* convention? Is it well to trust any part at all of the amendment process to people who, you think, would go wild if you turned them loose?)

These Bar Report arguments are poor stuff in themselves. To put them in the context I believe to be established by the opening paragraphs of this section, they are obviously not of a weight sufficient to support a second meaning, far less than plain, in addition to the quite plain meaning of the phrase, "...a Convention for proposing Amendments..."

I stress once again that, if I am right about the meaning of the Article V language, applications for a limited convention are *not* applications for the thing meant by Article V, are therefore *not* valid Article V applications, and so impose *no* obligation on Congress.

The Debates in the 1787 Convention

The Bar Report's treatment of these should be set out in full:

The debates at the Constitutional Convention of 1787 make clear that the convention method of proposing amendments was intended to stand on an equal footing with the congressional method. As Madison observed: Article V "equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other." The "state" method, as it was labeled, was prompted largely by the belief that the national government might abuse its powers. It was felt that such abuses might go unremedied unless there was a vehicle of initiating amendments other than Congress.

The earliest proposal on amendments was contained in the Virginia Plan of government introduced in the Convention on May 29, 1787 by Edmund Randolph. It provided in resolution 13 "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." A number of suggestions were advanced as to a specific article which eventuated in the following clause in the Convention's Committee of Detail report of August 6, 1787: "On the application of the Legislatures of two thirds of the States in the Union, for an *amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*"

This proposal was adopted by the Convention on August 30. Gouverneur Morris's suggestion on that day that Congress be left at liberty to call a convention "whenever it pleased" was not accepted. There is reason to believe that the convention contemplated under this proposal "was the last step in the amending process, and its decisions did not require any ratification by anybody."

On September 10, 1787 Elbridge Gerry of Massachusetts moved to reconsider the amending provision, stating that under it "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether." His motion was supported by Alexander Hamilton and other delegates. Hamilton pointed to the difficulty of introducing amendments under the Articles of Confederation and stated that "an easy mode should be established for supplying defects which will probably appear in the new System." He felt that Congress would be "the first to perceive" and be "most sensible to the necessity of Amendments," and ought also to be authorized to call a convention whenever two-thirds of each branch concurred on the need for a convention. Madison also criticized the August 30 proposal, stating that the vagueness of the expression "call a convention for the purpose" was sufficient reason for reconsideration. He then asked: "How was a Convention to

be formed? by what rule decide? what the force of its acts?" As a result of the debate, the clause adopted on August 30 was dropped in favor of the following provision proposed by Madison:

"The Legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S."

On September 15, after the Committee of Style had returned its report, George Mason strongly objected to the amending article on the ground that both modes of initiating amendments depended on Congress so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive...." Gerry and Gouveneur Morris then moved to amend the article "so as to require a convention on application of" two-thirds of the states. In response Madison said that he "did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application." He added that he had no objection against providing for a convention for the purpose of amendments "except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."

Thereupon, the motion by Morris and Gerry was agreed to and the amending article was thereby modified so as to include the convention method as it now reads. Morris then successfully moved to include in Article V the proviso that "no state, without its consent shall be deprived of its equal suffrage in the Senate."[11]

As to the first paragraph in this passage: I have already dealt with the "equal footing" point.[12] I don't know of anything in the 1787 debates at Philadelphia that supports the statement with which the above quotation opens. I dare say the Bar Committee didn't either, for the Madison quote is not from the Philadelphia records, but from the Federalist.[13] Nor does it weigh very much on either side of the present controversy; the origination "of the amendment of errors" might be accomplished by forcing the call of a general convention. As to what "prompted" the "state" method, or who on earth "labeled" it that, there is little or no evidence; the Bar Report cites none. The last sentence of the paragraph weighs nothing on

[11] *Id.* at 11-14.

[12] See text accompanying note 8 and following, *supra*.

[13] THE FEDERALIST No. 43, at 315 (Wright ed. 1961 Belknap Press) (J. Madison).

the present scale; a general convention would of course be a "vehicle of initiating amendments other than Congress," quite as well as would a limited convention. More so.

For whatever reason, the Bar Report, in mentioning the Virginia Plan's provision for amendment without the assent of the National Legislature, does not tell us that this latter provision, excluding Congress, was repeatedly postponed, by vote after vote, and never passed, so that the Committee of Detail went into session with nothing resolved on except that there should be "Provision...for the Amendment of the Articles of Union...."[14] The suggestion that any policy at all emerges from all this would be (or is?) simply ridiculous.

The rest of the Bar Report's quoted treatment of the 1787 Philadelphia debates is of a not unknown genre of "legislative history" —the kind that tells you a few things here and there, but never quite gets down to explaining why they prove what they are obviously put forward to prove. Marching on my own feet, I will discuss first the most critical juncture, the action on September 15, 1787, by which the language now under scrutiny was added. I think it well to put before your eyes the whole (very short) episode, as reported by Madison, beginning with the Article as it stood before this language was voted in:

> Art—V. "The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the (1 & 4 clauses in the 9.) section of article 1."
>
> Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.
>
> Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the peo-

[14] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (Farrand ed. 1937) [hereinafter cited as FARRAND].

ple, if the Government should become oppressive, as he verily believed would be the case.

Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of 2/3 of the Sts

Mr Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.

The motion of Mr. Govr Morris and Mr. Gerry was agreed to nem: con (see: the first part of the article as finally past).[15]

You will note that not only Mason but also Sherman objected to the amending article, as it then stood. The Bar Report mentions only Mason; I can't think why. While Mason, broadly, thought amendment was too *difficult* under the article as it stood, Sherman thought, broadly, that it was too *easy*, and therefore dangerous. He feared, specifically, the amending power of the *States*. Why does the Bar Committee think the immediately following alteration (which was to the present form) was proposed by Morris and Gerry to meet Mason's fears, and not to meet Sherman's fears? As Madison immediately saw and said, the Morris-Gerry proposal did not respond to Mason's fears at all, so far as Congress's role went. The proposal, instead, put another body, the convention, between the state legislatures and the passage of an amendment to the Constitution. This interposition of another, nationally-oriented body might more plausibly be seen as a response to Sherman's fears of "the States."

In only one way was this change possibly responsive to Mason's speech. He was, you will note, afraid that "the people" could not obtain amendments they wanted. If any one thing is certain about 1787 thinking, it is that "the people" and "the legislatures" were not thought to be the same thing—as some recent blusterings seem to assume they are. On the other hand, it was *conventions* that were seen as the organs of "the people." This is why the new Constitution was sent out for ratification by conventions rather than by the legislatures. I am not guessing; this thought occurs at many points, but is best expressed by Madison, on June 5, 1787, in defending this submission to conventions: "...[H]e thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves."[16] *That* is what he thought a *convention* embodied.

[15] *Id.* at 629-30 (footnotes omitted).

[16] 1 FARRAND, *supra* note 14, at 123.

It is possible then, that the insertion of a *convention* mode of proposal may have been conceived as a partial satisfaction of Mason's concern about "the people." But if that is true, then the suggestion is not that such a body, the visible organ of "the people," was to be led in with blinders put on by the legislatures, who were *contrasted* with "the people" in the discussion of the mode of ratification to be chosen for the new Constitution. Mason's fears, if they concerned the power of "the people," would be best answered by a provision for a *general convention*, wherein "the people" had most ample scope of authority.

It is to be noted, moreover, that Gerry (who co-proposed the present language) and Mason (whom it was supposed to mollify) were both, *some minutes later on the same day*, going to refuse to sign the new Constitution on the ground that a new "general Convention" was not to be absolutely mandatory, as they thought it should be.[17] How likely is it that people so minded would be pushing on the same day for subject-limited conventions? Is it not more likely that, disappointed in not getting an absolutely mandatory second general convention, they were pushing for the next best thing—the chance to get such a general convention by legislative applications?

The only other passages of any importance concern the Committee of Detail's August 6 provision (quoted by the Bar Report, above) and the September 10 change therein.

The Bar Report rightly sees that the August 6 proposal was for a convention, to be summoned on application of two-thirds of the legislatures, that would have *final power to amend*, without "ratification by anybody."[18] What the Bar Committee seems not to have seen is that, even if this provision did allow the legislatures to limit such a convention to a particular subject or proposal, the propriety of that dispensation, in the case of a convention with *final power*, needing no ratification, is a different thing, by light-years, from the propriety or necessity of limiting a convention whose proposals do have to be ratified. The two things have nothing to do with each other. The Bar Committee's failure to see this is the more remarkable since it is a difference alluded to in an article they cite just at this point, and on the very page they cite.[19]

Above all, the Bar Committee does not seem impressed by the fact that this August 6 proposal, on which they seem to be placing some sort of reliance, was rejected and thrown out, on September 10, on the grounds

[17] 2 FARRAND, at 631-32.

[18] BAR REPORT, *supra* note 6, at 12.

[19] *See* Weinfeld, *Power of Congress Over State Ratifying Conventions*, 51 HARV. L. REV. 473, 481 (1938), cited at BAR REPORT, *supra* note 6, at 42 n.21.

that it gave too much power to two-thirds of the states (Gerry)[20] and that "The State Legislatures will not apply for alterations but with a view to increase their own powers" (Hamilton).[21] (Gerry, be it remembered, was a co-mover of the language now in Article V.)

The most curious thing, confounding confusion, is that the phrase "for an amendment of this Constitution" (see the August 6 provision, quoted in the Bar Report, above) probably meant "for the process of amendment of..."—using the word "amendment" to mean this process of amending or its general result, rather than what we would call, in a different phrase, "an amendment *to*" the Constitution. I have three contemporary examples of this usage. Williamson, a delegate, wrote James Iredell, on July 22, 1787, from Philadelphia, that he hoped the whole "system" agreed on in Philadelphia "may fairly be called an *amendment* of the Federal Government."[22] Charles Pinckney, in the South Carolina ratification debates, spoke of the aim in Philadelphia as "the formation of a new, or the amendment of the existing system."[23] In Federalist No. 40, Madison refers to the Virginia proposal of the Annapolis Convention as being "towards a *partial amendment* of the Confederation."[24] The use of the word "partial" implies that "an amendment of the confederation," without that word, would have meant "an unlimited process of alteration." By no possibility does even the phrase "toward a partial amendment," applied to the Virginia initiative for Annapolis, refer to a specific alteration. "An amendment *of* the Constitution" did not mean the same thing to these people as "an amendment *to* the Constitution"; I would be interested in seeing examples to the contrary.

Now what does all this prove? Of course, next to nothing. I have been through all this material only because the Bar Committee seems somehow to be assuming it helps their case, without ever saying how or why. I submit that my discussion destroys that assumption. And I think that some of the points I have made may help my own case a little. But the overriding fact is that, however desperately we would like to, we don't know very much about what underlay each vote in Philadelphia in 1787. The records are obviously fragmentary; it is known they became more so as the summer wore on, toward that September 15 on which the crucial vote was taken,[25] two days before fatigued adjournment.

[20] 2 FARRAND, *supra* note 14, at 557-58.
[21] *Id.* at 558.
[22] 3 FARRAND, at 61.
[23] *Id.* at 248.
[24] THE FEDERALIST No. 40, at 291 (Wright ed. 1961 Belknap Press) (J. Madison).
[25] The proceedings of Sept. 15, 1787, are recorded in 2 FARRAND, *supra* note 14, at 621-40.

The Bar Report's Treatment of Eighteenth Century State Material

Again, I think it best to put before your eyes the short Bar Report passage:

> Both pre-1787 convention practices and the general tenor of the amending provisions of the first state constitutions lend support to the conclusions that a convention could be convened for a specific purpose and that, once convened, it would have no authority to exceed that purpose.
>
> Of the first state constitutions, four provided for amendment by conventions and three by other methods. Georgia's Constitution provided that
>
> "no alteration shall be made in this constitution without petitions from a majority of the counties,...at which time the assembly shall order a *convention to be called for that purpose,** specifying the alterations to be made, according to the petitions referred to the assembly by a majority of the counties as aforesaid."
>
> Pennsylvania's Constitution of 1776 provided for the election of a Council of Censors with power to call a convention
>
> "if there appear to them an absolute necessity of amending any article of the constitution which may be defective....But the articles to be amended, and the amendment proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."
>
> The Massachusetts Constitution of 1780 directed the General Court to have the qualified voters of the respective towns and plantations convened in 1795 to collect their sentiments on the necessity or expediency of amendments. If two-thirds of the qualified voters throughout the state favored "revision or amendment," it was provided that a convention of delegates would meet "for the purpose aforesaid."[26]
>
> *Note the similarity between this language (emphasis ours) and the language contained in the earliest drafts of Article V [footnote by the Committee].

(I have left in the starred footnote, which is on the same page as the quoted text, because it is an excellent illustration of the embarrassing inconsequence of many of the semi-reasonings in the Bar Report. The reference is to the August 6 proposal of the Committee of Detail, which I

[26] BAR REPORT, *supra* note 6, at 14-15.

have discussed above. Note the following: First, this August 6 proposal was not a "draft" of Article V; it was a provision that was rejected, and replaced by Article V.[27] But that is the least of it, for, secondly, one reels at the idea that the mere use of the general and neutral word "purpose," in two different passages, implies that the "purposes" themselves resemble each other in any way. Thirdly, if the Committee thinks this similarity does have any probative force, what in the world do they make of the fact that the word (like the phrase containing it) is *not* found in the version of Article V that actually did pass and is now in the Constitution?

This footnote is typical. A hint is dropped that something is being proved or suggested by some such "evidence" as this. (If that is not the intention, why the footnote?) On anything like competent analysis, this insinuated probative force turns out to be zero. But meanwhile a cumulation of such hints creates, in the minds of the unwary, the impression that there is a rich historical foundation for the Bar Committee's conclusions. I hope you will ponder this example well.)

To turn to the text of the Bar Report, just quoted: The Georgia material cited by the Bar Committee has to do with a "convention" that is to be empowered to *alter* the Georgia Constitution—*not* merely to "propose" alterations.[28] I can't see how anyone would think that the propriety of firm instructions to a convention so empowered could have anything to do with the interpretation of a provision (in our Article V) regarding a convention that is merely to "propose." (The Bar Committee seems chronically blind on this; see above .)[29]

Perhaps even stranger, however, is the fact that the ABA Committee did not turn four pages further along in Poore (their source) and note that the Georgia Constitution of 1789 (more nearly contemporary to the federal Constitution than was the one they do cite) provided:

> Sec. 7. At the general election for members of assembly, in the year one thousand seven hundred and ninety-four, the electors in each county shall elect three persons to represent them in a convention, for the purpose of taking into consideration the alterations necessary to be made in this constitution, who shall meet at such time and place as the general assembly may appoint; and if two-thirds of the whole number shall meet and concur, they shall proceed to agree on such alterations and amendments as they may think proper; *Provided*, That after two-thirds shall have concurred to proceed to

[27] *See* 2 FARRAND, *supra* note 14, 557-59, 629-30.

[28] *See* GA. CONST. art. LXIII (1777), at 1 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 383 (1878) [hereinafter cited as POORE].

[29] See text accompanying notes 18-19, *supra*.

> alterations and amendments, a majority shall determine on the particulars of such alterations and amendments.[30]

This "convention," *even though fully empowered to amend without further need of ratification,* was made a "general" convention. How can Georgia be counted as on the Bar Committee side?

The Pennsylvania Convention, also relied on by the Bar Report, is to be a convention empowered to *change* the Constitution, and not merely to *propose* changes.[31] How, again, can the proprieties as to limitation of such a convention be thought to carry over to the Article V "convention," whose acts must, to have effect, be ratified by three-quarters of the States?

Just flipping the pages of Poore, the authority cited by the ABA Committee, I am surprised (or perhaps when younger would have been surprised) that they didn't go just a little further into Poore's two volumes than they did. It might have been instructive to know, for example, that the New Hampshire Constitution of 1784—much closer in time to the federal Convention than is either of the two State Constitutions they do choose to cite—provides for the call of an *unlimited* convention for proposing amendments.[32]

Their handling of the Massachusetts material needs special treatment; I refer you to the just-quoted part of the Bar Report.[33]

Although the reference there is specific, and there is direct quotation, no citation is given. The obvious reference is, however, to Chapter VI, Article X, of the Massachusetts Constitution of 1780. Let me set out this Article, without deletions:

> X. In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments.
>
> And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary's of-

[30] GA. CONST. art. IV, § 7 (1789), in 1 POORE, *supra* note 28, at 387.
[31] *See* PA. CONST. § 47 (1776), in 2 POORE, at 1548.
[32] N.H. CONST. pt. II (1784), in 2 POORE, at 1548.
[33] See text accompanying note 26, *supra*.

fice, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

And said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this constitution to be chosen.[34]

When you see this whole passage it is obvious that "the purpose aforesaid" is "revising the Constitution, in order to amendments." The voters are not to be canvassed on their wishes as to one or more specific amendments, but "for the purpose of collecting their sentiments on the necessity or expediency of revising the Constitution, in order to amendments."

This is completely confirmed by the title of this Article in the 1780 Massachusetts Constitution: "Provision for a future Revisal of the Constitution."[!][35]

One will look in vain in this passage for any suggestion that the vote to be taken by the General Court is to be on anything but the general question of the "necessity or expediency of revising the Constitution in order to amendments."

This latter phrase is not natural to us, but the only meaning it can bear in the context is "in order to make amendments." Exactly this usage of the phrase "in order to" is attested in the Oxford Dictionary, s.v. "order,"28b with a 1773 example from Burke [...in order to a treaty]. "Revise" undoubtedly bears its etymological meaning, given in the Oxford Dictionary with examples before and after 1780, of "To go over again, reexamine, in order to improve or amend."[36] All this easy dictionary learning—which took me ten minutes and would have taken the Bar Association Committee ten minutes—simply confirms what would be obvious anyway—that this Article X embodies a perfectly straightforward plan for collecting the sentiments of the voters on whether the constitution needs to be looked over with a view to its amendment, and if the voters are of this opinion, the summoning of a convention with a view to its amendment. There is not a hint, anywhere, that instructions as to subject-matter are to bind such a convention, or even to be issued to it. The Massachusetts system, as embodied in the Article, not only does not fit the use the Bar Committee made of it, but is a clearcut example of provision for a *general* convention to be called when the people think a new look at the constitution is needed, with a view to its amendment—exactly the sort of conven-

[34] MASS. CONST. ch. VI, art. X (1780), in 1 POORE, at 972.

[35] MASS. CONST. ch. VI (1780), in 1 POORE, at 970.

[36] THE SHORTER OXFORD ENGLISH DICTIONARY 1821 (3d ed. 1973).

tion I believe is mandated by our Article V. Who would have guessed this, from the chosen quotations and summary given us by the Bar Committee?

The Nineteenth Century Record

In my earlier letter to Congressman Celler, described and cited above, I said that the notion that state legislatures may limit the subject-matter in their applications for conventions was "nothing but a child of the twentieth century."[37] I used Brickfield's tables, there cited, to establish that, until around the turn of our century, through all the turmoils until that time, nothing but general-convention applications were transmitted to Congress by the States.[38] This, if true, is very important, because it shows that, *for more than a century after the Constitution went into effect*, this Article V provision was *not* generally understood as empowering the state legislatures to set the agenda of any convention they applied for, or to apply for a convention so limited.

The Bar Report presents data on former state applications in such a manner as to make it difficult to get at the nineteenth century pattern.[39] But if you persevere through their material, you can see that it confirms my former statement. As far as these eyes can make out, *all* applications are in effect classified as "general" by the Bar Report, until 1893. There was one that year for direct election of Senators, and another such in 1895.[40] The next subject-matter limited application was in *our own* century. (The Bar Report cites a source of their own, an unpublished thesis not previously known to me,[41] which agrees with my own conclusion that the 1833 Alabama memorial, dealing with "nullification" was not really an Article V application at all.[42] And for some reason they do not put a 1790 application for "revision of the Constitution" under the "general" category, where of course it belongs.[43])

Think what this means. Through the controversies over the Alien and Sedition Laws, over the Embargo, over the "internal improvements" bills, over the Bank of the United States, over the early fugitive-slave laws, *not one single state legislature* acted as though it thought it had the power to force Congress to call a convention limited to one of these topics. It did not

[37] Black, *supra* note 2, at 189, 203.

[38] *Id.* at 202-203.

[39] BAR REPORT, *supra* note 6, at 59-69.

[40] *Id.* at 63.

[41] *See* Pullen, "The Application Clause of the Amending Provision of the Constitution," 1951 (unpublished dissertation in Univ. of North Carolina Library), cited at BAR REPORT, *supra* note 6, at 62.

[42] *See* BAR REPORT, *supra* note 6, at 67; and Black, *supra* note 2, at 202.

[43] BAR REPORT, *supra* note 6, at 68.

even occur to Kentucky and Virginia, in the 1790's, when they were busy with "interposition" against what they felt to be unconstitutional actions of Congress, to go at the matter *via* a limited Article V convention. Even in the great nullification and slavery contests, of the 1830's and 1860's respectively, the states that submitted applications made them "general," according to the Bar Report's own sources and tabulations.

This is overpowering evidence of an original and long-continued understanding, broken (except for the two 1890's applications mentioned above) only in this century, when some state legislatures thought up a bright (and entirely self-serving) notion.

Conclusion

There is no good argument and no solid evidence to support the Bar Report—not enough to serve even after the Bar Committee, quite without warrant, tries to turn the question around so the burden of persuasion seems to lie on the other side. Their treatment of the 1787 Convention debates is either languid or fanciful. Nothing solid so much as tends to sustain their conclusion except the prestige of the Committee's members, and that is not enough to be decisive on a fundamental question regarding ultimate constitutional power.

I don't want to win this fight on any other ground than rightness. But it is fair to point out to you the great importance of the question. The national House of Representatives is the only body, anywhere, wherein the whole American people are represented in proportion to their numbers. The waves of pseudo-populist bilge, that would somehow identify the state legislatures with "the people," break against this rock. (This identification, moreover, would have seemed absurd to the delegates in Philadelphia, as I have already shown.) About half the American people live in nine states. Three-quarters of the states can contain as few as forty percent of the people. Anything that builds up the power of the state legislatures, counted one by one, is not a facilitation of democracy but in derogation of the American national democracy.

I am not attacking the senatorial system, which I believe in. (Indeed, I am just currently working on a defense of the senatorial pattern of representation, now under attack from another quarter.) Nor do I wish to deny to the state legislatures any power that is legitimately theirs. But the population-ratio among states now runs as high as 65 or 70 to one, between five and six times as high as the highest ratio at the coming into effect of the Constitution. A nation believing in democracy ought to think a long time, and weigh evidence and argument very carefully, before it makes a *new* precedent that moves further toward equating the one to the 65. And a

nation that believes itself to be a nation ought likewise to hesitate before acquiescing in the flow of new power out to 50 legislatures.

I stress the word "precedent," Man and boy, I have been fighting off these "convention" applications for a long time. And I can assure you that if this road, now only a gleam in the legislatures' eyes, is ever opened, the "budget-balancing" amendment, silly and anti-constitutional as it is, will not be the worst you will see. Not by far.

Let me add one final word, of crucial present importance: I have argued, here as in my Celler letter, for the conclusion that an Article V convention must be entirely general, and that a state application asking for something other than that is void. I fully believe in this view. But it would be quite sufficient, for now, to hold to the far more modest proposition that, at the least, an application "for the purpose of proposing" a minutely described amendment is a mere travesty of grown-up constitutionalism, and indeed of the very word "propose," as applied to a solemnly assembled national constitutional convention. Assembling a convention for such a ministerial or rigorously channelled function is a bit of foolishness one can by no stretch of fancy think the Constitution calls for. It reminds me of Henry VIII's *congés d'élire*, which gave cathedral chapters the "right to elect" a bishop—namely, the bishop designated by Henry VIII. I fully argued this point in a 1963 article, *The Proposed Amendment of Article V: A Threatened Disaster.*[44] The difference between a directly quoted amendment to be "proposed," and a clearly described amendment to be "proposed," is trivial. Many of the current applications are of this kind. I hope at least that Congress will not be intimidated by these. They cannot possibly be what Article V means, and should be regarded as obviously without force.

Yours very respectfully,

Charles L. Black, Jr.
Sterling Professor of Law

CLB/lm
Enclosures

[44] Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 961-64 (1963).

TESTIMONY OF WALTER E. DELLINGER, PROFESSOR OF LAW, DUKE UNIVERSITY

Mr. DELLINGER. My mentor, Charles Black, has done such a fine job with this question that I do not think that I will recount, Senator, the historical review that is contained in my prepared statement. My view of that history was that the convention itself, and not Congress or the State legislatures, was granted the authority to determine the agenda of a convention and to determine the scope of its deliberations.

Rather than re-cover that well-trod ground, I thought it would be useful to take a few minutes and examine these bills from a slightly broader perspective.

The bills before the committee, it seems, have one evident purpose: to control and to domesticate an article V Constitutional Convention. With all respect to the very laudatory intentions of Senator Hatch and former Senator Ervin and the others behind these efforts——

Senator BAYH. I must confess that I must plead guilty here as being in that camp that is trying, as I am sure you observed from the question I asked John Feerick, I am trying, but I think it is important, of course, not to delude ourselves into recommending to people that which we are not quite sure we can deliver.

Mr. DELLINGER. I understand, Senator, that what you want to do is basically to domesticate and put some controls on a constitutional convention.

My belief that the legislation is ill considered is based on the notion that it threatens both to trivialize and to emasculate the convention method for proposing amendments.

I think the legislation is ill considered for two very different kinds of reasons.

First, I think it is unwise because it encourages State legislatures to make overfrequent resort to this mechanism by calling special-interest conventions for inappropriately narrow and shortsighted purposes.

My second and quite different objection is that this legislation could establish a precedent for congressional power to frustrate and hamstring the work of a wholly legitimate and proper constitutional convention if and when one should ever be needed.

Now, I am convinced, unlike some others, that the constitutional convention mechanism is a salutary one, and even though added in the last days of the Philadelphia meeting, is an important addition to the Constitution.

Properly conceived, it is a very important safeguard of ultimate democratic control over the organic law of the Nation.

I also agree, however, with Charles Pinckney, who said that "Conventions are serious things and ought not often be repeated."

Senator Hatch asked whether the convention mechanism was a dead letter. I think, Senator, it is proper to view the convention as an awesome device but one which serves us well, even as it stands and waits.

In this respect, it has much in common with another constitutional mechanism, the power to impeach and remove a President of the United States.

That, too, is a mechanism which has never been put to final use, but it is by no means a dead letter for that reason. The convention, like the power to impeach and remove a President, is an important part of the Constitution.

I think it is too important to be called into use for a narrow or trivially limited purpose.

Senator HATCH. If I could interrupt you for a second, one thing that bothers me, and I have great regard for both of you, is that under your interpretation where you can only call for a general convention, the only way you are going to have a convention under article V is if there is a general discontent with the Constitution itself.

If the States have no right to call for a convention on a specific issue, and have concern only about a specific issue, it seems to me we would never have a convention. Maybe I have oversimplified it, but that is a problem and concern that I have.

Mr. BLACK. It is not a dead letter to my mind. It is a final recourse. We have plenty of experience in amending the Constitution. We have amended it piecemeal on the one hand, and here we have the recourse if there is general discontent with the Government.

Senator HATCH. If the State has the sovereign right to call for the convention, it seems to me they should also have the right, to call for one on a limited basis or on a general basis. I am going to read your comments, and I certainly don't want to jump to any conclusions. If I am correct, it appears to me that Professor Black has taken the more extreme approach here today, extreme in the sense that he says that only a call for a general convention is in itself valid whereas others, such as Professor Dellinger, would at least countenance the validity of such applications, even though they could not actually limit the convention itself.

Would that be an accurate statement?

Senator BAYH. I am not sure Professor Dellinger had finished.

Senator HATCH. Why don't I let you finish.

Mr. DELLINGER. I will come to that point.

I think there is no difference on constitutional law between Professor Black and myself. I can conceive of circumstances in which Congress, perhaps, had become so oppressive that there was a critical need for a particular and very important amendment, or series of amendments, that States would seek a constitutional convention, fully realizing that it was within the convention's prerogative to survey the problem and determine what amendments the convention thought ought to be proposed. That convention might very well limit its deliberation to the pressing issue which called it into existence without necessarily reviewing all 26 amendments and every article of the Constitution, so that it would not in that sense be a "general convention" to produce a new document, but one called in very serious circumstances, and a convention that we would treat seriously by saying that this is indeed the body that was to propose the amendment.

Mr. BLACK. It might simplify things if I say I agree that a convention may limit itself, naturally.

Senator HATCH. I think anybody could agree with that.

Mr. DELLINGER. The position of the American Bar Association takes a different view than that I espouse, and I think their view proceeds largely from the underlying premise that what we are talking about is what they call the State mode of proposing constitutional amendments.

It naturally follows that if this is the "State mode," the State legislatures ought to be able to put it to any use they wish. I think that was the thrust of Senator Thurmond's remarks.

That is the fundamental error. There is no "State mode" for proposing amendments to the Constitution.

Senator HATCH. Professor Black says that the States, in calling for a constitutional convention, may only call one that is general.

You are saying that the States may call for a limited convention—this is not automatically invalid—but that the convention itself must be general.

Mr. DELLINGER. I can be quite precise about that point.

A proper convention, and the only proper convention under article V in my view, is one which has the authority to determine what amendment it ought to propose for ratification.

In asking whether a State legislature has applied validly for a convention, one is asking essentially a matter of statutory interpretation. Having concluded that a proper constitutional convention can propose any amendment it thinks necessary and desirable one can look at one of the State applications such as Idaho, and ask if Idaho has requested us to convene that kind of convention—what they asked for is a convention limited to the question of the balanced budget convention.

I suggest to you, Senator, if you read the Idaho application, you will see that they make it quite clear they are opposed to a convention that has authority to do anything other than propose an amendment, the very details of which are expressly set forth in the application. Therefore, one certainly should not construe their application as one calling for that which they make clear they oppose.

The proper response would be to inform Idaho that a convention has the power to decide finally what amendments are proposed. "If you understand that, and wish to invoke such a convention, we will do so and will honor your request if you are joined by 33 other States. But you may not control that convention and may not put limits on it. Let us know whether you want such a convention or not."

I think the States have been confused by the process of earlier State applications and the consideration of this legislation in Congress.

As I say, there is no "State mode" for proposing amendments. There is a congressional mode and a convention mode for proposing amendments.

One theme that emerges from the Philadelphia debates on article V is the expressed fear that State legislatures would enhance their own power at the expense of the central government. That takes on clear meaning if one considers, for example, the apportionment controversy, where if State legislatures could submit an amendment constitutionalizing malapportionment, and vote it up or down, and send it back to the same State legislatures for an up or down vote on ratification that is the very situation that Hamilton and others wanted to avoid.

It was a proposal——

Senator BAYH. Excuse me. Is there anything to keep the State legislators who petition from also being elected as delegates to the convention?

Mr. DELLINGER. No.

Senator BAYH. Could we constitutionally prescribe who can and who can't? Can we say that no Member of Congress or member of the State legislature can run for delegate?

Mr. DELLINGER. I would have grave doubts, Senator, about the validity of any congressional provisions for the convention other than those which are necessary to establish—minimally necessary—to establish the convention. It runs the risk of Congress hamstringing the convention.

Senator HATCH. Would you excuse me a second?

I apologize to both of you and to the other witnesses, because I have to go. I am going to read very carefully what you have to say. As Professor Black knows, I have in the past praised him a great deal.

If you will forgive me, I hate to leave this, because it has been an extremely interesting hearing, one of the more interesting and useful ones that we have had recently. I have presently disposed on the side of the right to have a limited convention, but I do have an open mind on these extremely difficult and novel constitutional questions.

There are many questions that are unanswered in my mind.

I am going to ask my staff member to ask some of these questions of you, if that is all right with you.

I will have one more question, if you are finished. Are you?

Mr. DELLINGER. No.

Senator HATCH. Excuse me. Go ahead, please.

Mr. DELLINGER. The "limited" convention, moreover seems to me to be a very bad way to make law, fundamental law.

The limited convention is a form of special interest politics run rampant. It allows aggressive single-issue fringe groups to engage in low-visibility lobbying through State legislatures for narrow proposals which then could be presented to a convention on a take-it-or-leave-it basis. I think that the record of the Constitutional Convention indicates that a deliberative process is what was in mind and not one that was conducted by a plebiscite of State legislatures which lends itself to single-interest politics which we have seen on the rise in this country.

I think what Congress should be telling the State legislatures is, "If you want a Constitutional Convention, the procedure for applying for one is simple." But the additional message to be conveyed is that the convention is a serious matter. It doesn't mean that you have to revise the whole Constitution, but any convention should be a mature, responsible body fully empowered to engage in constitutional drafting to evolve the amendment that the convention believes best responsive to the country's needs.

The States should be given that message, and not the message of this bill, which encourages single issue politics which allows a lobbying group to come in with a single-shot proposal and have the convention take it or leave it.

Senator HATCH. Thank you.

Mr. DELLINGER. Mr. Chairman, my second objection is of a different nature. That is, that I think these bills run a risk of establishing a precedent of congressional power that could be used to destroy the viability of a convention as an essential but seldom-used safeguard against serious oppression.

Now, I don't have the sense from the Philadelphia Convention that there was any anticipation that this would be a frequent mode of amendment. Congress is much better situated, as you well know, to

propose amendments, and to foresee the need for them. But on some occasions it was feared that this method of proposing amendments might fail.

What occasions would those be? Obviously, very serious ones indeed, where a constitutional amendment that would be desired by 38 ratifying States, after mature and thoughtful deliberation, could not be sent to them because of the recalcitrance of an oppressive and abusive Congress.

Senator BAYH. Let me be the devil's advocate here, if I might, because this is very interesting, and I think very helpful. It is just that feeling, I think, that some people have out in the country right now about Congress and about the fiscal question that causes this issue.

So you might crank that into your thoughts on the circumstances.

Mr. DELLINGER. I do not have any interest in taking a position on that particular issue. I am confident that if two-thirds of the people of this country seriously desired that amendment after informed reflection upon it, that it would be forthcoming from Congress.

We are talking about the need to utilize this other device only on those occasions in which Congress is simply not movable in spite of a mandated three-fourths, what we hope are three-fourths of the people who desire an amendment and Congress will not act.

Now, that is a time of very serious crisis in the country, and the convention mechanism, I think, was designed to be usable on such an occasion.

As George Mason said, when Congress becomes oppressive, there has to be some avenue of relief.

Now, I think that it would be wholly proper to have a Constitutional Convention at such a time, but what is critical about that kind of convention, one called to deal with a serious problem to which Congress was unresponsive, is that it should not be subject to the control of Congress.

From the very outset of the Philadelphia Convention, it was suggested in the words of the Virginia resolution that there must be a method of amending the Constitution for which the consent of Congress was unnecessary. That evolved as a convention mode, and yet under these bills, no amendments can proceed to the States without the assent of Congress.

Congress arrogates to itself the power to determine the scope of the convention's subject matter, and to block ratification of any proposed amendment which in Congress own view relates to or includes the general subject different from that set out by Congress.

Senator BAYH. I find a real test here on separating my thoughts from a specific amendment and a broader convention.

I might, to direct your thinking, point out that even in the Constitution, in the fifth amendment, as I recall, the convention is not immune from congressional action. It doesn't say on petition of a direct number of States, two-thirds of the States, that a convention shall meet, or automatically take place. It says Congress shall call one, and it is that "shall call" that we are dealing with here, I think—under what rules, regulations, or restraints may be placed, and so forth.

You are being very helpful here as to what were the limitations on the ability of Congress to meet that.

Mr. DELLINGER. I have no doubt that when two-thirds of the States submit valid applications, the Congress must call a convention. But

such a convention is intended to be free of congressional control. That was the whole point of the matter. These bills, in the process of trying to domesticate the convention and make it usable for these single-issue constituencies, run the risk of creating a precedent for congressional control over the convention at a future time when a convention might truly be needed as a counter to congressional abuse.

Now, we have debated the issue, in the literature, of whether Congress has the power to set limits on a convention.

Senator Hatch's bill is subject to different interpretations. I read it as saying that Congress, itself, may undertake to frame what is the "general subject" to which the convention is limited, perhaps extrapolating or subsuming a number of different State applications into what Congress thinks is an appropriate general subject, and then Congress in its sole determination has the power to exercise what is essentially censorship over the content of any proposals that emanate from a Constitutional Convention and say, "No, they don't meet the standards we set up, they don't meet what we think is in the general subject, and we will not forward them to the States."

Were there ever a time in which the Nation needed to limit congressional abuse, this power would be quite dysfunctional and contrary to the notion that the convention mode was to be independent of Congress.

So what these bills do are really two different things that look in different directions.

They first of all encourage the use of the convention in a trivial matter for single-shot special-interest groups and hope to make that a viable possibility by controlling, domesticating, and shackling the convention under congressional superintendence or State legislative applications.

Then, on the other hand, these bills cripple the use of the convention as a serious deliberative body free and independent as the framers intended, by setting a precedent that it is up to Congress to control one of these conventions.

They do that by the subject matter limitations and by setting a precedent for further controls by Congress, such as a congressionally imposed voting requirement.

I enjoyed rereading the debate which you had, Senator Bayh, with Senator Ervin over the proper voting majority in a constitutional convention.

With all due respect, this is one issue on which I think the American Bar Association report was correct, that this is not a matter for this body to decide.

If we take a convention for proposing amendments seriously, and keep ever in mind the essential attribute that the proposing body is independent of Congress, then that convention itself ought to set its own agenda and its own voting requirements.

Mr. BLACK. I totally agree with that.

Mr. DELLINGER. Senator Bayh suggested that if there is one issue at the convention, the delegates are going to count noses, and if there is a bare majority for our side, but not two-thirds, the majority would not put through a two-thirds requirement. Such an outcome is not clear, however, if the convention is going to have the authority to determine the scope of its own deliberations and what subjects it will consider.

At that point, delegates who favor by a bare majority proposition X may well vote in favor of a two-thirds majority out of fear that if they do not propositions Y and Z may also be proposed.

I am not saying they would decide to require two-thirds, but it is more likely than it would be in the case you analyzed of a single issue convention. If there is only one issue, everybody knows how you want to vote on the voting majority question as soon as the convention meets.

My point is that if Congress can say to a convention for proposing amendments, that "You must submit for ratification any measure which a bare majority favored," as Senator Ervin's original bill provided, or if Congress may say to the convention, "You may not submit for ratification any provision that two-thirds agree on," why not impose a requirement of four-fifths, or 90 percent?

That seems to me to make clear the fact that in attempting to domesticate this device to make it useful to the single-issue, special-interest groups, what we have done is set up a system in which Congress need never fear that its abuses might be checked by a Constitutional Convention. As long as Congress can determine what the voting majority will be, and how broad or narrow the subject matter must be, and determine in its own view whether any proposed amendment satisfies congressional judgment in terms of its content, whether it is in or out of that proposed standard, then Congress need never fear that this is a device that would be used to hamstring the power of the Congress.

Senator BAYH. Let me look at the consequences.

I had two concerns about two-thirds. One is the procedural substantive one which I mentioned, and the other one I just sort of referred to tangentially, that an amendment to the Constitution should have a broad cross-section of support, a consensus of support and Mr. Black pointed out that we had to get three-fourths of the States, rather than three-fourths of the people.

What you are saying, then, gentlemen, is that you agree that article V does not give the States the right to petition for a limited convention, and basically you think that is good.

Mr. DELLINGER. I do, Senator, and Professor Black doesn't disagree, that the State might petition for a convention and recommend in the application, recommend a specific amendment.

Mr. BLACK. Yes. It is entirely possible that a convention could be summoned and in fact one amendment only would be proposed, but that is a different thing than an obligation.

Mr. DELLINGER. That is right.

Senator BAYH. What concerns me is that if one follows your conclusion, and you may very well be right, and it really concerns me that you are right, and if we go ahead with this business of trying to do something, that we are holding out false hopes and we sort of turn cannon loose on the deck, but what concerns me about the no limitations interpretation is that we could then be confronted, either accidentally or we could intentionally, getting two-thirds. States asking for a general convention, and we could make the proposal repealing the Bill of Rights, and that may sound ridiculous, but when you see the issues and the emotions that have existed in this country at one time or another, and looking at Miranda, and other things, it might

be that that convention could vitiate the greatest act in the history of mankind.

Mr. BLACK. I agree with that. If I had a choice, I would put in the two-thirds vote provision in Article V, but I cannot see how it can be read into it. The ordinary common rule is that you have to have a majority of the vote.

I think one defect of this bill is that in reporting on the Electoral College—which is something I have strongly defended—that would increase the power of less populous States.

If a convention were called with proportional representation, it couldn't pass anything without a majority. When they come together the first thing they have to pass is their rules, and they would certainly have to be passed by a majority. I wish it had said two-thirds, but since it is a way of circumventing Congress in whatever field of operation, I cannot read into it the power in Congress to set the voting rules for such a convention. I think it would be—it is too bad that it is not there, but I can't see it there.

Mr. DELLINGER. Senator, I understand your concern about not unleashing something we cannot control, and I think that the best way to insure that we don't have irresponsible use of a Constitutional Convention would be for this Congress to make it clear to the States, through legislation and otherwise, that exactly to the contrary to section 10 of this bill, that exactly to the contrary, a convention for amendments could propose whatever amendments they desire, and again, exactly opposite to section 10, that the convention shall propose whatever amendments the convention thinks appropriate.

I think that would have a very salutary effect of curbing the desire to submit petitions for a convention by legislatures which have not really taken it seriously.

I think it would totally change the dynamics of the State legislative process if a State legislator could confidently assert to his fellow members: "If we want to have a convention on nationalizing the broccoli industry, we can have one, but the convention will be free to propose whatever it wants, and I don't think nationalizing the broccoli industry is important enough a matter for this State legislature and 33 others to summon a Constitutional Convention."

I think we would find that caution exhibited in State after State.

Senator BAYH. You have been very kind. I would like to submit some questions to you in writing and then put them in the record.

Mr. DELLINGER. My colleague from Duke disagrees with my views, so I am trying to scoop my papers up quickly and give him a chance to speak.

Senator BAYH. I hope Senator Hatch's staff could address some questions.

Mr. DELLINGER. I am sorry. I think he did have some questions.

Senator BAYH. Why don't we give our colleague from Utah the same right to present questions in writing.

I know how busy you are, gentlemen, and thank you very much for appearing.

Mr. BLACK. May I submit this to you for the record?

Senator BAYH. Yes.

Thank you very much.

[Mr. Dellinger's prepared statement and additional material follow:]

PREPARED STATEMENT OF PROF. WALTER E. DELLINGER

Mr. Chairman, the principal bill before this committee (S. 1710. "The Constitutional Convention Implementation Act of 1979", introduced by Senator Hatch) is predicated upon the fundamentally flawed premise that Congress or the state legislatures may exercise substantial control over the outcome of a "Convention for proposing Amendments". The specific erroneous assumptions underlying this bill are (1) that Congress may control any convention called for proposing amendments by limiting in advance the subject matter authority of that convention; (2) that state legislatures may validly specify in their applications that the convention be formally so limited; and (3) that Congress, in response to these limited requests, must call a limited convention, define, in rough or precise accord with the state applications, the scope of matters that may be considered, and mandate that the convention stay within those pre-set limits. It is possible that this legislation is also based upon an assumption that Congress can take applications for a narrowly limited convention, broaden those applications into a "general subject" defined by Congress, and call a convention on that more "general subject"—even if many of the applying state legislatures are in fact opposed to a convention with an expanded mandate.

For the reasons I have set forth at greater length in a recent article ("The Recurring Question of the 'Limited' Constitutional Convention", 88 Yale Law Journal 1623 (1979) I am persuaded that any Article V convention was intended to be free of the control both of Congress and of the state legislatures. One theme that emerges from the Philadelphia debates in 1787 is that Congress should not be given the exclusive authority to propose amendments; another is the fear expressed by Hamilton and others that state legislatures would propose amendments that would seek to enhance their own power at the expense of the national government. The framers of Article V therefore rejected a plan which would have permitted state legislatures to propose particular amendments for ratification. They created instead an alternative amendment method free of congressional or state legislative control: a constitutional convention free to determine the nature of the problem, free to define the "subject matter" and free to compromise the competing interests at stake in the process of drafting a corrective amendment. State legislatures may call for such a convention, but neither they nor Congress may control it.

A state legislature is free, of course, to suggest the particular problems it believes need to be addressed by a convention and free to recommend that the convention confine itself to those subjects. Any formal limitation on the subject matter authority of such a convention, however, would be inconsistent with one of the principal reasons for the creation of the convention device. If the state legislatures could limit the convention to consideration of a precisely worded amendment (as might be possible under the bill proposed by Senator Helms, S. 520), and restrict the convention to either proposing that exact amendment or taking no action at all, effective proposal power would have been shifted to the state legislatures and would exclude any national body from having an effective voice in shaping the amendment. If, on the other hand, the convention were confined not to an exact amendment, but rather to a "general subject" (as would be the case under the proposal by Senator Hatch, S. 1710) then Congress would likely become involved in defining and enforcing limits on the convention in the process of framing the call and judging whether the convention's product was within the "subject" established by Congress. This would conflict with a different goal of the drafters of Article V: the desire to create an alternative amendment process in which Congress had no significant control over the outcome.

An example of impermissible Congressional influence over a convention limited to a "general subject" by Congress may be drawn from Senator Hatch's own remarks. Senator Hatch's bill attempts to avoid the problem of undue state legislative control over the outcome of a convention by broadening the scope of limits over a convention to those of a "general subject". In explicating the term "general subject", Senator Hatch informed the Senate that a state application for a convention for the purpose of "improving the functioning of the executive branch of the Federal Government" would not fall within the same "general subject" as an application for a convention to consider "changes in the length of the presidential term of office." 125 Cong. Rec. S. 11872 (daily ed. Sept. 5, 1979). It strikes me as far from self-evident that these two proposals are not related to the same general subject: lengthening the term of the President would certainly be one conceivable way of improving the functioning of the executive branch. A Congress free to define the "general subject" of a convention called for by a series of different applications would have a good bit of influence over

the agenda and the possible outcomes of such a convention. And a Congress free to reject a convention's proposed amendment changing the term of the President because it did not properly relate to the "general subject" of the functioning of the executive branch, as Senator Hatch suggests would be proper is a Congress with substantial control over the final product. Since the convention method was established as an alternative to Congress, the influential task of defining the agenda should be left where Article V intended it to be left: with the "Convention for proposing Amendments".

Legislation which attempts, as each of the proposed bills pending before the House and Senate does, to limit the authority of the convention to propose whatever amendments the convention may think appropriate is thus inconsistent with Article V in either or both of two ways. Limitations confining a convention to an amendment whose "nature" or text is narrowly defined impermissibly transfer proposing power to the applying state legislatures; more generous limitations to a "general subject" mitigate this flaw, but only at the risk of creating another: an impermissible transfer to Congress of power to define the subject and to check a convention's proposing authority by rejecting amendments which in Congress' own view are inconsistent with the "general subject" as defined by Congress.

Because the term "general subject" is so elastic, it is difficult to ascertain from S. 1710 to what extent it would permit legislatures narrowly to confine the scope of a convention, and to what extent it would permit Congress to define the contours of the convention's authority. In either case, I believe it impermissibly withdraws from a "Convention for proposing Amendments" the authority to determine what amendments to propose. It may be useful to the committee, however, to go beyond this basic objection and to consider how this bill might operate in practice. How, for example, would the presently pending applications for a convention to propose a balanced budget amendment fare if tested by standards set out in Senator Hatch's bill? Senator Hatch has stated that "the imminence of a convention [on] the matter of a balanced budget has clearly created the urgency for this legislation". 125 Cong. Rec. 11872 (daily ed. Sept. 5, 1979). It is therefore ironic that virtually all of the pending applications for such a convention would presumably be invalid under the standards proposed by S. 1710. This bill requires legislatures to state in their applications the "general subject" of the proposed convention, requires Congress to limit the convention to such a "general subject" and permits a convention to propose any amendments pertaining to that "general subject". Senator Hatch recognizes that thoughtful constitution drafting cannot be conducted as a plebiscite among a series of resolution passing state legislatures which specify the very amendment to be "proposed" by the convention. He notes that

". . . to the extent that a petition was required to be precise, either with respect to the specific amendment sought, or the specific language sought, there would be litle use for the convention itself. To limit the convention to the consideration of a single, meticulously worded amendment is to make the convention a farce."

The thirty "balanced budget" amendments now pending before Congress contemplate that the convention will be limited to the consideration of just such an impermissibly narrow amendment proposal. Arizona, for example, seeks a convention for "the specific and exclusive purpose" of requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenue for that fiscal year." None of the thirty applications comes close to stating anything that could conceivably be called a "general subject" and therefore do not provide a basis for calling a limited convention under Senator Hatch's bill.

Some might suggest, however, that the proper response to such applications under the Hatch bill would be for Congress itself to define a "general subject" (such as "federal fiscal policy" or "inflation control") under which these specific applications could be subsumed, and then proceed, once the requisite number of appliations had been reached, to call a convention limited only by this expanded "general subject." Such action by Congress, however, would be flatly inconsistent with the expressed wishes of many of the applying state legislatures. They have made it clear in their applications that they oppose a convention with an expanded mandate. The following states, for example, have stated in their applications that they seek a convention limied to the "specific and exclusive purpose" of considering an amendment that federal expenditures may not exceed federal revenues: Alabama, Colorado, Georgia, Maryland, Oklahoma, Oregon, Pennsylvaina, South Carolina, Virginia, Wyoming, Nebraska, Idaho, South Dakota, Arkansas, Utah, Texas, Arizona and Iowa. Half a dozen states

(Colorado, Delaware, Louisiana, Idaho, North Carolina and Utah) explicitly provide that their applications are not to be counted towards the calling of a convention if the convention has the authority to propose an amendment which varies from the very narrowly defined "subject" set forth in the applications. Congress should not, under the Hatch bill or otherwise, act upon such applications, since they call for a convention shackled by narrow constraints that Congress has no power to impose, and since they expressly or by implication oppose the calling of a convention on any other basis.

One particular flaw of the proposed Hatch bill deserves separate mention: it flatly disregards the provision of Article V which grants to Congress the authority to determine whether amendments shall be ratified by state conventions or by state legislatures. Article V provides that amendments, whether proposed by Congress or by a constitutional convention, shall be valid "when ratified by the Legislatures of three fourths of the several states, or by Conventions in three fourths thereof, as one or the other Mode of Ratification may be proposed by the Congress."

Section 11(b) of Senator Hatch's bill provides that when a constitutional convention transmits an amendment to Congress, the President of the Senate and the Speaker of the House shall after 30 days automatically transmit that proposed amendment to the Administrator of General Services, if Congress has failed to take action within that period. The Administrator of General Services must, in turn, transmit the proposed amendment to "the States" under Section 11(c). The amendment becomes valid when ratified by three-fourths of "the States" under Sec. 12. Who is to decide in the case of congressional inaction whether ratification is to be by the legislatures or by conventions? The Administrator of General Services? Each state legislature? The bill does not say.

The original Ervin bill, and its present counterpart, S. 520, introduced by Senator Helms, attempt to deal with this problem by specifying that if Congress takes no action on an amendment sent to it by a constitutional convention, ratification shall be by state legislatures. (Sec. 12(c)). (The Helms proposal itself is arguably objectionable on the ground that the choice of mode of ratification should be made affirmatively for each particular amendmend proposal by the Congress sitting at the time the amendment is proposed.) The Hatch bill deals with the problem by ignoring it altogether. Under the Hatch bill, an amendment could be sent to "the States" without any Congress (the Congress which enacted the 1979 implementing legislation, the Congress which received the convention's proposed amendment, or any other) ever having selected a mode of ratification. In attempting to provide for virually automatic submission of convention proposals to the states for ratification, the Hatch bill short circuits the one power that Congress must clearly exercise over a proposed amendment: selecting the mode of ratification.

If this Congress were to enact any legislation regulating constitutional conventions, I would suggest that an appropriate bill would contain the following provisions. First, and foremost, the legislation should clearly state, exactly to the contrary of Sec. 10 of S. 1710, that a "Convention for proposing Amendments" may propose for ratification whatever amendment the convention deems necessary. The bill should permit state legislatures which apply for a convention to recommend the subject or subjects which the convention should consider, and may even permit legislatures to append suggested texts of proposed amendments. The legislation should clearly inform applying legislatures, however, that the final determination of the subjects to be considered and the amendment(s) to be proposed rests with the convention itself. When 34 applications from state legislatures are received which call for a convention which the legislatures understand will have the final authority over its own agenda. Congress should proceed to call such a convention. Only applications received within a four or five year period should be aggregated, and states should be permitted to rescind applications at any time before the requisite total is reached. Such a convention may very well decide to limit itself to the subject recommended by applying state legislatures. Any amendments proposed by such a convention, however, should be submitted for ratification, with Congress determining, in accordance with Article V, whether ratification should be by state conventions or by state legislatures.

A further word is in order on the suggested four or five year limit for applications and on the suggestion that states should be permitted to rescind applications. A constitutional convention should be held only if there exists a genuine national consensus that such a convention is necessary, If, as I have suggested, state legislatures may not specify mandatory limits to be imposed on a con-

vention, one device for establishing the existence of a consensus—agreement on the subject matter limits for the convention—is not available. A reasonably short time period within which "unlimited" applications are to be aggregated would help insure that a consensus existed that a convention was desired at given time in history, even if different states sought a convention with different purposes in mind. Permitting recission of applications would also facilitate the calling of a convention only when there was a consensus about the need for a convention. (Permitting states to rescind applications can quite arguably be distinguished from the controversial question concerning the right of states to rescind ratifications. A state which ratifies a proposed amendment has substantially all the information it needs—the text of the amendment—to make a formal, final and binding decision to ratify. A state which has applied for a constitutional convention, however, may be acting at an early, fluid stage of the amending process. It may have sought a convention in the expectation that the convention would likely confine itself to what appeared to be the only pressing problem calling for an amendment. In a subsequent year, it may appear that there are forces seeking a convention which would bend it to the consideration of other potential amendments which the first applying state did not desire to have considered. In those circumstances, a rescission of the application might properly commend itself to the first state.) If rescission of applications were permitted, it might be appropriate to extend the time within which "unlimited" applications are to be aggregated to six or seven years.

One further observation deserves reiteration. Congress has no authority under Article V or any other provision of the Constitution to call a constitutional convention merely because it feels that such a convention is necessary or desired by a number of people. Congress may call a convention only upon receipt of 34 valid applications. If 34 states seek only a so-called "limited convention", while opposing the calling of a real convention invested with full authority to propose amendments as contemplated by Article V, then Congress has a constitutional duty to decline to call a convention. Since S. 1710 purports to impose a contrary duty upon future Congresses, it is inconsistent with Article V.

[From the Duke Law Journal, Nov. 5, 1979]

Who Controls A Constitutional Convention—A Response

(By Walter E. Dellinger*)

Although I am pleased to have provoked such thoughtful comments from my colleague,[1] I do not agree that his objections to the thesis of my recent *Yale Law Journal* article[2] are either slight or marginal. I append this brief note to clarify the extent of the disagreement.

There are, to be sure, important points on which we agree. We agree, for example, that it would not be inappropriate for a constitutional convention to consider but a single subject and to propose a single corrective amendment.[3]

We differ quite sharply, however, with respect to a critical question: who is empowered to control a constitutional convention? Professor Van Alstyne has suggested that a group of applying state legislatures may dictate to a constitutional convention the exact text of the amendment the convention is to "propose" (if it takes any action at all). I have argued, on the contrary, that the "Convention for proposing Amendments"[4] is granted final authority under Article V to define the issues to be addressed and to determine the nature and extent of any amendments to be proposed for ratification.

I need not recount in detail the arguments I have previously set forth in support of this conclusion. Drawing upon the debates at the Constitutional Convention of 1787, I argued that the convention mode was created to provide a method of proposing amendments that was an alternative to proposal by Congress, but

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[1] Van Alstyne, *The "Limited" Constitutional Convention—The Recurring Answer*, 1979 Duke L. J. 000.

[2] Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 Yale L. J. 1623 (1979).

[3] For a contrary view, see Ackerman, *Unconstitutional Convention*, New Republic, Mar 3, 1979, at 8.

[4] U.S. Const. art. V.

independent as well of the state legislatures.[5] I suggested that the framers' rejection of a draft plan that would have permitted state legislatures to propose, as well as to ratify, amendments was in part a reflection of the concern expressed by Hamilton and others that "[t]he State Legislatures will not apply for alterations but with a view to increase their own powers * * *"[6] By substituting a constitutional convention for the state legislatures as a body to propose amendments, the drafters created an alternative proposing mechanism free of both the possible self-interest of Congress and the potential parochialism of the state legislatures. By leaving to the states the final authority to *ratify* all amendments, the framers carefully divided the power to amend the Constitution between state and national interests.

Professor Van Alstyne's narrow reading of the authority of a constitutional convention is reflected in his recurring references to the convention method as the "state mode"[7] of proposing amendments. But there is no "state mode" for proposing amendments created by Article V; it provides, on the contrary, for a "Convention for proposing Amendments."[8] The phrase "state mode" is one which, as far as I can ascertain, was never used at the Philadelphia Convention. There was considerable discussion of the need for a method of proposing amendments that was independent of Congress. The alternative chosen, however, was proposal by a national convention, and not proposal by state legislatures.

If I am correct that a "Convention for proposing Amendments" has the final authority to determine what amendments to propose, how should Congress treat state legislative applications that may erroneously presume to predetermine the subject or even the exact text of any amendment that is to be "proposed" by the convention? The question is essentially one of construing the intent of the applying state legislature: Does the applying legislature wish its application to be counted as one seeking a convention if that convention will have final authority to determine the amendments to be proposed?

The hypothetical state application with which Professor Van Alstyne ends his correspondence obscures this critical issue, for it provides scant basis for determining whether the hypothetical legislature—which seeks a convention "for the purpose of" proposing a specific amendment—would favor or oppose calling an Article V convention authorized to make its own final judgment concerning what amendments to propose. As I noted in my earlier article, "[t]he use of the phrase 'for the purpose of' is not necessarily inconsistent with recognition by the applying legislature that the convention would be free to consider other amendments."[9] Having no knowledge of the context in which this future hypothetical application might then be brought forward (or of what the settled professional opinion might then be about these issues), one cannot confidently speculate about the assumptions made by such a legislature. My answer to Professor Van Alstyne's hypothetical is intended to emphasize that an application is not *necessarily* invalid simply because it is accompanied by a suggested amendment, as long as the applying legislature understands its proposed amendment only to have the force of a recommendation.

It is important to note, however, that most of the applications presently pending in the real world are free from this ambiguity. With only one or two exceptions, they apply for the calling of a convention for the *sole* and *exclusive* purpose of proposing an amendment the exact text of which is set out in the applications. These applications implicitly, and still others by express provision,[10] make it clear that they are *opposed* to a "Convention for proposing Amendments" if such a convention is empowered to determine for itself what amendments to propose. Professor Van Alstyne considers such applications to be valid. I do not.[11]

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[5] See Dellinger, *supra* note 2, at 1624–30.
[6] II The Records of the Federal Convention of 1787, at 558 (M. Farrand ed. 1937).
[7] *See, e.g.*, Van Alstyne, *supra* note 1, at 1303.
[8] U.S. Const. art. V.
[9] Dellinger, *supra* note 2, at 1637.
[10] The North Carolina application, for example, sets out the exact text of the amendment it proposes and explicitly proves that "this application and request be deemed rescinded in the event that the convention is not limited to the subject of this application." N.C.S.J. Res. 5 (1979), *reprinted in* 125 Cong. Rec. S1123 (daily ed. Feb. 6, 1979).
[11] Professor Van Alstyne would have Congress act upon a sufficient number of such applications by calling a convention and imposing upon that convention whatever strictures of subject matter or predrafted text had been sought by 34 identical applications. I would not have Congress act upon such applications, since they call only for a convention shackled by constraints that Congress has no power to impose, and since they expressly or by implication oppose the calling of a convention on any other basis.

The Yale Law Journal

Volume 88
Number 8
July 1979

The Recurring Question of the "Limited" Constitutional Convention

by

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88 YALE L.J. 1623

59-609 O - 80 - 18

The Recurring Question of the "Limited" Constitutional Convention

Walter E. Dellinger†

Article V of the United States Constitution requires Congress to call "a Convention for proposing Amendments" upon application of two-thirds of the states.[1] Amendments proposed by such a convention, if subsequently ratified by three-fourths of the states, become part of the Constitution. Thus far in the history of the republic, no such convention has been called. In the last few years, however, thirty states[2] have submitted applications to Congress calling for a convention restricted to consideration of an amendment requiring a balanced federal budget. Only four more applications are necessary to reach the total of two-thirds specified by Article V; Congress is said to have been brought "to the brink of calling a constitutional convention."[3]

For a century following the Constitutional Convention in 1787, the only applications submitted by state legislatures under Article V contemplated conventions that would be free to determine their own agendas.[4] Only in this century have legislatures begun to submit ap-

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1. Article V reads as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

2. As of May 31, 1979, twenty-nine of these state resolutions had been printed in the *Congressional Record:* 125 CONG. REC. S6085 (daily ed. May 16, 1979) (New Hampshire); *id.* at S5017 (daily ed. May 1, 1979) (Indiana); *id.* at S2363 (daily ed. Mar. 8, 1979) (Arkansas and Utah); *id.* at S1931 (daily ed. Mar. 1, 1979) (South Dakota); *id.* at S1932 (Idaho); *id.* at S1306 (daily ed. Feb. 8, 1979) (Alabama, Arizona, and Colorado); *id.* at S1307 (Delaware, Florida, Georgia, Kansas, and Louisiana); *id.* at S1308 (Maryland and Mississippi); *id.* at S1309 (Nebraska and Nevada); *id.* at S1310 (New Mexico, North Dakota, Oklahoma, and Oregon); *id.* at S1311 (Pennsylvania and South Carolina); *id.* at S1312 (Tennessee, Texas, and Virginia); *id.* at S1313 (Wyoming); *id.* at S1123 (daily ed. Feb. 6, 1979) (North Carolina). As of May 31, 1979, the resolution by Iowa, S. J. Res. 1 (1979), had not been printed in the *Congressional Record.* For a discussion of the validity of these applications, see p. 1636 *infra*.

3. National Law Journal, Mar. 5, 1979, at 1, col. 2.

4. *See* Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 202-03 (1972).

plications reflecting a different view. These applications are premised upon three assumptions: (1) Congress may limit in advance the subject matter authority of any convention called for proposing amendments; (2) it is valid for states to specify in their applications that the convention be formally limited; and (3) Congress, in response to these requests for a "limited subject matter" convention, must call a limited convention, define the scope of the matters that may be considered in accordance with the state applications, and require that the convention stay within those limits.[5]

This article, however, argues that any new constitutional convention must have authority to study, debate, and submit to the states for ratification whatever amendments it considers appropriate. Although such a convention might well decide to focus upon one issue, it cannot be required to do so by Congress or the state legislatures. This article also concludes that any state convention applications that are premised on the erroneous view that a convention can be limited in advance must be treated by Congress as invalid.

I. Evolution of Article V at the Philadelphia Convention

An examination of the debates over Article V at the Philadelphia Convention establishes that the framers were concerned about the role constitutional amendments might play in the allocation of power between the state legislatures and the federal government. An analysis of the evolution of Article V illuminates the framers' intentions with respect to the role constitutional conventions should play, and supports the conclusion that the subject matter of such conventions cannot be limited.

The delegates in Philadelphia generally agreed that provision should

5. The most insightful piece supporting the state legislatures' position is a recent article by Professor William Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295. For earlier arguments supporting the position that mandatory limits can be imposed on a convention, see Rhodes, *A Limited Federal Constitutional Convention*, 26 U. FLA. L. REV. 1 (1973); Bonfield, *The Dirksen Amendment and The Article V Convention Process*, 66 MICH. L. REV. 949 (1968); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1629 (1972). Other arguments defending the validity of limited applications are included in Memorandum from J. Anthony Kline, Legal Affairs Secretary, to Edmund G. Brown, Jr., Governor of California (Jan. 31, 1979) (on file with *Yale Law Journal*) [hereinafter cited as California Memorandum]; SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMERICAN BAR ASSOC., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974) [hereinafter cited as ABA REPORT].

Professor Charles Black has been the leading advocate of the view that Article V conventions cannot be limited in scope by either Congress or the state legislatures and that state requests for the limited convention are invalid. *See* Black, *supra* note 4, at 189.

be made for amendment of the new Constitution. Experience under the Articles of Confederation, which provided that a single state could veto amendments,[6] persuaded the delegates of the need for an easier revision process. But it also was understood that casual or frequent amendment would threaten both the stability of the new government and the delicate balance of compromises hammered out at the first Convention.

The Philadelphia Convention readily agreed upon a method for ratifying proposed amendments to the new Constitution. After considering motions to require unanimous ratification by the states, or ratification by two-thirds, the Convention decided that approval by three-fourths of the states should be necessary in order to ratify amendments.[7] But a critical question remained: who should *propose* amendments? What organ of government should be empowered to initiate, develop and submit amendments for ratification? It proved particularly difficult to decide whether Congress should have the power to veto amendments the state legislatures wished to submit for ratification. The resolution chosen by the delegates midway through the deliberations was a grant of concurrent power to Congress and the state legislatures to initiate the amendment process. The Convention easily agreed on the method by which Congress would propose amendments,[8] and debate centered upon the alternative mode. Mason of Virginia objected to congressional control over the proposal of amendments because congressional abuses of power might be the cause of the perceived need for reform.[9] Set against this concern was the threat, perceived by Hamilton, that the states would seek amendment to enhance their power at the expense of the federal government.[10] This debate reflected the tension felt throughout the entire Convention between the need to create an effective national structure, significantly stronger than the one existing under the Articles of Confederation, and the desire to guard against delegating excessive power to the central government.

The drafters' answer to this dilemma was to provide that a national

6. Art. XIII of the Articles of Confederation provided that "[no] alteration [shall] at any time hereafter be made in [these Articles . . .,] unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State." U.S.C. xxxv, xxxviii (1976).

7. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 555 (M. Farrand ed. 1937) [hereinafter cited without cross-reference as II FARRAND].

8. II FARRAND at 559. This provision was not discussed or altered in later debates on Article V.

9. I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202-03 (M. Farrand ed. 1937) [hereinafter cited without cross-reference as I FARRAND].

10. II FARRAND at 558.

convention to propose amendments be summoned at the request of two-thirds of the state legislatures.[11] Such a convention would be, like Congress, a deliberative body with a national perspective, capable of assessing the need for constitutional change as well as developing proposals to be submitted for ratification; yet it would not be Congress itself. Thus the convention mode of amendment would avoid both the problem of congressional obstruction of needed reforms and the problem posed by parochial state self-interest.

The debates of the Philadelphia Convention trace the evolution of the delegates' decision to adopt a convention mode. The Virginia Resolutions, presented at the outset of the Convention by Edmund Randolph, made the first mention of the need to provide for amendments and reflected Randolph's concern over the danger of congressional control of the amendment process. The Thirteenth Virginia Resolve, introduced on May 29, 1787, stated "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."[12] Although some delegates did not see the necessity of providing for amendment at all,[13] the principal issue, according to Madison's notes, was "the propriety of making the consent of the Natl. Legisl. unnecessary."[14] Randolph and Mason of Virginia defended the part of the resolution that made congressional assent unnecessary.[15] The delegates were divided on the issue, however, and the Convention voted to postpone consideration of that part of the resolution.[16]

When the Convention next addressed the resolution, the controversial portion had been removed; Randolph's new Seventeenth Virginia Resolve simply read, "Resolved that provision ought to be made

11. In the latter part of the eighteenth century, conventions rather than legislatures were considered to be the institutions that most nearly embodied popular sovereignty. *See generally* G. Wood, The Creation of the American Republic, 1776-1787, at 306-43 (1969). With regard to the decision to ratify the Constitution by convention in each state, Professor Herman Ames wrote, "This was in harmony with the prevailing theory of the age, namely, that the sovereign people spoke directly through a convention elected for a specific purpose." Ames, *Recent Development of the Amending Power as Applied to the Federal Constitution*, 72 Proc. Am. Philosophical Soc. 87, 92 (1933).

12. I The Documentary History of the Ratification of the Constitution 245 (M. Jensen ed. 1976) [hereinafter cited without cross-reference as I Documentary History].

13. I Farrand at 202.

14. *Id.*

15. *See id.* at 203 (statement of Mason) ("It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendmt.")

16. *Id.*

for the amendment of the articles of Union, whensoever it shall seem necessary."[17] The resolution did not specify methods for either proposal or ratification of amendments. The Convention submitted it in this ambiguous form to the Committee of Detail on July 24.[18] When a draft constitution emerged from the Committee of Detail on August 6, the Nineteenth Article stated, "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."[19] It is not clear whether this draft contemplated that the states could apply for a convention specifically limited to consideration of a particular amendment *to* the Constitution, or whether the provision contemplated conventions with authority to provide generally for the revision and amendment *of* the Constitution.[20] A more serious defect was the article's failure to specify any method of ratification.

Although the Convention approved the draft Article on August 30,[21] Elbridge Gerry of Massachusetts moved to reconsider it on September 10.[22] Gerry was troubled that a convention apparently could amend the Constitution without any further requirement of ratification. He feared that a majority at a convention could "bind the Union to innovations that may subvert the State-Constitutions altogether."[23] His motion was seconded by Hamilton, who "did not object to the consequences stated by Mr. Gerry,"[24] but opposed the Article for different reasons. Hamilton warned that "[t]he State Legislatures will not apply for alterations but with a view to increase their own powers. . . ."[25] Hamilton suggested that the national legislature be authorized to call a constitutional convention upon the affirmative vote of two-thirds of both Houses. Roger Sherman proposed an amendment providing for the national legislature to propose amendments without a convention.[26]

17. I DOCUMENTARY HISTORY at 250.
18. *Id.* at 255, 259.
19. *Id.* at 269.
20. The *ABA Report* underscores the phrase "an amendment" in quoting this draft, presumably to suggest that the draft contemplated that state legislatures would apply for conventions to propose single amendments to the Constitution. ABA REPORT, *supra* note 5, at 12. The phrase used in the draft, however, is not "an amendment *to*" the Constitution, but rather "an amendment *of*" the Constitution. The more natural reading is that this phrase is used in the sense of "a revision of" the Constitution.
21. II FARRAND at 467-68.
22. *Id.* at 557.
23. *Id.* at 557-58.
24. *Id.* at 558.
25. *Id.*
26. *Id.*

Madison then offered the substitute draft that provided the structure and substance of what eventually became Article V. It read:

> The Legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislatures of the U.S.[27]

The Convention tentatively adopted Madison's proposal by a vote of nine states in favor, one against, one divided. The Madison draft did not provide for any convention method of proposing amendments; Congress was to propose amendments "whenever two thirds of both Houses shall deem necessary" or "on the application of two thirds of the Legislatures of the several States." The article was submitted to the Committee of Style,[28] which returned it several days later with only minor stylistic changes.[29]

On September 15, the Article was reconsidered by the Convention. Debate centered on the section of the Madison draft that provided that state legislatures could propose amendments, which Congress would submit for state ratification.[30] Since the draft gave authority to Congress to propose amendments on its own initiative, it would seem to follow that the provision permitting states to apply to Congress to "propose amendments" would allow them to suggest the content of those amendments. Thus, the most plausible reading of the Madison proposal is that it would have permitted two-thirds of the state legislatures to propose amendments to the Constitution; Congress would merely transmit those amendments to be ratified.

The Constitutional Convention rejected that provision in Madison's draft. On the motion of Gouverneur Morris and Elbridge Gerry, the Convention voted without dissent to substitute language requiring Congress to call a constitutional convention on the application of two-thirds of the state legislatures.[31] This accomplished the following change in Article V: "The Congress, whenever two-thirds of both houses shall deem *it* necessary, *shall propose Amendments to this Consti-*

27. *Id.* at 559.
28. I DOCUMENTARY HISTORY, at 270, 285.
29. II FARRAND, at 629.
30. *Id.* at 629-30.
31. *Id.*

tution, or on the application ~~of two thirds~~ of the legislatures *of two thirds* of the several states, shall ~~propose amendments to this constitution~~, *call a Convention for proposing Amendments*, ..."[32]

The accompanying discussion at the Convention does not clearly reveal the basis for the changes. Under Madison's draft, there was no guarantee that a national forum would be involved in the drafting of amendment proposals. Roger Sherman, one of the two recorded speakers, expressed "fears" in reference to the unamended Madison proposal "that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate."[33] The Morris-Gerry motion might be seen as responsive to Sherman's concern,[34] for it provided that a national convention, rather than the states, would formulate proposed amendments.

Mason of Virginia expressed a different—indeed, almost opposite—objection to the Madison draft.[35] In his opinion, the draft did not impose a mandatory duty upon Congress to submit the state legislatures' suggested amendments for ratification. Instead, he read it as giving Congress either discretion to withhold the suggested amendments or considerable influence in the drafting of the amendments. This plan was "exceptionable & dangerous" in Mason's view:

> As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.[36]

Though this seems a curious objection, given the seemingly mandatory language of the Madison draft,[37] it may have been based on Mason's

32. I DOCUMENTARY HISTORY at 284, 295. (The parts of the Article submitted to the Convention by the Committee of Style and left unchanged are in roman type; the deletions by the Convention are in lined-out type; changes made by the Convention are in italics; stylistic changes are not reflected here.)

33. II FARRAND at 629.

34. It is possible that Sherman's objection might have been directed not at the allocation of authority to propose amendments, but rather at the lack of substantive limits on the amending power. These objections were partially met by the subsequent action of the delegates in adding a provision to Article V whereby no state could, without its consent, be deprived of its equal suffrage in the Senate.

35. II FARRAND at 629.

36. *Id.*

37. Madison could not understand this objection in light of the delegates' clear expectation that Congress would call a convention in response to state applications: "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application." II FARRAND at 629-30.

belief in the practical necessity of having a single deliberative body undertake the consultation, debate, drafting, compromise, and revision necessary to produce an amendment.

Mason may have supposed that Congress, during the process of proposing amendments in response to a variety of state applications, would exercise great influence on the shape and substance of the amendments. The Morris-Gerry alternative convention mode, however, could be read as imposing a ministerial duty on Congress but not involving it in shaping amendments. Mason as well as the other delegates could thus support the requirement that Congress call a convention upon application by the states as a plan that realistically limited the duty imposed upon Congress, while leaving the determination of the subject matter and the drafting of any amendments to the convention itself.[38]

II. Controlling the Agenda of Constitutional Conventions

The accounts of the Philadelphia Convention do not expressly answer the question of whether a convention can be limited by either the states or by Congress. Two themes, however, do emerge from the debates: Congress should not have exclusive power to propose amendments; and state legislatures should not be able to propose and ratify amendments that enhance their power at the expense of the national government. States were empowered under Article V to *ratify* amendments; the power to *propose* amendments was lodged in two national bodies, Congress and a convention. The proceedings suggest that the framers did not want to permit enactment of amendments by a process of state proposal followed by state ratification without the substantive involvement of a national forum. Permitting the states to limit the subject matter of a constitutional convention would be inconsistent with this aim. If the state legislatures could not only control the text of the proposed amendment, but also limit the convention to that subject, effective proposal power would have been shifted to the state legislatures. If the states could confine the convention to a general

38. Such a view of Article V is expressed in the first state application for a constitutional convention, submitted by Virginia in 1787:

> We do, therefore, in behalf of our constituents, in the most earnest and solemn manner, make this application to Congress, that a convention be immediately called, of deputies from the several States, with full power to take into their consideration the defects of this Constitution that have been suggested by the State Conventions, and report such amendments thereto *as they shall find best suited* to promote our common interests, and secure to ourselves and our latest posterity the great and unalienable rights of mankind.

I ANNALS OF CONGRESS at col. 259-60 (Gales & Seaton eds. 1834) (emphasis added).

subject, but not to a specific amendment, and the applying legislatures suggested different limitations, then Congress would be forced to define and enforce limits on the convention. Such action would conflict with a different aim of the drafters: the desire to create a mode of proposing amendments in which Congress played no significant role. In order to satisfy the various objectives of the framers, a convention must be free to define for itself the subject matter it will address; the state legislatures may call for such a convention, but they should not be permitted to control it.

A. *Conventions Limited to a Single Amendment*

The most stringent limitation upon a convention would be a congressional requirement that it consider only a draft amendment, the wording of which had been ordained in advance by the applying state legislatures. One example of this kind of limitation is found in Delaware's 1975 application to Congress "to call a convention for the proposing of the following amendment to the Constitution of the United States: . . . The costs of operating the Federal Government shall not exceed its income during any fiscal year, except in the event of declared war."[39] The Delaware application makes clear the state's desire to limit the convention to consideration of this amendment. The application expressly states that

> the General Assembly of the State of Delaware interprets Article V to mean that if two-thirds of the states make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would have power *only* to propose the specified amendment and would be limited to such proposal and *would not have power to vary the text therof* nor would it have power to propose other amendments on the same or different propositions.[40]

Professor Van Alstyne, an advocate of the view that state-imposed limitations on the authority of conventions are constitutionally permissible, has argued that

> Congress could *least* decline to call a convention if, in keeping with [thirty-four resolutions such as Delaware's] the sole function of that convention would be to do no more than to deliberate and

39. Del. H. Con. Res. No. 36 (1975), *reprinted in* 125 Cong. Rec. S1307 (daily ed. Feb. 8, 1979).
40. *Id.* (emphasis added).

> to debate the pros and cons of an exactly particularized proposal, with choice at the convention's conclusion for the delegates only to vote 'yea' or 'nay.'[41]

He argues that the framers intended the states to have a ready means of curing defects that Congress would not address, and suggests that

> [i]f two-thirds of the state legislatures might perchance agree on the exact wording of an amendment they would wish to be reviewed in a called convention for discussion and vote, this would seem to me to state the paradigm case in which Congress should proceed with the call—and limit the agenda exactly in accordance with the unequivocal expressions of those solely responsible for the event.[42]

This approach, though it provides a means of proposing amendments that is free of congressional control, is not responsive to the second aim of the Philadelphia Convention; state legislatures should not be given authority to propose amendments without the involvement of some national body in the formulation of such amendments. To permit the state legislatures to dictate to the convention the exact terms of its proposals is to short-circuit the carefully structured division of authority between state and national interests.

If the aim had been to give the state legislatures the power to propose as well as to ratify amendments, it would have been unnecessary to provide for conventions. The drafters could simply have provided that when two-thirds of the state legislatures agree on the wording of an amendment, some central authority must automatically submit that amendment for ratification by the required three-fourths of the states. Of course, a convention whose sole authority would be to vote "yes" or "no" on a proposal dictated in advance by state legislatures could, by delaying the amendment process, serve an important function by allowing time for reflection and debate and by providing an additional hurdle for any proposed amendment. Assembling a tightly controlled convention for this limited purpose, however, would have made little sense to the drafters in 1787. The difficulty of choosing and assembling delegates from all the states was extraordinary; commencement of national meetings was sometimes delayed for weeks by the late arrival of many of the delegates.[43] Delegates to such a convention would likely

41. Van Alstyne, *supra* note 5, at 1305.

42. *Id.* at 1305-06.

43. *See* M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 54 (1913) (Constitutional Convention called to meet on May 14, 1787, but "[p]artly owing to the difficulties and slowness of travel . . . it was not until Friday, the twenty-fifth of May, that seven states were represented and the convention could proceed to organize.")

be frustrated by the delay and anxious to get on with the sole official act permitted them: voting on an amendment whose wording had been determined beforehand. The framers understood that "[c]onventions are serious things,"[44] and it is doubtful that they meant to suggest such a meeting by the phrase "a Convention for proposing Amendments."

B. *Conventions Limited to a Particular Subject*

Even when the applying state legislatures seek only to limit the convention with respect to subject matter, the case against the validity of the applications is still persuasive. Narrowly defined subject matter limits have to a lesser extent the same difficulty as limits that confine a convention to consideration of a specific text: they transfer the proposing power from the convention to the state legislatures. The more restricted the alternatives available to a convention, the greater the chance that any amendment will in effect have been predetermined.[45] Moreover, restricting the convention's subject matter may have a deleterious effect on the amendment process. The framers knew from their experience in Philadelphia that issues are often fundamentally redefined in the course of their resolution; accommodations in seemingly unrelated areas may permit resolution of complex issues in an unanticipated manner. Narrowly defining in advance the subject matter of a convention would seriously hamper the process of creative compromise that had been central to the success of the Philadelphia Convention.

Although this predetermination argument applies less directly to broader limitations on a convention, other problems arise if only general subject matter limitations are imposed. Such limits differ importantly from "exact text" limitations in that the process of setting the subject matter agenda of a convention is likely to give Congress a significant degree of control over the convention. It is conceivable that thirty-four state legislatures would agree on exactly the same limitation of a convention's subject matter. However, it is more likely that state

44. II FARRAND at 632 (statement of Charles Pinkney).

45. This critical point is overlooked in both the California Memorandum, *supra* note 5, and the ABA REPORT, *supra* note 5. The California Memorandum states:

> The notion that the states lack the power to limit a convention is also at war with the principle *major continet in se minus*; that is, absent an expressed intent to the contrary, a body vested with specified powers inherently possesses and may exercise lesser powers. As stated by the ABA Committee, "since Article V specifically and exclusively vests the state Legislatures with the authority to apply for a convention, we perceive no sound reason as to why they cannot invoke limitations in exercising that authority."

California Memorandum, *supra* note 5, at 14. The difficulty with this argument is its unwarranted assumption that the power to define a convention's agenda and restrict its deliberations is a *lesser* power than the authority to call the convention.

applications would vary in both their description of the problem giving rise to the applications, and their suggested revisions. Congress, in framing the call for the convention, would then assume a major role in defining the subject matter.[46] That role should be left to the convention itself in order to avoid undue congressional influence over the convention mode of amendment.[47]

Proponents of the view that "limited convention" applications are valid also rely on the argument that the convention mode should be free of congressional control. Professor Van Alstyne argues that con-

46. An alternative solution would leave the definition and enforcement of any limits to the judiciary. The courts could enjoin the ratification process on the ground that an amendment proposal was not within the subject matter limits set by the original applications, or could refuse to give effect to the amendment after ratification on the ground that it was beyond the proposing authority of the convention. This alternative would merely substitute judicial control of the convention for congressional control. There is nothing in the deliberations to indicate that the drafters contemplated either congressional or judicial control over the subject matter of a constitutional convention.

47. Consider the example of the Bill of Rights. Several state conventions accompanied ratification of the Constitution with a recommendation that amendments be adopted. Different states proposed different amendments on a variety of subjects. Compare the amendments proposed by Virginia, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AT PHILADELPHIA IN 1787, vol. 3 at 657-63 (J. Elliot ed. 1937) with the proposals by Massachusetts, *id.*, vol. 2 at 176-78. Had these amendments been proposed by convention rather than by Congress, it would have been highly inappropriate for Congress, the body whose powers were to be constrained by a number of the suggested revisions, to attempt to limit the questions to be considered.

It does not appear to have occurred to James Madison that Congress could call a "limited" convention to propose a bill of rights. In a letter written to George Eve on Jan. 2, 1789, Madison expressed his preference, under the circumstances, for the congressional mode of proposing amendments:

> The Congress who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger it. A Convention, on the other hand, meeting in the present ferment of parties, and containing perhaps insidious characters from different parts of America, would at least spread a general alarm, and be but too likely to turn everything into confusion and uncertainty. It is to be observed however that the question concerning a General Convention, will not belong to the federal Legislature. If 2/3 of the States apply for one, Congress cannot refuse to call it; if not, the other mode of amendments must be pursued.

5 THE WRITINGS OF JAMES MADISON 321 (G. Hunt ed. 1904). In a letter to Phillip Mazzei dated December 10, 1788, Madison stated his belief that

> The object of the Anti-Federalists is to bring about another general Convention, which would either agree on nothing, as would be agreeable to some, and throw everything into confusion, or expunge from the Constitution parts which are held by its friends to be essential to it.

Id. at 316. Madison did not suggest the possibility of countering the drive for a "general convention" by seeking to limit the convention's subject matter authority in advance. *See* Martin, *Madison's Precedent of Legislative Ratification for Constitutional Amendments*, 109 PROC. AM. PHILOSOPHICAL SOC. 47, 49-50 (1965).

Two passages in *The Federalist*, one of them by Madison, have been cited in support of the position that the framers believed "the convention need not be unlimited in scope." Note, *supra* note 5, at 1629. This argument has been rebutted by Professor Black, *see* Black, *supra* note 4, at 197, and is further undermined by these passages from Madison's correspondence.

gressional authority to treat "limited" applications as invalid could be used to obstruct state initiation of constitutional conventions:

> the state mode for getting amendments proposed was not to be contingent upon any significant cooperation or discretion in Congress. . . . Congress was supposed to be mere clerk of the process convoking state-called conventions. Certainly it was not imagined to sit astride that process as a hostile censor, a body entitled to impose such stringent requirements upon the states as effectively to render the state mode of securing particular amendments nearly impossible.[48]

This point is not without merit. A generous construction by Congress of what constitutes a valid application may be seen as most consistent with the limited role Congress was to perform under the convention mode of amendment. But if Congress is to be "mere clerk of the process," it should leave the influential task of agenda-setting to the convention itself. Moreover, Congress could establish a precedent that applications are valid if and only if applying states understand that the convention will be free to set its own limits. This determination would be significantly less intrusive than if Congress were to undertake with each set of applications to infer and enforce limits on the subject matter authority of the convention.[49]

It is possible that a set of state applications could establish subject matter limitations sufficiently broad to provide latitude for compromise and consensus-building at the convention and sufficiently uniform to enable Congress to define and enforce those limits without

48. Van Alstyne, *supra* note 5, at 1303.

49. The extent to which Congress could exercise influence over a "limited convention" is suggested by the provisions of the Ervin Bill, which passed the Senate in 1971, S. 215, 92d Cong., 1st Sess., 117 CONG. REC. 36804-06 (1971), but was not acted upon by the House. The Ervin Bill sought to establish in advance procedures by which a constitutional convention would be called if Congress ever received the requisite number of applications. The bill was thoroughly premised upon a "limited convention" view of Article V and provided, among other things: that each state resolution should "stat[e] the nature of the amendment or amendments to be proposed," *id.* at § 2; that Congress, in calling the convention, should "set forth the nature of the amendment or amendments for the consideration of which the convention is called," *id.* at § 6(a); that "[b]efore taking his seat each delegate shall subscribe to an oath . . . to refrain from proposing . . . [any] amendment to the Constitution of the United States relating to any subject which is not named . . . in the concurrent resolution of the Congress by which the convention was called," *id.* at § 8(a); that "[n]o convention . . . may propose any amendment or amendments of a nature different from that stated in the concurrent resolution [of Congress] calling the convention," *id.* at § 10(b); and that questions concerning whether a proposed amendment is within the limits set by the congressional resolution "shall be determined solely by the Congress of the United States . . ." *id.* at § 13(c).

unduly intruding into the convention's work.[50] It is more likely, however, that state applications attempting to limit the subject matter of a convention will result in either impermissible state control of the proposal process or undue congressional influence over that process.[51] Consequently, while a convention should be influenced in its choice of agenda by the grievances that led the states to apply for its convocation, the authority to determine the agenda and to draft the amendments to be proposed should rest with the convention rather than with Congress or the state legislatures.

III. Determining the Validity of State Applications

If Congress and the state legislatures lack the power to limit a constitutional convention to consideration of a particular amendment or subject, the issue arises whether state applications calling for Congress to convene a limited convention are valid. Professor Charles Black argues that, "[s]tate requests for a limited convention create *no* obligation under Article V, since they are not applications for the thing which, and only which, the States may oblige Congress to call."[52] Professor Black rejects the argument that a state's request for a limited convention should be treated as an application for an unlimited convention.[53]

There is often a question, however, whether a state has in fact called for a limited convention. Nothing in the argument against the limitation of subject matter suggests that states may not validly recommend that a convention deal with a single subject, or that it consider a draft text of an amendment, so long as the applications do not assume that the applying state legislatures or Congress can limit the convention's agenda. For example, a state application that requests Congress to call a convention, and recommends that the convention be limited to consideration of an amendment requiring a balanced federal budget, should be deemed valid, provided it is clear that the suggested limit is only a recommendation.

50. An example of a limited convention that would involve minimal congressional control is one called for the sole purpose of repealing an earlier amendment. In that case, strict definition of the subject in state applications would preclude a convention from considering options such as a partial repeal.

51. Although it is possible to imagine a hypothetical set of legislative applications requiring a limited convention that might not as seriously implicate the concerns that animated the drafters, it is those possibilities that are most likely that should influence our interpretation of what the drafters meant by "a Convention for proposing Amendments."

52. Black, *supra* note 4, at 199-200 (emphasis in original).

53. *Id.* at 200.

An application may be ambiguous on this last point. Suppose that a state legislature applies to Congress for a constitutional convention "for the purpose of" proposing an amendment, the text of which is set out in the application. The use of the phrase "for the purpose of" is not necessarily inconsistent with recognition by the applying legislature that the convention would be free to consider other amendments. Nevertheless, in light of the widespread assumption that the state legislatures and Congress can impose subject matter limits on a convention,[54] the applying legislature may have assumed that the convention would be strictly limited to considering the suggested draft amendment. Before summoning a convention, Congress ought to be confident that those who applied for the convention did so with a proper understanding of the convention's authority.

State applications recently submitted to Congress, calling for a convention on a balanced federal budget, illustrate this point. With one or two exceptions,[55] the thirty "balanced budget" applications are clearly premised on the assumption that a convention's subject matter can be limited by the state legislatures and Congress. At least twenty-two of the applications request Congress to call a convention "for the *specific* and *exclusive* purpose"[56] or "the *sole* and *exclusive* purpose"[57] of proposing an amendment requiring a balanced federal budget. If Congress lacks the power to limit a convention to consideration of a particular amendment, then these applications request something that Congress cannot grant. Moreover, there is no reason to assume that every state that requested a convention for the "sole and exclusive" purpose of approving a draft amendment would wish Congress, if it could not call a limited convention, to call instead a convention free to set its own agenda.

This last point need not be left to conjecture, however; a number of state resolutions are explicit on this point, and render any debate over the proper treatment of such applications academic. The Colorado legislature, for example, in applying for a convention for "the specific and exclusive purpose" of proposing an amendment prohibiting "deficit spending," expressly resolved "that this application and request be deemed null and void, rescinded, and of no effect in the event that

54. *See* note 5 *supra*.

55. *See, e.g.*, N.D. S. Con. Res. No. 4018 (1975), *reprinted in* 125 CONG. REC. S1310 (daily ed. Feb. 8, 1979) (calling "for a convention for such purpose as provided by Article V of the Constitution," while proposing specific balanced budget amendment).

56. *See, e.g.*, Ala. H.J. Res. 227 (1976), *reprinted in* 125 CONG. REC. S1306 (daily ed. Feb. 8, 1979) (emphasis added).

57. *See, e.g.*, Kan. S. Con. Res. 1661 (1978), *reprinted in* 125 CONG. REC. S1307 (daily ed. Feb. 8, 1979) (emphasis added).

such convention not be limited to such specific and exclusive purpose."[58] The applications submitted to Congress by Idaho[59] and North Carolina[60] contain similar restrictions. The Utah application expresses its limitation even more precisely, resolving

> that this application for a Convention Call for proposing amendments be limited to the subject matter of this Resolution and that the State of Utah be counted as part of the necessary two-thirds states for such a call only if the convention is limited to the subject matter of this Resolution.[61]

Thus, if Congress lacks the power to limit a convention to the exclusive consideration of a particular narrow amendment, applications such as these, now being counted as part of the total, simply self-destruct. They are obviously invalid under the test set out, as are other applications that erroneously assume congressional authority to limit a convention.

IV. The Viability of an Unlimited Convention

If neither the state legislatures nor Congress may limit a convention's agenda, the question arises whether the only kind of convention contemplated by Article V is one to revise the entire Constitution. Professor Black suggests that the convention method was designed to provide "some means of compelling a thorough reconsideration of the new plan."[62] The convention mechanism, in Professor Bruce Ackerman's view, should be reserved for those occasions "when the states are willing to assert the need for an unconditional reappraisal of constitutional foundations."[63] If conventions must propose general revisions, then Professor Van Alstyne is correct in observing that it "all but eliminates [Article V's] use in response to specific, limited state dissatisfactions."[64]

There is, however, no basis in Article V for asserting that a convention is required to reappraise the whole Constitution, or that states

58. Colo. S. J. Mem. 1 (1978), *reprinted in* 125 CONG. REC. S1306-07 (daily ed. Feb. 8, 1979).

59. Idaho H. Con. Res. 7 (1979), *reprinted in* 125 CONG. REC. S1932 (daily ed. Mar. 1, 1979).

60. N.C. S. J. Res. 5 (1979), *reprinted in* 125 CONG. REC. S1123 (daily ed. Feb. 6, 1979).

61. Utah H.J. Res. 12 (1979), *reprinted in* 125 CONG. REC. S2363-64 (daily ed. Mar. 8, 1979).

62. Black, *supra* note 4, at 201.

63. Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8.

64. Van Alstyne, *supra* note 5, at 1303. Ackerman's argument permits Van Alstyne to characterize this position as one that tells the states that they may not seek a convention for the purpose of considering the repeal of one amendment "unless they mean also to consider a repeal of the other twenty-five and of all six articles as well (and to manifest that willingness in the resolutions they submit to Congress). . . ." *Id.* at 1306.

would have to favor such revision before they could apply for a convention. It is reasonable to expect that a convention would choose to confine itself to considering amendments addressing the problem that led states to apply for the convention. If the prospect of a "runaway convention"[65] is frightening,[66] then delegate candidates are likely to campaign for office on a pledge to limit the convention's agenda and that pledge is likely to have popular appeal. While some delegates would undoubtedly lobby to have the convention propose amendments on other subjects, such appeals would not be likely to commend themselves to a majority of the delegates.[67]

It is probably true that the state legislatures "would be less likely to take advantage of the convention method of amendment if they believed a convention, once convened, would be free to propose drastic changes."[68] If a convention is free to set its own agenda, there is a chance that the convention, in spite of the recommendations of the applying states, would consider subjects other than those recommended. However, a majority of delegates would have to be persuaded to support those amendments on "extraneous" subjects, and three-fourths of the states would still have to ratify them. Thus it is unlikely that delegates at the Philadelphia Convention considered this risk to be so substantial that they would have assumed that no convention would be viable unless Congress and the applying states could control its deliberations. Moreover, Congress itself was granted unlimited power to propose constitutional amendments; there is no reason why a convention, possessed of the very same authority to propose amendments, would have been viewed by the drafters as too frightening a prospect to be a practical method of proposing amendments.[69]

65. As Professor Black has noted, the term "runaway convention" is a misnomer. If a properly called convention is constitutionally free to exercise its own judgment about the limits of its deliberations, then "no convention can be called that has anything to run away from." Black, *supra* note 4, at 199. I use the term here to refer to a convention that, acting within its constitutional authority, proposes an amendment different from the amendment sought by those who requested the convention.

The California Memorandum, in arguing for the validity of applications for a limited convention, suggests that one defense against a "runaway convention" is "the enormous control that Congress can and should impose upon a constitutional convention." California Memorandum, *supra* note 5, at 22. The argument here is that such control is impermissible and is likely to be unnecessary.

66. In 1789, James Madison opposed the calling of a convention to propose a Bill of Rights, for fear that it would "turn everything into confusion." *See* note 47 *supra*.

67. *But cf.* W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS 242 (4th ed. 1977) ("logrolling" enables minority positions to gain majority support).

68. Note, *supra* note 5, at 1629.

69. This point was apparently overlooked by the author of the California Memorandum, who states that if the legislatures and Congress lack the power to limit the agenda of a constitutional convention, then the convention would be an unthinkable "black hole of absolute power." California Memorandum, *supra* note 5, at 16.

Conclusion

If the legislatures of thirty-four states request Congress to call a general constitutional convention, Congress has a constitutional duty to summon such a convention. If those thirty-four states recommend in their applications that the convention consider only a particular subject, Congress still must call a convention and leave to the convention the ultimate determination of the agenda and the nature of the amendments it may choose to propose. If, however, a state's application is based on the erroneous assumption that Congress is empowered to impose subject-matter limits on the convention, such an application must be considered invalid. Many of the state applications calling for a convention on a balanced budget amendment are invalid under this test. Congress has no authority to call a convention in the absence of valid applications from two-thirds of the states. Therefore, even if the total number of applications reaches thirty-four, Congress must decline to call a constitutional convention.

Senator BAYH. Let's move along to our next panel, Prof. William Van Alstyne and Prof. Gerald Gunther of Stanford University School of Law.

TESTIMONY OF PROF. WILLIAM W. VAN ALSTYNE, DUKE UNIVERSITY LAW SCHOOL, DURHAM, N.C.

Senator BAYH. We appreciate your both being here with us.

Mr. VAN ALSTYNE. It is a pleasure to be here and it is good to see you again.

I have submitted a prepared statement that I do not wish to read, and it is about 22 pages. In addition, I have submitted to the staff of the committee two published pieces on some historical observations that I think——

Senator BAYH. We will put the statement in the record.

Mr. VAN ALSTYNE. I have not even taken the care to prepare a truncated version, because knowing the order in which I would appear as a witness, I thought that might be an exercise in futility and not be responsive to the prior presentations. So if my remarks seem extemporized, please bear in mind that I tried to prepare them while listening to the morning discussion.

This is in my opinion long overdue legislation for the instruction of Congress and the instruction of the State legislatures in the use of article V. Whatever you do, within fairly substantial guidelines I believe that your work product should be sustained to the extent at all that it were subject to challenge by a State legislature or by members of a convention or thereafter.

I simply want to set the general context so as to reduce the degree of enthusiasm that each one of us might feel for some more particular professional view that person holds on the one construction of article V. Generally, with regard to these matters, subject to an outside boundary which might informally be described as an act of manifest abuse, my opinion is that the Supreme Court, in a case appropriately brought before it testing what you might do with respect to legislation of this kind, would defer to the manner in which Congress has resolved these questions to its own satisfaction. That is not to say that they are literally nonjusticiable, or that there are no boundary lines. It is rather to set before you my general view with regard to these problems.

Generally speaking, the Court will display an unusual degree of latitude toward Congress with respect to the implementation of article V. If there is a qualification there might be a greater modicum of judicial review in the manner in which Congress deals with this portion of article V than when the Court might review amendments proposed by Congress. That is to say, the deference of the Court should be at its maximum, relating to the congressional use of the amending process.

On the other hand, because I am quite clear in my mind that this feature in article V, that having to do with the State initiation of changes to the Constitution, is emphatically for the benefit of the States, the degree of judicial review might be less deferential to Congress insofar as the view of Congress carried into law is hostile to State opportunities to secure amendments through this feature of

article V. But in regard to most of the particulars that are featured in S. 1710, while I may differ, as I do, in some respects as to which attitude more faithfully executes my own understanding of article V. I do not regard the alternatives as too far apart in the main as being likely to be settled by a Supreme Court decision.

The State-initiated mode of securing amendments is not in contemplation of wholesale revision; it is, rather, to secure to State legislatures a means of getting a fairly efficient response, albeit under the auspices of a national convention, to grievances of a rather particularized and limited nature. This is not to say that the use of the article is limited to such a function. Indeed State legislatures may compose their agenda in the nature of the call they submit by way of their petitions, to their own satisfaction. But a petition to secure attention to particular issues is by far the most expected kind.

If there is adequate consensus among 34 State legislatures, is Congress placed under an obligation? In my view, it is, respectfully, to respond to that consensus and furnish that kind of convention.

An analogy has been suggested to you, rather by way of improvization, I think, to the power to impeach and remove a President. There is also power of the Congress to declare war. War, even more than impeachment, is of utmost gravity. It was in recognition of its gravity that the power and necessity to get a congressional declaration of war was put into the Constitution, so as to forestall the unilateral activity of the Executive to drag in the country, by rather slow degrees, into war.

So the power to deal with declaring war is given to Congress. To be sure, insofar as one does not want war to be declared at all, ever, under any circumstances, then consistent with that view one might mount a highly intelligent argument that when Congress does trigger its power to declare war, the only kind of war it may declare is a total war, an all-out war, a war against the world, or at least an all-out unconditional surrender type of war against a designated country.

It is long settled, however, that that non sequitur is profoundly untrue. The function of the declaration of war clause is to locate a judgment in Congress as to whether this country shall embark upon sustaining overseas military action. If in the judgment of Congress a limited engagement is an appropriate one under the circumstances, then it defeats the purpose of the law itself to lay upon the Congress the preposterous injunction that it may have no war at all unless it has total war.

I do no mean to borrow a different history from a different clause by drawing your attention to the Declaration of War clause. Analogies are only that. They are highly imperfect. There are different purposes. My analogy is used to correct a misimpression, and put this issue back on a more proper footing.

I do think, however, a suggestive analogy would put before you the notion that insofar as the Executive carries out the war, nevertheless, the boundaries within which he proceeds as Commander in Chief can be laid down and prescribed by this Congress. Correspondingly, under article V, this mode of amending the Constitution is meant to commit to the discretion of State legislatures when they arrive at the requisite extraordinary consensus of two-thirds to set in motion a convention

of such dimensions as they believe responds to their perceptions of an oversight in the Constitution, or a defect in the Government.

The draft proposed by James Madison made no provision for a convention at all. It was but a two-step process. If the legislatures of two-thirds of the States agreed upon the particular wording of a specific amendment, then under Madison's formulation, which he maintained preference for throughout the proceedings, that proposed amendment would at once have to be submitted to the legislatures of all of the States, such that upon ratification by three-fourths of them, it would at once become part of the Constitution.

The convention was inserted. Madison's reservation was of the kind that has tied up this Congress. It was the vexation of knowing how to deal with these matters of not unimportant details. Where shall it be held? How shall the delegates be selected? What votes may be required? Madison preferred the simpler alternative of not having a convention at all. He lost on that point, and I do not mean to diminish the significance of the change. It is rather, again, merely to bring to your attention that it was well recognized that Congress would have to make a provision for its execution.

If Congress were to make a provision for the place of holding a convention, a contingency obviously contemplated within article V, and designated Quebec City, I would suggest to you that that is a case of manifest abuse which is so far from keeping with the idea that this article V provision could be useful, that the legislatures and the Supreme Court should overthrow the selection of that site. Similarly, if Congress required that no amendment could be proposed but by four-fifths of the convention, that is so far from any compatibility of holding a convention responding to the grievances of the States and still allow the convention to go forward that four-fifths would not be accepted by the Court.

Senator BAYH. How about two-thirds?

Mr. VAN ALSTYNE. It is sufficiently reasonable and measured in terms that you have previously spoken to and those formerly endorsed by Professor Freund and by others, that I do not regard it as abusive, and do not think it makes it intolerable or unreasonably hard to obtain amendments pursuant to article V. Whether it is well advised, or whether some alternative is better, such as a simple majority, I do not hold any particularly powerful views for that, but I do feel there is much to be said that delegates may be selected one way or another, and may or may not come under instruction from the sources that elected them, and depending on the resolution of the neighboring issues, it may well be a sensible sort of self restraint on the operation of that convention; that is, to take care that any amendment that comes from that body has indeed mounted a two-thirds majority rule.

On the main issue, however, and despite what has been said here in such a passionate fashion, I do not doubt that the most anticipated use of the State mode was to get a response in convention to identify a specific grievance. Petitions contemplating such a convention should, therefore, be respected by Congress.

If you resolve your will that only petitions seeking all-out conventions are tolerable, you must still exercise judgment and the line that you will draw will itself be somewhat arbitrary at the very edge of

the line. What judgment is that? Obviously, it must be a judgment as to whether or not these petitions all call for an open-ended convention, and whether they have come together in a reasonable period of time, sufficient in Congress view that the expression of State legislative consensus is adequately contemporary so that the petitions, all of which call for an open-ended convention, can be related to one another. Indeed, if you do not exercise that kind of limited judgment, then I think a petition originally filed in 1798 must still be counted with those filed in 1979, a thoroughly silly result. So you are called upon to exercise judgment as to whether an adequate number of State legislatures are present in any event.

Professor Dellinger said that to contemplate a convention call at the request of 34 States for a limited purpose is to trivialize article V. I submit that is false. The subject may, of course, be of breathtaking sweep. It might even be a proposal to repeal outright the first amendment to the Constitution, which I would view as not trivial, but horrendous. It might be less controversial. I can hypothesize a situation where the President of the United States may be enormously popular, but barred from reelection by the 22d amendment, and whether the other party in Congress has a majority in Congress, so that there is no chance for Congress to propose repeal of the 22d amendment, but nonetheless, two-thirds of the State legislatures think it important enough to consider repeal of the 22d amendment to submit uniform petitions requesting a convention to consider exactly that subject, the repeal of the 22d amendment.

Some may think the topic trivial. I would not. I would regard it as intermediate importance, somewhat more important than the prohibition amendment, the 18th, or its repeal, in the 21st, or as somewhat less important than a convention to consider the repeal of the first amendment.

I hold that this part of article V is an express vehicle by means of which State legislatures, when they are dissatisfied with the response of Congress, may proceed on their own. This is a possible use of it, the hypothetical 22d amendment situation.

I submit to you respectfully that it is altogether in keeping with the proper use that Congress, as it convokes the convention, to appropriately limit the convention to the purpose it was convoked for in the first instance.

Insofar as, by some untoward event, that convention—called for that purpose, and under these auspices—were suddenly to run away with itself and, instead, produce an antiabortion amendment, for example, so far from the exercise that brought it into being, and from the common understanding of those who brought it into being, that it would be entirely proper to reject that amendment on abortion.

It is so obviously nongermane to the auspices of the convention otherwise properly assembled, it would be entirely proper for Congress to reject it. I add that in anticipation, frankly, of Professor Gunther's objection; that although Congress might provide for a convention with a limited agenda, the convention once in being is a plenary body that may do entirely as it pleases. I wholly disagree. Merely as a prudential matter, moreover, I think that a limitation by Congress announcing in advance that an amendment not in keeping with the

agenda as previously determined according to the concensus of the petition of the 34 States would not, in turn, be submitted, would be useful. Such a guideline is constructive and will be extremely helpful to the convention itself so you could minimize the likelihood in fact of such maverick proposals being entertained by the convention.

Finally, the insertion into article V that there be a convention was undoubtedly meant as a buffer. It is to get solemn consideration in a national form, inclusive of States that have not previously considered the matter, or did not choose to join in the call, so as to consider the proposal or variety of proposals germane to that subject. It is a national form, it is broader, it takes more time, it insulates the process and it utterly fulfills, in my best view, the function for holding a convention.

Others who see this as triviality may hold to their opinion. I do not. I see it as originally intended, the function originally intended.

With respect to S. 1710, to the extent that it is compatible with the interpretation I share with you today, I think it is basically a sound bill. There are portions of the bill that I attempt to address in my prepared statement going to the rescission of ratification, which I strongly oppose as being probably unconstitutional and at best, being unwise for Congress to do, but that deals with matters beyond the scope of our discussion this morning.

Thank you.

Senator BAYH. So as not to prolong the questioning, and I have several questions I would like to submit in writing if I could, Professor. I appreciate your testimony.

On that last note, do you feel that inclusion in any procedure of the rescission clause is unconstitutional?

Mr. VAN ALSTYNE. Yes, I do, and I think it is utterly unwise for Congress to adopt it. I think it is unconstitutional, but that is a debatable point, and I am not sure that a court would see it abusive of Congress' power so that they would take the case, but I think it is unwise, and it ought to be deleted.

Were I a member of the Congress, in view of the good faith controversy over the pending 27th amendment, the uncertain status of the attempted rescissions there, I could not in conscience vote for a bill which contained a provision like this, which, though not directly applicable to the 27th amendment, would provide additional ground for argument for its ultimate demise, which I think would be totally unfortunate and entirely unwarranted.

Senator BAYH. Thank you very much.

[Mr. Van Alstyne's prepared statement and responses to questions from Senator Bayh and Senator Thurmond follow:]

PREPARED STATEMENT OF WILLIAM W. VAN ALSTYNE*

INTRODUCTION

Article V of the Constitution provides that Amendments may proceed from "a Convention" convoked "on application of the Legislatures of two-thirds of the several states." Article V does not itself provide any details respecting requirements of form or of substance of those state legislative applications.

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Neither does it presume to describe the manner of composing a Convention, the place for it to meet, or the procedures for its conduct. That all of these questions would eventually have to be addressed in some responsible fashion, however, was itself anticipated and understood in 1787 when Article V was under consideration. The Records of the Federal Convention of 1787 (vol. II, M. Farrand ed., at p. 558) register James Madison's initial concerns:

"Mr. Madison remarked on the vagueness of the terms, 'call a Convention for the purpose,' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?"

That such questions as there would indeed subsequently have to be resolved incidental to the effective use of this portion of Article V, moreover, was well understood. But their admitted uncertainty, and the omission to provide for them in Article V itself, were not deemed sufficient reason either to abandon the provision in Article V or to outfit the Article with further details. It is true that James Madison personally preferred a mode of state legislative initiated amendment altogether avoiding these uncertainties. His preferred alternative was to provide that whenever two-thirds of the state legislatures had severally agreed upon the terms of a proposed amendment, Congress should thereupon submit such amendments to all the legislatures of the several states (or to conventions in all of the states), with the amendment becoming effective once ratified by three-fourths of those legislatures (or conventions), thus obviating the need to route proposed amendments through a called national convention. See II Farrand at p. 559. But as Madison also declared (id. at 629–30):

"He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to form, the quorum, etc. which in Constitutional regulations ought to be as much as possible avoided."

Senate Bill 1710 is a contemporary effort to provide effective guidelines for the information and instruction of state legislatures and for Congress itself in respect to the very kinds of matters understandably omitted from Article V. It is not perpetually binding on subsequent Congresses of the United States (i.e., as an Act of Congress it is of course subject to repeal) and it may not be immune from judicial review under all circumstances. Yet, neither of these considerations is sufficient in itself for regarding SB 1710 as either pointless or ill advised. To the contrary. Insofar as this Bill does not attempt to prevent its own ultimate review in the Supreme Court (to whatever limited extent that that Court may otherwise conclude is within the range of "justiciable" questions), I regard this Bill as superior and less presumptuous than alternatives which would presume to do so. And insofar as some subsequent congress may wish to alter one or another of its provisions prospectively, in keeping with difficulties that may hereafter appear (but are not now obvious), that power in Congress should similarly be regarded reassuringly, rather than with frustration or animus.

Since 1787, there has been an aggregate of more than two hundred state legislative applications in contemplation of constitutional conventions pursuant to Article V. Although at no time were there outstanding petitions sufficiently contemporary in time and sufficiently similar in content as to have produced a called convention (the closest were petitions contemplating an amendment to provide for the election of Senators—which petitions were mooted when Congress itself proposed the Seventeenth Amendment so providing), it is quite plain that this portion of Article V was meant to be as available for use as that portion reposing a power in Congress to propose amendments by two-thirds vote of both Houses. And insofar as the very substantial details necessary to make this portion of Article V more perfectly operational were expected to be provided, it strikes me as eminently reasonable that Congress should attempt to do so in legislation directed to the subject generally, rather than to some particular problem ad hoc. Proceeding in this fashion would appear to be in keeping with the expectations attending the original debates on Article V itself and extremely useful for the guidance of state legislatures. for any Convention convoked upon their application. and for Congress as well. The general propriety and usefulness of this kind of Bill, therefore, impress me as both worthy and right.

II. QUESTIONS OF POLITICAL, BUT NOT OF CONSTITUTIONAL, SIGNIFICANCE

Given the background and text of Article V itself, and given the substantial number of Supreme Court decisions which either hold or imply that the implementation of Article V by Congress will be respected by that court (at least in

the absence of egregious or manifest abuse by Congress), in my opinion most of the questions that this Committee is concerned with under Senate Bill 1710 are questions of statescraft, fairness, and prudence—rather than questions of constitutional power. Objective standards, readily identified and plainly disallowing any of the provisions of Senate Bill 1710 even as now drafted, do not exist. In their absence (and as confirmed by the general deference the Supreme Court has observed toward Congress with respect to Article V questions), I think it most unlikely that the Bill can be discredited on the claim of simple unconstitutionality.

Many of its provisions (e.g., that which assigns to each state a number of convention delegates equal to its whole number of Senators and Representatives in Congress; that which provides that each delegate's vote shall count individually [rather than each state voting qua state, as was the case in the 1787 Convention]; that which provides for delegate selection as each state legislature shall decide) are planly subjects of reasonable differences of opinion as to their wisdom and effect. None of these seems to me beyond the boundary of congressional preference, however, and while there are doubtless equally "constitutional" alternatives that Congress might provide, it may be sufficient that (a) these provisions appear to be both fair and workable and (b) they do establish a uniform standard which state legislatures may thus take into account in considering the desirability of applying for a convention in the light of these standards, that they are at least demonstrable superior to the utter uncertainty of providing no standard at all. That uncertainty, I suggest, favors only those who are so very apprehensive of any use of the state legislative mode of securing amendments to the Constitution (which apprehension I share to some extent but believe is not a just reason to omit any provision respecting state legislative-called conventions) that they prefer an indefinite state of complete uncertainty.

Questions similar to those noted above, albeit probably less significant than those questions, can be seen elsewhere in the Bill. For example, that the most senior state supreme court chief justice shall preside until a convention shall elect a presiding officer, that "any aggrieved State" may sue in the Supreme Court with respect to alleged congressional errors under Sections 6 or 11 (but must do so within sixty days after such claim first arises (?), without such opportunity otherwise forbidding suits appropriate under the Constitution or any other laws), and that the G.S.A. shall provide "such facilities" as the convention may require (but that no federal funds are to be appropriated for convention expenses), are questions of this kind. Again, without at all disparaging questions or alternatives that may sensibly be pressed by others on issues such as these, those questions and alternatives do seem to me to be less matters of constitutional power and propriety than of specific political wisdom and preference. Other than as questions may arise in this Hearing, I mean therefore not to address them further in this statement.

III. QUESTIONS OF CONSTITUTIONAL POWER AND OF CONSTITUTIONAL WISDOM

In this summary presentation, submitted in the advance of the actual hearings, there are but three issues of constitutional power or propriety that I believe warrant comment:

1. The Manner in which S. 1710 describes an acceptable state legislative application;

2. The Manner in which S. 1710 describes the obligation of Congress in response to such applications;

3. The Manner in which S. 1710 provides for state legislative rescissions either of applications or of subseqeunt ratifications.

In respect to the sufficiency of a state legislative application for a constitutional convention, I believe that S. 1710 stands in need of some clarification—but that that clarification can be provided in the accompanying legislative history of the Bill and that it may, therefore, be sound and sufficient as it stands. The function of Article V's provision for state legislative applications is as Madison noted in The Federalist (No. 43): "It * * * equally enables * * * the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other." Whether the errors that might be perceived would be particular errors or general errors is not assumed either way, and I have no doubt that state legislatures were meant to be left free to their own perceptions respecting the kinds of errors suitable in their view for correction under the auspices of a constitutional convention. If this is so, as

I think it was so, the kind of state application which would be a "valid" application under Article V may be any of a large possible variety. Accordingly, the sole check on the breadth (or narrowness) of a given state legislative application is the check provided for by Article V itself—that two-thirds of all the state legislatures must be in manifest agreement respecting the scope of the convention they ask to be called, the necessity of each state so to secure like applications from thirty-three other states providing the limitation set by Article V itself.

It is conceivable, for instance, that a state may be so agitated by dissatisfaction with the entire Constitution that its legislature may apply for a convention in which wholesale revision may be entertained. That state's application is a valid one, not to be disregarded by Congress, but necessarily leading to no called convention unless matched within a reasonable period of time by like applications from thirty-three other states.

It is somewhat more likely, on the other hand, that a given state legislature will have a particular subject of tentative amendment which alone moves it to apply for a convention, and yet not be confident that the particularity of its own concern is shared by a sufficient number of other state legislatures as to give rise to the requisite number of like applications from those other states. In that event, as a matter of securing the requisite consensus, it may submit an application identifying the particular occasion or subject that animates its own interest, while yet providing expressly that the convention for which it makes application shall also be free to consider such additional subjects as any other state may wish to have considered as well. By that means, it may hope to frame an appeal sufficient to attract like applications from thirty-three other states, some of which may not share the particular concern of the first state's application but are willing to have that state's concern reviewed in convention equally with a different concern of their own. Under such circumstances, Congress would be bound to call a convention which would perforce be free to consider such subjects or proposals as the delegates in attendance saw fit to bring forward on behalf of their state, as the valid applications each and all so specified.

It follows similarly that when thirty-four states do share a limited concern which they wish to have addressed in convention, and yet stand opposed to possible revisions to other portions of the Constitution with which they find no fault, they should equally be allowed to submit applications reflecting that view—with the expectation that Congress will respect the uniformity of their requests. It is imaginable, for instance, that a state legislature may wish to have considered in convention an amendment which, when proposed and ratified, would simply repeal the twenty-second amendment (which limits eligibility for election as President to two four-year terms). If that state legislature wishes to act on its own confidence that thirty-three other state legislatures can be persuaded to apply for a conventioon in which that amendment of repeal would be reviewed for proposal, and no other alteration could be entertained, I know of no basis for Congress to regard its application to that effect as less than "valid," or to decline to call a convention if, indeed, thirty-three like applications were forthcoming from the other states.

An almost unlimited number of intermediate permutations are also imaginable. Some state legislatures may conclude that repeal of the twenty-second amendment is desirable, for instance, but seeing no prospect that that desirability will appeal to Congress and despairing that an application seeking a convention only for consideration of that one subject will strike sufficient response in thirty-three other state legislatures, it frames its application more broadly. Yet, eager to have its repealer amendment considered, and willing on that account (in order to secure a convention) to have certain other subjects (of more urgent concern to other state legislatures) considered as well, still that state legislature may prefer that there be no convention at all rather than that there be a convention in which, say, the First Amendment could be modified or repealed. In that circumstance, I suppose it may frame an application suitable to its view: an application for a convention in which repeal of the twenty-second amendment shall be considered together with such other proposals as may be brought before the convention, exclusive, however, of any proposal which would alter or abolish the First Amendment. Again, supposing that thirty-three like applications were shortly thereafter forthcoming, I would think Congress then to be bound to provide for the convention in keeping with the common description of the requisite number of state legislative applications.

The point of all of these illustrations is the same: a state legislative application is not more or less "valid" that another because of its breadth, rather, each application is "valid" regardless of its specificity or its breadth. And the question in each instance is simply the question as to whether a sufficient number of applications of sufficient consensus have been received as to require, on the part of Congress, the calling of a convention responsive to that consensus.

S. 1710 appears to recognized the matter in this light and, accordingly, I believe it reflects the right approach. Section 2(a) provides that state legislative resolutions shall state "the general subject of the amendment or amendments to be proposed." Section 6(a) provides that when the requisite applications "with respect to the same general subject" have been received, the Congress shall proceed to call a convention "upon that general subject." Section 10 tracks the same view by providing that a called convention shall propose only such amendments as deal with the same subject (or subjects) as that reflected in the convoking resolution, and Section 11(b)(1)(B) contemplates rejection of a convention-proposed amendment only if "such proposed amendment relates to or includes a general subject which differs from or was not included as one of the general subjects named or described in the concurrent resolution of the Congress by which the convention was called."

If there are difficulties in this aspect of S. 1710, they are probably difficulties of reasonable interpretation only and I am not satisfied that alternative formulations would be any better. For instance, I take it to be consistent with the Bill that it does not mean to preclude an application which would mean to leave the convention agenda of subject matter completely open, despite the provision requiring that such legislative resolutions state "the general subject of the amendment or amendments to be proposed" in convention. Presumably, consistent with that requirement, a state may submit an application requesting a convention "for the purpose of considering such amendments to the Constitution as the convention may decide to propose." Alternatively, I assume the provision is meant to allow an application which, while designating a particular subject that that state believes to provide the occasion for a convention, provides also that the convention may consider and dispose of "such other proposals as any other state may wish to bring before it." If S. 1710 were meant to forbid a called convention free to set its own agenda in keeping with the sponsoring applications of thirty-four identically inclined state legislatures, I would doubt its validity—as I do not doubt that such a convention is contemplated by Article V. But I do not read the bill that way and, accordingly, have no problem of that kind.

Similarly, I assume that its provisions are satisfied even were there thirty-four applications in very clear agreement on the particularity of a given subject (e.g., "a convention to be called for the purpose of proposing an amendment which, when ratified, would repeal the twenty-second amendment.") That is, I suppose the provision that the applications reflect consensus at least as to "the same *general* subject" (emphasis added) is meant to be generous, rather than restrictive: that it is enough that a common subject (or subjects) be shared by applications to count each as valid with respect to that subject, despite marginal differences in phraseology. If, on the other hand, S. 1710 were meant to disallow the convoking of a convention even when thirty-four identically framed state applications were very clear in agreeing to a very particular and limited subject (i.e., "a convention called solely to consider repeal of the twenty-second amendment"), then I would doubt its validity—as I do not doubt that such a convention is itself contemplated by Article V. But I do not read the bill in this way either, and accordingly I have no problem of this kind.

Rather, I take it to be the function of the bill in this respect to lay down instructive and useful guidelines in keeping with the interpretation of Article V I believe to be sound. A state may apply for whatever scope of constitutional convention it believes best responds to its felt interests, understanding at the same time that no such convention is to be called unless thirty-three additional applications agreeable to the same kind of convention are also received by Congress within the prescribed reasonable time limits. When it becomes clear to Congress' reasonable satisfaction that sufficient applications in contemplation of the same kind of convention (respecting the scope of its work) have been received, Congress shall indeed call that convention and, accordingly, prescribe the scope of its work. A convention thus called may accordingly consider, reject, or propose amendments responsive to the subject or subjects within the scope of that agenda

and not otherwise. Thus, the original applicant states may be assured that the convention will meet and consider all matters however broad, that characterized their applications. Correspondingly, when their original expressed concern was modest in scope, they need not fear that their applications can be rejected by Congress on that account or that a convention may presume to disregard the boundaries of the subject or subjects which solely occasioned its being called at all.

If this construction of the Bill is correct, then I think the Bill is itself both correct and desirable. It does not eliminate all areas of good faith disagreement, but on this subject no bill can and this bill does provide for a degree of understanding and coherence that we have lacked for too long.

Objection may be made to this interpretation of Article V that it leaves much to Congress, i.e., that it assigns to Congress the necessity of assessing various state legislative applications to determine whether the requisite two-thirds consensus on any subject exists. It will likewise doubtless be urged that all such difficulties can be avoided if Congress now presumes to declare that there is only one kind of "valid" state legislative application, and that agreement on the requisites of that one kind of "valid" application would virtually eliminate the alleged difficulties. Specifically, it may be argued that the only "valid" state legislative application is one which is submitted in contemplation of a convention of unlimited revisory authority over the whole of the Constitution—and that any state application not manifesting an understanding of that power shall not be counted as all. According to this view, a state may of course identify a subject that occasions its application, but it must do so in an application that nonetheless makes plain that the application extends to a convention called not merely to treat of that subject but to treat of any and of every other subject that delegates may introduce for discussion and proposal.

A number of able individuals have urged this course. (If it were adopted, incidentally, it would not necessarily require any change in S. 1710 in either Section 2(a) or Section 6(a); each of these will bear the interpretation that while every state application must state "the general subject" of an amendment (or amendments) to be proposed, these statements are but advisory and that when called, a convention may nonetheless consider whatever else any delegate sees fit to bring before it.) (On the other hand, adoption of this view would require a change in Sections 10 and 11(b)(1)(B), insofar as the first of these two sections purports to restrict the agenda of a called Convention to the subject or subjects identified in the state applications, and the second impliedly authorizes Congress to refuse to submit to ratification such amendments as a convention may propose not within the subject or subjects identified in the state applications.)

Despite the respect I have for those who urge this course, I disagree with them entirely and believe that they are mistaken. Rather, I agree with the Special Report of the American Bar Association, the view of Brickfield in his Study for the House, and the view held also by Professor Kurland of the University of Chicago, Kauper at Michigan, Noonan at California, Bonfield at Iowa, and the rest of the substantial majority of persons who have reviewed this matter. My reasons for this conclusion are set forth in two pieces of writing, both of which are appended to this Summary—and for that reason I will not reiterate them in any detail here. Essentially, they come to this. I do not believe that Article V meant, either advertently or inadvertently, to attach a "price" to the use of Article V by concerned state legislatures. In my view, the most expected use of Article V was to respond to particular perceived grievances against Congress, and to particular perceived shortcomings in the Constitution following its adoption.

The most expected use of Article V was to permit the states a reasonably efficient and prompt means of perfecting amendments occasioned by particular developments, e.g., omissions by Congress or Acts of Congress both surprising and alarming in view of what had been supposed would be the case, and/or decisions by the Supreme Court reflecting unexpected interpretations of the Constitution. Two-thirds of the states could at once set on foot the necessary corrective measure which, if found suitable and responsive in a deliberative convention in which all the states would be represented, three-fourths of the states might unite by subsequent ratification to make a part of the Constitution itself. If two-thirds of all the state legislatures do indeed manifest agreement on the particular subject for review in a constitutional convention, there-

fore, I see no reason to disallow the validity of their applications and no reason to disregard their will that no other subjects, not then agitating them, should be treated in that convention. This view seems to me more reflective than any alternative of what Hamilton wrote in Federalist No. 85. Urging that the Constitution be ratified despite different kinds of misgivings in some states as to different parts of the Constitution, Hamilton observed:

"If * * * the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine in favor of subsequent amendment, rather than of the original adoption of an entire system. [Hamilton's footnote, reads instructively: "It may rather be said TEN, for though two thirds may set on foot the measure, three fourths must ratify."] * * * [E]very amendment to the Constitution, if [the constitution is] once established, would be single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point—no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution."

I am satisfied from canvassing all of the early constitutional materials as well as the writings of my colleagues that the requirements of holding a convention was to buffer state-legislative proposals for specific amendment from being at once submitted for ratification by requiring their review by a national, deliberative body as a prerequisite to ratification. It was not, on the other hand, to establish a plenary and uncabinable proceeding free to act ultra vires the expressed will of the state legislatures which called it into being.

A sense of prudence and of self-interest among state legislatures is expected to operate in such fashion that few will submit applications so narrow and confined that they assume the risk that thirty-three other state legislatures will not see fit to submit applications identically narrow and confined. A state legislature may ignore that risk, of course, and submit a very narrow application, and have it counted as valid—for what it is. If Congress, acting in good faith (as Congress is expected to do under Article V) concludes that that state's statement of restrictions on the subject of a convention are narrower or more exclusive than other states find acceptable in their own applications, then Congress will simply count that application as "valid"—but valid merely for what it is, i.e., a convention of so confined description that there is but one valid application before it calling for a convention of that description.

Correspondingly, where it is plain to Congress that thirty-four applications have been received in which the consensus respecting the scope of the convention is clear and unmistakable, whether that consensus be on a scope of considerable breadth or of considerable specificity, it should at once proceed to call a convention responsive to that consensus. As I think S. 1710 (albeit requiring some modest interpretation) so provides, I believe it to be sound and desirable.

On the last question I mean to address in this submitted statement, lack of time requires me to be even more succinct. I oppose the provision which provides that a state legislative ratification of a constitutional amendment may be withdrawn or rescinded and, albeit not with equal rigor, similarly oppose the provision providing for withdrawal or rescission of convention applications. Congress has never intimidated to the States that an act of ratification is less than final. Twice at least, moreover, Congress has declined to accede to purported rescissions. While there is no adjudicated settlement respecting the constitutionality of purported rescissions, I believe that the past practice of congress reflects the better view of the matter by far.

Article V itself nowhere speaks of "rescissions," but only of ratification. An amendment may lie before a state legislature for a reasonable period of years and may not, of course, at once impress that legislature as sufficiently worthy or free of doubt to be approved. That is as it ought to be, as ratification should be a considerate act. And it is a far more considerate act when undertaken with the understanding, thus far confirmed by congressional practice, that when done it is final. The power of the state to ratify an amendment, moreover, is derived wholly from Article V; it is not, as in respect to ordinary matters of state legisla-

tion, a byproduct of the state's own constitution as several Supreme Court decisions make quite clear. It thus bears no fair analogy to the enactment of a state law which, being found unsatisfactory to a succeeding legislature, may at once be repealed. Rather, once exercised, the Article V power to ratify is at an end; it is functus officio.

Were the matter legitimately doubtful, however, still it is the better course for Congress not now to introduce an additional instability in the ratification process. A license to rescind, even as expressly authorized by Congress, is of uncertain constitutionality at the very least. An apparent prerogative to rescind may encourage states more blithely to "ratify" a proposed amendment, carrying it through quite inconsiderately on the supposition that at least so long as less than thirty-seven other states have not yet ratified, it may at will reconsider and recall its casual sponsorship. That unsteady casualness, with the prospect of states dropping in and out again of the ratification list (as differing coalitions may produce different majorities within the same legislature after each election), impresses me as wholly unwise for Congress itself to encourage. Insofar as at least two amendments (the fourteenth and the fifteenth) were promulgated by Congress which refused to grant any standing to purported "rescissions," moreover, a different disposition (generally to "permit" rescissions) by the present Congress may unnecessarily reopen attempts to unsettle those amendments. To be sure, the Supreme Court has generally indicated that such questions are "nonjusticiable," i.e., not suitable for judicial resolution but most suitable, rather, for Congress. If, however, Congress itself is inconstant in the manner in which it purports to settle such questions (for instance, disallowing rescissions as to the fourteenth and fifteenth amendments, but allowing them for the twenty-second amendment or, as contemplated by S. 1710 more generally), a fair question is raised as to whether Article V permits Congress to be inconsistent in its own rules of decision.

All of these (and other questions too) are avoided by revising S. 1710 to provide that ratification by a state is indeed a final act and may not be recalled—a modification I think to be desirable. Assuming, however, that this issue were sufficiently divisive within the current Congress that that change cannot be made without unreasonable delay and possible prejudice to the balance of S. 1710, at the least the section now providing for rescission should be dropped; those Members of Congress concerned with the implications of the current provisions with respect to the pending Equal Rights Amendment, as well as those opposed to providing for such a license either as a matter of wise policy or as a matter of constitutional propriety, will rightly oppose S. 1710 altogether rather than become a party to the "enactment" of so doubtful a provision as this.

The arguments I find persuasive and correct against the propriety of purported rescissions of ratifications apply in substantial measure, but not in full measure, to the provision respecting rescissions of state applications seeking a constitutional convention. On balance, I support the same conclusion here as well: a state having filed an application describing an amendment or a subject it wishes to have considered in convention ought to understand that its proposal is meant to encourage the legislatures of other states to consider and thereupon to join in that call—a license to pull back the application within the period of time S. 1710 otherwise provides to other states to file similar applications destabilizes the whole process and makes the application an unruly sport, subjecting each state legislature to uncertainty about the seriousness with which other states have acted, encouraging applications more likely than otherwise to be rather casual, and inviting new controversy in each state that has already filed a petition to jockey for position to secure its recall. When Congress itself has set a reasonable outside time limit within which like petitions from thirty-three other states must have been received in order to require a called convention, it strikes me that providing also for a (questionable) license to withdraw a petition is both unwise and unnecessary.

One may acknowledge, however, that applications seeking a constitutional convention may reasonably be seen as different in some elementary respects from acts of ratification—and that a different rule in respect to applications may be defensible. The procedure provided by Article V for state legislatures to initiate a called convention is, after all, principally a provision intended to provide recourse to secure amendments against the failure or resolve of Congress not itself to initiate the desired kind of amendment; it is a provision meant emphatically to

provide a means to the states to petition for a redress of constitutional grievances against perceived usurpations by the national government and to make repairs of a kind the national government itself might lack the motive or capability to propose. Insofar as the state-called convention mode of proposing amendments proceeds from that concern, then it may be fair to compare the filing of a state application to a petition for redress of grievances which, if the filing state itself determines no longer to be a just grievance, the state should be permitted to withdraw—rather than compelling the holding of a convention that does not now have its support. Our history of state applications, unlike our history of ratifications, is itself somewhat consistent with this view of the matter; i.e., some petitions have doubtless been filed more as a signal of anger or distress (to "send a message to Congress" as it were), than from more measured thought that a convention would be called. Ratification has a different history and, I think, a different gravity. A different rule respecting the different phenomena would, though I do not favor it, be understandable.

Overall, subject to the observations and reservations I have summarized, I believe that S. 1710 is desirable legislation. The present complete uncertainty respecting the adequacy of state applications, the procedure for convoking a convention, the boundaries of its agenda, and the representation of states in that convention, and plainly undesirable. Article V's provision respecting state applications to secure review of perceived constitutional shortcomings in convention was neither casual nor trivial. It was meant to be highly important and expected to be most useful. The omission of congress to provide a framework to enable state legislatures to measure the wisdom and efficacy of proceeding by application has been regrettable. That omission, leaving virtually all questions associated with this part of Article V unsettled (and even incoherent), has been unworthy of Congress itself. Legislation which can be altered insofar as experience may show such alterations to be sensible is virtually two centuries overdue and S. 1710 is basically a sound occasion to correct that oversight.

QUESTIONS SUBMITTED BY SENATOR BAYH FOR PROF. WILLIAM VAN ALSTYNE

1. It has been recommended that the procedures issue should be confronted at a time when the problem can be faced in the open and without pressure, in order to be prepared in advance of state action. Since most scholars agree that one Congress cannot bind another, would it be a prudent use of the Congress' time to consider implementing legislation before applications are received from the states for a convention? Should Congress routinely enact procedures legislation at the beginning of each Congress in order to be prepared?

2. Section 3(b) of S. 1710 provides that questions "concerning the State legislative procedure and the validity of the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature." Would this provision take away all power of Congress to consider the validity of a resolution, regardless of the circumstances surrounding its alleged adoption?

3. Likewise, in Section 3(b) and Section 5(b) of S. 1710, the power is removed from Congress to determine the validity of any withdrawal of an application. What are your thoughts on these sections?

4. In many of the petitions that have been submitted, it appears there has been consideration by the State governor and in many instances the governor's signature appears on the petition. Would this indicate that State's preference for including the governor in the process, or possibly the tradition of that State's legislative policy

5. There have been several petitions submitted to Congress which state, in effect, that a convention is to be called on a specific subject, including specific language for an amendment, and if any other subject or language is adopted the petition is to be considered null and void. What are your thoughts as to the consequences, if after a convention is called, several states were to withdraw their petitions or refuse to participate further?

6. If a procedures bill were to be adopted by Congress which included a provision for the calling of a limited convention, do you have an opinion as to the odds of that convention ultimately expanding the subjects for review and discussion?

7. The procedures legislation pending before this Subcommittee contain a clause with respect to each delegate taking an oath to refrain from discussing any sub-

ject other than that subject which was authorized by the petitioning states. Other than a moral exhortation, what means of enforcement is available?

8. The ABA and several constitutional scholars have recommended that convention delegates be popularly elected. Can you foresee any problems that may be connected with those elections with state laws, or possibly the necessity of amending state laws to accommodate those elections?

9. What are your thoughts on convention delegates being appointed? Would that appointment be made by the governor or the State legislature?

10. The ABA Report states there is no evidence of any federal constitutional bar against a member of Congress serving as a delegate. Do you have an opinion on that?

11. What are your thoughts with respect to a State legislator serving as a delegate to a convention? What are the ramifications of a State legislator serving as a delegate, proposing an amendment and then returning to the State and ratifying that amendment?

12. Would a provision in procedures legislation, such as that contained in S. 1710, Sec. 7(a) which states that no Senator or Representative or person holding an office of trust or profit under the United States, shall be appointed as a delegate—be an effective bar?

13. Is the exclusion of Federal employees as delegates justified in light of the fact that State employees would not be excluded?

14. Is it appropriate for Congress to include in the implementing legislation, a clause designating either the Federal government or the States to provide funds for the convention?

15. In your opinion, which entity should bear financial responsibility for a convention?

16. S. 1710 embodies the basic tenants of federalism and the sovereignty of the States. In Section 8(b), which states that with respect to no federal funds appropriated for a convention, the states shall bear all expenses incurred. The constitutional question seems to be how can the Congress require the legislatures of the sovereign States to appropriate funds for the support of a federal constitutional convention? In the past there has been instances of "matching funds" but precedent would be set for total financial support by the States. The convention would be totally dependent upon the goodwill of each and every State to pay its share, which as we know, was one of the problems faced by the Convention of 1787.

17. In S. 1710, the State supreme court justice with the most tenure shall convene the constitutional convention and administer the oath of office to each delegate and preside until officers are elected. What are your thoughts on this provision as to the practicalities and political impact?

18. As we know, the original convention was in session roughly five months and drafted the entire Constitution, do you have any recommendation as to the duration of any future convention?

19. Section 9 of S. 1710 eliminates the provision in S. 3 which provides that a constitutional convention shall terminate in one year unless extended by Congress. Would this omission effectively authorize a continuing convention?

20. I would like to draw your attention to the fact that S. 1710 does not provide for a vote on final passage of an amendment by the convention. If S. 1710 was to be passed by Congress, do you think it could be implied that the convention itself has the authority to determine the mode and margin of the vote, or would that become a matter to be decided by the courts?

21. By what vote, whether required by procedures legislation or left to the convention to decide, do you think should be required for passage of an amendment? A simple majority or two-thirds or possibly some other fraction?

22. What provisions for judicial review should be incorporated in any procedures bill, or would the convention itself have to provide for any review by the courts?

23. What would be the status of any lawsuit brought before a convention assumes its responsibilities?

24. The ABA report suggests that a three judge district court panel be authorized to review any disputes that may arise with respect to a constitutional convention. Do you have an opinion as to the advisability of this panel? How do you foresee this panel being selected?

25. As you know, S. 3 does not provide for any judicial review, whereas S. 1710 makes provision for an aggrieved State to bring an action in the Supreme

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Court directly, which was rejected by the ABA feeling that the initiation of suit in the Supreme Court necessarily escalated the level of the controversy without regard to the significance of the basic dispute. What are your thoughts on this?

26. Do you think Section 15(a) of S. 1710 is constitutionally consistant with Article III of the Constitution, which establishes the original and appellate jurisdiction of the Supreme Court?

27. Should time constraints be put upon any court, panel or arbitrating body for a determination of any dispute or legal action brought by any individual or State in connection with any procedures legislation or action by the convention?

28. Section 12 of S. 1710 fails to include any provision for dealing with a situation where Congress fails to enact a concurrent resolution providing for the mode of ratification, but the proposed amendment is submitted to the States for ratification by the Administrator of the General Services Administration anyway. What are your thoughts as to whether this leaves a serious gap in the ratification procedure?

29. Section 13 of S. 1710 omits a provision included in S. 3 which states that Congress shall decide questions "concerning State ratification or rejection" of proposed amendments. This power to determine the validity of a State ratification or rejection is one that Congress has traditionally exercised. In the alternative, what other institution could make that determination or would be better qualified?

Brief Response to the 29 Questions Asked by Senator Bayh

Responses to a number of these questions appear in my prepared testimony before the Subcommittee on The Constitution, and I hope that testimony will be helpful. Some of that testimony is amplified in the two brief published essays I submitted with that prepared testimony, and some parts may also have been clarified in the course of the brief oral presentation I made to the Subcommittee.

In one portion of my prepared testimony, I took care to note that there are, of course, many questions of practical significance associated with S. 1710 and with the operation of a called constitutional convention. Part II of my prepared testimony ("Questions of Political, But Not of Constitutional, Significance") identified several such questions and some of these overlap some of the twenty-nine questions framed in Senator Bayh's addendum. Similarly, Professor Tribe (in his essay published in the Pacific Law Review) noted a very considerable number of such matters. With respect to nearly all of them, as I said in my prepared testimony:

"[W]ithout at all disparaging questions or alternatives that may sensibly be pressed by others on [such] issues, those questions and alternatives do seem to me to be less matters of constitutional power and propriety than of specific political wisdom and preference."

Because that is so, I accordingly do not value my own opinion respecting the best way of providing for each such question and for that reason I respectfully do not wish to submit advice which frankly cannot warrant more credence than the well-informed opinions of the members of the Subcommittee itself—but which advice, once given in this setting, may at once appear to claim some special insight. For whatever guidance it may yield to the Subcommittee in response to the more particular questions before it (other than questions of constitutional magnitude to which I have attempted rather fully to respond), my basic thoughts are merely these:

1. As I am firmly of the view that the state-initiated mode of securing amendments to be proposed was meant to be of practical availability (and not meant as mere "window-dressing" carrying the appearance but not the means of securing constitutional modifications), I think that, accordingly, congressional legislation providing for its use should be drafted to make its use practical rather than to make its use virtually impossible;

2. As I think also that a constitutional convention is indeed meant to be a deliberative body (albeit a deliberative body convoked in contemplation of a reasonably specific agenda rather than a revision of the whole Constitution at large), it would be more in keeping with that view that in cases of doubt respecting the procedures of the convention, Congress should generally defer to the discretion of the convention in the formulation of such procedures or, if Congress elects to provide some procedures, it should provide procedures which

facilitate the Convention's proceedings as against procedures rendering such proceedings difficult and frustrating.

3. As I think legislation reflecting the central features of S. 1710 is both long overdue and clearly superior to the utter uncertainty of providing no standards of any kind whatever (which, as I said in my prepared testimony, favors only those "who are so very apprehensive of any use of the state legislative mode of securing amendments * * * that they prefer an indefinite state of complete uncertainty"), insofar as the Subcommittee does not feel strongly (or insofar as it finds itself divided) on some of the secondary questions it may be better advised at this time to adopt a limited bill than either (a) to do nothing, or (b) draft in such detail as must necessarily involve both a high level of speculation and a high level of political controversy.

These are, of course, statements at a fairly reified level of abstraction—and may on that account appear to do no one much good. But I think that they may do some good, as but one or two examples may help to show. Questions fourteen and fifteen, for instance, are directed to the preference or appropriateness of federal and/or state funding to defray convention expenses. I hold no strong opinion with respect to either alternative, though it strikes me that there is no impropriety were Congress to provide for reasonable federal funding, even while omitting any provision from this bill with respect to that particular subject would also be understandable and by no means so "serious" an omission as to make the balance of the bill either useless or undesirable. (Assuming, even as question sixteen recalls was true of the original Philadelphia Convention, that money problems should turn out to embarrass the convention—then even as was true of the original convention it is hardly a matter of constitutional significance.) Similarly, question seventeen directs its attention to the proposal that the most senior state supreme court justice act briefly as presiding officer until a presiding officer is chosen by the convention itself. Omission to provide for such a matter would seem to me altogether understandable—though the provision as it now appears seems hardly subject to more than mincing criticism (*e.g.*, such as who shall momentarily preside should the most senior state supreme court justice refuse to serve?). Similarly, a question of somewhat greater political significance is doubtless question eight:

"The ABA and several constitutional scholars have recommended that convention delegates be popularly elected. Can you foresee any problems that may be connected with those elections with state laws, or possibly the necessity of amending state laws to accommodate those elections?"

Yes, surely there are such problems—but presumably there may be problems as well though state legislatures were left free to designate that state's complement of delegates other than by popular election. Assuming that popular election seems highly desirable (a view I think has its own pros and cons and would prefer to leave to each state consistent only with each acting with sufficient dispatch as not to delay the convening of the convention which in most instances I anticipate will be a limited convention), however, insofar as provision for such election proceeds pursuant to legislation enacted under Article V, I should think that such legislation may be controlling with respect to its special subject matter and not require any general alterations in state election laws.

Yet, even as I sketch these brief responses, the original point makes itself clearer than before: some of those proposed provisions may be thought by others clearly important to have and, if so, I have no personal basis for strongly opposing them. Nearly all invite marginal disagreements and add targets for objections, on the other hand, and insofar as most of them are not essential to address in basic guideline legislation (which in my view is all that legislation of this kind need now be) either some change in or outright omission of many of them would be understandable. The legislation should preferably be generous and be brief. Congress would thus be better advised at this time to adopt a limited bill than either to do nothing or to draft in such detail as necessarily engages a very high level of speculation and unnecessary controversy.

QUESTIONS SUBMITTED BY SENATOR THURMOND FOR PROF. WILLIAM VAN ALSTYNE

Question. You feel that the state applications and Congressional call for a Convention can limit the subject matter at that Convention. If the Convention ignores the limitations, how would those limits be enforced?

Answer. By Congress, declining to submit such ultra vires proposals for ratification.

Question. Do you believe that every state application which calls for a Convention is valid no matter how restricted a Convention the application envisions? That is, is every application valid, even if it cannot be used with other applications to achieve the aggregate two-thirds, because it addresses a unique issue?

Answer. Yes.

Senator BAYH. Professor Gunther, you are a patient soul.

Mr. GUNTHER. You are patient, too, and in light of the hour, I think the best service I can perform is to keep this brief.

Senator BAYH. I would like nothing better than to spend a whole afternoon, or a whole weekend, with the four of you gentlemen, having a chance, without reservation, to discuss this.

TESTIMONY OF GERALD GUNTHER, A WILLIAM NELSON CROMWELL PROFESSOR OF LAW, STANFORD UNIVERSITY SCHOOL OF LAW, STANFORD, CALIF.

Mr. GUNTHER. It sounds like an attractive seminar to me. Maybe we could give academic credit as an inducement to hold it.

I have submitted a prepared statement and I have appended to that a fuller exposition of my written views, the Sibley lecture that I gave a few months ago at the University of Georgia and that is about to be published in the Georgia Law Review.

I won't belabor my constitutional position set forth at length in the Georgia lecture. My prepared statement was designed to give a shorter, 10-minute version of my position but I now think even that is too long for this purpose, and I will try to give you a shorter version.

Senator BAYH. We will put the entire statement in the record.

Mr. GUNTHER. Let me focus primarily on a problem you raised earlier on, Senator Bayh.

One of your concerns, you said, was that you did not want to hold out false hopes to the States, to the country, in enacting legislation purporting to curb the agenda of a Constitutional Convention. I think that is properly a central issue that you ought to consider. I think that if today's discussion demonstrates anything, it should persuade you and your colleagues on the subcommittee and on the full committee and in the Senate of the United States that indeed you risk holding out false hopes to the extent that you purport to enact anything like the Helms bill or the Hatch bill—enactment which, as Professor Dellinger pointed out, would be taken by the States as assurances that they could readily have a limited convention.

I think there are two problems about that. I won't dwell at any length here on the first one—namely, that legislation curbing a convention rests on a very questionable constitutional understanding of article V.

The problem I would like to dwell on, because it hasn't been dealt with today, is the political dynamics you could confront even if you were to enact legislation designed to curb a convention. How effective would it be in keeping a good faith convention—not a mad or a crazy, but a good faith convention—and good faith convention delegates run-

ning for election from proposing discussion of subjects other than the ones Congress chose to put in its call?

I think it is a very real and very high responsibility of this Congress to inform the country on these matters, to advise about this process, and above all to warn the people and the State legislatures that a congressional effort to limit the convention agenda cannot guarantee that the limit will be effective.

Senator BAYH. May I just, so that we will understand what we are talking about, say this: We are talking about a convention that is called for by the initiation of State legislatures, with the Congress as a conduit for the calling process.

Mr. GUNTHER. What has been often overlooked, is the question of what it is that the States are initiating: It is a convention as contemplated by article V, not necessarily a convention of the sort the States would like to have.

Senator BAYH. Yes. What I was suddenly struck with was the precedents. Is it the States that do the calling, and have a vehicle that is then beyond their control? There is some debate about whether it is beyond the control of Congress or not. There can be no question that the States who called the convention, or asked the Congress to call the convention, who in good faith and reasonable assurance that the call is limited, are powerless to do anything about it if it isn't limited, except not ratify it.

Mr. GUNTHER. There are lots of problems with what you are saying, in all deference, Senator.

One of the central problems is that you are talking about States in good faith thinking they can do something which—as Professor Black argues and Professor Dellinger argues, and as I argue as well, though somewhat differently—the Constitution does not provide for. All that the States are capable of calling, despite their mistaken good faith belief, is a convention that has the power to set its own agenda.

In California last February, the legislature held hearings on some of the problems we are discussing here today. The California legislature was extraordinary because it was the first legislature that even considered in any detail what they would be voting for if in fact they applied for a convention. California, so informed, voted down the application for a convention. The votes in every other legislature before February 1979 came amidst not just confusion, but pervasive inattention to what an article V convention was really all about.

The votes in most legislatures were up and down votes as the symbol of a balanced budget, not on the nature of an article V convention. I have talked with legislative leaders in various States, and they have often confirmed this. In California as elsewhere, some legislators had the initial misimpression that they could constitutionally have a process such as only Professor Van Alstyne has endorsed—where the legislature can, in fact, go so far as to specify the detailed terms of a proposed amendment and compel Congress to call a convention that would be limited to a yes or no vote on a specific amendment. That is a misimpression. That would not be a deliberative convention as contemplated by article V.

Congress bears part of the responsibility for reinforcing that misimpression, by not holding hearings before now and by not enacting

legislation that would clarify the constitutional process and apprise the States of the risks. The State legislatures have acted in good faith, I agree, but, more important, they have also acted on the basis of a combination of inattention and, I think, misunderstanding. Your main question should be: What can Congress do to help toward a proper understanding of the convention process?

May I point out that Professor Van Alstyne is the only person I have found, other than some confused State legislators, who will tell you what he just told you and what he has said in his recent writings—that a State legislature can, in fact, take the National Taxpayers Union's or the Right to Life movement's specific proposals for amendment, put them verbatim into a State application for a convention, and compel Congress to call a convention that would be limited to voting up and down on that specific proposal. The ABA doesn't say that and no other commentator has said that. And even Professor Van Alstyne hadn't said that at the time 28 legislatures voted for a balanced budget convention.

I think and hope it will give your committee pause to contemplate today's testimony. You ought to be, and I hope you will be, impressed by the fact that most constitutional scholars here disagree with the central assumption of the bills before you—the assumption that Congress has constitutional power effectively to limit a convention's agenda. I believe that if you gathered another panel of four constitutional lawyers and then another panel of four constitutional lawyers and then another such panel, the breakdown would be very much like we have today—three people telling you that it is not possible constitutionally to limit the convention's agenda and only one person supporting the misapprehensions that I think underlie S. 1710 and the other bills.

Does anybody care what academics think about all this? I think you should, when you contemplate the false hope you may be holding out to the country if you enact this legislation—the false hope that you can assure that a convention will be limited.

Our views are on record and in print. Others are ready to say the same thing to you. If and when a convention gets underway, I am prepared to tell a convention delegate that if he perceives his constituency is interested in a subject not listed in the congressional call, be it the cutting off of funds for abortions or increasing funds for energy, he is free to propose constitutional amendments on these subjects at the convention.

Senator BAYH. What about repealing the first amendment?

Mr. GUNTHER. If in the course of the convention process, that were to be done, I think that it would be constitutionally legitimate, although I would argue vehemently that it should not be done. I recognize that my former employer, Chief Justice Warren, used to include in some of his commencement speeches a reference to an old "Time" poll which suggested that if you asked the people about particular applications of each one of the Bill of Rights, each one of the first eight amendments, you would not get majority support today for most of the Bill of Rights. But I also think—or at least I hope I have enough faith in the country—that the Bill of Rights would not be repealed. But, my point is, that it is not your legitimate function,

if I may say so, to prevent this country from repealing the Bill of Rights if it so chooses, in a process where the people elect the delegates to a convention designed to propose constitutional changes. To assume that Congress has the power to keep a convention from considering "bad" amendments is to stand article V and its history on its head. I don't think it is contemplated by the constitutional scheme, and I don't think the political and legal dynamics are such, that Congress can operate as a body which could or would keep an anti-Bill-of-Rights view of the people from being effectuated at a convention. Article V clearly rejects the notion that Congress is the guardian of the substantive deliberations at a convention.

Let me briefly indicate where my own constitutional position stands on the spectrum of views you have heard today. We have on one extreme, Professor Van Alstyne, who is the only one here—and, I think, the only constitutional lawyer in the country—who supports the legitimacy of the narrowest limitations on a convention that one could conceive of. He says that a convention can be limited to a yes-or-no vote on the text of a specific amendment. No other scholar has ever said that. At the other extreme, I suppose, stands Professor Black, claiming that a State application which purports to say anything about subject matter is entirely void. He insists that only an unlimited convention application is proper. In between, you have Professor Dellinger and me, with some slight disagreements, but we are somewhere in the middle. But I should add that, as to the ultimate scope of a convention, we are much more in Professor Black's camp then in the ABA or the Van Alstyne camp. We believe that a convention is a separate, largely autonomous body that has a legitimate claim to have its views effectuated on the convention floor and above all to exercise ultimate control over its own agenda.

Professor Dellinger and I do not agree on everything, but we are remarkably close. I am impressed by that, though I don't see any reason why you should necessarily be. I am impressed because my view and that of Professor Dellinger, while very close, were arrived at entirely independently. I did not know that he was writing about this issue, nor did he know that I was thinking and speaking and writing about it. I think it is not insignificant that two reasonably independent, reasonably non-ax-grinding scholars reached such similar conclusions after several months of entirely individual thought.

All that is background. It does not show that either I, or Professor Dellinger, or anybody else is right. It does suggest that there are significantly different views about the proper scope of a convention. And for the Congress to embrace one of those views for the purpose of curbing a convention may therefore well be a very misguided notion. Congress would surely add to the confusion and raise false hopes if, by enacting S. 3 or S. 1710, it conveyed the impression a convention could be effectively limited in the face of the fact that so many of us argue that that is not true.

So your false hope concern is a very genuine, admirable, central concern, Senator Bayh. If you are really concerned about conventions that may rewrite the Bill of Rights or do other substantial, damaging things to the basic document that has served us so well for a couple of hundred years, I would urge you to follow Professor Dellinger's

suggestion and my own; namely, enact legislation which would adopt minimal housekeeping guidelines, but which would not have congressional veto powers of the sort before you. You should make it clear to the States that they can adopt an application which would produce a congressional call stating: "We hereby call a convention because 34 States want to discuss this issue responsibly." But it is of the greatest importance that you also make it clear to the States that you believe that that convention will have a plausible reason to go beyond the subjects suggested in the application and the call. In short, I think it is your duty to apprise the States of the risk of an unlimited convention.

Such congressional action would, I think, change the political dynamics in the States right now. I think many States would reconsider and repeal their applications. I think such congressional action would also be true and more faithful to Congress proper constitutional role in our constitutional scheme.

To summarize very briefly: My view is that States can specify a subject in their applications, can say what they would like a convention to discuss; and that Congress can state that subject in its call. But I differ with the premises of the bills before you and with Professor Van Alstyne and with the ABA committee when it comes to the force of that statement. In my view, the statement of the subject in your call and in the State applications is largely an informational device and, at most, a moral exhortation to the convention, in effect saying, "We hope you will stick to this subject." But such a statement of the subject does not go so far as to effectively bind that convention; ultimately, the presumption created by the statement of subject can be overcome; ultimately, the convention delegates are free to respond to the call of the voters and to get their own agenda.

I say all that as a matter of constitutional interpretation. But I also want to spend a couple of minutes on an amateur effort at analyzing the political and legal dynamics—dynamics which make it very unlikely that any congressional attempt to impose a binding limit on the convention's agenda can or will be effective in any ironclad way. I have participated in a number of debates around the country on the issues before us today. I have found people on both sides with respect to the proper constitutional interpretation of article V. But I can assure you that very few people will tell you that anything you say in your call in order to limit a convention will have an overriding probability of really succeeding. Even those disagreeing with constituional interpretations such as those of Black or Dellinger or Gunther will typically agree that a congressional effort to limit may not work.

Professor Van Alstyne tells you that the courts may defer to a congressional judgment. But the Federal courts are themselves part of the very National Government that the article V convention method was intended largely to circumvent, so that the Supreme Court may not be very cooperative in getting into the fray and siding with Congress. If you passed the bill to limit the subject matter, the Supreme Court may well—and, I suspect, wisely—delegate the ultimate decision to the convention itself, and to the delegate selection process.

I say in my prepared statement that I believe my views are supported not only by sound constitutional interpretation, but also by considerations of political dynamics. Let me dwell very briefly on

those dynamics. Suppose Congress were to specify subject to its call, were to enact an exhortation that a convention should address only that particular subject. The next step would be the selection of delegates to a convention. The convention delegates would probably be chosen in popular elections, where passions and delegates would be hostile to congressional control, where issues other than the specified ones, would no doubt be raised, and where some successful candidates would respond to those pressures.

I believe that, when the elected delegates gathered at the convention, they could legitimately speak as representatives of the people, chosen at the most recent nationwide election. Those delegates could make the justifiable argument that they were charged with considering all those constitutional issues perceived as of significance by the people who elected them—essentially, that the convention was entitled to set its own agenda.

The convention accordingly might propose a number of amendments going beyond the subject mentioned in the call. Under the bills before you, Congress could veto such "unauthorized" proposals, could refuse to submit such convention proposals to the States for ratification. But I believe that that kind of congressional veto effort would encounter not only substantial constitutional arguments but also substantial political restraints.

As I noted, the convention delegates could make a plausible constitutional argument that they were essentially in control of their own agenda. They could make even more powerful arguments that a congressional refusal to submit the convention's proposals would thwart the opportunity of the people to be heard once again in the ratification process. They could claim, too, that a congressional veto would fly in the face of one of the really dominant themes in the constitutional history: That the article V convention method was designed to minimize the role of Congress in the amendment process.

In the light of those constraints, in the face of those political dynamics and those legal arguments, might not Congress find it impolitic to refuse to submit the convention's proposals to ratification? I suggest that it is not at all inconceivable that Congress, despite its initial hope that it could confine the agenda of the convention by specifying the subject, would ultimately find it to be the course of least resistance, as well as the course truest to the constitutional scheme, to submit all of the proposals emanating from a convention of delegates by the people to the ratification process, where the people would have another say.

Permissible specifications of subject matter in State applications and in the congressional call, but, ultimately, no effective or proper limit on the scope of the convention's deliberations: That, I submit, is the most plausible understanding of the article V convention method.

That, I believe, is the understanding this committee should embrace and convey to the State legislatures and the Nation, in order to dispel the prevailing uncertainties about the article V convention method. That understanding, I submit, should govern this committee's scrutiny of the pending proposals; that understanding supports those provisions of S. 3 and S. 1710 dealing with minimum procedural, housekeeping ground rules, but not those seeking to impose substantive constraints on a convention's deliberations.

Obviously, those premises lead me to disagree with the ABA committee as to congressionally imposed limits. Instead, I—and, in different ways, Professors Black and Dellinger—insist that it is not for Congress to impose an effective substantive limit on the convention's agenda. That is not to say that I would be opposed to Congress identifying in its call—for the purpose of informing the delegates and as a matter of exhortation—those concerns that were uppermost in the State legislatures' minds when they applied for a convention.

I think, however, that you would be holding out a false hope and adding to rather than alleviating the prevalent confusion if you told the country that you had, by enacting S. 3 or S. 1710, effectively cleared the way for a limited convention which would be controlled by you or by the Federal courts or by any other national agency. That would be contrary to the view of many of us who have considered the constitutional history and the dynamics of the political process.

I have gone on longer than I planned. I apologize.

Senator BAYH. Neither of you gentlemen has had as much time as I think you deserve. I regret the restrictions. It is now 1:30. Permit us, if we might, to read the full record, and then present whatever questions we might have in writing.

Mr. GUNTHER. I will be glad to do so.

Senator BAYH. I appreciate your taking the time to be with us. Unfortunately, article V and the Philadelphia proceedings, are not replete with precedents.

Mr. GUNTHER. I am just starting a revision of my constitutional law casebook, which I hope to get to the printer in the short time of 3 months; and you will be interested to know that in the constitutional law literature, there is very little discussion of this difficult constitutional issue. In the 1,650 pages of my own book, for example, I do not mention this issue once. But I plan to correct that omission in the new edition. My colleagues here can tell me what chapter the subject belongs in.

Senator BAYH. Somewhat painfully, as we went through the process of extension of the Equal Rights Amendment, it is slim pickings to find out what was meant. Some of our colleagues reached one conclusion, and some another, but it is certainly not the kind of thing where there is a wealth of information to draw from.

Let me ask one question, Mr. Gunther. I don't think you volunteered your assessment of this, and if you care to, you may, but Professor Van Alstyne did relative to the question of rescission.

Mr. GUNTHER. On the rescission of State ratifications? I disagree with Professor Van Alstyne on that question, too, although I must say, as he said, that by and large we agree on almost everything else in constitutional law.

Senator BAYH. That specifically was not the question, but that is all right. Has either of you gentlemen views on the ability of the State legislators to rescind petitions, applications, and resolutions?

Mr. GUNTHER. I have no doubt in my own mind that one of the few clear things required by article V is substantially contemporaneous State application for a convention, and that the State legislatures are perfectly free to change their minds, before the requisite 34 are in hand, as to whether they want a convention or not.

Indeed, my own view is that if Congress were to adopt legislation based on my consitutional understanding, instead of the misguided understanding that underlies the pending legislation, that would cause some State legislators, including some I have talked with, to re-examine what they have done; I believe that quite a few legislators would then vote to withdraw existing State applications. The most useful thing you can do is to make it clear that Congress or the States cannot guarantee a limited convention; I think you will then have withdrawals from a number of State legislatures.

Senator BAYH. Professor Van Alstyne, do you have a comment on that?

Mr. VAN ALSTYNE. Yes, I do, if I understand Professor Gunther correctly. The basis for his conclusion proves too much for me, insofar as his view would go to the process of rescinding ratifications as well. So that is not a satisfactory answer.

Mr. GUNTHER. It is for me, of course.

Mr. VAN ALSTYNE. Not for those who think it is appropriate for Congress to first permit States to ratify and then look at the tally and reconsider. But with regard to petitions for a convention, at least, a different argument can be made. In my view, ratification is meant to be deliberate, and it is more so by being considered final when done. It may be considered several times, but not called back again once released.

The view on the other side of the question, with regard to calling back petitions for a convention, on the other hand, could be seen like a petition seeking redress of grievances; and insofar as any one of the States having submitted its request with respect to that, alters its views, even within a short range of years and no longer feels as aggrieved as it did on the spur of the moment, when it may have called up the petition, then I think there are good reasons for Congress to contemplate a different rule.

That does make it harder to get 34 petitions outstanding, because there would be political jockeying for position among the legislatures who had previously submitted positions, making the process more difficult to operate at all. I do not know anything starkly unconstitutional about either alternative.

I only suggest that the difference in treatment between petitions for application and ratification seem to me to have an arguably sound foundation, and I would want you to stay with that because of your own interest in the amendment process, Senator Bayh, and your successful efforts on behalf of the 27th amendment, I do urge you as an individual, Senator, to think carefully about any bill that would tend to have a carryover effect.

There is a widespread understanding that ratifications are disallowed. Encouragement of the contrary understanding is not at all historical either with regard to this amendment or to the general proposition.

Mr. GUNTHER. I would urge you not to be unduly concerned about what you were just told about the spillover effect of the question before us on the ERA ratification problem. I supported the ERA, but I did not support the arguments of those who prevailed on the ratification issue. However, I also believe, that, since ERA is a congres-

sionally submitted amendment, Congress was entitled to enact a different view as to whether it would allow rescissions of ratifications. In short, I think there is no doubt that the ERA extension action was a constitutionally authorized thing for Congress to do. But when dealing with the convention route, I think it is very important to bear in mind that the congressional role in governing the process is far more minimal than when Congress initiates the amendment process. So I think the spillover effect is clearer on the surface than when one thinks about it. The spillover argument risks comparing apples and oranges.

Senator BAYH. Thank you, gentlemen, both of you, for your contribution here. I apologize for keeping you here until almost 2 o'clock. Thank you.

Mr. GUNTHER. Thank you. We appreciate the opportunity of being here.

[Whereupon, at 1:42 p.m., the subcommittee recessed to reconvene subject to the call of the Chair.]

[Mr. Gunther's prepared statement with attachments and answers to questions from Senator Bayh and Senator Thurmond follow:]

PREPARED STATEMENT OF GERALD GUNTHER

I appreciate the opportunity to participate in these important hearings. They are important for at least two related reasons.

First, I believe that Congress has the responsibility to air and help eliminate some of the uncertainties and difficulties pertaining to the convention method of amendment under Article V of the Constitution. As you know, about 30 state legislatures have applied for a constitutional convention; in most of those legislatures, there has been virtually no attention to the question of what the calling of such a convention would entail; and many of the state legislators voting for applications have acted on the mistaken assumption that it is within the states' power to initiate a convention limited to an up-and-down vote on a very specific amendment proposal.

Second, I believe that Congress has the responsibility to address the question of enacting procedural legislation pertaining to the calling of a convention under Article V. We have never used that amendment method; no guidelines are on the books pertaining to a congressional response to the requisite number of applications from the states. I have grave constitutional doubts about some of the provisions in the constitutional convention bills pending before you; but I do not doubt that addressing these proposals and the questions they raise can shed important and helpful light on the process—light which is surely preferable to the darkness in which the state legislatures have groped and stumbled, without adequate information and deliberation, toward the brink of a convention.

During recent months, I have spoken and written extensively about a range of problems raised by the untried and uncertain convention method under Article V. In this brief statement, I will limit myself to a central problem: Are there legitimate and effective means to limit a constitutional convention to a single subject specified in advance? In my view, the answer is "no."

I would summarize my views as follows: I believe that state legislatures are entitled to state in their applications the subject which prompted their vote. I believe, moreover, that Congress may, in its call of a convention, state the subject which has prompted the initiation of the convention process. But I would add that those recitals of subject matter in the state applications and in the congressional call are not ultimately binding on the convention. I think that the convention delegates should treat those recitals as informational devices and as moral exhortations; but I also believe that those recitals create no more than a presumption that the convention should confine itself to the stated subject. Ultimately, I believe, the convention is empowered to set its own agenda. In my view, the convention delegates will have a valid claim to consider and propose amendments on any subject of constitutional dimension of concern to the electorate who

chose them. I accordingly believe that, although Congress may properly enact minimal housekeeping provisions regarding the receipt of state applications and the convening of a convention, it cannot legitimately compel the convention to limit itself to a specified subject matter, either through imposing oaths or other obligations on the delegates or through threats to veto so-called "unauthorized" convention proposals. I would add, moreover, that even if the congressional call purported to confine a convention to a stated subject, the dynamics of politics as well as the most persuasive constitutional arguments would generate powerful forces making it highly unlikely that Congress could and would effectively interpose itself between the convention's allegedly "unauthorized" proposals and the ratification process.

My examination of the text, history and structure of Article V persuades me that the convention was to be a substantially autonomous body, and that the role of Congress in channeling the convention method of amendment was to be a minimal one. To me, the most significant aspect of the debates on the amendment process in Philadelphia in 1787 was the deliberate introduction of the convention device into Article V. That device makes the state-initiated amendment route very different from the traditionally used alternative, whereby Congress proposes amendments and the states ratify. Under the convention route, states cannot propose specific amendments and may only initiate a convention; Congress must call a convention when the requisite number of valid state applications are at hand; and, most important, it is the convention that is the central body in formulating proposed amendments.

The convention mechanism was a compromise between centralist and localist forces. It was designed to still the fears of those who thought that state legislatures might have power to dictate the terms of proposed amendments on their own, without the intervention of a national deliberative body at the proposal stage. At the same time, it was a method likely to calm the anxieties of those who feared that Congress would have undue control over proposals emerging from the state-initiated amendment route. In short, the convention—understood to be a powerful mechanism in 1787, both from the kind of convention contemplated early in the Philadelphia convention and from the Framers' experience at the Philadelphia Convention itself—was conceived as the central institution in the state-initiated amendment process, a genuinely deliberative body with very considerable autonomy of its own.

Even a cursory examination of the sources relevant to constitutional interpretation undercuts the basic premise of those who argue that the state-initiated amendment route must be construed as parallel or essentially synonymous to the congressionally-initiated one, that it must be as "easy" to use, and that the convention's agenda must accordingly be limited to the subject specified in the state applications and in the congressional call. The Philadelphia Convention did not accept Madison's proposal to make two-thirds of the states coequal with Congress in proposing amendments. Instead, the 1787 debates limited the states' initiative to one applying for a convention, and it inserted the convention as the institution that would undertake the actual proposing. True, Congress has full control over the terms of the proposed amendment when it rather than the states initiates the process. But, given the nature of the convention mechanism set up by the Constitution and the background of that mechanism, the state-initiated convention route cannot be synonymous. Under that route, state legislatures can voice their grievances and demand a convention; the national legislature's control is sharply limited; and it is the convention that is the dominant national forum to consider constitutional defects and debate and propose desirable amendments.

In short, what I think the Framers had primarily in mind was that the states should have the opportunity to initiate the constitutional revision process if Congress became unresponsive, arrogant, or tyrannical. That does not mean that any convention called under Article V must be as far-reaching as the one in 1787. I see no reason why the states cannot voice the grievance that prompts the applications, or why the articulation of that grievance should not have appropriate weight when it is repeated in the congressional call. But I do insist that the convention contemplated is not limited to consideration of the specified grievance. I believe that a convention is entitled to consider all major constitutional issues of concern to the country at the time the delegates are selected and the convention meets.

My constitutional position stands in between the extremes: I do not agree with those who claim that only a limited convention is contemplated by Article V nor with those who argue that only an unlimited convention is permissible, so that Congress must consider void and ineffectual any state application for a limited convention. Instead, I believe that specifications of subject matter by the states and by Congress are permissible, but that the convention is a separate, independent body ultimately not controllable by the applying states or by Congress. My view does not preclude the possibility of a single-issue convention if there is only one, overriding constitutional problem before the country when the delegates are selected and the convention gathers; but if several constitutional issues are of concern to the nation, I believe that the delegates may consider them. My reading is akin to that of the "limited convention" advocates in giving some weight to state and congressional specifications of subject matter; but it is allied with the "unlimited convention" position in insisting on ultimate control by the convention of its own agenda.

I believe that my position is supported not only by sound interpretation of the constitutional scheme but also by considerations of political dynamics. Consider those dynamics for a moment.

Suppose that Congress were to specify a subject in its call—an exhortation that the convention address only that particular subject. The next step would be the selection of delegates for a convention. The convention delegates would probably be chosen in popular elections—elections where the platforms and debates would be outside effective congressional control, where interest groups would surely seek to raise issues other than the specified one, and where some successful candidates would probably respond to those pressures. I believe that when the delegates gather at a convention, they can legitimately claim to speak as representatives of the people, reflecting voter desires expressed at the most recent nationwide election. And these delegates could accordingly make a very plausible argument that they were charged with considering all those constitutional issues perceived as major concerns by the American people who elected them—in essence, that the convention is entitled to sets its own agenda. Acting on those premises, the convention might well propose a number of amendments, including amendments on subjects not specified in the congressional call.

Now, if the convention were to report such allegedly "unauthorized" proposals to Congress for submission to ratification, would Congress truly be in a position effectively to ignore them? I doubt it: I believe any such congressional veto effort would encounter not only substantial constitutional arguments but also substantial political restraints.

Consider the possible context in which congressional consideration of a veto of the convention's efforts would arise. The delegates elected to serve at "a Convention for proposing Amendments" (in the words of Article V) could make plausible constitutional arguments that they acted with justification, despite the prior congressional specification of the subject. They could make even more powerful arguments that a congressional refusal to submit the convention's proposed amendments to ratification would thwart the opportunity of the people to be heard once again, in the ratification process. They could claim, too, that any significatnt congressional control and confinement of the convention route would fly in the face of one of the dominant themes of the constitutional history: if the state-initiated method for amending the Constitution was designed for anything, it was designed to minimize the role of Congress. Congress was given only two responsibilities in the Article V convention route; and, properly construed, these are extremely narrow responsibilities. First, Congress must call the convention when 34 valid applications are at hand (and it is of course a necessary part of that task to consider the validity of the applications and to set up housekeeping details regarding the receipt of applications and the convening of the convention). Second, after the convention has submitted its proposals, Congress has the responsibility for choosing the method of ratification. And that, it can be persuasively argued, is all that Congress can properly do.

In the face of those political dynamics and those legal arguments, might not Congress find it impolitic to refuse to submit the convention's proposals to ratification? I suggest that it is not at all inconceivable that Congress—despite its initial hope that it could confine the agenda of the convention by specifying the subject—would ultimately find it to be the course of least resistance (as

well as the course truest to the constitutional scheme) to submit all of the proposals emanating from a convention of delegates elected by the people to the ratification process, where the people would have another say.

Permissible specifications of subject matter in state applications and in the congressional call, but, ultimately, no effective or proper limit on the scope of the convention's deliberations: that, I submit, is the most plausible understanding of the Article V convention method.

That, I believe, is the understanding this committee should adopt and convey to the state legislatures and the nation in order to dispel the prevailing uncertainties about the Article V convention method. That understanding, I submit, should govern this committee's scrutiny of the pending proposals; that understanding supports those provisions dealing with minimum procedural groundrules, but not those seeking to impose substantive constraints on a convention's deliberations.

In this statement, I have not been able to spell out all of the arguments supporting that understanding. I will of course be glad to answer questions. And, with your permission, I will submit for the record the fullest written elaboration of my views, the text of an article soon to be published in the Georgia Law Review based on the John A. Sibley Lecture I gave at that University some months ago.

GEORGIA LAW REVIEW

VOLUME 14 FALL 1979 NUMBER 1

THE CONVENTION METHOD OF AMENDING THE UNITED STATES CONSTITUTION*

*Gerald Gunther***

In April, 1978, when I accepted the invitation to speak in your distinguished series of John A. Sibley Lectures, I was quite confident that I would speak on one of my two major preoccupations—the work of the Burger Court and the life of Learned Hand. But one cannot work in constitutional law for long without appreciating the hazards of guesses about the future. Not only is it foolhardy to place bets on outcomes of pending cases or to venture predictions about impending shifts of doctrine; it is equally risky to make confident assertions about where one's interests may lie a year hence.

In recent months, much of my attention has been directed to a problem that was not at all on my mind a year ago. The problem is the meaning of Article V of our Constitution[1]—in particular, the meaning of the provision which states that, "on the Application of the Legislatures of two thirds of the several States," Congress "shall call a Convention for proposing Amendments." As you know, we have had only twenty-six amendments to our remarkably brief Constitution in our nearly two hundred years of national existence. All of those amendments have been initiated through the first of the two methods provided by Article V: they have been proposed by a two-

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* The John A. Sibley Lecture in Law delivered at the University of Georgia School of Law on May 24, 1979, revised and annotated for publication.

** William Nelson Cromwell Professor of Law, Stanford University. B.A., Brooklyn College, 1949; M.A., Columbia University, 1950; LL.B., Harvard University, 1953.

[1] It states, in relevant part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislature of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V.

thirds vote of Congress, with subsequent ratification by three-fourths of the states. We have never tried the alternative method of amendment, the constitutional convention process. And that constitutional convention route bristles with unanswered questions. Those questions have prompted me to do some reading and thinking in recent months in the unaccustomed and refreshing realm of constitutional interpretation unguided (and unobscured) by judicial pronouncements.

The constitutional convention issue entered most people's consciousness only this spring, largely through the efforts of a specialist in consciousness-raising, California Governor Jerry Brown. Early in 1979, the Governor urged in his inaugural speech that the states apply for a convention to achieve adoption of a constitutional amendment mandating a balanced federal budget.[2] And the Governor has ever since campaigned in support of the drive to call the first constitutional convention since the Philadelphia one in 1787.[3] That drive is momentous indeed: as of mid-1979, thirty states had applied to Congress for a convention;[4] and under Article V, it is clear that, when thirty-four valid applications are at hand, Congress is under a duty to call a convention—a constitutional convention for which there are no guidelines regarding such central problems as the selection of delegates, the duration of its meeting, and, above all, its agenda and authority.

In examining the constitutional convention process, I will begin with some comments on the current drive to persuade two-thirds of the states to apply for a convention.[5] I especially want to scrutinize the assurances of the budget amendment advocates that their campaign will not produce a "runaway" convention.[6] I will then offer my own view of what the Constitution contemplates about the contours of a constitutional convention called under Article V.[7] Finally, I want to address the question of what Congress should do now, and

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[2] *See* excerpts from Brown's inaugural address in *Brown's Twin Speeches: Presidential-Campaign-Inaugural and Routine State-of-the-State*, 10 CAL. J. 73, 73 (1979).

[3] Interview with Edmund G. Brown, Jr., Governor of California, in San Francisco, California (Oct. 6, 1979), *reported in* King, *Brown Starting Drive in Northeast to Eliminate Carter as Candidate*, N.Y. Times, Oct. 7, 1979, at 26, col. 1-2.

[4] For a convenient listing of the applying states as of May 31, 1979 (with references to the pages of the *Congressional Record* in which the text of the resolutions have been printed), *see* Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1623 n.2 (1979).

[5] *See* text accompanying notes 9-12, *infra*.

[6] *See* text accompanying notes 13-23, *infra*.

[7] *See* text accompanying notes 24-43, *infra*.

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especially the problems raised by pending proposals for federal legislation establishing the machinery for (and delineating the bounds of) Article V constitutional conventions.[8]

I. The Current Campaign

The ongoing balanced budget campaign is a threat to launch the first Article V convention in our history. The fact that we have never used the convention route does not make it illegitimate, of course: it is there in the Constitution, and it is there to be used when appropriate. But it is an uncertain route because it hasn't been tried, because it raises a lot of questions, and because those questions haven't begun to be resolved. If thirty-four state legislatures deliberately and thoughtfully want to take this uncertain course, with adequate awareness that they risk prompting a convention that will be able to consider issues ranging far beyond the balanced budget, so be it. But the present campaign has in fact largely been an exercise in constitutional irresponsibility—constitutional roulette, or brinksmanship if you will, a stumbling toward a constitutional convention that more resembles blindman's buff than serious attention to deliberate revision of our basic law.

Although he is largely responsible for making most of us aware that such a campaign is in fact under way, California Governor Brown did not initiate it. When the Governor got aboard last January, we were already well along towards a convention. The National Taxpayers Union had long been at work on a nationwide, little noticed, but remarkably successful drive,[9] a drive that had persuaded about two dozen state legislatures to apply to Congress for a call of a convention. Even before Governor Brown joined in, the campaign had already gotten the support of about half of the states. These state legislatures had voted with the most remarkable inattention to what they were really doing. Typically, the legislatures did not even hold hearings on the unresolved questions of Article V. Typically, the legislative debates were brief and perfunctory, essentially up-and-down votes on whether one was for or against a balanced budget. Yet what was adopted, typically, was a resolution which said that, unless Congress submitted a budget amendment of its own, the state was applying under Article V for a constitu-

[8] *See* text accompanying notes 44-64, *infra*.

[9] *See* Mohr, *Tax Union Playing Chief Role in Drive*, N.Y. Times, May 15, 1979, at D18, col. 1; Wall St. J., Feb. 1, 1979, at 17 (Western ed.) (NTU full-page advertisement advocating federal balanced budget amendment).

tional convention.[10] I think it is fair to say that the questions of what such a convention might do, and especially whether such a convention could and would be limited to the balanced budget issue, were largely ignored.

When Governor Brown joined the campaign, the public began to take it more seriously. In February 1979, a committee of the California Assembly became the first state legislative body to hold extensive hearings on what the convention process really might look like.[11] The California legislature rejected the convention proposal after those hearings. Many people then assumed that the drive was dead. But it continues. By the summer of 1979, New Hampshire had become the thirtieth state to ask for a convention.[12] The chief proponents, the National Taxpayers Union and the California Governor, plan to press the campaign in other state legislatures during 1980. If four more states join the campaign, I suppose everyone will become aware that a truly major constitutional issue confronts us.

II. The Unpersuasive Assurances of the Budget Amendment Advocates

A major reason why so many serious questions have been ignored is that the advocates of the balanced budget amendment have uttered frequent assurances that a constitutional convention can readily be limited to a single, narrow subject and that the process won't get out of hand. One way of examining the problems of the convention route is to scrutinize those assurances, in which I perceive three major recurrent themes. First, we are told that a constitutional convention is not likely to come about, since the real aim of this drive is to spur Congress into proposing a budget amendment of its own. Second, we are told that, even if a convention is called, it will be confined to the budget issue and will not become a "runaway" convention, as the 1787 Convention of course was. And, third, we are told that even if the convention were to become a "runaway" convention that proposed amendments going beyond the budget issue, its proposals would never become part of the Constitution because three-fourths of the states would never ratify them.

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[10] *See, e.g.*, Del. H. Con. Res. No. 36 (1975), *reprinted in* 125 Cong. Rec. S1307 (daily ed. Feb. 8, 1979).

[11] California Assembly Comm. on Ways and Means Report 79-1, *Transcript of Hearings on the Balance the Federal Budget Resolutions* (1979) [hereinafter cited as California Hearings].

[12] *See* N.H. POM-223 (1979), *reprinted in* 125 Cong. Rec. S6085 (daily ed. May 16, 1979).

In my view, there is no adequate basis for those assurances, and certainly not for the confidence with which they are persented. I believe that the convention route promises uncertainty, controversy, and divisiveness at every turn. With respect to the central constitutional question—whether a convention would and could be limited to a single subject—I am convinced that there is a serious risk that it would not and could not in fact be so limited.

Let me take a closer look at the major arguments of those who seek to allay concerns about the risks of the convention route.

First, we are promised that there isn't likely to be a convention, because the campaign is simply a device to press Congress into proposing a budget amendment of its own. That claim seems to me the simplest to challenge: a threat to induce congressional action needs to be a credible threat; a strategy that rests on the threat of a convention must surely take account of the possibility that a convention will actually convene. Moreover, one of the very few issues about the convention route on which scholars agree is that, once thirty-four proper applications for a convention are submitted, Congress is under a *duty* to call a convention and does not have a legitimate discretion to ignore the applications.

Second, we are told that any convention would be limited to the subject matter of the state applications. That is of course the central constitutional problem, and it raises a number of questions for which there are no authoritative answers. Let me touch on just a few of the issues that raise doubt about the possibility of truly limiting a convention, and let me consider several scenarios that might quite possibly confront us in the months to come.

Let me begin by recalling the various steps broadly delineated in Article V of the Constitution. The first step is "the Application of the Legislatures of two thirds of the several States" for a convention. After proper "Applications" are received, Congress, as the second step, "shall call a Convention for proposing Amendments." Incident to that "call," Congress will have to provide for the selection of delegates; choosing those delegates is the third step in the process. Then, as the fourth step, the convention meets. After the convention reports its proposals, Congress is called upon to take the fifth step: to select the "mode of Ratification" of the proposed amendments—ratification either by the "Legislatures of three fourths of the several States" or by ratifying conventions in three-fourths of the states. The sixth and final step is the actual consideration of ratification in the states.

With respect to the first step, some scholars believe that the only

valid state "Application" is one calling for a general, unlimited convention.[13] A larger number of scholars believe that applications that are somewhat limited can be considered valid, so long as they are not so narrowly circumscribed as to deprive the convention of a real opportunity to deliberate, to debate alternatives, and to compromise among measures.[14] Hardly anyone believes that a very specific application, such as one asking for an up-or-down vote on the text of a particular amendment, is the kind of "Application" contemplated by Article V.[15] Yet the typical proposals adopted by the states so far quite specifically seek a balanced budget amendment; they are accordingly open to the charge that they are not proper "Applicatons" in the Article V sense.

But the question of what the state legislatures may properly in-

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[13] Professor Charles L. Black, Jr., of Yale Law School has long been the most vigorous advocate of the "unlimited convention" position. *See, e.g.*, Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); his testimony at the California legislative hearings in February, 1979, California Hearings, *supra* note 11, at 126-54; and his statement at a conference sponsored by the American Enterprise Institute in May 1979. American Enterprise Institute for Public Policy Research, Conference on the Constitution and the Budget: Are Constitutional Limits on Tax, Spending and Budget Powers Desirable at the Federal Level? 19-28 (May 23, 1979) (unpublished transcript) [hereinafter cited as AEI Conference]. *See also* Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8. For a more recent analysis somewhat similar to the Black-Ackerman position, see the thoughtful discussion in Dellinger, *supra* note 4.

[14] *See, e.g.*, AMERICAN BAR ASSOCIATION SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974) [hereinafter cited as ABA REPORT]; Memorandum from J. Anthony Kline, Legal Affairs Secretary, to Edmund G. Brown, Governor of California (Jan. 31, 1979) [hereinafter cited as Kline-Brown Memorandum]; Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1968); Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1968).

The articles by Professor Bonfield and Senator Ervin were part of a Michigan Law Review symposium on the constitutional convention method which has also been published as THE ARTICLE V CONVENTION PROCESS—A SYMPOSIUM (L. Levy ed. 1971). Senator Ervin's arguments in his symposium piece strongly reflect the position of Professor Philip B. Kurland at the 1967 Ervin committee hearings on proposed convention procedure legislation. *Federal Constitutional Convention: Hearings on S. 2307 Before the Subcomm. on Separation of Powers Comm. on the Judiciary*, 90th Cong., 1st Sess. 233 (1967) [hereinafter cited as 1967 Hearings] (statement of Philip B. Kurland).

The testimony of the late Professor Alexander Bickel at those hearings affords an unusually eloquent statement that a convention must have a real opportunity to deliberate, debate and compromise. *Id.* at 60 (statement of Alexander Bickel). My own analysis of the problem is heavily indebted to his probing discussion.

[15] When I delivered this lecture in May, 1979, I said that I didn't know of a single scholar who believed that a specific application for an up-or-down vote was valid. Since then, a respected scholar, William W. Van Alstyne of Duke, has made just such an argument. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (1979).

clude in their "Applications" is only a preliminary problem. The main difficulties lie in what Congress could and would do, what the dynamics of the delegate selection process would be, and, above all, what a convention could and would do. If Congress, in the second step of the Article V convention process, adopted the position that only unlimited applications are proper, it could simply ignore the limited ones, and the process would stop right there, at least for the time being.[16] Or, Congress, still acting on the belief that all conventions had to be general ones, might disregard the specifications of the subject matter in the applications and issue a call for a general convention.

I suspect that Congress would adopt neither alternative. My guess is that Congress would first of all turn to the question of whether the applications at hand were valid ones. They are not all properly addressed to the correct recipient in Washington, according to some members of Congress.[17] They are not identical in text. Moreover, they typically contain conditions--for example, that the application is to be considered only if Congress fails to propose its own budget amendment, and that it is to be viewed only as an application for a convention with limited scope. If some plans that have been discussed in Washington materialize, congressional committees would hold hearings narrowly confined to the question of the validity of the individual applications. If that happens, we may see a process in which Congress finds flaws in most of the applications submitted. I certainly hope that Congress does not take that route: what could do more to reinforce the feeling of distrust of Washington that underlies the balanced budget campaign than to have Congress strike, one by one, the applications before it, on various technicalities?

I believe that the most probable congressional action if thirty-four states adopt valid applications (and if Congress doesn't propose an amendment of its own) is this: Congress would attempt to heed the grievance that stirred the budget amendment applications but would call a convention with a scope broad enough to still the qualms about excessively narrow conventions. Congress might, for example, call a convention to address the issue of fiscal responsibility. If the convention bowed to that congressional delineation of its

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[16] *See* Dellinger, *supra* note 4.

[17] Late last winter, while most sources were reporting that valid applications had been approved by 26 or 27 state legislatures, Senator Alan Cranston of California counted only 14 and Senator Birch Bayh of Indiana counted 16 while disputing six of Cranston's tally. N.Y. Times, February 7, 1979, § 1, at 16, col. 1.

agenda, it could, for instance, consider the spending limitation supported by Milton Friedman[18] as well as the balanced budget proposal supported by Governor Brown. If Congress took that route, it would presumably enact—at last—some legislation that would set up machinery for a convention: legislation similar to that proposed by Senator Sam Ervin a decade ago; legislation that presents a troublesome set of problems of its own, as I will elaborate later.[19]

But all that takes us only through the first two steps of the convention route. The uncertainties at those stages are grave enough, but they are as nothing compared to what confronts us at the all-important third stage, the convention itself. Even if Congress were satisfied that the quite specific balanced budget applications constituted valid "Applications," and even if Congress were satisfied that it had the power to confine a convention to the subject matter it defined (both debatable assumptions), that would not resolve the problem of what might take place at the convention itself. The convention delegates would probably be chosen in popular elections,[20] elections where the platforms and debates would be outside of congressional control, where interest groups would surely seek to raise issues other than the budget, and where some successful candidates would probably respond to those pressures. Those convention delegates could legitimately speak as representatives of the people. And those delegates could make a plausible case that a convention

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[18] *See* Friedman, *The Limitations of Tax Limitation,* POLICY REVIEW, Summer, 1978, at 7; National Tax-Limitation Committee, Memo Re: Proposed Constitutional Amendment to Limit Federal Spending (January 30, 1979) (unpublished memorandum on file with *Georgia Law Review*).

[19] *See* text accompanying notes 44-64, *infra.*

[20] Popular election of delegates has been the assumption in most modern discussions of Article V constitutional conventions. *See, e.g.,* ABA REPORT, *supra* note 14. Moreover, proposed convention legislation has typically provided for popular election. *See* Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution,* 85 HARV. L. REV. 1612 (1972). *See also* the Ervin bill passed by the Senate in 1971, S.215, 92d Cong. 1st Sess., 117 CONG. REC. 36804 (1971), and its more recent counterpart, the Helms bill, S.520, 96th Cong., 1st Sess., 125 CONG. REC. S.1935 (1979). The Ervin-Helms proposal would give each state a number of delegates equivalent to the number of its representatives and senators, with two delegates elected on a statewide basis and the others by congressional district.

A more recent proposal, by Senator Hatch—the Constitutional Convention Implementation Act of 1979, S.1710, 96th Cong., 1st Sess. (1979)—leaves the manner of selection of delegates to the states. The Hatch bill provides: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of delegates, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress." *Id.* at § 7(a). But even Senator Hatch stated in introducing it on the floor that "each of the States will undoubtedly introduce some means of popular election for the delegate positions." 125 Cong. Rec. 11874 (daily ed. Sept. 5, 1979).

is entitled to set its own agenda. They could, for example, claim that the limitation in the congressional "call" was to be taken as a moral exhortation, but not as a binding restriction on the convention's discussion. They could argue that they were charged with considering all those constitutional issues perceived as major concerns by the American people who elected them. And, acting on those premises, the convention might well propose a number of amendments, amendments going not only to fiscal responsibility but also to such issues as nuclear power or abortion or defense spending or health insurance or school prayers.

If the convention were to report proposals such as those to Congress for submission to ratification, the argument would of course be made that the convention had gone beyond the bounds set by Congress. I have heard it said that Congress could easily invalidate the efforts of any such "runaway" convention by "simply ignoring" the proposed amendments on issues exceeding the limits. I do not doubt that Congress could make a constitutional argument for refusing to submit the convention's allegedly "unauthorized" proposals to ratification. But any such congressional veto effort would, I believe, run into substantial constitutional counterarguments and equally substantial political restraints.

Consider the possible context—the legal and political dynamics—in which congressional consideration of a veto of the convention's efforts would arise. The delegates elected to serve at "a Convention for proposing Amendments" (in the words of Article V) could make plausible constitutional arguments that they acted with justification, despite the congressional effort to impose a limit. They could make even more powerful arguments that a congressional refusal to submit the proposed amendments to ratification would thwart the opportunity of the people to be heard through the ratification process. Indeed, one of the supposed "safeguards" heralded by advocates of the convention route—the requirement of ratification by three-fourths of the states—could well become the instrument that would quell any congressional inclination to bury so-called "unauthorized" proposals by the convention.

In the face of such arguments, might not Congress find it impolitic to refuse to submit the convention's proposals to ratification? I suggest that it is not at all inconceivable that Congress, despite its initial belief that it could impose limits, and despite its effort to impose such limits, would ultimately find it to be the course of least resistance to submit all of the proposals emanating from a conven-

tion of delegates elected by the people to the ratification process, where the people would have another say.

I am not reassured by the argument that if Congress attempted to submit such allegedly "unauthorized" proposals to ratification, a lawsuit would stop the effort in its tracks. There is a real question as to whether the courts would consider this an area in which they could intervene; other aspects of the amendment process have been held by the courts to raise nonjusticiable questions.[21] Moreover, since the convention route was designed to provide an amendment method largely free of national control,[22] curbs emanating from the national judiciary may prove no more palatable than restraints imposed by the national legislature. And, even if the courts decided to rule, they might reject the constitutional challenge. In any event, the prospect of such a lawsuit simply adds to the potentially divisive confrontations along the convention road—a confrontation between Court and Congress, to go with the possible other confrontations, between Congress and the convention, between Congress and the states, and perhaps between the Supreme Court and the states.[23]

That brings me to the third reassurance about the low-risk nature of the convention route. We are told that the requirement that three-fourths of the states must ratify a proposed amendment guarantees that the convention won't endorse wide-ranging, radical changes in the Constitution. I think there is a fatal flaw in that argument as well. It assumes that a convention would either limit itself to a narrow subject or "run amok" with wild-eyed proposals. But that overlooks a large part of the spectrum in between. Can there really be confidence that there are no issues of constitutional dimension other than a balanced budget that could conceivably elicit the support of the convention delegates and, ultimately, the requisite support in the states?

True, it can be argued that one should not worry about a method of producing constitutional amendments if three-fourths of the states *are* ultimately prepared to ratify. But I am concerned about the *process,* a process in which serious focus on a broad range of possible constitutional amendments does not emerge until quite

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[21] *See* Coleman v. Miller, 307 U.S. 433 (1939). *See also* Dillon v. Gloss, 256 U.S. 368 (1921); Leser v. Garnett, 258 U.S. 130 (1922). *See generally* the discussion of justiciability in Note, *The Process of Constitutional Amendment,* 79 COLUM. L. REV. 106 (1979).

[22] *See* text accompanying notes 24-43, *infra.*

[23] *See* statement of Professor Laurence H. Tribe, which was based on his memorandum to the White House, California Hearings, *supra* note 11, at 70.

late. What we risk is a process which starts with a state focus on the balanced budget, leads to a congressional call of a convention to consider fiscal problems, develops into delegate election campaigns where amendments dealing with discrimination and health are also debated, and culminates in a constitutional convention considering amendments on a wide range of other issues as well. Is it really deliberate, conscientious constitution-making to add major amendments through a process that begins with a mix of narrow, single-issue focus and inattention and ignorance, that does not expand to a broader focus until the campaigns for electing convention delegates are under way, and that does not mushroom into broad constitutional revision until the convention deliberates?

III. The Understanding of the Framers: A Suggested Reading

I must confess that it is a good deal easier to challenge the reassurances of the budget amendment advocates that a constitutional convention can readily be limited to a narrow subject than to arrive with adequate confidence at one's own understanding of how the process should work. What is clear is that no one can make absolutely confident assertions about how the convention method was intended to operate. The inferences that can be drawn from the historical materials and the structure of Article V are not unambiguous; and, as might be expected, there is no consensus among commentators.

That lack of consensus has not prevented some supporters of the budget amendment from making confident assertions that there is overwhelming agreement among constitutional scholars that a convention can be readily limited to a specific subject.[24] But those assertions are wrong: amidst the widely varying commentaries on Article V, the point of agreement that most often emerges is that the argument for an effectively limited constitutional convention is shaky indeed.[25] Moreover, the very existence of divergent views in

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[24] For example, Governor Brown of California repeatedly uttered such assertions in public statements after joining the balanced budget-constitutional convention drive early in 1979. *See also* Kline-Brown Memorandum, *supra* note 14.

[25] For example, even scholars who argue that as a matter of constitutional interpretation a limited convention is possible concede that there is no effective machinery to keep within bounds a convention determined to set its own agenda. *See, e.g.*, California Hearings, *supra* note 11, at 106 (statement of Dean Gerhard Casper); Mishkin, *A Question of Trust*, Newsweek, March 5, 1979, at 17; and American Enterprise Institute: Public Policy Forum, A Constitutional Convention: How Well Would It Work? (May 23, 1979) (unpublished transcript) (remarks of Professor Paul Bator).

the literature adds strength to the warning that venturing down the convention road is risky business. But responsible examination of Article V should and can go beyond acknowledgment of the prevailing uncertainties. My own thinking about the materials relevant to constitutional interpretation convinces me that it is possible not only to distinguish between more and less persuasive readings but also to articulate the single most compelling interpretation.

Most of the literature clusters around one of two fairly extreme positions—the "limited convention" theme and the "unlimited convention" argument. In my view, the truth lies somewhere in between.

The "limited convention" position, illustrated by Professor Philip Kurland's arguments,[26] relies heavily on the assumption that the two amendment routes in Article V must be viewed as parallel and essentially synonymous methods, that states initiating the convention process in order to obtain an amendment on a particular subject must have as ready an avenue to achieve their objectives as Congress does when proposing a specific amendment on its own initiative. Closely related to that structural submission by the "limited convention" defenders is the allegedly practical consideration that any clouding of the "limited convention" possibility would unduly inhibit the states from initiating the amendment process.

At the other extreme, the "unlimited convention" believers, epitomized by Professor Charles L. Black, Jr.,[27] point to the open-ended Philadelphia Convention of 1787 as the obvious model for the Article V convention, insist on the total autonomy of the convention, and go on to argue that a state application for a limited convention is wholly void and should carry no weight at all with Congress, because it seeks a gathering which the Constitution does not contemplate.

My own view eschews those extremes in favor of a point in the middle of the spectrum of possible readings of Article V. To me, the most persuasive interpretation is that states may legitimately articulate the specific grievances prompting their applications for a convention; that Congress may heed those complaints by specifying the subject matter of the state grievances in its call for a convention; but that the congressional specification of the subject is not ultimately binding on the convention. Rather, the congressional specifi-

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[26] 1967 Hearings, *supra* note 14, at 233. For a fuller elaboration of the essence of the Kurland position, *see* Ervin, *supra* note 14. *See also* ABA REPORT, *supra* note 14.

[27] *See* Black, *supra* note 13.

cation serves the purpose of informing the convention delegates of the subject matter that prompted the applications and operates as a moral exhortation to the convention. I insist, however, that the convention is a separate, independent body ultimately not controllable by the applying states or by the Congress issuing the call. The convention, which in modern times will no doubt be composed of popularly elected delegates, should treat the congressional specification as creating a presumption that the articulated subject designates the business before the convention; but that presumption can be overcome. I believe that the final authority to determine the convention's agenda rests with the convention itself, and that the convention delegates are authorized to consider any issue perceived by the people who elected them as sufficiently significant to warrant constitutional change. My own view, in short, does not preclude the possibility of a single issue convention, *if* there is only one, overriding constitutional problem before the country when the delegates are selected and the convention gathers; but when a wider range of constitutional issues are of concern to the people, Article V in my view permits the convention to go beyond the single issue stated in the applications and specified in the call. This reading is akin to that of the "limited convention" camp in permitting and giving some weight to state and congressional specifications of subject matter; but it is allied with the "unlimited convention" position in insisting on ultimate control by the convention of its own agenda.

The relevant historical materials and the structural considerations reflected in Article V support my interpretation. The readily available reviews of the 1787 context make it unnecessary to rehearse the history of Article V in detail here.[28] But the dynamics of the evolution of Article V during that long, hot Philadelphia summer of 1787 are worth recalling.

From the outset, there was agreement that the new Constitution, unlike the Articles of Confederation, should not require the unanimous vote of the states for amendment, but that amendment should be difficult enough to be more than a casual exercise. The problem that most persistently divided the delegates was the proper forum for the proposing of amendments. As with so many other issues in the framing of the Constitution, the underlying tension was between localism and centralization, between state control and na-

[28] For Philip B. Kurland's memorandum outlining the historical data, *see* 1967 Hearings, *supra* note 13, at 234. For an especially useful recent review of the 1787 background, *see* Dellinger, *supra* note 4.

tional power. At the outset of the Convention, one of the Virginia Resolves proposed excluding "the National Legislature" entirely from the amendment process,[29] and the draft that emerged from the Committee of Detail early in August substantially reflected that emphasis: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."[30] That amendment process would have been initiated solely by the states; the role of Congress would have been minimal; and the convention would have been the sole source of amendments and apparently could have made changes in the Constitution on its own, without any further requirement of ratification.

But in the closing days of the 1787 Convention—and with some haste, in debates that are not fully recorded—that scheme for a wholly autonomous convention was set aside, because of the concerns voiced by both localist and centralist delegates. Localists feared that the wholly autonomous convention could subvert states' rights;[31] centralists feared that barring Congress from any initiating role would skew any constitutional change toward an unduly localist direction.[32]

These contending positions produced a compromise, originally sketched by Madison but significantly changed before final adoption. Under the Madison scheme, Congress would have been the sole body to propose amendments, but would have acted "on the applications of two thirds of the Legislatures of the several States" as well as on its own initiative.[33] The Madison scheme resembles the final product in giving state legislatures as well as Congress a share in the initiating function; but it is different from the ultimate Article V in eliminating any reference to a convention. An all-powerful convention had been the sole proposing mechanism at the outset; Madison's compromise eliminated that device altogether.

The most important result of the debates on Madison's substitute was that the convention scheme resurfaced and became part of Article V. As finally adopted, the state initiative was limited to applying

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[29] I THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 245 (M. Jensen ed. 1976) (Thirteenth Virginia Resolve, May 29, 1787).

[30] *Id.* at 269 (draft constitution by the committee of detail, August 6, 1787).

[31] I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557-58 (M. Farrand ed. 1937) [hereinafter cited as II FARRAND] (statement of Elbridge Gerry).

[32] *Id.* at 558 (statement of Alexander Hamilton).

[33] *Id.* at 559 (proposal by James Madison).

to Congress for the call of a convention; it was that convention that was given the authority to propose amendments, with ratification left to subsequent action in the states.[34] Madison's draft was changed because, once again, objections were raised by both sides. One critic of the Madison plan, Roger Sherman, feared "that three fourths of the States might be brought to do things fatal to particular States."[35] Another critic, George Mason of Virginia, feared that Congress was given too much control: since, under Madison's scheme, Congress was the sole proposer of amendments, either on its initiative or that of the states, "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."[36]

In response to those objections, Gouverneur Morris and Elbridge Gerry proposed substitute language that ultimately found its way into Article V. It provided that, in the state-initiated amendment process, the congressional task was limited to the calling of a convention, with a constitutional convention reinstated to undertake the actual proposing of amendments.[37] That was a compromise, though it was certainly not Madison's compromise. Congress could initiate amendments on its own, as Madison had provided; but the state-initiated process was substantially altered, with the state applications serving merely to get a convention under way, with the role of Congress unmistakably reduced to a largely ministerial one, and, most important, with the convention device reintroduced as the prime instrument for considering and proposing amendments.[38]

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[34] *See* text of Article V, *supra* note 1.

[35] II FARRAND, *supra* note 31, at 629.

[36] *Id.* at 629.

[37] *Id.*

[38] One recent article expresses a viewpoint similar to my own. *See* Dellinger, *supra* note 4. Professor Dellinger argues that, so long as state applications merely *recommend* that a convention consider a particular subject, they must be counted; but if the state applications *insist* on a limited convention, they ask for action beyond the authority of Congress, so that the applications "simply self-destruct." I agree with Professor Dellinger's view that a convention is ultimately entitled to set its own agenda, but I do not share his view that most pending state applications must be considered invalid.

The Dellinger article, published after this lecture was delivered, is an unusually thoughtful discussion of the constitutional convention problem, and I welcome its publication. His recital of the historical evolution of Article V relieves me of the burden of retracing that ground in detail.

I agree with Professor Dellinger's summary and interpretation of that background, with the exception of one passing statement. Professor Dellinger describes Madison's substitute draft as providing "the structure and substance of what eventually became Article V." That kind

The convention device under Article V was clearly not as powerful as that considered early in the 1787 Convention, for its proposals would have to survive a ratification process before becoming part of the Constitution. But, in view of the evolution of the Article V compromise, the introduction of the convention device into the Constitution made the convention a prominent body indeed. It was plainly a mechanism to still the fears of those who thought that state legislatures might have power to dictate the terms of proposed amendments on their own. At the same time, it was a method likely to calm the anxieties of those who feared that Congress would have undue control over proposed amendments emerging from the state-initiated route. In short, the convention—understood to be a powerful mechanism both from the kind of convention contemplated early in the Philadelphia Convention and from the experience of the delegates throughout that Convention—was apparently conceived of as the central institution in the state-initiated amendment process, a body with very considerable autonomy.

Even a cursory overview of that history undercuts the basic premise of the "limited convention" position—that the state-initiated amendment route must be construed as parallel or essentially synonymous to the congressionally initiated one, and that the convention's agenda must accordingly be limited to the subject specified in the state applications and the congressional call. True, Congress has full control over the terms of the proposed amendment when it rather than the states initiates the process. But, given the nature of the mechanism set up by the Constitution and the background of that mechanism, the state-initiated convention route surely cannot be synonymous. The Philadelphia Convention did *not* accept Madison's proposal to make two-thirds of the states coequal with Congress in proposing amendments. Instead, those debates in the closing hours of the 1787 sessions limited the states' initiative to one of applying for a *convention,* and the framers inserted the *convention* as the institution that would undertake the actual proposing. That convention step inevitably makes the state-initiated

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of characterization has misled many supporters of the "limited convention" argument. Though it is true that Madison was the first to propose the division of the initiating function between the national and state legislatures, Article V as ultimately adopted differed in one very significant respect from Madison's "structure and substance": it added the institution of a constitutional convention, lacking in Madison's scheme. As Professor Dellinger himself recognizes after crediting Madison with the ultimate "structure and substance" of Article V, "[t]he Madison draft did not provide for any convention method of proposing amendments . . . ." Dellinger, *supra* note 4, at 1628.

route a different, not a closely parallel alternative.

What I think the framers had primarily in mind, then, was that the states should have an opportunity to initiate the constitutional revision process if Congress became unresponsive, arrogant, and tyrannical. No doubt, the notion of a convention most familiar to the framers was precisely the kind of convention they were attending in Philadelphia—one that set its own agenda and undertook a major overhaul of an unsatisfactory basic document. That does not mean, however, that any convention called under Article V must be as far-reaching as the one in 1787. In my view, the existence of the Philadelphia model does not support the position of the "unlimited convention" camp that state applications specifying a particular subject are illegitimate and should be treated by Congress as ineffectual. I see no reason why the states cannot voice the grievance that prompts their applications, even if it is a grievance as "limited" as a particular Supreme Court decision or a particular congressional program. Nor do I see any reason why the articulation of that grievance should not have appropriate weight when it is repeated in the congressional call. But I do insist that the convention contemplated is not limited to consideration of the specified grievance and is entitled to consider *all* major constitutional issues of concern to the country. If the balanced budget question were the only major issue of national concern today, a single issue balanced budget convention would be entirely feasible. But the actual, unavoidable problem today is that there *are* other constitutional issues of concern; and, if they are of concern, in my view the convention may consider them.

The strained attempt by the "limited convention" advocates to make the state-initiated amendment route parallel to and as easy to utilize as the congressionally initiated one not only overlooks history but, ironically, fails to achieve its objective of giving overpowering significance to state specifications of grievances. For example, even Philip Kurland concedes that state applications cannot attain a convention limited to an up-and-down vote on a particular proposal; even in his view, a convention must be able to consider alternative solutions to a problem.[39] In the "limited convention" proponents' search for a "mediating position,"[40] they accordingly

[39] 1967 Hearings, *supra* note 14, at 233.

[40] The "mediating position" phrase is Professor Paul Bator's. AEI Conference, *supra* note 13 (statements of Professor Paul Bator). *See, e.g.*, California Hearings, *supra* note 11, at 106 (statement of Dean Gerhard Casper); Ervin, *supra* note 14.

give Congress—the body clearly intended to play a very minor role on the convention road—a very considerable authority. Congress, in their view, must broaden the call from something as narrow as the National Taxpayers Union's budget proposal to something more expansive, such as "fiscal problems." I of course do not believe that a convention can ultimately be confined even to such broader limits. But I would add that even a convention limited to a subject as narrow as the "budget" could still be a quite far-ranging one: as any legislator who has sat on a budget committee knows, discussion of a budget can readily include consideration of particular items in a budget. If a convention cannot be limited to simply voting "yes" or "no" on a particular balanced budget scheme, what is to prevent it from considering such questions as permissible or impermissible expenditures for, say, abortions or health insurance or nuclear power?

A convention capable of considering a broad range of issues, capable of determining its own agenda in the face of curtailment efforts in the state applications or in the congressional call: that view, I believe, is what the historical background as well as the constitutional text suggest. Yet advocates of the "limited convention" position nevertheless argue that such a reading should be rejected as not being sensible. The argument goes that such a reading makes the state-initiated route preposterously hard to use and does not give the states as much of a chance to initiate constitutional changes as Congress has.[41] To the extent that this argument advocates an organic view of the constitution, a freedom to reinterpret it according to alleged modern needs, it strikes me as resting on questionable principles of constitutional interpretation. If the text does not limit the convention, and if the relevant history leaves the convention quite a broad scope, is there justification for reinterpretation of an important structural provision because of strongly felt contemporary perceptions?

Even if one were to grant the premise that current needs justify constitutional reinterpretation, I find no compelling case for such a necessity. My interpretation emphasizes the notion that a convention is serious business, as the framers clearly intended it to be,[42]

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[41] *See* authorities cited in note 14, *supra*.

[42] *See, e.g.*, Charles Pinckney's statement in 1787, that conventions "are serious things." II FARRAND, *supra* note 31, at 632. *See also* Professor Dellinger's illuminating review of Madison's opposition, in 1787, to a constitutional convention to propose a bill of rights. Dellinger, *supra* note 4, at 1634. James Madison, in a letter to George Eve on January 2, 1787, noted that a convention would be "too likely to turn everything into confusion and uncer-

and as I think it should be. My view does not deprive the states' concern with a particular issue of all force; my reading makes a relatively narrow convention possible, but *not* on a risk-free basis.

The case for viewing the convention as the central forum in the state-initiated Article V process is considerably reinforced, in my view, by a structural consideration. Congress is ordinarily our one national deliberative body, and that national body is the forum for considering proposed amendments when Congress chooses to take the initiative under Article V. An Article V constitutional convention, when called upon the application of the requisite number of states, provides another, extraordinary national deliberative body as an alternative forum for considering such weighty business as changing our basic law. Thirty-four state legislatures acting separately simply are not as likely to act as seriously as a single national forum in the proposing of constitutional amendments. Certainly, thirty-four states acting individually cannot engage in the kind of give-and-take and compromise possible in Congress (and in a convention as well) when an amendment proposal is under consideration.

Surely, our recent experience illustrates that point forcefully. Most of the state legislatures that have adopted balanced budget-constitutional convention resolutions have acted as if they were merely making a symbolic gesture, without fully realizing that they might be part of a triggering mass of thirty-four that would get a convention under way. Contrast a rare recent exception to the typical consideration in state legislatures, the deliberations earlier this year in the legislature of Montana.[43] Montana came close to becoming the thirtieth state to approve the budget proposal. But shortly before the final vote, one of its legislative leaders urged his colleagues to think of themselves as if they constituted the thirty-fourth state. That sobering warning had a dramatic effect: the admonition prompted the state legislators to ponder the seriousness of their responsibility, and Montana drew back and refused to approve the resolution.

For all these reasons, then, I prefer my own reading of Article V. My approach to interpretation insists that one ordinarily follows the most plausible inferences of text, history and structure, and that one does not deviate from those, if at all, unless there are truly

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tainty." 5 THE WRITINGS OF JAMES MADISON 321 (G. Hunt ed. 1904), *cited in* Dellinger, *supra* note 4, at 1634 n.47.

[43] *See* S.F. Chronicle, Mar. 23, 1979, at 7, col. 3.

overpowering reasons for modifications which the text is capable of bearing. In my view, the implications of the text, history and structure of the convention provision in Article V are reasonably clear, and I can find no compelling reasons of contemporary necessity to modify that interpretation.

IV. What Can Congress Do?—The Ervin-Helms Proposals

One lecture is hardly adequate for a full exploration of the large number of unresolved questions posed by the constitutional convention route. But there is one more set of problems that I want to address before concluding. I said earlier that Congress may soon have to deal with an issue that it has side-stepped for nearly 200 years: enacting some legislation regarding the machinery of a constitutional convention, for use when thirty-four states submit valid applicatons for a convention. More than ten years ago, when Senator Everett Dirksen's campaign to overturn the Supreme Court's one person-one vote ruling was before the country, Senator Sam Ervin waged a crusade to get Congress to remove some of the uncertainties about the convention route by enacting guideline legislation.[44] He repeatedly held hearings on his proposals before his subcommittee of the Senate Judiciary Committee. The hearings in 1967 were especially useful, for they produced an impressive colloquy between Professors Kurland and Bickel.[45] Senator Ervin's campaign finally bore fruit in the Senate; there, the Ervin bill was adopted in 1971 and again in 1973,[46] but each time the House failed to act.

A carbon copy of the Ervin proposal is once again pending before Congress. On January 15 of this year, Senator Helms of North Carolina introduced a proposed "Federal Constitutional Procedures Act."[47] And this time, Congress may be pushed to give it serious

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[44] *See, e.g.*, S.2307, 70th Cong., 1st Sess. (1967); 1967 Hearings, *supra* note 14, at 2; Ervin, *supra* note 14, at 876-79.

[45] 1967 Hearings, *supra* note 14, at 72-78.

[46] S.215, 92d Cong., 1st Sess., 117 Cong. Rec. 36804-06 (1971); S.1272, 93d Cong., 1st Sess., 119 Cong. Rec. 22731-37 (1973).

[47] S.3, 96th Cong., 1st Sess., 125 Cong. Rec. S.33 (1979). On March 1, 1979, Senator Helms reintroduced the bill with no changes as S.520, *supra* note 20, and it was placed on the Senate calendar under that number. 125 Cong. Rec. S.4138. All references in the ensuing discussion of the pending legislation patterned on the Ervin proposal will be to section numbers in the current Helms bill, S.520.

In the Senate, Senator Hatch has recently introduced another bill—the Constitutional Convention Implementation Act of 1979—S.1710, 96th Cong., 1st Sess., 125 Cong. Rec. S.11871 (1979). For a section-by-section analysis of that bill, *see* 125 Cong. Rec. 11871-75. Moreover, there are various convention procedures proposals pending in the House: H.R.2587,

attention by the mounting force of the balanced budget campaign.[48]

If the Ervin-Helms proposal were now on the books, and if it were accepted as valid legislation, a lot of the uncertainty that now besets the convention route would be removed. But Congress has not acted; and, more important, there are serious questions about its authority to enact all of the provisions of the pending proposal.

The bill does take care of some necessary housekeeping chores, and those aspects seem to me clearly within congressional authority, as essential to the exercise of its power to call a convention. For example, the bill specifies the proper national addressees of state applications,[49] and that would resolve an area of controversy that has erupted this year.[50] It provides, moreover, that an application will ordinarily be effective for seven years, and that a state may ordinarily rescind its application.[51] It also resolves important issues about the composition of the convention: it provides for popular elections; it states that there shall be "as many delegates from each state as it is entitled to Senators and Representatives in Congress"; and it prescribes that "[i]n each state two delegates shall be elected at large and one delegate shall be elected from each Congressional district."[52]

Provisions such as these seem to me not only clarifying but also constitutionally legitimate. But there are other provisions that raise grave constitutional doubts. For example, the bill repeatedly states that any disputes at various stages of the process shall be determined finally by Congress, with congressional decisions

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96th Cong., 1st Sess., 125 CONG. REC. H.1055 (1979) (Rep. Volkmer); H.R.2274, 96th Cong., 1st Sess., 125 CONG. REC. H.814 (1979) (Rep. Devine); H.R.1964, 96th Cong., 1st Sess., 125 CONG. REC. H.555 (1979) (Rep. Hyde); H.R.1664, 96th Cong., 1st Sess., 125 CONG. REC. H.402 (1979) (Reps. Fountain, Jones, Whitley, and Hefner); H.R.500, 96th Cong., 1st Sess., 125 CONG. REC. H.170 (1979) (Rep. Hyde); H.R.84, 96th Cong., 1st Sess., 125 CONG. REC. H.128 (1979) (Rep. McClory). For a comparison of these bills, *see* Staff Memorandum, *Subcommittee on the Constitution of the Senate Comm. on the Judiciary, Analysis and Comparison of Six House Bills on Constitutional Conventions*, 96th Cong., 1st Sess. (Aug. 24, 1979).

[48] Senator Bayh's Subcommittee on the Constitution of the Senate Judiciary Committee held the first of a series of meetings on the pending convention proposals on November 29, 1979. Senator Bayh agreed to hold such hearings in the course of the debate on the extension of the federal Civil Rights Commission legislation in June. *See* 125 CONG. REC. S.7172-75 (June 7, 1979) (remarks of Sen. Bayh); Letter from B. Bayh to G. Gunther (August 8, 1979).

[49] S.520, *supra* note 20, at § 4(a) (a State's secretary of state or other qualified officer "shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives").

[50] *See* note 17, *supra* and accompanying text.

[51] S.520, *supra* note 20, at § 5.

[52] *Id.* at § 7(a).

"binding on all others, including state and federal courts."[53] Moreover, the Helms bill imposes a time limit on the deliberations of the convention: ordinarily, the convention shall "terminate" one year after the date of its first meeting.[54] Even more troublingly, it insists that each state application must state "the nature of the amendment or amendments to be proposed."[55] That language suggests that a state application for a general convention is unacceptable—even though that kind of convention was the one most clearly contemplated in 1787.[56] Pursuing its insistence on state specifications of subject matter, the Helms bill goes on to say that the congressional call must specify the "subject" of the state applications as a directive to the convention.[57] To put teeth into that congressional effort to limit the scope of the convention, Section 8(a) provides, with highly questionable authority, that each delegate to the convention shall, prior to taking his seat,

> subscribe to an oath by which he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not named or described in the concurrent resolution of the Congress by which the convention was called.[58]

Apparently, the drafters were not entirely sure that delegates' oaths would work, for a later provision authorizes Congress to block the

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[53] *See id.* at §§ 5(c), 10(b), and 13(c). *But see* H.R.2587, *supra* note 47, at § 16 (United States District Court for the District of Columbia may reverse congressional determinations if "clearly erroneous"); S.1710, *supra* note 47, at § 15 (a state may bring an action in the Supreme Court to challenge findings, determinations, or failures to act in Congress, within 60 days after its claim first arises; further judicial review may be had "as is otherwise provided by the Constitution or any other law of the United States").

[54] S.520, *supra* note 20, at § 9(c).

[55] *Id.* at § 2.

[56] *See* text accompanying notes 24-43, *supra; cf.* Black, *supra* note 13, at 203 (theory of limited convention is 20th century innovation); Dellinger, *supra* note 4, at 1630-31 (framers intended that convention alone have power to set its agenda).

[57] S.520, *supra* note 20, at § 6(a):

> If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such concurrent resolution shall (1) designate the place and the time of meeting of the convention, and (2) set forth the nature of the amendment or amendments for the consideration of which the convention is called.

[58] *Id.* at § 8(a).

submission of a convention-proposed amendment to the states when "such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described [by] Congress" when it called the convention, "or because the procedures followed by the convention in proposing the amendment were not in substantial conformity with" the congressional act.[59]

I have the most serious doubts about the validity of this last group of provisions—provisions such as the time limit, and especially the effort to control the convention agenda through delegates' oath requirements and through congressional veto of convention proposals. I believe these requirements are quite distinguishable from such minimal, essential guidelines as those pertaining to the selection and expenses of the delegates.

In my view, the text, history and structure of Article V make a congressional claim to play a substantial role in setting the agenda of the convention highly questionable. If the state-initiated method for amending the Constitution was designed for anything, it was designed to *minimize* the role of Congress.[60] Congress was given only two responsibilities under that portion of Article V, and I believe that, properly construed, these are extremely narrow responsibilities. First, Congress must call the convention when thirty-four valid applications are at hand (and it is of course a necessary part of that task to consider the validity of the applications and to set up the machinery for convening the convention). Second, Congress has the responsibility for choosing a method of ratification once the convention submits its proposals. I am convinced that is *all* that Congress can properly do.

I suspect that the Ervin-Helms effort at congressional guardianship over the scope of the convention's deliberations rests on the mistaken assumption that the approach of *McCulloch v. Maryland*[61]—the view of broad discretionary powers of Congress so familiar in other circumstances—is appropriate to congressional action under Article V. True, the Necessary and Proper Clause[62] applies to all powers of Congress; but the scope of the implementing powers surely turns on the nature of the underlying authority and its context in the Constitution. The delineation of congressional authority

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[59] *Id.* at § 11(b)(1)(B).

[60] *See* text accompanying notes 29-37, *supra.*

[61] 17 U.S. (4 Wheat.) 316 (1819).

[62] U.S. CONST., art. I, § 8, cl. 18.

regarding the convention route must heed the fact that it is a route largely intended to bypass Congress, to place the initiative for beginning the process in the states, and to give the central role in the proposing of amendments to the constitutional convention itself. Congress seems to me to go well beyond legitimate bounds when it does more than setting up necessary machinery and when it goes on to impose substantive limitations on the scope and duration of convention deliberations. In short, I agree generally with the very persuasive doubts raised by the late Alexander Bickel at hearings on Senator Ervin's bill in the 1960's, doubts which led him to brand mechanisms such as congressionally-imposed delegates' oaths as illegitimate and "quite wrong."[63]

These doubts about the constitutional legitimacy of some of the Ervin-Helms proposals do not mean that Congress should continue to avoid confronting proposals such as the Federal Constitutional Convention Procedures Act. Minimum mechanisms to implement the Article V convention route are necessary, and addressing the issues raised by the Helms bill is long overdue.

That observation prompts some comments about additional congressional action that may be appropriate now. I think it is high time that Congress not only consider the pending legislative proposals, but also pay serious attention to the pending budget convention campaign. I believe that general hearings on the problems of the constitutional convention route are in order, and that they are needed now. If there is merit to my tale of confusion and uncertainty, Congress surely owes it to the country to consider the differing views about Article V and to clarify the misimpressions under which so many state legislatures may have acted. For example, as I have noted, almost all scholars agree that the states cannot compel a convention to vote up-or-down on the balanced budget proposal; yet that seems to be the assumption of most of the resolutions that have so far gained state approval. If Congress is of the view that it can convert such narrow applications into a somewhat broader convention subject such as fiscal responsibility, surely it ought to apprise the states, so that they may have a chance to reconsider their applications. Moreover, if Congress should conclude that a convention has ultimate authority to set its own, even less confined agenda, the state legislatures should surely be told.

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[63] *See* 1967 Hearings, *supra* note 14, at 65; Letter from A. Bickel to P. Kurland (Oct. 2, 1967), *reprinted in id.* at 230-33.

I fear, however, that Congress will make no move until thirty-four applications are at hand. At that time, if Congress believes that an unlimited convention is possible, it may rely on that premise to set aside the state applications and in effect to remand them to the state legislatures for reconsideration.[64] Whatever the logical soundness of that course, it would surely be perceived as one more effort by Washington to squelch local initiative. Would it not be better if Congress moved promptly to address and clarify the uncertainties, before the thirty-fourth state has acted and before its back is against the wall?

Conclusion

Everything I have said constitutes conjecture about the past and advice about the future. What we have now is an ongoing, nearly successful campaign to get thirty-four states behind the balanced budget drive. Given that present reality, let me conclude with this: If the nation, with open eyes and after more careful attention than we have so far had in most state legislatures, considers a balanced budget amendment so important as to justify the risks of the convention route, that path ought to be taken; but surely it ought not to be taken without the most serious thought about the road ahead. It is a road that promises controversy and confusion and confrontation at every turn. It is a road that may lead to a convention able to consider a wide range of constitutional controversies. My major concern in all this is simply to argue that, as we proceed along this road, we should comprehend the full dimensions of the risks. It is that conviction which leads me to urge that state legislatures not endorse the balanced budget-constitutional convention campaign on the basis of overconfident answers to unanswered and unanswerable questions, or of blithe statements that inadvertently or intentionally blind us to the genuine hazards.

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[64] This is in effect the process urged by Dellinger, *supra* note 4, at 1636-40.

QUESTIONS SUBMITTED BY SENATOR BAYH TO PROF. GERALD GUNTHER, WITH RESPONSES

Question 1. It has been recommended that the procedures issue should be confronted at a time when the problem can be faced in the open and without pressure, in order to be prepared in advance of state action. Since most scholars agree that one Congress cannot bind another, would it be a prudent use of the Congress' time to consider implementing legislation before applications are received from the states for a convention? Should Congress routinely enact procedures legislation at the beginning of each Congress in order to be prepared?

Answer 1. I believe it would be a prudent use of the Congress' time to consider implementing legislation before 34 valid applications are received from the states for a convention. Indeed, as I have argued in my Georgia lecture, I believe that Congress has something of a moral obligation to consider such legislation before it finds itself confronted by the requisite number of state applications. My main reason for urging this is that I believe Congress has an important role to play in apprising the state legislatures of the contours and risks of the convention process, so that state legislators voting on applications may have a clearer understanding of what they are asked to vote on. The very recent history of state consideration of applications for a balanced budget convention demonstrates graphically that state legislatures have mostly acted in confusion and ignorance. Most often, those who have thought about the implication of Article V at all have assumed without discussion that the states can bring about a convention limited to an up-and-down vote on a very specific amendment proposal. Hardly any scholars believe that the states have such a power. If I am correct in my view that state and congressional specifications of subject matter are not ultimately binding on a convention—that states and Congress can exhort convention delegates to address a particular subject, but cannot force them to limit themselves in that way—it is particularly important that Congress air that view at a time when state legislatures have not taken final action on convention applications. In short, I view congressional consideration of implementing legislation as virtually the only available national forum to clear the air about the prevailing confusion regarding the contours and limits of a constitutional convention under Article V.

I do not believe that, if Congress were to air the problems I have adverted to in the near future, it need routinely address procedures legislation again at the beginning of each Congress. One congressional statement of desirable implementing methods should be adequate until a later Congress is persuaded that the premises of such legislation are inaccurate; later Congresses are of course free to enact new legislation if that is the case. I would reiterate that the major obligation of Congress is to air the problems of the convention route. Even if Congress were to adopt the view that it had the authority to limit a convention's agenda (a view with which I disagree, but which is incorporated in the pending legislation), I believe Congress has the additional obligation to advise the nation and especially the state legislators that there is a substantial and, I believe, respectable body of opinion among scholars and others that such a congressional effort carries no guarantee of effectiveness—that, instead, a strong case can be made that a convention is ultimately entitled to go beyond the subject specified by Congress.

Question 2. Section 3(b) of S. 1710 provides that questions "concerning the State legislative procedure and the validity of the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature." Would this provision take away all power of Congress to consider the validity of a resolution, regardless of the circumstances surrounding its alleged adoption?

Answer 2. I read Section 3(b) of S. 1710 as being addressed primarily to internal state legislative procedures leading to the adoption of an application. As such, I think it is consistent with the constitutional scheme of leaving the initiating function to the state legislatures. I do not read the provision as taking away the legitimate power of Congress to consider whether the resolution as adopted is a "valid" resolution entitled to be counted in determining whether two-thirds of the states have applied for a convention under Article V. That kind of "validity" seems to me to involve such questions as, for example, whether a state is really calling for a convention or merely issuing a general exhortation that Congress propose an amendment. I do not believe that Congress is charged with

examining the circumstances surrounding the adoption of such a resolution, however. For example, I do not think Congress may ignore an application because it believes that the extent and thoroughness and depth of the debate in a state legislature was inadequate or poorly informed or subject to excessive lobbying pressure.

Question 3. Likewise, in Section 3(b) and Section 5(b) of S. 1710, the power is removed from Congress to determine the validity of any withdrawal of an application. What are your thoughts on these sections?

Answer 3. I believe principles similar to those just noted govern the answer to this question as well. I read the provisions as suggesting essentially that preenactment internal legislature procedures in the states are of no legitimate concern to Congress: Congress must of course use its judgment on the *product* of the state legislative process in determining whether the requisite number of valid applications is at hand; but Congress is not, I believe, properly charged with intervening in preenactment state legislative procedures in exercising its responsibilities under Article V. (For further comments on state withdrawals of applications, see my responses in the closing pages of the record of the oral testimony.)

Question 4. In many of the petitions that have been submitted, it appears there has been consideration by the State governor and in many instances the governor's signature appears on the petition. Would this indicate that State's preference for including the governor in the process, or possibly the tradition of that State's legislative policy?

Answer 4. I would suspect that the answer to that question is yes; but, more basically, I believe that a state's judgment on involving its chief executive in its legislative process ought to be respected for purposes of congressional evaluation of the validity of state applications under Article V.

Question 5. There have been several petitions submitted to Congress which state, in effect, that a convention is to be called on a specific subject, including specific language for an amendment, and if any other subject or language is adopted the petition is to be considered null and void. What are your thoughts as to the consequences, if after a convention is called, several states were to withdraw their petitions or refuse to participate further?

Answer 5. I believe that state actions after a convention is called should be viewed as ineffective. It seems to me that the state's responsibility ends when it sends purported applications for a convention to Congress (except with respect to withdrawal of a state application at a time when 34 valid ones have not yet been submitted). Congress then takes over to determine whether the requisite number of valid applications are at hand; and if so, it must call a convention. Efforts by the states to intrude into the process after a state legislature has sent its "application" to Washington and after a convention has been called seem to me inappropriate under the constitutional scheme.

Question 6. If a procedures bill were to be adopted by Congress which included a provision for the calling of a limited convention, do you have an opinion as to the odds of that convention ultimately expanding the subjects for review and discussion?

Answer 6. The odds are difficult to evaluate: they depend very much on the situation in the country and the wishes of the voters in the delegate election campaigns at the time a convention process gets underway. As I have noted in my prepared statement and my Georgia lecture, I believe that the convention delegates are entitled to address any constitutional issue perceived as of concern to the voters who chose them. If the convention were to be called, say, in the spring of 1980, my guess would be that the odds are about 50:50 that the convention would ultimately expand its agenda beyond the subject specified in the applications and the congressional call. But the odds might be different two or four or six years hence.

The more important underlying point raised by this question is in my view this: there is a risk, more or less substantial in accordance with the circumstances and times, that a convention will go beyond the specified subjects, despite any congressional effort to provide for the calling of a limited convention. That risk, not insignificant, ought to be aired by Congress in these hearings and ought to be part of the history and even the language of any implementing legislation Congress may enact. I would reiterate that if Congress were to enact implementing legislation purporting to limit conventions without adverting to those risks, it would be holding out a false and confusing hope to the state legislature. Congress

could legitimately say: "We are trying our best to provide a limited convention, but we cannot assure you that our efforts will be effective." I do not believe that Congress can responsibly say: "Here are the mechanisms for calling a limited convention; we guarantee that our mechanism will work." Even a superficial survey of scholarly opinion will reveal that the latter statement does not enjoy significant support among those who have attempted to make constitutional sense of the Article V convention text, structure and history.

Question 7. The procedures legislation pending before this Subcommittee contain a clause with respect to each delegate taking an oath to refrain from discussing any subject other than that subject which was authorized by the petitioning states. Other than a moral exhortation, what means of enforcement is available?

Answer 7. As I note in my Georgia lecture, I believe such an ultimate requirement is unconstitutional if it purports to be an effective requirement. At least, it is misleading to the extent it seeks to convey a sense to the states and the people that Congress is guaranteering an effectively limited convention. I believe, with the late Alexander Bickel at the 1967 hearings before Senator Ervin's committee, that oath provisions are illegitimate and "quite wrong." Not only are there no effective means of enforcement in my view; I do not believe that such a provision can even serve as a respectable moral exhortation, for a convention delegate can quite readily claim that the provision is drained of all moral and legitimate content by the fact that it is a congressional measure way beyond legitimate congressional powers under Article V. (I would distinguish the specification of subject matter in the congressional call, which I believe can, at the most, be viewed as a moral exhortation. The oath provision seems to me a much more blatant attempt by Congress to bind the actions of a convention—an effort by the very national body that the Framers in Philadelphia in 1787 sought to limit to a very minor, minimal housekeeping role along the constitutional convention route under Article V.)

Question 8. The ABA and several constitutional scholars have recommended that convention delegates be popularly elected. Can you foresee any problems that may be connected with those elections with state laws, or possibly the necessity of amending state laws to accommodate those elections?

Answer 8. I agree that popular election is the most desirable (though not constitutionally mandated) method in the late twentieth century. Since the composition of the convention seems to me one of those matters which is necessary to getting the convention process underway, I believe Congress has the authority under Article V to require popular election of delegates; and as valid congressional legislation, it will of course supersede any contrary state laws under the Supremacy Clause of the Constitution.

Question 9. What are your thoughts on convention delegates being appointed? Would that appointment be made by the governor or the State legislature?

Answer 9. I would hope that, for the reasons given by the ABA committee and others, convention delegates would be elected rather than appointed. If appointment were the chosen route, I do not know who would do the appointing.

Question 10. The ABA Report states there is no evidence of any federal constitutional bar against a member of Congress serving as a delegate. Do you have an opinion on that?

Answer 10. I agree with the ABA committee that there is no federal constitutional bar against a member of Congress—or anyone else—serving as a delegate to a national constitutional convention under Article V.

Question 11. What are your thoughts with respect to a State legislator serving as a delegate to a convention? What are the ramifications of a State legislator serving as a delegate, proposing an amendment and then running to the State and ratifying that amendment?

Answer 11. I see no reason why a state legislator should be barred from serving as a delegate to a convention. Certainly in the late eighteenth century, and in most state constitutional convention processes since, the convention has properly been viewed as a separate body elected by the people to revise their basic charter of government; and the tradition has rightly been that there ought to be no significant barriers regarding the peoples' choice of whom they want to represent them at so solemn an occasion. Judges and federal legislators as well as state legislators have frequently served at state constitutional conventions throughout our history.

Consider the early nineteenth century practice, for example. Chief Justice Marshall sat in a Virginia constitutional convention in the late 1820s; Justice

Story, at a Massachusetts convention; Chancellor Kent of the New York State bench, at a New York constitutional convention. I am quite clear that all of these then setting judges would have thought it entirely inappropriate if they had simultaneously served in the executive or legislative branches of their governments, or run for office in those branches. They did not hesitate about serving in state constitutional conventions. They rightly understood that state constitutional conventions are not institutions for the day-by-day running of government, but solemn occasions for the reexamination of the basic structure of government, and that even judges could serve at such assemblages.

I accordingly do not believe that Congress ought to enact significant barriers on who may serve as a constitutional convention delegate. I see no significant conflict of interest in a state legislator serving as a convention delegate and then considering ratification as a member of the state legislature. I think it is fanciful to believe that a substantial number of members of any single state legislature would be elected as delegates; and even if they were, that would represent the people's expression of preference as to the constitutional convention.

Question 12. Would a provision in procedures legislation, such as that contained in S. 1710, Sec. 7(a) which states that no Senator or Representative or person holding an office of trust or profit under the United States, shall be appointed as a delegate—be an effective bar?

Answer 12. For the reasons given in my preceding answers, I believe a bar on federal office holders sitting as convention delegates would be entirely inappropriate. I doubt it would be effective; I know it would be illegitimate.

Question 13. Is the exclusion of Federal employees as delegates justified in light of the fact that State employees would not be excluded?

Answer 13. Again, my earlier answers apply here: selecting groups of office holders for exclusion from eligibility as convention delegates seems to me to miss the point as to the nature of a convention. Accordingly, exclusion of federal employees seems to me entirely unjustified.

Question 14. Is it appropriate for Congress to include in the implementing legislation, a clause designating either the Federal government or the States to provide funds for the convention?

Answer 14. I believe it is entirely appropriate for Congress to provide for funding of a convention. My basic principle, as explained in my Georgia lecture and elsewhere, is that Congress is charged with the necessary housekeeping details to get a convention process underway when the requisite number of valid applications are on hand. Providing for funding surely is an essential housekeeping matter.

Question 15. In your opinion, which entity should bear financial responsibility for a convention?

Answer 15. Since the purpose of a convention under Article V is to provide a national forum for the consideration of proposed amendments—an alternative to the national forum that is Congress when the other, traditionally invoked amendment-proposing route under Article V is used—, I believe that the federal government is the appropriate entity to bear financial responsibility for a convention.

Question 16. S. 1710 embodies the basic tenets of federalism and the sovereignty of the States. In Section 8(b), which states that with respect to no federal funds appropriated for a convention, the states shall bear all expenses incurred. The constitutional question seems to be how can the Congress require the legislatures of the soverign States to appropriate funds for the support of a federal constitutional convention? In the past there has been instances of "matching funds" but precedent would be set for total financial support by the States. The convention would be totally dependent upon the goodwill of each and every State to pay its share, which as we know, was one of the problems faced by the Convention of 1787.

Answer 16. I agree with the implications of this statement: for reasons noted earlier, I believe that Congress, not the states, is the appropriate funding source. I believe Section 8(b) of S. 1710 is misguided, and that a provision such as Section 8(b) in S. 520—similar to a provision in the earlier Helms bill as well as in the Ervin bill—reflects the proper response to the funding issue.

Question 17. In S. 1710, the State supreme court justice with the most tenure shall convene the constitutional convention and administer the oath of office to each delegate and preside until officers are elected. What are your thoughts on this provision as to the practicalities and political impact?

Answer 17. I have no strong feelings about the initial presiding officer—whether it is the senior state supreme court justice as in S. 1710 or the Vice President of the United States, as in Section 8(a) of the Helms and Ervin bills. Either choice would present few practical difficulties, I should think; either choice may have some political impact, depending on the incumbents. Forced to a choice, I think I would support the solution suggested by Senators Ervin and Helms.

Question 18. As we know, the original convention was in session roughly five months and drafted the entire Constitution, do you have any recommendation as to the duration of any future convention?

Answer 18. As I have said in my Georgia lecture, I do not believe it is the business of Congress to limit the duration of a convention. Durational limits, like those going to oaths, seem to me to go beyond the proper bounds of the congressional role in attending to the necessary housekeeping details regarding the convention. Acknowledging such a congressional power would give Congress a powerful weapon to control the deliberations of the convention; and Congress was not intended to have any such power under the Article V scheme. My recommendation, therefore, is that congressional legislation should contain no provision as to the duration of a convention.

Question 19. Section 9 of S. 1710 eliminates the provision in S. 3 which provides that a constitutional convention shall terminate in one year unless extended by Congress. Would this omission effectively autnorize a continuing convention?

Answer 19. For reasons just noted, I believe Section 9 of S. 1710 is correct (and that Section 9(c) of S. 3 is mistaken) in attempting to limit the duration of the convention. I suppose S. 1710 would effectively authorize a continuing convention—certainly a continuation beyond a one year limit, without congressional approval. Here, again, the wishes of the voters and the judgment of the convention delegates seems to me the proper source of decision. It is difficult to conceive of political circumstances that would in fact produce a "continuing convention"; but if they arose, I think the constitutional purpose is to bar Congress from contravening the will of the people and the delegates.

Question 20. I would like to draw your attention to the fact that S. 1710 does not provide for a vote on final passage of an amendment by the convention. If S. 1710 was to be passed by Congress, do you think it could be implied that the convention itself has the authority to determine the mode and margin of the vote, or would that become a matter to be decided by the courts?

Answer 20. I believe that, under S. 1710, it would be implied that the convention itself has the authority to determine the mode and margin of the vote on final passage of an amendment proposal. Not only is that the proper implication from the statute, in my view; it is also the proper implication from the Constitution. Again, in accordance with my view that the congressional role is limited to necessary housekeeping details, any effort by Congress to govern the voting mechanism at the convention would strike me as constitutionally illegitimate.

Question 21. By what vote, whether required by procedures legislation or left to the convention to decide, do you think should be required for passage of an amendment? A simple majority or two-thirds or possibly some other fraction?

Answer 21. I believe a simple majority vote would be appropriate.

Question 22. What provisions for judicial review should be incorporated in any procedures bill, or would the convention itself have to provide for any review by the courts?

Answer 22. I lean toward the ABA committee view on the question of provisions for judicial review, albeit somewhat reluctantly. For reasons suggested in my Georgia lecture, I rather doubt that the federal courts will want to get involved in reviewing the amendment process even when the convention route is invoked. Moreover, the federal courts are national courts, and it would not be an undue strain of the constitutional history to suggest a constitutional antipathy to national control of the substance of the state-initiated convention process for amendment; and that national control can come from the federal courts as well as Congress.

Question 23. What would be the status of any lawsuit brought before a convention assumes its responsibilities?

Answer 23. I have not given sufficient thought to this problem to have an informed answer.

Question 24. The ABA report suggests that a three judge district court panel be authorized to review any disputes that may arise with respect to a constitutional convention. Do you have an opinion as to the advisability of this panel? How do you foresee this panel being selected?

Answer 24. If federal court review is provided—a matter as to which I have some doubt, as I have just noted, but on which I lean slightly in the direction of the ABA committee report—I think a three judge district court would be appropriate. I have not thought about the selection or such a panel. Indeed, the problems about an appropriate selection tend to reinforce my doubts about the desirability of much if any judicial review authorizations in the bill. Wouldn't it be preferable to handle this delicate and difficult issue by expressing no view on it in the legislation?

Question 25. As you know, S. 3 does not provide for any judicial review, whereas S. 1710 makes provision for an aggrieved State to bring an action in the Supreme Court directly, which was rejected by the ABA feeling that the initiation of suit in the Supreme Court necessarily escalated the level of the controversy without regard to the significance of the basic dispute. What are your thoughts on this?

Answer 25. Without much careful thought, I think the provision of S. 1710 in this regard has a good deal of appeal. An aggrieved state has the strongest claim of anyone for judicial review, for the convention route was after all to be a state-initiated route. And any claim an aggrieved state may raise does I think warrant the dignity of direct access to the Supreme Court, in accordance with the role originally contemplated for the Supreme Court in state-involved cases. On this matter, the ABA feeling does not seem persuasive: any time a state disagrees with respect to a state-protective amendment procedure, it seems to me questionable implicitly to label the dispute as "insignificant."

Question 26. Do you think Section 15(a) of S. 1710 is constitutionally consistant with Article III of the Constitution, which establishes the original and appellate jurisdiction of the Supreme Court?

Answer 26. Without extensive thought, and without adequate time to elaborate here, I believe that Section 15(a) is consistent with the provisions of Article III of the Constitution with respect to the original jurisdiction of the Supreme Court.

Question 27. Should time constraints be put upon any court, panel or arbitrating body for a determination of any dispute or legal action brought by any individual or State in connection with any procedures legislation or action by the convention?

Answer 27. No.

Question 28. Section 12 of S. 1710 fails to include any provision for dealing with a situation where Congress fails to enact a concurrent resolution providing for the mode of ratification, but the proposed amendment is submitted to the States for ratification by the Administrator of the General Services Administration anyway. What are your thoughts as to whether this leaves a serious gap in the ratification procedure?

Answer 28. I believe that Section 12 of S. 1710 does leave a serious gap in the ratification procedure. As I reiterate frequently in my writings on convention problems, congressional powers with respect to the convention process of amendment are very limited; but one of the very few clear powers and indeed duties of Congress under Article V is to select the mode of ratification for a proposed amendment. I think any congressional legislation ought to reiterate that clear constitutional duty of Congress. Indeed, Section 12 of S. 1710 strikes me as ironic indeed, in light of my other writings and some of my earlier answers to your questions. S. 1710, in earlier provisions, seems to me to go beyond the legitimate congressional powers with respect to the calling of a convention when it seeks to limit the scope of a convention's deliberations; yet, after exceeding legitimate congressional powers in that respect, it proceeds in Section 12 to fail to reiterate a duty of Congress, with respect to choosing a mode of ratification for proposed amendments. Section 12 seems to me to illustrate that it, like the other proposals pending before you (such as S. 3), rests on an inadequate understanding of the constitutional groundrules.

Question 29. Section 13 of S. 1710 omits a provision included in S. 3 which states that Congress shall decide questions "concerning State ratification or rejection" of proposed amendments. This power to determine the validity of a State ratification or rejection is one that Congress has traditionally exercised. In the alternative, what other institution could make that determination or would be better qualified?

Answer 29. Sections 13(a) and (b) of S. 1710 do include provisions regarding ratification and recissions, much as S. 3 and S. 520 do. In short, it does involve congressional determination of some questions "concerning State ratification." True, S. 1710 omits Section 13(c) of the Helms proposal, the general provision as to congressional decision of such questions. I believe that omission is ill advised: I believe that the traditional congressional role with regard to state ratifications or rejections is as appropriate under the convention route as under the usually used, congressionally initiated amendment route. I do not believe that any other institution is more appropriate for the decision of such questions.

QUESTIONS SUBMITTED BY SENATOR THURMOND TO PROF. GERALD GUNTHER, WITH RESPONSE

Question 1. While you would allow permissible specifications of subject matter in state applications, what effect would this specification have on the validity of the application?

Answer 1. I believe that a state specification of subject matter in an application for a constitutional convention is consistent with a valid application under Article V. The fact that a constitutional convention called in response to such application would nevertheless be able to control its agenda (see my prepared statement and my Georgia lecture) does not deprive a states "limited" application of validity. The crux of the matter is that a "convention" called under Article V is ultimately free to set its own agenda, as a matter of law as well as political dynamics; the scope of such a convention is not within the states' control. It is partly for that reason that I have long urged your committee to hold hearings on this issue, so that Congress may air the widely held belief among scholars that convention delegates would have a powerful practical and legal claim to make proposals on all constitutional issues they think of significance to the electorate. In my view, it is only by such airing of what a convention may indeed entail that the states can be adequately informed as to what they are really voting for when they apply for a convention.

Question 2. When you state that you would give "some weight" to state or Congressional specifications, what do you mean by "some weight", in light of your decision that the Convention would control its own agenda,

Answer 2. When I say that specifications of subject matter in state applications and congressional calls can be given "some weight," I mean that such specifications are properly read as signifying at least the subject that prompted the congressional call and that Congress would like the convention to discuss. In other words, the specifications are legitimate at least as information-conveying devices. I believe, moreover, that the specification of subject in the congressional call can properly be read as a moral exhortation to the convention that the specified subject should be the delegates' initial focus. But the specifications are entitled, I suggest, only to "some weight" and not to conclusive weight. Despite the specifications, the convention may proceed to consider additional subjects, in accordance with the legal and practical arguments set forth in my opening statement and in my Georgia lecture. The specification of subject matter in the call, under my view, would create at most a rebuttable presumption that the convention should address only that subject; the significant limit on the weight of the specification—a limit of which the state legislatures should be apprised by Congress—is that the presumption can be overcome, and that the convention delegates are ultimately free of any legally or practically effective restraint in setting their own agenda.

APPENDIX

PART 1—ADDITIONAL STATEMENTS, NEW ARTICLES, AND CORRESPONDENCE

A Second Constitutional Convention: The View From the First Convention

(By Jeffrey T. Bergner)

At this moment thirty states have called for a second constitutional convention to propose an amendment to balance the Federal budget. The total is just four states short of the thirty-four states required to compel the Congress to call a convention. This is by no means the first campaign for another constitutional convention. Indeed, before the Constitutional Convention of 1787 had adjourned, some of its delegates were already calling for a second convention to consider matters not resolved to their satisfaction in the first convention. To date over three hundred petitions for another convention have been filed by the states on various subjects, and every state in the union has filed at least one.[1]

Because we are a nation which lives under a written constitution, our discussions of policy tend naturally to revolve around the meaning of this document. Our laws are structured and judged in terms of their appropriateness to the Constitution. Even proposed amendments to the Constitution must justify themselves in terms of the spirit and the other language of the Constitution if they are to have a chance of adoption. All changes in our political life must demonstrate their conformity with the fundamental law which is the Constitution. Because all questions ultimately turn on the meaning of the Constitution, the intentions of the framers of the Constitution become highly significant. This is a legacy of the framers themselves, and it has been well said that great men necessarily condemn lesser men to interpret them.

For this reason the intentions of the framers in drafting the amending article of the Constitution invite discussion. But such discussion is required for another reason as well. The balanced budget amendment has evoked highly emotional opposition, and opponents have offered a variety of interested, but wholly unjustified, interpretations of the meaning of Article V of the Constitution. One scholar, basing his opinion upon a single letter of a single word in *Federalist* No. 85, has argued that a second convention can be called only for a general revision of the Constitution, and not for proposing a single, specific amendment. Another scholar, less attracted to subtlety, has simply asserted that the framers did not intend the convention mode of amendment as a serious possibility. In light of such novel views, it is all the more useful to consider the deliberations of the framers themselves concerning the amendment process.

These deliberations reveal that the framers regarded the convention mode of amendment "to be as desirable and as viable as that which allows for constitutional amendment at the initiation of Congress." [2] Indeed, this conclusion understates the importance of the convention mode and overstates the importance of the Congressional mode. For, as Madison remarked, the issue facing the Convention of 1787 was not whether popular conventions should be excluded from the amendment process, but whether the Congress should be excluded from the process.[3] Any interpretation of the intentions of the delegates to the Convention of 1787

[1] *Amendment of the Constitution by the Convention Method Under Article V*, The American Bar Association, 1974, p. 69.
[2] Senate Committee on the Judiciary, Federal Constitutional Convention Procedures Act, S. Rep. No. 293, 93d Congress, 1st Session 7 (1973).
[3] *The Records of the Federal Convention of 1787*, edited by Max Farrand, vol. I, p. 202.

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must finally confront the fact that the states are given a paramount role in the amending process. There is an old German saying that "Mann denkt, Gott lenkt," which may be roughly translated as "Man proposes, God disposes." The sense of this saying is preserved in the amending process: amendments must be both proposed and disposed. In amending the Constitution, there are two ways of proposing and two ways of disposing. Either the Congress or the states may propose, but only the state may dispose. In the last analysis, the power of the disposition—as the old saying suggests—is the greater of the powers. When it is coupled with the power of proposition, its power is complete. A manifestly greater power is thus given in principle to the states than to the Congress in amending the Constitution. The states may act as proposers and disposers; the Congress may act only as proposer. Let us turn to the deliberations of the Convention of 1787 in ordered to see why this is so.

II.

Prior to the Convention, the Virginia delegation drew up a list of resolutions as a focus for the discussions of the Convention. The first mention of the amending process is found in the thirteenth of these resolutions, listed in the *Record* on May 29th. It reads in full: "13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislation ought not to be required thereto." In this formulation the Congress (the National Legislature-to-be) was deliberately excluded from the amending process. This formulation differed from the procedure for amending the Articles of Confederation in two ways. First, it excluded the Congress from any role in the amending process. Under the Articles of Confederation the Continental Congress was the sole proposer of amendments. Second, it did not specify the necessity of unanimity of the states to adopt any proposed amendment. It remained silent on this point. The Articles of Confederation had demanded unanimity, a feature which was an acknowledged deficiency of the arrangement which made the Confederation largely an alliance of states. We may note one thing about this resolution. Whereas the entire intent of the Convention was to construct a stronger national government, there was not an equal concern to expand or even to maintain the power of the national legislature to propose alterations in the fundamental law. Indeed, it might be suggested that simply because a so much stronger national legislature was contemplated, the Virginia delegation saw reason to place the amending power in the hands of the states alone.

Resolution thirteen was considered formally on June 11th. On that day there was apparently discussion about the propriety of excluding the national legislature from the amending process. George Mason of Virginia was on that day and throughout the Convention the strongest advocate of excluding the national legislature from the amending process. He was supported by fellow Virginian Edmund Randolph. Mason argued that the Congress might refuse its consent to a proposed amendment, because the amendment might attempt to remedy an abuse of power by the Congress itself. Such an amendemnt, directed at the prerogatives of Congress itself, would be unlikely to secure the assent of Congress. This view was part and parcel of the general view of human and institutional nature prevalent among the delegates to the Convention of 1787. Whether we have reason to reject that view in favor of a more optimistic one has certainly not been adequately demonstrated.

No agreement was reached on the exclusion of the Congress on that day, and the Convention turned to a discussion of another issue. The delegates agreed only that some provision for amendments ought to be made in the new Constitution. This minimal agreement was reflected subsequently in resolution seventeen, listed in Madison's notes on June 13th. Resolution seventeen was considered formally on July 23rd and unanimously adopted in the following form: "That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary."

On August 6th, Madison reported in his notes the form given to the resolution (now number XIX) in the report of the Committee of Detail. The Committee, chaired by Mr. Rutledge of South Carolina, proposed the amending article as follows: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose." From this we can see that the

Committee had attempted in the interim to give a role, however slight, to the Congress. The Committee proposed that the Congress should call a convention if applied for by the legislatures of two thirds of the states. This was quite a natural role for the Congress to assume. First, it was through the Continental Congress that the Convention of 1787 was called into being. Second, it was not clear what other body besides the Congress would be in a position to facilitate the call for a new convention. Presumably, this was not a power which the delegates thought of granting to the executive. The power of amending the fundamental law of the nation was simply irrelevant to the task of the executive, who was but to administer the present laws. The role of the Congress is restricted to calling a convention. It is not empowered to propose amendments. Indeed, it is given no discretion in calling a convention: it "shall" call a convention, if requested to do so. It is given no discretion to call a convention only for certain purposes, such as "general revisions" of the Constitution: it shall call a convention "for *an amendment* of this Constitution" (emphasis mine).

This resolution was reconsidered during the last week of the Convention in September. On September 10th, Elbridge Gerry moved reconsideration of the resolution. Gerry's concern, however, was not to secure an expanded role for the Congress in the amending process. Rather, he was concerned that two thirds of the states might call a new convention and introduce binding "innovations" upon the remaining states. There was no solicitude here for the power of the Congress to alter the new Constitution.

At that point, Alexander Hamilton seconded the motion to reconsider the resolution, although for a different reason. He argued that the Articles of Confederation did not provide sufficient ease of amendment, and that the new Constitution ought not to fall victim to the same defect. The proposed mode of amendment was inadequate and needed supplementation. The only reason that state legislatures would apply for amendments, Hamilton argued, would be to increase their powers. The new Congress, on the other hand, would be more sensible of the defects of the new Constitution. Here at last, in Hamilton, there is a defender of the Congress' power to amend. But two points must be observed. First, Hamilton raised this matter in the context of supplying an expanded amending power. He was not distressed by the ease of amending the Constitution, but by the difficulty of amending it. Second, Hamilton did not propose at this point granting the Congress the power to propose, much less to dispose, amendments. He contended only that the Congress (by two thirds vote of both Houses) ought to be empowered to call a convention. This, Hamilton argued, would not be "dangerous," because the "people" would have in the convention the proximate power of proposing and the final power of disposing amendments. Hamilton simply urged that the possible defects of the new Constitution be brought to light from more than one source.

Madison then concurred that the resolution ought to be reconsidered, but for a third reason. The phrase "calling a convention," he said, was a vague one. Thus, although there were no less than three reasons for reconsideration, none of them turned on a deficiency of Congressional power either to propose or to dispose amendments. The motion to reconsider was accepted 9–1–1.

At this point, Mr. Sherman moved for the first time (just five days before the adjournment of the Convention) that the national legislature be authorized to propose amendments to the states. He added that no amendment ought to be binding without the consent of the several states. Presumably the consent of the "several states" meant the consent of each and every state. Mr. Wilson then moved that the consent of only two thirds of the states be required. Once again the central debate ensued over the states' power vis-à-vis other states to amend the new Constitution. Mr. Wilson's motion was defeated 5–6. Another motion requiring the consent of three fourths of the states was substituted, and it was agreed to without objection. The state delegations clearly wished to maintain a strong control over the disposition of amendments without, however, going so far as to require a unanimity which would be difficult or impossible to obtain.

At this point, Madison introduced a new proposal which embodied the three-fourths requirement just adopted. Madison's proposal read: "The Legislature of the U.S. whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or

the other mode of ratification may be proposed by the Legislature of the U.S." Madison's proposal was adopted 9–1–1. What is missing from Madison's proposal is the idea of a national constitutional convention, called for by the states. The meaning of this omission was not revealed until Madison commented further upon it later in the week.

On the present day, however, Mr. Rutledge argued that the three-fourths provision, although good in principle, did not offer sufficient protection of the interests of the slave states from the possible designs of the non-slave states. He offered the motion that no amendment should affect the slavery question prior to 1808. Whatever the feelings of the various delegates, this was well understood to be an issue of such intense interest that it must be reckoned with in some form or subvert the entire end of the Convention. It was passed.

The September 12th report of the Committee of Style—comprised of Mssrs. Johnson, Hamilton, Morris, Madison, and King—followed the language proposed by Madison on the 10th. Final discussion of this matter occurred on the 15th, the last day of the Convention. Discussion was initiated once again by the concern for what the states might do to one another by means of amendments to the Constitution. Sherman argued that the protection provided in the exemption of the slavery clause from amendment ought to be generalized to other areas of state concerns. Madison, however, argued that further exemptions would be demanded by every state, and that it was better to restrict exemptions from amendments to the barest minimum. Sherman's amendment was defeated, 3–8. Governor Morris then offered a compromise, including with the slavery clause the provision that "no State, without its consent shall be deprived of its equal suffrage in the Senate." This provision, which is arguably the most explicitly anti-democratic provision of the Constitution, was accepted without formal objection, and is the language of the Constitution.

George Mason then raised the question of the Congressional role in amending the Constitution. He argued that both modes of amendment in the Committee report depended too heavily on the cooperation of the Congress. If, as he believed it would, the Congress were to become oppressive, the people would have no convenient manner of effecting amendments to counteract the practices of the Congress. Mason clearly wished for at least one mode of amendment in which the Congress simply was not involved. Morris and Gerry then moved to amend the article to require a convention on the application of two thirds of the states. To this Madison responded that he "did not see why Congress *would not be as much bound* to propose amendments applied for by two thirds of the States as to call a Convention on the like application" (emphasis mine). Madison clearly regarded the Congress to be *obliged* to propose amendments applied for by the states. In saying this, he also clarified the reason why the convention mode was omitted from his motion on September 10th, viz., that the Congress was bound to honor the wishes of two thirds of the states and that this mode *was* essentially independent of the Congress. Madison went on to say that he "saw no objection . . . against providing for a Convention for the purpose of amendments," save that practical difficulties might attend such a procedure. Such difficulties he seemed to regard as a technical problem, and not one of much substance. Examples include quorums, forms, procedures of the convention, and the like. That he did not regard these difficulties as fundamental is proven by the fact that he did not think them fit subjects for constitutional regulations. The question, however, remains: if regulations for a new convention were not specified in the Constitution, who is to make them?

On this question the Convention of 1787 remained silent. It might be reasonably supposed that Congress could and should provide such regulations as are necessary to facilitate the calling of a new convention if it is requested by two thirds of the states. The limit of Congressional power in this regard would be the point at which it conflicted with the clear intention of the Convention of 1787 to provide a genuine alternative to Congressional proposition of amendments. The convention motion was adopted on September 15th *without objection*, perhaps the clearest possible testimony that the delegates to the Convention of 1787 did not wish to preclude another convention if two thirds of the states desired one. What other reasonable interpretation could be put on this unanimity is difficult to imagine.

John Sherman once again expressed his fear that some states might amend the Constitution in ways unfavorable to the remaining states. He proposed to remove the requirement that three fourths of the state legislatures be neces-

sary to ratify amendments. This he did under a concern for "flexibility," i.e., that future conventions ought to be allowed to adopt, as it were, their own standards of what would count as ratification of their work. His motive for presenting his demand in this form is perhaps clear enough. At any rate, the Convention *rejected* his motion 3–7–1. The "legislative history" of the Convention of 1787 is thus straightforward: the Convention of 1787 rejected the motion that future conventions are free to propose new modes or new standards for the ratification of new amendments—unless, of course, these new modes or new standards are themselves first adopted in a constitutional way, i.e., by ratification by three fourths of the state legislatures or state conventions. The claims of current opponents of a second constitutional convention—that new conventions will be free to propose new modes of ratification—thus appear to be baseless. An amendment proposed by a new convention, but not yet ratified by three fourths of the states, would not yet be a part of the Constitution. It would have no more standing than an amendment proposed by the Congress, such as the Equal Rights Amendment, which has not yet been ratified by three fourths of the states. This would be so no matter what the delegates to a second constitutional convention asserted. A new convention would itself be constitutional, unlike the first convention which was not itself legitimated under the Articles of Confederation.

The Convention of 1787 was in every way an extraordinary gathering. A second convention, if requested by two thirds of the states, would derive its existence from authority given in the Constitution, and would be bound by that authority. Such a view is consistent with the fact that amendments are listed after the original language of the Constitution. In 1787, Roger Sherman insisted that this procedure be adopted in order to indicate that all amendments are empowered by and in accord with the document which is the Constitution. A rogue convention would be a usurper of the Constitution, and true supporters of the Constitution would be obliged to defend it against excesses with whatever means necessary. Fortunately, there is nothing whatever on the horizon at this moment which would suggest the danger of a rogue convention bent upon opposing the Constitution. Rather, the current requests for another convention seem fully within the spirit of the Constitution.

As the Convention of 1787 drew to a close, Edmund Randolph spoke of the "dangerous power" given to the Congress in the new Constitution. He proposed that the ratifying conventions in the states be authorized to propose amendments to the new Constitution, and that these be deliberated upon by a second constitutional convention. George Mason spoke in support of this plan, expressing once again his fear of the national government. To this plan Mr. Pinckney countered that only confusion could spring from an invitation to the states to propose amendments to be considered by a second convention. He argued that the diversity of views and subjects to be considered at a new convention would be so great that a national government would not be likely to emerge from it. He concluded that "Conventions are serious things, and ought not to be repeated."

The reason for his conclusion is instructive. ***His reason was that a second convention would be unable to produce agreement.*** This is a very different concern from that of present opponents of a second constitutional convention, who fear precisely that a new convention *would* produce agreement. Pinckney said that "the States will never agree in their plans," and for him that was conclusive. But why was general disagreement to be feared? Pinckney referred to the absence of an effective national government in 1787 (indeed, he feared the "contemptible weakness and dependence of the Executive" even in the new Constitution); he said that failing the creation of a national government, there would be a decision "by the sword." Hamilton later echoed this view in *Federalist* No. 85: "There can, therefore, be no comparison between the facility of effecting an amendment and that of establishing, in the first instance, a complete Constitution." Surely the present situation is not analogous to the circumstance of 1787. Who could reasonably argue that at present the national government suffers from contemptible weakness and too little power? Indeed, it is the power of the national government that has prompted most of the current demands for another constitutional convention. Would a great danger to the republic be found in a sitting convention, empowered only to propose amendments, while the national government continues to govern? Might not the national government govern more carefully and more responsively with such "competition" at hand?

Having seen the difficulty of securing a minimal agreement on the part of jealous states, the delegates to the Convention of 1787 were not about to risk their fragile success before a national government was even established. The plan to instruct the states to propose amendments to a mandated second convention, and hence to continue to operate under the Articles of Confederation, was rejected by all of the state delegations. The new Constitution was then agreed to unanimously.

IV.

A mandated second convention was thus rejected in the year 1787. It was rejected, however, because of the need for an immediate, functioning national government with the authority to act independently of the will of each and every state of the union. It was perhaps rejected, too, because a constitution ought not to be "up for amendment" without a clear demand arising for it. Madison made himself clear enough on this in his cool response to Jefferson's notion that the Constitution ought to be reconsidered every generation. Such a mechanical formula—amendment of the Constitution whether it needs it or not, as it were—Madison rejected as unwise. But a second convention was not rejected by the framers out of a fear that the states or the people might agree, i.e., might wish to effect a widely advocated change. Those who now oppose another convention on this ground reveal an anti-democratic sentiment that might even Hamilton blush.

The Convention of 1787 did not fear the convention mode of amendment. Quite to the contrary: the Convention of 1787 began and ended by affirming it. What power was given to the Congress was never conceived as a substitute for state power to amend, but as an addition to it. Three fourths of the states are given the power to dispose amendments, either in conventions or in state legislatures. Two fundamentally different modes of proposing amendments are established, each to offer amendments to correct deficiencies discovered from different perspectives. Madison speaks with his usual clarity in *Federalist* No. 43: "That useful alterations (in the Constitution) will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults." The provision that three fourths of the states dispose of amendments secures the permanence of the Constitution; the provision of different modes of proposing amendments secures its responsiveness and flexibility.

The framers had no intention whatever of constructing an immutable document. The framers' attitude toward amendment of the Constitution is revealed in the several modes for amending the Constitution which they included in Article V: when unable to agree on one single mode, they simply established two modes. The new found solicitude for the sanctity of the Constitution on the part of some factions is touching; opposition to another convention, however, is simply not defensible in terms of the understanding of the delegates to the Convention of 1787. Hamilton wrote in *Federalist* No. 85: "The will of the requisite number (of states) would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States (now thirty four or thirty eight states, respectively) were united in the desire of a particular amendment, that amendment *must infallibly take place*" (emphasis mine). There appears, to Hamilton's mind at least, no doubt that amendments might be brought forth, singly or otherwise, by the states, and be adopted without the decisive participation of the Congress. *Federalist* No. 85 speaks in the clearest imaginable language: "the national rulers, whenever nine States (now thirty four states) concur, will have no option on the subject. By the fifth article of the plan, the Congress will be *obliged* 'on the application of the legislatures of two thirds of the States (which at present amount to nine), to call a convention for proposing amendments which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.'

"The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air. Nor however difficult it may be supposed to unite two thirds or three fourths

of the State legislatures in amendments which may affect local interests can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority." Difficulties ought to attend the amending process when it affects only local or special interests; difficulties ought not to attend the amending process when it concerns the liberty of the people. These are not the words of a man who fears a convention relative to the general liberties of the people; they are the words of Alexander Hamilton.

A REVIVAL, JUST IN CASE

(By James J. Kilpatrick)

The Congress has a piece of unfinished business left over from 1971. When the two houses have nothing better to do, which is most of the time, they ought to get at it. This is an act to provide for the holding of a constitutional convention.

Once again the states are applying pressure. At the last count, no fewer than 22 states had filed petitions with Congress, asking that a convention be called in accordance with Article V of the Constitution. The petitioning states want an amendment to require a balanced federal budget. They are going at it the hard way.

Not many persons are acquainted with the "state application" provision of Article V, and this is not surprising; the provision never has been successfully invoked. Every amendment to the Constitution thus far, has come into being through the familiar procedure by which two thirds of each house of Congress approves a proposal and sends it out to the states.

The founding fathers, fearful of an intransigent national legislature, wisely provided an alternative course. "The Congress on the application of the legislatures of two thirds of the several states shall call a convention for proposing amendments." Note that the provision is not discretionary; it is mandatory: The Congress "shall" call.

Over the past 19 years, every state in the union at one time or another has petitioned Congress in this fashion. Amendments have been sought embracing everything from polygamy to prohibition. Early in the century, so many states petitioned for the direct election of senators that Congress itself put in motion the resolution that resulted in the 17th Amendment. At the time of a study by the American Bar Association in 1971, more than 300 such petitions had been filed.

The ABA report stemmed from a sudden onrush of state applications having to do with the issue of reapportionment. Many of the state legislatures were infuriated by the Supreme Court's one-man, one-vote, decree in *Baker* v. *Carr*. They set about passing resolutions, many of them identically phrased, demanding that Congres call a constitutional convention to undo what the high court had done.

Then as now, 34 states (representing two thirds of all the states) would have triggered the call. Amazingly, by mid-1967 the count actually got to 32. Sen. Everett Dirksen of Illinois, grand marshal of this remarkable parade, was ecstatic. His colleague, Paul Douglas, was aghast. Douglas suggested that if a 34th application should materialize, Congress ought to refuse the call anyhow. That set Dirksen into flights of oratory scarcely equaled since Cicero took off on the Carthaginians. Such senators as Javits of New York, Proxmire of Wisconsin and Robert Kennedy of New York denounced the very idea of the constitutional convention.

One thing led to another, and in October of 1967 the Senate Judiciary Committee conducted hearings on the whole business. The hearings led to a bill sponsored by Sam Ervin of North Carolina that passed the Senate 84–0 in October of 1971: Then interest waned, and nothing much had been heard of the matter until the latest campaign began to gather momentum.

Prudence suggests that Congress send for the Ervin bill and trot it around the track once more. It seems to be doubtful that 12 more states will make application under Article V, but you never know. It would be far better to provide the machinery now than to hustle up a bill, as the ABA study observed,

in a time of "divisive controversy and confusion." An act should provide for validating the applications, for electing and paying delegates to a convention, and for other housekeeping matters.

For the record, even a faint prospect of a constitutional convention gives me the willies. Scholars disagree, but there is good reason to believe a convention could not be limited to proposing a single amendment on tax limitation. A convention could conceivably propose a complete rewriting of our fundamental law. The wisest course would be for Congress voluntarily to restrain its profligate impulses, and meanwhile, to revive the Ervin bill—just in case.

[From Christianity and Crisis, vol. 39, Apr. 16, 1979]

A New Constitutional Convention?

HARNESSING THE TIGER

(By Frank Thompson, Jr., and Daniel H. Pollitt)[1]

Twenty-seven States have now enacted resolutions calling upon Congress to convene a constitutional convention to require a balanced Federal budget; often with lopsided margins, generally with bare minutes of debate. North Carolina Iowa and Utah joined this number in recent weeks. Similar measures have passed one of the houses in the legislatures of California, Indiana and South Dakota, and the issue is now calendared for legislative action in both Montana and Washington.

In short, it appears very likely that the requisite 34 states will have joined in the call within the near future. When and if this happens, we will have our second constitutional convention. It is time to think hard about this clear and present possibility.

Article V of the Constitution mandates the Congress "on the application of the legislatures of two-thirds of the several states" to "call a convention for proposing amendments." The amendments proposed at the convention "shall be valid to all intents and purposes, as part of this Constitution, when ratified" either by the "Legislatures of three-fourths of the several states" or by "Conventions in three-fourths thereof" as the "one or the other Mode of Ratification may be proposed by the Congress."

Large majorities of Americans polled on the subject favor both a balanced budget (legally mandated) and a constitutional convention if need be to secure one. Simply put, they are fed up with high taxes, inflation and deficit spending, and they place the blame for these ills on wasteful government spending. California's Governor Jerry Brown urges a constitutional convention for more lofty reasons befitting a (still bashful) Presidential candidate—a balanced budget, he contends, is a "philosophical symbol" for the "kind of discipline this country needs." Declared Presidential candidate John Connally of Texas sides with Governor Brown in the need for a constitutional convention. But most of the national leadership is opposed.

President Carter warned that a constitutional convention would be "completely uncontrollable, with multitudes of amendments originating therefrom." Senator Edward Kennedy labeled the current drive an "ominous development" and a "serious threat to the integrity of the Constitution." Senator Edward Muskie of Maine sees it as nothing less than a "constitutional crisis," and Senator John Stennis of Mississippi describes himself as "alarmed and frightened" by the prospect. Columnist James J. Kilpatrick declares that "even a faint prospect" of a convention "gives me the willies": Howard Jarvis, father of California's Proposition 13, fears that a convention would put the Constitution "back on the drawing board" where "radical crackpots" would "rewrite the supreme law of the land."

Is this fear of a "runaway convention" justified in fact? Equally important, if not more so, can this fear and opposition be justified in democratic political theory? To begin analyzing these questions one must consider why the Con-

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stitution includes *two* methods of amendment. The first and original process requires that amendments originate in the Congress by two-thirds votes in both the House and Senate, to take effect only when ratified by vote of three-fourths of the states. The second mode was accepted as a means of goading a reluctant Congress, and on at least one occasion was applied to achieve this very purpose. In the early 1900's there was a national clamor for the direct election of United States Senators. This clamor fell on deaf ears in the Senate (the incumbents were quite happy with the system that resulted in their being where they were), but then a number of states proposed a constitutional convention for this purpose. As this movement gained momentum—and not until then—two-thirds of the Senate joined the House in proposing what is now the 17th Amendment.

What, one may ask, is wrong with utilizing this constitutional road for constitutional amendment? Sanctioned by and in the Constitution, it rests on the democratic conviction that the ultimate power lies with the people acting directly through their elected representatives at the state level. Those who met in Philadelphia in 1787 to draft our Constitution realized that imperfections inevitably would appear as time wore on and conditions changed. That is why Article V makes change possible.

A FLAWED PROCESS

Against this argument, what is suggested here is that the second method of amendment is itself one of these imperfections. In historical fact it was proposed late in the hot summer months as a substitute for the earlier proposal, and not so much out of pure democratic preference as out of a desire to increase the power of the states over against that of the central government. Time and temper were running out, and in a spirit of compromise it was decided to adopt both methods of amendment. Accordingly, there were no sharp questions about the second mode, no explorations of consequence; above all, no guidance for procedures of operation. Obvious questions were ignored: How are convention delegates to be selected? Will all states have equal voting strength, regardless of population? Will a simple convention majority suffice to move an amendment to the states for ratification?

The failure to answer these questions in a democratic way means that what originally was intended as a safeguard against authoritarian Congressional arrogence might easily be used in an anti-populist, nti-majoritarian way. Consider the following scenario.

Thirty-four states (the required two-thirds) petition Congress for a constitutional convention. Congress, obedient to the Constitution, calls for a convention in Philadelphia and authorizes the necessary financing. In the call, Congress sets forth the number of delegates allocated to each state (one for each member of Congress), but otherwise it makes no procedural stipulations. The result could well be that the delegates, or many of them, are not elected on the one-person-one-vote principle, but instead are selected by the Governor, by the legislature or by specially held conventions. The democratic process undergoes its first defeat.

Suppose further that upon arrival in Philadelphia the small states (Idaho, Wyoming, South Dakota, Rhode Island, etc.) hold a caucus and, fearing domination by a liberal coalition of large states (California, Massachusetts, Michigan, New York, New Jersey, Ohio, Pennsylvania, etc.), move that each state have one, and only one, vote. The roll is called (Alabama, Arizona, Arkansas, etc.), and the plan is adopted by the convention.

Once organized, the convention turns to its primary purpose "of proposing amendments." A majority of states (quite possibly representing a minority of the people) vote for the "balanced budget" amendment; and then (still on fiscal matters) vote to prohibit all public funding (Federal and state) of abortions; to prohibit all public funding of "busing" in connection with school integration; but in a spirit of fiscal generosity, vote to authorize tuition reimbursement for parents who send their children to parochial schools. This package of four amendments is then transmitted back to the states (from whence it originated). Who is so bold as to predict that three-fourths of them—again, perhaps including only a minority of the people—would not give approval?

This is the specter of the "runaway" convention that haunts President Carter, Senators Kennedy, Muskie and Stennis, and the commentators.

Turning loose a constitutional convention is like riding a tiger. It is a reckless and unnecessary gamble. The traditional method for constitutional change is available, and it works with all deliberate speed.

We have amended the constitution by this process on 11 occasions in this century alone—approximately once every seven years. In 1913 we authorized a Federal graduated income tax (the 16th Amendment). Then we prohibited alcoholic beverages (18th Amendment), but on sober second thought repealed the prohibition (21st Amendment). Most of the amendments perfect our concept that the best governments rests on the consent of the governed. We have provided for the direct election of Senators (17th Amendment) ; and have extended the franchise to women (19th Ameriment), to residents of the District of Columbia (23rd Amendment), and to persons over 18 (26th Amendment). We abolished the poll tax that disenfranchised the indigent (24th Amendment). We have eliminated the "lame duck" President (20th Amendment), limited every President to two full terms in office(22nd Amendment) and provided for the transfer of Presidential authority to the Vice President when the Chief Executive is unable to perform the duties of the office (25th Amendment). In short, the people of the United States can and have worked their constitutional will through this time-tried process of amendment.

CONSTITUTIONAL SAFEGUARDS

It is a cautious process, but our whole constitutional system is a cautious one. We have built-in checks and balances. The two houses of Congress check each other, and their legislative power is balanced by that of the President, who can checkmate the Congress with a veto (good unless overruled by a three-fourths vote in each House). Finally, the judiciary can reverse them both in a process which generally takes several years. Those on our highest courts (our own Platonic Guardians) take a long second look when the heat and passion of the moment are forgotten, and ensure that the legislative and executive action conforms to our constitutional norm.

This process of deliberation permeates our form and system of government. It is implicit in all that we do. Clearly, the movement for a constitutional convention puts this spirit of deliberative caution greatly at risk. And yet we must face the very strong possibility that the movement will not be checked before it reaches the point at which Congress must acquiesce.

Like it or not, then, it may be that we will have to ride the tiger of a constitutional convention. If so, we must begin now to fashion a proper harness. And that can be done. If and when Congress issues its call for a convention, it will have to settle on a time and place, provide funding, define the convention's purpose and set up the procedures under which it is to act. It is in creating these procedures that the Congress—whose members, like the President and the Justices of the Supreme Court, are duty bound to respect the Constitution—can provide safeguards against ill-considered or anti-democratic action by the convention. The following are suggested as illustrative.

First, as already mentioned. Congress should establish the time and place for the convention (Philadelphia would be traditional) and provide the necessary financing.

Second, Congress should set the total number of delegates at a level which generates the strong possibility that women, youth and minorities will be elected. All views should be present for consideration when the Constitution is up for debate.

Third, Congress should apportion the delegates among the states on the basis of population. This should be a convention of and by the people, not a convention of and by the states.

Fourth, Congress should require that delegates be elected, not handpicked by the Governor, by the state legislative body or by a controlled state convention.

Fifth, the delegates should be elected from Congressional districts, not on a statewide basis. This would ensure that differing elements within a state would all have a chance to be heard.

Sixth, a one-delegate-one-vote rule should be required. Congress should prohibit any kind of unit rule that gags minority views and votes within a state delegation.

Seventh, Congress should require a two-thirds vote for the enactment of a proposed amendment. This is the requirement in both houses when constitutional amendments are proposed by the traditional route. The requirement of a supermajority approval is equally appropriate, no matter which route for constitutional change is followed.

Eighth, Congress should hold any proposed amendments for at least one year to provide ample opportunity for discussion and debate. Some minimum opportunity for second thought is a traditional safeguard in our system.

Ninth, Congress should restrict the convention agenda to the items listed in the state petitions, i.e., a balanced Federal budget. There have been many movements for a constitutional convention in our history. At the turn of the century, many states joined in a convention petition to ban polygamy. During the early decade, the subject was the direct election of United States Senators. During the depression years. Wisconsin proposed that Congress call a convention for a general reexamination of the entire Constitution. During and shortly after World War II, a number of states petitioned for a convention to authorize some form of world government. More recently, in direct revolt against Supreme Court decisions, there have been proposals for constitutional conventions to deal with such matters as one-person-one-vote, school prayer and busing. Currently, some 12 states have called on Congress to convene a convention to outlaw abortion.

These efforts failed. The people rejected them. They should not be swept into consideration now, under the umbrella of a balanced budget amendent. Should a convention be called to consider a balanced budget, and then adopt any of these previously rejected proposals (a runaway convention), Congress properly should refuse to refer them to the states for approval. Only thus can the constitutional requirement of *prior* approval by 34 states for *consideration* of an amendment be maintained.

Tenth, Congress should provide opportunity for judicial review. The law is somewhat confused on this subject. In 1871, the Supreme Court held that the issue of whether the Civil War Amendments had been properly ratified was a matter left exclusively to the political departments of the Government [see *White* v. *Hart*, 80 U.S. 646 (1871)]. Again, in 1939 the Supreme Court repeated the concept that matters of constitutional ratification are not subject to judicial review. It refused to consider the effect of a previous rejection of the Child Labor Amendment by the state of Kansas; and it refused to consider whether a proposed constitutional amendment died a natural death 13 years after proposal [*Coleman* v. *Miller*, 307 U.S. 433 (1939)].

On the other hand, the Supreme Court has held that Congress has the power to set a reasonable time limit upon the ratification process [*Dillion* v. *Gloss*. 256 U.S. 368 (1921)], and has sustained the power of Congress to establish the manner of ratification [*Hawke* v. *Smith*. 253 U.S. 221 (1920)]. While the matter is not free from doubt, it seems that if Congress establishes procedural and substantive rights as suggested above, it should have the power to authorize jurisdiction in the Federal courts to hear any "case or controversy" alleging a denial or forfeiture of these congressionally created obligations.

HOW STRONG THE REINS?

Will any of the above proposals "work"? Scholars certainly are divided on the subject. The Constitution itself is vague, and we have almost no historical precedent. The last constitutional convention we had was called by the Continental Congress in 1787 "for the sole and express purpose of revising the Articles of Confederation." We can be grateful that it saw the need for larger action and gave us our nation.

Today, however, most Americans are profoundly committed to preserving the essence of our foundational law. Whatever the merits of the proposal for a constitutionally mandated budgeting policy, the movement in its support is not a popular call for radical tinkering with the Constitution, and surely it is not a call for Congressional abdication or for carelessness.

When the Founding Fathers finished their work of drafting the Constitution, South Carolina delegate Charles Pinckney looked back over the long hot summer months and observed that "conventions are serious things and ought not to be repeated." For almost 200 years we have taken this wisdom to heart. If we are now to depart from this admonition, we should do so with all deliberate caution. The time for safeguarding our heritage is now.

[From the Federal Bar News, April 1979]

BALANCED BUDGET AMENDMENT: CONGRESS VERSUS STATES?

(By Meredith McCoy)

Up until January when California Governor Edmund G. (Jerry) Brown announced in his inaugural address his support for the campaign to launch a constitutional convention for the purpose of proposing a constitutional amend-

ment to require balancing of the federal budget, only a few groups such as the National Taxpayers' Union were paying serious attention to and keeping tabs on the slow trickle of petitions coming from the States. The constitutional convention drive actually started about four years ago and beggan to pick up steam last summer in the wake of the controversy surrounding California's Proposition 13. Brown's subsequent declaration of support 6 weeks aggo added new impetus to the drive and won for it national media attention.

The National Taxpayers' Union, the Washington-based lobbying group helping to coordinate the campaign, currently lists 28, and possibly 29 of the required 34 states as having approved a resolution. The group expects more to be passed within the coming weeks.

Of course, Congress will not begin to scrutinize the applications received unless the states continue to demand a convention on the budget issue, and once it does so, the campaign could suffer serious set backs because of unresolved questions surrounding the validity of some of the petitions. Even if the intent is clear, the existing applications represent a "hodge podge" of proposals, and at least 16 petitions call for a convention only in the face of congressional inaction on the subject. Whether such conditional requests remain valid is unknown, since the case of *Hawke* v. *Smith*, 253 U.S. 221 (1920), which held that a state may not condition its ratification upon the outcome of a binding popular referendum, is applicable to the proposing stages of the amending process only by analogy.

Although 5 states have passed resolutions since mid-January, the earlier gained momentum may have reached a peak partly due to the defeat of a resolution in Brown's own state, California, and partly due to a burgeoning congressional backlash, particularly by the leadership in both the House and the Senate. In addition to the hearings already held by Birch Bayh's subcommittee on the Constitution and those scheduled later by another Senate committee, chairman of the House Judiciary Committee, Peter W. Rodino, Jr., (D-N.J.), plans a cautious and very deliberate investigation into the legal, economic, and budgetary effects and ramifications of the various budget proposals introduced this year, particularly those which specifically emphasize a limit of federal spending.

As a result of the prodding effect of requests from the states, congressional repsonse has tended to take two directions. While many members of Congress are unhappy with the balanced budget movement, most members understand that voters are concerned about inflation, high taxes, and government spending. But if Congress is apprehensive about the economic problems besetting the country, many members perceive as far more serious the threat of a wide-open constitutional convention. Because the thought of a "runaway" convention that would rewrite the country's fundamental laws is such a fearsome prospect, and because the political futures of some might depend upon the response to the balanced budget issue, the States' action thus far may prompt serious consideration of the alternatives available. Even the wide divergence among legal scholars as to the nature of a constitutional convention may not detract from the motivating effect of a convention call.

The problem Congress will try to resolve is how to prevent the states from getting into the amending business by way of convention while offering them some means of assuring a curb on federal spending.

The special fears surrounding the use of the convention method have their source in the fact that the lack of historical and legal precedent gives rise to nothing but unanswered and unanswerable questions with respect to not only the procedural aspects of the convention method but also the knotty substantive issues such as the limits and sources of congressional power in the area.

Among the constitutional uncertainties which abound are a number of initial obstacles which would have to be overcome before Congress could call a convention. For example, it would have to determine whether the petitions as worded constitute a national consensus as to the necessity for an amendment; whether the requirement of timeliness is met; and whether an application is valid if conditionally phrased, or vetoed by the state governor, or improperly certified by state officials. The Constitution is silent on all these questions just as it is silent on the question of whether a state can withdraw its application once it is sent to Congress. The requirement of timeliness or contemporaneity is derived from the case of *Dillon* v. *Gloss*, 256 U.S. 368 (1921), which held that ratification under Article V must be within a reasonable time, and presumably, this standard would also apply to the proposing stage of the amending process.

Although most commentators agree that Congress is impliedly delegated such "housekeeping" functions as setting the time, place, and financing of a conven-

tion, many theorists are diametrically opposed as to the extent of Congress' power to regulate or govern the operations of a convention either through enactment of a regulatory statute, such as proposed by Senator Sam Irvin in 1973, or through the refusal of Congress to submit to the States for ratification a disfavored amendment produced by a convention. Could Congress limit the scope and powers of a convention? This is perhaps the most debated question on the subject and the one on which the opinions are often carried to the furthest extremes. For example, Charles L. Black, Jr., of Yale University Law School believes that a constitutional convention by definition is illimitable, but this is a minority opinion and not shared by Attorney General Griffin Bell. Others view Congress as the appropriate body for assuring uniformity of operation on issues of national importance, and therefore, the proper institution for resolution of some of the technical questions concerning procedure, but not as a supervisor of a convention once it is launched. A distinction is made between the power to establish and the power to interfere. Other unanswered questions include the method of selection and apportionment of delegates. Should the convention comport with the one man one vote rulings of the Supreme Court or be based on a congressional model?

Moreover, whether Congress acts by proposing its own amendment, enacts a regulatory statute, or simply ignores the critics from the state legislatures, there remains the final issue of judicial review. In *Coleman* v. *Miller*, 307 U.S. 433 (1939), four Justices stated in a concurring opinion that the amending process is political in its entirety and not subject to judicial guidance or control. Although expressly upheld in *Baker* v. *Carr*, 369 U.S. 186 (1962), this case and the political question doctrine as a whole do not constitute a particularly firm foundation for any absolutist view on the abstinence from judicial action on the subject. The Supreme Court has dipped into the area several times in the past, although it is sheer speculation as to how it would react, if at all, until after the initial determinations were made by Congress and subsequent action taken in reliance upon that legislative judgment.

If Congress decides to propose its own amendment instead, the difficulty would be in deducing what it is that the States really want. Several irate Members of Congress, including Senator Edmund Muskie of Maine, have already threatened the States with an end to revenue sharing and the Federal Grants-in-aid as a means of cutting the budget. Proponents of a balanced budget amendment believe that eliminating the federal deficit would reduce inflation, thereby strengthening the dollar; while critics of this approach charge that deficit spending is necessary for flexible government, and that such deficits are not the source of the oil price increases, cost of hospital care increases, and food price increases.

But the advocates are unmoved by the threats of cuts in federal aid and steadfastly assert that only the injection of fiscal discipline into the Constitution will circumvent an economic catastrophe.

Some of the resolutions thus far introduced simply call for outlays not to exceed revenues except in the case of a national emergency. Others propose that government spending not exceed a fixed percentage of the gross national product. One proposal, the so-called Friedman amendment, propounded by the National Tax Limitation Committee from California, would tie the rate of spending growth to that of the gross national product, but if the rate of inflation exceeded 3 percent, the allowable spending increase would be cut. At the time of this writing, a final version of this proposal had not yet been introduced.

The myriad of questions on the effect of "constitutionalizing" economic and budget policy is equal to the legal morass surrounding the calling of a constitutional convention. First of all, what does and does not constitute the budget probably cannot be defined or characterized in a manner suitable to the forming of a constitutional amendment. If economists and budget experts have a hard time measuring and defining terms such as "gross national product" and "total outlays," then the politicians will be totally unable to agree on what would be encompassed by the phrase "national emergency." Is a national emergency a war, catastrophic weather conditions, mild recession, or severe economic depression?

If such an amendment were ratified. how would it be enforced? By presidential impoundment of funds? Or would there be a limited right of judicial review included in the amendment, as with the case of the Friedman proposal? Furthermore, if what the states are attempting in reality to achieve is a decrease in governmental intrusion into and regulation of our lives, a balanced budget

is unlikely to achieve this effect. Notwithstanding the cry of the critics that a balanced budget amendment would "tie the hands of Congress," perhaps the greatest fear is that of the unknown. That is, many of the implications and potential effects on federal-state, congressional-executive, and national-foreign relations are hidden beneath the surface of the present political situation. The balanced budget gospel presently being preached belies the possibility that some of the hardest questions may not have been asked.

Constitutional Convention Procedures

Statement of James A. Michener

One of the rare privileges of my life was to serve as the secretary of the Constitutional Convention which rewrote the basic laws of the Commowealth of Pennsylvania. We met for ninety days, under a strict set of instructions from the legislature and with severe limitations in three areas: we could not alter the term of the governorship, for this had only recently been attended to by the legislature; we could not impose a state income tax; and among ourselves we agreed not to bring up the thorny question of state aid to parochial schools, for this was being handled elsewhere.

We succeeded within those limitations in becoming the only major state to successfully revise its entire constitution, New York and Maryland having failed conspicuously at about the same time that we were working. We succeeded in part, I think, because of the brilliant leadership provided by Former-Governor William Scranton, a superb public servant who helped keep the convention from becoming polarized as to political party. The Republicans had a slight majority in numbers and could have dominated the convention structure, had they wished; we Democrats had a high supply of mercurial debaters and could have tied things up in a knot had we been forced to do so. Thanks to Scranton's sober leadership, we avoided this internecine struggle and worked instead as a single unit, something that did not happen in other states.

In a dozen major areas we brought in new concepts of law while preserving the best of the old. We got rid of our preposterous minor judiciary which was paid according to the percentage of charged persons who were found guilty, substituting for it a well paid, well trained, well housed preliminary judiciary which works very well indeed. We arranged for removal of judges for cause and in such a way as to preserve an old man's dignity when his powers were obviously fading. We paved the way for sensible area forms of government which cut across ancient boundaries. And we revised our tax law completely, paving the way for an orderly transition to the statewide income tax, which we knew would come along shortly, even though we were forbidden to enact one.

Of all the writing I have done in my life, I am proudest of what I helped do in rewriting this basic law of a great state, and I am pleased to see that in the years that followed this labor, the young men who served with me have gone on to positions of great eminence: to Congress, to judgeships, to Federal attorneys, and in the person of Richard Thornburgh to the governorship itself. It formed one of the happiest and most productive experiences of my life, and it forms the basis whereby Pennsylvania can govern itself prudently and constructively for the next century.

I am, however, totally opposed to any measure that would encourage the 50 states of our union to amend our national Constitution by means of the convention method, for I, better than most, appreciate the hidden dangers inherent in this system.

The people of the United States are certainly entitled to use this device if they wish. The framers of the Constitution realizing that what they did was not perfect or sacrosanct, laid plans for its revision, and two procedures were spelled out: the houses of Congress could propose changes which the legislature of the states could accept or reject (the way in which our present 26 amendments have been added); or the legislatures of the states themselves, bypassing the federal legislature, could assemble a convention which would propose amendments, which would then be ratified either by the state legislatures or by conventions called together in the states.

The first procedure having worked so effectively, both for proposing amendments and for removing one when it did not function as planned, we have

never used the second plan. Indeed, the day-by-day procedures under which such conventions would be called and the rules under which they would operate have never been spelled out by Congress, but it is proposed now to remedy that deficiency by laws which would lay down the ground rules.

So the convention method of amending the Constitution is totally legal, and it has the most honorable sponsorship, for it was specifically authorized by the Founding Fathers. Why should anyone object to its implementation now?

I object for two reasons. The plan we are using has served us so well and so constructively in the 182 years since 1789 that as a traditionalist I see no need for meddling with the system; but more important, I know from history and from experience that once a constituent assembly has been convened, there is no power that can restrict it to limits arbitrarily set.

Any such convention contains the right and the implied power to become a runaway convention, and this is a most dangerous possibility that should be avoided if at all possible. And in a case like the present, when we already have a splendidly functioning system of amendment, it would be folly to lurch off irresponsibly to an alternative method which has not been proved and which contains dangers of the most treacherous kind.

History is replete with examples of innocent conventions, assembled for one purpose, which exploded into unforseen directions, the two most memorable being the Legislative Assembly which gave hideous guidance to the French Revolution and the Long Parliament which supervised the more peaceful revolution in England. I am afraid of such runaway conventions.

But, it is argued, if the United States convened such a constitutional convention its powers would be strictly limited by the enabling legislation which summoned it into being. And here precisely is the trouble. I do believe that any prior law, no matter how carefully drawn, cannot inhibit, or restrict, or delimit a constituent assembly once it convenes. Of course those initiating the convention would say, 'But it's field of legal operation is limited. We have said so.' My contention is that it cannot be so limited. At the moment a convention is assembled and sworn in, it becomes a self-directing body with only such limitations as it prudently places upon itself, and the prior restraints which have so carefully been placed upon it no longer apply.

My personal experience in this field is relevant. I have explained how carefully the Pennsylvania legislature spelled out the limits within which the Pennsylvania Constitutional Convention must act, and since we stayed within those limits it would seem that this proved the efficacy of that system of policing a convention.

Quite the contrary. As secretary of the convention I became aware of the intense pressure on some members to break out of the limits thus arbitrarily set. Again and again we ran up to the margins of our commission like little boys playing at the edges of a bonfire, and with a few bad breaks we could have destroyed the entire procedure.

I should like to describe one crisis. We had solemnly agreed among ourselves not to raise the inflammable issue of State aid to parochial schools, and we did so for two reasons: (1) this matter was being handled with such intelligence in another way; and (2) we knew we would break the convention wide open and destroy every good chance we had if we attempted to solve that problem when a state-wide consensus had not yet been reached.

Gingerly we skirted this explosive issue and were congratulating ourselves on having avoided disaster when a young member of the convention, seeing a chance to gain some glory for himself and some advantage for his religion, announced late in the day that on the following morning he would be proposing a measure that would tear the convention wide apart. The fat was in the fire, just as I had expected all along that it would be.

Since the young man was a Democrat, I was given the job of trying to dissuade him from this disruptive action, but he had already gained so much applause that he ignored my pleas. Catholic members from each party argued with him, for they did not want to see the convention destroyed by an issue which was being handled capably elsewhere, but they accomplished nothing. Elder statesmen of both parties argued with him, and they too were powerless, so I went to bed disheartened.

But at breakfast a Republican member came to me and whispered, 'I think everything will be all right. Charley Murray talked with him at midnight.' And when we convened at 0900 a chastened young man arose and informed us that he was not going to present his bill. We all sighed and then applauded and our convention proceeded to a finel conclusion.

I was so grateful that I went to the young man to express my appreciation and to ask him why he had changed his mind when Murray talked with him when I had been able to accomplish nothing. 'Mr. Murray gave me a different explanation,' he said.

So I went to Murray and asked, "What did you tell him?" and Murray, a stocky, tough Philadelphia politician of the old school replied, "I took him out in the street where no one could hear. It was about one in the morning; the street was deserted. I grabbed him and said, 'If you bring in that bill I'll break both your arms above the elbow.' At last he understood."

The story, which could have ended so disastrously, actually ended rather well. After the convention Charley Murray, because of his excellent performance, was chosen sheriff of Philadelphia, a job he filled for many years with generosity and distinction. One of the first deputies he employed was the young man who had given him so much trouble at the convention. "I liked him," Sheriff Murray said, "because he knew how to take orders."

The simple moral of this tale if by chance we do convene a constitutional convention, be sure that Sheriff Murray is one of the delegates. A more philosophical caution is that preliminary rules or agreements do not always prevail once an assembly meets.

I know with that difficulty we kept our convention on track and how perilous some of our adventures were. Had we been a convention covering the entire nation and had our members been driven by great sectional and moral imperatives, I doubt that discipline could have been maintained. I caution most seriously against turning loose any convention which has runaway potentials, especially when it is not needed.

Can Congress or any other body limit the subjects to be tackled by a convention? I think not, and the whole pressure of history warns us that it can not.

Can the convention, once legally assembled, do pretty much what it wants? I think so, and history gives us many examples of this riotous behavior.

Can the Supreme Court throw out those parts of an assembly's results if such results exceed the commission? I suspect not, for the new enactments are now part of the Constitution. The court could interpret but not reject.

Should we expect legal and perhaps physical battles if the court tried to reject the results of the convention? I fear so, and this is a risk we do not need to take.

Could the convention, once legally assembled, decide on its own to take a look at the Bill of Rights and amend it as it felt current circumstances required? Yes. Judging from what such assemblies have done in the past, the revision of the Bill of Rights would be one of their simplest and easiest acts.

Have we no safeguards at all? Of course we do. Article V states that when the convention is finished with its work, its proposals must be ratified by three-fourths of the States before they can become part of the Constitution. This means that 38 States must approve, which means that only 13 are needed to prevent the proposals from becoming part of our national governance. That seems a prudent number, one calculated to prevent wild or ill-considered proposals from becoming part of the Constitution.

But there is a further provision which scares me. Approval of the States can be given not only by the legislatures thereof but also by State conventions. This means that were the Nation to be gripped by some mania, and this happens often with nations, a vast uprising of the people could in the first instance demand a constitutional convention and then dominate State conventions also, producing hysterical results which might not be in the interests of the general population.

Already proponents of the convention method have sneered at such warnings as inflammatory or irresponsible. I believe they are sensible and prudent. I believe the protectors of a democracy ought always to anticipate the worst possibilities and then protect the Nation from those possibilities. We must look soberly at the possible consequences of behavior which though authorized has never been tested.

So that there need be no confusion as to where I stand on this matter, I state that because of my experience in the United States and elsewhere I am afraid that a runaway convention might revoke or alter the fundamental laws which have enabled this nation to exist for so long and with such distinction. I believe without question that a convention meeting in a crisis situation might do irreperable damage to our form of government and might indeed revoke some of our basic protections.

Are those who want to change in some particular area powerless? Not at all. The amendment process is wide open and has been used most constructively in all past decades of our national history. (We often forget that the original bill of rights contained 12 proposed amendments, not 10. Two were judged not in the best interests of the Nation and were rejected.) At periodic intervals we have added to our basic law and can be expected to do so in the future. By no means are we a monolithic government irresponsive to the demands of the people.

Were a constitutional convention to be held now I would fear for two parts of our present Constitution: the provisions governing the Supreme Court (Article III) and the law governing the freedom of the press (Amendment One). The temper of the times is such that radical revisions of those two parts of our basic law might easily be proposed and enacted, and I suppose that many would like to alter the fifth amendment, which gives the accused the right to remain silent rather to speak in a way which might self-incriminate.

I do not want to subject our Constitution to frivolous or hasty amendment.

It seems to me that the classic example of how best to amend the Constitution, even against the foot-dragging of the Congress, came with the 17th amendment of 1913. For many years citizens had demanded the direct election of senators, like the direct election of representatives; but the Constitution stated specifically that senators of a state must be "chosen by the legislature thereof."

Normal political agitation accomplished little, because the Senate was not likely to sponsor an amendment which would alter its prerogatives. So by the beginning of 1912 29 States had devised tricks and stratagems whereby their citizens could participate in the selection of their Senators, and finally Congress realized that if they didn't act promptly, the States were going to convene a constitutional convention as authorized by Article V. Belatedly the Congress proposed an amendment, in the traditional way, and the convention was avoided. The amendment passed quickly, after which Senators were elected in the manner the people wanted.

This, I think, is the safe and honorable way. Let the people bring pressure upon the Congress. Let the Congress react, as speedily or as slowly as events dictate. Let the States ratify in due process. And let the new laws take effect, if that is the will of the people. With such a stately and time-honored procedure there seems no reason to adopt one less tested.

Finally, since the alternative method is authorized in the Constitution, and since no one today knows what the specific procedures would be for instituting or governing such a convention, I see some logic in having Congress today set forth specifically what those rules should be, on the grounds that it would be best to devise the laws now, in a time of tranquility, rather than later in some time of distress. But if the passage of such law were to become either an invitation or an excitation to use it immediately, I would be strongly against such passage.

I am all in favor of abiding by the time-honored, court-tested procedures which have served us so well for so long.

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The Convention Method of Amending the Constitution

by the Hon. Sam J. Ervin, Jr.
(former Senior Senator from North Carolina)

Published in the public interest by

Americans for a Constitutional Convention
Suite 825 • 529 14th Street, NW • Washington DC 20045

As a public service, Americans for a Constitutional Convention is privileged to make available "The Convention Method of Amending the Constitution" by the Honorable Sam J. Ervin, Jr., former United States Senator from North Carolina, and one of our nation's most distinguished constitutional authorities.

Everything that Senator Ervin discusses in this remarkable article is of vital importance as we move forward in our Call for a Constitutional Convention which will undo the fateful January 22, 1973 decision of the United States Supreme Court legalizing abortion-on-demand nationwide.

The subject of an open or limited Convention, the obligation of Congress to call a Convention, the sufficiency of state applications, the role of state governors, the calling of the convention itself, its procedures and voting, the ratification of proposed Amendments — all are among the questions considered by Senator Ervin.

The facts and information in this article should be of great value to anyone interested in the Convention method, and certainly will aid those directly involved in considering a Convention Call. It is truly amazing to sit through (as I have) legislative hearings and to listen to the maze of misinformation passed off as fact by those who are determined now more than ever to defeat a Convention Call. Senator Ervin's article can do much to remedy this situation.

We believe the greatest strength of the anti-abortion movement is in the state legislatures, which are much closer to the people than our Senators and Representatives in far-off Washington, and certainly far closer than the seven judges who rendered the abortion decisions. The Supreme Court, in these cases (as in many others), intruded upon and seized the power of our state legislatures. Prior to 1973 only two of 50 states permitted easy abortion, and even in those two states it was by no means as permissive as what the Court has forced on the whole nation.

The people *have the opportunity to assert the power granted them by the Founders of the American Republic by resorting to a Constitutional Convention to restore decency and sanity to our nation on the subject of abortion-on-demand.*

In 1974, the Special Constitutional Study Committee of the American Bar Association unanimously agreed that "Our two-year study of the subject has led us to conclude that a national Constitutional Convention can be channeled so as . . . to be . . . an orderly mechanism of effecting constitutional change when circumstances require it."

Certainly circumstances require it now, more than four years after abortion-on-demand became the law of the land, followed by the death of millions *of unborn babies, with no meaningful action by Congress to end this terrible crime against humanity and blemish against our nation.*

We believe Senator Ervin's article to be one of the best available and we hope that you will find it an important weapon in the fight for the rights of the unborn.

DAN BUCKLEY
Chairman

[The following article is reprinted without alteration from the Spring, 1977 issue of *The Human Life Review* (150 East 35 St., New York, NY 10016); it originally appeared in *The Michigan Law Review* (Vol. 66, No. 5) in March, 1968. © 1968 by *The Michigan Law Review Association.*]

The Convention Method of Amending the Constitution

Sam J. Ervin, Jr.

ARTICLE V of the Constitution of the United States[1] provides that constitutional amendments may be proposed in either of two ways — by two-thirds of both houses of the Congress or by a convention called by the Congress in response to the applications of two-thirds of the state legislatures. Although the framers of the Constitution evidently contemplated that the two methods of initiating amendments would operate as parallel procedures, neither superior to the other, this has not been the case historically. Each of the twenty-five constitutional amendments ratified to date was proposed by the Congress under the first alternative. As a result, although the mechanics and limitations of congressional power under the first alternative are generally understood, very little exists in the way of precedent or learning relating to the unused alternative method in article V. This became distressingly clear recently, following the disclosure that thirty-two state legislatures had, in one form or another, petitioned the Congress to call a convention to propose a constitutional amendment permitting states to apportion their legislatures on the basis of some standard other than the Supreme Court's "one man-one vote" requirement. The scant information and considerable misinformation and even outright ignorance displayed on the subject of constitutional amendment, both within the Congress and outside of it — and particularly the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth — prompted me to introduce in the Senate a legislative proposal designed to implement the convention amendment provision in article V. This article will discuss that provision of the Constitution, the major questions involved in its implementation, and the answers to those questions supplied by the provisions of the bill, Senate Bill No. 2307.[2]

II. Background

On March 26, 1962, the United States Supreme Court, in the landmark case of *Baker v. Carr*,[3] held that state legislative appor-

Sam J. Ervin, Jr., is a former U.S. Senator from North Carolina (he retired in January, 1975). This article first appeared in *The Michigan Law Review* (Vol. 66, No. 5) in March, 1968, and is reprinted here with permission of the author and the *Review*

tionment is subject to judicial review in federal courts, thus overruling a long line of earlier decisions to the contrary. Two years later, on June 15, 1964, in *Reynolds v. Sims*,[4] the controversial "one man-one vote" decision, the Court held that the equal protection clause of the Fourteenth Amendment requires that both houses of bicameral state legislatures be apportioned on a population basis.

The two decisions evoked a storm of controversy. In the Congress, dissatisfaction with the Court's intrusion into the hitherto nonjusticiable political thicket resulted in attempts in both houses to reverse the rulings by legislation or constitutional amendment. On August 19, 1964, the House of Representatives passed a bill introduced by Representative Tuck of Virginia which would have stripped federal district courts of jurisdiction over state apportionment cases and denied the Supreme Court appellate jurisdiction over such cases. The Senate declined to invoke that extreme remedy, passing instead a "sense of Congress" resolution that the state legislatures should be given time to reapportion before the federal judiciary intervened further. In both 1965 and 1966, however, a majority of the Senate voted to propose the so-called "Dirksen amendment" to the Constitution, which would permit a state to apportion one house of its bicameral legislature on some standard other than population. But the amendment failed both times to get the required two-thirds vote, failing fifty-seven to thirty-nine in 1965 and fifty-five to thirty-eight in 1966.

A more extraordinary effect of the rulings in *Baker v. Carr* and *Reynolds v. Sims* was the activity generated in the state legislatures designed to reverse the Court's rulings by means of a constitutional amendment proposed by a convention convened under the second clause of article V. In December 1962, following *Baker v. Carr*, the Council of State Governments, at its Sixteenth Biennial General Assembly of the States, recommended that the state legislatures petition the Congress for a constitutional convention to propose three amendments, including an amendment to accomplish essentially the same purpose as the Tuck bill, that is, the denial to federal courts of original and appellate jurisdiction over state legislative apportionment cases. In response to this call, twelve state petitions were sent to the Congress during 1963 requesting a constitutional convention to propose such an amendment.[5] Although this was the largest number of petitions on the same subject ever received by the Congress in any one year, the total was far below the required thirty-four, and their receipt caused no excitement in the Congress and attracted no public attention.

In December 1964, following the decision in *Reynolds v. Sims,* the Seventeenth Biennial General Assembly of the States recommended that the state legislatures petition the Congress to convene a constitutional convention to propose an amendment along the lines of the Dirksen amendment, permitting the states to apportion one house of a bicameral legislature on some standard other than population. The response to this call was even greater than in 1963. Twenty-two states submitted constitutional convention petitions to Congress during the Eighty-ninth Congress (1965 and 1966) and four more during the first session of the Ninetieth Congress (1967). If one counted the petitions adopted by four other states, questionable in regard to their proper receipt by Congress,[6] this brought the total number of state petitions on the subject of state legislative apportionment to thirty-two.

At this point, March 1967, the situation attracted the first attention in the press. A *New York Times* story on March 18, 1967,[7] reported that only two more petitions were necessary to invoke the convention amendment procedure. The immediate reaction was a rash of newspaper editorials and articles, almost uniformly critical of the effort to obtain a convention, and a flurry of speeches on the subject in the Congress. Whether favorable or unfavorable to the efforts by the states, all of these press items and all of the congressional speeches had one common denominator. They all bore the obvious imprint of the authors' feelings about the merits of state legislative apportionment. Those newspapers that had editorially supported the Supreme Court's decisions now decried the states' "back-door assault on the Constitution."[8] Those newspapers that had criticized "one man-one vote" now applauded the effort by the state legislators to overrule the new principle by constitutional amendment. Much more disturbing to me was the fact that many of my colleagues in the Senate seemed to be influenced more by their views on the reapportionment issue than by concern for the need to answer objectively some of the perplexing constitutional questions raised by the states' action. Those Senators who had been critical of the "one man-one vote" decision and were eager to undo it now expressed the conviction that the Congress was obligated to call a convention when thirty-four petitions were on hand and that it had little power to judge the validity of state petitions. Those Senators who agreed with the Supreme Court's ruling were now contending that some or all of the petitions were invalid for a variety of reasons and should be discounted, and that, in any case, Congress did not have to call a convention if it did not wish to. Most distress-

ing of all was the apparent readiness of everyone to concede that any convention, once convened, would be unlimited in the scope of its authority and empowered to run rampant over the Constitution, proposing any amendment or amendments that happened to strike its fancy. That interpretation, supported neither by logic nor constitutional history, served the convenience of both sides in the apportionment controversy. Those who did not want to call a convention that might propose a reapportionment amendment pointed out that an open convention would surely be a constitutional nightmare. Opponents of "one man-one vote" cited the horrors of an open convention as an additional reason for proposal of a reapportionment amendment by the Congress.

My conviction was that the constitutional questions involved were far more important than the reapportionment issue that had brought them to light, and that they should receive more orderly and objective consideration than they had so far been accorded. Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment — and I am admittedly a partisan on that issue — should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process. Any congressional action on this subject would be a precedent for the future, and the unseemly squabble that had already erupted was to me a certain indication that only bad precedents could result from an effort to settle questions of procedure under article V simultaneously with the presentation of a substantive issue by two-thirds of the states. Although it is not easy to anticipate all of the problems that may develop in the convention amendment process, nor to deal with those problems wisely in the abstract, I nevertheless felt that the wisest course would be to consider and enact permanent legislation to implement the convention amendment provision in article V.

I introduced S. 2307 on August 17, 1967. In my statement accompanying introduction, I stressed that I was not committed to the provisions of the bill as then drafted. I was convinced only of the necessity for action on the subject, action that might forestall a congressional choice between chaos on the one hand and refusal to abide the commands of article V on the other. Open hearings on the bill were held on October 30 and 31, 1967, before the Senate Subcommitte on Separation of Powers. The testimony revealed deficiencies in the bill and suggested modifications and additions. As a result, I have subsequently amended the bill in several respects.

In discussing specific questions raised by the bill, I shall describe the relevant provision of the original draft and note the amendments made since the hearings.

III. Questions Raised by the Bill

Before going to specific issues and matters of detail, it seems appropriate to discuss briefly two threshold problems posed by the bill: whether the Congress has the power to enact such legislation, and, if it does, what policy considerations should guide it in exercising such power.

I have no doubt that the Congress has the power to legislate about the process of amendment by convention. The Congress is made the agency for calling the convention, and it is hard to see why the Congress should have been involved in this alternative method of proposal at all unless it was expected to determine such questions as when sufficient appropriate applications had been received and to provide for the membership and procedures of the convention and for review and ratification of its proposals. Obviously the fifty state legislatures cannot themselves legislate on this subject. The constitutional convention cannot do so for it must first be brought into being. All that is left, therefore, is the Congress, which, in respect to this and other issues not specifically settled by the Constitution, has the residual power to legislate on matters that require uniform settlement. Add to this the weight of such decisions as *Coleman v. Miller*,[9] to the effect that questions arising in the amending process are nonjusticiable political questions exclusively in the congressional domain, and the conclusion seems inescapable that the Congress has plenary power to legislate on the subject by amendment by convention and to settle every point not actually settled by article V of the Constitution itself.

With respect to the second problem, within what general policy limitations that power should be exercised, I think the Congress should be extremely careful to close as few doors as possible. Any legislation on this subject will be what might be called "quasi-organic" legislation; in England it would be recognized as a constitutional statute. When dealing with such a measure, it is wise to bear in mind Marshall's well-worn aphorism that it is a Constitution we are expounding and not get involved in "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must [be] seen dimly, and which can best be provided for as they occur."[10] This approach is reflected at several points in the bill, notably in its failure to try to anticipate and enumerate the various

grounds on which Congress might justifiably rule a state petition invalid, and its failure to prescribe rigid rules of procedure for the convention. In addition, I think the Congress, in exercising its power under article V, should bear in mind that the Framers meant the convention method of amendment to be an attainable means of constitutional change. This legislation can be drawn so as to place as many hurdles as possible in the way of effective use of the process; or it can be drawn in a manner that will make such a process a possible, however improbable, method of amendment. The first alternative would be a flagrant disavowal of the clear language and intended function of article V. I have assumed that the Congress will wish to take the second road, and the bill is drawn with that principle in mind.

Open or Limited Convention?

Perhaps the most important issue raised by the bill is the question of the power of the Congress to limit the scope and authority of a convention convened under article V in accordance with the desires of the states as set forth in their applications. This was, as I have noted, one of the issues that most troubled me when I first heard of the efforts by the states to call a convention.

It has been argued that the subject matter of a convention convened under article V cannot be limited, since a constitutional convention is a premier assembly of the people, exercising all the power that the people themselves possess, and therefore supreme to all other governmental branches or agencies. Certainly, according to this argument, the states may not themselves, in their applications, dictate limitations on the convention's deliberations. They may not require the Congress to submit to the convention a given text of an amendment, nor even a single subject or idea. For the convention must be free to "propose" amendments, which suggests the freedom to canvass matters afresh and to weigh all possibilities and alternatives rather than ratify a single text or idea. The states may in their applications specify the amendment or amendments they would hope the convention would propose. But once the Congress calls the convention, those specifications would not control its deliberations. The convention could not be restricted to the consideration of certain topics and forbidden to consider certain other topics, nor could it be forbidden to write a new constitution if it should choose to do so.

I will concede that such an interpretation can be wrenched from article V — but only through a mechanical and literal reading of the words of the article, totally removed from the context of their

promulgation and history. My reading of the debates on article V at the Philadelphia Convention and the other historical materials bearing on the intended function of the amendment process[11] leads me to the opposite conclusion. As I understand the debates, the Founders were concerned, first, that they not place the new government in the same straitjacket that inhibited the Confederation, unable to change fundamental law without the consent of every state. The amendment process, rather a novelty for the time, was therefore included in the Constitution itself. Second, the final form of article V was dictated by a major compromise between those delegates who would utilize the state legislatures as the sole means of initiating amendments and those who would lodge that power exclusively in the national legislature. The forces at the convention that sought to limit the power of originating amendments to the states were at first dominant. The original Virginia Plan, first approved by the convention, excluded the national legislature from participation in the amendment process. On reconsideration, the forces that would limit the power of origination of amendments to the national legislature became prevalent. The arguments on both sides were persuasive: the improprieties or excess of power in the national government would not likely be corrected except by state initiative, while improprieties by the state governments or deficiencies in national power would not likely be corrected except by national initiative. In the spirit that typified the 1787 Convention, the result was acceptance of a Madison compromise proposal which read, as the final article was to read, in terms of alternative methods.

It is clear that neither of the two methods of amendment was expected by the Framers to be superior to the other or easier of accomplishment. There is certainly no indication that the national legislature was intended to promote individual amendments while the state legislatures were to be concerned with more extensive revisions. On the contrary, there is strong evidence that what the members of the convention were concerned with in both cases was the power to make specific amendments. They did not appear to anticipate a need for a general revision of the Constitution. And certainly this was understandable, in light of the difficulties that they had in finding the compromises to satisfy the divergent interests needed for ratification of their efforts. Provision in article V for two exceptions to the amendment power[12] underlines the notion that the convention anticipated specific amendment or amendments rather than general revision. For it is doubtful that these exceptions could have been expected to control a later general revision.

This construction is supported by references to the amendment process in the *Federalist Papers*. In *Federalist No. 43*, James Madison explained the need and function of article V as follows:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as as they may be pointed out by the experience on one side or on the other.

Hamilton, in *Federalist No. 85*, was even more emphatic in pointing out the possibility of specific as well as general amendment of the Constitution on the initiative of the state legislatures:

> But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place.

Apart from being inconsistent with the language and history of article V, the contention that any constitutional convention must be a wide open one is neither a practicable nor a desirable one. If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the states to call for a convention in the absence of a general discontent with the existing constitutional system. This construction would effectively destroy the power of the states to originate the amendment of errors pointed out by experience, as Madison expected them to do. Alternatively, under that construction, applications for a limited convention deriving in some states from a dissatisfaction with the school desegregation cases, in others because of the school prayer cases, and in still others by reason of objection to the *Miranda* rule, could all be combined to make up the requisite two-thirds of the states needed to meet the requirements of article V. I find it hard to believe that this is the type of consensus that was thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date — and there are a large number of them — should be added up to see whether, in what is considered an appropriate span of time, two-thirds of the states have made demands for a constitutional convention to propose amendments, no matter the

cause for applications or the specifications contained in them. Moreover, once such a convention were convened, it could refuse to consider any of the problems or subjects specified in the states' applications, and instead propose amendments on other subjects or rewrite the Constitution in a manner unacceptable to any of the applicant states.

My construction of article V, with reference to the initiation of the amendment procedure by the state legislatures, is consistent with the literal language of the article as well as its history, and is more desirable and practicable than the alternative construction. As I see it, the intention of article V was to place the power of initiation of amendments in the state legislatures. The function of the convention was to provide a mechanism for effectuating this initiative. The role of the states in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be called by reason of such action by the states would then be to decide whether the problem called for correction by constitutional amendment and, if so, to frame the amendment itself and propose it for ratification as provided in article V. The bill carries out this intention in keeping not only with the letter but also with the spirit of article V.

The bill provides that state petitions to the Congress which request the calling of a convention under article V shall state the nature of the amendment or amendments to be proposed by such convention. Upon receipt of valid applications from two-thirds or more of the states requesting a convention on the same subject or subjects, the Congress is required to call a convention by concurrent resolution, specifying in the resolution the nature of the amendment or amendments for the consideration of which the convention is being called. The convention may not propose amendments on other subjects and, if it does, the Congress may refuse to submit them to the states for ratification.

Under the provisions, the states could not require the Congress to submit to a convention a given text of an amendment, demanding an up or down vote on it alone. But they could require the Congress to submit a single subject or problem, demanding action on it alone. They could not, however, define the subject so narrowly as a deprive the convention of all deliberative freedom. To use the reapportionment issue as an example, the states could not require the Congress to call a convention to accept or reject the exact text of the reapportionment amendment recommended by the Coun-

cil of State Governments, for then the convention would be merely a ratifying body. But they could properly petition for a convention to consider the propriety of proposing a constitutional amendment to deal with the reapportionment problems raised by the Supreme Court decision, defining those problems in specific terms. The convention would then be confined to that subject, but it would be free to consider the propriety of proposing any amendment and the form the amendment should take — that of the Dirksen proposal, the Tuck proposal, or some other form. To take another example, those states which might desire a convention to deal with the *Escobedo-Miranda* issue could phrase their petitions generally in terms of the problem of federal control over the criminal processes of the states. The convention would then be confined to that subject, but would nevertheless have great deliberative freedom to canvass all possible solutions and propose whatever amendment or amendments it deemed appropriate to respond to the problems identified by the states.

I am convinced that these provisions of the bill fully accord with the mandate of article V, its history, and intended function.

May Congress Refuse to Call a Convention?

Perhaps the next most important question raised by the bill is whether the Congress has any discretion to refuse to call a convention in the face of appropriate applications from a sufficient number of states.

Article V states that Congress "shall" call a convention upon the applications of the legislatures of two-thirds of the states. I have absolutely no doubt that the article is peremptory and that the duty is mandatory, leaving no discretion to the Congress to review the wisdom of the state applications. Certainly this is the more desirable construction, consonant with the intended arrangement of article V as described in the preceding section of this article. The founders included the convention alternative in the amending article to enable the states to initiate constitutional reform in the event the national legislature refused to do so. To concede to the Congress any discretion to consider the wisdom and necessity of a particular convention call would in effect destroy the role of the states.

The comments of both Madison and Hamilton, subsequent to the 1787 Convention, sustain this construction. In a letter on the subject, Madison observed that the question concerning the calling of a convention "will not belong to the Federal Legislature. If two-thirds of the states apply for one, Congress cannot refuse to call it:

if not, the other mode of amendments must be pursued."[13] Hamilton, in the *Federalist No. 85*, stated:

> By the fifth article of the plan the congress will be *obliged*, "on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion.

It has been argued forcefully that, notwithstanding the language of article V, the Congress need not call a convention if it does not wish to do so, and that, in any event no legislation such as this can commit a future Congress to call a convention against its judgment. This argument is based on the premise that although article V provides that Congress "shall" call a convention if enough states apply, this word may be interpreted to mean "may" for all practical purposes, since the courts are not apt to try to enforce the obligation if Congress wishes to evade it. I cannot accept such a flagrant disregard of clear language and purpose.

Although it may be true that no legislation by one Congress can bind a subsequent Congress to vote for a convention, and that the courts will not intervene, it is my strong feeling that the bill should recognize the fact that the Congress has a strict constitutional duty to call a convention if a sufficient number of proper applications are received. The bill does this by providing that it shall be the duty of both houses to agree to a concurrent resolution calling a convention whenever it shall be determined that two-thirds of the state legislatures have properly petitioned for a convention to propose an amendment or amendments on the same subject. Concededly, the Congress cannot be forced by the courts or by the provisions of this bill to vote for a particular convention. However, every member has taken an oath to support the Constitution, and I cannot believe a majority of the Congress will choose to ignore its clear obligation, I would hope, moreover, that this bill will facilitate the path to congressional action by underlining the obligation of the Congress to act.

Sufficiency of State Applications

Assuming the Congress may not weigh the wisdom and necessity of state applications requesting the calling of a constitutional convention, does it have the power to judge the validity of state applica-

tions and state legislative procedures adopting such applications? Clearly the Congress has some such power. The fact alone that Congress is made the agency for convening the convention upon the receipt of the requisite number of state applications suggests that it must exercise some power to judge the validity of those applications. The impotence or withdrawal of the courts underlines the necessity for lodging some such power in the Congress. The relevant question, then, concerns the extent of that power.

It has been contended that Congress must have broad powers to judge the validity of state applications and that such power must include the authority to look beyond the content of an application, and its formal compliance with article V, to the legislative procedures followed in adopting the application. The counterargument is that to grant Congress the power to reject applications, particularly if that power is not carefully circumscribed, would be to supply it with a means of avoiding altogether the obligation to call a convention. The result would be that the Congress could arbitrarily reject all applications on subjects it did not consider appropriate for amendment, leaving us in effect with only one amendment process.

In drafting the bill I was mainly concerned with limiting the power of the Congress to frustrate the initiative of the states, particularly since the debate on the Senate floor at the time indicated that some Senators were inclined to seize on any slight irregularity in a petition as a basis for not counting it. My bill, as introduced, therefore set forth only requirements as to the content of state applications, leaving questions of legislative procedure for determination solely by the individual states, with their decisions made binding on the Congress and the courts. However, I think the hearing amply demonstrated the danger of disabling the Congress from reviewing the procedural validity of state petitions. In general, state legislatures ought to be masters of their own procedures. But this is a federal function that they would be performing, and the Congress should retain some power uniformly to settle the questions of irregularity that might arise. The bill has therefore been amended to remove the disability of the Congress to review legislative procedures. Under the amended bill, Congress would retain broad powers in this respect, indeterminate and unforeseeable in nature, but to be exercised, I would hope, rarely and with restraint.

It might be well to say something at this point on a question that is much debated: whether a legislature that has been held to be malapportioned, or that is under a decree requiring it to reap-

...tion and perhaps qualifying its powers in some measure before reapportionment, can validly pass a resolution for a constitutional convention. I should think in general that it could, unless an outstanding decree forbids it to do so, either specifically or by mention of some analogous forbidden function. To open to congressional review the question of the propriety of state legislative composition would be to open a Pandora's box of constitutional doubts about the validity even of the Fourteenth Amendment.

However, the bill does not expressly answer this question. This is one of the many questions of irregularity on which the Congress will have to work its will should the question be squarely presented in the form of thirty-four state applications including some passed by malapportioned legislatures.

One further important point should be mentioned. Most of the states obviously do not now understand their role in designating subjects or problems for resolution by amendment, and many of them do not even know where to send their applications. By setting forth the formal requirements with respect to content of state applications and designating the congressional officers to whom they must be transmitted, the bill furnishes guidance to the states on these questions and promises to avert in the future some of the problems that have arisen in the current effort to convene a convention. The bill also requires that all applications received by the Congress be printed in the *Congressional Record* and that copies be sent to all members of Congress and to the legislature of each of the other states. In this way, the element of congressional surprise can be eliminated, and each state can be given prompt and full opportunity to join in any call for a convention in which it concurs.

The Role of State Governors

The argument has been made that a state application for a constitutional convention must be approved by both the legislature and the governor of the state to be effective. This argument rests on the claim that article V intended state participation in the process to involve the whole legislative process of the state as defined in the state constitution. I do not agree with that argument. We do not have here any question about the exercise of the lawmaking process by a state legislature in combination with whatever executive participation might be called for by state law. We have rather a question of heeding the voice of the people of a state in expressing the possible need for a change in the fundamental document. It seems clear to me that the Founders properly viewed the state legislatures

as the sole representative of the people on such a matter, since the executive veto, a carryover from the requirement of royal assent, was not regarded as the expression of popular opinion at the time of the 1787 Convention. And, to resort to the kind of literalism invoked by others as appropriate for construction of other provisions of article V, the language of the article definitely asserts that the appropriate applications are to come from "legislatures."

Closely analogous court decisions support this interpretation. The Supreme Court in *Hawke v. Smith, No. 1*[14] interpreted the term "legislatures" in the ratification clause of article V to mean the representative lawmaking bodies of the states, since ratification of a constitutional amendment "is not an act of legislation within the proper sense of the word."[15] Certainly the term "legislature" should have the same meaning in both the application clause and the ratification clause of article V. Further support is found in the decision in *Hollingsworth v. Virginia,*[16] in which the Court held that a constitutional amendment approved for proposal to the states by a two-thirds vote of Congress need not be submitted to the President for his signature or veto.

The bill therefore provides specifically that a state application need not be approved by the state's governor in order to be effective.

May a State Rescind Its Applications?

The question of whether a state should be allowed to rescind an application previously forwarded to the Congress is another of the political questions to which the courts have not supplied answers and presumably cannot. The Supreme Court has held that questions concerning the rescission of prior ratifications or rejections of amendments proposed by the Congress are determined solely by Congress.[17] Presumably, then, the question of rescission of an application for a convention is also political and nonjusticiable. Although the Congress has previously taken the position that a state may not rescind its prior ratification of an amendment, it has taken no position concerning rescission of applications. My strong conviction is that rescission should be permitted. Since a two-thirds consensus among the states at some point in time is necessary in order for the Congress to call a convention, the Congress should consider whether there has been a change of mind among some states that have earlier applied. Moreover, an application is not a final action, since it serves merely to initiate a convention, and does not commit even the applicant state to any substantive amendment that might eventually be proposed.

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The bill therefore provides that a state may rescind at any time before its application is included among an accumulation of applications from two-thirds of the states, at which time the obligation of the Congress to call a convention becomes fixed. Incidentally, the bill also provides that a state may rescind its prior ratification of an amendment proposed by the convention up until the time there are existing valid ratifications by three-fourths of the states, and that a state may change its mind and ratify a proposed amendment that it previously has rejected.

Another much debated point concerning state applications for a constitutional convention is timing. In order to be effective to mandate the Congress to act, within how long a period must applications be received from two-thirds of the state legislatures? Article V is silent on this question, and neither the Congress nor the courts has supplied an answer.

The Congress and the courts have agreed that constitutional amendments proposed by the Congress and submitted to the states for ratification can properly remain valid for ratification for a period of seven years. It has been felt that there should be a "reasonably contemporaneous" expression by three-fourths of the states that an amendment is acceptable in order for the Congress to conclude that a consensus in favor of the amendment exists among the people, and that ratification within a seven-year period satisfies this requirement.[18] Presumably, the same principle should govern the application stage of the constitutional amendment process. If so, the Congress would not be required, nor empowered, to call a convention unless it received "relatively contemporaneous" valid applications from the necessary number of states. This rule seems sensible. The Constitution contemplates a concurrent desire for a convention on the part of the legislatures of a sufficient number of states, and such a concurrent desire can scarcely be said to exist, or to reflect in each state the will of the people, if too long a period of time has passed from the date of enactment of the first application to the date of enactment of the last. It is true that legislatures are free under the bill to change their minds and rescind their applications; but the passage of a repealer is a different and more difficult political act than the defeat, starting fresh, of an application calling for a constitutional convention. The fact, therefore, that a legislature has not rescinded an application calling for a convention is an insufficient indication that the state in question, after the passage of a long period of time, still favors the calling of a convention.

What, then, is a proper period during which tendered applications are sufficiently contemporaneous to be counted together? Some Senators and scholars have suggested that two years, the lifetime of a Congress, would be a reasonable period. Others have suggested that petitions should remain valid for a generation. My feeling when I drafted the bill was that six years would be a reasonable compromise. However, the hearings revealed a general disposition among the witnesses to agree on a four-year period. Since this would be long enough to afford ample opportunity to all the state legislatures to join in the call for a convention — particularly in view of the requirement in the bill that all other states be given immediate notice of any application received by the Congress — I have concluded that a four-year period is preferable.

The bill has therefore been amended to provide that an application shall remain valid for four years after receipt by the Congress unless sooner rescinded. The bill also provides that rescission must be accomplished by means of the same legislative procedures followed in adopting the application in question, and that the Congress retains power to judge the validity of those proceedings.

Calling the Convention

The bill provides that the Secretary of the Senate and the Clerk of the House of Representatives shall keep a record of the number of state applications received, according to subject matter. Whenever two-thirds of the states have submitted applications on the same subject or subjects, the presiding officer of each house shall be notified and shall announce the same on the floor. Each house is left free to adopt its own rules for determining the validity of the applicants, presumably by reference to a committee followed by floor action. Once a determination has been made that there are valid applications from two-thirds or more of the state legislatures on the same subject or subjects, each house must agree to a concurrent resolution providing for the convening of a constitutional convention on such subject or subjects. The concurrent resolution would designate the place and time of meeting of the convention, set forth the nature of the amendment or amendments the convention is empowered to consider and propose, and provide for such other things as the provision of funds to pay the expenses of the convention and to compensate the delegates. The convention would be required to be convened not later than one year after adoption of the resolution.

As introduced, the bill required the Congress to designate in the concurrent resolution convening a convention the manner in which

any amendments proposed by the convention must be ratified by the states and the period within which they must be ratified or deemed inoperative. Testimony at the hearings suggested that these determinations might properly be influenced by the nature of the amendments proposed and that they should therefore not be required to be made at the time the convention is called. For example, certain proposed amendments might call for ratification by state conventions rather than state legislatures, and certain circumstances might indicate a shorter or longer period than usual during which ratification should take place. The Congress should be able to make those decisions after it has the convention's proposals. The bill therefore has been amended to so provide.

The bill as introduced provided that each state should have as many delegates as it is entitled to representatives in Congress, to be elected or appointed as provided by state law. However, the hearings revealed a general feeling that the national interest is too closely affected to permit each state to decide how its delegates to a national constitutional convention shall be elected, or, indeed, appointed. For this reason, the bill has been amended to require that delegates be elected — not appointed — and that they be elected by the same constituency that elects the states' representatives in Congress. Under the amended bill, each state will be entitled to as many delegates as it is entitled to Senators and Representatives in Congress. Two delegates in each state will be elected at large and one delegate will be elected from each congressional district in the manner provided by state law. Vacancies in a state's delegation will be filled by appointment of the governor.

Convention Procedure and Voting

The bill provides that the Vice President of the United States shall convene the constitutional convention, administer the oath of office of the delegates and preside until a presiding officer is elected. The presiding officer will then preside over the election of other officers and thereafter. Further proceedings of the convention will be in accordance with rules adopted by the convention. A daily record of all convention proceedings, including the votes of delegates, shall be kept, and shall be transmitted to the Archivist of the United States within thirty days after the convention terminates. The convention must terminate its proceedings within one year of its opening unless the period is extended by the Congress by concurrent resolution.

As introduced, the bill provided that each state should have one

vote on all matters before the convention, including the proposal of amendments. This was decided upon in deference to the method followed in the 1787 Convention rather than from a conviction that this would be the necessarily proper procedure in conventions called under article V. On the basis of the testimony presented at the hearings, I have decided that unit voting would not be appropriate for such conventions. The reasons for unit voting in the 1787 Convention were peculiar to the background against which that convention worked and are not valid today. Moreover, the states, as units, will have equal say in the ratification process. It seems appropriate, therefore, to recognize the interests of majority rule in the method of proposing amendments. Hence, the bill has been amended to provide that each state delegate shall have one vote so that the voting strength of each state will be in proportion to its population.

Finally, the bill provides that amendments may be proposed by the convention by a vote of a majority of the total number of delegates to the convention. The alternative would be to impose a two-thirds voting requirement analogous to the requirement for congressional proposal of amendments. However, article V does not call for this, and I think that such a requirement would place an undue and unnecessary obstacle in the way of effective utilization of the convention amendment process.

Ratification of Proposed Amendments

The bill provides that any amendment proposed by the convention must be transmitted to the Congress within the thirty days after the convention terminates its proceedings. The Congress must then transmit the proposed amendment to the Administrator of General Services for submission to the states. However, the Congress may, by concurrent resolution, refuse to approve an amendment for submission to the states for ratification, on the grounds of procedural irregularities in the convention or failure of the amendment to conform to the limitations on subject matter imposed by the Congress in the concurrent resolution calling the convention. The intent is to provide a means of remedying a refusal by the convention to abide by the limitations on its authority to amend the Constitution. Of course, unlimited power in the Congress to refuse to submit proposed amendments for ratification would destroy the independence of the second alternative amending process. Therefore, the Congress is explicitly forbidden to refuse to submit a proposed amendment for ratification because of doubts about the merits of its substantive provisions. The power is reserved for use only with respect to amend-

ments outside the scope of the convention's authority or in the case of serious procedural irregularities.

Ratification by the states must be by state legislative action or convention, as the Congress may direct, and within the time period specified by the Congress. The Congress retains the power to review the validity of ratification procedures. As noted earlier, any state may rescind its prior ratification of an amendment by the same processes by which it ratified it, except that no state may rescind after that amendment has been validly ratified by three-fourths of the states. When three-fourths of the states have ratified a proposed amendment, the Administrator of General Services shall issue a proclamation that the amendment is a part of the Constitution, effective from the date of the last necessary ratification.

IV. Conclusion

There is some evidence that the current effort to require the Congress to call a convention to propose a reapportionment amendment has failed and that the danger of a constitutional crisis has passed. The two additional applications needed to bring the total to thirty-four have not been received and there is a strong likelihood that some applicant states will rescind their applications. Even if this is the case, however, the need for legislation to implement article V remains. There may well be other attempts to utilize the convention amendment process and, in the absence of legislation, the same unanswered questions will return to plague us. The legislation therefore is still timely, and the Congress may now have the opportunity to deal with the sensitive constitutional issues objectively, uninfluenced by competing views on state apportionment or any other substantive issue.

Some have argued that the convention method of amendment is an anomaly in the law, out of step with modern notions of majority rule and the relationship between the states and the federal government. If so, that part of article V should be stricken from the Constitution by the appropriate amendment process. It should not, however, be undermined by erecting every possible barrier in the way of its effective use. Such a course would be a disavowal of the clear language and history of article V. The Constitution made the amendment process difficult, and properly so. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to conclude that the Founders intended that amendments originating in the states should have so much harder a time of it than those proposed by Congress. As I have pointed out, that issue

was fought out in 1787 Convention and resolved in favor of two originating sources, both difficult of achievement, but neither impossible and neither more difficult than the other. My bill seeks to preserve the symmetry of article V by implementing the convention alternative so as to make it a practicable but not easy method of constitutional amendment.

NOTES

1. The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. *U.S. Const. Art. V.*

2. The text of the bill, as amended, is set forth as an appendix to this Article. As of this writing, the amended bill has not been approved by the Committee on the Judiciary. The reported bill may include additional amendments.

3. 369 U.S. 186 (1962).

4. 377 U.S. 533 (1964).

5. Copies of the applications referred to herein are on file in the offices of the Committees on the Judiciary of the United States Senate and House of Representatives.

6. New Hampshire, Colorado, Utah, and Georgia have adopted applications, but copies are not on file with the Senate and House Judiciary Committees.

7. The New York *Times*, March 18, 1967 (city ed.), at 1, col. 6.

8. Editorial, The Washington *Post*, March 21, 1967, at A-10, col. 1.

9. 307 U.S. 433 (1939).

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

11. *E.g.*, LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA; ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 135-36 (1964); THE FEDERALIST NOS. 43 & 85 (J. Cooke ed. 1961); L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION (1942); THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1937). The relevant excerpts from these and other sources are printed as an appendix to the *Hearings on the Federal Constitutional Convention Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, United States Senate, Oct. 30 and 31, 1967.

12. *See* the text of Art. V quoted in note 1 *supra.*

13. U.S. BUREAU OF ROLLS AND LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA V, 141, 143, *quoting* Madison's letter to Mr. Eve, dated Jan. 2, 1789.

14. 253 U.S. 221 (1920).

15. *Id.* at 229.

16. 3 U.S. (3 Dall.) 378 (1798).

17. *Coleman v. Miller*, 307 U.S. 433, 448-49 (1939).

18. *Dillon v. Gloss*, 256 U.S. 368 (1921).

Bill S. 2307

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Federal Constitution Convention Amendment Act."

Applications for Constitutional Convention

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and stating the nature of the amendment or amendments to be proposed.

Application Procedure

SEC. 3(a) For the purpose of adopting or rescinding a resolution pursuant to section 2, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, but without the need for approval of the legislature's action by the governor of the State.

(b) Questions concerning the State legislature procedure and the validity of the adoption of a State resolution cognizable under this Act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts.

Transmittal of Applications

SEC. 4(a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution.

(2) the exact text of the resolution, signed by the presiding officer of each house of the State legislature, and

(3) the date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets for the text of the resolution.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Represen-

tatives shall report to the House of which he is presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall cause copies of such application to be sent to the presiding officer of each House of the legislature of every other State and to each member of the Senate and House of Representatives of the Congress of the United States.

Effective Period of Applications

SEC. 5(a) An application submitted to the Congress by a State pursuant to this Act, unless sooner rescinded by the State legislature, shall remain effective for four calendar years after the date it is received by the Congress, except that whenever the Congress determines that within a period of four calendar years two-thirds or more of the several States have each submitted a valid application calling for a constitutional convention on the same subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 8, calling for a constitutional convention.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission in conformity with the procedure specified in sections 3 and 4, except that no such rescission shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject.

(c) Questions concerning the rescission of a State's application shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

Calling of a Constitutional Convention

SEC. 6(a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever the Secretary or the Clerk has reason to believe that valid applications made by two-thirds or more of the States with respect to the same subject are in effect, he shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce upon the floor of the House of which he is an officer the substance of such report. Pursuant to such rules as such House may adopt, it shall be the duty of such House to determine whether the recitation contained in any such report is correct. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the

calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention; (2) set forth the nature of the amendment or amendments for the consideration of which the convention is called; and (3) authorize the appropriation of moneys for the payment of all expenses of the convention, including the compensation of delegates and employees. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the presiding officer of each House of the Legislature of each State.

(b) The convention shall be convened not later than one year after the adoption of the resolution.

Delegates

SEC. 7(a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each Congressional district in the manner provided by State law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefore in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

Convening the Convention

SEC. 8(a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe an oath not to attempt to change or alter any section, clause or article of the Constitution or propose additions thereto except in conformity with the concurrent resolution calling the convention. Upon the election of permanent officers of the convention, the names of such officers

shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) The Congress shall appropriate moneys for the payment of all expenses of the convention.

(c) Under such regulations as the President shall prescribe, the Administrator of General Services shall provide such facilities, and each executive department and agency shall provide such information, as the convention may require, upon written request made by the elected presiding officer of the convention.

Procedures of the Convention

SEC. 9(a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The votes of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

Proposal of Amendments

SEC. 10(a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of a majority of the total number of delegates to the convention.

(b) No convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including state and Federal courts.

Approval by the Congress and Transmittal to the States for Ratification

SEC. 11(a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit the exact text of any amendment or amendments agreed upon by the convention to the Congress for approval and transmittal to the several States for their ratification.

(b) The Congress, before the expiration of the first period of

three months of continuous session following receipt of any proposed amendment, shall, by concurrent resolution, transmit such proposed amendment to the States for ratification, prescribing the time within which such amendment shall be ratified or deemed inoperative and the manner in which such amendment shall be ratified in accordance with Article V of the Constitution: *Provided,* that, within such period, the Congress may, by concurrent resolution, disapprove the submission of the proposed amendment to the States for ratification on the ground that its general nature is different from that stated in the concurrent resolution calling the convention or that the proposal of the amendment by the convention was not in conformity with the provisions of this Act: *Provided* further, that the Congress shall not disapprove the submission of a proposed amendment for ratification by the States because of its substantive provisions.

(c) If, upon the expiration of the period prescribed in the preceding subsection, the Congress has not adopted a concurrent resolution transmitting or disapproving the transmittal of a proposed amendment to the States for ratification, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such proposed amendment to the Administrator of General Services for submission to the States. The Administrator of General Services shall transmit exact copies of the same, together with his certification thereof, to the legislatures of the several States.

Ratification of Proposed Amendments

SEC. 12(a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the State legislatures shall adopt their own rules of procedure. Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Any proposed amendment transmitted to the States pursuant to the provisions of section 11(c) of this Act shall be ratified by the legislatures of three-fourths of the several States within seven years of the date of transmittal or be deemed inoperative.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

Rescission of Ratifications

SEC. 13(a) Any State may rescind its ratification of a proposed

amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

Proclamation of Constitutional Amendments

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

Effective Date of Amendments

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

The Convention Method of Constitutional Amendment: Its Meaning, Usefulness, and Wisdom

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(Comm. on Ways & Means, Calif. State Assembly, February 15, 1979

The Convention Method of Constitutional Amendment: Its Meaning, Usefulness and Wisdom

One of the great American innovations at the founding of our Republic was a Constitution which could be amended. At the time "it was heresy to suggest the possibility of change in governments divinely established and ensured."[1] To provide in the written instrument itself for change was to take the position in advance that experience would show defects, that change would sometimes be desirable and good, and that the people of the next generation or the twelfth generation later could be as wise and trustworthy as the founding fathers themselves.

The Meaning of the Method

Two methods of amendment were provided. One was dependent on the initiative of Congress, the other on the initiative of the States. The methods were intended to be parallel ways of changing the Constitution. In Madison's words in *The Federalist* the Article on Amendments "equally enables the general and the State governments to originate the amendment of errors."[2] It was recognized that those in power in the national government might have a disinclination to give up any of their prerogatives, so that it was particularly necessary to leave open the initiative of the States; and so Hamilton pointed out in his Final Plea for Ratification in *The Federalist*, the second method of Amendment had been provided in order that Congress would be under a "peremptory" duty to call a Convention when two-thirds of the States made application for one.[3]

You have been told that the second method of amendment provided by Article V of the Constitution is unworkable; that it is "shrouded in legal mystery of the most fundamental sort," that it is full of "fundamental uncertitudes," that it will lead to confrontations between branches of government of "nightmarish dimensions," and that its invocation will lead to trauma for the country.[4] Reading these prophecies of doom, I have been reminded

of what an inveterate Tory might have pronounced in 1789 as our new Constitution was launched. Every word — legal mystery, fundamental incertitudes, confrontations between branches of government — could have been used and would in some sense have been true; but what distrust of popular government it would have been to act on such gloomy guesses! What distrust it shows today both in the wisdom of the founding fathers who gave us Article V and in ourselves to predict that we cannot safely use the second great mode of amendment offered by our Constitution.

The principal objection offered to the convention method is that a Convention may be a runaway body enacting Amendments on all kinds of matters not within its call. In the most flamboyant expositions of this danger it is even suggested that the Convention could repeal the Bill of Rights. Is there anything at all to such fears? The language of the Constitution is clear. Congress is to call a Convention on the application of the legislatures of the States. Congress is not free to call a Convention at its pleasure. It can only act upon the States' application; and if it can only act upon their application it cannot go beyond what they have applied for. If they apply for a Convention on a balanced budget Congress must call a Convention on a balanced budget. It cannot at its pleasure enlarge the topics. Nor can the Convention go beyond what Congress has specified in the call. The Convention's powers are derived from Article V and they cannot exceed what Article V specifies. The Convention meets at the call of Congress on the subject which the States have set out and Congress has called the Convention for.[5]

This understanding of the Article is confirmed by both Madison and Hamilton. Madison says explicitly that the national and State governments have equal powers of amendment.[6] It is obvious that the powers are very unequal if the national government can propose individual amendments but the States can only propose amendment of the whole Constitution. If Congress can propose one amendment at a time, so can the States. Hamilton is, if anything, even more explicit. He says in so many words that every amendment "would be a single proposition and might be forwarded singly. There would then be no necessity for management or compromise, in relation to any other point — no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular

amendment that amendment must infallibly take place."[7] There is absolutely nothing in this authoritative exposition that suggests that the States can only call a general Convention where the whole Constitution will be on the table to be bargained over. What is contemplated and assured by Article V is entirely different: two-thirds of the States agree on an amendment and "that amendment must infallibly take place."

There are no mysteries here, no fundamental incertitudes unless one is not willing to trust Congress and the Convention it calls to act lawfully and constitutionally. Of course one can always imagine bad men usurping the functions of a Convention as bad men could act as usurpers in Congress or the Executive Branch or the Judiciary. But the Constitution is not addressed to men of bad will. It is addressed to the great law-abiding American people. It assumes that responsible people will act in accordance with what the Constitution provides. If they do so, there can be no runaway Convention.

It has been argued to you by Professor Charles Black of Yale that States can *only* call general Conventions, that any lesser and more specific call is void. Professor Black is wiser than the legislatures of all the States which have acted under Article V in this century. All of them, according to his theory, have done vain acts. I cannot believe that only Professor Black knows what the Constitution means. I cannot believe that Congress or the Supreme Court would adopt his ingenious and unique exposition, which defies Hamilton and Madison's contemporaneous expositions of the meaning.

It has been argued to you by Professor Gerald Gunther of Stanford that not bad men but reasonable men could expand the subject of the proposed Amendment to include matters remote from the intention of the proposers. I do not doubt the ability of lawyers — and lawyers are preeminently reasonable men! — to connect one subject with another: they are trained in the art of showing seamless webs, just as they are trained in taking such webs apart. But Professor Gunther's sagacious argument goes too far. If, with a show of reason, almost any topic can be linked with any other topic, a limited Convention is never possible. In a subtle form Professor Gunther's argument restates Professor Black's position: only general Conventions may be asked for by the States. But this conclusion, *contra* Hamilton and Madison, is to leave the States

helpless to mandate action by Congress on the specific grievances.

The proper answer to Professor Gunther, therefore, must be that while reason can connect all things, when a Convention is called on a specific subject, all those subjects which are tangential and remote from the main issue must be eschewed by the Convention delegates. It is not beyond human wit to draw lines or beyond human sense to observe them. If the delegates wander, Congress need not transmit their wanderings. If irrelevancies are appended by a Convention, the States need not ratify them. If the States vote on matters not within the scope of the call, the Supreme Court can strike the surplusage. There is a triple check, a triple lock, of Congress, States, and Court. These bodies are surely competent to confine a Convention to the matter on which it was asked to act. The Convention is as safe and stable an instrument of governmental power as any other of the great institutions set up by the Constitution on a fundament of trust in the people.

The Usefulness of the Convention Method

The usefulness of the States' application for a Convention may be doubted because in fact a Convention has never been called. Is application for a Convention merely a way for a State legislature to blow off steam, harmlessly, without effect? In the almost two hundred years of our constitutional history there have been over 300 such applications by the States; every State has made at least one.[8] No doubt some of the applications were fulminations in the air without result. But at least three of the topics addressed by application were made the subjects of amendments by Congress — the limitation of presidential tenure to two terms; the repeal of Prohibition; and the direct election of senators. It is fair to say that in each case the expression of the will of the States for a Convention was a factor contributing to congressional action; and that in the case of the direct election of senators the application for a Convention was a critical factor.[9]

For a decade Congress had refused to amend the Constitution to take from the State legislatures the power to elect senators. The reform threatened a power bloc in the Senate. The House had proposed the amendment several times. But the Senate each time killed it by referral to a committee. In 1906, twelve states met and planned concerted action to apply for a Convention.[10] The number of States calling for a Convention rapidly mounted toward the

requisite two-thirds. In 1911 the proponents of reform laid the States' petitions before the Senate. It was at this juncture that Senator Heyburn of Idaho, whom Professor Laurence Tribe invokes as a constitutional authority, opined that a Convention could "repeal every section" of the Constitution. Heyburn was one of the diehard reactionaries, trying to scare off the needed change. But by 1911 thirty States had applied for a Convention on direct election. In 1912 the retrograde Senate surrendered and Congress proposed the Seventeenth Amendment.

The lessons are clear: A reform that strikes at the power of Congress may only be adopted if effective pressure is generated by the States. The way of generating effective pressure is the way provided by the Founding Fathers — application by the legislatures of the States for a convention.

The Wisdom of the Convention Method

You have heard testimony that it would "trivialize" the Constitution to propose an amendment requiring a balanced budget.[1] I am surprised at what your witness viewed as trivial. No one, I should suppose, regards the Sixteenth Amendment as setting up a trivial tax. It is very hard to understand how an Amendment dealing with the limits of governmental expenditures is more trivial than an Amendment granting one form of taxing power. It is evident to most people that the limits of governmental finance are fundamental to the economic stability of the nation and are as properly a subject of constitutional concern as any specific form of taxation.

You have also been advised that a Convention would cause national trauma. In that warning I hear the voices of those supremely content with the country as it is, who, if they do not believe the Constitution is divinely established, at least have for the present system sentiments of satisfaction which they do not want disturbed by any democratic action of the people. To them the best answer, perhaps, lies in the words of Abraham Lincoln speaking at a time of grave national peril and giving his First Inaugural Address:

> I fully recognize the rightful authority of the people over the whole subject [amendment of the Constitution], to be exercised in either of the modes prescribed in the instrument itself, and I should, under existing circumstances, favor, rather than oppose, a fair opportunity being [illegible]

> the people to act upon it. I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse . . .[12]

A method sanctioned by Lincoln, by Hamilton, by Madison, by Washington and Franklin, and by all the makers of the Constitution, and invoked from time to time by every state, is indeed a workable, useful, and wise way of keeping our Constitution a living instrument of the people.

NOTES

1. Roger Merriam, *The Written Constitution and the Unwritten Attitude* (1931) 6.
2. *The Federalist*, number 43 (Madison).
3. *Ibid.* number 85 (Hamilton).
4. Laurence Tribe, *Statement before the Ways and Means Committee of the Assembly*, February 1, 1979 at 12 and 14.
5. See the conclusions of the Special Constitutional Convention Study Committee of the American Bar Association, *Amendment of the Constitution* (1974) p. 17. Among the members of this committee reaching this unanimous conclusion were Judge Sarah Hughes of the Federal District Court and Dean Albert Sacks of Harvard Law School. The same conclusion is reached by Professor Paul G. Kauper of the University of Michigan Law School, "The Alternative Amendment Process: Some Observations," 64 *Michigan Law Review* 903 at 912 (1968) and by Note, *Harvard Law Review* 85 (1974) 1612 at 1629.
6. *The Federalist*, no. 43 (Madison).
7. *Ibid.* no. 85 (Hamilton).
8. ABA Special Constitutional Convention Study Committee, *Op. cit.* at 69.
9. See Edward S. Corwin and Mary Louise Ramsey, "The Constitutional Law of Constitutional Amendment," 26 *Notre Dame Lawyer* (1951) 185 at 196.
10. ABA Committee, 72.
11. Tribe, *Statement* at 3.
12. Abraham Lincoln, First Inaugural Address, March 4, 1861, Lincoln, *Collected Works*, ed. Roy P. Basler (New Brunswick: Rutgers University Press 1953) 4, 269-270.

DOES ARTICLE V RESTRICT THE STATES TO CALLING UNLIMITED CONVENTIONS ONLY?—A LETTER TO A COLLEAGUE

WILLIAM W. VAN ALSTYNE*

From time to time, various state legislatures have adopted resolutions designed to require Congress to call a limited convention in which one or another possible amendments to the Constitution might be proposed. In 1967, thirty-two states, two short of the requisite two-thirds, filed such resolutions requesting a convention for the purpose of considering an amendment to "overrule" the Supreme Court's principal reapportionment decisions. In 1971, Senator Ervin of North Carolina introduced a bill to provide guidelines to be followed upon a state call for a convention. This year, approximately twenty-eight states have adopted some kind of resolution for the purpose of considering an amendment to impose fiscal restraint upon the federal government—to require a "balanced budget."

Curiously, the convention mode of proposing amendments remains completely untested: no such convention has ever been assembled. Yet the amending convention obviously is contemplated by article V of the Constitution:

> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .*[1]

Several scholars, including Professors Charles L. Black, Jr.[2] *and Bruce A. Ackerman,*[11] *both of Yale Law School, have argued that unless the state legislative resolution reflects a desire to convoke a constitutional convention having the authority to propose an unlimited variety of fundamental changes in the Constitution, Congress should treat the state resolu-*

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1. U.S. CONST. art. V.
2. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972).
3. Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8.

tion as a nullity. Recently, Professor Ackerman sent Professor Van Alstyne a reprint of his New Republic *editorial and asked Professor Van Alstyne whether he had "any thoughts on this." The following is Professor Van Alstyne's reply. Footnotes have been added by the editors.*

March 9, 1979

Professor Bruce Ackerman
Yale Law School
New Haven, Connecticut

Dear Bruce,

I do have some thoughts, albeit very incomplete ones. By chance, your note and enclosure found me in the midst of reading old and musty material—Farrand, Elliot, Madison's Dairy, *The Federalist*, early congressional discussions, recollections from varieties of inputs into article V. This unglamorous exercise was occasioned by the very subject of the editorial you sent me and, more particularly, by a fresh reading of Charles Black's *Yale Law Journal* Letter on the same point.

I understand that the basic point being urged is this: unless Congress concludes that thirty-four states have submitted resolutions contemplating an unrestricted convention for proposing amendments, Congress should decline to "call a convention." A qualified or limited or restricted state legislative resolution, one which would display an unwillingness to have the convention free to consider and to propose whatever amendments it deems appropriate to be submitted for possible ratification, should be regarded by Congress as falling short of the requisite commitment by that state. A "qualified" application by a state legislature is, in contemplation of article V, no sufficient application at all.

Accordingly, even if, by chance, thirty-four state legislatures were to submit identically phrased qualified applications (*e.g.*, identically worded "single-item amendment agenda"), thus manifesting a concurrence and identical purpose to have that one proposal considered for full discussion and a flat up-or-down vote in convention, Congress should nonetheless, in fidelity to the requirements of article V, decline to call a convention. As each such resolution is incomplete insofar as it is thus qualified, each such resolution is no different than no resolution at all. As Charles puts it: thirty-four times zero is still zero.[4] I gather you agree. Disappointingly, I do not—although I do think a cogent argument can be made (as you and Charles have made it) which, by

4. Black, *supra* note 2, at 198.

being accepted, tends thus to fulfill itself and to pass into the received wisdom.

Before sharing with you my misgivings about this view of article V, however, let me quickly concede in what several respects the argument cannot be easily disposed of and, indeed, has very considerable plausibility. First, it goes without mention that I know of no judicial decisions that offer any resistance. Second, I have found *nothing* in the early materials I have been canvassing that specifically anticipates the argument or that specifically discredits it; a question in the form you and Charles have raised was, so far as I can determine, never raised at all. There is thus no expression of views, favoring it or deriding it. Third, the language of article V assuredly is not inconsistent with the argument and may, without uncommon strain, even be read as mildly implying the rightness of the argument. Fourth, as Charles notes,[5] insofar as a convention is seen as equivalent to Congress in its authority, the requirement of "equivalent" power to propose amendments favors the argument. Let me pause on these last two points before going on.

So far as text is concerned, the argument derives consistency, at the least, merely from noting: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[6] Congress, of course, has no limited agenda (and no limit*able* agenda) in respect to its proposing authority. Correspondingly, it may (as Charles has done) be nicely observed that a convention summoned in substitution of, or as an alternative or equivalent to, Congress ought not be conceived of as properly subject to constraints of any greater force: the convention cannot be confined in its authority any more than Congress may be so confined. A plausible argument derives from Charles' larger views of "structure and relation"[7]—a convention must relate to the amendment power as Congress is related to the same amendment power; they are but alternative forums in which either must have authority "for an *unconditional* reappraisal of constitutional foundations."[8]

Fifth, the nearest thing we have to "early practice" on the use of this mode to secure amendments is in no respect inconsistent with the argument; to the contrary, it is wholly consistent with the argument. The early practice I have in mind consists of such possibly interesting

5. *See id.*
6. U.S. CONST. art. V (emphasis added).
7. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
8. Ackerman, *supra* note 3, at 8 (emphasis added).

shards of history as these:

(a) Despite grumbling and protest that the Philadelphia Convention of 1787 had no authority to propose a wholly new Constitution or to propose it under terms of ratification plainly disallowed as an authorized mode for altering the Articles of Confederation, once assembled that Convention presumed to reach its own conclusion that something more than the subjects proposed for revision by the various state legislatures was called for. States nonetheless ratifying the resulting product have reason to understand, therefore, that since the Convention they sent delegates to in 1787 did not deem itself constrained by whatever particular or limited items that may have been of exclusive or particular interest to some of them, they are on historical notice (as it were) of the uncabinable discretion of such conventions. More to the point, insofar as ratifying conventions within those same states elected to ratify that Constitution despite the extent to which its proposals greatly exceeded the originally limited purposes for which delegates from some states were sent to that Convention, the states must correspondingly concede that, evidently, such conventions cannot properly be subject to limited-agenda constraints.

(b) Among the states ratifying the Constitution, a good number did so very reluctantly—principally, although not exclusively, because of the absence of any kind of Bill of Rights. Concurrent with unconditional ratification, however, several of these state conventions accompanied their resolutions of ratification with a call for amendments, either by proposal by Congress or by a convention to be summoned for the purpose (presumably as contemplated by article V). Different state conventions had different amendments they wished to have considered: some dealt with identical subjects, but dealt with them in various degrees; some dealt with subjects not dealt with by others at all. There did appear to be a tacit assumption that insofar as Congress might respond by calling a convention rather than, as it did, by itself proposing twelve amendments, the convention to be called in keeping with article V would not (could not?) be constrained by the particular and limited amendment-interests of the calling states. In short, the mention of particular amendments to be considered did not imply an intention that no others could be considered or that, if any other amendments were to be considered then, in that event, the petitioning state convention would rather have no amending convention at all.

Sixth, the view of the matter that you and Charles take may claim additional strength from a sense of article V as a whole. What is that sense? Arguably, it is that amending the Constitution is a *serious* business. Alterations in the fundamental law should be possible, but *not*

easy. You yourself make the point well in your *New Republic* editorial. It could be expanded. Supermajorities are required; a special mix of different constituencies is demanded. Short of virtual impossibility of change, which was regarded to be the problem under the Articles of Confederation where *unanimous* approval by all the states was required, the dominant function of article V (as Brandeis opined to be true with respect to the dominant function of separate powers[9]) is not to facilitate, but to clog; not to make haste in the furor of *ad hoc* dissatisfactions, but to require a more profound dissatisfaction—then to assemble in convention, to give pause to the felt necessity for changes, *et cetera*.

The argument has obvious application, in support of your view, as an article V "price tag." Amendments are a serious business, especially in the less-structured auspices of a convention. The notion that state legislatures may precipitate such events to blow off steam, a notion encouraged if single-item resolutions are deemed sufficient to mandate a convention, should be discouraged. It may best be discouraged by having state legislatures understand that just as there is no such thing as a "qualified" ratification of an amendment and just as it was uniformly understood in 1787 that there was no such thing as a "qualified" ratification of the Constitution, neither is there such a thing as a "qualified" call for an amending convention.

Seventh, your view is also helpful, were it adopted, in two eminently *practical* and important ways. First, it eliminates the plain and arbitrary difficulty of expecting a reasonable Congress to decide whether, given different forms in which these state resolutions are submitted (the current example of the "budget-balancers" is itself a fine example), a sufficient "consensus" has in fact been expressed for a given kind of limited convention? It avoids, too, the plain and related problem (supposing Congress agrees that a sufficient, albeit limited-agenda, consensus has been expressed), of what Congress is expected to do in describing the agenda for the convention thus called. Endless (and endlessly intractable) administrative and political questions at once arise in both respects. *Neither kind of question arises, however, when only one kind of convention is deemed proper*—the kind you argue for. Perhaps a better way of expressing this concern is as follows: as between two constructions of article V, one of which will necessarily generate an entire series of *additional* questions for which there are no objective criteria to resolve, and the other of which wholly eliminates any need to consider such questions, other things being roughly equal,

9. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

is it not far better to prefer the latter construction?

Complementary to this preceding argument, your view is equally helpful as these same practical issues identically must confront the convention to be assembled. How shall such a convention reasonably determine whether one or another proposal is within its mandate? Suppose a "budget-balancing" single-item agenda is supplanted with a substitute offered from the floor to cap the national debt—or, instead, to adopt the monetarist view of the problem, by restricting the volume of paper money (and of government credit) to be allowed in circulation, etc., etc. Additionally, is there not a belittling of such a convention insofar as its agenda is authoritatively (whether by itself or by Congress) deemed to be tightly restricted? What sort of convention is it, anyway, that convenes to discuss national economics, for instance, if after all is said and done its exclusive alternatives are to vote "yea" or "nay" on a single proposition that the convention is deemed to have no authority to modify in any way?

And, again, what is to happen with the work products from a "limited" convention? If they are to be routed through Congress as the conduit by which they are then to be submitted for ratification by "the one or the other Mode of Ratification" as "Congress" is to determine (according to article V itself), what then does Congress do? Should Congress decline to submit such proposed amendments to either mode of ratification if reasonably persuaded that the convention acted *ultra vires*? The point is not that no reasonable answer can be suggested but rather that we eliminate these kinds of issues outright by accepting the interpretation you and Charles support.

So, Bruce, all in all I think there is *much* going for the view that (a) amendment conventions cannot be circumscribed; and (b) state legislative resolutions inconsistent with a convention understood to have unqualified proposing authority are not to be counted. (This second point is consistent, however, with a state legislative resolution calling for a convention even while expressing a statement of subjects which that state deems sufficient to warrant the call.) In brief recapitulation, the points are these:

1. Such a construction of article V wholly avoids difficulties that must necessarily arise under any other construction—difficulties for which there are no self-evident answers even for those who would attempt to cope with them in good faith and the mere contemplation of which itself suggests that such a construction could not have been intended and ought not be preferred.

2. Such a construction of article V regards the authority of conventions as fully equal to that of Congress (rather than as more lim-

ited). This is far more in keeping with federal principles because the means accessible to states for proposing amendments to the Constitution is as generous in its authority as the means accessible to Congress.

3. Such a construction is also in keeping with the history of the Constitution itself. No small or passing disadvantage should be thought sufficient to assemble in convention to alter the nation's fundamental charter; when sufficient need is perceived to assemble in convention, that convention may set its own course respecting the alterations it may see fit to propose. This view of the matter was, in one sense, "ratified" in Philadelphia, and the propriety of that conduct was itself "ratified" in state conventions.

4. Even though the power of a convention should appropriately be equal to the power of Congress (when convened consistent with article V), no state should be provided encouragement to solicit so important an event merely to entertain some grievance or proposal peculiar to itself. No one's "call" for a convention should be deemed bona fide by Congress unless it is plain that the call contemplates a willingness to have a truly open convention assembled—a convention capable of entertaining other kinds of amendments than that of particular or narrow interest to "triggering" states. Since article V is not simply a means of changing the Constitution, but is at the same time a deliberate constraint on the ease of doing so, each state is made to put its own interests in the Constitution "at risk" insofar as it would, on its own account, put other states (and other people) at risk by the amendments it thinks proper to propose in such a convention.

The argument I have recapitulated, borrowed in large measure from you and from Charles, might well be persuasive to Congress. Insofar as Congress may consider it sound, I think it most unlikely the Supreme Court would gainsay the congressional judgment. Even assuming the Court would deem the issue a justiciable one (when presented in an otherwise suitable test case), I would guess that there is nothing so plainly incorrect about this congressional interpretation of article V that a majority could be mustered on the Court to override the congressional view.

If this be correct, the argument would be validated in every practical sense and for every practical purpose once Congress itself becomes persuaded of its rightness and utility: not because congressional opinion alone is enough, but because the Court can be expected to yield to that opinion under circumstances where congressional opinion is not *plainly* wrong. Judicial deference presumably is greatest in respect to article V questions, as virtually all the cases suggest. In this area of judicial review, probably nothing less than Thayer's "plain error" stan-

dard of judicial review would move the Court to hold against Congress. And, again, I see no "plain" error in this argument.

If the issue is, however, not the expediency of this interpretation of article V but its rightness (as, for instance, a conscientious Member of Congress might personally wish to consider), I should feel obliged to suggest that the interpretation is unsound. The argument I have attempted to restate, whether considered as a whole or in any particular part, really does not convince me at all, not because I do not think it "convincing," but simply because I do not think it is true. Rather, my sense of things from the reading I have been doing (which, quite unfairly, I cannot put into neat citation here) is very different.

During virtually all the time the Constitution was being composed, and during the subsequent months it lay before conventions assembled in the states (except in Rhode Island, which refused to have anything to do with it at any stage), uncertainty accompanied its passage. This thoroughly eclectic instrument was marked by features very different from the lesser document it was meant to replace. It also embodied a variety of features different from the English experience. Most parts were untested in colonial or state experience; the document was not woven from any one thread of political science or classical experience. Rereading all of the principal discussions of the period, rather than merely indexed portions on article V in particular, makes plain what one otherwise might tend to forget: in many, many particulars the "workability" of the Constitution was felt to be highly uncertain. The thing is full of close compromises—the propriety of which was stoutly defended, to be sure, but the long-term suitability of which (and even the short-term consequences of which) were, admittedly, highly indeterminate.

That occasion for particular repairs might well arise almost at once was diffidently recognized. Such an occasion might depend, for example, upon the chance circumstances of what the national government might in fact be like—once transformed from paper description to protean reality. It would surely depend, too, upon the uncertain impact the conduct of that national government could have upon the states (and, more especially, on their retained home-rule powers). Such occasions might separately arise, and most obviously (as seen at the time) upon the recognized eventuality that the omission of a Bill of Rights should prove to have been an awful error—even as Jefferson insisted to be true and as was reflected in the serious misgivings of others.

Then, following proposal of the Constitution, the task of securing ratification by nine states proved nearly insurmountable insofar as the scant provisions in article I, section 9 struck many in the state conven-

tions as yielding far too little security against the possibility of self-serving interpretations Congress might presume to make of its peculiarly enumerated powers and the Supreme Court—as an agency of that same national government—might presume to sustain. Providing for modes of change was thus not lightly considered or casually arrived at: only by being persuaded that these would be ample against every contingency could doubting persons be made to think the plan safe to try at all—notwithstanding substantial sentiment that the Articles of Confederation were themselves a failure.

More to the point, the fact that no one could foresee just how responsive the untried "Congress" might be to the felt necessities for amendment meant, necessarily, that no critical reliance could be placed upon Congress as a plausible sole or even plausible best source for every kind of amendment. That the "state mode" of introducing amendments by called convention never, by itself, produced a single amendment to the Constitution does not derogate from this in the slightest. Rather, it may show only that the Congress proved to be better than expected—itself responsive with sufficient adequacy to carry into amendment every major and sustained demand for that kind of change.

The various stages of drafting through which article V passed convey an additional impression as well: that the state mode for getting amendments proposed was not to be contingent upon any significant cooperation or discretion in Congress. Except as to its option in choosing between two procedures for ratification, either "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof," Congress was supposed to be mere clerk of the process convoking state-called conventions. Certainly it was not imagined to sit astride that process as a hostile censor, a body entitled to impose such stringent requirements upon the states as effectively to render the state mode of securing particular amendments nearly impossible. To put the matter simply, a generous construction of what suffices to present a valid application by a state, for consideration of a particular subject or of a particular amendment in convention, is far more responsive to the anticipated uses of article V than a demanding construction that all but eliminates its use in response to specific, limited state dissatisfactions.

To be sure, concern was expressed (principally by Madison) over just what Congress was expected to do in the execution of its duty to "call a Convention" when required so to do "on the application of the Legislatures of two thirds of the several States." Madison thought that far too little attention was given to that problem in Philadelphia. The Philadelphia Convention *was* itself remiss in this regard, even as all of

the writings that centered on Senator Ervin's proposed guideline legislation in the 1960s make quite clear. But neither that oversight in the Convention nor any writings suggest that anything less than a permissive construction, rather than an exclusionary one, is closest in keeping with the expected uses of this feature of article V.

In several places, moreover, it is made very plain that certain kinds of amendments state legislatures might wish to have considered by a convention would be precisely the kinds least likely to be forthcoming from Congress—indeed, the very kinds to which Congress could be expected to be hostile. Congress might prove to be a wholly reliable instrument to propose amendments occasioned by discovered shortcomings most felt at the national level. But insofar as the felt shortcoming was one of Congress' own doing (for instance, in the self-aggrandizement of its powers at the expense of state powers), a check for a specific shortcoming of that kind was the power of states to mount adequate support from like-minded legislatures elsewhere, to convoke a convention where a corrective measure might be approved, subject thereafter only to ratification pursuant to whichever mode of ratification Congress elected.

What, then, is the contemplated function of a called convention under *these* anticipated circumstances? Surely not that the only kind of appropriate (and thus legitimate) convention is one within which a complete reapprasial of the whole Constitution would be either desirable or required. Surely not that Congress could turn aside even identically phrased, single-item resolutions submitted by more than two-thirds of the states resolved to have a particular (constitutional) grievance considered in convention, by suddenly placing a wholly unexpected price tag (a "Catch 22" as it were) on that right—that unless these same states were also willing that the proposed convention consider anything else appealing to the individual fancy of some delegates, some special interests, or some other states, then Congress was at liberty to refuse to call any convention at all.

There is, in all the places I have looked, no discussion anywhere of this "Catch 22" interpretation of article V. I cannot believe that the reason for this lack of discussion is that such an interpretation was itself so widely assumed, and so widely regarded as so utterly uncontroversial, as universally to have been taken for granted. Rather, I believe it is because the very notion that such an idea would be thought of even as a possible interpretation of article V, much less as a plausible interpretation, was beyond imagination. That interpretation stands the whole matter on its head.

That a general convention, itself like the one at Philadelphia, con-

voked deliberately to undertake (in your words) "an unconditional reappraisal of constitutional foundations"[10] is the only kind of convention or even the typical kind of convention anticipated under article V strikes me as decidedly untrue. To the contrary, while allowed by article V, such a convention is the least likely to be the foreseeable object of states expected to make use of their collective authority in article V. An event most likely to provide the most expected (and legitimate) use of this power would be just that: a *particular* event, an untoward happening, itself seen as a departure from, or as a suddenly exposed oversight within, the Constitution. The event would be the kind of thing, however, Congress might not be expected swiftly to repair, especially if Congress were itself the source of the mischief; the kind of thing, rather, providing specific occasion for parallel state resolutions to consider a particular proposal (or alternative proposals) in convention at once to be called for the purpose.

In sum, on the basic issue I quite agree with the student's view stated in the *Harvard Law Review* seven years ago:

> Although it would be contrary to article V if Congress attempted to limit the scope of a convention when the states had applied for an open convention, it would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the express desires of the applicant states.[11]

So far as I would differ from this view, it is a very mild difference. It is perfectly plausible that Congress might leave all debatable degrees of germaneness to the discretion of the convention itself. When convinced that within a reasonable number of years (*e.g.*, seven) that it has in fact received applications from two-thirds of the several states requesting a call for convention consideration of a given subject of sufficient common description that further insistence for more perfect agreement among the applications would clearly be unreasonable, however, Congress *is* under a constitutional obligation to call a convention responsive in good faith to those applications.

Indeed, I think that Congress could *least* decline to call a convention if, in keeping with identically worded state legislative resolutions to this effect, the sole function of that convention would be to do no more than to deliberate and to debate the pros and cons of an exactly particularized proposal, with choice at the convention's conclusion for the delegates only to vote "yea" or "nay." If two-thirds of the state legislatures might perchance agree on the exact wording of an amend-

10. Ackerman, *supra* note 3, at 8.

11. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1628-29 (1972) (footnote omitted).

ment they would wish to be reviewed in a called convention for discussion and vote, this would seem to me to state the paradigm case in which Congress should proceed with the call—and limit the agenda exactly in accordance with the unequivocal expressions of those solely responsible for the event. On the other hand, were Congress to presume altogether to disregard these resolutions, as though neither singly nor in the aggregate did they qualify as proper applications under article V, I should think it outrageous.

The notion that nothing may be considered by means of convention unless everything may be considered in that same convention seems to me a *non sequitur* having no basis whatever in article V. The typical convention called under article V would surely least be like—rather than most be like—*the* Convention of 1787. The most proper use, rather than the least proper use, of such a convention would be in contemplation of a fairly modest change rather than a wholesale change. That thirty-four states could be instructed by Congress that they may not resolve a common call for a convention for the sole purpose of considering a repeal of the sixteenth amendment unless they mean also to consider a repeal of the other twenty-five and of all six articles as well (and to manifest that willingness in the resolutions they submit to Congress) seems to me the ultimate in congressional cynicism. Yet all of this is explicit in the position that you and Charles have suggested. I do, as I said at the beginning, have some doubts.

Cordially,
William Van Alstyne /s/

[From ADA World, May–June 1979]

DON'T LET'EM OPEN THAT CAN!

(by Stina Santiestevan)

"Americans for Democratic Action notes with alarm that 28 states have passed resolutions calling for a constitutional convention to mandate a balanced federal budget. We reject this approach as impractical and injurious to our system on both constitutional and economic grounds."

With these words, ADA's national board in March served notice that ADA had joined the nation-wide battle against Con-Con.

One week earlier ADA—with representatives of the AFL–CIO, NEA, Common Cause, Congress Watch, and a number of other progressive groups—announced formation of Citizens for the Constitution, an *ad hoc* coalition formed to combat the proposed constitutional convention.

Citizens for the Constitution is headed by Massachusetts' lieutenant governor, Tom O'Neill, who says the organization will concentrate on lobbying legislatures which are considering the issue or are expected to do so soon, including Alaska, Ohio, New Hampshire, Montana, Rhode Island, Vermont, Maine, and West Virginia.

The National Taxpayers Union, the major force behind Con-Con and a front for assorted Right Wing organizations, has claimed it will have the necessary 34 states by the middle of the year. (It requires two-thirds of the states, or 34, to force Congress to call a constitutional convention, but any amendment to the constitution would require ratification by 38 states.)

NTU, which is loosely related to some 500 state and local groups, was founded in 1969, claims over 100,000 members, and spent $1 million on "education" in 1978. It says it will double that amount this year.

NTU opposes federal spending of all kinds, and "never alienates supporters by specifying what it would cut," according to the UAW. The AFL–CIO'c Committee on Political Education says NTU is linked to the John Birch Society, the NAM, the Heritage Foundation, and Americans Against Union Control of Government.

The statement issued by ADA's board in March said in part:

". . . a constitutional convention will surely plunge us into a crisis of mammoth proportions, for there is no precedent. The only opinion constitutional experts can agree upon is that there is no clear approach to a constitutional convention. No one is sure how delegates would be selected. No one is sure of the convention procedures. Worse, no one is sure whether the convention is limited to a single issue or whether convention delegates may take on the entire document . . . needlessly amending the constitution can only initiate an erosion of our political system and diminish the power of the document to define fundamental national values."

Economists, constitutional scholars, and political leaders are frightened at this prospect—whether they are liberals or conservatives. Experts have pointed out that delegates would gather after a popular election and could argue that a convention has the right to set its own agenda. It is unlikely that the agenda would be limited to the federal budget. Liberals fear such acts as repeal of the income tax, reversal of the "one-man-one-vote" Supreme Court decision, establishment of a compulsory open shop policy, or the outlawing of abortion, forced busing, and gun control. Thoughtful conservatives fear efforts to legalize drugs or outlaw guns or establish an environmental "bill of rights."

Economists point out that the federal budget can be "balanced" in one of several ways: by raising taxes, or by cutting expendiutres—especially the $89 billion in grants to state and local governments, or by accounting devices which shift capital expenditures out of the budget entirely. About three-quarters of each budget is pre-set by long-term legislation, leaving only about one-quarter to be controlled by annual budgets.

In its statement, ADA's national board warned that our $2.3 trillion economy is complex. "The fiscal and monetary policies of the federal government are a crucial component of our ability to fine-tune and stabilize our economy. To impose a rigid requirement on a system that requires flexibility would mean that mild recessions would turn into repeats of the 1930s."

The Effects of S.3 and S.1710 on State Procedures for the Adoption of Applications for a Constitutional Convention

(By David Gillespie)

Article V of the United States Constitution provides: "The Congress * * * on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments * * *." Two bills pending in the United States Senate, S.3 and S.1710, attempt to address many of the thorny procedural issues inherent in the convention provision. Although the two bills differ in various particulars, they are substantially identical in terms of their underlying constitutional theories. Both bills regulate state procedures for the adoption of convention applications and the role of state governors in the application process. They also provide mechanisms for the resolution of procedural questions that arise in the course of the application process. This analysis concentrates on two aspects of the proposed legislation: the scheme these bills provide for the regulation of state procedures for the adoption of convention applications; and, their proviso to nullify the State Governors' veto power over convention applications.

The Constitution vests power to apply for constitutional conventions in the legislatures of the several States. Article V does not supply the States with a procedure for application, nor does it vest power to control the application procedure in Congress. The raison d'être for the convention method of constitutional amendment is to provide the States with a means to circumvent the congressional route of amendment. Any attempt by Congress to meddle with this domain of state power violates the language and intent of Art. V. The convention method of amendment is the constitutional co-equal of the congressional method. Congress has no more power to constrain the power of constitutional conventions than it has to limit the enumerated powers of other branches of the Federal Government. Thus, Congress has no power to regulate substantively the application process, which is an inteegral element of the convention power. Under Act. V, the sole power of Congress with respect to constitutional conventions is to tabulate applications and to "call" a convention when the requisite number of valid applications is received.

Although Congress has no power to interfere with State application procedures, the constitutional mandate to call a convention rests with Congress. Congress must be in a position to judge the validity of state applications. S.3 and S.1710 provide different procedures for the resolution of questions that arise concerning the validity of applications. S.3 Sec. 3(b) vests power in Congress to make final determinations of "* * * questions concerning the adoption of * * * State resolution(s) cognizable under this Act." The most fundamental difficulty with this provision is that no basis exists in Art. V to support such a broad assertion of congressional power. Furthermore, Congress lacks both the procedure and the expertise to resolve such questions of state law. Vexatious as they may be, the laws and procedures of the 50 States must provide the standard by which the validity of convention applications is judged. Both bills crudely recognize this principle when they provide in Sec. 3(a) that in adopting applications, "* * * the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature." Unfortunately, this formulation of the principle of state primacy in the realm of application procedure presents a myriad problems.

The approach of S. 1710 Sec. 3(b) is more consonant with constitutional principles than its S. 3 counterpart. If Justice Holmes is correct in his observation that "* * * there is no Canon against using common sense in construing laws as saying what they obviously mean," *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929); Art. V means that State legislatures have the power to decide whether or not they have adopted an application for a convention. To deny the States the ability to make this decision, as does S. 3, is to eliminate a substantial element of the States' application power. S. 1710 comports with the basic constitutional principle of allowing the States to determine whether they have applied for a convention. The problem with the procedure under Sec. 3(b) in S. 1710 is that it makes a questionable bedfellow for Sec. 3(a). The States do not have full power under Sec. 3(b) to determine "Questions concerning the validity of State legislative procedure and the validity of the adoption or withdrawal of a State resolution cognizable under this Act," if, as required by Sec. 3(a), the legislature is constrained to "* * * follow the rules of procedure that govern the

enactment of a statute (emphasis mine) by that legislature." Sec. 3(b) gives the legislatures a measure of power that Sec. 3(a) takes away. This paradox is treated at greater length below.

Sec. 3(a) in both S. 3 and S. 1710 limits the State legislatures' choice of procedures for the adoption of convention applications. However, for Congress to require that the adoption of applications proceed in the same manner as the adoption of statutes places a restriction on the States' application power that is not supported by Art. V. Not only is the imposition of such a stricture beyond the pale of Congress' Art. V power, it is a poorly thought out procedural rule that prevents States from consideration and adoption of special procedures for the purpose of adopting convention applications. If a State is constrained to follow procedures for the adoption of statutes when in the process of adopting a convention application, the State is prevented from developing a set of procedures suited to the unique function allotted to it by Art. V. Many States have constitutional provisions that govern the proposal of amendments to their respective constitutions. Many have provisions that govern the calling of conventions to propose amendments or to propose large scale constitutional revision. To place a State in this procedural strait jacket not only prevents the development of parallel state legislative response to the Federal application problem, it creates many additional difficulties due to the baggage that goes along with legislative procedures for the adoption of statutes. Depending upon the State in question, S. 3 and S. 1710 may have the effect of either making it too easy or too difficult for the States to adopt convention applications.

Similar problems arise with a congressional attempt to proscribe the role of State governors in the application process. Sec. 3(a) of S. 3 and S. 1710 makes just such an attempt. Sec. 3(a) accomplishes two things: it binds the State legislatures to procedures that govern the enactment of statutes; and, it removes governors from any significant role in the application process. The authors of S. 3 and S. 1710 are oblivious to the fact that Congress has no constitutional authority to interfere with the role of governors in the convention application process. Plenary power to apply for constitutional conventions is vested by Art. V in the State legislatures. The power to exclude governors from the application process rests with the State legislatures, and by simple logical extension, the power to include them in the process rests with the State legislatures. Under Art. V, the State legislatures are free to adopt their own procedures for the adoption of convention applications, and this freedom includes the provision of a substantial role for their respective governors in the application process. Under a guise of constitutional soundness which uses language that suggests congressional deference State legislative procedures, S. 3 and S. 1710 act so as to regulate unconstitutionally the method of convention application adoption.

The most obvious problem created by the elimination of governors from the application process arises when a governor vetoes a convention application. The simple question to be answered: What result? Before reaching the "simple" solution, we shall turn to an investigation of the veto power of the Governor of the State of Nevada. The reason for our choice of State is twofold: Nevada is one of 48 States which provides its Governor with veto power; and, the Governor of this State vetoed the legislature's application for a constitutional convention (Con. Rec., Feb. 21, 1979, H 808).

Article 4 section 35 of the Nevada Constitution grants the governor veto power over bills. The constitution does not provide him with a pocket-veto power. The governor has 5 days in which to return bills with his objections, for reconsideration. A two-thirds majority of both houses is needed to override a veto. The veto power also extends to joint resolutions under Nevada Statute 218.420. Joint resolutions are treated by the Nevada legislature in the same manner as bills, just as in the United States Congress, where the ". . . two forms are often used indiscriminately (Charles J. Zinn, "How Our Laws Are Made," p. 8, U. S. Government Printing Office, 1974)." The Nevada convention application exists in the form of a joint resolution, Senate Joint Resolution No. 8, and is therefore within the full ambit of the Governor's veto power.

The Governor's veto power is strictly construed by the Supreme Court of Nevada. An act of the legislature has force of law only in the following three circumstances: if the act is signed by the Governor; if the Governor gives his tacit approval by not returning the act; or, if the act commands a majority of two-thirds of both houses of the legislature. Standing by itself, a simple majority of both houses has no force of law in the State of Nevada.

Without the express approval of the Executive, there are but two ways by which an Act of the Legislature can become a law: 1st. By receiving a two-thirds vote of both houses of the Legislature after it has been vetoed by the Governor. 2d. By a failure on the part of the Governor to return it to the house where it originated within five days after its reception by him whilst the Legislature is in session, or within 10 days after the adjournment of that body. In both of these cases the Act becomes a law without the signature or approval of the Executive. (Vide Constitution, Art. 4, Sec. 35.) These are the only cases, however, in which the approval of the Governor can be dispensed with. In all other cases, such approval is as essential to give it the sovereign authority of law as the passage by the Legislature itself. *Birdsall* v. *Carrick*, 3 Nev. 154, 156 (1867).

S. 3 and S. 1710 create a contest between the long-established veto power of Nevada's Governor, and the authority of Congress under Art. V to ride roughshod over a State constitution.

A veto by the Governor raises two additional problems: What response is possible on the part of Congress or the Nevada legislature if the secretary of state fails to sign or send the vetoed application to Congress as Sec. 4 of both S. 3 and S. 1710 requires; and, is this situation resolvable under the respective Sec. 3(b) provisions which address the resolution of questions concerning state legislative procedure?

S. 3 and S. 1710 charge the secretary of state with the certification and the transmission of applications. Under Nevada law, a joint resolution that is vetoed by the governor and which fails to muster two-thirds of both houses of the State legislature is a nullity. Do S. 3 and S. 1710 compell the secretary of state to certify and transmit a joint resolution that is void under State law? If these bills do not so compell the secretary, and congressional authority based on Art. V to support such compulsion is dubious, then he has the power to kill applications by not sending or not certifying them within the 30-day period which Sec. 4 of S. 3 and S. 1710 enunciate. Not only does the secretary have the potential to kill applications that are void under State law, Nevada law may require that he burke such applications.

Neither S. 3 nor S. 1710 addresses the problem of harmonizing the functions of the State legislature under State law with the functions of the Executive under State law, and neither provides a mechanism for resolving inter-branch disputes. The bills only address questions of adoption and withdrawal of applications. Even assuming the ability of Congress to compell the Secretary of State to certify and transmit applications in spite of State law, these procedures bills do not indicate how to achieve this compulsion. Nor do they indicate whether a situation involving a recalcitrant secretary mitigates the effect of Sec. 4's thirty day transmission requirement with respect to the validity of applications. At the very least, S. 3 and S. 1710 create the possibility that a Secretary of State has the power to frustrate convention applications by deliberately or carelessly failing to transmit or certify them within the congressionally specified time period.

S. 3 and S. 1710 create another more subtle dilemma for state executive departments, and all those who must evaluate the states' convention applications. Assuming *arguendo* that the secretary can be compelled to certify and transmit convention applications that are void under Nevada law if these applications constitute valid convention applications under one of Congress' procedures acts, the manner in which the secretary, Congress and the Nevada legislature are to discover the configuration of a valid application remains to be established. Sec. 3(a) instructs the state legislatures to follow procedures for the enactment of statutes, with the caveat that actions of the States' Governors will not affect the validity of applications. To recapitulate, a Nevada statute can be passed under the three following circumstances: (one), with a simple majority in both houses of the legislature and with the signature of the Governor; (two), with a simple majority of both houses and with the tacit approval or acquiescence of the Governor; (three), with a two-thirds majority of both houses in the event of a veto from the governor.

In all three cases, the Governor has power to affect the course of legislation. If the Governor uses his veto power, the legislature is powerless to act without a two-thrids majority. There are only two circumstances in which the legislature can pass valid joint resolutions without the overt approval of the Governor: (one), when the Governor acquiesces in a resolution, a simple majority of both houses suffices to carry the legislation; (two), when the Governor vetos

a resolution, a two-thirds majority of both houses is necessary to carry the legislation.

The question remains: What type of majority is sufficient to produce a valid application in Nevada? Under the doctrine of S. 3. Sec. 3(b), Congress has power to dictate to the States the size of majority that would produce a valid application. Thus, S. 3 opens the door to complete or substantial congressional control of the application process in direct opposition to the Framers' intention to provide an extra-congressional route for the proposal of constitutional amendments. S. 1710's solution to this problem is superior to that of S. 3 in terms of constitutional probity, because S. 1710 does not blatantly usurp the Art. V power of state legislatures to apply for the calling of a convention. However, S. 1710 Sec. 3(a) has the distinct liability of providing a solution that is: problematic; poorly drafted; or, both of the above. Presumably, S. 1710 would allow the Nevada legislature to pass a joint resolution to determine the size and constitution of a valid majority for a convention application. However, this resolution is then subject to the Governor's veto power. On dubious constitutional grounds, S. 1701 excludes the Governor from the application adoption and withdrawal process, but, Sec. 3(b) does not prohibit the Governor from participating in the process of determining the validity of the adoption procedures.

S. 1710 prevents the Governor from successfully vetoing an application and thereby necessitating a two-thirds majority to secure passage, but the bill does not prohibit him from vetoing a joint resolution (or any other act of the legislature) which establishes the size of a valid majority for the passage of an application, or which resolves some other procedural matter. Sec. 3(b) allows the Governor to exercise a power more fundamental than the power Sec. 3(a) attempts to constrain. If Sec. 3(b) read: "Questions . . . are determinable by the State legislature, *and that action shall be valid, without the assent of the Governor of the State,*" then the bill at least would possess internal consistency with respect to its treatment of state executive power. The bill does not so read.

Thus, S. 3 and S. 1710 offer no clear guidance to State legislatures in determining the nature of a valid majority for the adoption of convention applications. What they do provide is that State legislatures are to follow procedures that govern the enactment of statutes. In Nevada, some of these procedures are themselves a matter of statute. For example, Nevada is one of more than 30 States which has a statute or rule requiring that proposed legislation likely to affect the State's fiscal liability include a "fiscal note," or "fiscal impact statement" (*See* "The Fiscal Letter," National Conference of State Legislatures, Vol. 1, No. 4, June 1979). More specifically, Nevada Statute 218.272 provides:

"Before any bill which makes an appropriation or changes any existing appropriation, fiscal liability or revenue which appears to be in excess of $2,000 is considered at a public hearing of any committee of the assembly or the senate, or before any vote is taken thereon by such committee, the legislative counsel shall obtain a fiscal note containing a reliable estimate of the anticipated change in appropriation authority, fiscal liability or state revenue under the bill, including, to the extent possible, a projection of such changes in future biennia."

Nevada Statute 218.2754 requires that the summaries of all bills include a comment on the disposition of their respective fiscal notes.

Nevada's fiscal note statute can apply to joint resolutions (the form of Nevada's convention application) as well as to bills. According to Ron Sparks, Fiscal Analyst for the Department of Legislative Counsal, State of Nevada (as per conversations on January 24 and February 8, 1980), the fiscal note requirement can be interpreted as applying to all actions of the Nevada legislature which alter the State's fiscal liability to the extent of $2,000 or more. Although the fiscal note requirement has not been applied to joint resolutions, this is because joint resolutions normally do not generate substantial fiscal liabilities. The statute is not limited to appropriation bills or to bills which describe a particular liability or revenue. Any action of the legislature that creates a potential $2,000 fiscal liability invokes the statute. No magic words are needed to trigger the statute into effect, nor is its application limited to legislative acts that affect only state or local appropriations. The fiscal note requirement applies to any legislation that affects the disposition of local, State or Federal funds.

Senate Joint Resolution No. 8 of the 60th Session of the Nevada legislature is an application to Congress for the calling of a constitutional convention to propose an amendment to the Constitution requiring that, in the absence of a national emergency, federal appropriations not exceed estimated revenues. The

degree to which the adoption of such an amenndment would affect the fiscal liabilities of Nevada is indeterminate, but the potential effects are of considerable magnitude. Any curtailment of the federal budget is certain to have effects on revenue-sharing and other types of Federal assistance to the States. Of course, the liability resulting from the adoption of a balanced budget amendment, or any other type of amendment affecting Federal spending, is contingent. However, contingent liabilities are within the scope of the fiscal note statute if they "appear" to be $2,000 or more.

Aside from the liability that results from the adoption of a balanced budget amendment, the states are certain to incur a substantial liability from the mere holding of a convention. Neither S. 3 nor S. 1710 makes any provision for expenses incurred at the State level in the selection, transportation and remuneration of convention delegates. S. 1710 places the entire cost of a convention on the States. It provides that "No Federal funds may be appropriated specifically for the purposes of payment of the expenses of the convention." If Nevada's application for a convention is successful, this State is certain to suffer a change in fiscal liability from the transportation and remuneration of a single convention delegate which exceeds $2,000.

A fiscal note to this effect is appropriate under the Nevada statute and it may be mandatory. No fiscal note was prepared with respect to Nevada's convention application. The cost of delegates and possibly the entire cost of a convention are expenses borne by the States regardless of the type of amendment to be proposed. In the case of an application for a convention to propose an amendment to impose fiscal restraint on the Federal Government, it is ironic indeed that the Nevada Legislature fails to comply solicitously with its own recently enacted statutory device for monitoring its own fiscal responsibility.

The failure of the Nevada Legislature to prepare a fiscal note for its convention application makes that action of questionable validity under Sec. 3 and Sec. 4 of both S. 3 and S. 1710. Sec. 3 requires a State to follow procedures that govern the enactment of statutes. The Nevada fiscal note requirement is one of those procedures. The legislature's failure to prepare a fiscal note is a possible violation of Nevada procedure, and therefore, a violation of Sec. 3. If the legislature must prepare a fiscal statement, and the copies of the joint resolution-convention application submitted to Congress do not include the appropriate notation mandated by Nevada Statute 218.2754, the application fails to comport with Sec. 4, which requires the submission of a copy of the exact text of the resolution-application. To comply with Nevada Statute 218.2754, the application must include one of the following statements: Fiscal Note: Yes; Fiscal Note: No; Fiscal Note: Effect less than $2,000. Whether or not a bill changes the state's liability more than $2,000, it must include one of the preceeding comments in order to demonstrate that the appropriate effort was made to accommodate the terms of the statute.

Not only may the Senate bills require the preparation of a fiscal note for the Nevada application (under Sec. 3), but they may also require that it contain the notation described in 218.2754. It is not enough for the legislature simply to prepare a fiscal note under Sec. 4 of the Senate bills, the application sent to Congress must state whether or not a fiscal note has been prepared.

The dilemmas that S. 3 and S. 1710 create for the Nevada legislature are largely the result of Sec. 3(a) and its problematic instruction for the states to follow procedures that govern the enactment of statutes and to ignore the Governor's veto power. As discussed above, Sec. 3 creates three major initial problems: what happens if the Governor vetoes an application?; what type of majority is needed to pass a valid convention application?; and, do all of the requirements that attend the passage of statutes, such as the fiscal note requirement, also apply to the passage of a convention application? These problems would be ameliorated if the States are free to adopt their own methods of application in accordance with state law and the XIVth Amendment.

The Nevada Constitution provides procedures both for amendment and for the calling of conventions to make State constitutional revisions. Either of these procedures would provide a better procedure for the Nevada Legislature to follow when considering application for a Federal constitutional convention than the procedures required by S. 3 and S. 1710. Article 16 section 1 sets out the procedure for amending the Nevada Constitution. A majority of the members of both houses during two successive legislatures must vote to propose an amendment.

Then, the amendment must receive the vote of a majority of the State's electors. In order to call a constitutional convention, two-thirds of both houses must vote to recommend the calling of a convention, and then, this recommendation must meet with the favor of a majority of the electors. A simple majority of the legislature has no power to call a state constitutional convention or to propose constitutional amendments.

Under the Supremacy Clause of Art. VI, the United States Constitution is of greater dignity than any state law, including state constitutions. It would be anomalous in the extreme if the procedures instituted for calling a constitutional convention to propose amendments to the Federal Constitution were more lax, wide-open and ambiguous than the procedures for calling a convention to propose changes in the constitution of the State of Nevada, or any other state. The flaw in such procedures becomes even more glaring in light of what a noted constitutional scholar has referred to as the way in which convention applications have been "whooped and hollered" through a good many state legislatures. The plain meaning of Art. V is not: "The Congress . . . on the Application of a simple majority of the Legislatures of two thirds of the Several States, shall call a Convention. . . ." In the case of Nevada, if a simple majority of the legislature can make valid applications for a federal constitutional convention, passage of such an application would be easier than passage of a state parking regulation (see, e.g., Nevada Statute 484.399). The latter requires the assent of the Governor or a two-thirds majority of the legislature. At the recent Senate hearings on constitutional conventions conducted by the Subcommittee on the Constitution, Professor Charles Black stated, "It is the genius of American constitutional interpretation to read our Constitution in a sensible way. . . ."

It is hardly "sensible" to have a Federal mandate requiring that applications for constitutional conventions be easier to push through state legislatures than parking regulations.

If Congress does not have the constitutional authority to dictate procedures to the States for the adoption of con titutional convention appli ations, then Sec. 3 (a) lies beyond the ambit of congressional power. If Congress does have the authority to control the procedures for making applications, then Congress has the duty to come up with a better set of procedures than the problematic instructions which S. 3 and S. 1710 offer to the states.

Excerpt, Proposed Amendments to the Constitution of The United States 1789-1889, Herman V. Ames. (1896) Reprinted: 1970

CHAPTER VI.

PROCEDURE AS TO CONSTITUTIONAL AMENDMENTS.

176. METHOD OF AMENDMENT.

The Constitution of the United States, in Article V, provides for its own amendment whenever two-thirds of the Houses of Congress, or a convention called upon the application of two-thirds of the State legislatures, shall propose amendments, which in either case shall be valid when ratified by the legislatures of or conventions in three-fourths of the several States, as Congress may direct.[1]

Thus it appears that amendments may be proposed in one of two ways—either by Congress or a convention called by Congress in response to the request of the necessary number of the State legislatures. Also discretionary power is given to Congress to choose one of the two methods of ratification permissible, namely, either by the legislatures of States or by conventions in the several States. The amount of discretion allowed in this clause plainly indicates the expectation of the framers of the Constitution, that the amending machinery would be frequently put into operation.[2] It is therefore remarkable that only one of the methods of proposing amendments has been used, and that it has always been accompanied by one method of ratification.[3]

177. GENERAL CONVENTIONS.

In making provision for a Federal convention,[4] the framers of the Constitution doubtless had in mind the possibility of a future fundamental revision, and in addition wished to provide when necessary for a body having a direct mandate from the people to propose amendments.[5] The fact that nearly two

[1] Of the two exceptions enumerated in the article one is obsolete; the other, in regard to equal representation of a State in the Senate, has as much force to-day as ever.

[2] See Hamilton's remarks in the Federal Convention, Elliot, V, 530.

[3] With the exception of the proposed thirteenth amendment in 1861, which was ratified by a convention in Illinois in 1862. See post, par. 179.

[4] The first provision agreed to for securing amendments provided only for a convention, on application of the legislatures of two-thirds of the States, August 6, 1787. Elliot, V. 381.

[5] See advantages of a convention referred to by Nicholas in the Virginia convention, Ibid., III, 101-102.

hundred constitutional conventions have been called to frame or revise the State constitutions,[1] renders it all the more remarkable that this method of proposing amendments to the Constitution of the United States has never been put in operation. This may be accounted for in part by the fact that there has never been a time when a general revision of the Constitution has been widely desired. Although conventions for the proposal or ratification of amendments have never been assembled, yet occasions have arisen when their trial has been urged. Passing over the propositions for a second convention, which were made in the Federal Convention itself, and in the States at the time of their ratification of the Constitution,[2] we find that the Government had scarcely been established when Virginia and New York made application for a convention to draft amendments.[3] In the winter of 1832–33, the legislature of South Carolina passed resolutions declaring it "expedient that a convention of the States be called as early as practicable to consider and determine such questions of disputed powers as have arisen between the States of this Confederacy and the General Government."[4] This seems to have led to the legislatures of Georgia and Alabama passing resolutions in conformity to Article V, petitioning Congress to call a Federal convention to consider the proposal of amendments.[5] The legislature of Delaware, on the other hand, in reply to the resolutions of South Carolina, declared that the Constitution does not recognize any such tribunal or political assemblage as a convention of the States, but has provided for modes of amendment, if amendment be necessary, in the fifth article; * * * "any other mode, therefore, must be repugnant to its provisions;" that any such convention "must be a convention of the people," "and not a convention of the States;"[6] and "that it is not expedient for Congress to call a convention for proposing amendments at this time."[7]

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[1] Jameson, Constitutional Convention, p. 550. Tiedman, Unwritten Constitution, p. 42.

[2] Article by E. P. Smith in Jameson's Essays, p. 46.

[3] App., Nos. 125, 126.

[4] Senate Journal, Twenty-second Congress, second session, p. 83.

[5] App., Nos. 612a, 613–625.

[6] "That such a convention of the States, if assembled, could have no such power as that set forth by the resolutions of South Carolina."

[7] Senate Journal, Twenty-second Congress, second session, pp. 157–158. For Resolves of Massachusetts in disapproval to Resolves of South Carolina, see Resolves of Massachusetts, Vol. XIX, pp. 401–402; for report and reply of Massachusetts legislature disapproving of the Georgia resolutions, see ibid., pp. 411–423.

Again, in the sessions of Congress just previous to the rebellion, when there was a general desire that every means should be tried before resorting to a civil war, petitions from the legislatures of six States,[1] besides nine propositions from members of Congress, were received calling for a drafting convention.[2] On the invitation of Virginia, a peace convention was also held, at which commissioners from twenty-one States were present.[3] As a result of its work, the convention recommended to Congress a series of amendments to the Constitution.[4] In this same session of Congress, Mr. Florence of Pennsylvania offered the following singular amendment: "The reserved power of the people in three-fourths of the States to call and form a national convention to alter, amend, or abolish this Constitution, according to its provisions, shall never be questioned, notwithstanding the direction in Article V of the Constitution."[5]

Propositions for a convention were also offered at three different times during the period of the civil war, and again in 1866.[6] Of those presented during the course of the war, the first was introduced by Mr. Vallandigham, in 1861, the other two by Senator Davis of Kentucky, who proposed such a convention of the States for the purpose of bringing about the restoration of peace and the Union.[7]

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[1] Virginia, Kentucky, New Jersey, Ohio, Illinois, and Indiana. The convention in Missouri also approved of a similar course. Stephen, War between the States, II, p. 364.

[2] App., Nos. 812, 834, 835, 873, 895, 900, 908, 911, 931a, 941, 954, 970, 970a, 940a.

[3] App., No. 873. See ante, pars. 106, 107. Chittenden, Debates and Proceedings of the Peace Convention; McPherson, History of the Rebellion, pp. 67-70. Twenty-two States appointed commissioners, but several did not attend. Foster, Commentary on Constitution, I, p. 173.

[4] App., Nos. 917.

[5] App., No. 892.

[6] App., Nos. 972, 976, 1039a, 1115. The latter by Senator Lane of Kansas, for the Committee on the Judiciary to inquire into the expediency of calling a convention. The framers of the Confederate constitution, evidently profiting by the experience of the past, determined to make it easier to assemble a convention to amend. Provision was made that upon the demand of any three States legally assembled in their several conventions, the congress shall summon a convention of all the States to take into consideration such amendments as the said States shall concur in suggesting at the time when the said demand is made; the same to be submitted to the States for ratification, if agreed on by said convention, voting by States. Article V, of Confederate constitution. McPherson, History of the Rebellion, p. 99.

[7] App., No. 976, submitted in 1862, called for a convention to meet in Louisville, Ky., on the first Monday in April, 1863, to take into consideration the condition of the United States and the proper means for the restoration of the Union. Each State to send as many delegates as it is entitled to Senators and Representatives in Congress. App., No. 1039a (1864), called for a convention for a similar purpose, and for the vindication of the Constitution, and the construction of additional and adequate guaranties of the rights and liberties of the people. He presented a series of propositions as the basis of a lasting settlement of all difficulties. See ante, par. 103.

Senator Ingalls, in 1876, in consequence of the disputed Presidential election in that year, introduced a resolution recommending the legislatures of the States to apply to Congress to call a convention to revise and amend the Constitution.[1] This resolution made full provision for the holding of the convention, and for the submission of the revised draft of the Constitution to a convention in each State, chosen by the people thereof.[2] In 1884 an attempt was made to create a commission to call a convention,[3] and as recently as 1886 a minority report of the Committee on Election of President and Vice-President suggested the recommendation of such a convention, owing to "the imperative necessity of a substantial change in the organic law," and the failure of Congress to give due consideration thereto.[4]

[1] App., No. 1429.

[2] This made provision for a convention composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. Two to be chosen by the legislature in each State, the others in the Congressional districts, but no person holding any office of profit or honor under any State or the United States to be eligible as a delegate. The convention should assemble at Columbus, Ohio, May 2, 1877, the Chief Justice of the Supreme Court of the United States to be the presiding officer. Said convention should revise the Constitution and report "such alterations and amendments in the nature of an entire instrument," which should be reported to the President of the United States, who should immediately submit the same to a convention of delegates chosen in each State by the people thereof, under recommendation of the legislature, for their assent and ratification.

[3] App., No. 1631. This resolution, after reciting the failure of Congress to recommend needed amendments, provided for the appointment of a commission of seventy-six persons by the President, composed of two persons from each State from different political parties, for the purpose of considering and proposing to the States the propriety of the legislatures of at least two-thirds of the States uniting in calling a convention on the 4th of July, 1887, for the purpose of proposing amendments to the Constitution.

[4] App., No. 1660. House Rep., No. 2493, Forty-ninth Congress, first session, p. 5. See ante, par. 35.

PREPARED STATEMENT OF BRIAN W. FITZGERALD, STUDENT AT THE ANTIOCH SCHOOL OF LAW, WASHINGTON, D.C.

THE COST OF A FEDERAL CONSTITUTIONAL CONVENTION, HOW MUCH? AND WHO PAYS?

One issue raised by the calling of a Federal constitutional convention which is often overlooked because of more heavily debated and contested issues involved, but one we certainly cannot afford to forget about, is the effect such a convention would have on the taxpayers of the United States. How much would a Federal constitutional convention cost the taxpayers and how and by whom would the expenses of the convention be paid?

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Congressional Budget Office estimates the cost of holding a Federal constitutional convention, at 1981 and 1983 cost levels, excluding the cost of a delegate election process, to be as the following table presents.

ESTIMATED COSTS

[In millions of dollars]

Type of expenditure	1981 price levels	1983 price levels
Salary and per diem for delegates	24.3	29.2
Air fare for delegates	.1	.2
Staff salaries and benefits	1.7	2.0
Other expenses	7.0	8.4
Total	33.1	39.8

In preparing this cost estimate, the Congressional Budget Office based the estimate primarily on the following assumptions: (1) the convention lasting 12 months; (2) the meeting taking place in Washington, D.C. or another city such as Chicago, Ill.; (3) the delegates apportioned from each State as that State is entitled to Senators and Representatives in Congress; and (4) the delegates receiving compensation for each day of the convention, plus per diem and one round-trip airfare between their homes and either Washington or Chicago.

The following explains the assumptions and data used by the Congressional Budget Office to determine the cost of each of the items found in the table. Except for the delegates' compensation, airfare and per diem, all costs are based on data for each type of expenditure obtained from the Democratic and Republican National Committees for the 1976 National Conventions, and from the States of Arkansas, Illinois, Louisiana, Montana, North Dakota, New Hampshire, Tennessee, and Texas for their state constitutional conventions.

1. Delegate salaries are assumed to be $2,300 per month.

2. Delegate per diem expenses are based on the rate currently allowed by the federal government for Washington, D.C. and Chicago.

3. Current airfares were used to estimate the cost of airfare for the delegates. The delegates, except for those residing near the convention city, were assumed to fly coach class from the capital city of their respective states to the convention city.

4. For the determination of the size of the convention staff it has been assumed, based on the experience of the eight States, that 35 core staff personnel will be required to organize and run the convention with an additional 50 people, (including, pages, stenographers, security staff, etc.) needed during the time the convention is in session. It is estimated that the core staff will need at least 3 months prior to the convention to make all necessary preparations, and to perform all advance legal and research work, etc., plus an additional month after the convention is adjourned to finalize administrative and procedural details. An average annual salary of $20,500 plus benefits has been used for the core staff, and $11,400 plus benefits for the additional convention staff.

To estimate other miscellaneous costs that would be involved, since the data collected for the Democratic and Republic National Conventions and the eight

State conventions are for varying lengths (anywhere from 4 days to 2 years) the relationship of their total compensation and benefits (including travel and per diem but excluding delegate salaries) to other costs was used to estimate the relationship for a Federal convention. Specifically, for these 10 different conventions, other expenses were approximatley 60 percent of total compensation and benefits. When applied to a Federal convention this would mean an additional 7 million at 1981 price levels.

In addition to the costs shown in the table, the election of the delegates would cost State and local governments approximately $120 million if a separate election was held in 1981 for this purpose. If the delegates were put on a general election ballot, the cost would be approximately $1 million and would be somewhat higher if put on the primary ballots, since some jurisdictions do not hold primaries and would have to do so for the purpose of electing convention delegates. According to the Federal Election Commission the cost of elections rises about 10 percent each year. Therefore, if the delegates were selected in 1983 through a separate election, the cost would be approximately $150 million; if put on a general ballot, the cost would be $1.5 million.

This estimate does not include the additional costs for the reservation and use of a convention meeting place. It has been assumed that if a convention was to be held in major hotel, the hotel would not charge for the use of its ballroom if it was going to house most of the delegates. (All housing costs of the delegates were included as a part of the per diem expenditures.) However, no major hotel would be able to tie up its ballroom facilities for a year without reservations having been made many years in advance. Thus, if arrangements for holding the convention in a major hotel were not made well in advance in order to secure their ballroom cost free, such an additional cost might have to be included in the total cost estimate. A ballroom in one of the major hotels in Washington would cost approximately $1,500 to $2,000 per day if no housing or meal services were provided.

It should be noted here that the Congressional Budget Office, in its discussions with the various managements of the major hotels in the Washington area, found that these hotels are somewhat less than enthusiastic about becoming involved with such a convention. Management seems to feel that the indefinite and possible extended duration poses a serious scheduling problem; one they feel may not be worth the notoriety of being the host of a national constitutional convention.

Other possibilities for a convention meeting site would be a facility owned by the Federal Government, such as the Department of Agriculture's Auditorium in Washington. The current charge for its use is $55 per hour, plus $14 per hour for technical service. It is most unlikely that local government facilities would be available for this convention. For instance, the City of Chicago is unlikely to donate the use of its convention halls for this purpose, even though it would make them available for such events as the Democratic National Convention, because of the potential duration of a Federal convention and the fact that a Federal convention would involve only approximately one-tenth the number of people. In other words, the convention does not have the potential revenue generating capacity for Chicago's various businesses in order to make it an attractive guest for the city's convention halls, particularly when the convention may possibly be a long term guest.

Most evidently, the cost of holding the convention will increase, due to inflation, the later the convention is held. Accordingly, the 1983 costs found in the table are based on the 1981 estimate adjusted for the Congressional Budget Office projection of the rate of increase in the consumer price index.

HISTORICAL PRECEDENT: WHO PAID FOR THE CONSTITUTIONAL CONVENTION OF 1787

The delegates of the 1787 Convention[1] were paid by their respective states.[2]

The Constitutional Convention itself passed a resolution[3] on the 5th of September calling on the Continental Congress in New York to pay the Secretary, William Jackson, and the other officers of the Convention for their services.

[1] Max Farrand, *The Records of the Federal Convention of 1787*, Vol. III, App. B, pp. 557–559, (3rd ed. 1927).
[2] *Id.* at Vol. III. App. A, IV, XXXVIII, XLIII, XLIV, LII, LXI, XCIII; App. B, pp. 557–559.
[3] *Id.* at Vol. II, p. 510, 511.

"Resolved that the U.S. in Congress be requested to allow and cause to be paid to the Secretary and other officers of this Convention such sums in proportion to their respectives times of Service, as are allowed to the Secretary & similar officers of Congress."

"Ordered that the Secretary make out & transmit to the Treasury office of the U.S. an account for the said Services, & for the incidental expenses of this convention."

In addition to the above provisions for the payment of the delegates and other members' expenses, the Continental Congress, by resolution on the 23rd of April, 1787 gave all members the privilege of sending and receiving letters and packages free of postage.[4]

On the motion of Mr. Carrington seconded by Mr. Johnson Resolved That the priviledge of sending & receiving letters and packets free of postage be extended to the members of the Convention to be held in Philadelphia on the second Monday in May next in the same manner as is allowed to the members of Congress.—

TODAY: IN THE EVENT OF A CONSTITUTIONAL CONVENTION, WHO SHOULD PAY?

The alternatives for covering the costs of a federal constitutional convention are limited: either the federal government pays all expenses, the states divide up the costs or the federal government and the states somehow divide up the costs.

The first alternative, the federal government paying all the costs, is one provided for in the Senate bill S. 3.[5] S. 3 provides in section 8 (b) the following: "There are hereby authorized to be appropriated such sums as may be necessary for the payment of the expenses of the convention." This approach is, as it appears, very straight forward and uncomplicated. The United States Congress would merely appropriate the necessary monies in order to cover all the costs of the convention.

The second option, as mentioned above, is one provided for in Senate bill S. 1710.[6] S. 1710 provides in section 8 (b) the following: "No federal funds may be appropriated specifically for the purposes of payment of the expenses of the convention." This would mean that the states would somehow have to share the costs of the convention. This approach poses two serious questions that are not addressed by S. 1710.

The first of which is how the cost would be apportioned among the States under the provision in S. 1710. Should each state share equally one-fiftieth of the total cost or should each State only be responsible for that percentage of its representation of the total number of delegates in attendance. For example: under the provisions for selection of delegates found in S. 3 and S. 1710, each state would be entitled to as many delegates as it is entitled to Senators and Representatives in Congress. This would mean that under present circumstances, a total number of 485 delegates would be attending the convention. (The recent census may change the number of delegates in the near future.) Pursuant to the above mentioned provisions of S. 3 and S. 1710, Rhode Island would be entitled to only four delegates, while California would have 45 delegates. Rhode Island's four delegates represent only approximately .9 percent of the total number of delegates; California's 45 delegates represent approximately 9.2 percent of the total number. Should Rhode Island be expected to share equally with California, each paying one-fiftieth the total cost, when California would have more than 10 times the number of delegates and representation at the convention or should Rhode Island pay only .9 percent of the total cost and California pay 9.2 percent of the total? If the states are to be expected to cover the costs of the convention, as S. 1710 provides, this question will have to be addressed.

The second question that arises is one that is most fundamental and one never lacking in controversy: federalism and states' rights. In other words, how and under what authority can the federal government require the states to pay the costs of a national constitutional convention.

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[4] *Id.* at Vol. III, App. A, V; *Documentary History of the Constitution*, IV, p. 121.

[5] S. 3. Senator Helms introduced the bill on Jan. 15, 1979. The bill was referred to the Subcommittee on the Constitution of the Judiciary Committee on Feb. 27, 1979. No further action has been taken on the bill.

[6] S. 1710. Introduced by Senator Hatch on Sept. 5, 1979. No further action has been taken on the bill.

The other alternative method for paying the costs of a convention would be to somehow divide up the costs between the Federal Government and the States as was done in the 1787 Convention. This could be done in any number of different ways too numerous to be spelled out here. The main advantage of such an approach would be that it would be a middle of the road compromise between those persons who feel the Federal Government should pay and those who feel the states should cover the costs.

[The Washington Star, March 1, 1979]

GOVERNMENT UNIONS OPPOSE BALANCED BUDGET CONVENTION

(By Joseph Young)

Government employee unions have embarked on a battle they consider as vital to federal and postal workers as any they fought in the past.

The unions are seeking to block adoption of the constitutional amendment convention that would be called for the purpose of requiring a balanced federal budget.

Employee leaders believe such a constitutional convention could wipe out as many as 300,000 to 400,000 federal and postal jobs and reduce pay and fringe benefits of government workers.

In addition, they fear that such a constitutional convention would adopt other amendments harmful to government workers.

The AFL–CIO American Federation of Government Employees has instructed its membership throughout the country to campaign at state legislature levels and work with other groups to block ratification of the constitutional amendment. Already 28 of the 34 states required for ratification of such a constitutional amendment convention have voted their approval.

The AFL–CIO National Association of Letter Carriers has asked its membership to join other interested groups in lobbying at state levels to block the constitutional amendments from being approved.

Vincent Sombrotto, NALC president, and Tony Huerta, the union's executive vice president, told the membership:

"The real trouble is that such a convention would undoubtedly be dominated by right-wing activists and nothing could prevent the delegates from considering extremist issues such as 'Right to Work,' uniting the federal retirement program with Social Security, repeal of the income tax, and turning the Postal Service to private enterprise."

Government employee leaders emphasize that such a convention would not only eliminate hundreds of thousands of government jobs, it also would eliminate many valuable and necessary publice services.

The NALC charged such action would "seriously threaten national security, increase unemployment and induce a national depression."

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GOLDWATER V. CARTER:[1] ITS IMPLICATIONS FOR JUSTICIABILITY ISSUES IN THE CONVENTION METHOD OF AMENDING THE CONSTITUTION

(By Kenneth F. Ripple*)

A. INTRODUCTION

On December 13, 1979, the Supreme Court of the United States decided, in summary fashion, the challenge of certain members of Congress to the President's unilateral decision to terminate the United States' Mutual Defense Treaty with the Republic of China. The Court's three and one-quarter line order simply recites that the petition for certiorari is granted, the judgment of the Court of Appeals[2] is vacated and the case is remanded to the District Court[3] wih directions to dis-

[1] 48 U.S.L.W. 3402 (U.S. Dec. 13, 1979) (No. 79–856).

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[2] *Goldwater* v. *Carter*, No. 79–2246 (D.C.Cir. Nov. 30, 1979) (en banc).

[3] *Goldwater* v. *Carter*, No. 78–2412 (D.D.C. Oct. 17, 1979).

miss the complaint. The Court thus leaves us, quite deliberately, with no precedent at any level of judicial review either on the important threshold questions of justiciability or on the merits of the dispute. However, two members of the Court filed statements addressing various aspects of the justiciability issue. The purpose of this short paper is to relate these recent statements by members of the Court on the question of justiciability to the question of whether Congressional determinations pursuant to its responsibilities under Article V's convention method are reviewable by the Supreme Court of the United States.

B. THE STATEMENTS

1. Mr. Justice Powell

Writing only for himself, Mr. Justice Powell viewed the substantive issue as basically involving "the allocation of power between the President and the Congress * * *" [4] In his judgment, that matter was not ripe since those two branches had not yet reached "a constitutional impasse." [5] Neither the House nor the Senate had definitely rejected the President's position. Justice Powell concluded: "If the Congress chooses not to confront the President, it is not our task to do so." [6] The Justice made it clear, however, that, in the event of such a constitutional impasse, "it would be the duty of * * * [the] * * * Court to resolve the issue." [7] He found no "'textually demonstrable constitutional commitment of the issue to a coordinate political branch'" [8] since "[n]o constitutional provision explicitly confers upon the President the power to terminate treaties." [9] Moreover, the question could be resolved by the application of "normal principles of interpretation to the constitutional provisions at issue" [10] without "an initial policy determination of a kind clearly for non-judicial discretion." [11] Such judicial action does not imply, he argued, "lack of respect for a coordinate branch" [12] since it would eliminate, not create, multiple constitutional interpretations.

2. Mr. Justice Rehnquist

Writing for himself, the Chief Justice, Mr. Justice Stewart, and Mr. Justice Stevens (one vote short of a majority), Mr. Justice Rehnquist took the position that the case presented a political question. The Justice argued that his conclusion followed *a fortiori* from the holding in *Coleman* v. *Miller*.[13] Central to his analysis was Chief Justice Hughes' observation in *Coleman* that Article V contains no explicit provision concerning rejection of an amendment by a state legislature and that Congress therefore retained final authority to decide whether "by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications." [14] The Constitution is similarly silent on the manner in which a treaty is to be terminated, Justice Rehnquist noted, and, since "different termination procedures may be appropriate for different treaties," [15] the matter "'must surely be controlled by political standards.'" [16] Indeed, he added, the justification for such a conclusion is even greater here since the matter involved the conduct of foreign relations. The steel seizure case, *Youngstown Sheet & Tube Co.* v. *Sawyer* [17] could be distinguished on the ground that that suit involved a challenge to the President's authority by private litigants, while, in this case, the dispute was between "coequal branches of our government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum." [18]

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[4] *Goldwater* v. *Carter*, 48 U.S.L.W. at 3402.
[5] *Id.*
[6] *Id.*
[7] 48 U.S.L.W. at 3403.
[8] 48 U.S.L.W. at 3402, quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).
[9] 48 U.S.L.W. at 3402.
[10] *Id.*
[11] *See* note 8 *supra*.
[12] 48 U.S.L.W. at 3403, citing *Powell* v. *McCormack*, 395 U.S. 486, 548 (1969).
[13] 307 U.S. 433 (1939).
[14] *Id.* at 456.
[15] 48 U.S.L.W. at 3403.
[16] 48 U.S.L.W. at 3403, quoting *Dyer* v. *Blair*, 390 F.Supp. 1291, 1302 (N.D. Ill. 1975).
[17] 343 U.S. 579 (1952).
[18] 48 U.S.L.W. at 3403. On an accompanying footnote, Mr. Justice Rehnquist quoted at length from the opinion of Chief Judge Wright (joined by Judge Tamm) in the Court of Appeals which catalogued the political tools of retaliation possessed by the Congress. Judge Wright concluded: "As our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of our government." Slip opinion at p. 13.

C. ANALYSIS

Our task is to assess the import of these statements on the issue of whether congressional determinations with respect to the convention method of amendment are justiciable. From that perspective, it would be quite easy to read too much into these statements. First, a general caveat is indicated. As Justices Blackmun and White most pointedly noted,[19] the writings in this case are not the product of the usual deliberative process reserved for cases taken for plenary review. Certainly, the level of analysis manifested in the statements of Mr. Justice Powell and Mr. Justice Rehnquist are not the equals of other efforts on comparable topics by the same authors.[20] Quite simply, these writings were forged in a "hydraulic pressure" [21] not present in deliberations on a case heard and decided in due course.

With that general caution noted, it is possible to cull from the statement of Mr. Justice Rehnquist a limited amount of relevant analysis. Certainly, his reliance on *Coleman* does seem to establish that at least four Justices of the present Court are willing to accept the holding of Coleman that Congress alone may accept or reject a state's ratification of a proposed amendment. These same Justices would apparently reject Justice Powell's comment [22] that *Coleman* can be limited to circumstances where the particular proposed amendment would overrule a decision of the Court. More significantly, these Justices would apparently reject the view that absence of a textual provision covering Congressional rejection of a petition for convention or a proposed amendment or the failure of Congress to act makes the matter any less a political question. It appears that they would consider such issues committed to another branch of government (and thus not judicially manageable in the sense of the *Baker* v. *Carr* [23] criteria) as long as the *subject matter* was clearly committed by the text to the exclusive control of that other branch. Such a structural approach to constitutional interpretation, especially in the area of separation of powers, is certainly not novel [24] and has, indeed, a certain common sense quality.

Mr. Justice Rehnquist's statement takes the further position that *Goldwater* is actually a stronger case for the application of the political question doctrine than *Coleman* since it deals with foreign affairs, a matter which he is willing to accept as a traditional area of Executive exclusivity.[25] Here, Justice Rehnquist ignores the crucial fact that, in *Goldwater*, the Court was confronted with a question of allocating power between two branches of government, a task which, as Mr. Justice Powell notes, the Court has been quite able to undertake in some contexts and where it has performed the important function of preserving the separation of powers by the allocation of power.[26] On the other hand, *Coleman* and situations posed by the pending constitutional convention procedures bill do not involve a dispute between two branches of the Federal Government. Rather they require the Court to second-guess a judgment which it has already found to be the exclusive prerogative of one other branch. Arguably, in this latter situation, there is far less need for the Court to act and a far greater possibility of unresolved "multifarious pronouncements by various departments on one question." [27]

Since Justice Powell relies so heavily on the duty of the Court to arbitrate interbranch disputes over the allocation of power, it is difficult to assess how his remarks bear on the justiciability of Congressional determinations with respect to the convention method of amending the constitution. As noted, *supra*, cases arising under the procedures bill would not involve allocating power between two branches of government. They would, however, involve fact-specific review of Congressional action or inaction. Such litigation would be quite

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[19] These Justices filed a short statement indicating that they would not have decided the case without plenary consideration, including oral argument.

[20] *See, e.g., Warth* v. *Seldin*, 422 U.S. 490 (1975).

[21] *Northern Securities Co.* v. *United States*, 193 U.S. 197, 401 (1904) (dissenting opinion of Holmes, J.).

[22] 48 U.S.L.W. at 3403, n. 2.

[23] 369 U.S. at 217.

[24] *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 703–713 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion of Jackson, J.).

[25] 48 U.S.L.W. at 3403, citing *United States* v. *Curtiss-Wright* Corp., 299 U.S. 304, 315 (1936).

[26] 48 U.S.L.W. at 3403, citing *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *United States* v. *Nixon*, 418 U.S. 683, 707 (1974); *The Pocket Veto Case*, 279 U.S. 655, 676–678 (1929); *Myers* v. *United States*, 272 U.S. 52 (1926).

[27] *Baker* v. *Carr*, 369 U.S. at 217.

analogous to the example of a non-justiciable controversy which Mr. Justice Powell offers in *Goldwater*—the review of a President's decision to act or not to act pursuant to a treaty provision in a given situation.[28]

D. CONCLUSION

Goldwater deals with a justiciability question quite different from the one which is posed by current legislative proposals purporting to make Congressional determinations with respect to a constitution convention reviewable in the courts. *Goldwater* involves an interbranch dispute; the latter situations would not. It is clear from *Goldwater*, however, that at least four Justices appear disposed to follow a structural rather than literal approach in deciding if a given activity is committed to the exclusive care of another branch. Moreover, at least five Justices seem ready to declare non-justiciable any dispute calling for a fact-specific review of a determination which another branch clearly had the prerogative to make alone. These developments make the justiciability of Congressional determinations under a convention procedures bill even more suspect than they appeared before *Goldwater*. They reemphasize the Court's reassessment in recent years of the proper role of the judiciary in resolving policy matters which the Constitutional scheme leaves to the more democratically responsive branches.

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[28] 48 U.S.L.W. at 3402.

Is There a Constitutional Convention in Your Future?

By Tom Dybdahl

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...SDAY, JULY 2, 1981 Subscription Rates See Box A2 25c

First Amendment Repealed

July 2, 1981—The National Constitutional Convention, meeting this week in Kansas City, voted today to repeal the First Amendment to the Constitution and replace it with a more restricted statement permitting free speech and free exercise of religion only within well-defined guidelines.

As currently written, the First Amendment places no restrictions on freedom of speech, freedom of the press, or the free exercise of religion, and guarantees the separation of church and state, as well as the right of the people to assemble peaceably.

"We wish to make it clear," a spokesman for the convention said, "that we are not opposed to these freedoms. But unless there are some limits, freedom of speech and freedom of religious practice can become tyranny by tiny minorities. We are in danger of being destroyed by those who promote unorthodox and dangerous ideas under the guise of 'exercising their constitutional rights.'"

The spokesman said further that the convention's decision "was not a negative action abolishing important rights, but a positive action that will bring about constructive and necessary changes in our society. We need to get back to the faith of our founders."

When asked about specific recommendations the convention had discussed, the spokesman said, "There have been no final decisions, but the guidelines will likely include required prayer in public schools and a national day of worship." A definite announcement is expected at the convention's closing session on July 4.

Tomorrow's news story? Probably not. An impossible fantasy? Certainly not. It could become a reality if the accelerating effort to call a constitutional convention is successful.

By early 1980, 30 state legislatures—four short of the required two thirds—had passed resolutions asking Congress to call a constitutional convention to approve an amendment requiring a balanced federal budget. The National Taxpayers Union, which is spearheading the drive for the convention, predicts they'll have the 34 states necessary to convene a convention before the year is over.

But what is the connection between an effort to force the federal government to balance its budget and our First Amendment rights? Is there really any potential danger from a constitutional convention (sometimes abbreviated con-con)?

When the Founding Fathers approved the Constitution, they recognized that changes might be needed. Congress was given the right to make amendments subject to the approval of three quarters of the states. Article V, however, provides that a constitutional convention shall be called when two thirds of the state legislatures petition Congress for one. Alexander Hamilton, writing in *The Federalist*, No. LXXXV, reinforced this point: "The words of this article are peremptory. The Congress *shall* call a convention.'" (Italics supplied.) As with congressional amendments, any amendment proposed by a convention requires approval from three fourths of the states.

In addition to calling a convention, Congress has the responsibility of deciding such secondary but crucial matters as how many delegates shall attend, how they shall be chosen, and the manner in which each state is to be represented.

After that, however, the situation becomes much less clear and much more ominous. Can Congress, for instance, set boundaries for a con-con by specifying what issues it may properly consider? If Congress does impose guidelines, must the convention honor them and stick to the specific issue(s) for which it was called, or may it consider other matters, as well?

Most of those who favor a con-con claim that fear of a freewheeling convention—such as one that might repeal all or part of the Bill of Rights—is preposterous. They have no less a dig-

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"When the Constitution was first framed I predicted that it would last fifty years. I was mistaken. But I was mistaken only in point of time. The crash will come, but not quite so quick as I thought."

—Ascribed to Aaron Burr, circa 1835, in **Life and Times of Aaron Burr** *(1858), by James Parton.*

ure than former U.S. Attorney General Griffin Bell on their side. "Limits can be set," he has said. "Congress has a duty to do so."

But others are less certain. Howard Jarvis, the antispending crusader who led the fight for California's Proposition 13, warned that in a constitutional convention "every radical crackpot or special-interest group would have the chance to write the supreme law of the land." Congressman Barber Conable (R-N.Y.) says such a gathering would be a kind of "constitutional Russian roulette."

Such fears are not entirely unfounded. The precedent of the only other constitutional convention, which met in Philadelphia in 1787, is somewhat less than reassuring. It was assigned the job of amending the Articles of Confederation. What it did—and perfectly legally—was to abandon that document completely and write another, very different, charter. That could happen again.

The prospect has given rise to all kinds of fantasies. Amendments on several subjects are currently pending before Congress. Many people would like to reinstate school prayer. A considerable number of very determined people would like to see a constitutional amendment that would prohibit abortion. (At this writing 15 states have called for a con-con on *that* issue.) What would prevent a delegate from putting forward one of these amendments at a constitutional convention gathered to consider the federal budget?

Of course, Congress can call a con-con and limit its subject. However, the convention could then—legally—declare itself superior to Congress and ignore any limitations that had been set (as did the 1787 convention). It could also—for good measure—vote to amend the Constitution to eliminate the Supreme Court. And no rules approved by one Congress would necessarily be binding on any other Congress or on the convention.

Even if Congress could successfully limit a convention's powers, how could the debate be focused? Various states have approved different resolutions, some very short and general, others long and specific. The one approved in Delaware calls for a convention only if the other states approve a resolution identical to Delaware's; no other state has yet done so.

Another approach could be to limit the convention to a single subject, such as the federal budget. But in that case, those who favor school prayer could propose that no federal funds go to states that don't permit prayer in public schools. Or antiabortionists could offer an amendment cutting off welfare funds to any state that allowed abortion.

If, as proponents sometimes suggest, Congress is fearful of a con-con, the convention strategy might be just the prod needed to get the legislators moving. This has happened before. Both the Seventeenth Amendment, providing for the direct election of Senators, and the Twenty-first, repealing prohibition, were passed after drives for special conventions were under way. Conservative Columnist William Safire believes that this is, in fact, the purpose of Article V. It was, he says, "provided by the Founding Fathers as a way of lighting a fire under Congress if the government in Washington did not prove sensitive to the will of most of the states."

According to this scenario, Congress would short-circuit a constitutional convention by passing its own amendment. The problem here is that while many members of Congress would like to balance the budget, and while they love to tell their constituents about their efforts in this regard, there is a limited amount of support for an iron-clad amendment requiring it.

Supporters of a con-con say discussions of possible dangers from such a convention are just a way of dodging the real issue—the need for a balanced budget. They point to opinion polls that show that 70 percent of Americans want a balanced budget, along with some sort of law requiring one. Even if the convention is wide open, they say, there is nothing to fear. California Governor Jerry Brown, a leading con-con advocate, argues that "the idea that the American people want to junk the Bill of Rights is absurd."

Most people would agree that repeal of the First Amendment—or any other part of the Bill of Rights—is highly unlikely. At the same time, an unlimited convention could work other sorts of serious mischief. The judgment of "the people" may generally be good, but we all have lapses. Consider the fact that less than thirty years ago an amendment was seriously proposed that would have set aside the First Amendment and replaced it with the assertion that "this nation devoutly recognizes the authority and law of Jesus Christ, Saviour and Ruler of Nations, through whom are bestowed the blessings of Almighty God." Noble as that sentiment may be, America would be in real trouble if that were, in fact, our First Amendment!

Most of those who support a constitutional convention believe they are acting in the best interests of their country. They are not part of a plot to deprive us of any of our freedoms, including religious ones. But history confirms that good intentions are not enough. A constitutional convention, whatever its merits, offers the possibility of serious problems. For those of us who cherish all our rights, it is a possibility better avoided. □

JUDICIAL REVIEW OF CONGRESSIONAL DETERMINATIONS PURSUANT TO THE CONVENTION METHOD OF AMENDING THE CONSTITUTION

(By Kenneth F. Ripple*)

SUMMARY

Recent holdings of the Supreme Court dealing with various aspects of justiciability have further clouded the issue of whether Congressional determinations pursuant to the Article V amendment procedures are justiciable. Certainly, the provisions of S. 1710 do not create a scheme particularly compatible with the constitutional policy concerns most frequently articulated by the Court in its recent decisions.

INTRODUCTION

The constitutional and practical feasibility of providing for judicial review of Congressional action with respect to the calling of a federal constitutional convention [1] has been discussed rather frequently in the literature.[2] This presentation will not attempt to plough that ground again. Rather, it will identify, in light of recent trends in Supreme Court case law, the arguments which ought to serve as the focus of the current debate over the proposed constitutional procedures legislation.

CONSTITUTIONAL CONSIDERATIONS FAVORING JUDICIAL REVIEW

Setting aside, for the moment, the particular language of this bill, it must be stated at the outset that a significant and respected portion of the legal community clearly favors limited judicial review of Congressional action with respect to a constitutional convention. For instance, the Report of the ABA Special Constitutional Convention Study Committee addressed the matter rather extensively and, pursuant to that Report, the House of Delegates resolved that "[a]ny Congressional legislation dealing with such a process for amending the Constitution should provide for limited judicial review of Congressional determinations concerning a constitutional convention." [3]

Indeed, the ABA Study Committee Report probably sets forth the case in favor of a provision for judicial review in a convention procedures bill most succinctly:

1. Although, in each case, the matter arose in a context other than the actual proposal and ratification procedure, the courts have already adjudicated many questions which would arise in legislative action pursuant to a convention procedures bill: [4]

a. Whether Congress may choose the "state legislature" method of ratification for proposed amendments which expand federal power; [5]

b. Whether a proposed amendment requires the approval of the President; [6]

c. Whether Congress may fix a reasonable time for ratification of a proposed amendment by state legislatures; [7]

d. whether the states may restrict the power of the legislatures to ratify amendments or submit the decision to a popular referendum; [8]

e. the meaning of the requirement of a two-thirds vote of both Houses.[9]

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[1] U.S. Const. Article V.

[2] *See, e.g.*, ABA Special Constitutional Convention Study Committee, Amendment of the Constitution by the Convention Method Under Article V (1974) thereinafter ABA Report); Proposals for a Constitutional Convention to Require a Balanced Budget (AEI 1979); Note, "The Process of Constitutional Amendment," 79 *Col. L. Rev.* 108, 138–172 (1979); Note, "Proposed Legislation on the Convention Method of Amending the United States Constitution," 85 *Harv. L. Rev.* 1612 (1972).

[3] ABA Report vii–viii.

[4] *But see Leser* v. *Garnett*, 258 U.S. 130 (1922) (official notice of ratification conclusive on the courts), *Fairchild* v. *Hughes*, 258 U.S. 126 (1922) (a citizen may not institute suit in federal court to obtain indirectly an advisory opinion on the validity of an amendment.)

[5] *United States* v. *Sprague*, 282 U.S. 716 (1931).

[6] *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall) 378 (1798).

[7] *Dillon* v. *Gloss*, 256 U.S. 368 (1921).

[8] *Hawke* v. *Smith*, 253 U.S. 221 (1920).

[9] *National Prohibition Cases*, 253 U.S. 350 (1920).

2. The subsequent case of *Coleman* v. *Miller*[10] placed in doubt whether all of the foregoing issues remain justiciable.[11] However, *Coleman* itself may have been significantly restricted by the Court's later decisions in *Baker* v. *Carr*,[12] and *Powell* v. *McCormack*.[13] Arguably, the rationale of *Powell*, with its strong emphasis on the interest of voters in having the person they elect take a seat in Congress, would also control a situation where Congress refused to call a convention despite the requisite number of petitions. Clearly, the convention method was meant to permit the states, expressing the will of the people, to bring about change despite congressional opposition.[14] *Baker*, moreover, may suggest that, despite dicta to the contrary in *Powell*,[15] the Court, in vindicating such a frustration of the popular will, need not restrict itself to declaratory relief but might fashion a more extensive remedy.[16]

CONSTITUTIONAL CONSIDERATIONS AGAINST JUDICIAL REVIEW

1. The case against the justiciability of Congressional decisions in the convention amendment procedure must begin with the reality of *Coleman* v. *Miller*[17] which, while ambiguous on the actual scope of its rationale, charts attitudinally a course of judicial non-involvement.[18] *Coleman* can be read as acknowledging that the amending process by convention involves, in the words of *Baker*, a "textually demonstrable commitment"[19] to another branch. Moreover, if the Court is required to second-guess the decision of Congress as to whether the petitions deal with the same general topic, the possibility for head-to-head confrontation with the Congress in an area devoid of real standards would be acute.[20] *Baker* itself can be distinguished on the ground that it did not involve a confrontation with a coordinate branch of the federal government but rather involved the obligation to enforce federal constitutional standards upon nonconforming state action. Powell, of course, did involve Congressional action. The Court acted, however, only after it was convinced that there was not a textually demonstrable commitment of the question to a coordinate branch and then only when it was clear that simple declaratory relief would suffice.

2. More importantly, in the years following the ABA Study Committee Report, the Court had several occasions to examine further the concept of justiciability. Significantly, these cases involved constitutional provisions which, like Article V, deal with institutional responsibilities and not individual rights. These cases manifiest, at least at the hands of the present Court, a distinct propensity to acknnowledge the right and responsibility of the other branches to interpret definitively such clauses. For instance, in *United States* v. *Richardson*,[21] the

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[10] 307 U.S. 433 (1939).

[11] In the words of the ABA Report (p. 21–22): In *Coleman*, the Court held that a group of state legislators who had voted not to ratify the child labor amendment had standing to question the validity of their state's ratification. Four Justices dissented on this point. The Court held two questions non-justiciable: the issue of undue time lapse for ratification and the power of a state legislature to ratify after having first rejected ratification. In reading these conclusions, the Court pointed to the absence of criteria either in the Constitution or a statute relating to the ratification process. The four Justices who dissented on standing concurred on non-justiciability. They felt, however, that the Court should have disapproved *Dillon* v. *Gloss* insofar as it decided judicially that seven years is a reasonable period of time for ratification, stating that Article V gave control of the amending process to Congress and that the process was "political in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Even though the calling of a convention is not precisely within these time limits and the holding in *Coleman* is not broad, it is not at all surprising that commentators read that case as bringing Article V issues generally within the rubric of "political questions."

[12] 369 U.S. 186 (1962).

[13] 395 U.S. 486 (1969).

[14] ABA Report pp. 23–24.

[15] 395 U.S. at 517–518.

[16] ABA Report p. 24.

[17] *See* note 10, *supra*. See also *Chandler* v. *Wise*, 307 U.S. 474 (1939).

[18] *See* note 11, *supra*.

[19] 369 U.S. at 217.

[20] In addition to "a textually demonstrable constitutional commitment . . . to a coordinate political department," *Baker* lists the following criteria as relevant for ascertaining the presence of a "political question": a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a courts undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question. 369 U.S. at 217.

[21] 418 U.S. 166 (1974).

Court held that a private citizen did not have standing to maintain an action for the enforcement of the Accounts Clause [22] since he could show no "particular concrete injury" [23] from Congress' refusal to enforce the Clause against the Central Intelligence Agency.[24] Replying on *Ex parte Lévitt*,[25] the Court readily acknowledge that [i]t can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absense of any particular individual or class to litigate these claims gives support to the argument that the subject is committed to the surveillance of Congress, and ultimately to the political process.[26]

Mr. Justice Powell's concurring opinion [27] manifested an even greater reluctance to involve the Court in such matters. Speaking of the power of judicial review, he wrote:

"The irreplaceable value of the power (of judicial review) lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." [28]

Significantly, on the same day, the Court addressed the question of whether a citizen could judicially challenge Congress' non-enforcement of the provisions of the Incompatibility Clause [29] against its own members. [30] Again, the Court declined to entertain the issue, noting that to allow such a suit would "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "'government by injunction.'" [31]

It may be argued that, since the foregoing cases deal essentially with the concept of standing, they are inapposite to a determination of whether a particular issue raises a "political question." However, as Chief Justice Warren pointed out in *Flast* v. *Cohen*, [32] both of these concepts, standing and political question, have common constitutional roots in the "case or controversy" requirement of Article III. In both situations, the Court must ultimately focus on whether the dispute presents a matter capable of judicial resolution. The common root of these concepts is perhaps best illustrated by one of the cases which reached the Court in the aftermath of the tragedy of Kent State, *Gilligan* v. *Morgan*.[33] There the Court held that a request to submit the training and operations of the Ohio National Guard to continuing federal judicial scrutiny was non-justiciable. That conclusion, noted the Court, could be articulated either as a lack of standing or as a political question requiring judicial scrutiny of a subject committed expressly by the Constitution "to a coordinate political department" [34] because of the mandate of the Militia Clause.[35]

Therefore, in the years following the last careful review of Article V in the ABA Report, the Court has demonstrated an increased reluctance to define the constitutional limitations of judicial power so as to require judicial monitoring of the institutional responsibilities of the coordinate branches. At the very least, there is an increased doubt that the reasoning of *Baker* and *Powell* affords a realistic basis upon which to premise a statutory judicial review procedure of Congressional determinations pursuant to its responsibilities under Article V.

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[22] U.S. Const. Art. I, sec. 9, cl. 7.
[23] 418 U.S. at 177.
[24] The Central Intelligence Agency Act of 1949, 63 Stat. 208, 50 U.S.C. § 403a et seq. permitted the CIA to account for its expenditures "solely on the certificate of the Director. . . ." 50 U.S.C. § 403j (b).
[25] 302 U.S. 633 (1937).
[26] 418 U.S. at 179.
[27] *Id.* at 180–197.
[28] *Id.* at 192.
[29] U.S. Const. Art. I, sec. 6, cl. 2.
[30] *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).
[31] *Id.* at 222.
[32] 392 U.S. 83, 95 (1968). *See also Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). There is also a non-constitutional, prudential element to justiability questions which is not of immediate concern here. *See Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). *See generally Ashwander* v. *TVA*, 297 U.S. 288, 346–356 (1936) (concurring opinion of Brandeis, J.).
[33] 413 U.S. 1 (1973).
[34] *See* note 19, *supra*.
[35] U.S. Const. Art. I, sec. 8, cl. 16.

A CRITIQUE OF THE PROPOSED LEGISLATION IN LIGHT OF THE FOREGOING CONSIDERATIONS

The bill under consideration is S 1710, 96th Congress, 1st Session. As submitted, section 15 would provide:

"SEC. 15. (a) Any State aggrieved by any determination or finding, or by any failure of Congress to make a determination or finding within the periods provided, under section 6 or section 11 of this Act may bring an action in the Supreme Court of the United States against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. Such an action shall be given priority on the Court's docket.

"(b) Every claim arising under this Act shall be barred unless suit is filed thereon within sixty days after such claim first arises.

"(c) The right to review by the Supreme Court provided under subsection (a) does not limit or restrict the right to judicial review of any other determination or decision made under this Act of such review as is otherwise provided by the Constitution or any other law of the United States."

The foregoing discussion makes clear that a judicial review procedure has the best possibility of surviving judicial scrutiny if it can be characterized as essentially an effort "to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes." [36] Cast in this light, a provision might be justified on the rationale of *Baker*. Such a characterization could, moreover, gather a good deal of legitimacy from the fact that the "convention method" of amendment was designed to permit the people to circumvent a Congress which was frustrating the popular will.[37] The bill in question contains several features which appear to detract from the possibility of sustaining such a characterization. While a specific legislative grant of standing to initiate an action is no doubt viewed with favor by the courts,[38] the right to initiate the action is here vested in the states. Arguably, the states need not resort to the judiciary for protection against the Congress since the Constitution specifically provides them with representation in each House.[39] Moreover, the possibility of a finding of non-justiciability is probably increased somewhat by the bill's invocation of the Court's original jurisdiction.[40] Traditionally, the Court appears to have been especially sensitive to the problem of non-justiciability in cases coming within its original jurisdiction.[41] Moreover, as the ABA noted, "[i]nitiation of suit in the Supreme Court necessarily escalates the level of the controversy without regard to the significance of the basic dispute." [42]

Perhaps, more importantly, the proposed section would apparently require the Court to determine the correctness of the Congressional determination that the requisite number of state petitions deal "with the same general subject" [43] or that an amendment proposed by the convention "differs from or was not included as one of the general subjects named or described in the current resolution of the Congress by which the convention was called." [44] Such a judgment might easily involve "judicial review of substantive political judgments entrusted to the coordinate branches of government." [45] It is not at all clear that,

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[36] 413 U.S. at 11.

[37] *See* Feerick, "Amending the Constitution Through Convention," 60 *ABA J.* 285, 287 (1974).

[38] *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

[39] *Cf. Massachusetts* v. *United States*, 435 U.S. 444 (1978). (plurality opinion of Brennan, J.) (relying on Chief Justice Marshall's famous dictum in *McCullough* v. *Maryland*, 17 U.S. (4 Wheat.) at 427, he justifies the narrow scope of a state's immunity from federal taxation on the ground that federal tax policy is the product of the national Congress which, in turn, is composed of state constituencies). *But see National League of Cities* v. *Usery*, 426 U.S. 833, 841 n. 12 (1976) (expressing the view that a state's representation in the national legislature is not a sufficient guarantee of its amendment X autonomy against federal use of the Commerce Power).

[40] U.S. Const. Art. III, sec. 2, cl. 2.

[41] *See, e.g., Massachusetts* v. *Mellon*, 262 U.S. 447, 483–485 (1923) : *Mississippi* v. *Johnson*, 4 Wall. 475 (1866) : *Georgia* v. *Stanton*, 6 Wall. 50 (1867). *See generally*, Stern and Gressman, *Supreme Court Practice* 5th ed. 610. *But see National Prohibition Cases*, 253 U.S. 350 (1920) where the Court apparently assumed jurisdiction in two cases seeking an injunction against the enforcement of criminal statutes enacted pursuant to the Eighteenth Amendment. These cases were decided prior to *Coleman* v. *Miller*, note 10 *supra*, and involved a *post facto* determination of the validity of the Amendment's ratification procedures. The Court was not asked to interject itself into the actual conduct of those procedures.

[42] ABA Report 25.

[43] Slip bill p. 5, sec. 6.

[44] *Id.* at 10, sec. 11.

[45] 413 U.S. at 11.

in attempting to fulfill its designated function under this bill, the Court could limit itself to the sort of declaratory relief which sufficed in *Powell*.[46] The Court could, therefore, find itself in the embarrassing situation of being totally unable to enforce its decision.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
WASHINGTON BUREAU,
Washington, D.C., January 9, 1980.

Mr. JOHN MINOR,
Office of Senator Edward Kennedy,
2237 Russell Senate Office Building,

DEAR MR. MINOR: I am enclosing a copy of NAACP's resolution opposing a constitutional amendment to balance the Federal budget.

Sincerely yours,

ALTHEA T. L. SIMMONS,
Director, Washington Bureau.

Enclosure.

NAACP 70TH ANNUAL CONVENTION RESOLUTIONS, JUNE 25–29, 1979, LOUISVILLE, KENTUCKY

. . .

7. OPPOSITION TO CONSTITUTIONAL CONVENTION FOR BALANCED BUDGET

Whereas, there is a national climate of negativism and retrenchment towards civil rights generally, and organized groups are attempting to repeal hard-won civil rights gains of black people by instituting fiscal austerity measures that reduce governmental funding of programs which provide for the essential health, education, employment, and welfare of the poor and black citizenry ; and

Whereas, there is now an effort to have the requisite two-thirds of the states to convene a Federal Constitutional Convention for the alleged purpose of amending the United States Constitution in order to require a "Balanced Federal Budget" ; and,

Whereas, a Constitutional Amendment to so balance the Federal Budget would have disastrous and deleterious consequences for the poor, by endangering Federal funding of social and other programs presently aiding poor and black people, and distressed areas of our nation ; and

Whereas, such a convention process is unprecedented, and is likely to be fraught with political posturing, various agendas, and constitutional uncertainty ; and,

Whereas, there is the danger that a Constitutional Convention would be so open-ended a process that amendments might be proposed undermining basic civil rights and civil liberties protections ; and,

Whereas, the Constitutional Convention is *NOT* an appropriate mechanism for dealing with the problem of inflation, which hurts the poor as well as the rich ; and,

Whereas, there is no way to insure proper black representation at such a convention ; and,

Whereas, there is no way to insure that such a convention would not infringe on civil rights decisions of the courts, based on the Fourteenth Amendment, which have aided and advanced the rights of black people, therefore be it

Resolved, That the NAACP is unalterably opposed to the convening of a Constitutional Convention and call upon its branches, youth councils, members and friends to work promptly and diligently to urge state legislatures either to disapprove of such application for the convening of a convention, or where such measures have passed it urge its units to work for recision by the legislatures of resolutions calling for the convening of such a convention.

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[46] *See* note 15, *supra*.

National Federation of

Business and Professional Women's Clubs

RESOLUTION #5

Adopted at the Boston Convention, July 24, 1979

Whereas, There are existing proposals to call a Constitutional Convention covering a variety of subjects or concerns, and

Whereas, The conventional method of state ratification of an amendment to the U.S. Constitution, upon proposal by Congress, has worked satisfactorily to achieve 26 amendments to the Constitution over the entire period since 1789, and

Whereas, No guidelines currently exist as to the convening method, necessary majority, or subjects to be covered, and

Whereas, The National Federation of Business and Professional Women's Clubs, Inc. is dedicated to action necessary to protect and insure the basic rights and liberties of the Constitution; therefore, be it

Resolved, That the National Federation of Business and Professional Women's Clubs, Inc. go on record opposing a Constitutional Convention; and be it further

Resolved, That in the event of the introduction in Congress of measures calling for such Constitutional Convention, the National Federation of Business and Professional Women's Clubs, Inc. urge Congress to call a National Conference of representatives of prominent, concerned National Organizations to participate in the establishment of appropriate criteria and parameters for the calling of such a Constitutional Convention; and be it further

Resolved, That a copy of this resolution be sent to each Member of Congress within thirty (30) days of the conclusion of this Convention.

[Report No. F–7 New York County Lawyers' Association Committee on Federal Legislation June 1979]

REPORT ON THE PROPOSED CONSTITUTIONAL CONVENTION PROCEDURES ACT

RECOMMENDATION: DISAPPROVAL

S. 520, 96th Cong., 1st Sess. (1979) and similar legislation has been introduced designed to clarify questions arising out of applications by states for convening a constitutional convention pursuant to Article V of the Constitution of the United States.

It is widely assumed that such clarification is automatically desirable, or even mandated by due respect for the Constitutional provision invoked.

However, the Constitutional provision does not expressly require or even provide for implementing legislation. Indeed, the fact that it is not contained in Article I, concerning the powers of Congress, may indicate that legislative implementation, apart from actually calling a constitutional convention in a proper case, is not contemplated.[1]

Moreover, there may be serious dangers to making decisions in advance concerning how applications for a convention under different circumstances ought to be treated. There is always some risk, of course, in all decisions by society concerning how problems that have not yet reached fruition should be handled. This risk is increased where the uncertainty surrounding the circumstances involved, and the consequences of the decisions to be made, may be frought with important dangers.

Specifically, serious questions might well be presented in a given instance concerning whether or not a given series of applications are identical or within a sufficiently close time period to be counted, whether the rescission of an application is effective, and whether under all of the circumstances involved Article V requires the calling of a constitutional convention. A strong argument can be made that attempts to precommit Congress to a particular course of action, beyond whatever is contained in the text of Article V itself, are unwise.

The question of whether a convention should be called is expressly confided to Congress. This may well refer to the Congress sitting at the time, not a prior Congress attempting to deal with contingencies in advance. An attempt by one Congress to bind future Congresses may not be binding.

The decisions of the courts appear to indicate that a matter such as the calling of a constitutional convention is a political question.[2] The Framers, by confiding the decision to Congress, appear to have intended this. An attempt to convert a political judgment into a purely mechanical one may thus contradict the philosphy of Article V as well as creating new difficulties.

In addition, specific decisions contained in the proposed legislation concerning such matters as whether calls for a convention by a state require the approval of the Governor, or whether such matters should be left to state law, may be subject to legitimate debate.

We believe, however, that regardless of the merits of such individual matters, Congress ought not to attempt to bind itself to future action beyond the strictures already contained in Article V.

This position was adopted in unanimous reports of this Committee and the Committee on Federal Legislation of the New York County Lawyers' Association and the Committee on Legislation of the Federal Bar council comprising lawyers practicing in Federal courts in New York, New Jersey and Connecticut, in opposing an earlier bill which, while differing in some respects from the present bill, contained the same purported advance commitment of future Congresses to act in particular circumstances. The Federal Bar Council report stated:

"Legislation has been proposed which would commit Congress to call a federal Constitutional Convention under Article V of the Constitution of the United States once applications for such a convention satisfying the mechanical requisites set forth in the legislation were received from the proper number of state legislatures. S. 623, 91st Cong., 1st Sess. (1969).

"By exercising such congressional judgment in advance, the bill would purport to preclude Congress from deciding that an application was untimely because

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[1] Cf. *United States* v. *Bergman*, 592 F. 2d 533, 536 (9th Cir. 1979).
[2] See *Coleman* v. *Miller*, 307 U.S. 533 (1939).

of changed circumstances, stale because it arose from a malapportioned legislature and sought to overturn reapportionment decisions, or was properly rescinded while Congress was considering the question of calling a convention.

"Basically, the bill seeks to exercise in advance of the event the power of Congress under Article V to determine questions concerning the call to any future convention, thus preempting consideration of such issues in their factual context when presented.

"We believe that such a step attempting to bind future elected Federal Legislatures may well be unconstitutional and void, because the calling of a convention is a political function and no court would seek to compel one Congress to exercise its political functions as decreed by its predecessors.

". . . The same may be said of the provision . . . that no application may be withdrawn while the requisite number of applications are under consideration by Congress.

"In our view the calling of a federal Constitutional Convention is a step not to be lightly taken, and no judgment in favor of such a step should be exercised in advance. Otherwise we may gut our 'great instrument of government, intended to endure for unnumbered generations . . .' *Dimick* v. *Schiedt*, 293 U.S. 474, 490 (1935) (Stone, J. dissenting)." Federal Bar Council, Bulleting of Reports Concerning Legislation 9–10 (Jan. 1970).

The same position has been taken by Professor Charles L. Black, Jr., of Yale Law School in a letter to the Chairman of the House Judiciary Committee on February 28, 1972 where he stated:

"This bill, as to the vote commanded in its crucial Section 6, rests on the constitutionally impossible assumption that this Congress can bind the consciences of successor Congressmen and Senators, on questions of contitutional law and policy."

Professor Black also points out that a resolution to call a convention is nowhere exempted from the blanket provision of Article I, section 7(3) of the Constitution that "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives . . ."

There is historical precedent that amendments to the Constitution proposed by Congress have never been presented for Presidential approval.[3] But such amendments proposed by Congress require a two-thirds vote on the part of both Houses of Congress, the majority necessary to override a veto. Under the proposed legislation, a majority of Congress would be directed by the proposed statute to call a Federal Constitutional Convention—without presenting the matter to the President. The two-thirds approval required by Article I, section 7(3) in the absence of Presidential approval is thus circumvented by a mere statute. We do not think this is either wise or constitutional.

The President's participation is also important because apart from the judiciary, which this bill excludes from all participation in matters concerning the calling of a convention, the President is the only officer involved in the process who represents the entire nation rather than a particularized constituency. Compare Neustadt, Presidential Power (1962); Rossiter, The American Presidency (Mentor ed. 1960); Jaffe, "The Effective Limits of the Administrative Process: A Reevaluation," 67 Harv. L. Rev. 1105, 1107–13 (1954); Jaffe, "Judicial Review: Question of Law," 69 Harv. L. Rev. 239, 273–74 (1955).

The exclusion of the President from action contemplated by the bill is in our view one of the few instances where a statute could be found to violate the Constitution by simply laying the provision "alongside" the Constitution to see "if the latter squares with the former," as Justice Roberts said was done by the Court in *United States* v. *Butler*, 297 U.S. 1, 62 (1936).

The problem with the bill is that it gives these matters insufficient importance by assuming that the only pertinent questions will be mechanical—i.e. does the number of applications equal two-thirds of the states? This is not necessarily true—indeed the opposite may well be the case in a concrete situation.

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[3] See *Hollingsworth* v. *Virginia*, 3 U.S. 378 (1798); but see Black "The Proposed Amendment of Article V: A Threatened Disaster," 72 Yale L.J. 957 (1963).

For example, the question of what applications are sufficiently similar, if not identical in all respects, to be counted toward the same request for a convention is far from mechanical.

Referring to the Sherman Act, Chief Justice Hughes once said, "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359–60 (1933). Article V possesses these attributes. The pending bill does not.

In legislation purporting to flesh out the Constitution rather than to deal with specific problems, it is particularly important to avoid what Justice Holmes has called "delusive exactness," *Truax* v. *Corrigan*, 257 U.S. 312, 343 et seq. (1921) (Holmes, J. dissenting) and to keep in mind Chief Justice Marshall's famous dictum that "it is a Constitution we are expounding." In seeking to anticipate and provide specific and purportedly binding answers for all future questions under Article V, we could easily fall into the trap described by Karl N. Llewellyn in "Meet Negotiable Instruments," 44 Colum. L. Rev. 299, 322 (1944): "... Once a man starts thinking up unhappy contingencies and sets about the careful legal covering of himself against each of them, he has embarked upon a course which ends only with the incorporation of a fifteen volume encyclopedia of law and procedure or else with plain exhaustion."

This bill, in purporting to be a tight solution with no leeway for the unforeseen, avoids Llewellyn's trap by assuming all of the questions to be mechanical and no real questions exist. If such legislation were passed, and not deemed invalid, a rule of reason would probably be read into it. Cf. *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

We do not agree, however, that this bill would pass muster either constitutionally or as wise. The bill seeks to prevent full consideration of the question of calling a constitutional convention in its full factual context by settling all possible issues in advance. This we believe to be wrong, unwise and not necessarily binding even if adopted.

Respectfully submitted.

COMMITTEE ON FEDERAL LEGISLATION.

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Political Implications of a National Constitutional Convention

(By Kenneth Kofmehl, Purdue University)

The Senate Subcommittee on the Constitution is considering S. 3 and S. 1710, bills to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States on application of the legislatures of two-thirds of the states, pursuant to Article V of the Constitution. The basic issue involved in this legislation is whether or not Congress should facilitate recourse to this hitherto unused method of amending the Constitution. Its decision is fraught with grave consequences for our political system and processes. This paper deals with some of these and political factors likely to give rise to them.

IMPACT ON THE CONSTITUTION

Obviously, proponents of invoking the constitutional convention approach expect it will enable them to get amendments proposed that they otherwise could not. Some like California Gov. Jerry Brown have frankly admitted the aim of pressuring Congress to act through fear of what might eventuate from the untried convention procedure. Should that tactic fail, however, most are confident that a constitutional convention would be amenable to their wishes. In either case, the result would be to increase the ease with which the Constitution can be altered. This would seriously jeopardize its nature. The difficulty of persuading Congress to propose amendments has served that document well by protecting its essential character. As a relatively brief statement of fundamental principles couched in general terms, it has been flexibly adapted through interpretation while preserving the appearance of a stable foundation for our political system. As a revered symbol embodying basic procedures indispensable to democracy as a method of government, the Constitution has helped gain acceptance for them and to legitimate policies adopted in accordance with them.

These attributes of the Constitution would be impaired by too frequent alteration or by addition of inappropriate material. As the late Alexander M. Bickel, a leading constitutional scholar, pungently observed, "I fear that with constitutions, as has happened in many of our States, familiarity of amendment will breed a species of contempt." [1]

Experience with state constitutions does indeed confirm the dangers of excessive amendment. According to an eminent authority on the subject, Albert L. Sturm, "The original state constitutions were short, rarely containing more than 5,000 words, and demonstrated the principle that the basic law should be restricted to fundamental matters." [2] However, in the past hundred years or so, most state constitutions underwent a drastic transformation, greatly increasing in length and detail to the extent that in many respects they were indistinguishable from statutory law. By 1969 the worst example was the Louisiana constitution, which numbered over 1,000 pages and ran to an estimated 253,800 words. The average length of the fifty state constitutions that year was 30,075 words. This was about four times as long as the Constitution of the United States, which contained approximately 7,250 words then.[3]

Professor Sturm ascribes the inclusion of much nonfundamental and transitory material of a statutory sort in state constitutions and their mushrooming size to popular distrust of legislatures, public dissatisfaction with judicial interpretations of constitutional provisions, the pressure of special interests for constitutional status, faulty drafting, and the tendency of lengthy constitutions to breed more amendments. He also comments, "The trend in the past has been to impose numerous and excessive restrictions on governmental agents, particularly the lawmaking body.[4]

The similarity of these dynamics to the motives behind current campaigns to call a national constitutional convention is obvious. The instant cause of concern with this procedure, an amendment requiring a balanced budget, reflects distrust

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[1] U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Separation of Powers, *Hearings on Federal Constitutional Convention*, 90th Cong., 1st Sess., Oct. 31, 1967, p. 61.

[2] *Thirty Years of State Constitution-Making: 1938–1968* (New York: National Municipal League, 1970), p. 5.

[3] *Ibid.*, pp. 14–15.

[4] *Ibid.*, p. 6.

of Congress and would seriously restrict its control over fiscal measures. The resolute effort to write into the Constitution a ban on abortions expresses intense dissatisfaction with judicial interpretations of that document. If success crowns the endeavors of groups pushing these proposals, other organized interests will be encouraged to insert their pet prescriptions into the Constitution and bring about an upward spiral of amendment.

Besides facilitating the inclusion of inappropriate substantive policies in the Constitution, a national convention might very well produce undesirable changes in the basic framework and procedures of government. Data from state constitutional conventions supports the assumption that a large proportion of the delegates to a national convention would aspire to the public offices whose powers they are authorized to modify. For example, from the 1961–62 Michigan constitutional convention, George Romney, vice president of that body, was elected governor in 1962. In that same election, 45 of the 147 convention delegates sought seats in the state legislature. Others of them were candidates for lieutenant governor, secretary of state, attorney general, state treasurer, university regents, and judgeships, as well as for local offices.[5] Because of coveting the presidency or a seat in Congress, delegates to a national convention would be inclined to propose restrictions on tenure in these offices (e.g., limiting the President to a single six-year term or members of Congress to twelve years of service) to increase the turnover and multiply the chances of competing for them. Blinded by ambition, such delegates might not have due regard for the adverse effects on political accountability of denying an opportunity for reelection or on responsible decisionmaking of forfeiting experience and judgment by automatically removing capable incumbents.

IMPAIRMENT OF POLITICAL PROCESSES

These kinds of modifications of the Constitution could have very untoward effects on our political system. Some would likely engender disillusionment and aggravate political alienation. For instance, several advocates of a balanced budget amendment freely avow that it can serve only as a symbol. Aware of the impossibility of straightjacketing Congress so that necessary measures cannot be taken to deal with unanticipated fiscal emergencies arising out of war, economic depression, or other catastrophes, they have built into their proposal escape clauses that reduce the purported restrictions to mere exhortations. Once such an amendment were adopted and perception of its charade-like character spread among the electorate, the ensuing cynicism about the Constitution would add a new and ominous dimension to political alienation. To date public opinion polls show that despite declining confidence in specific national government institutions—the presidency, Congress and even the Supreme Court—there is still strong support for our political system as a whole. However, disenchantment with the Constitution would erode the foundation for the system itself.

Adoption of the antiabortion amendment or others that represent efforts by a segment of the population to impose its moral views on the rest would further increase disrespect for the Constitution and contribute to a general breakdown of law and order. For such constitutional provisions would surely be flouted by the millions of persons with intensely held convictions based on differential perceptions of morality. Experience with the ill-fated noble experiment of prohibition in the 18th Amendment is instructive in this regard.

Moreover, our ability to achieve consensus on other pressing issues of national policy would be impaired. For a necessary condition to reach that sort of agreement is an underlying consensus on the basic rules of the game for conducting political activities. To the extent that the Constitution, which embodies many of these vital procedural safeguards, becomes discredited, their acceptance is jeopardized. Also, acrimonious struggles over inserting sumptuary legislation into the Constitution would exacerbate the divisiveness that is already too prevalent in our highly fragmented society.

Consensus on public policy is necessary for any political system based on consent of the governed. As J. Roland Pennock, distinguished democratic theorist, has remarked: "It is a commonplace that democracy will fail where a certain undefinable minimum of agreement ceases to exist. Without some degree of con-

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[5] William N. Thompson, "An Analysis of the Legislative Ambitions of State Constitutional Convention Delegates," *Western Political Quarterly*, Vol. 29, No. 3 (Sept., 1976), p. 431.

sensus, the democratic process and especially bare majority decisions, will not be tolerated." [6]

Because of the great diversity in the United States, consensus has always been especially important in our political process and is becoming even more so as we enter an age of scarcity. For that will result in governmental allocative decisions requiring sacrifices by our citizens. Such decisions will only be acceptable to the citizenry if they are perceived to be just, and they are likely to be so if reached through consensus. Because of its representativeness and procedures, Congress may be our national institution best able to reach consensus decisions.[7]

DANGER TO CONGRESS

Recourse to the national convention approach to amending the Constitution endangers the successful functioning of Congress in a number of ways. As mentioned above, a national convention might propose limits on tenure of members of Congress that would reduce their political accountability and capacity for responsible decision-making. Even the threat of calling a convention might impair the deliberative processes of Congress and conduce to unfortunate legislative outcomes. To avoid the harmful potentialities of such a convention, Congress might approve constitutional amendments it otherwise would not. Or Congress might pass undesirable legislation in order to obviate efforts by a convention to accomplish the same purpose with an amendment that would write statutory language into the Constitution and mar the integrity of that document. Thus, from laudable motives, Congress might be prompted to take ill-advised actions.

If a national constitutional convention ever materialized, the adverse effects on Congress would be even more pronounced. Uncertainties about the scope of congressional powers while a convention was addressing itself to modifying them would inhibit Congress from acting on matters falling within their purview. The propagandizing in the campaigns for election of delegates and rhetoric during the sessions of the convention, which would certainly receive wide media coverage, would further diminish the prestige of Congress. To gain support for restricting Congress or for removing subjects from its jurisdiction, proponents of such action undoubtedly would exaggerate its shortcomings and promote misconceptions in which some of its strengths are perceived as weaknesses; e.g., the slowness with which it acts on a matter on which a consensus takes a long time to develop. Inasmuch as current opinion polls show that Congress has sunk to a record low in public approval, negative reinforcement of this sort is the last thing it needs.[8]

As the campaign for a balanced-budget amendment confirms, there are mounting efforts to impose restrictions on Congress. If any of these succeed, the resulting restraints on Congress would hamper its ability to deal effectively with national problems. In turn, this would further reduce public confidence in Congress. And that would encourage additional attempts to prescribe constitutional remedies for alleged congressional ailments. To protect Congress as an institution against these kinds of assaults, the members would have to engage in time-consuming counterattacks, which would divert their attention from the agenda of important national and international issues which Congress should be considering.

WHAT MANNER OF DELEGATES

Proponents of the national convention procedure attribute anxieties about it to lack of faith in our ability to produce delegates comparable in quality with the framers of the Constitution. They suggest this is a libel on the wisdom and trustworthiness of the present generation. It is nothing of the sort. Nor does it reflect belief in the mythology that the framers were demigods, the like of which no longer walks the earth. No one disputes that there is a large number of intelligent, highly educated, and otherwise gifted persons in the country today, many of whom may well surpass most of the framers in raw ability and rectitude. The basic question is whether or not individuals with appropriate attitudes would be selected from this reservoir of talent. Besides being very

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[6] J. Roland Pennock, "Responsiveness, Responsibility, and Majority Rule," *American Political Science Review*, Vol. 46, No. 3 (September 1952), p. 795.

[7] For discussion of this point and the role of Congress in building consensus, see Richard F. Fenno, Jr., *Home Style: House Members in Their Districts* (Boston: Little, Brown & Co., 1978), p. 245.

[8] The 19 percent approval rating given Congress in June, 1979 is 10 points lower than its rating in September 1978 and 29 points below its 48 percent approval rating in August 1974 (George Gallup, "Performance Ratings for Both Carter, Congress Decline to New Lows," *The Gallup Poll*, June 21, 1979, pp. 1–3).

well educated and experienced in practical politics, the framers were hardheaded pragmatists thoroughly disposed to compromise. They had an acute appreciation of the requisites for a viable constitution, and they were dedicated to producing such an instrument.

Under present conditions, a preponderance of delegates with these characteristics is not apt to be chosen. In the first place, there would predictably be low voter participation in their election. Experience in the states indicates that a smaller proportion of the electorate votes on matters involving constitutional conventions than in other kinds of elections. For example, in Maryland on September 13, 1966, only 13.6 percent of the registered voters took part in a referendum on calling a state constitutional convention. However, 65.2 percent of them voted for governor in the general election on November 8, 1966. Similarly, in New Mexico, 71.4 percent of the registered voters cast their ballots for governor in the 1970 general election. Yet, eleven months earlier, only 30.2 percent of them had bothered to vote on proposals made by a constitutional convention.[9] Generalizing about the pervasiveness of this phenomenon, Professor Sturm writes, "The generally low level of public interest reflected in nonvoting on constitutional issues exists in practically all the states." [10] That there would be a comparably low level of voting for delegates to a national constitutional convention can reasonably be inferred from Austin Ranney's findings about the parallels between low turnout in presidential primaries and other primary elections in the states.[11] It is a truism that in elections with small turnout, voters tend to be atypical. Obviously, they have more intense interest than the rest of the electorate and often hold more extreme views.

Second, during the past two decades, a new type of political activist, dubbed "purist" by Aaron Wildavsky, has displayed remarkable growth in numbers and influence on national politics. Consisting largely of college educated, middle- and upper middle-class professionals, the purists have ample leisure and other resources to participate in political activities. Ideological and issue-oriented, they are averse to compromise. They are more concerned about policy than party and give ideology priority over electoral victory. They possess communications skills of a high order. And they want their views expressed without equivocation.[12]

The synergistic effect of these two factors (low turnout and purists) was demonstrated in the composition of the 1972 Democratic National Nominating Convention, for which more than three fourths of the delegates were elected in state presidential primaries. A large majority of the delegates were purists. In her monumental study of the 1972 nominating conventions, Jeane Kirkpatrick concluded that this outcome was not caused by the imposition of quotas but by the influence of party activists on delegate selection.[13]

Hence, there is every reason to believe that a comparable proportion of delegates to a national constitutional convention would consist of purists. Their mode of selection is almost identical to that for most of the 1972 nominating convention delegates. On the national political scene, purists are as prominent as ever and, if anything, would probably be more influential in delegate elections dealing with abstract issues of constitutional revision than in delegate elections centering on the choice of presidential candidates.

The consequences for the Constitution are obvious. With their characteristic mind set, purists would insist on writing their prepossessions specifically into that document no matter how destructive such action might be of its basic nature as a rather short general statement of fundamental principles of government.

LACK OF INSTITUTIONAL CONSTRAINTS

Whatever the proportion of purists among the delegates to a national constitutional convention, they would be able to act more irresponsibly and to exert more influence than a corresponding number of them in Congress could because of differences in institutional characteristics of the two bodies. Span of exist-

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[9] Computed from figures in *Maryland Manual, 1967–1968* (Annapolis, Md.: Hall of Records Commission of the State of Maryland, 1968), pp. 503, 539, 562; *The Book of the States, 1970–1971* (Lexington, Ky.: The Council of State Governments, 1970), p. 26, Table 5; *ibid., 1972–1973* (*Ibid.*, 1972), p. 44.

[10] Sturm, *Thirty Years of State Constitution-Making*, p. 87.

[11] Austin Ranney, "Turnout and Representation in Presidential Primary Elections," *American Political Science Review*, Vol. 66, No. 1 (March 1972), pp. 23–24.

[12] Nelson W. Polsby and Aaron Wildavsky, *Presidential Elections* (4th ed.; New York, Scribners, 1976), pp. 22, 29–34; Jeane Kirkpatrick, *The New Presidential Elite: Men and Women in National Politics* (New York: Russell Sage Foundation, 1976), pp. 8–9.

[13] *Ibid.*, pp. 330–331.

ence, procedures, norms, and informal power structures in Congress, a continuing organization, impose constraints that would be absent in a constitutional convention, an ad hoc organization. Convention delegates would not be subject to the check of running for reelection. They would bear none of the burden of passing any legislation required to implement the amendments they initiated. For a convention, the Constitution does not mandate extraordinary majorities for decisions of unusual gravity, such as the two thirds vote of both houses of Congress necessary to propose amendments. Some legal scholars argue that any attempt by Congress to prescribe such a requirement would be unconstitutional. And the short life span of a convention would militate against its voluntarily adopting formal rules necessitating more than a simple majority vote for any kind of decision.

Moreover, all the delegates to a convention would start out on equal footing. All would be newcomers. There would be no seniority or socialization of novices. Actually, there would be no folkways, such as reciprocity or specialization, to be transmitted thusly and to help control the behavior of delegates. And there would be no hierarchy of senior members with informal structures of power built on longstanding friendships, respect, and intricate patterns of mutual understandings and obligations. In a convention, for the most part, there would be only the formal organization, supplemented by such blocs or other groupings as might develop during its brief existence.[14]

In Congress, by exploiting strategic positions in internal power structures, or procedural safeguards like the Senate filibuster, even a few members with an acute grasp of constitutional necessities can block undesirable amendments and can insist on modifying others until they become acceptable. In contrast, at a national constitutional convention, which would lack most such institutional constraints, a bare majority of purists could work its will.

INADEQUACY OF STATE SAFEGUARDS

Eeven supporters of the national convention approach recognize the need for consensus on any proposed amendments to the Constitution. Conceding the institutional deficiencies of a national convention in this respect, they insist nevertheless that the requirements of requests by two thirds of the State legislatures for calling a constitutional convention and of ratification of its output by three fourths of the States would ensure consensus on the end product. But would they? Recent experience with State legislatures in approving applications to Congress to call conventions is not reassuring. From research on the first 21 States to pass petitions for a convention to propose a balanced budget amendment, Common Cause found that some legislatures rushed the petitions through without much deliberation. In two States, no committee in either house of the legislature considered the petitions before they were approved. Committees held hearings where the public was allowed to testify in only six legislatures. Committee reports explaining the proposed action were issued in but six States. And frequently committee consideration was perfunctory. For instance, in the Colorado Legislature, the Senate committee held a half hour discussion of a petition on January 30, 1978, before voting seven to one to report it favorably to the Senate, where it passed without a recorded vote on February 3. On March 9, the House committees discussed the petition for only six minutes before approving it by a vote of six to two. On March 20, after some debate, the House passed it by a vote of 40 to 24.[15]

The campaign for a convention to propose an antiabortion amendment reveals confusion among State legislators when approving petitions for such a purpose and intense pressure brought to bear on some of them by single-issue interest groups. For example, in the Massachusetts Legislature, the night the House passed a petition, Representative Elaine Noble recounts, "It was done on a voice vote, later, in the middle of a lot of other bills. A lot of people didn't really know what they were voting for." [16] In New York after Stanley Steingut, Speaker of the assembly, had played a key role in defeating a petition, he was the target of vituperative lobbying that included a number of full page ads attacking him in the local Albany newspapers.[17]

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[14] For discussion of such characteristics of state conventions, see Thompson, *Western Political Quarterly*, Vol. 29, p. 429.

[15] "A Constitutional Convention. The Need for Debate," *Current*, No. 213 (June, 1979, p. 22).

[16] As quoted in Lisa Cronin Wohl, "Are We 25 Votes Away From Losing the Bill of Rights . . . and the Rest of the Constitution?" *MS*, Vol. 6, No. 8 (Feb., 1978), p. 97.

[17] *Ibid.*, p. 98.

Moreover, if the required two thirds of the State legislatures applying for a convention were from the 34 least populous states, they would represent only 31.1 percent of the voting age population of the United States. If the three fourths of the State legislatures (or State conventions, depending on which method Congress specified) necessary for ratification were from the 38 smallest States, they would represent only 40.2 percent of the voting age population. Since the vote would undoubtedly be divided in each of these State legislatures, legislators representing somewhere between 16 and 31.1 percent of the voting age population could require a national constitutional convention to be called, and State legislators or State convention delegates representing somewhere between 21 and 40.2 percent of the voting age population could ratify its proposals.[18] This would hardly fit the definition of a national consensus. Such a scenario is not too fanciful because the smaller of these States are predominantly rural, and many of the larger are in the Bible Belt. Hence, on any style of life amendments, they could very well make common cause against the predominantly metropolitan population in the 12 largest States.

UNDESIRABILITY OF GUIDELINE LEGISLATION

Because of the predictably adverse impact on our political system of the national convention approach to amend the Constitution, Congress should strongly discourage recourse to it. Enacting any of the proposed bills setting forth procedures for calling a national constitutional convention would have the opposite effect. To do so would apparently give congressional endorsement to using this method of proposing constitutional amendments. Requiring that copies of each petition received by Congress from a State legislature be sent to every other State legislature, as all the pending bills do, would stimulate interest in campaigns for particular amendments with which many legislatures might otherwise be unfamiliar. By prescribing criteria for petitions, guideline legislation would remove conditions that prevent some State legislatures from participating effectively in these endeavors. Presently, State legislatures are unsure about how to frame a valid request for a national convention, and some do not know where in Congress to send their applications.[19]

Advocates of enacting guidelines now argue that adopting them before receiving 34 applications for a convention on the same subject would avoid controversy—possibly even avert a constitutional crisis—afterward. Quite the contrary, it would cause even greater disputation then. Having fulfilled the statutory specifications for their applications, state legislatures would expect them to be honored by Congress. Yet, the Congress sitting at the time the issue of calling a convention arises might not agree with the criteria in the law and could not be bound by them. To do so would require members of Congress to surrender in advance their judgment on matters of constitutional interpretation on which opinions honestly differ and which circumstances may alter. For example, how long should petitions remain valid? Until recently, there was general agreement that 7 years was a reasonable period to indicate a contemporaneous demand for a convention. However, as a consequence of the struggle over extending the time for ratification of the Equal Rights Amendment, thinking has changed in this regard. What once seemed appropriate may no longer be acceptable. Because the context in which issues of this sort may develop cannot be foreseen, Congress should preserve the maximum latitude for deciding them when they arise instead of attempting to bind itself before hand by statutory prescriptions that may be inappropriate then.[20]

MEMORANDUM

To: Hon. Birch Bayh, Chairman, Subcommittee on the Constitution.
From: Kennth Kofmehl, Professor of Political Science, Purdue University.
Date: July 4, 1980.
Subject: Questions on Constitutional Convention Procedures.

To supplement my prepared statement, you have asked me to answer questions on constitutional convention procedures sent to me by Linda Rogers-

[18] Computed from figures in U.S. Bureau of the Census, *Statistical Abstract of the United States: 1978* (99th ed.; Washington, D.C., 1978), pp. 14, 522.
[19] U.S., Congressional Record, 96th Cong., 1st Sess., Jan. 15, 1979, Vol. 125 (daily ed.), p. S75.
[20] For supporting arguments, see Charles L. Black, Jr., "Amending the Constitution: A Letter to a Congressman," The Yale Law Journal, Vol. 82, No. 2 (December 1972), pp. 189–196.

Kingsbury, Chief Clerk, Subcommittee on the Constitution. The questions are listed below with my answer to each immediately under it.

1. *Question.* It has been recommended that the procedures issue should be confronted at a time when the problem can be faced in the open and without pressure, in order to be prepared in advance of state action. Since most scholars agree that one Congress cannot bind another, would it be a prudent use of the Congress' time to consider implementing legislation before applications are received from the states for a convention? Should Congress routinely enact procedures legislation at the beginning of each Congress in order to be prepared?

Answer. For several cogent reasons, it would not be a prudent use of the Congress' time to consider implementing legislation for a convention before valid applications were received from two-thirds of the states. First, with regard to many aspects of such legislation, it is impossible to decide in the abstract what are appropriate provisions. Only knowledge of conditions at the time a convention is to be called can furnish a basis for intelligent action. A good example is afforded by the campaign for a constitution convention to propose amendments to frustrate the Supreme Court's reapportionment decisions. Within far less than seven years, many of the state legislatures submitting petitions had been reapportioned. Hence, their applications became stale much short of the time that most proposed implementing legisaltion would keep such petitions effective. Additional illustrations of this point are set forth below in my answers to other of your questions.

Second, such legislation involves major constitutional and policy questions. Congress should not settle them when national attention is directed elsewhere as is presently the case. The only time that the general public can be sufficiently aroused about such procedural issues is when a substantive change in the Constitution is imminent. Even most of the very limited current discussion of these questions in national news media and professional journals has been stimulated by ongoing campaigns for budget-balancing and antiabortion amendments. Not until Congress is confronted with a situation apparently requiring it to call a convention for proposing such amendments will more than a small fraction of the potentially attentive public become interested. Only then will Congress be able to ascertain the preferences of an informed electorate on these momentous issues.

Third, as I stress in my prepared statement, using the national convention approach to amending the Constitution would have predictably adverse effects on our political system. Enacting any of the proposed federal convention procedures bills would encourage recourse to this method of proposing constitutional amendments. Also, adoption of such legislation beforehand would exacerbate any controversy whenever thirty-four applications for a convention on the same subject were received. Having fulfilled the statutory specifications for their applications, state legislatures would expect them to be honored by Congress. Yet, the Congress sitting at that time might not agree with the criteria in the law and could not be bound by them.

In particular, Congress should not routinely enact procedures legislation at the beginning of each Congress in order to be prepared. To do so would compound the shortcomings of adopting such legislation in advance. There would be a strong tendency to endorse perfunctorily provisions of a questionable nature on the assumption that they had already been carefully considered. Yet, they would not have been subjected to the searching scrutiny that comes only from an assessment of relevant conditions at a time a convention is actually going to be called. For instance, two earlier versions of S. 3 (S. 215 of the 92d Congress and S. 1272 of the 93rd Congress) were approved by the Senate. Despite hearings on an antecedent bill (S. 2307 of the 90th Congress) and floor debate and detailed commentary in law journals on S. 215 and S. 1272, their current incarnation, S. 3, contains provisions on basic matters, such as apportionment of delegates, to which strong objections have been raised by several eminent legal scholars.

2. *Question.* Section 3(b) of S. 1710 provides that questions "concerning the State legislative procedure and the validity of the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature." Would this provision take away all power of Congress to consider the validity of a resolution, regardless of the circumstances surrounding its alleged adoption?

Answer. Evidently the drafter of Section 3(b) intended that decisions by a State legislature on questions concerning the adoption or withdrawal of a state

resolution shall be binding on the Congress. That is the clear connotation of the word "determinable." Also, otherwise the language would be unnecessary. For no one could dispute the power of a state legislature to decide initially questions concerning the validity of its actions.

3. *Question.* Likewise, in Section 3(b) and Section 5(b) of S. 1710, the power is removed from Congress to determine the validity of any withdrawal of an application. What are your thoughts on these sections?

Answer. Even by implication, Congress should not waive its authority to determine questions concerning the adoption or withdrawal of a state's application because allegations of irregularity and bad faith on the part of a state legislature might, quite conceivably, arise. And the legitimacy of the Constitution would be weakened if it could plausibly be charged that a constitutional amendment had come into being by means of irregular state procedures.

To avoid any misunderstanding in this respect, I would revise Section 3(b) of S. 1710 as follows:

"(b) Questions concerning the adoption of a State resolution cognizable under this Act shall be determined by the Congress of the United States."

And I would add the following paragraph to Section 5 of S. 1710:

"(c) Questions concerning the withdrawal of a State's application shall be determined by the Congress of the United States."

4. *Question.* In many of the petitions that have been submitted, it appears there has been consideration by the State governor and in many instances the governor's signature appears on the petition. Would this indicate that State's preference for including the governor in the process, or possibly the tradition of that State's legislative policy?

Answer. Any opinion I might venture on why some States include their governors to varying degrees in the application process would be pure conjecture. However, I do feel very strongly that S. 1710, S. 3, or any other implementing legislation should not exclude governors from the application process. At a minimum, such bills (most of which ironically are imbued with a "States' Rights" philosophy) should leave the decision on participation by the governor to each individual State.

There are no compelling reasons in fact or theory for denying governors a role in the application process. Advocates of exclusion argue by analogy from the decision in *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798), that amendments proposed by Congress need not be approved by the President. However, being an unreasoned opinion, that precedent is weak, and many distinguished constitutional scholars maintain it is erroneous. Likewise, exclusionists cite *Hawke* v. *Smith*, 253 U.S. 221 (1920), to justify their position. Although this case concerns ratification of a constitutional amendment by a State legislature, it nowhere deals with the role of the governor in that process. Moreover, in *Smiley* v. *Holm*, 285 U.S. 355 (1932), which was decided 12 years later, the Court found that the term "legisulature" as used in the Constitution does require participation by the governor in the performance of some functions.

In theory a strong case can be made for inclusion of the governor in the application stage of the amending process. As Chief Justice John Marshall convincingly demonstrated in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), it is the people, not the States as such, who are the source of constitutional powers. The people in a given State act through its government to express their will. Who is better able to reflect the preferences of the voters in a State than the governor, who is chosen directly by its entire electorate? Especially since gerrymandering of legislative districts is apt to distort representation in a State legislature, it is desirable that the governor help decide whether the people of a State wish to apply for a constitutional convention.

5. *Question.* There have been several petitions submitted to Congress which state, in effect, that a convention is to be called on a specific subject, including specific language for an amendment, and if any other subject or language is adopted the petition is to be considered null and void. What are your thoughts as to the consequences, if after a convention is called, several states were to withdraw their petitions or refuse to participate further?

Answer. In the first place, a convention should not be called in response to the kind of petitions described, and Congress would be remiss to do so. A petition setting forth the exact wording of an amendment and stipulating that it must be adopted without change is not a valid application for a convention. Such a petition would deprive the convention of its primary function of proposing amend-

ments and reduce it to being a part of the ratification process. Secondly, both S. 3 and S. 1710 prohibit any state legislature from rescinding a valid application after two-thirds of the states have submitted such applications to Congress. Hence, it would not seem necessary to worry about the withdrawal of petitions after a convention is called.

Of course, at any time, some delegates might refuse to participate further for a variety of reasons. Or because of being bitterly opposed to the whole idea of such a convention, several states might decline to send delegates. With no way of knowing what the magnitude of such abstentions might be, it is impossible to estimate the consequences.

6. *Question.* If a procedures bill were to be adopted by Congress which included a provision for the calling of a limited convention, do you have an opinion as to the odds of that convention ultimately expanding the subjects for review and discussion?

Answer. The odds are overwhelming that such a convention would ultimately expand the subjects for discussion and consideration because of its nature. A constitutional convention is intrinsically a deliberative body with the power to propose amendments incorporating what it decides are the best solutions to the problems assigned to it. To fulfill this function, a convention must be able to canvass a wide range of possible solutions. In doing so, it may discover implications of a problem that necessitate an entirely different approach than that contemplated in the call for the convention. Or to garner the requisite support for an amendment dealing with a subject entrusted to it, a convention may have to develop and propose an amendment on an unrelated subject as a quid pro quo. This latter possibility is enhanced by the conditions likely to prevail in the election of delegates. As indicated in my prepared statement, voter turnout will be predictably low, and purists will constitute a disproportionate fraction of the electorate. Regardless of the subject of the amendments that a convention has been called to consider, single-interest pressure groups will be out in force doing their best to exact commitments from the candidates to push their pet projects in exchange for their electoral support. Delegates who win election because of endorsing such extraneous issues can be expected to raise them at the convention.

7. *Question.* The procedures legislation pending before this Subcommittee contain a clause with respect to each delegate taking an oath to refrain from discussing any subject other than that subject which was authorized by the petitioning states. Other than a moral exhortation, what means of enforcement is available?

Answer. There does not seem to be any means of enforcement. If there were, it probably should not be invoked. For such an oath—particularly of the sort prescribed in Section 8(a) of S. 3—may well represent an unconstitutional effort to deprive delegates of the discretion they need to fulfill the function of a constitutional convention, which inherently must be free to consider various subjects.

8. *Question.* The ABA and several constitutional scholars have recommended that convention delegates be popularly elected. Can you forsee any problems that may be connected with those elections with state laws, or possibly the necessity of amending state laws to accommodate those elections?

Answer. Before responding to your question about the election of delegates, I would like to discuss a related matter, their apportionment. The apportionment formula in both S. 1710 and S. 3 is undesirable. Senators should be counted in determining the number of delegates. There should be as many delegates from each state as it is entitled to Representatives in Congress. In every state one delegate should be elected from each congressional district by the persons entitled to vote for the Representative from that district.

Apportionment of delegates should be based on population. It is especially important to do so because the nation's population is not proportionately represented at either the application or ratification stages of this method of amending the Constitution. Moreover, there are sound reasons for concluding that the one-person, one-vote rule is applicable to a national constitutional convention. Hence, the constitutionality of allowing each state as many delegates as it has Senators and Representatives in Congress is questionable because that distribution would give greater voting weight to the residents in some states than in others. Fifteen states would be overrepresented by 50 percent or more. However, allotting each state as many delegates as it has Representatives in Congress should satisfy one-person, one-vote standards. The small variance in representation that would result from this provision would be preferable to the increased total number of

delegates (678) that would be necessary to achieve precisely equal representation if Alaska were allowed one delegate or to the disregard for the integrity of the states that would result from redistricting the entire country without regard to state boundaries.

To answer your question more directly I believe that a number of problems could arise if the procedures legislation provides that "delegates shall be elected . . . in the manner provided by State law." For instance, circumstances might develop that would require federal conduct of elections of delegates to prevent racial or other discrimination. Or in some regions there might be substantial sentiment for choosing delegates in nonpartisan elections. This would necessitate amending state laws to provide appropriate nominating and general election procedures. Some states might do this while others might prefer to continue with partisan elections. The resulting mix of partisan and nonpartisan delegates would pose grave problems in organizing and conducting the constitutional convention. Hence, to avert such difficulties, Congress might have to prescribe a uniform manner of electing delegates. Once again, these hypothetical cases, which could be multiplied many times, demonstrate the wisdom of not enacting implementing legislation until such time as a national constitutional convention is actually going to be called.

9. *Question.* What are your thoughts on convention delegates being appointed? Would that appointment be made by the governor or the State legislature?

Answer. Most emphatically, I believe that convention delegates should be popularly elected. (Of course, any vacancies that occur in a state delegation might be filled by appointment as discussed below.) It is essential that convention delegates be responsive to the people they represent, for the people are the source of constitutional powers. Popular election is the best available means of achieving such responsiveness. Under no circumstances should delegates be chosen initially through appointment by the state legislature or by some other body it designates. This procedure, which state legislatures are empowered to use for picking presidential electors, is anarchronistic. Since the 19th Century, no state legislature has appointed electors itself, but every one has provided for their popular election.

In a situation where a vacancy occurs in a state delegation, the legislature of that state might not be in session at the time. Hence, it would seem more appropriate to authorize the governor instead of the legislature to fill any such vacancy by appointment.

10. *Question.* The ABA Report states there is no evidence of any federal constitutional bar against a member of Congress serving as a delegate. Do you have an opinion on that?

Answer. I find the supporting arguments of the ABA Report most persuasive. The Supreme Court has held that the provision of Article I, Section 6 barring Congressmen from holding offices under the United States applies only to an appointive position created pursuant to Article II, Section 2. Obviously this is not the case for an elected delegate to a national constitutional convention. Moreover, the Articles of Confederation contained a clause similar to Article I, Section 6. Yet several delegates to the Constitutional Convention of 1787 were members of the Continental Congress.

11. *Question.* What are your thoughts with respect to a State legislator serving as a delegate to a convention? What are the ramifications of a State legislator serving as a delegate, proposing an amendment and then returning to the State and ratifying that amendment?

Answer. If a state legislator is popularly elected as a delgate to a national constitutional convention, I see no good reason why he or she should not serve. In my opinion, the most important consideration in this respect is the possibility of excessive influence not by individual state legislators but by the state legislatures. To reduce that danger, any amendments proposed in this way should be ratified by state conventions, which should be popularly elected in accordance with rules prescribed by Congress. Otherwise, the state legislatures would have complete control over the initial and final stages of this method of amending the Constitution. This would tip the balance too far in favor of the state legislatures.

12. *Question.* Would a provision in procedures legislation, such as that contained in S. 1710, Sec. 7(a) which states that no Senator or Representative or person holding an office of trust or profit under the United States, shall be appointed as a delegate—be an effective bar?

Answer. In my opinion, the most important issue is not whether such a bar would be effective but whether it would be desirable. Congress should not ban

Senators, Representatives, or other federal employees from serving as delegates. They would bring to a federal constitutional convention valuable firsthand knowledge of national interests and a sense of responsibility for implementing any constitutional amendments that might ensue. The voters in each state should be free to elect whomever they deem best qualified to represent them as delegates to a national constitutional convention.

13. *Question.* Is the exclusion of Federal employees as delegates justified in light of the fact that State employees would not be excluded?

Answer. As indicated by my preceding answer, I feel that the exclusion of federal employees as delegates would be neither justified nor desirable.

14. *Question.* Is it appropriate for Congress to include in the implementing legislation a clause designating either the Federal government or the States to provide funds for the convention?

Answer. In the implementing legislation, it is proper for Congress to authorize appropriations for the payment of the expenses of the convention, as Section 8(b) of S. 3 does. However, Congress can only authorizes the expenditure of federal funds. It would be improper for Congress to try to allocate the costs of the convention among the states, and it would be very difficult to devise a suitable formula for that purpose.

15. *Question.* In your opinion, which entity should bear financial responsibility for a constitutional convention?

Answer. Very definitely, the federal government shoudl bear financial responsibility for a national constitutional convention because the convention would be performing a federal function.

16. *Question.* S. 1710 embodies the basic tenets of federalism and the sovereignty of the States. In Section 8(b), which states that with respect to no federal funds appropriated for a convention, the states shall bear all expenses incurred. The constitutional question seems to be how can the Congress require the legislatures of the sovereign States to appropriate funds for the support of a federal constitutional convention? In the past there have been instances of "matching funds", but precedent would be set for total financial support by the States. The convention would be totally dependent upon the goodwill of each and every State to pay its share, which as we know, was one of the problems faced by the Convention of 1787.

Answer. Congress cannot constitutionally require state legislatures to appropriate funds for the support of a federal constitutional convention. Federal grant-in-aid programs that require participating state governments to provide matching funds are not analogous to imposing the costs of a convention on the states. In such programs, state governments have the incentive of receiving federal funds at least equal to and generally much larger than the sums they contribute. Moreover, participation in any federal grant-in-aid program is optional. That could hardly be the case with a national constitutional convention. For its legitimacy would be impaired if a number of states declined to send delegates.

You quite properly point out the difficulty of relying on voluntary contributions from every state government. The inadequacy of voluntarism in fiscal affairs has been repeatedly exemplified not only by the experience of our central government under the Articles of Confederation but also by the present day refusals of member governments to make their payments to the United Nations. In fact, the problem of financing a national constitutional convention would be even greater than in these instances because the states would not know what their respective fair shares of the total outlays were. There is no provision for allocating the costs of a convention among the states.

In addition to to the difficulties you mention, Section 2 of S. 1710 poses severe financial problems for the GSA and other federal agencies. Section 8(b) states, "No Federal funds may be appropriated specifically for the purposes of payment of the expenses of the convention." Yet Section 8(c) ordains that the GSA Administrator shall provide such facilities and that every other federal agency shall provide such information and assistance as the convention may require. The costs of such facilities and services, which are the expenses of the convention, could be very large. How would the GSA and other federal agencies be reimbursed for them if no federal funds could be appropriated specifically for that purpose? Moreover, would it be legal for federal agencies to divert funds appropriated for other programs to pay the costs of such facilities and services? And should these other programs have to absorb such costs as they would have to do if there is no possibility of reimbursement?

17. *Question.* In S. 1710, the State supreme court justice with the most tenure shall convene the constitutional convention and administer the oath of office to each delegate and preside until officers are elected. What are your thoughts on this provision as to the practicalities and political impact?

Answer. It is difficult even to guess why this provision, which has a potential for considerable inconvenience, was made for filling a position that is largely ceremonial in nature. For instance, when needed to convene and preside initially over the constitutional convention, the most senior chief justice of the state supreme courts might very well be unavailable because of being in the midst of an extremely busy session. The most plausible hypothesis is that some sort of symbolic gesture is intended. If that be the case, I cannot imagine any significant political impact that would result.

In contrast, the provision in S. 3 for the Vice President of the United States to convene and preside at the outset of the convention is more reasonable. The Vice President is already in Washington, D.C., and does not have other pressing duties that would interfere with his discharging this responsibility.

18. *Question.* As we know, the original convention was in session roughly five months and drafted the entire Constitution, do you have any recommendation as to the duration of any future convention?

Answer. Because of the adverse effects on our political system while such a convention is sitting, some of which are set forth in my prepared statement, I recommend that any future convention terminate its proceedings within six months after the date of its first meeting. That should be ample time to work out one or so specific amendments, which is all that a "limited" convention is supposed to do according to its proponents. And Congress could always extend this period if necessary.

The reasonableness of this period is attested by experience with the 27 state constitutional conventions that assembled during the 31-year period from 1938 through 1968. The average length of these conventions, including both unlimited and limited bodies, was 4.4 months. And if the extraordinarily long Rhode Island convention is excluded, the average duration was only 2.6 months.

19. *Question.* Section 9 of S. 1710 eliminates the provision in S. 3 which provides that a constitutional convention shall terminate in one year unless extended by Congress. Would this omisssion effectively authorize a continuing convention?

Answer. Yes, this omission would effectively authorize a continuing convention. And if the provision in S. 1710 for state financing of the convention were realizable, Congress would not even be able to terminate its proceedings by cutting off its funds. In any event, implementing legislation should prescribe the maximum duration of the convention.

That the dangers of an unduly protracted convention are not imaginary was demonstrated by a Rhode Island constitutional convention that ran more than 50 months. It convened on December 8, 1964 and did not adjourn sine die until February 17, 1969. Can you imagine the consequences if a national constitutional convention continued for that length of time, which would include one and possibly two presidential elections and two congressional elections for sure!

20. *Question.* I would like to draw your attention to the fact that S. 1710 does not provide for a vote on final passage of an amendment by the convention. If S. 1710 was to be passed by Congress, do you think it could be implied that the convention itself has the authority to determine the mode and margin of the vote, or would that become a matter to be decided by the courts?

Answer. With respect to the mode of voting, Section 9(a) of S. 1710 does provide, "In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote." However, S. 1710 does not specify the margin of the vote on final passage of an amendment. And it certainly could be implied that the convention itself has the authority to determine the size of the vote required to propose an amendment. In general, for any internal procedures of a convention that Congress has not prescribed, the convention has inherent power to do so.

21. *Question.* By what vote, whether required by procedures legislation or left to the convention to decide, do you think should be required for passage of an amendment? A simple majority or two-thirds or possibly some other fraction?

Answer. The vote necessary for proposing amendments should be two-thirds of the convention delegates voting, a quorum being present. A quorum should consist of a majority of the total number of delegates to the convention. This would correspond exactly with the vote required in each house of Congress for final passage of a constitutional amendment.

Whether proposed by Congress or a convention, a constitutional amendment should not be submitted to the states before a substantial consensus on its desirability has been reached by a national deliberative body. A bare majority vote by a convention would not ensure this.

22. *Question.* What provisions for judicial review should be incorporated in any procedures bill, or would the convention itself have to provide for any review by the courts?

Answer. Neither procedures legislation nor the convention itself has to provide for judicial review. If the Supreme Court decides that questions arising out of this method of amending the Constitution are justiciable, judicial review can be exercised. And the Court will not decline to rule on such matters because Congress has declared that congressional decisions on such questions shall be binding on the courts. Consequently, the provisions of S. 3 which purport to bar judicial review [Sections 3(b), 5(c), 10(b), 13(c)] are undesirable and should be deleted. For they serve no useful purpose and could aggravate the embarrassment caused by Congress by the Court's review.

On the other hand, Congress should not ease the issue of justiciability by providing for judicial review in convention procedures legislation. As the Court has conceded in stating that various aspects of the amending process involve political questions, Congress has better means and facilities available to it to determine such questions than the Court has. Hence, Congress should not act in any way to reduce the long-standing reluctance of the Supreme Court to intrude into this area.

23. *Question.* What would be the status of any lawsuit brought before a convention assumes its responsibilities?

Answer. To be effectual, any lawsuit seeking injunctive relief from the calling of a convention would have to be decided before the convention assembled, much less assumed its responsibilities.

24. *Question.* The ABA report suggests that a three judge district court panel be authorized to review any disputes that may arise with respect to a constitutional convention. Do you have an opinion as to the advisability of this panel? How do you foresee this panel being selected?

Answer. As indicated in my answer to Question 22, I do not believe that there should be any provision for judicial review in convention procedures legislation.

25. *Question.* As you know, S. 3 does not provide for any judicial review, whereas S. 1710 makes provision for an aggrieved State to bring an action in the Supreme Court directly, which was rejected by the ABA feeling that the initiation of suit in the Supreme Court necessarily escalated the level of controversy without regard to the significance of the basic dispute. What are your thoughts on this?

Answer. The same as my answer to Question 24.

26. *Question.* Do you think Section 15(a) of S. 1710 is constitutionally consistent with Article III of the Constitution, which establishes the original and appellate jurisdiction of the Supreme Court?

Answer. The same as my answer to Question 24.

27. *Question.* Should time constraints be put upon any court, panel or arbitrating body for a determination of any dispute or legal action brought by any individual or State in connection with any procedures legislation or action by the convention?

Answer. The same as my answer to Question 24.

28. *Question.* Section 12 of S. 1710 fails to include any provision for dealing with a situation where Congress fails to enact a concurrent resolution providing for the mode of ratification, but the proposed amendment is submitted to the States for ratification by the Administrator of the General Services Administration anyway. What are your thoughts as to whether this leaves a serious gap in the ratification procedure?

Answer. This does leave a serious gap in the ratification procedure. Article V gives Congress exclusive control over the mode of ratification of an amendment regardless of the method by which it was proposed. Consequently, a constitutional convention could not choose the mode of ratification nor could any other body but Congress do so. To fill this gap, I recommend adding the following paragraph to Section 12 of S. 1710:

"(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amendment to the Constitution shall become valid when ratified by conventions in three-fourths of the several States within seven years from the date of the submission thereof to the States, or within such other period of time as may be prescribed by such proposed amendment."

In my answer to Question 11, I have already given my reason for preferring ratification by state conventions whenever this alternative method of amending the Constitution is used. Otherwise, the state legislatures have complete control over the initial and final stages of the process, which accords them excessive influence over changes in the basic framework of our political system.

29. *Question.* Section 13 of S. 1710 omits a provision included in S. 3 which states that Congress shall decide questions "concerning State ratification or rejection" of proposed amendments. This power to determine the validity of a State ratification or rejection is one that Congress has traditionally exercised. In the alternative, what other institution could make that determination or would be better qualified?

Answer. Both authority and reason support the proposition that no other institution is better qualified than Congress to decide questions concerning state ratification or rejection of proposed amendments. In *Coleman* v. *Miller*, 307 U.S. 433 (1939), which centrally concerns ratification issues, the Court said, ". . . the question of the efficacy of ratifications by state legislatures in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." In *Coleman*, the Court refused to decide how long a child labor amendment remained open to ratification in the absence of a time limitation by the Congress. The Court deferred to Congress on this question on the grounds that it involved an appraisal of a great variety of relevant conditions, political, social, and economic, which could not be properly weighed by the courts. The Court stated that such questions "can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

Also, observable facts confirm that no other institution is better qualified by composition and organization to make such determinations. The Congress comprises members from all parts of the country who are sensitively attuned to conditions in their districts. Their accessibility and collegial decision-making ensure a maximum of responsiveness to these dynamic circumstances.

[The New York Times, Feb. 16, 1979]

PROPOSED CONVENTION ON BALANCING BUDGET

(By Adam Clymer)

WASHINGTON, Feb. 15.—Twenty-seven state legislatures have called on Congress to summon a constitutional convention to draft a constitutional amendment requiring the Federal budget to be balanced except in emergencies. If seven more states join them, Congress may be obliged to call the first such convention since 1787.

While the discussions in most state legislatures have been perfunctory, the subject is getting increasing attention as the total nears the 34 that would make the necessary two-thirds of the states, and three lines of debate are emerging, as follows:

¶Whether a requirement for a regularly balanced budget is a good idea in itself.

¶Whether such a requirement should be in the Constitution.

¶Whether a constitutional convention is the best place to write such an amendment, and, even if it may be, whether a convention might not run wild and try to change the fundamental elements of the Constitution.

Congressional Democrats generally answer "no" to the three questions implicit in the lines of debate. President Carter says he favors a balanced budget, opposes constitutional conventions and urges that the idea of an amendment be approached "very gingerly, very carefully."

Republicans here almost universally oppose a convention, argue for balanced budgets as a goal but split about whether an amendment would be appropriate. Many prefer an amendment that would limit only Federal spending, which is more easily controlled than tax revenue. In the remaining states, however, support for the convention effort generally comes from Republican legislators.

THE BACKGROUND

The Federal convention of 1787 fixed on two methods for amending the Constitution. On 32 occasions Congress has used one route and proposed amendments to the states. Five were not ratified by the necessary three-fourths of the legislatures, and one, the equal rights amendment, is still pending.

The other course, a convention called by Congress on the request of the states, has never been used. In two cases, however, the legislatures came within one state of the needed two-thirds.

Early in this century that pressure contributed to Congressional proposal of the amendment requiring the direct election of senators. Then, in the late 1960's, Congress held fast against an effort to undo the Supreme Court's reapportionment decision.

While attacks on deficit spending have been a political commonplace for many years, the current effort began seriously in 1975 when State Senator James Clark of Maryland, pushed a convention call through his Legislature and began talking up the idea with other state lawmakers. He also enlisted the backing of the National Taxpayers Union, a small organization best known until now for attacks on foolish-sounding Federal grants and on double-dipping by military pensioners on the Federal payroll.

The convention campaign gathered steam in the last couple of years. It has been helped along by rampant inflation, which 58 percent of the public in the latest New York Times/CBS News Poll think could be curbed by cuts in Federal spending. Since most states are required to have blanced budgets (though usually by accounting methods very different from Federal practices), the idea has until recently met little opposition.

Recently, most of the states that approved a convention call have offered Congress a way out—writing an amendment itself—as they sought to reassure those who argued that a convention might go haywire.

THE SUPPORTERS' CASE

James D. Davidson, chairman of the National Taxpayers Union, contends that deficits spur inflation and devalue the currency. He argues that emergency clauses could cope with the needs of war and depression. Gov. Edmund G. Brown Jr. of California, the most prominent political supporter of the drive, goes further seeing a balanced budget as a philosophical symbol for "the kind of discipline this country needs."

Mr. Davidson maintains that without a constitutional injunction members of Congress will be unable to withstand the temptation to spend more than they are willing to tax to pay for.

While most of the supporters say they are using the convention call only as a "club" to get Congress's attention, Mr. Davidson says he has no fear that it would run wild, feeling that Congress and the courts would enforce the calls from most of the states that make it clear this is the only subject they want considered. In any case, he says, the necessary 38 states would not ratify wild amendments from a convention. And he argues that a caliber of delegate comparable to those who met in Philadelphia in 1787 would be chosen for a new convention.

THE OPPONENTS' CASE

Critics such as Senators Edmund S. Muskie of Maine and John C. Culver of Iowa, both Democrats, insist that, while balanced budgets are a worthy ideal, any binding requirements would be too inflexible and would make it hard for Congress to react quickly and head off a depression when an economic downturn began.

They contend that the states that are demanding a balanced budget are hypocritical, getting $30 billion in Federal aid. They warn, with arguments that are beginning to be heard in state capitals, that revenue sharing and other grants would be cut first.

Some foes maintain that deficits have little effect on inflation anyway and that economic theory should not be embedded in the Constitution, because it would be stuck there even if the theory proved wrong. Others say that this sort of detail does not belong in a statement of great principles.

But the most effective argument the critics have is the fear of a runaway convention. Senator Birch Bayh of Indiana, chairman of the Senate's Constitutional

Amendments Subcommittee, says he thinks Congress could limit a convention, but he is not sure. While legal scholars are found on both sides of the issue, opponents point out that the original convention went beyond its mandate and say they do not want to run the risk of turmoil and uncertainty that efforts to rewrite the basic law of free press, free speech or abortion would raise.

THE OUTLOOK

It now appears more likely than not that sometime this year the necessary 34th state will call for a convention, even though Congress has not received, or cannot find, some of the earlier resolutions. That confusion has led some Congressmen to contend that as few as 14 states have passed resolutions, but there is no reason to doubt that additional copies will be forwarded to Capitol Hill. This problem is probably a reflection of the fact that Congress has never set up precise procedures for dealing with such resolutions. In fact, only the Senate has ever considered legislation to regulate an actual convention. It passed such measures twice but the House took no action.

Despite the mandatory language of the Constitution that Congress "shall call a convention" once two-thirds of the states ask for one, the fact that most of the resolutions give Congress the alternative of proposing its own amendment will blunt, for a time, any requirement for an immediate convention call.

When and if the 34th state signs up Congress is likely to get seriously at work on a budget-balancing amendment of its own, with as much flexibility as it can manage, and on a revival of legislation to govern convention procedures. But the issue will not go away, and even the amendment's severest critics are aware of its strong public support, recorded by 73 percent of those in the Times/CBS News Poll.

HOUSE OF REPRESENTATIVES,
Washington, D.C., November 21, 1979.

HON. BIRCH BAYH,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed is a copy of an independent research paper entitled "Resurrecting a Federal Constitutional Convention Procedures Act" which I wrote last spring in connection with my studies at Catholic University School of Law where I am presently a fourth year, evening division student.

Copies of the paper have also been furnished to the Senate sponsors and cosponsors of constitutional convention procedures legislation in the 96th Congress—S. 3, S. 520, and S. 1710. I would appreciate your making the paper and this letter of transmittal a part of the November 29 hearing record on this legislation.

The paper analyzes the development of the Article V convention provision and the modern dilemma facing the Congress—the absence of statutory convention procedures, recent applications for a constitutional convention to consider a balanced budget amendment, and unanswered questions regarding the convention alternative.

Included are a detailed analysis of the legislative history of the Ervin bill which twice passed the Senate as well as a sectional analysis of that legislation.

My firm conclusion is that a procedures bill should be enacted by the Congress. Among my recommendations for amendments to the Ervin legislation are:

A requirement that legislatures state clearly in each application its effective date;

A Congressionally-prescribed short form for applications to aid in determining their validity;

Full applicability of the provisions of the Act to applications submitted prior to enactment of the bill;

A periodic determination and count of valid applications pending before the Congress;

Convention proposal of appropriate amendments by simple majority vote, except that in any case the number be a percentatge of delegates voting;

Clarification of Congressional intent regarding rescissions of ratifications of proposed amendments before the states at the time of enactment of the bill;

Limited judicial review of Congressional determinations provided in the bill, under a standard of "clearly erroneous."

Thank you for your attention.

Sincerely,

GORDON M. THOMAS,
Legislative Assistant.

RESURRECTING A FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT

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Article V of the Constitution of the United States provides two alternative means by which the Constitution can be amended. In pertinent part, Article V reads as follows:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .

To date, all proposed amendments submitted to the states for ratification have been proposed directly by Congress; the constitutional convention method has never been utilized.

BACKGROUND AND HISTORY OF THE CONVENTION PROVISION

Out of a general sense of dissatisfaction with the manner in which the national government was functioning under the Articles of Confederation,[2] Congress called the Philadelphia Convention of 1787 into session for the purpose of proposing revisions, subject to the approval of Congress and the states.[3] Instead, the convention proposed an entirely new Constitution which was accepted by Congress and ratified by the requisite number of states.[4]

The convention provision in Article V, in its earliest form, was the product of a compromise between Virginia delegates, who wished the national legislature to have no part whatsoever in any amendment procedure,[5] and a broader cross section of delegates generally who thought it unwise and improper to exclude Congress completely.[6]

The Committee on Detail and Committee on Style and Revision reported draft language which, when temporarily accepted by the delegates over the course of extended debate on an amendment article, became the forerunner of the current Article V convention provision.[7] This initial text contained no provision for direct proposal of an amendment by the national legislature, nor did it include a requirement that the states ratify any action taken by a convention.

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[1] The author of this directed research project is employed as Legislative Assistant to Representative L. H. Fountain of North Carolina, chief sponsor of a constitutional convention procedures bill in the 96th Congress, H.R. 1664. The research for the writing of this paper began several weeks prior to Representative Fountain's introduction of H.R. 1664 and was conducted independently of the author's employment duties. Views expressed herein are entirely those of the author and should not necessarily be attributed to Representative Fountain.

[2] In particular, Article XIII, which provided for amendment of the Articles of Confederation, did not permit a national consensus short of unanimity on the part of state legislatures to respond to changing circumstances. Article XIII prohibited any alteration "unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of *every State*" (emphasis supplied). Note that Article XIII made no provision for the calling of a convention when initiated by the states.

[3] *See, e.g.*, Congressional Research Service, Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82, 92d Cong., 2d Sess. XL (1973).

[4] *Id.* For establishment of the Constitution between states ratifying it, Article VII required ratification by conventions in nine states.

[5] 1 M. Farrand, *The Records of the Federal Convention of 1787*, 22 (rev. ed. 1937). The Virginia Plan called for amendment "whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."

[6] *Id.* at 202–03. The Committee of the Whole, consisting of delegates from all the colonies, rejected language excluding the national legislature.

[7] *See generally* C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, House Judiciary Committee, 85th Cong., 1st Sess. 4 (Comm. Print 1957).

At the urging of Alexander Hamilton, who believed "the State legislatures will not apply for alternations but with a view to increase their own powers", and of James Madison, who offered substitute language providing for alternative modes of amendment, the convention adopted a proposal permitting Congress itself to initiate an amendment in addition to the convention method previously reported by the Committee on Detail and Committee on Style and Revision and approved by the delegates.[8] The final version contained the requirement embodied in Article V that three-fourths of the states ratify any amendment proposed under either alternative in order for it to become part of the Constitution.[9]

Writing in The Federalist Papers, Madison and Hamilton provide additional legislative history of the Article V convention provision.[10] In particular, Madison detailed the opportunity possessed by the states, in effect, to introduce amendments, an opportunity which was intended to be on a par with that of Congress:

"That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.[11]

Little supplemental historical authority exists to explain in further detail what the Founding Fathers had in mind when they wrote the convention provision into Article V. Since the convention route has not been invoked under the current Constitution, there are no modern precedents, legislative or judicial, to use in determining a host of vexing problems and issues associated with the specter of a federal constitutional convention. Despite the lack of additional legislative history, the basic intent of the provision is clear: the convention method of proposing amendments is an alternative which cannot be ignored.

THE MODERN DILEMMA FACING THE CONGRESS

A. No statutory convention procedures

Since 1967, as a result of the absence of statutory implementation of the Article V convention alternative, the United States Senate has made significant strides toward enactment of such a bill.[12] The House of Representatives has thus far refused to act on Senate-passed legislation, and the House Judiciary Committee has not held a legislative hearing directly on the issue.[13]

Proponents of procedures legislation argue that Congress has general power under the "necessary and proper" clause [14] to enact a bill. Former Senator Sam J. Ervin, Jr. of North Carolina, the earliest and most noted advocate of a procedures act, has said:

"I have no doubt that the Congress has the power to legislate about the process of amendment by convention. The Congress is made the agency for calling the convention, and it is hard to see why the Congress should have been involved in this alternative method of proposal at all unless it was expected to

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[8] *Id.* at 5.

[9] For a more complete account of the deliberations of the convention on these points, *see* Brickfield, *supra* note 6, at 4–6. *See also* ABA Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* 11–14 (1974) (hereinafter cited as ABA Study).

[10] *The Federalist No. 43* (J. Madison), at 278–79 (Mentor ed. 1961) and *The Federalist No. 85* (A. Hamilton), at 526 (Mentor ed. 1961).

[11] *The Federalist No. 43*, *supra* note 9.

[12] *See* discussion *infra* of Congressional attempts to establish statutory procedures and guidelines.

[13] Representative Emanuel Celler, chairman of the House Judiciary Committee when the Senate first passed a procedures bill, believed "that the present state of uncertainty, while undesirable, is preferable to the active encouragement of a flood of new amendments that might result from setting up the new machinery." N.Y. Times, Oct. 20, 1971, *reprinted in* 117 *Cong. Rec.* 45184 (1971). Yet, years earlier Chairman Celler had called the issue "a long-neglected but vital problem" and wrote, "(u)nfortunately there is no statutory authority to guide this committee or the Congress in classifying applications or in counting them, nor . . . for the calling of a convention." C. Brickfield, *Problems Relating to a Federal Constructional Convention*, House Committee on the Judiciary, 85th Cong., 1st Sess. Foreword (Comm. Print 1957). The issue has been touched upon peripherally in other House committee hearings. *See, e.g., Amending the Constitution Relative to Taxes on Income, Inheritances, and Gifts: Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 1st Sess. (1958).

[14] *U.S. Const.* art. I, § 8, cl. 18.

determine such questions as when sufficient appropriate applications had been received and to provide for the membership and procedures of the convention and for review and ratification of its proposals . . . (Congress) has the residual power to legislate on matters that require uniform settlement.[15]

The Supreme Court, in *Dillon* v. *Gloss*,[16] said:

"As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule.[17]

Taking a contrary view, Professor Charles Black of Yale Law School believes:

"Article V allows only a general, no-holds barred convention. Anything which ties the hands of the delegates . . . is not the kind of deliberative body the founding fathers envisioned.[18]

The weight of scholarly authority,[19] and the unanimous passage of a procedures bill by the Senate on two occasions,[20] without serious question during the legislative debate as to the bill's constitutionality, indicate that Congress has power to implement by statute the convention alternative of Article V, subject to a standard of reasonableness.[21]

B. Proposals regarding a constitutional amendment to require a balanced Federal budget

Renewed interest in the constitutional convention issue has surfaced in recent months as the result of a nationwide campaign [22] to write into the Constitution an amendment requiring a balanced federal budget for each fiscal year except in time of war or national emergency as declared by Congress.[23]

As part of the drive to require a balanced federal budget, approximately 29 state legislatures,[24] five short of the 34 (two-thirds) necessary under Article V, have passed resolutions of application to the Congress to call a constitutional convention for the purpose of proposring a balanced budget amendment.[25] There is difficulty in arriving at a binding count of valid convention applications before Congress since there are no established procedures for the receipt, notation, tabulation, and central storage of such applications.

The Library of Congress, through its own efforts as well as through the use of data compiled by a private source, has counted up to 29 applications for a balanced budget convention. Not all of the 29 have been received by the Speaker of the House and the President of the Senate and officially noted in the Congressional Record, or have been located in the files of the Senate and House Judiciary Committees. Some applications are conditional and therefore of questionable validity in that they call on Congress first to propose an amendment directly, and, failing that, then to call a convention.[26]

Several states which have passed, but perhaps erroneosuly submitted, applications to the Congress, or have failed altogether to submit them, have made

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[15] Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 879, 880 (1968) (hereinafter cited as Ervin article).

[16] 256 U.S. 368 (1921).

[17] *Id.* at 376.

[18] Margolick, "Constitutional Convention?", *The National Law Journal*, Mar. 5, 1979, at 1, col. 2 (paraphrasing Professor Black). *See also* Black, *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189 (1972).

[19] *See, e.g., Federal Constitutional Convention: Hearings on S. 2307 Before the Subcommittee on Separation of Powers of the Committee on the Judiciary*, 90th Congress, 1st Session (1967) (hereinafter cited as Senate Hearings).

[20] The Senate passed S. 215 of the 92d Congress by a vote of 84–0, 117 Congressional Record 36804 (1971), and S. 1272 of the 93d Congress by voice vote, 119 Congressional Record 22731 (1973).

[21] *See* Senate Hearings, supra note 18, at 34–38 (statement of Theodore C. Sorensen). *See also*, 117 Congressional Record 36766 (1971) (statement of Sen. Bayh).

[22] The campaign has been spearheaded by the National Taxpayers Union, a Washington lobbying organization, and California Governor Jerry Brown.

[23] Dozens of resolutions calling for Congress to propose such an amendment directly have been introduced in the 96th Congress. The Senate Judiciary Subcommittee on the Constitution opened hearings on the issue on Mar. 12, 1979. 125 Congressional Record D234 (daily ed. Mar. 12, 1979). *See, e.g.*, S.J. Res. 5, S.J. Res. 6, S.J. Res. 18, and S.J. Res. 38, 96th Cong, 1st Sess (1979). The House Judiciary Subcommittee on Monopolies and Commercial Law began hearings on similar House resolutions on Mar. 27, 1979. 125 Congressional Record D340 (daily ed. Mar. 27, 1979).

[24] *See infra* note 25. The number of valid applications before the Congress is open to question.

[25] D. Huckabee, "Constitutional Convention Applications: Addressing the Controversy of Counting State Applications Relating to a Deficit Spending Amendment." The Library of Congress, Congressional Research Service, Government Division 7–11 (rev. print Mar. 12, 1979).

[26] *Id.*

copies available to individual members of Congress for publication in the Congressional Record, or have recently sent newly certified copies to Congress for official notation in the Congresional Record.[27]

C. Unanswered questions

Assuming that Congress has power to regulate convention procedures by statute,[28] and that Congress may pass upon the validity of submitted applications, several questions arise in connection with the calling and conducting of a convention. Among the more important and difficult are whether a convention call by Congress when valid applications are received from two-thirds of the state legislatures is mandatory.[29] whether a convention can be limited to one or more subjects as specified in the applications (or whether it is free to propose anything up to and including a general revision of the Constitution),[30] how amendments may be proposed by a convention,[31] and what role, if any, Congress has in approving proposed amendments and transmitting them to the states.

THE ERVIN LEGISLATION: AN ATTEMPT TO LEGISLATE ANSWERS

A. Legislative history

In response to Supreme Court decisions in the early 1960s requiring reapportionment of state legislatures,[32] several states applied to Congress for a constitutional convention to propose an amendment reversing those decisions. By 1967, 32 states, two short of two-thirds, had submitted applications on this subject. In response, Senator Sam J. Ervin, Jr. introduced legislation for the first time to provide procedures governing such a convention.[33]

Senator Ervin's Judiciary Subcommittee on Separation of Powers held two days of hearings on the bill in 1967.[34] But it was not until 1971 that the legislation,[35] modified as the result of the 1967 hearings and public discussion, was reported to the Senate by the full Judiciary Committee.[36]

The Ervin legislation was substantially amended in one respect on the Senate floor in 1971. The bill as reported provided that a convention could propose amendments by a simple majority vote of the delegates.[37] The Senate adopted an amendment by Senator Birch Bayh of Indiana requiring a two-thirds majority vote.[38] The bill then passed the Senate unanimously,[39] but was not considered by the House.[40] The bill, in identical form, was introduced in and passed the Senate unanimously, without debate, in 1973,[41] again without subsequent consideration by the House.

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[27] *See, e.g.*, 125 Congressional Record S1304–13 (daily ed. Feb. 8, 1979) (remarks of Sen. H. Byrd), 125 Congressional Record H808–11 (daily ed. Feb. 21, 1979) (remarks of Rep. Volkmer). Whether these published compilations constitute valid receipt by Congress is an open question. *See also* sundry House memorials and Senate petitions officially noted and published in 125 Congressional Record, 96th Congress (indexed in Congressional Record Index under headings "Speaker of the House" and "Vice President").

[28] *See supra* note 20.

[29] *See, The Federalist No. 85, supra* note 9, at 526. Hamilton wrote: "By the fifth article . . . the Congress will be obliged (emphasis in the original) . . . to call a convention. . . . The words of this article are peremptory. The Congress *'shall* (emphasis in the original) call a convention.' Nothing in this particular is left to the discretion of that body."
Contra, Corwin and Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 Notre Dame Lawyer 185 (1951). Related unresolved questions include whether a call is simply a ministerial act and whether Congress can be judicially compelled to call a convention. Senator Ervin believed the courts cannot order Congressional action because of the separation of powers doctrine and because the matter may be labeled a political question. He drafted his bill, *see infra* note 32, to reflect a Congressional "duty" to call a convention at the proper time in furtherance of a "clear obligation" to support the Constitution as reflected in the Congressional oath of office. Ervin article, *supra* note 14, at 886.

[30] The thesis of *Coleman* v. *Miller*, 307 U.S. 433 (1939), is that Congress has sole discretion on questions concerning amendment procedure. *See also*, remarks of Sen. Ervin, *supra* note 14. *Contra see* Black, *supra* note 17.

[31] *See infra* note 37, regarding floor debate on whether amendments should be proposed by two-thirds or by a simple majority of convention delegates.

[32] *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[33] S. 2307, 90th Congress, 1st Session (1967). The bill was reintroduced two years later, S. 623, 91st Congress, 1st Session (1969).

[34] Senate Hearings, *supra* note 18.

[35] S. 215, 92d Congress, 1st Session (1971) (hereinafter cited as Ervin bill).

[36] S. Rep. No. 336, 92d Congress, 1st Session (1971) (hereinafter cited as 1971 report).

[37] Ervin bill, *supra* note 34, § 10(a).

[38] 117 Cong. Rec. 36770 (1971). The vote was 45–39.

[39] *See, supra* note 19.

[41] S. 1272, 93d Congress, 1st Session (1973) and S. Rep. No. 293, 93d Congress, 1st Session (1973) (substantively identical to 1971 report, *supra* note 35).

[40] *See, supra* note 12.

In speaking in favor of his amendment in 1971, Senator Bayh said:

"(T)he two-thirds vote requirement has served as one of the most effective protectors of the Constitution against the incursion of poorly thought out, hastily drafted, and ephemeral amendments." [42]

Replying on behalf of retaining the majority vote language, Senator Ervin said:

"The Founding Fathers . . . put in one protection against hasty action and that was that it took at least two-thirds of the States to cause Congress to call a constitutional convention. Then they put another stringent safeguard against any hasty action by providing that it took three-quarters of the States to ratify any of the amendments submitted by the constitutional convention before it could be a part of the Constitution." [43]

Senator Ervin argued that the Constitution is silent on the question of convention voting and continued:

"It is a fundamental principle that Congress cannot add anything to the Constitution by one of its acts . . . (W)hen power is delegated to a body, and the numbers of the members of that body who are to exercise that power are not designated, that body acts through a majority vote of its members . . . (The Bayh amendment) is an effort to add something to the Constitution that is not in the Constitution . . . If Congress can say that it takes two-thirds of the delegates to submit an amendment, the Congress can say it can take 99 percent, and, therefore, Congress could nullify article V." [44]

In support of Senator Ervin's position, Senator Lawton Chiles of Florida said: ". . . there is a well established parliamentary procedure and principle of law that majority vote shall be used unless a document such as our Constitution provides otherwise. (An) example is when the House of Representatives brings impeachment proceedings against an individual by a majority vote. However, the Senate, according to the Constitution, must determine the guilt or innocence by a two-thirds vote . . . If our forefathers were allowed to write our Constitution by majority votes, so should subsequent conventions, if called, be allowed to propose amendments by majority vote." [45]

B. Sectional analysis

Section 1 provides the short title.[46]

Section 2 provides that a state legislature's application shall state the nature [47] of the amendment(s) to be proposed. The Act shall apply only to applications received after its enactment.

Section 3 provides that a state legislature [48] shall use its usual statutory enactment procedures for applications, but that gubernatorial approval of the application is not needed.[49] Congress alone shall have power to determine all adoption-related questions and its decisions will be binding on the courts.[50]

Section 4 states technical requirements regarding transmittal of applications to Congress, their content, and official reports of their receipt in each House.

Section 5 provides that applications are effective for seven years unless rescinded sooner in the same manner in which adopted (unless two-thirds of the states have submitted valid applications, in which case no rescissions can be

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[42] 117 Cong. Rec. 36762 (1971).

[43] *Id.* at 36765.

[44] *Id.* at 36766. Senator Bayh replied that a 99 percent requirement would be unreasonable. *Id.*

[45] *Id.* at 36770.

[46] 1971 report, *supra* note 35, at 1, 2. The intent of the bill is to establish procedures for conventions considering amendment(s) in a specific area or areas, not for a convention called for the general revision of the Constitution, which the committee believes is a separate issue.

[47] Ervin article, *supra* note 14, at 884. This provision allows the states "to identify the problem or problems" for a convention to consider, yet prevents the states from "defin(ing) the subject so narrowly as to deprive the convention of all deliberative freedom . . . The convention would be confined to that subject, but it would be free to consider the propriety of proposing any amendment and the form the amendment should take." This would prevent Congress from "submit(ting) to a convention a given text of an amendment, demanding an up or down vote on it alone." *See also*, 1971 report, *supra* note 35, at 10, 11.

[48] A legislature is "the representative body which (makes) the laws of the people." *Hawke* v. *Smith*, 253 U.S. 221, 227 (1919).

[49] The legislatures are performing essentially a federal function not subject to a governor's veto. Ervin article, *supra* note 14, at 888, 889. *See also*, 1971 report, *supra* note 35, at 14.

[50] *See infra* note 65, regarding the American Civil Liberties Union's 1971 position on judicial review.

made). Congress shall determine all questions relating to rescission and its decisions will be binding on the courts.[51]

Section 6 describes Congressional record keeping and reporting requirements. When two-thirds of the states have submitted applications on the same subject, each House shall determine whether the applications are valid. If a sufficient number are valid,[52] each House shall agree to a concurrent resolution calling a convention, setting the time and place of its meeting which must be within one year of the resolution, and setting the nature of amendment(s) which may be considered.

Section 7 sets the number of delegates from each state as the number of Senators and Representatives to which it is entitled.[53] Delegates are to be elected,[54] one from each Congressional district, and two at-large from each state. Governors shall fill vacancies by appointment. Delegates shall enjoy the same constitutional immunities as members of Congress and shall receive compensation for services and expenses.

Section 8 sets procedures for convening the convention (by the Vice President), and provides for the delegates' oath of office committing them "to refrain from proposing or casting (a) vote in favor of any proposed amendment . . . relating to any subject which is not named or described in the concurrent resolution" calling the convention.

Section 9 dictates procedures at the convention: each delegate shall have one vote, a daily verbatim record of proceedings shall be published, and the convention may meet for no longer than one year from the date of its first meeting unless Congress extends its life.

Section 10 provides that amendments may be proposed by a two-thirds vote of the total number of convention delegates,[55] and that in no event may a convention propose any amendment(s) *ultra vires*. Congress shall decide all proposal-related questions and its decisions will be binding on the courts.[56]

Section 11 sets post-convention procedures: Congress shall receive any proposed amendments and determine the time and manner of ratification by the states. Congress may disapprove the submission of a proposed amendment to the states if it "relates to or includes a subject" not contained in the resolution calling the convention or if convention procedures "were not in substantial conformity" with the Act.[57]

Section 12 routinely repeats the ratification process detailed in Article V and provides that ratification must occur, if at all, within seven years unless Congress sets a different time limit.

Section 13 permits a state to rescind an earlier ratification at any time until three-fourths of the states have ratified a proposed amendment.[58] States may ratify after having first rejected a proposed amendment. Questions relating to ratification or rejection shall be determined by Congress and its decisions will be binding on the courts.[59]

Section 14 stipulates that an amendment shall be proclaimed as part of the Constitution when ratified by three-fourths of the states.

Section 15 sets the effective date of a new amendment as that specified therein, or, if none is specified, the date of ratification by the last state necessary to constitute three-fourths.

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[51] *Id.*

[52] Congress may weigh only the technical sufficiency and the validity of the applications, and may not address the wisdom and the necessity of considering proposed amendments on a given subject. Ervin article, *supra* note 14, at 886.

[53] This formula gives less populated states a higher, disproportionate share of the total voting power. States with the largest populations would have a greater proportionate share of the total vote if the number of delegates were the same as the number of members in the House of Representatives only. *See*, ABA Study, *supra* note 8, at 34–37 for a discussion of the issue as it pertains to the constitutional doctrine of one person, one vote.

[54] The original 1967 Ervin bill, *supra* note 32, allowed delegates to be elected or appointed, as provided in each State.

[55] *See* discussion of Senator Bayh's amendment *supra*.

[56] *See infra* note 64.

[57] Ervin article, *supra* note 14, at 894. Congress may refuse to submit an amendment to the States on account of procedural irregularities at the convention, but may not refuse to submit one on account of substantive reasons which go to the merits of the particular subject matter.

[58] *See* discussion *infra* regarding the need to amend this section in light of proposed amendments currently before the state legislatures.

[59] *See infra* note 64.

Senator Ervin retired from the Senate at the close of the 93rd Congress. His bill in basic form has been reintroduced in each subsequent Congress, including the present Congress, the 96th.[60] No further action on the bill directly has been taken in either the Senate or the House. All convention procedures bills introduced since Senator Ervin's retirement have been either identical to his legislation or altered only slightly, save for some continuing debate, reflected in the bills, as to the number of convention delegates needed to propose an amendment (simple majority or two-thirds).

Representative Don Edwards of California, chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, is reluctant to hold hearings on convention procedures bills referred to it. He "fears that passage of a procedures bill would encourage the push for a constitutional convention" and has said "Anything that would encourage this sort of utilization of Article V is unwise." [61]

Similarly, Senator Bayh's Judiciary Subcommittee on the Constitution has scheduled no hearings on procedures proposals.[62]

RECOMMENDATIONS

Section 2 of the Ervin bill should be amended to require legislatures to state clearly in each application the effective date thereof. Potential problems arise when a state submits a conditional application; for example, petitioning Congress to call a convention only if Congress itself first fails to propose an amendment directly.[63] Applications should therefore include the date on which any contingency ceases and the petition for a convention vests.

Section 2 should also be amended by prescribing a short form for applications, to be officially accepted by Congress, as a way of reducing the chances of serious questions arising as to the validity of applications. The form should include such essential elements as a general description of the subject matter to be considered by a convention, but without specifying the text of a proposed amendment, and the effective date of the application. Congress could at the same time freely permit the state legislatures to include additional information, such as a statement of findings, in resolutions beyond the basic form requirements.

In addition, Section 2 should be amended so that the Act will apply with full force to applications submitted to Congress prior to its enactment.

Section 4 of the bill should be amended to include a procedure for periodic determination of the number of valid applications before Congress. Congressional policy should be to keep a running tabulation to prevent delayed determinations of validity based on the merits of any particular issue possibly subject to a convention call. The periodic determinations should include a requirement of timely statements on the floor of each House, by the Speaker of the House and the President of the Senate, as to the number of valid applications then before Congress in each subject area. The American Bar Association has proposed draft language providing that an application will be valid unless both Houses of Congress, by concurrent resolution, determine it to be invalid, either in whole or in part, within sixty days of its receipt.[64]

Section 10(a) of the Senate-passed Ervin bill should be amended in two respects. First, only a simple majority vote of convention delegates should be

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[60] For the 94th and 95th Congresses, see S. 1815, 94th Congress, 1st Session (1975); S. 1880, 95th Congress, 1st Session (1977); H.R. 7008, 95th Congress, 1st Session (1977); H.R. 8560, 95th Congress, 1st Session (1977); H.R. 10134, 95th Congress, 1st Session (1977); H.R. 10836, 95th Congress, 2d Session (1978); H.R. 11600, 95th Congress, 2d Session (1978). For the current 96th Congress, see S. 3, 96th Congress, 1st Session (1979); S. 520, 96th Congress, 1st Session (1979); H.R. 84, 96th Congress, 1st Session (1979); H.R. 500, 96th Congress, 1st Session (1979); H.R. 1664, 96th Congress, 1st Session (1979); H.R. 1964, 96th Congress, 1st Session (1979); H.R. 2274, 96th Congress, 1st Session (1979); H.R. 2587, 96th Congress, 1st Session (1979). On Mar. 1, 1979, Senator Jesse Helms of North Carolina, sponsor of S. 520, attempted through unanimous consent to bring the bill before the Senate for immediate consideration, but Senator Bayh, chairman of the Senate Judiciary Subcommittee on the Constitution, to which convention procedures legislation is referred, objected. 125 Congressional Record S. 1920–21 (daily ed. Mar. 1, 1979). At the request of Senator Helms and by unanimous consent, S. 520 has since been ordered placed onto the Senate calendar. 125 Congressional Record S. 4138 (daily ed. Apr. 9, 1979).

[61] Hucker, "Constitutional Convention Poses Questions," Congressional Quarterly, Feb. 17, 1979, 273, 275.

[62] *Id.*

[63] *See*, Huckabee, *supra* note 24.

[64] ABA Study, *supra* note 8, at 49.

required to propose amendments. The constitutional arguments of Senator Ervin and Senator Chiles are persuasive. It ought to be conclusively presumed that a simple majority vote prevails unless the Constitution provides otherwise. In addition, as Senator Ervin said during floor debate on the question, two adequate safeguards against hasty actions are already explicitly provided in the Constitution (two-thirds of the state legislatures must apply for a convention and three-fourths of the states must ratify a proposed amendment before it becomes part of the Constitution). Second, the number of votes necessary to propose an amendment should in any case be a percentage of delegates voting instead of the total number of delegates to the convention. Congress conducts business entirely on the basis of a percentage of members voting—enactment of legislation, override of Presidential vetoes, expulsion of members, impeachment and conviction, and direct proposal of constitutional amendments under Article V. A constitutional convention should not be made subject to a higher, more difficult standard.

Section 13(a), regarding rescission of ratifications, should be amended to make clear the Congressional intent on rescission of any proposed amendments before the states at the time of the enactment of the bill. This is particularly important in light of the continuing debate over the validity of rescissions of state ratifications of the Equal Rights Amendment.

A new Section 16 should be added authorizing limited judicial review of Congressional determinations and findings provided for elsewhere in the bill. The American Bar Association has drafted language providing that Congressional determinations and findings "shall be binding and final unless clearly erroneous." [65] The "clearly erroneous" standard of review provides a judicial check against arbitrary Congressional actions, yet forcefully acknowledges the primary political role of Congress in determining questions concerning the amendment process. In this regard, the American Civil Liberties Union has persuasively argued:

"Questions arising under Article V are constitutional in character and have extremely important consequences for the body politic . . . While Congress should make the initial determination on questions arising under Article V, the final decision on all constitutional questions should rest in the courts of the United States." [66]

Various sections of the Ervin legislation which provide for binding determination by Congress of questions arising under the Act should be appropriately amended to reflect the addition of a section authorizing limited judicial review.

In order to track convention applications more easily, the Senate and House should amend their respective rules to provide a special section in the Congressional Record entitled "Constitutional Convention Applications", in which all applications would be printed in their entirety, with a similar heading in the Congressional Record Index.[67]

CONCLUSION

Congress should immediately begin the process of enacting a constitutional convention procedures bill, using as a firm basis the comprehensive Ervin legisaltion twice passed by the Senate. As the ABA has said with regard to further delay:

"If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional convention would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.

"It is far more prudent, we believe, to confront the problem openly and to supply safeguards and general rules in advance." [68]

Should the number of applications for a balanced budget convention soon approach the magic number of 34, it is probable that Congress would itself pro-

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[65] *Id.* at 57.

[66] Letter from Hope Eastman, Acting Director, American Civil Liberties Union, to Senator Birch Bayh, Oct. 8, 1971, *reprinted in* 117 Congressional Record 36763 (1971).

[67] For a detailed examination of current Senate and House practices on memorials and petitions, which do not provide for separate classification of constitutional convention applications, *See,* Stasny, "State Applications for a Convention to Amend the Federal Constitution," *reprinted in* 123 Congressional Record S 18494 at 18495 (daily ed. Nov. 2, 1977).

[68] ABA Study, *supra* note 8, at 8.

pose some sort of amendment addressing the issue in order to avoid being forced into calling a convention over which it arguably could exercise no substance control. There is precedent for this idea: Congress proposed an amendment providing for direct election of Senators, which later became the Seventeenth Amendment, when the state legislatures were only one application short of two-thirds.[69] The Library of Congress has written: ". . . the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress." [70]

Whether the response by the 96th Congress will be to enact a procedures bill, to propose directly a balanced budget amendment, to mandate a balanced budget by state, or to do nothing at all remains to be seen. Should Congress be faced with the duty of calling a convention, it is to be hoped that Congress will act without basing procedural decisions on the merits of the issue at hand. To do otherwise would be to abrogate the intent of the Founding Fathers.

The Senate Judiciary Committee in 1971 stated the need for procedures legislation as being: ". . . to avoid what might well be an unseemly and chaotic imbroglio if the question of procedure were to arise simultaneously with the presentation of a substantive issue by two-thirds of the State legislatures. Should article V be invoked in the absence of this legislation, it is not improbable that our country will be faced with a constitutional crisis the dimensions of which have rarely been matched in our history." [71]

The 96th Congress would do well to remember that admonition.

REWRITING THE CONSTITUTION: LIFE, LIBERTY, AND A BALANCED BUDGET

(By Ben Martin)

Who do you like for president of the next constitutional convention—Sam Ervin or Archibald Cox? Take your time deciding, but do not take too long; the drive for a convention to require a balanced budget is bearing in on Washington. Officials there are hurrying to avoid it, but the thirty-fourth state could call for a convention within months. Then Congress would have to decide what to do about it, and the stakes could not be higher.

The call for a balanced budget has been raised to draw official Washington's attention finally to taxes, inflation, and a rising sense that government is out of control. It is a summary complaint against the growth of government, reflecting a basic insight that getting and spending, along with regulation, are the heart of public policy. It steps over piecemeal issues, and the demand for constitutional amendment underscores the seriousness of the complaint.[1]

The states have petitioned for a balanced budget, but limiting government spending is more nearly the matter. "Balanced budget" is a slogan that makes sense in individuals' terms, but on the federal level even higher taxes to balance government spending is the last thing advocates want. Another scheme—perhaps more sensible—would tie annual spending to increases in the gross national product.

Both ideas are enormously popular. In July, 1978, a Gallup survey found 81 percent polled favoring an amendment requiring a balanced budget, though the figure slipped to 70 percent in an AP/NBC poll last February. And a CBS News/*New York Times* poll last November found 76 percent favoring a cut in spending over a tax cut. Yet people are realistic: 70 percent doubted politicians will work to balance the budget.

Americans still display overwhelming support for the Constitution. At the same time, there is widespread disaffection and a sense of distance from government. The Harris poll found alienation from politics has doubled in a decade. Most believe the American condition is worse now than in the past,

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[69] 1971 report, *supra* note 35, at 6.
[70] Congressional Research Service, Library of Congress, *supra* note 2, at 858.
[71] 1971 report, *supra* note 35, at 2.
[1] *Article V.* "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress."

and they also feel things will not improve. For the first time, there is personal pessimism as well; a maority now feel that their personal situations will deteriorate in the future, along with the country as a whole. And they pin the blame on Washington. Fewer have confidence in the central government than in state and local governments, and confidence levels are lower overall for governmental than for private institutions—except for organized labor, which is distrusted as much as the federal government.

The states have applied to Congress hundreds of times before, for a wide range of amendments, but this time Washington is worried. With the steady centralization of power and the emergence of a national press, the vectors of cultural and political innovation seemed clear: elite to mass, Washington to hinterland, figurative center to periphery. But now, out of nowhere—out of state legislatures, of all places—comes this vulgar threat to the American mandarinate.

What passes for leadership of the movement comes from something called the National Taxpayers Union, although a Maryland state senator, James Clark, has also been pushing the idea with other state legislators since 1974.

Since the Supreme Court has held that no individual taxpayer has standing to sue Congress over spending from the general treasury, the drive to limit spending constitutionally amounts to a grand, political class-action suit by taxpayers. The convention mode is the closest thing there is in the Constitution to the techniques of popular initiative and referendum, reflecting popular distrust of political establishments.

State legislators calling for a balanced budget are seen in Washington as traitors to the official class, siding with the voters against their big brothers at the national level and making them look bad. Accordingly, the first response in the capital was to threaten to shut off the federal money spigot to the states and localities: you want less spending, goodbye revenue sharing. This has had a sobering effect; state governors are already complaining about punitive blackmail from Washington.

Liberal Democrats generally oppose, in increasing order of ferocity: requiring a balanced budget; doing it by constitutional amendment; and doing that in another constitutional convention. Republicans in Washington also oppose a convention, but favor a balanced budget and are moving toward the method of amendment. The House Republican Policy Committee endorsed both a constitutionally required balanced budget and a limit on federal spending last spring, but party leaders in both chambers oppose another convention.

Jerry Brown of California is trying to ride the west wind by supporting all three, while Jimmy Carter of Washington opposes them. Brown's embrace of Proposition 13 last year assured his reelection as governor, but his support for a constitutional convention has hurt his chances for the Presidential nomination, at least in the party of government subsidy. He has little support among the union leaders, Democratic regulars, and political activists who are more liberal than the rank-and-file but who dominate the party's organization. They have little love for Carter and may pine for Kennedy, but Brown's endorsement of a balanced-budget amendment is considered heresy and may have disqualified him even as stalking horse for Kennedy.

The national press has treated the taxpayers' revolt from the beginning as an outlandish oddity—more dangerously reactionary than stock-car racing, but about as bizarre. It has received only grudging recognition as a genuinely popular trend and still is not designated as a fully respectable movement. Episodic coverage of the drive for another constitutional convention gave way early this year to a rash of press stories pronouncing it "sputtering" and tying it to Jerry Brown, whom the revisionists were then transforming from a serious candidate into a guru on safari. By siding with the taxpaying majority, Brown forfeited his greatest political asset—the willingness of the press to be used—and guaranteed coverage of his shallowness and naked ambition.

President Carter has avoided that mistake, which should aid his renomination but could jeopardize his reelection. He opposes legally requiring a balanced budget, on the advice of Charles Schultze, chairman of the Council of Economic Advisers. who says it would prevent the government from fighting recessions and would be impossible to administer. This reflects the countercyclical economic notion on which fiscal policy supposedly has been set for nearly twenty years, in which deficits during recession years are, in theory, offset by surpluses in boom years to produce steady growth without accumulating deficits. The trouble is

that the surpluses in the good years have not been tried. The last small surplus was in 1969, and inflation remains chronic, which allows government the luxury of ever-increasing revenues without the messiness of a tax increase.

Spending is politically profitable; taxing is not. Inflation conveniently pushes taxpayers into higher brackets, even when purchasing power declines, and tax revenues increase automatically. Spending can then rise, illusory "tax cuts" can be made noisily every few years, and government can grow.

In the past twenty-five years, the proportion of the income of the average American family taken in taxes has doubled. Federal, state, and local taxes now take more than a third of the net national product. Where does it all go? Neo-Keynesian theory helps justify government spending to stimulate demand, but it says nothing about who the payers and payees ought to be. Liberal Democratic social theory and constituency interests provide the answer: they should be different people. In the 1970s, for the first time in our history, the primary business of the central government became the transfer of income among individuals. Those in the upper half of adjusted gross incomes (above $8,931 in 1975) paid ninety-three percent of all the personal income taxes collected by the Internal Revenue Service, while purposeful transfer programs accounted for more than half of all the spending. This has created a growing class of permanent government dependents who see their subsidies as entitlements and who, together with public bureaucrats, provide vital support for the Democratic party.

The calls for a constitutional amendment to require a balanced budget are an attempt to check the growth of the share of the national income taken by government. Some think an amendment that limits spending would accomplish that more directly, since taxes could be raised to balance any budget. The National Tax Limitation Committee, led by Milton Friedman, has proposed an amendment to Congress that would limit federal spending hikes to increases in the GNP, with a downward adjustment for inflation that would give politicians an incentive for reducing inflation rather than increasing it, as at present.

In practice, both ideas, balancing budgets and limiting spending, might tend to have the same effects. Taxpayers' complaints would slow the rise in taxes—and therefore spending—a bit if balanced budgets were required; and inflation-swollen taxes would quickly rise enough to balance the budget if spending were limited by law. Both amendments contain escape clauses that would free spending in case of national emergency, but neo-Keynesian economists—and President Carter—still claim they are insufficiently flexible to fight recessions.

Of course, inflexibility is the whole point of these spending limitations. Like locked liquor cabinets, they are intended to prevent larceny and intemperance in those we mistrust. Washington is a conglomerate of subgovernments—coteries of Congressmen and their staffs, bureaucrats, and lobbyists—concerned with different policy areas. Each of these iron triangles serves itself and its constituents in the short term, and the logrolling among them produces total spending and policy outcomes of unexpected proportions. The sluice points monitored by party leadership, the Congressional Budget Committees, and the Office of Management and Budget are unable to check the great flow of policy and spending. The proposed amendments to control the budget, are appropriately, determinedly *constitutional*, to govern profligate impulses when self-discipline is absent and resolution inadequate.

Democrats in Congress want to give resolution another try. The defeat of many liberal Democrats last November and the threat of the constitutional convention have been instructive. Suddenly, many are for a balanced budget—but not by constitutional amendment. And few are willing to risk another convention. Democrats have lost five of the six special elections for House seats since Carter's election; however, most members can rely on their anonymity and the advantages of office they have bought themselves to assure reelection.

The most worried are those deficit spenders in the Senate who feasted on the spoils of Watergate in 1974, but who now must face a less distracted electorate: Gary Hart of Colorado, Patrick Leahy of Vermont, John Durkin of New Hampshire, John Culver, George McGovern, Frank Church, Birch Bayh. They are getting their campaigns started earlier than usual, putting distance between themselves and Carter, and hoping the voters overlook the unbalanced budget in favor of all the water projects they've lugged into their states.

But fiscal 1981 is the year the Congressional Budget Committees are planning a balanced budget, for the first time in more than a decade, though only after another $23-billion deficit in fiscal 1980, the fruit of Carter's "austerity." They

may make it, too, because inflation is pushing tax receipts so high so fast that the 1981 budget could be balanced with even enough left over for a tax cut of some $15 billion.

That would meet Carter's campaign promise of 1976, but Congressional leaders are also hoping the promise of a balanced budget in just a couple of years will reduce pressure on state legislatures for another constitutional convention. In 1980, it would remain only that—a promise—but that is probably the best the Democrats can do.

President Carter has called the proposal for a second convention "extremely dangerous," citing fears that it might throw out the Bill of Rights and undermine civil liberties, a curious reaction from a candidate who only wanted to make the government as good as the American people. But opponents believe that the American people would not be represented at another convention; it would be dominated by special interests.

If another convention were called, Congress would try to restrict its deliberations to the budget amendment, although most legal scholars doubt the validity of such an attempt. Prof. Charles Black of Yale Law School feels the framers intended the Congressional method for piecemeal amendment and the convention mode only when so many were dissatisfied with their government that a general revision was necessary. All the state applications for a balanced-budget amendment have limited their calls specifically to that subject, and some have called for a convention only if Congress fails to initiate such an amendment; but, once gathered, the delegates could argue convincingly that they were entitled to set their own agenda, and such a run-away assembly is the stunning possibility that mesmerizes everyone. At the furthest edge of plausibility, the delegates could propose drastic changes for the Constitution and also try to change the ratification procedure, as the first convention in Philadelphia did in 1787.

Whatever amendments another convention produced, the Congress might claim the right to refuse to submit them to the states. But whatever that outcome, three-fourths of the states must still ratify them to become part of the Constitution, and it is hard to imagine any attempts to avoid that last requirement. This provision, which no one has suggested changing, should assuage any reasonable fears about a wide-open convention, for any amendment that thirty-eight states approved could not be all bad. Nor is ratification likely to be causual for any amendment from now on, after the cautionary tale of the ERA.

We should admit that the first Constitution is moribound. Except for a few institutions—the dominant federal structure is not one of them—the original Constitution is largely irrelevant to contemporary public affairs. It set a framework for government on principles widely shared by Americans in the eighteenth century, still held by the majority today, but long abandoned by our governors.

From the Mayflower Compact through the Articles of Confederation, Americans relied upon written fundamental laws to establish, but just as importantly to limit, government. The Constitution was written to correct the inadequacies of the Articles primarily in defense and foreign affairs, for which the new central government was allowed to finance itself. The commerce and currency clauses were intended to *prevent* state regulation and paper money. The Bill of Rights was intended as a further check on the central government, although it has become a license for central control.

Federalism is obliterated now, of course. State and local governments have become franchisees of Washington, dependent upon revenue carrots and submissive to the stick that inevitably followed. There are few domains left now for which federal action is unprecedented. Central government expansion has been driven through every opening in the first Constitution. The antifederalists were right.

The Constitution's careful separation of powers has been wrecked by the growth of Presidential initiative and Congressional delegation to the bureaucracy. The least accountable arms of central government, bureaucracy and the courts, govern most freely. What began as a Constitution of states' and private rights has been turned into a cornucopia of powers.

Building a collective state in this century has required demolition of the classical liberal values of the Constitution. Redistribution and regulation have required progressive assaults on property, and an antibourgeois animus has driven the architects of our new constitutional order. The new premises of public policy have turned taxpayers' money into "public funding" or "federal spending." Senator Kennedy has criticized the "blank check for all the spending programs

contained in the Internal Revenue Code—the tax expenditure programs." Even the money the government lets you *keep* should not be regarded as "yours," rather as a boon from Washington. Senator McGovern described Californians voting for Proposition 13 as "degrading hedonists."

Today's rebellion is aonther middle-class reassertion of the legitimacy of the inherited order, as was the original Revolution. Tax rebels today would agree with the revolutionary aim of John Adams: "I say again that resistance to innovation and the unlimited claims of Parliament, and not any new form of government, was the object of the Revolution."

Most of the values underlying that Revolution and the Constitution were found in the thought of John Locke, who distinguished between occasional violations of natural law inevitable under any form of government and chronic violations constituting a "long train of abuses, prevarications, and artifices" marking degeneration into tyranny, against which rebellion became a right, even a duty. Liberty was conceived as freedom from alien dictation, freedom *from* government, and American conditions seemed so neatly to confirm Locke's views that they became the bedrock of American political thought.

Americans generally expect and accept social change, but primarily outside politics and not as a sweeping purpose of government. They generally support the Lockean emphasis on private property as crucial to individual liberty, and they value achievement still. It is no wonder what mounting redistribution and regulation have evoked today Jefferson's charge against King George III, that "he has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance."

Washington is mobilizing to avoid another constitutional convention. The Congress has been alternately soothing the states with promises of a balanced budget by 1981 and threatening them with cuts in revenue sharing. Senator Bayh's Judiciary Subcommittee on the Constitution has been holding hearings on an amendment, and others are on in the House.

President Carter has set up a squad of staff members from the White House and the Office of Management and Budget to pressure governors and legislative leaders in key "battlefront" states not to call for a convention. It is cooperating with a group called the Citizens for the Constitution, brought together by Lt. Gov. Thomas P. O'Neill III of Massachusetts to lobby against a convention, backed in turn by labor unions, civil-rights groups, and public-interest groups.

Congress might try to get by with some general resolution for fiscal responsibility, hoping that will stem the tide. Or it might propose a balanced-budget amendment itself, hoping that thirty-eight states will not ratify it after they realize that balancing is not the same as controlling spending. Nearly the most dangerous move, from liberal Democrats' perspective, would be a Congressional amendment to tie annual spending to increases in the GNP. This makes more sense than a balanced-budget requirement and comes closest to satisfying tax rebels.

Democrats in Congress have resisted efforts to set ground rules of a convention by law. Such a law would set the time, place, delegate-selection, and voting procedures and try to set the issue to be considered.

Delegates would probably be elected in House districts, with seats at large from each state. If the thirty-fourth state applied quickly enough and Congress moved soon enough, Washington politicians might prefer delegate selection at the same time as the 1980 elections, so they could get double duty from their campaign funds and organization. That timing would probably help offset the damage to Democrats if the elections of delegates were on a separate ballot, formally nonpartisan, and decided by the issue.

In any case, the advantages of Washington incumbents in such elections would be so great that Congress might be forced to set the size of the convention at, say, twice that of the Electoral College, instead of just one from each district and two from each state. This would still be an assembly of just under 1,100 and would make it easier for Ralph Nader, César Chavez, and William Buckley to join the crowd.

Contemporary liberals warn that reactionaries—meaning classic liberals who still like the values of the first Constitution—would dominate a new convention. But it is just as likely that leftist groups already strong enough to have entrenched themselves in Washington would be able to take over a convention as well. Unions, especially, as well as the new class of well-educated professional and managerial symbol-specialists who took over the Democratic party in 1972,

should do quite well with their organizational and polemical talents. Even if they dominated the convention and enshrined in the Constitution the new politics they have imposed in this century, we would gain a lot just in having the current philosophy of American public affairs set out explicitly. Another convention, with all its posibilities, would force a great shaking-out of American politics. Its drama would cut through the layers of mass apathy and focus popular attention on the fundamental political questions. It would force Americans to consider the kind of people we have become, and the society and government we prefer. It would allow a genuinely New Foundation, if desired.

The proximate issue, controlling government spending, is not some fiscal technicality; it reflects a growing desperation among the governed. The political appeal of the New Deal model—our current constitutional order—has lain in its promise to each voter to take from and control other people for his benefit. But as leveling and legislation have proceeded, a growing majority of Americans have realized that they are now those other people, more often targets of state action than beneficiaries; yet the machinery of regulation and redistribution seems impervious to individual aspiration.

Another convention would force Americans to recall the values of the first Constitution and consider how we have changed as a nation. It would allow a recalculation of the costs of dependence upon government and the benefits of individual responsibility and voluntary public spirit. Another convention could offer perhaps a last chance to make sure we have the government we deserve.

[From the Christian Science Monitor, May 9, 1979]

SHOULD THE BUDGET BE BALANCED BY A CONSTITUTIONAL CONVENTION?

YES

(By James Dale Davidson)

Only once since 1960 has the federal budget been balanced. Through good years and bad, the deficit has tended to increase, so that today—in the fifth year of a recovery—the President plans a deficit of $29 billion. It will likely be larger.

As the deficits have increased, so has the rate of inflation. The consumer price index has more than doubled since 1967. At current rates it will double again by the early 1980s. Costs for many necessities have been rising even faster.

This outcome is due to the fact that incurring inflationary deficits is in the self-interest of congressmen. It improves their chances of reelection. Deficits enable them to make the benefits of increased spending immediately evident to special constituencies, while disguising the costs (which are defused over large numbers of the rest of society).

This is true in either of the two ways in which deficits can be financed.

• To the extent that the excessive spending is financed by the sale of bonds to the banking system, the costs will be borne by the average consumer in the supermarket and at the gas pump. If even 20 percent of the public is confused by the resulting inflation and cannot identify the source of their hurt, this involves a political advantage over the levying of taxes.

In other words, deficits achieve a successful deception of the people. As a result of this deecption many of the political pressures emerging from the excessive spending are not directed toward politicians in Washington but toward businesses and labor unions. A clamor arises for "control" of higher prices nad wage settlements which are apparently responsible for the declining living standards of the average person.

• When deficits are financed through genuine borrowing from the public, those who will bear the costs are the future generations who must pay taxes to redeem the bonds. This too reduces the political costs of the spending. By passing the bills on to our children, their children, and others who are not yet born, members of Congress evade the responsibility for their spending decisions.

In other areas of life we recognize that it is necessary to take account of the self-interest of individuals in order to obtain behavior which points toward the public interest. In fact, we have built the most productive society in all history by harnessing the profit motive in private enterprise. That productivity is now being destroyed, however, because we have not extended the same insights about human nature to the operations of government.

Just as we could not expect the nation to be well shod if shoemakers obtained a higher income for producing ill-fitting and uncomfortable shoes, so we should not be surprised that we are victimized by inflation when we make it within the self-interest of politicans to contribute to inflation. If we wish to stop inflation, we must change the circumstances in which the decisions to inflate are taken.

A balanced budget amendment would do that. It would require the politicians to be accountable; to own up explicity and honestly to the full costs of their spending.

That is something which no political body in history has ever wanted to do. Once politicians shake free from fiscal discipline it is only by a kind of miracle that they are ever induced to voluntarily restrain themselves again. The record of many countries proves this. Thankfully, our constitutional fathers foresaw that a day might come when the Congress would fail the people. They gave us the means through Article V to go around the Congress to propose constitutional amendments by the convention process at times when the Congress itself was the cause of a defect in our system.

Today, 30 states of a needed 34 have already officially petitioned the Congress to either pass a balanced budget amendment or convene a limited constitutional convention to consider that and no other subject. As this movement to halt inflationary deficit spending nears success, the Big Spenders have raised false alarms about the dangers of popular government. They say that the people cannot be trusted to select delegates to a convention and that the state legislatures cannot be trusted to refrain from ratifying absurd proposals.

Furthermore, critics of a convention conveniently ignore the fact that the Congress itself is effectively an unlimited convention which could propose any amendment it chose at any time. Through almost two hundred years no steps have been taken to repeal the Bill of Rights or do any of the other unholy things which are alleged to be likely from a limited convention. Upon close consideration, therefore, the charges against a convention would not persuade a reasonable citizen.

The experience of many countries proves that inflation, once allowed to run out of control, is destructive of freed institutions. Inflation turns expectations upside-down. It impoverishes the elderly, makes fools of those who save, and turns every contract into a fraud, eventually creating conditions which no person of goodwill could desire.

That is why we must heed the advice of responsible people of all parties and convene a limited constitutional convention. Such a convention, far less subject than is the Congress to day-to-day political pressures, could be expected to do a better job of what the Congress has as yet refused to do: introduce an outside restraint to prohibit individual congressmen from pursuing their self-sprung tendency to obtain political profits in the present by mortgaging our future.

Mr. Davidson is the chairman of the National Taxpayers Union.

No

(By John Culver)

Let me state right at the outset that I strongly favor moving toward a balanced budget as part of our fight against inflation. Doing so will set an example to the country that its leaders are serious about putting their own house in order. It will help to identify and root out waste, mismanagement, and fraud. It will reduce the burden we place on future generations to pay for our current needs.

But achieving a balanced budget will not persuade OPEC nations to roll back the price of oil which they have raised sixfold since 1973. It will not prevent labor and management from playing leapfrog with wages and prices. It won't improve our lagging productivity or add anything positive to our balance of payments. It won't call a halt to consumer deficit financing—which, incidentally, is of a far greater magnitude and growing much faster than the government's. And until there are answers to those intractable questions it is unrealistic to expect any sizable inroads into inflation, which by every index of public opinion is the number one problem facing the American people.

In addition to its obvious economic consequences and the fear and insecurity which it breeds, inflation poses another insidious danger. It stimulated the all-too-human desire to blame convenient villains and demand easy answers for difficult and complex problems. In this context it is not difficult to understand the movement to require a balanced budget by constitutional amendment. It en-

courages the notion that a single deft and decisive stroke will sweep away inflation. However comforting that vision may be, it in no way corresponds to the economic or political realities.

Our Constitution is a design of representative government and a charter of personal liberty. Only twice in the nation's history have we demeaned it as a vehicle for social or economic experiments. Both of those instances—slavery and prohibition—were tragic failures. Whatever the merits of a balanced budget, indelibly revising the supreme law of the land is the wrong way to go about it.

One proposed amendment states categorically that expenditures in any given year may not exceed revenues but gives no guidance as to how this balance will be achieved. It could actually be done more easily by raising taxes than by cutting spending. And if spending were reduced there is no guarantee that the least useful programs would be eliminated. This is especially the case since more than 75 percent of the budget is relatively "uncontrollable"—spending obligated by previous defense contracts, for example, or medicaid payments.

In addition, such an amendment might leave the nation straitjacketed in the event of a threat to our national security or an economic emergency. Most economists fear that an abrupt balancing of the budget may push us into a recession. In such a case, each rise of 1 percent in unemployment would shrink tax revenues by $15 billion and boost outlays (for unemployment compensation and the like) by $3 to $5 billion, necessitating, by terms of the amendment, another round of higher taxes and reduced spending, deepening the recession and renewing the downward spiral. Where—or if—it would bottom out, no one knows.

Some proposals try to preempt the foregoing scenario by establishing a "state of emergency" escape hatch. Designing one that permits corrective action without making it so large that any excuse could justify a deficit, however, has proved an elusive goal.

Finally, other proposed amendments attempt to enforce complex economic formulas. These are almost guaranteed to wreck havoc on a Constitution which has endured war, depression, wrenching social change, and spectacular technological achievement in great measure because it limits itself to timeless principles expressed in simple, flexible language. Perhaps the best known of the "formula" amendments—Dr. Milton Friedman's—is longer than the Bill of Rights. It employs imprecise technical terms such as off-budget outlays, gross national product, and inflation on whose definition economists often disagree and statistics for which vary widely.

The last method suggested to achieve a balanced budget—a constitutional convention—would set us on a voyage into uncharted waters and unpredictable procedural chaos. Not since 1787 have we tried such a course and no established procedures exist with regard to agenda, funding, delegates or voting. Nor do we know for sure whether the convention would be confined to consideration of the balanced budget issue alone. In the wake of Vietnam, Watergate, and political assassination, at a time when special interests and single-issue groups abound, now is not the time to risk the divisiveness of constitutional revision on a national scale.

Using currently available tools, President Carter (with the aid of Congress) has trimmed away more than half of the deficit he inherited from the previous administration. The latest projections from the Office of Management and Budget predict a surplus in FY 1981. Constructive proposals such as sunset legislation with periodic review of spending programs and automatic termination of obsolete ones will help us make more progress. Pursuit of these responsible courses of action and disciplined consideration of all individual taxing and spending questions rather than a quick constitutional fix are the way to responsibly attack inflation and excess spending.

Senator Culver, Democrat, represents the State of Iowa in the U.S. Senate.

PREPARED STATEMENT OF JAMES N. STASNY ON PROPOSED CONSTITUTIONAL CONVENTION PROCEDURES ACT

The testimony I submit today is that of a private citizen who has studied the subject of a federal constitutional convention for sixteen years. The views expressed are entirely my own based, as nearly as possible, on an objective analysis

of the problems in the process through which the several States apply for a convention and on an assessment of the merits and defects of the bills submitted to govern the proceedings of a constitutional convention.

INTRODUCTION

Oliver Wendell Holmes, one of America's most respected jurists once observed, "About seventy-five years ago I learned I was not God. And so, when the people of the various states want to do something and I can't find anything in the Constitution expressly forbidding them to do it, I say, whether I like it or not: Damn it, let 'em do it."

In the face of the recent efforts to summon a convention to add a balanced budget amendment to the Constitution, there are many who do not share Justice Holmes' casual confidence in the ability of the American people to do it well. Because the convention method of amendment stands on the constitutional frontier of unanswered questions, many fear the convention process almost as an alien force. Consequently, even while the tide runs high for a convention, there is an equally strong push to thwart the convention procedure, either by stopping it altogether or by tightly circumscribing its authority. The convention bills that twice passed the Senate in the early 1970's would have made any convention a weak, second-citizen to the congressionally initiated procedure for amending the Constitution. Under these bills, Congress would have overwhelming control of a convention.

I do not believe a convention should be held. At a time when the international situation is precarious and world economic uncertainties cast shadows over the strength of all currencies, a convention would divert our domestic attentions from pressing problems while focusing global attention on what would certainly appear to allies and adversaries alike as a fundamental challenge to the American system of government. Nevertheless, even against so grave a background, if it is the combined judgment of the States that a convention should be held, it must be fair, open, and provide every deliberative opportunity for the delegates to freely decide what, if any, amendments should be submitted for ratification by the States. Whatever problems the summoning of a convention might cause for us abroad, they would be compounded many times over at home if our own people felt the convention was a closed, heavily restricted assembly.

I. Congress and the application process

A 1952 staff report of the House Judiciary Committee called the application process "the stepchild of constitutional law." In articles appearing in the Congressional Record of March 22, 1979, September 25, 1978 and November 2, 1977 I detailed some of the problems associated with the application process. What follows is a summary review of the principal issues involved.

A. Senate Practices on Memorials and Petitions

Rule VII of the Standing Rules of the Senate controls the manner in which the Senate deals with memorials and petitions.

Reception of memorials and petitions makes up part of the Morning Business. While memorials and petitions are technically laid before the full Senate by the presiding officer, he makes no formal announcement of their receipt. They are presented by bringing them to the Clerk's desk, or by delivering them to the Secretary of the Senate. With the approval of the presiding officer, they are entered in the Journal and the Congressional Record and appropriately referred.

The presentation of memorials and petitions follows the reading of the Senate Journal, the presentation of reports and communications from the heads of departments and such bills, joints resolutions and other messages from the House of Representatives as may remain on the table undisposed of from previous day's sessions. Their reception proceeds the reports of standing and select committees.

Memorials from state legislatures are printed in full in the Senate section of the Congressional Record and a memorial may not be received unless signed. In the Senate, the practice is to list memorials from state legislatures under the heading "Petitions".

Until the start of the 95th Congress, the Senate had no orderly means of catalouging memorials submitted by the States. But, on December 16, 1976 in a memo from the Secretary of the Senate, a new system of control numbers for petitions and memorials was announced to take effect January 4, 1977.

According to the memorandum, petitions and memorials were to be combined into one category and assigned numbers preceded by the initials "POM". Under the new system petitions and memorials go first to the office of the President of the Senate who dates them. They are next sent to the Parliamentarian who assigns the control number and makes the appropriate committee referral. The Official Reporter then inserts them into the Congressional Record and the Bill Clerk sees to it that the appropriate committee physically receives the memorial or petition. This provision appears to be in contravention of Rule VII, paragraph (6) which directs that memorials are to be kept in the files of the Secretary of the Senate.

The December 16, 1976 memo also specifies that the Journal Clerk is to receive a list of the "petitions placed before the Senate and printed in the Record each day."

B. House Practices on Memorials and Petitions

Under the Rules of the House of Representatives, Memorials are treated under Rule XXII, paragraph (4), and Petitions are treated under Rule XXII, paragraph (1). They are listed separately and numbered sequentially in the House portion of the Congressional Record following the introduction of bills and resolutions at the conclusion of the day's proceedings. It is the practice to have memorials brought to the attention of the House by the Speaker.

Resolutions of state legislatures and/or primary assemblies of the people are received as memorials. They are filed with the Clerk of the House but the office of the Clerk advises they do not, in fact, retain them. Rather, they are transferred to the Speaker who refers them (through the Parliamentarian) to the appropriate committee where they are filed.

Rule XXII, paragraph (4) of the House Rules specifies that memorials and their titles shall be entered on the Journal and printed in the Congressional Record of the next day. *In practice, however, the process is reversed.* According to the House Journal Clerk's Office, staff members clip memorials printed in the Record and subsequently enter them on the Journal.

The office of the Bill Clerk actually prepares the briefs of the memorials that appear in the Record. The Bill Clerk receives the memorials from the Parliamentarian's office and assigns them the number which appears in the Record. He sees to it that the memorial is physically delivered to the committee to which it has been referred.

C. The convention applications: Anomalies in the Congress and the State legislatures

Of the thirty-two applications for a convention received by the Congress between 1974 and 1977, I located the texts of all but one (California 1974). Of the remaining thirty-one, sixteen were directed by the respective state legislatures to the Speaker of the U.S. House of Representatives and the President of the United States Senate. Eleven applications were directed to the attention of the Secretary of the Senate and the Clerk of he House. Of the remaining four applications, three were addressed to the Congress without specifying an officer of either House and one was addressed only to the members of the state's congressional delegation.

Of the sixteen applications directed to the President of the Senate and Speaker of the House, eleven were noted in the Congressional Record by both Houses. Four of the remaining five applications were printed in full by the Senate. One was printed only by the House.

Of the eleven applications addressed to both the Clerk of the House and the Secretary of the Senate, all but one were noted in the Record by both the House and Senate. This suggests that when applications are directed to the Secretary of the Senate and the Clerk of the House, they are more likely to be properly received by both Houses of Congress than when they are sent to the presiding officer of each House.

Nevertheless, the principal convention bills introduced in the Congress since 1953, specify that applications for a convention be addressed to the President of the Senate and the Speaker of the House. This provision was included in both S. 215 which passed the Senate 84 to 0 on October 19, 1971 and in S. 1272 which passed the Senate without debate on July 9, 1973.

The provision directing memorials to the Speaker and the President of the Senate also appears to be at variance with established practice in the House of

Representatives. Rule XXII of the House directs that memorials be delivered to the Clerk, a procedure dating from 1842. Rule VII, paragraph 2 of the Standing Rules of the Senate similarly notes that Senators having memorials may deliver then to the Secretary of the Senate.

In sum, established procedures in the House and Senate give to the Clerk and the Secretary the responsibility for the technical processing of the memorials. Moreover, the record shows that between 1974 and the end of 1977, the Clerk and the Secretary have been shown to be more reliable in handling the state memorials than the Speaker and the Vice-President. The clear inference is that future legislation providing guidelines for a constitutional convention should direct that memorials be sent to the Secretary of the Senate and the Clerk of the House.

The question also arises as to whether memorials for a convention, in order to be valid, need to be recorded by both Houses in either the Journal or the Congressional Record. This is another of the myriad unresolved questions attending the convention process. Nevertheless, the legislative proposals on this subject offered in Congress over the years providing as they do for reference of applications to both houses, imply that the validity of an application would at least be suspect if not officially received and noted by both Houses of Congress.

D. Recommendation

There is needless uncertainty surrounding the terms "petition" and "memorial". Memorials from the State legislatures are, at best, political statements which have small impact and no binding effect on the Congress. However, the Article V applications for a convention are constitutionally authorized instruments which, in the aggregate, impose a specific duty on the Congress. There, at least, ought to be a separate means of tracking and counting the memorials from the states which request a convention. A reasonable procedure would be for the Congress to establish a third functional category in the classification scheme for petitions and memorials. That category would be termed simply "applications", just as it appears in Article V, and the only documents listed under it would be requests received from the State legislatures to call a constitutional convention. It would be a mechanical term of art established through the office of the Secretary of the Senate and the Clerk of the House and would appear separately along with memorials and petitions in the Congressional Record. It would have the advantage of giving a separate identity to those State requests authorized by Article V. It would be useful in tracking the requests in the Congressional Record and be of material value should a subsequent Congress decide to make a fortright judgment on the question of whether, as the Constitution appears to make clear, these requests impose a mandatory, unavoidable obligation on the Congress to act.

II. The State applications

The applications from the States since 1974 attempt to impose a variety of conditions under which the applications would either remain valid or become void. One application for a convention indicated such a gathering need not be held if Congress submitted an amendment to the States within 60 days of the time the necessary number of applications to force a convention had been received. Applications from Massachusetts and Kansas claim to be self-voiding if Congress should submit an amendment first. A Colorado application would become "null void and rescinded" if a convention dealt with an amendment outside the subject area of its application. A Nebraska application expressly conditioned the continuing validity of the application on (1) Congress' establishing clear procedures for a convention including a limitation on the subject matter, (2) provisions that if a convention departs from the subject matter the convention be dissolved, and (3) that selection of delegates to a convention be determined by the state legislatures.

It is unlikely that these conditions which the states add to their applications would have any real effect on congressional action. There is, however, one common characteristic to at least 16 of the state applications that can have a decided impact on whether a convention is to be held. Those 16 state applications do not make the convention route the primary choice for obtaining an amendment. The first choice in each of these cases is to have Congress approve and submit an amendment. That raises a fundamental question of whether any of these 16 applications can be considered legitimate requests for a constitutional convention.

There can be no doubt that many state legislatures perceive the application process as a tactical maneuver to prod Congress into action. The legislatures, themselves gatherings of political animals, want to show to the voters that they are taking steps to hold down government spending. The means to that end has become in too many instances a process of either focusing the blame on Congress or abdicating the responsibility to a convention. The State legislatures must realize that they cannot have it both ways, political security *and* economic adventure. The States, at the minimum should be expected to make basic choices for themselves. They must either "memorialize" the Congress to devise and submit an amendment for ratification, or; they should apply for a convention to draft and submit an amendment. Nothing exposes the political motives of state legislatures like a so-called application for a convention which says "but-only-if-Congress-doesn't-act-first." These should not be considered valid applications. That, in itself, would force state legislatures to render more considered judgments on just what it is they want done and how they want to do it.

III. The Constitutional Convention procedures bills

A. Votes required to propose amendments

When Senator Ervin introduced S.2307 in August of 1967, it provided at Section 10 that the convention may propose amendemnts by a majority of the total votes cast on a question. Four years later, when the Senate passed S.215, a modified version of S.2307, the voting requirement had been changed to two-thirds of the total number of delegates. The new super-majority was added as an amendment by Senator Bayh and approved by the Senate 45 to 39.

In the life of parliamentary assemblies, the voting requirements are pivotal. There are oceans of difference between permitting approval of a question by a majority of those recorded on a given issue and requiring two-thirds of the total membership to approve. The Bayh amendment represents an exceptionally severe restriction on the ability of a convention to propose an amendment. That, at any rate, was the view of Senator Ervin, author of the bill. In opposing the Bayh amendment, Senator Ervin noted, "It undertakes to say that the people cannot amend their own Constitution . . . It would handicap the people of the States in procuring amendments by the convention process."

There is other opposition to the Bayh proposal. A 1971 study of the American Law Division of the Library of Congress noted that any procedural requirements for passage and ratification of an amendment in addition to those specified in Article V are formalities and are not strictly binding. In support of that view, a Harvard Law Review study notes Article V does not expressly require a super-majority vote for the proposal of amendments by a convention even though it does require a two-thirds vote for the proposal of amendments by Congress The study further states that a "two-thirds requirement predetermined by Congress would appear to be unconstitutional."

Moreover, the 1974 American Bar Association study of the convention method of amendment states, "We view as unwise and of questionable validity any attempt by Congress to regulate the internal proceedings of a convention. In particular, we believe that Congress should not impose a vote requirement on an Article V convention."

It might be noted further that the first standing rule of procedure adopted by the Constitutional Convention on May 28, 1787 shows the convention decided voting requirements for itself. The rule states, "A House to do business shall consist of the Deputies of not less than seven States; and all questions shall be decided by the greater number of these which shall be fully represented; but a less number than seven may adjourn from day to day."

Senator Bayh, during the 1971 debate on his two-thirds voting amendment said, "I can say without fear of contradiction that never in the history of this Republic has a constitutional amendment been referred to the States for ratification without concurrence of two-thirds of the Members, not of one body, but of two bodies, the House and Senate."

History does not support Senator Bayh's contention.

On December 6, 1803 during debate in the House of Representatives on approval of the Twelfth Amendment, the two-thirds question was raised a number of times. Both Representative Griswold and Representative Dennis noted that when the Senate, four days earlier, approved the amendment, they did not do so

with the approval of two-thirds of the entire membership. Mr. Griswold noted, "By certificate, obtained from the Secretary of that body, it appears that the resolution was passed by the votes of twenty-two members in favor of it; twenty-two voting in the affirmative and ten in the negative. It is known to every gentleman that the Senate consists of thirty-four members, and that it consequently requires twenty-three to constitute two-thirds of its members."

During the same House debate on the Twelfth Amendment, there was also discussion of the means by which the Congress had approved the Bill of Rights for submission to the States. Mr. Rodney spoke to the action taken by the Senate, saying, "The Journal expressly says they were adopted by two-thirds of the Senators present concurring * * * We * * * find that in September, 1789, it is declared on the Journal of the Senate that amendments passed, and which are now part of the Constitution, were ratified by two-thirds of the members present."

Both Hinds' Precedents and Cannon's Precedents of the House of Representatives specifically state in bold type that the vote required for passage of a joint resolution proposing an amendment to the Constitution is two-thirds of those voting, a quorum being present, and not two-thirds of the entire membership. To support that precedent, illustrations are provided of House actions on two separate proposals on the amendment allowing for direct election of U.S. Senators. An excerpt from Cannon's Precedents shows how the two-thirds question was finally resolved:

"On May 13, 1912, the House was considering the Senate amendments to the joint resolution (H.J. Res. 39) proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States.

"A motion by Mr. William W. Rucker, of Missouri, that the House concur in the Senate amendment being put, and the yeas and nays being ordered, the years were 238, nay 39, answering present 5, not voting, 110."

"Mr. Thomas U. Sisson, of Mississippi, submitted that the constitutional requirement had not been complied with and the motion had not been agreed to. He cited Article V of the Constitution providing that two-thirds of the two Houses might submit amendments to the Constitution and took the position that under this provision more than 260 votes would be required for affirmative action, whereas only 238 had noted in the affirmative.

"The Speaker said:

"Two-thirds of the House means two-thirds of a quorum.

"It has been uniformly held, so far as the Chair knows, that two-thirds of the House means two-thirds of those voting, a quorum being present.

"When the phrase or collocation of words, 'the House of Representatives,' is used, it means a quorum of the House. If it can do one thing with a bare quorum (it) can do anything; and what precedents there are both of the Supreme Court and the Speaker—because Mr. Speaker Reed rendered an opinion—held that in a situation like this 'two-thirds' meant two-thirds of those voting, provided it was a quorum."

Further comment is found in the Supreme Court's ruling on the *National Prohibition Cases*. Speaking for the Court, Justice Van Devanter wrote, "Two-thirds note in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership . . ."

Justice Van Devanter based his statement on the case of *Missouri Pacific Railway Company* v. *State of Kansas* decided by the Court on January 7, 1919. Chief Justice White gave the opinion of the Court and his argument focused in large part on the action of the Congress in proposing the Bill of Rights. After citing passages from the Senate Journal indicating that two-thirds of a quorum rather than two-thirds of the elected membership proposed the amendments, the Chief Justice made this observation:

"When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated."

"But that is not all, for the Journal of the Senate contains further evidence that the character of the two-thirds vote exacted by the Constitution (that is, two-thirds of a quorum) could not have been overlooked, since that Journal shows that at the very time the amendments just referred to were under con-

sideration there were also pending other proposed amendments, dealing with the treaty and lawmaking power. Those concerning the treaty-making power provided that a two-thirds vote of all the members (instead of that proportion of a quorum) should be necessary to ratify a treaty dealing with enumerated subjects, and exacted even a large proportionate vote of all the members in order to ratify a treaty dealing with other mentioned subjects; and those dealing with the law-making power required that a two-thirds (instead of a majority) vote of a quorum should be necessary to pass a law concerning specified subjects.

"The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the people, has governed as to every amendment to the Constitution submitted from that day to this."

When matched against these precedents, the Bayh amendment represents an extravagant imposition on the ability of a convention to reach a decision on proposing an amendment. The two-thirds provision is not included in S. 3, the current convention guideline bill before the 96th Congress, and should be rejected if it is offered again as an amendment.

B. Time limits

Although S. 3 states that a convention must convene within one year of the time Congress approves a concurrent resolution calling it into being and that the convention would meet for no longer than one year unless otherwise extended, there is no specified time in which Congress would be required to take action on the concurrent resolution itself. To avoid any needless delays, a time limit of 30–60 days should be set on the passage of the concurrent resolution.

C. One issue convention

The bills under consideration would limit a convention to discussion of the amendment specified in the applications. On June 7, 1979 Senator Helms offered an amendment to a bill reauthorizing the Civil Rights Commission that would prevent any convention from proposing an amendment or amendments aside from what was stated in their application.

For reasons which I detailed at some length at page S. 4780 of the April 1, 1976 (Daily Edition) of the Congressional Record, that would be a mistake.

People generally described as having conservative political affiliations have generated the drive for a balanced budget amendment via the convention route. People within that same broad group have had a prominent hand in promoting a convention drive on the question of abortion. If a convention were called for the purpose of devising a balanced budget amendment, what would become of those who feel so deeply that an abortion amendment should be proposed as well? Will those who contend so fiercely for a one issue convention be suddenly inclined to bend the rules and make it a two issue convention? If that came to pass, then what do both groups of supporters say to those who have a third or a fourth issue to consider?

The success of any convention will rest largely on whether the public perceives it as a legitimate expression of self-government in action. If a convention ends in the splinters of disenchantment among people who discover that even this assembly has no room for their views, to what will they turn? What will be left? The answer is that there will be nothing left within the constitutionally prescribed procedures for redress of their grievances. In those circumstances, compounded perhaps by growing social unrest, is the risk of the possible undoing of two-centuries of faith in the right of the people to try and achieve through law what they believe to be fair and worthwhile.

Beyond that, a one issue convention could be viewed as only an extension of the ratification process. Once a convention is summoned, the likelihood that an amendment will be produced is quite high. Such a convention limited to one issue would not really debate the "yes" or the "no" of an amendment; that there will be an amendment of some sort will have been already decided by the call. The delegates would become glorified wordsmiths deciding questions of syntax. So a one-issue, limited convention is really no convention at all. It is simply an intermediate gathering of editors, the middle step between the time the states have decided a convention should be held, and the time the states finally decide

either in their capitals or at ratification conventions whether the wording of the amendment should be approved.

CONCLUSION

A convention would, to my mind, be a mistake. There is simply too much to do in this Country that we cannot afford to distract ourselves with extravagant enterprises such as this. But if the wisdom of the States says a convention must be held, it would be a still greater mistake to lock its doors to free deliberation. The bills now before the Congress are responsible to the extent they lay out a groundwork in advance for a convention. To the extent that they confine a convention to one issue, they are unreasonably restrictive and should be changed to reflect a more firm confidence in the ability of a convention to make its own choices and for the states to pass judgment on what the convention produces. While there are good reasons for not holding a convention, there is no reason to fear that a convention may consider other amendments. As Rufus King said during the Convention of 1787, "We have power to propose anything, but to conclude nothing."

The Federalist

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James Madison

January 23, 1788

To the People of the State of New York

THE *fourth* class comprises the following miscellaneous powers.

1. A power "to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries."

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

2. "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the States, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The indispensible necessity of compleat authority at the seat of Government carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the Government, would be both too great a public pledge to be left in the hands of a single State; and would create so many obstacles to a removal of the Government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the Government which is to exercise authority over them; as a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

The necessity of a like authority over forts, magazines

&c. established by the general Government is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned, in every such establishment.

3. "To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons, have been the great engines, by which violent factions, the natural offspring of free Governments, have usually wrecked their alternate malignity on each other, the Convention have with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

4. "To admit new States into the Union; but no new State, shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress."

In the articles of confederation no provision is found on this important subject. Canada was to be admitted of right on her joining in the measures of the United States; and the other *colonies*, by which were evidently meant, the

other British colonies, at the discretion of nine States. The eventual establishment of *new States*, seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety therefore has the new system supplied the defect. The general precaution that no new States shall be formed without the concurrence of the federal authority and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution against a junction of States without their consent.

5. "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with a proviso that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

This is a power of very great importance, and required by considerations similar to those which shew the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary, by jealousies and questions concerning the Western territory, sufficiently known to the public.

6. "To guarantee to every state in the Union a Republican form of Government; to protect each of them against invasion; and on application of the Legislature; or of the Executive (when the Legislature cannot be convened) against domestic violence."

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations.

The more intimate the nature of such a Union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into, should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. "As the confederate republic of Germany," says Montesquieu, "consists of free cities and petty states subject to different Princes, experience shews us that it is more imperfect than that of Holland and Switzerland." "Greece was undone" he adds, "as soon as the King of Macedon obtained a seat among the Amphyctions." In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alterations in the state governments, without the concurrence of the states themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprizing leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long therefore as the

existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the states may chuse to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which it is presumed will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used, seems to secure each state not only against foreign hostility, but against ambitious or vindictive enterprizes of its more powerful neighbours. The history both of antient and modern confederacies, proves that the weaker members of the Union ought not to be insensible to the policy of this article.

Protection against domestic violence is added with equal propriety. It has been remarked* that even among the Swiss Cantons, which properly speaking are not under one government, provision is made for this object; and the history of that league informs us, that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other Cantons. A recent and well known event among ourselves, has warned us to be prepared for emergencies of a like nature.†

At first view it might seem not to square with the republican theory, to suppose either that a majority have not the right, or that a minority will have the force to subvert a government; and consequently that the fœderal interposition can never be required but when it would be improper. But theoretic reasoning in this, as in most other cases, must be qualified by the lessons of practice. Why may not

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* In Essay 19. (Editor)

† Madison was referring to Shays' Rebellion. (Editor)

illicit combinations for purposes of violence be formed as well by a majority of a State, especially a small State, as by a majority of a county or a district of the same State; and if the authority of the State ought in the latter case to protect the local magistracy, ought not the fœderal authority in the former to support the State authority? Besides, there are certain parts of the State Constitutions which are so interwoven with the Fœderal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a fœderal interposition, unless the number concerned in them, bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the Superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succours from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen in fine that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage? I take no notice of

an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men; but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States not heated by the local flame? To the impartiality of Judges they would unite the affection of friends. Happy would it be if such a remedy for its infirmities, could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind.

Should it be asked what is to be the redress for an insurrection pervading all the States, and comprizing a superiority of the entire force, though not a constitutional right; the answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the Fœderal Constitution, that it diminishes the risk of a calamity, for which no possible constitution can provide a cure.

Among the advantages of a confederate republic enumerated by Montesquieu, an important one is, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

7. "To consider all debts contracted and engagements entered into, before the adoption of this Constitution, as being no less valid against the United States under this Constitution, than under the Confederation."

This can only be considered as a declaratory proposition; and may have been inserted, among other reasons,

for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine that a change in the political form of civil society, has the magical effect of dissolving its moral obligations.

Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favour of the United States, as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told, what few others need be informed of, that as engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves a validity on the other side; and that as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told that every Constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would DARE, with or even without this Constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned.

8. "To provide for amendments to be ratified by three-fourths of the States, under two exceptions only."

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other. The exception in

favour of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the Legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

9. "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States ratifying the same."

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the Convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion. 1. On what principle the confederation, which stands in the solemn form of a compact among the States, can be superceded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it.

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. PERHAPS also an answer may be found without searching beyond the principles of the compact itself. It

has been heretofore noted among the defects of the Confederation, that in many of the States, it had received no higher sanction than a mere legislative ratification.* The principle of reciprocality seems to require, that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorises them, if they please, to pronounce the treaty violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it, the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical, forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of

* See Essay 22. (Editor)

a common interest, and above all the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to re-union, will, it is hoped, not urge in vain MODERATION on one side, and PRUDENCE on the other.

PUBLIUS

44

James Madison

January 25, 1788

To the People of the State of New York

A *Fifth* class of provisions in favor of the fœderal authority, consists of the following restrictions on the authority of the several States:

1. "No State shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver a legal tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

The prohibition against treaties, alliances and confederations, makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution. The prohibition of letters of marque is another part of the old system, but is somewhat extended

in the new. According to the former, letters of marque could be granted by the States after a declaration of war. According to the latter, these licences must be obtained as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those, for whose conduct the nation itself is to be responsible.

The right of coining money, which is here taken from the States, was left in their hands by the confederation as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance also the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints, and diversify the forms and weights of the circulating pieces. The latter inconveniency defeats one purpose for which the power was originally submitted to the fœderal head. And as far as the former might prevent an inconvenient remittance of gold and silver to the central mint for recoinage, the end can be as well attained, by local mints established under the general authority.

The extension of the prohibition to bills of credit must give pleasure to every citizen in proportion to his love of justice, and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money, on the necessary confidence between man and man; on the necessary confidence in the public councils; on the industry and morals of the people, and on the character of Republican Government, constitutes an enormous debt against the States chargeable with this unadvised meas-

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The Federalist

85

Alexander Hamilton

May 28, 1788

ACCORDING to the formal division of the subject of these papers, announced in my first number, there would appear still to remain for discussion; two points, "the analogy of the proposed government to your own state constitution," and "the additional security, which its adoption will afford to republican government, to liberty and to property." But these heads have been so fully anticipated and exhausted in the progress of the work, that it would now scarcely be possible to do any thing more than repeat, in a more dilated form, what has been heretofore said; which the advanced stage of the question, and the time already spent upon it conspire to forbid.

It is remarkable, that the resemblance of the plan of the convention to the act which organizes the government of this state holds, not less with regard to many of the supposed defects, than to the real excellencies of the former. Among the pretended defects, are the re-eligibility of the executive, the want of a council, the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press: These and several others, which have been noted in the course of our inquiries, are as much chargeable on the existing constitution of this state, as on the one proposed for the Union. And a man must have slender pretensions to consistency, who can rail at the

latter for imperfections which he finds no difficulty in excusing in the former. Nor indeed can there be a better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention among us, who profess to be the devoted admirers of the government under which they live, than the fury with which they have attacked that plan, for matters in regard to which our own constitution is equally, or perhaps more vulnerable.

The additional securities to republican government, to liberty and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the union will impose on local factions and insurrections, and on the ambition of powerful individuals in single states, who might acquire credit and influence enough, from leaders and favorites, to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the states in a disunited situation; in the express guarantee of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the state governments, which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

Thus have I, my fellow citizens, executed the task I had assigned to myself; with what success, your conduct must determine. I trust at least you will admit, that I have not failed in the assurance I gave you respecting the spirit with which my endeavours should be conducted. I have addressed myself purely to your judgments, and have stu-

diously avoided those asperities which are too apt to disgrace political disputants of all parties, and which have been not a little provoked by the language and conduct of the opponents of the constitution. The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual charges which have been rung upon the wealthy, the well-born and the great, have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men. It is not impossible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend: It is certain that I have frequently felt a struggle between sensibility and moderation, and if the former has in some instances prevailed, it must be my excuse that it has been neither often nor much.

Let us now pause and ask ourselves whether, in the course of these papers, the proposed constitution has not been satisfactorily vindicated from the aspersions thrown upon it, and whether it has not been shewn to be worthy of the public approbation, and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty, from which nothing can give him a dispensation. 'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will

justify to himself, to his country or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party. Let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation. And let him remember that a majority of America has already given its sanction to the plan, which he is to approve or reject.

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

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

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

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

It appears to me susceptible of absolute demonstration, that it will be far more easy to obtain subsequent than previous amendments to the constitution. The moment an alteration is made in the present plan, it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each state. To its complete establishment

* Intitled "An Address to the people of the state of New-York." (Publius) Written by John Jay, the pamphlet was first published in April, 1788. (Editor)

throughout the union, it will therefore require the concurrence of thirteen states. If, on the contrary, the constitution proposed should once be ratified by all the states as it stands, alterations in it may at any time be effected by nine states. Here then the chances are as thirteen to nine* in favour of subsequent amendments, rather than of the original adoption of an intire system.

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

But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather ten states, were united in the desire of a particular amendment, that amendment

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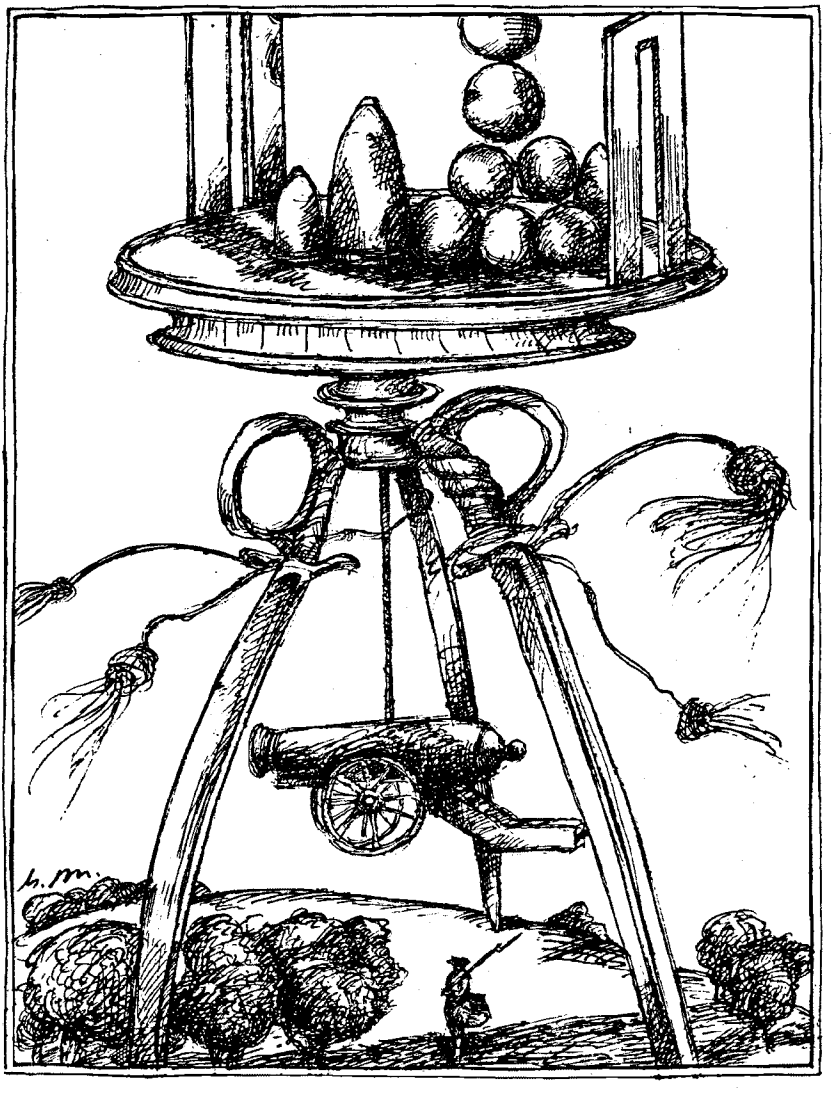
* It may rather be said TEN, for though two-thirds may set on foot the measure, three-fourths must ratify. (Publius)



"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"

CONSTITUTION 4-3

must infallibly take place. There can therefore be no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete constitution.

In opposition to the probability of subsequent amendments it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing THIRTEEN STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this, that the national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan the congress will be *obliged*, "on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, van-

ishes in air. Nor however difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.

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

The zeal for attempts to amend, prior to the establishment of the constitution, must abate in every man, who, is ready to accede to the truth of the following observations of a writer, equally solid and ingenious: "To balance a large state or society (says he) whether monarchial or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work: EXPERIENCE must guide their labour: TIME must bring it to perfection: And the FEELING of inconveniences must correct the mistakes which they *inevitably* fall into, in their first trials and experiments."* These judicious reflections contain a lesson of moderation to all the sincere lovers of the union, and ought to put them upon their guard against hazarding

* Hume's Essays, vol. I, page 128.—The rise of arts and sciences. (Publius)

anarchy, civil war, a perpetual alienation of the states from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a defect of political fortitude, but I acknowledge, that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A NATION without a NATIONAL GOVERNMENT is, in my view, an awful spectacle. The establishment of a constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen states; and after having passed over so considerable a part of the ground to recommence the course. I dread the more the consequences of new attempts, because I KNOW that POWERFUL INDIVIDUALS, in this and in other states, are enemies to a general national government, in every possible shape.

PUBLIUS

PREPARED STATEMENT OF LAURENCE H. TRIBE, PROFESSOR OF LAW, HARVARD UNIVERSITY

THINKING ABOUT A NEW CONSTITUTIONAL CONVENTION

Chief Justice John Marshall succinctly summarized his justly celebrated approach to constitutional interpretation when he insisted that we "never forget that it is a *constitution* we are expounding." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). No less vital as we explore the topic of constitutional alteration is that we never forget that it is a constitution we are *amending*.

If that aphorism seems opaque, I would propose this overriding criterion for evaluating suggested mechanisms of change pursuant to Article V of the Constitution: The processes we endorse and employ to amend the Constitution must be structured to serve the great purpose of permitting necessary change in our fundamental law, and thereby avoiding constitutional ossification and paralysis, without plunging the Nation into procedural and institutional controversies so profound or protracted that confusion and confrontation, rather than clarity and at least substantial consensus, become the consequences of each attempt to embody new principles in the Constitution's text.

Given that criterion, there seems to me no escape from the conclusion that prudence counsels avoiding, until it has been considerably clarified, the never-used and hence much-controverted Article V device whereby Congress is to "Call a Convention for proposing Amendments . . . on the application of the Legislatures of two thirds of the several States." In present circumstances, given the alternative route of amendment by congressional submission of a proposal to the States, I am convinced that holding an Article V Constitutional Convention, even after enacting legislation designed to put various procedural questions to rest, would be a needless and perilous undertaking—one likely to generate uncertainty where confidence is indispensable, one likely to invite division where unity is critical, one likely to thwart rather than vindicate the will of the American people and damage rather than mend the Constitution.

Particularly in a period of recovery from a decade ruptured by war, political assassination, near-impeachment, and economic upheaval, and particularly in a time when such recovery has already been interrupted by new domestic and international crises, it is vital that the means we choose for amending the Constitution be generally understood and, above all, widely accepted as legitimate. An Article V Convention, however, would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mysteries of the most fundamental sort, mysteries yielding to no ready mechanism of resolution.

This objection to calling an Article V Convention is based not on misgivings at the prospect of unchecked democracy, nor on any vague apprehension about unsealing a Pandora's box, nor on a reflexive preference for the familiar over the unknown. Inherent in the Article V Convention device is the focused danger of three distinct confrontations of nightmarish dimension—confrontations between Congress and the Convention, between Congress and the Supreme Court, and between the Supreme Court and the States. However democratic an Article V Convention might be in theory, such a convention would inevitably pose enormous risks of constitutional dislocation—risks that are unacceptable while recourse may be had to an alternative amendment process (the congressional initiative) that can accomplish the same goals without running such serious risks.

1. HOLDING A CONVENTION WOULD RISK CONFRONTATION BETWEEN CONGRESS AND THE CONVENTION

The primary threat posed by an Article V Convention is that of a confrontation between Congress and such a Convention. Upon Congress devolves the duty of calling a Convention on application of the legislatures of two-thirds of the states, and approving and transmitting to the states for ratification the text of any amendment or amendments agreed upon by the convention. The discretion with which Congress may discharge this duty is pregnant with danger even under the most salutary conditions.

Specifically, consider the incidental yet critical disagreements that could arise as Congress endeavored in good faith to discharge its duties under the convention clause. With no purpose whatsoever of avoiding its duties, Congress might nevertheless decide procedural questions arguably within its discretion in a

manner that frustrated the desire of the states to call and conduct a convention—by treating some applications as invalid, or by withholding appropriations until the Convention adopted certain internal reforms, or by refusing to treat certain amendments as within the Convention's scope.

As a result of any of these decisions, the Nation might well by subjected to the spectacle of a struggle between Congress and a Convention it refused to recognize—a struggle that would extend from the Convention's own claim of legitimacy to disputes over the legitimacy of proposed amendments. Such a struggle would undoubtedly be judicial as well as political, and thus draw the Supreme Court into the fray. Considering the seriousness with which Congress and the Convention would take each other's challenge in light of the monumental stakes—constitutional power—it is unlikely that either side would surrender before the contest had deeply bruised the Nation. Such a contest between Congress and the Convention, which could flare from a single procedural dispute in the balance of which hung the Convention's fate, the Nation could ill afford.

2. HOLDING A CONVENTION WOULD RISK CONFRONTATION BETWEEN CONGRESS AND THE SUPREME COURT

In the event of a dispute between Congress and the Convention over the congressional role in permitting the Convention to proceed, the Supreme Court would almost certainly be asked to serve as referee. Because the Court might well feel obliged to protect the interests of the states in the amendment process, it cannot be assumed that the Court would automatically decline to become involved on the ground that the dispute raised a non-justiciable political question, even if Congress sought to delegate resolution of such a dispute to itself, as in § 3(b) of the Helms proposal, S. 3, 96th Cong., 1st Sess., or to the States, as in § 3(b) of the Hatch proposal, S. 1710, 96th Cong., 1st Sess. In any event, depending upon the political strength of the parties to the dispute, a decision to abstain would amount to a judgment for one side or the other. Like an official judgment on the merits, such a practical resolution of the controversy would leave the Court an enemy either of Congress or of the Convention and the states that brought it into being.

Even in the absence of such a dispute over the Convention's initiation and completion, the Court could become embroiled in a confrontation with Congress over the limits of congressional power under Article V. For example, S. 3, the bill introduced by Senator Helms, entitled the "Federal Constitutional Convention Procedures Act," provides in § 7(a):

"A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each congressional district in the manner provided by law."

One may readily guess that, were Congress to adopt such a provision in the exercise of its Article V powers, the Supreme Court would be asked to decide whether the one-person, one-vote rule applies to the election of delegates to a national constitutional convention. See "ABA Special Constitutional Convention Study Committee, Amendment of the Constitution by the Convention Method Under Article V" 34 (1974) (concluding that the rule is applicable). Similarly, a rule prescribed by Congress providing that "a convention called under this Act may propose amendments to the Constitution by a vote of the majority of the total number of delegates to the Convention," S. 3, § 10(a), might well be challenged as an unconstitutional attempt by Congress to regulate the internal procedures of an Article V Convention. See "ABA Study Committee" at 19–20 (characterizing such an attempt as unwise and of questionable validity).

Whether the Court, once called upon to vindicate the one-person, one-vote principle or the autonomy of a convention, would invalidate an act of Congress passed pursuant to its Article V powers is no doubt an open question. But the stress that a decision either way would place upon our system is another unwelcome possibility inherent in the Article V Convention device. Like the risk of confrontation between Congress and the states that have called a Convention, the possibility of conflict between Congress and the Supreme Court is, of course, not peculiar to the Article V Convention device. But this device, which carries the potential for such grave clashes of power, should be utilized only if no alternative process is at hand.

3. HOLDING A CONVENTION WOULD RISK CONFRONTATION BETWEEN THE SUPREME COURT AND THE STATES

A decision upholding against challenge by one or more states an action taken by Congress under Article V—pursuant to § 15(a) of the Hatch proposal, S. 1710, for example—would, needless to say, be poorly received by the states involved. Truly disastrous, however, would be any result of a confrontation between the Supreme Court and the states over the validity of an amendment proposed by their Convention. Yet the convention process could, quite imaginably, give rise to judicial challenges that would cast the states into just such a conflict with the Supreme Court—despite congressional attempts to exclude such disputes from the Court's purview.

It is true that such conflicts are theoretically possible even when the more familiar amendment route—the congressional initiative—is followed. But in that context it has been settled for over half a century that Congress exercises exclusive control over the mode of an amendment's proposal and ratification, and thus has the last word on such matters as attempted rescission and the timeliness of ratification. *See Coleman* v. *Miller*, 307 U.S. 433 (1939); *Dillon* v. *Gloss*, 256 U.S. 368 (1921). When the familiar route is taken, therefore, the established preeminence of Congress milltates against divisiveness arising from a conflict involving the states—although even along this familiar route passions may sometimes run high, as the recent debates over extension and rescission in the case of the Equal Rights Amendment demonstrated. But when the alternative course of an Article V Convention is chosen, soothing assertions of congressional supremacy, and noble efforts to legislate such supremacy, *see, e.g.*, S. 3, § 3(b), are bound to be undercut by reminders that the Convention device was, after all, meant to *evade* control by Congress. And, once such battle lines are drawn where the authority of Congress is not widely recognized, the ensuing debate is sure to be vehement.

4. MANY CRITICAL QUESTIONS THREATENING SUCH CONFRONTATIONS LACK AUTHORITATIVE ANSWERS

Although a few questions about the Article V Convention device do indeed have clear answers, many critical questions are completely open. These are questions that could well trigger one or more of the confrontations sketched above. As to each of these questions, one can find a smattering of expert opinion and some occasional speculation. But for none of them may any authoritative answer be offered. To make the point forcefully, one need only present a catalogue of basic matters on which genuine answers simply do not exist—matters as to many of which protracted dispute can surely be expected:

A. The Application Phase

(1) By what vote in each house of a state legislature must application to Congress be made? Simple majority? Two-thirds?

(2) May a state governor veto an application to Congress?

(3) When, if ever, does a state's application lapse?

(4) May a state insist in its application that Congress limit the Convention's mandate to a specific amendment?

(5) Must a state's application propose a specific amendment, or may a state apply to revise the Constitution generally? ***Must*** a state apply for a general Convention?[1]

[1] The preponderant view among constitutional scholars has been that Article V contemplates only a Constitutional Convention of unlimited, or at least of extremely broad, scope. See, e.g., Black, "Amending the Constitution: A Letter to a Congressman," 82 Yale L. J. 189 (1972); Tribe, "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment," 10 Pac. L. J. 627 n.* (1979); Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," 88 Yale L. J. 1623 (1979). But see, e.g., Van Alstyne, "The Limited Constitutional Convention—The Recurring Answer," 1979 Duke L. J. 985; Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague," 1978 Duke L. J. 1295. The Framers' very choice of the Convention alternative for proposing amendments, and the refusal of the Framers to create a mechanism for amendments to be proposed directly by two-thirds of the state legislatures, suggests the Framers' recognition of a need to have all amendments emerge from a broadly deliberative body, whether Congress or a Convention, and not from a single-issue machine. Insofar as the pending legislative measures presuppose the contrary, see S. 3, §§ 2, 6(a), 10(b), 11(b)(1); S. 1710, §§ 2(a), 6(a), 10, 11(b)(1), they may well be unconstitutional. But whether or not one agrees with this view, it is plain at the very least that the matter is a controvertible one, and that no statute could eliminate the controversy.

(6) Is a defective application to be deemed null and void, or may it be rehabilitated by a decision to ignore whatever aspects render it invalid?

(7) By what criteria are applications proposing related but slightly different subjects or amendments to be aggregated or set apart?

(8) May a state rescind its application? If so, within what period and by what vote?

(9) What role, if any, could a statewide referendum have in mandating or forbidding an application or a rescission?

May Congress authoritatively answer any or all of the these questions? May the States? Could such answers apply retroactively to applications already made? What role, if any, would the courts play in answering such questions? Even these questions—about who has the power to decide—must be described as unanswerable.

B. The Selection and Function of Delegates

(1) Who would be eligible to serve as a delegate? May any category of persons be excluded, as in S. 1710, § 7(a)?

(2) Must delegates be specially elected? Could Congress simply appoint its own members?

(3) Are the states to be equally represented, as they were in the 1787 Convention, or must the one-person, one-vote rule apply, as it does in elections for all legislative bodies except the United States Senate? If either question should be answered in the affirmative, the Helms and Hatch bills would both be void. See S. 3, § 7(a); S. 1710, § 7(a).

(4) Would delegates be committed to cast a vote one way or the other on a proposed amendment? Could they be forbidden to propose certain amendments?

(5) Would delegates at a Convention enjoy immunity parallel to that of members of Congress?

(6) Are delegates to be paid? If so, by whom?

(7) Could delegates be recalled? Could the Convention expel delegates? On what grounds?

Which of these questions, if any, may Congress authoritatively answer? How much supervision may Congress exercise over the selection and function of delegates? What supervisory role would the courts play?

C. The Convention Process

(1) May Congress prescribe any rules for the Convention or limit its amending powers in any way? Are there any limits on the sorts of rules Congress might seek to impose?

(2) How is the Convention to be funded? Could the power to withhold appropriations be used by Congress to control the Convention?

(3) May the Convention remain in session indefinitely? May it agree to reconvene as the need arises? May it choose not to propose the amendments for the purpose of which it was convened?

Again unknowable are the respective roles of Congress, the States, and the courts in resolving these matters.

D. Ratification of Proposed Amendments

(1) To what degree may Congress—under its Article V power to propose a "Mode of Ratification," or ancillary to its Article V power to "call a Convention," or pursuant to its Article I power under the Necessary and Proper Clause—either refuse to submit to the states a proposed amendment for ratification or decide to submit such an amendment under a severe time limit? What if Congress and the Convention disagree on these matters?

(2) May Congress permit or prohibit rescission of a state's ratification vote? May the Convention? What if Congress and the Convention disagree?

Unknowable once again are the respective roles of Congress, the States, and the courts in providing a definitive resolution in the event of disagreement.

5. THE PROPOSED CONSTITUTIONAL CONVENTION PROCEDURES AND IMPLEMENTATION ACTS CANNOT AVOID THESE DIFFICULTIES

However much one might applaud the energy and intelligence that have gone into the currently pending attempts to resolve legislatively at least some of the many questions plaguing the Article V Convention route, *see, e.g.*, S. 3, 96th Cong., 1st Sess.; S. 1710, 96th Cong., 1st Sess., the irreducible fact is that ***no*** Act of

Congress could possibly lay to rest the most fundamental of those questions: what authority, if any, may Congress constitutionally exercise in laying down rules to govern an Article V Convention and in channeling controversies over such rules to various dispute-resolution forums? Needless to say, the reach of such congressional authority cannot be settled by Congress itself: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). At a minimum, therefore, the federal judiciary, including the Supreme Court, will have to resolve the inevitable disputes over which branch and level of government may be entrusted to decide each of the many questions left open by Article V as that Article was written by the Framers.

The only possible way to circumvent the problematic prospect of such judicial resolution is to avoid use of the Convention device altogether until its reach has been authoritatively clarified in the only manner that could yield definitive answers without embroiling the federal judiciary in the quest: *through an amendment to Article V itself*, one proposed by two thirds of both Houses of Congress and ratified by three fourths of the state legislatures or by conventions in three fourths of the states, as one or the other mode of ratification is specified by Congress.

Consideration of the various forms such an amendment to Article V might take could profitably begin now, but a congressional choice among the available options should probably await a time in which that choice can be separated to a substantial degree from the divisive and necessarily distracting context of the various substantive proposals—balanced budget, ERA, right-to-life—now being debated in the several states.

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN,
Champaign, Ill., September 27, 1979.

Senator BIRCH BAYH,
U.S. Senate, Committee on the Judiciary,
Subcommittee on the Constitution, Washington, D.C.

DEAR SENATOR BAYH: Thank you for your letters of August 8, 1979 and September 11, 1979. In response to your inquiries concerning constitutional conventions under Article V, I have reviewed the material you have sent me and other pertinent legal literature.

In the first place I do not doubt the power of Congress to enact legislation to implement the Article V constitutional convention process. Congress has the power, under Article V, to call a convention when two-thirds of the state legislatures so apply. Under Article 1, section 8, clause 18, Congress has the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers [i.e., those enumerated in Art. I, § 8] and *all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (emphasis added). The Article V power is one of the other powers vested in the Congress, the legislative department of the government. Moreover, Congress is the only body to enact the implementing legislation. The Convention itself cannot do it, since it does not exist unless Congress issues the call. Nor can any state or combination of states do it, for the same reason: there is no convention unless Congress issues the call.

Congress might decide to make a judgment concerning the applications for the call on an ad hoc basis. Or, in order to give fair warning to the states and to avoid charges that a particular Congress is acting in bad faith, creating unnecessary obstacles, and not fulfulling what many view as its nondiscretionary duty to call a convention [1] Congress might decide to create implementing legislation now. I would prefer this course in order to avoid any constitutional crisis that might otherwise occur later. Congress should debate and provide for the procedures before two thirds of the states have acted.

Whether or not Congress creates implementing legislation, Congress must decide how to treat a particular application. Related to that question is whether the states can limit the convention to a particular subject. I am of the view that Congress can issue a limited call.

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[1] See, e.g., Hamilton, Federalist Paper No. 85: Congress, when two-thirds of the states concur, "will have no option upon the subject * * *. The words of this article are peremptory. The Congress 'shall call a convention.' Nothing is left to the discretion of that body."

The most natural reading of the history behind Article V supports the view that the framers wished to assure the people that even if the central government were unresponsive to defects in the Constitution, the people have another option: the people, through their state legislatures, can begin the process of amendment. This check on the central government—what Hamilton in Federalist Paper No. 85 called "the national rulers"—is not effective if people have only the option of an all or nothing approach. The convention method was supposed to be an equal means of amending the Constitution.

The language of Article V supports this reading of the history. Both methods of proposing amendments, by Congress or by the Convention, are dealt with together. It is true that Article V provides that the convention may "propose Amendments" (emphasis added), but the use of plural does not mean either that the amendments must not relate to the same subject or that the convention must propose more than one. Article V also provides that Congress may propose "Amendments" (emphasis added), yet Congress can propose only one, as it usually does, or more than one, as it did when it proposed the Bill of Rights.

There is nothing in the nature of things that provides that Conventions cannot be limited. Some states provide that amendments proposed by its conventions can be limited beforehand to certain areas.[2] And we know that some states also provide that special sessions of the legislature may be limited to one topic.[3]

Prior practice also supports the conclusion that a convention can be limited, for the states have always acted as if the convention call can be limited to a specific area. Thus, when Congress was reluctant to propose an amendment providing for the direct election of the U.S. Senators, more than 30 states applied to Congress for a convention limited to that subject. The states thought they had such a power, and Congress certainly acted as if they did, for the previously reluctant Congress felt sufficiently cajoled to moot the issue by proposing, in 1912, the Seventh Amendment, which was quickly ratified in 1913.

Congress must judge the applications it receives. Perhaps a state is applying for a convention that is open-ended. Such an application should not be added to another application calling for a convention limited to a specific issue. If one state calls for a convention on a specific issue, then Congress should only add that application to one calling for a similar limitation.

I do not think that the applications must be identically worded, but in substance should be identical. As Professor Van Alstyne has argued, the applications should be "of a given subject of sufficient common description that further insistence for more perfect agreement among the applications would clearly be unreasonable. . . ."[4]

It is important to realize that the states apply for a convention, but it is only *Congress* that limits the call, and it is only the *Convention* which proposes, if it wishes, one or more amendments Thus for example, a state cannot submit a valid application that is limited to a convention which in fact will propose a given amendment. The convention need not propose any, and, if it does, it *a fortiori* cannot be bound in advance of its existence to propose a particularly worded amendment.

It is sometimes argued that Congress cannot limit a convention because a convention can always be a runaway convention: the convention, it is thought might simply refuse to be bound to a certain subject. Such a view is not a fair reading of Article V. If two-thirds of the states submit valid applications that in substance all call for a convention to deal with a particular problem—e.g., whether to have the direct election of U.S. Senators or whether to limit the federal taxing

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[2] Pennsylvania, provides that the constitution may be amended by a convention called by law to propose changes. In 1967 the electorate approved the calling of a constitutional convention to prepare for submission to the electorate proposals for limited revision. Pursuant to Act. No. 2 § 7 of March 15, 1967 the "constitutional convention shall have the power to make recommendations to the electorate on the following subjects only. . . ." This system allows the people to call a convention limited to the areas that they are concerned with. They do not have to submit themselves to the possibility of the convention passing amendments on totally unrelated subjects. Still, the electorate could refuse to ratify the unrelated amendments but it is much more efficient to simply limit the convention from the start.

[3] Special sessions of the legislature called by the governor consistently provide for limited session. E.g., Art. IV § 5(b) of the Illinois Constitution provides that the governor must state the purpose of the special session in his proclamation and that only business encompassed by such a purpose may be transacted. And the Michigan constitution states that no bill may be passed on any subject not expressly covered in the governor s proclamation. Art. IV § 28.

[4] Van Alstyne, Does Article V Restrict the States to Calling Unlimited Conventions Only? 1978 Duke L. J. 1295, 1305 (1978).

and spending powers—then Congress should issue such a limited call If the convention lawlessly ignores the restrictions on its existence, Congress may not properly treat the amendments as validly proposed. Such amendments should not be sent to the states to secure the required three-fourths ratification and any legislation implementing Article V should specifically so provide.

Authority for this proposition is found not only in sound policy and logic but also in the language of Article V. It provides that once the convention proposes one or more amendments, three-fourths of the several states must ratify. How must they ratify? Either by their legislatures or by convention in the states. And who is to decide which method is to be used? Congress must propose one or the other form of ratification according to Article V. Thus, if Congress proposes neither, the amendment cannot be sent to the states for ratification. The states cannot ratify an amendment if Congress refuses to offer that amendment to the states and provide for a mode of ratification.

In deciding whether to accept an application as valid, Congress should only consider those applications which are reasonably contemporaneous with each other. By custom Congress has usually given the states seven years to ratify an amendment. I think that seven years is too long a time as applied to the application for the convention. A shorter time, three, four, or five years, is much more appropriate. While Congress may allow the states seven or more years to ratify an amendment, that is because three-fourths of the states must ratify. But it only takes two-thirds of the states to submit applications requiring a call. It obviously should not take as long for this smaller number to get their votes together. Also, if the states use the convention route and submit applications for a call, the states do not have to pass identical language, just reasonably similar language. If the Congressional route is chosen, the states must ratify identical language. It takes a longer time to ratify identical language than to submit reasonably similar applications. For both of these reasons then, the seven or more years time period is appropriate as to the question of ratification, but a shorter time period should govern the applications in order to assure a reasonably contemporaneous consensus.

Just as I believe Congress may choose to allow a state to rescind its ratification before the three-fourths mark is reached,[5] I believe that Congress may allow a state to rescind its application any time before Congress actually issues the call.

I hope these preliminary thoughts will be helpful. If I can be of further assistance please let me know.

Sincerely,

RONALD D. ROTUNDA,
Professor of Law.

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[5] See e.g., Rotunda, Can the ERA Be Saved, 64 A.B.A.J., 1507, 1509 (1978).

(From the Center Magazine, March 1980)

Why Risk a Constitutional Convention?

(by C. Herman Pritchett)

Article V of the Constitution provides two methods for amending that document. First, Congress may propose amendments by a two-thirds vote of each House, which must then be ratified by three-fourths of the states, either by the state legislatures or conventions, as Congress may direct. All twenty-six amendments to the Constitution have been proposed in this way, and all except one have been ratified by state legislatures. Conventions were mandated by Congress for ratification of the Twenty-first Amendment, because of a belief that gerrymandered, rural-dominated state legislatures did not accurately reflect public attitudes toward Prohibition.

Second, the legislatures of two-thirds of the states may make application to Congress to call a convention for proposing amendments. From 1789 to 1974, at least 356 applications were filed with Congress for the calling of a convention, but in fact none has ever been held. Consequently, a discussion of the operation and possible consequences of a convention necessarily requires a certain amount of speculation and prediction.

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Today's interest in the convention method of amendment arises from the effort to secure an amendment to require balancing the federal budget, by the convention route if necessary. At the present writing, apparently some twenty-eight or twenty-nine state legislatures have approved applications to call a convention for this purpose. Attention was previously centered on the convention device in 1966 when, after the Senate had defeated a proposed amendment to overturn the Supreme Court's one-person, one-vote decision, Senator Everett Dirksen undertook to secure the same result by convention applications from two-thirds of the states. His campaign fell short by only one state, thirty-three of the necessary thirty-four legislatures responding.

It appears that in only one case have the necessary number of states ever filed applications for a convention. In the early part of this century some thirty-one states, meeting the two-thirds requirement at that time, submitted petitions for an amendment to provide for direct election of senators. Congress failed to heed this call for a convention, but eventually proposed the amendment itself.

A study by Barbara Prager and Gregory Milmoe in 1975 for the American Bar Association revealed that actually seventy-five applications for direct election of senators had been filed at various times, the largest number ever received by Congress on one issue. They noted fifty-four petitions on apportionment, forty-two on federal tax limitation or repeal of the Sixteenth Amendment, thirty for the outlawing of polygamy, twenty-one for revenue sharing, and nineteen for revision of Article V. Applications in this last category were stimulated by the Council of State Governments, which in 1962 inaugurated a campaign for three so-called "states' rights" amendments.

The Drafting of Article V

Discussions at the Constitutional Convention in 1787 throw some light on the thinking of the framers concerning the amendment process. They took for granted that the states should have the right to set the amending machinery in motion. In fact, it was the role of Congress that was in dispute at the time. The original draft of the Virginia Plan (Resolution XIII) read:

"Provision ought to be made for the amendment of the Articles of Union whenever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto." (Farrand, I, 22)

In Committee of the Whole on June 11, George Mason approved:

"It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment." (Farrand, I, 203)

The Committee on Detail, reporting on August 6, revised the language of Resolution XIII, but retained the state monopoly on the amending process:

"On the application of the legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the legislature of the United States shall call a Convention for that purpose." (Farrand, II, 188, 557)

But on September 10, Elbridge Gerry moved to reconsider this provision, with the support of Alexander Hamilton and James Madison. Hamilton said that the plan, giving the states a monopoly of the amending process, was "not adequate."

"The State legislatures will not apply for alterations but with a view to increase their own powers — The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments. . . ." (Farrand, II, 558)

Madison joined in the attack, raising prophetic questions about the role and operation of an amending convention. He "remarked on the vagueness of the terms, 'call a Convention for the purpose,' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?" (Farrand, II, 558). He then proposed the dual amendment plan which, with some modifications in wording and the addition of two provisos, became Article V. In No. 43 of *The Federalist,* Madison looked at the language on amendments and found it good:

"It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience of one side, or on the other."

Experience with Congressional Monopoly

Madison's favorable appraisal of Article V has been generally supported by subsequent experience. The amending process has proved to be neither too easy nor too hard, given a real consensus. Excluding the first ten amendments, which must be regarded as really part of the original Constitution, amendments have been adopted at the rate of less than one per decade. Following the Civil War amendments, there was a period of more than forty years during which the Constitution appeared unamendable. This was an era of agrarian discontent, industrial unrest, and growing interest in political and economic reforms. The conservatism of the Supreme Court — symbolized by its invalidation of the income tax in 1895 — made constitutional amendment seem a necessary step toward achieving liberal legislative goals.

Under these circumstances, there was much talk about the necessity of easing the amendment process. In 1913, however, the long liberal campaign for the income tax and direct election of senators succeeded with adoption of the Sixteenth and Seventeenth Amendments respectively. Adoption of the Eighteenth Amendment in 1919 revealed the possibility of a small but dedicated pressure group exploiting the amending machinery successfully. The women's suffrage amendment (Nineteenth Amendment) came in 1920. With six amendments added to the Constitution between 1913 and 1933, the amending process no longer seemed so formidable. Moreover, the liberalization of the Supreme Court's views by President Franklin D. Roosevelt's appointees substantially eliminated liberal interest in further amendments.

After the nineteen-thirties, pressure for amendments came principally from conservative political quarters. The increase in executive power and congressional expenditures, the federal government's acceptance of new welfare functions domestically and new responsibilities internationally, the reduced role of the states, and liberal tendencies on the Supreme Court stimulated conservative recourse to the amendment process. During the nineteen-fifties, the Bricker Amendment to limit the federal government's power to enter into international agreements and a proposal to place a ceiling on federal income taxation were conservative measures that failed of adoption. In the nineteen-sixties, efforts to override the Supreme Court's decisions on one-person, one-vote and Bible reading in the public schools were defeated. The nineteen-seventies saw an organized effort to reverse the Court's abortion decision. Thus far, the only amendment secured by conservative forces was the Twenty-second, limiting the President to two terms. In contrast, the four amendments adopted since 1961 have had a generally liberal character; three of the four extended the franchise. However, the probable defeat of the Equal Rights and District of Columbia Amendments suggests that the era of liberal amendments may be over and that the temper of the country more favorable for conservative amendments.

Problems with Amendment by Convention

There can be no question that over the years the great weight of informed opinion in the United States has opposed the use of Article V conventions. Much opposition, of course, is *ad hoc*, engendered by dislike of the purpose of the particular amendments proposed. But there are more principled objections to amendment by convention.

First, there are the practical types of queries that occurred to Madison in 1787, when he asked: "How was a Convention to be formed? by what rule decide? what the force of its acts?" No convention has been held since 1787, and after two hundred years that experience has little relevance. Many questions can be raised concerning the organization and powers of a constitutional convention. Here are some of them:

☐ How is the validity of applications from the states to be determined?

☐ How specific must the state legislatures be in asking for amendments?

☐ Must all the applications be in identical language?

☐ Within what time period must the required number of applications be received?

☐ Can Congress refuse to call a convention on demand of two-thirds of the states, and if it does, can it be compelled to act by the courts?

☐ Who are the delegates, and how are they to be chosen?

☐ Can the convention act by simple majority vote, or will a two-thirds majority be required, as in Congress, for proposing an amendment?

☐ How is the convention to be financed, and where does it meet?

☐ May the convention propose more than one amendment?

☐ Is there a time limit on the proceedings, or can the convention act as a continuing body?

☐ Can controversies between Congress and the convention over its powers be decided by the courts?

An even more serious case against the Article V convention invokes the specter of "Pandora's box." A parade of horribles — which some contend are imaginary and others insist are very real — has featured arguments against a convention. The possibility of a "runaway" convention is supported by the experience of the 1787 Convention, which had been authorized by Congress to meet for the "sole and express purpose of revising the Articles of Confederation." The Convention promptly ignored these instructions and proceeded to draft an entirely new Constitution based on a fundamentally different principle of union. Could not this happen again? Could not a convention claim to be a truer representative of the popular will than Congress, superior in authority, and justified in defying any restrictions placed upon it by Congress? Could it not proceed to redraft the Constitution, repeal provisions of the Bill of Rights, reverse unpopular Supreme Court decisions, and generally remake the constitutional system in its own image?

Convention proponents dismiss such concerns as hypothetical hobgoblins. They contend that in the unlikely event of a runaway convention, three-fourths of the states would never ratify its proposals.

The dangers can be overdrawn, but the contents of Pandora's box have been frightening, not only to liberals worried about the Bill of Rights, but also to some conservatives favorable to the budget-balancing principle. Senator Barry Goldwater wants a budget-balancing amendment, but not by the convention route. In the Senate on February 26, 1979, he said he was "totally opposed" to a convention. It might run wild, he warned, adding, "We may wind up with a Constitution so far different from that we have lived under for two hundred years that the Republic might not be able to continue." Though Howard Jarvis later succumbed to pressure to support a convention, his initial reaction was strongly and characteristically against opening up the Constitution to "weirdos" who might write their own "screwball" version of the document.

Preventing a Runaway Convention

It does seem altogether possible, given the current political temper of the country, that a convention called to draft a budget-balancing amendment might go further afield. Is there any way to guard against this possibility?

Former Attorney General Griffin Bell has said that he "absolutely" believes that Congress can set limits on what kind of amendments a convention can propose. The same position has been taken by former Senator Sam Ervin, by Senator Jesse Helms, and generally by those favoring the convention approach. Legislation for the purpose of exercising such control has been before Congress since 1967. At that time it appeared that Senator Everett Dirksen might succeed in securing the required applications from thirty-four state legislatures for a convention to repeal the Supreme Court's legislative apportionment decision. Senator Ervin, who supported Dirksen's effort, recognized the widespread fears of an uncontrolled convention and sought to allay them by drafting a Federal Constitutional Convention Procedures Act. (S. 2307, 90th Cong.) The Senate failed to take action when the Dirksen threat faded. But in 1971 another convention proposal surfaced, as some nine state legislatures petitioned for a convention to propose a revenue-sharing amendment. This time Ervin's bill, after some amendments to make it more acceptable to liberal senators, passed the Senate by a vote of eighty-four to nothing on October 19, 1971 (S. 215, 92d Cong.), but the House took no action.

In 1977, an almost identical bill was proposed, sponsored in the Senate by Helms, Goldwater (in spite of his opposition to conventions), and Senator Richard Schweiker, and in the House by Henry J. Hyde, Republican from Illinois. (S. 1880, H.R. 7008, 95th Cong.) The sponsors were advocates of a constitutional amendment outlawing abortion, and again the purpose was to quiet various objections that had been lodged against the convention device. The bills had not, by March, 1979, emerged from the Judiciary Committees of either house.

These bills have been drafted on the assumption that Congress does in fact have power to control and specify the powers and procedures of an Article V convention. If that is true, then the Ervin-Helms bills, if adopted, would dispose of many of the concerns about runaway conventions. The principal provisions of the bills are:

☐ State legislatures can call for a convention for the purpose of proposing "one or more" amendments to the Constitution.

☐ Legislative adoption of resolutions calling for a convention are to follow the regular state legislative rules of procedure, except that the governor's approval is not required.

☐ Applications for a convention are to remain effective for seven calendar years, but rescission would be possible up to the time that two-thirds of the state legislatures had presented valid applications.

☐ When applications from two-thirds of the state legislatures have been received, the two Houses of Congress must by concurrent resolution designate the time and place of the meeting and "set forth the nature of the amendment or amendments for the consideration of which the convention is called." The convention must meet within one year.

☐ Each state is to have as many delegates as it is entitled to senators and representatives in Congress. Two delegates are to be elected at large and one from each congressional district "in the manner provided by law." Vacancies are to be filled by the governor. Delegates are to have the same immunities as members of Congress, and the concurrent resolution shall provide for their compensation and all other expenses of the convention.

☐ The convention is to be convened by the Vice-President of the United States, and would then proceed to elect permanent officers.

☐ Each delegate is to have one vote. In Ervin's original bill, the vote was by states as in the 1787 Convention, each state having one vote.

☐ Amendments are to be proposed by "a majority of the total number of delegates to the convention." This is the only substantial point on which the 1971 Ervin and the 1977 Helms drafts differ. While the Ervin bill originally provided for majority vote, it was amended on the floor of the Senate to require a two-thirds majority. The Helms bill goes back to a simple majority.

☐ Three provisions undertake specifically to guarantee against runaway conventions. Section 8(a) requires each delegate to take an oath "to refrain from proposing or casting his vote in favor of any proposed amendment . . . relating to any subject which is not named or described in the concurrent resolution of the Congress by which the convention was called."

Then Section 10(b) provides that "no convention called under this Act may propose any amendment or amendments of a nature different from that stated in the concurrent resolution calling the convention." Finally, Section 11(b)(1) permits Congress to disapprove the submission of any proposed amendment to the states if "such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution . . . by which the convention was called," or because the procedures followed by the convention were not in conformity with the act.

☐ As required by the Constitution, ratification is by vote of three-fourths of the states. Congress retains its Article V right to direct whether ratification shall be by state convention or state legislative action. State legislatures shall adopt their own "rules of procedure" in voting on ratification, which must be completed within seven years of submission of the amendment to the states. A state may rescind its ratification prior to ratification by three-fourths of the states.

☐ To avoid the possibility of judicial review of any issues raised by the convening of a convention or the exercise of powers by that body, the bills provide that any questions concerning the adoption of state resolutions calling for a convention shall be determined by Congress, "and its decisions thereon shall be binding on all others, including state and federal courts." (Section 3(b)) Likewise, questions whether proposed amendments are of a nature differing from that stated in the concurrent resolution "shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including state and federal courts." (Section 10(b))

The intention of the Ervin-Helms bills is to settle in advance questions as to the organization and powers of an Article V convention, and to guarantee against a runaway body. When the Ervin bill was before the Senate in 1971, it won praise from different quarters of the political spectrum. *The New Republic* said: "Ervin's bill is sound insurance against a runaway rewrite job by latter-day founding fathers. Congress should adopt it." The columnist James J. Kilpatrick wrote: "This is a wise and prudent bill."

For whatever a measure of this sort may prove to be worth, it can do no harm. The only significant point in controversy would seem to be whether action of a convention should be by simple or two-thirds majorities. Even the most adamant opponents of constitutional amendment by convention might well regard such legislation as insurance against a future disaster.

But Will It Work?

The premise that Congress can control a convention and prevent any wayward tendencies assumes that Congress has the will to enforce limits such as those imposed by the Ervin bill. But is that necessarily so? Suppose that a convention, called to write a budget-balancing amendment, goes on to draft amendments providing criminal punishment for abortions, forbidding busing to remedy *de jure* or *de facto* racial segregation, authorizing Bible reading in public schools, or abolishing the exclusionary rule in the federal courts — all purposes that a congressional majority might approve. In this situation, Congress might have no interest in enforcing the Ervin statutory limits. The oaths which the bill requires of convention members are probably not legally enforceable, and the legislation makes all congressional decisions pertaining to disputes with the conventions final and not subject to appeal to the courts. In any case, ever since 1939 the Supreme Court has taken the position that the amending process is, in its entirety, a political issue in which the courts will not intervene.

Even if Congress had the desire and the courage to lasso a runaway convention, what would be the effect? Suppose a convention, called to act on budget-balancing, also proposed an abortion amendment, which Congress then refused to submit to the states because it was unauthorized by the concurrent resolution. The abortion amendment would be killed, but at what cost? Paul J. Mishkin, who proposes this scenario (*Newsweek*, March 5, 1979), suggests that supporters of the abortion amendment would see the congressional action as a subterfuge, "a betrayal of trust by their opponents, Congress, and 'the system.' " He concludes that "the convention route will inevitably precipitate issues that will strain the network of trust on which a free democratic society depends."

Laurence H. Tribe, the Harvard law professor and author of the book *American Constitutional Law*, also stresses the dangers of a confrontation between Congress and a convention, whether "by treating some applications as invalid, or by withholding appropriations until the convention adopted certain internal reforms, or by refusing to treat certain amendments as within the convention's scope. As a result of any of these decisions, the nation might well be subjected to the spectacle of a struggle between Congress and a convention it refused to recognize — a struggle that would extend from the convention's own claim of legitimacy to disputes over the legitimacy of proposed amendments."

Already there is disagreement over how many valid applications have been filed with Congress for the budget-balancing convention, though Senator Birch Bayh says that, considering the climate of the country, "I for one am not going to look at the crosses on the t's and the dots on the i's."

Tribe also sees the possibility of the Supreme Court's involvement in disputes between Congress and the convention or the states. Some of the requirements of the Ervin bill might be challenged as unconstitutional interference with the internal procedures of an Article V convention. According to Tribe, even if the Court declined to intervene on the ground that the issues were political and nonjusticiable, "a decision to abstain would amount to a judgment for one side or the other . . . and leave the Court an enemy either of Congress or of the convention and the states that brought it into being."

Election of Delegates

One of the most frightening aspects of a constitutional convention, which has been little discussed, concerns the election of delegates and the character of the election campaigns. The Ervin bill says simply that the delegates shall be elected "in the manner provided by state law." Conceivably states might set up some special method for nonpartisan election of delegates. But much more probably the regular election laws would be used with nominations by party primaries or petitions, and general election contests between two major party candidates and perhaps others from minor parties.

The possibilities of the nation tearing itself apart in such election free-for-all contests are mind-boggling. A normal partisan election campaign is structured to some extent by party loyalties and allegiances, incumbencies, and voting patterns, the issues often being subordinated to candidates' personalities. But in an election for delegates to a constitutional convention, with no incumbents, and with issues paramount, the pressure of interest groups on candidates would be crushing. Every big or little pressure group would want commitments from candidates, and they in turn would seek votes by embracing as many causes as possible. It is inconceivable that candidates would campaign simply on the degree of their commitment to a balanced budget, or that they would be permitted to avoid discussing other issues. It is inconceivable that they would not be asked to take stands on abortion, gun control, busing, regulation of religious cults, exemption of religious schools from state educational regulations, coddling of criminals, or any other currently controversial public issue. Positions taken on these extraneous problems might well determine which delegates were elected; and delegates who had won election on these issues would be expected to carry them onto the convention floor, making it unlikely that the convention could be confined to its assigned subject.

The Folly of a Budget-Balancing Amendment

There is too much chance that a constitutional convention would be, in Justice Potter Stewart's vivid phrase, "a loose cannon." Calling a convention for budget balancing or any other purpose is playing Russian roulette with the Constitution. If an amendment requiring budget balancing is desirable and wise public policy, it should be drafted and proposed by Congress in the manner by which the previous twenty-six amendments have been added to the Constitution.

But should budget balancing be in the Constitution at all? This is not the place, nor am I the one to discuss the economic arguments for and against budget balancing. But as a political scientist and a former student of public administration, I can raise questions about the practical implementation of a public policy; and I suggest that a budget-balancing amendment would be unenforceable. There is no possibility of framing an amendment that would be able to control expenditures in the real world of national finance.

Budgets are forecasts. Even if they are in hypothetical balance at the beginning of a fiscal year, they can be thrown out of balance by unanticipated developments — a defense emergency, a depression (a one-per-cent rise in unemployment costs twenty billion dollars), a natural calamity, an oil embargo. There are no feasible sanctions to enforce budget balancing. A deficit cannot be made up out of the President's salary. Presumably the amendment would direct Congress to raise taxes or reduce expenditures when a deficit threatened, but the members of the Ways and Means and Appropriations Committees cannot be mandamused or put in jail.

The fact is that the drafters of a budget-balancing constitutional amendment would face an impossible task and find themselves on the horns of an inescapable dilemma. Either the amendment will require a balanced budget with no ifs, ands, buts, or escape clauses, in which case it will be as futile as King Canute and as unenforceable as the Eighteenth Amendment. Or it will be supplied with enough escape clauses so that it becomes nothing but a moral preachment to Congress.

Even if it were possible to draft a practical budget-balancing amendment, its inclusion would be a violation of the spirit and purpose of the American Constitution. Fiscal policy has no place in the fundamental law of the Republic. State legislators and others who are familiar with state constitutions, some of which run to almost one hundred thousand words, are incredibly detailed, and are amended at every election, may not see an issue here. But the strength of the Constitution and the foundation for much of its mystique has been that it was limited to fundamentals — government structure, governmental powers and their limitations, and individual rights. Loading the Constitution with policy preferences cheapens the document and freezes policies where alternatives should remain available.

As Tribe points out, "Slavery is the only economic arrangement our Constitution has ever specifically endorsed, and Prohibition the only social policy it has ever expressly sought to implement." Madison said that the purpose of amendments should be to correct the "discovered faults" and "errors" in the Constitution. The only two amendments that did not have this purpose were the Eighteenth and the Twenty-first.

The Hidden Case for the Convention

It is well to recognize that reasoned arguments against a convention will not necessarily relate to the motivation of many convention advocates. Many proponents admit, more or less frankly, that they do not really expect or even want a constitutional convention. For them, the campaign is simply a way to force Congress to pay attention to the problem of budget deficits and to draft its own constitutional amendment. It is a ploy, a two-by-four to hit the congressional mule over the nose. This is not true of Governor Jerry Brown of California, however. His strategy appears to go well beyond this limited purpose, or even 1980. James Reston, following an interview with Brown, reported that "his call for a constitutional convention to compel a balanced budget is only one means of changing the political dialogue," and is somehow connected with the exploration of outer space in the twenty-first century.

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Again, there are those who back a convention as a way of expressing their distrust for Congress and, indeed, their alienation from the entire political system. For many, budget balancing has become a code word to express resentment against the spenders, the bureaucrats, the government regulators, the welfare cheats. They are fed up and they aren't going to take it any more. Any stick to beat a dog.

The American Constitution is, in a sense, the victim of its own success. Veneration of the Constitution has resulted in an "amendment mania." Constitutional amendments are attractive to reformers and propagandists of all persuasions who want to give their cause status and glamour and place it beyond the reach of legislative challenge or later change of national mind.

A constitutional amendment is sought by the budget balancers because they want to invoke the prestige and the finality of constitutional language. But the surest way to drain the Constitution of its prestige and its finality is to make it a hostage in quarrels over explosive social issues. Peter McGrath's warning in a *New Republic* article in 1976 is eloquent and timely:

"Illegitimacy is the one thing that a constitution can never risk for it is the main — perhaps the only — agent of legitimacy for substantive policy decisions. This is why it is unwise for us to force our Constitution too far into the bitter controversies of the moment, such as those over busing and abortion. Each time we do so, we demystify it a little, which even in this secular age is not necessarily a good thing. The Constitution is an organism, and when you kick it, it kicks back, as Richard Nixon found out to his sorrow and surprise. But like any living thing, it can be worn down, burdened with work it was never made for." □

PART 2—BAR ASSOCIATION AND LAW REVIEW ARTICLES

The Alabama Lawyer

OFFICIAL ORGAN STATE BAR OF ALABAMA

July 1952

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Volume Thirteen — Number Three

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A Study in the Invalidity of Memorialization Rescission Resolutions

FRANK E. PACKARD[1]
Chicago

TWENTY-EIGHT state legislatures have passed resolutions memorializing the United States Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States limiting federal income tax rates at twenty-five per cent in peacetime. Similar action by four more state General Assemblies is necessary in order to have two-thirds of the states, or thirty-two states, as required by Article V of the Constitution before the Congress has to call the convention for the purpose of proposing an amendment to the Constitution imposing a twenty-five per cent ceiling on federal income tax rates in peacetime. Of the twenty-eight state legislatures which adopted the foregoing resolutions those of Alabama,[2] Illinois,[3] Kentucky[4] and Wisconsin[5] rescinded their passage of such resolutions. The resolutions of rescission subsequently adopted by the legislatures of these four states are null and void and are of no legal effect whatsoever. This can be proved conclusively by keeping in mind the federal amendatory process provided for in Article V as follows: "The congress, whenever two-thirds of both houses shall deem it necessary, shall *propose* amendments to this constitution, or, on the *application* of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when *ratified* by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress. . . ."[6] (emphasis

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[1] Senior Partner in the Chicago Law Firm of Packard and Evans; member of the Bar of the Supreme Court of the State of Illinois and of the Bar of the Supreme Court of the United States.

[2] Ala. Acts 1945, p. 155.

[3] Ill. Laws 1945, p. 1797.

[4] Ky. Acts 1946, p. 720.

[5] Wis. Laws 1944-45, pp. 1126, 1127.

[6] U. S. Const., Art. V.

mine) — and by comparing memorialization by states with proposal by the Congress and comparing the right of a state to withdraw a memorialization with the right of the Congress to withdraw a proposal. Such a right does not exist in either case according to Professor Lester Bernhardt Orfield, who in his text book *The Amending of the Federal Constitution* states as follows: "Suppose Congress should attempt to withdraw an amendment after it had been proposed. This question was directly raised in 1864 when Senator Anthony proposed to repeal the joint resolution submitting the Corwin amendment. . . . The practice has been to regard such a withdrawal as ineffectual. The theory apparently is that each affirmative step in the passage of an amendment is irrevocable . . . confusion would be introduced if Congress were permitted to retract its action."[7] This view is shared by Professor Francis M. Burdick, who in his text book *The Law of the American Constitution* states that: "It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration . . ."[8] Professor Orfield continues as follows: "In such a case the analogy of a state legislature's attempting to withdraw its ratification of an amendment would seem apposite."

Additional proof that a state legislature does not have the legal right to rescind a memorialization resolution may be adduced by comparing the right of a state to withdraw a memorialization and the right of the Congress to withdraw a proposal on the one hand with the right of a state to withdraw a ratification of a proposed amendment to the Constitution on the other hand for as the Supreme Court of the United States declared in 1921 in the case of *Dillon v. Gloss*: ". . . proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor . . ."[9] In the case of this additional comparison the answer is the same as a state cannot withdraw a ratification. Judge John Alexander Jameson in his text book *A Treatise on Constitutional Conventions — Their History, Powers and Modes of Proceeding* states that: "The language of the constitution is, that amendments proposed by congress, in the mode prescribed, 'shall be valid to all intents and

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[7] Orfield, Professor Lester Bernhardt, *The Amending of the Federal Constitution*, The University of Michigan Press, Ann Arbor, Michigan, 1942, p. 52.

[8] Burdick, Professor Francis M., *The Law of the American Constitution — Its Origin and Development*, G. P. Putnam's Sons, N. Y., 1922, p. 39.

[9] 256 U. S. 368, 374, 375, 65 L. Ed. 994, 997, 41 S. Ct. 510, 512 (1921).

purposes, as part of this constitution, *when ratified by the legislatures of three fourths of the several states,'* etc. By this language is conferred upon the states, by the national constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by by the constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity. . . . When ratified by the legislature of a state, it will be final as to such state. . . . When ratified all power is expended."[10] Professor Walter F. Dodd, writing in the Yale Law Journal, states that: ". . . the view is incontrovertible, that a state, once having ratified, may not withdraw that ratification . . . to construe the Constitution otherwise, would be to permit great confusion in that no state in ratifying could know what the status of the amendment was if at the same time other states were permitted to withdraw. Of course, confusion would occur also in that it would be difficult to know when three-fourths of the states had ratified. . . . The function of ratification seems to be one which, when once done, is fully completed, and leaves no power whatever in the hands of the state legislature."[11]

The Court of Appeals of Kentucky held in 1937 in the case of *Wise v. Chandler* that: "It is the prevailing . . . view of writers on the question that a resolution of ratification of an amendment to the Federal Constitution, whether adopted by the Legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the 'powers and disabilities' of the two classes of representative assemblies mentioned in Article V are 'precisely the same,' when a Legislature, sitting, not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its powers in this connection."[12] The Supreme Court of Kansas in the same year ruled in the case of *Coleman v. Miller* that: "It is generally agreed by lawyers, statesmen and publicists who have debated this question that a . . . ratification once given cannot be withdrawn . . . from historical precedents, it is . . . true that where a state has once ratified an amend-

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[10] Jameson, Judge John Alexander, *A Treatise on Constitutional Conventions – Their History, Powers and Modes of Proceeding*, Callaghan and Co., Chicago, 1887, secs. 579, 581.

[11] Dodd, Professor Walter F., "Amending the Federal Constitution," 30 Yale L. J. 321, 346 (1921).

[12] 270 Ky. 1, 8, 9, 108 S. W. 2d 1024, 1028 (1937).

ment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the federal constitution read that the amendment should be valid 'when ratified by three fourths of the states, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify.' . . . when a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist."[13]

When a state adopts a resolution memorializing the Congress to call a convention for the purpose of proposing an amendment to the Constitution that state is engaging in a "federal function" which places such activity within the exclusive domain of federal jurisdiction and completely removes same from the pale of state province and beyond the power of state withdrawal. The truth of this is mainfest since the function of a state legislature in memorializing the Congress to call a convention for the purpose of proposing an amendment is derived wholly from the Constitution the same as is either the function of the Congress in proposing an amendment or the function of a state legislature in ratifying a proposed amendment and since the latter two functions have been judicially identified as "federal functions" totally without state realm. The Supreme Court of Kansas declared in 1937 in the *Coleman v. Miller* case that: "It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the constitution of the United States, *like the function of congress in proposing an amendment*, is a federal function derived from the federal constitution; and it transcends any limitation sought to be imposed by the people of a state. (Emphasis mine.) The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its auhority from the federal constitution, to which the state and its people alike have assented. . . . If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation in the proper sense of that term. It has been so held."[14]

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[13] 146 Kan. 390, 400, 403, 71 P. 2d 518, 524, 526 (1937).

[14] 146 Kan. 390, 392, 393, 71 P. 2d 518, 520 (1937).

FEBRUARY 1959 • Volume 45 • Number 2

American Bar Association JOURNAL

Constitutional Law:

The States and the Amending Process

by Frank E. Packard • *of the Illinois Bar (Chicago)*

Amendments to the Federal Constitution may be proposed either by two thirds of both houses of Congress or by a convention called by Congress at the application of the legislatures of two thirds of the states. The second method of proposing constitutional amendments has never been used. However, Mr. Packard points out that thirty-three states have adopted resolutions calling upon Congress to call a convention to propose an amendment to limit the power of the Federal Government as to income taxes. Although seven of the thirty-three have since tried to rescind their resolutions, Mr. Packard believes that these attempted rescissions are of no effect, and he argues that a writ of mandamus will lie to compel the Congress to issue the call for a convention.

On March 2, 1957, the Legislature of Idaho passed a resolution memorializing the United States Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States limiting federal income tax rates. On March 30, 1957, the Tennessee General Assembly followed suit. This meets the requirement of Article V of the Constitution that if two thirds of the states, or thirty-three in number, petition Congress to call the convention for the purpose of proposing an amendment to the Constitution, then Congress "shall" do so. The thirty-three states which have enacted such memorializations are: Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming.

Of the thirty-three state legislatures which adopted the foregoing resolutions, those of Alabama, Arkansas, Illinois, Iowa, Kentucky, Rhode Island and Wisconsin have attempted to rescind their resolutions. This raises the first thorny point: *Are the resolutions of rescission adopted by the legislatures of these seven states of any legal effect whatsoever?*

Some light on this question may be thrown by examining the federal amendatory process provided for in Article V. It is described in the Constitution as follows:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall *propose* amendments to this constitution, or, on the *application* of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when *ratified* by the legislatures of three fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of the ratification may be proposed by the Congress[1]. . . [Italics added].

Obviously, an amendment which arises through memorialization by states is equated with an amendment which arises through proposal by the Congress. Similarly, the right of a state to withdraw a memorialization must be equated with the right of the Congress to withdraw a constitutional proposal. Such a right does not exist in either case according to Professor Lester Bernhardt Orfield. Professor Orfield states as follows:

> Suppose Congress should attempt to withdraw an amendment after it had been proposed. This question was directly raised in 1864 when Senator Anthony proposed to repeal the joint resolution submitting the Corwin Amendment . . . The practice has been to regard such a withdrawal as ineffectual. The theory apparently is that each affirmative step in the passage of an amendment is irrevocable . . . Confusion would be introduced if Congress were permitted to retract its action.[2]

This view is shared by Professor Francis M. Burdick, who points out:

> It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States,

1. U. S. Constitution, Article V.
2. Orfield, Lester Bernhardt, THE AMENDING OF THE FEDERAL CONSTITUTION (University of Michigan Press, Ann Arbor, Michigan, 1942, page 82.

cannot thereafter withdraw it from their consideration . . .[3]

Professor Orfield continues as follows:

> In such a case the analogy of a state legislature's attempting to withdraw its ratification of an amendment would seem apposite.

A perfect analogy exists in the 1951 decision of the Supreme Court of the United States that West Virginia could not withdraw from the Ohio River Valley Water Sanitation Compact. The Constitution provides that: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another state."[4] Thus, once a compact entered into between two or more states is approved by the Congress, the compact becomes a federal and multi-state matter entirely removed from the contingency of unilateral action on the part of one state.

In 1939, the same year that the income tax rate limitation movement began, the legislature of West Virginia ratified that state's adherence to the compact.[5] Eight states entered into the compact—New York, Kentucky, Indiana, Ohio, Illinois, West Virginia, Pennsylvania and Virginia. The following year the compact received the necessary approval of the Congress.[6]

In 1950, the Court of Appeals of West Virginia, in the case of *State* ex rel. *Dyer* v. *Sims*, held that the ratification of the compact by its legislature was unconstitutional and that, as a result thereof, West Virginia was not a member of the compact.[7]

The following year in the case of *State of West Virginia* ex rel. *Dyer* v. *Sims*, the Supreme Court of the United States, speaking through Mr. Justice Frankfurter held that:

> A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review . . . We are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States . . . its [West Virginia's] legislature may not be free, at any time, to withdraw the power delegated.[8]

Mr. Justice Jackson concurring, declared that:

> She [West Virginia] now attempts to read herself out of this interstate Compact . . . she may not . . . release herself from an interstate obligation. The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question before this Court . . . West Virginia should be estopped from repudiating her act . . . she is bound by the Compact.[9]

Additional proof that a state legislature does not have the legal right to rescind a memorialization resolution may be adduced by examining the right of a state to withdraw a ratification of a proposed amendment to the Constitution. Judge John Alexander Jameson indicates that:

> The language of the Constitution is, that amendments proposed by Congress, in the mode prescribed, "shall be valid to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three fourths of the several states*, etc." By this language is conferred upon the States, by the National Constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the Constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity . . . When ratified by the legislature of a state, it will be final as to such state . . . When ratified all power is expended.[10]

Professor Walter F. Dodd adds:

> . . . the view is incontrovertible, that a state, once having ratified, may not withdraw that ratification . . . to construe the Constitution otherwise, would be to permit great confusion in that no state in ratifying could know what the status of the amendment was if at the same time other states were permitted to withdraw . . . The function of ratification seems to be one which, when done, is fully completed, and leaves no power whatever in the hands of the state legislature.[11]

The Court of Appeals of Kentucky held in 1937:

> It is the prevailing . . . view of writers on the question that a resolution of ratification of an amendment to the Federal Constitution, whether adopted by the Legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the "powers and disabilities" of the two classes of representative assemblies mentioned in Article V are "precisely the same" when a legislature, sitting not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection.[12]

The Supreme Court of Kansas in the same year ruled in the case of *Coleman* v. *Miller* that:

> It is generally agreed by lawyers, statesmen and publicists who have debated this question that a . . . ratification once given cannot be withdrawn . . . from historical precedents, it is . . . true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make Article V of the Federal Constitution read that the amendment should be valid "when ratified by three fourths of the States, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify. . . . when a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist.[13]

The historical precedents here are more than ample. Some references to a few may be helpful.

Some Precedents . . . Two Earlier Amendments

New Jersey and Ohio[14] were among the states which ratified the proposed Fourteenth Amendment.[15] Subsequently, New Jersey and Ohio[16] took action to rescind their respective ratifications. However, after passage of ratifications by the necessary three fourths of the states, the Congress passed a resolution[17] listing the ratifying states and

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3. Burdick, Francis M., THE LAW OF THE AMERICAN CONSTITUTION—ITS ORIGIN AND DEVELOPMENT (G. P. Putnam's Sons, New York, 1922) page 39.
4. U. S. Constitution, Article 1, §10, clause 3.
5. W. Va. Acts 1939, c. 38.
6. 54 U. S. Stat. at L. 752.
7. 134 W. Va. 272 (1950).
8. 341 U. S. 22, 27, 28, 30; 71 S. Ct. 557, 560-562 (1951).
9. 341 U. S. 22, 35, 36; 71 S. Ct. 557, 564 (1951).
10. Jameson, Judge John Alexander. A TREATISE ON CONSTITUTIONAL CONVENTIONS—THEIR HISTORY, POWERS AND MODE OF PROCEEDING (Callaghan and Co., Chicago, 1887) §§579, 581.
11. Dodd, Walter F. *Amending the Federal Constitution*. 30 YALE L. J. 321, 346 (1921).
12. *Wise* v. *Chandler*, 270 Ky. 1, 8, 9, 108 S. W. 2d 1024, 1028 (1937).
13. 146 Kan. 390, 400, 403, 71 P. 2d 518, 524, 526 (1937).
14. Ohio Laws 1867, pages 320, 321.
15. 14 U. S. Stat. at L. 358.
16. 65 Ohio Laws 280.
17. 15 U. S. Stat. at L. 709, 710.

included New Jersey and Ohio. The Congress transmitted such resolutions to the Department of State. Secretary of State William H. Seward, in pursuance of such a resolution and acting under statutory duty, issued his certificate[18] declaring the Fourteenth Amendment an integral part of the Constitution. In his certification, Secretary Seward also listed the ratifying states and included New Jersey and Ohio.

New York was among the states that ratified the proposed Fifteenth Amendment. Subsequently, New York took action to rescind her ratification. However, after passage of ratifications by the requisite three fourths of the states, Secretary of State Hamilton Fish, acting under statutory duty, issued his certification[19] declaring the Fifteenth Amendment an integral part of the Constitution. In his certification, Secretary of State Fish listed the ratifying states and included New York.

All of the foregoing would seem to indicate clearly that when a state adopts a resolution memorializing the Congress to call a convention for the purpose of proposing an amendment to the Constitution, that state is engaging in a "federal function". That function places such activity within the exclusive domain of federal jurisdiction and completely removes it from the state province and beyond the power of state withdrawal. The truth of this is manifest. The function of a state legislature in memorializing the Congress to call a convention for the purpose of proposing an amendment is derived wholly from the Constitution, just as is the function of the Congress in proposing an amendment or the function of a state legislature in ratifying a proposed amendment. The latter two functions have been judically identified as "federal functions" totally without the realm of the states.

The Supreme Court of Kansas declared in 1937 in the *Coleman* v. *Miller* case that:

> It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the Constitution of the United States, *like the function of Congress in proposing an amendment*, is a federal function derived from the federal Constitution; and it transcends any limitation sought to be imposed by the people of a state [italics added]. The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its authority from the federal Constitution, to which the state and its people alike have assented . . . If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation in the proper sense of that term. It has been so held.[20]

All of which would indicate that the attempts of the seven states to rescind their resolutions calling on Congress for a convention to propose an income tax limitation amendment are null and void.

A subsidiary problem arises with respect to two of the thirty-three states which have memorializations to Congress in connection with a limit on federal income tax rates. The governors of two of these states—Pennsylvania[21] in 1943 and Montana[22] in 1951—vetoed the resolutions. *Do such vetoes have any force?* In that connection, the following testimony at a panel hearing of the Joint Committee on the Economic Report of the Congress on January 31, 1952, may be of interest:

Alfred G. Buehler of the University of Pennsylvania declared that:

> Pennsylvania is one of the states that passed the resolution, and Senator Martin, who was then Governor, vetoed the resolution . . . I think our Attorney General has given out the opinion unofficially that the veto would have no legal effect.[23]

The governor of a state has no power to veto either a state legislative resolution ratifying a proposed amendment to the United States Constitution or a state legislative resolution memorializing the Congress to call a convention for the purpose of proposing an amendment. The precedent for this principle lies in the rule that the President of the United States has no power to veto a resolution of the Congress proposing an amendment to the Constitution.

Moffett Studio

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This rule that the President's veto does not extend to congressional proposals of amendments but only to legislative acts was first laid down in 1798 by the Supreme Court of the United States in the case of *Hollingsworth* v. *Virginia*. In that case, the validity of the Eleventh Amendment was attacked on the ground that the resolution proposing it in 1794 had not been submitted to the President for his approval. Delivering the opinion of the Court, Mr. Justice Chase stated that:

> The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution.[24]

In 1887, Judge Alexander Jameson stated that the decision in *Hollingsworth* v. *Virginia*:

18. 15 U. S. Stat. at L. 708, 709.
19. 16 U. S. Stat. at L. 1131, 1132.
20. 144 Kan. 390, 392, 393, 71 P. 2d 518, 520 (1937).
21. Pa. Acts, June 7, 1943 (H.R. 50). Vetoed: *Cong. Rec.*, Volume 89, page 5220.
22. Mont. Acts, Feb., 1951 (H. J. Res. 4). Vetoed: *Cong. Rec.*, Daily, March 16, 1951, page 2613.
23. *Hearings*, January, 1952, Economic Report of of the President, Joint Committee on the Economic Report, parts 344-347.
24. 3 Dall. 378, 382, 1 L. ed. 644, 646 (1798).

. . . coincides with that entertained by the Senate, when the amendment of 1803, respecting the mode of electing President and Vice-President of the United States was under consideration. From the journals of that body, it appears that the question was distinctly raised on a motion that the amendment should be submitted to the President for his approval. The following is the entry on that subject:

"On motion that the Committee on Enrolled Bills be directed to present to the President of the United States, for his approbation, the resolution which has been passed by both Houses of Congress, proposing to the consideration of the State legislatures an amendment to the Constitution of the United States, respecting the mode of electing President and Vice-President thereof, it was passed in the negative—yeas 7, nays 23."

In 1865, the amendment proposed by Congress, relative to slavery, having by inadvertence been presented to the President of the United States for his approval by a subordinate officer of the Senate, Senator Trumbull of Illinois, Chairman of the Judiciary Committee of that body, introduced the following resolution:

"Resolved, that the article of amendment proposed by Congress to be added to the Constitution of the United States, respecting the extinction of slavery therein, having been inadvertently presented to the President for his approval, it is hereby declared that such an approval was unnecessary to give effect to the action of Congress in proposing said amendment, inconsistent with the former practice in reference to all amendments to the Constitution heretofore adopted, and being inadvertently done, should not constitute a precedent for the future; and the Secretary is hereby instructed not to communicate the notice of the approval of said amendment by the President to the House of Representatives" . . . Mr. Trumbull's resolution was agreed to without a division.[25]

In 1921, Walter F. Dodd summed up the prevailing opinion:

> An issue which presents itself with respect to state ratification is that as to whether the governor has any veto power over the state legislative action in this regard. It has already been suggested that the President of the United States has no power to disapprove the action of Congress in proposing constitutional amendments to the states, and this view is taken because the proposal of constitutional amendments is not regarded as a regular function of legislation, the Constitution prescribing it as a different process to be exercised in a different manner. The same view applies with respect to the governor's power of vetoing the state legislative ratification of a federal amendment. The state legislature here is not acting as a state legislative body under the terms of the state constitution, but is, in the clear view expressed by the Supreme Court, acting as an agent of the national government in the performance of a function specified by the Constitution of the United States. The Governor has, by the terms of the federal Constitution, no share in this function.
>
> The governor of New Hampshire vetoed the resolution of the legislature of that state ratifying the Twelfth Amendment, but as the vote of the state was not needed to make up the three-fourths vote required for the ratification of the amendment, no issue seems to have been made about the matter. When the legislature of the State of Kentucky rejected the Thirteenth Amendment, the resolution was presented to the governor of that state. The governor, although disagreeing with the legislative action, merely transmitted the action of the general assembly to the federal authorities.
>
> When the income tax amendment was pending, Mr. Hughes, who was then governor of New York, sent a message to the legislature of that state recommending that the amendment be not approved, but nothing in the circumstances indicated any view upon his part that he had any negative power over such action as might be taken by the legislature. In the State of Arkansas, the legislative action ratifying the income tax amendment was submitted to the governor and was vetoed by him. The action of the legislature was, however, transmitted to the Secretary of State of the United States, and Arkansas was properly counted as one of the states ratifying that amendment.[26]

In 1951, Edward S. Corwin added the last word:

> . . . it has been established by practice, with the implied approval of the Supreme Court, that legislative resolutions ratifying proposed amendments to the Federal Constitution are not subject to gubernatorial veto. In *Leser* v. *Garnett* (258 U.S. 130, 137, 32 S. Ct. 217, 66 L. Ed. 505 1922), it appeared that the governor of Tennessee had not certified the ratification of the Nineteenth Amendment to the Secretary of State. The Supreme Court held, nevertheless, that the Amendment had been validly ratified, saying "As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the secretary, duly authenticated, that they had done so, was conclusive upon him . . ."[27]

The principle that the governor of a state has no power to veto a state legislative resolution pertaining to the federal amendatory process is further attested to by decisions of the courts of last resort of the States of Arkansas[28], Colorado[29], Louisiana[30], Maryland[31], Michigan[32], Nebraska[33], North Dakota[34], Pennsylvania[35] and Washington[36]. All of which should invalidate any claim that the governors' vetoes in Pennsylvania and Montana have any force in the matter of the resolutions we are discussing.

The Proposed Convention . . . Mandatory or Discretionary

When thirty-three state legislatures have passed resolutions memorializing the Congress to call a convention for the purpose of proposing constitutional amendments (as required by Article V), *is it mandatory or discretionary with the Congress to call a convention?* Some have raised this point, but the authorities are in agreement that under such circumstances it is mandatory upon the Congress to call a convention.

Professor Henry Rottschaefer stated that amendments

> . . . may be proposed by Congress on its own initiative whenever two-thirds of both houses shall deem it necessary, or by a convention called for that purpose which Congress is

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25. Jameson, Judge John Alexander, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (Callaghan and Co., Chicago, 1887), pages 589, 596, 592.

26. Dodd, Walter F., *Amending the Federal Constitution*, 30 YALE LAW J. 321, 345, 346 (1921).

27. Corwin, Edward S., *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAWYER 185, 207 (1951).

28. *Mitchell* v. *Hopper*, 153 Ark. 515, 241 S.W. 10 (1922).

29. *People* ex rel. *Stewart* v. *Ramer*, 62 Col. 128, 160, 1032 (1916).

30. *State* ex rel. *Morris* v. *Mason*, 43 La. Ann. 590, 9 So. 776 (1891); *State* v. *American Sugar Refining Co.*, 127 La. 407, 53 So. 742 (1915).

31. *Warfield* v. *Vondiner*, 101 Md. 78, 60 A. 538 (1908).

32. *Murphy Chair Co.* v. *Attorney General*, 148 Mich. 565, 112 N.W. 127 (1907).

33. *In re Senate File No. 31*, 25 Neb. 864, 41 N.W. 981 (1889).

34. *State* v. *Dahl*, 6 N. Dak. 81, 58 N.W. 438 (1896).

35. *Commonwealth* ex rel. *Attorney General* v. *Griest*, 196 Pa. St. 396, 46 A. 505 (1900).

36. *State* ex rel. *Mullen* v. *Howell*, 107 Wash. 187, 181, 929 (1919).

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> required to call on application of the legislatures of two-thirds of the States.[37]

Professor Westel Woodbury Willoughby wrote as follows:

> It would appear that the act thus required of Congress is a purely ministerial one in substance, if not in form, and the obligation to perform it is stated in imperative form by the Constitution.[38]

In the words of Article V "The Congress . . . on the application of the legislatures of two thirds of the several States, shall call a Convention proposing Amendments." As long ago as 1816 it was held by Mr. Justice Story in *Martin* v. *Hunter's Lessee*[39] that the word "shall" imports the imperative and the mandatory.

What if Congress refuses to call a constitutional convention to draft the desired amendment or refuses to draft it itself? The hand of the Congress can be forced in the matter. Under the foregoing circumstances an action at law of mandamus in the District Court of the United States would lie against every member of the Congress. For precedents there are the cases of *State* v. *Town Council of South Kingston* and *Virginia* v. *West Virginia*.

In the former, the Supreme Court of Rhode Island issued a writ of mandamus against a municipal *quasi*-legislative body and in the latter the Supreme Court of the United States held that it had the power to issue a writ of mandamus against the West Virginia legislature. In the former case the Supreme Court of Rhode Island stated that:

> . . . the question is whether the case alleged is a proper one for the issue of a writ of mandamus. One office of mandamus is to enforce obedience to statute law. In general, it lies to compel all officers to perform ministerial duties, as well as to compel subordinate courts to perform judicial duties; but not to compel the exercise of discretion in any particular way. It is not contended that the duty of the town council in this matter is other than ministerial. Mandamus is peculiarly the proper remedy when other specific remedies are wanting. The remedy which a legislature can provide is to make a law applicable to the case. When the law is made, it is for the court to enforce it, or to punish for disobedience of it. In either function it must construe the statute, i.e. declare what it means. In the present case, if the law already made imposes a present duty, no further legislation would make it more imperative. Any legislative act designed as a remedy must impose ministerial duties upon individuals. The court must again be resorted to, to compel such individuals to perform those duties. So that in the last analysis this remedy by mandamus is the only specific and efficient one, and if it is not afforded there are no other means which can give to the electors the opportunity to exercise such rights as the law gives them.[40]

In the latter case the Supreme Court of the United States declared that:

> The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. Insofar as the duty to award that remedy is disputed merely because authority to enforce a judgment against a State may not affect state power, the contention is adversely disposed of by what we have said.[41]

Walter K. Tuller, in reviewing the evidence, concluded:

> Every officer, of whatever branch, is sworn to support and obey the Constitution, and it is the natural presumption, fully justified by our history, that none will refuse to obey its mandates as interpreted by that body whose function and duty it is to do so.
>
> The form of remedy for compelling Congress to act would seem clearly to be a writ of mandamus. It is believed that such a proceeding may be instituted by any citizen. Every citizen of the country has a direct interest that the Constitution shall be obeyed, and that interest is none the less real and entitled to recognition and protection by the courts that it is not capable of financial computation. Indeed, the very fact that he has no other remedy serves rather, under the established principles governing its issuance, to emphasize his right to this writ. Since the Constitution does not confer original jurisdiction upon the Supreme Court to issue writs of mandamus (see *Marbury* v. *Madison*), it would be necessary to commence the action in the courts of the District of Columbia. It has been settled since the decision of *Kendall* v. *United States*, that those courts have jurisdiction to issue the writ of mandamus as an original proceeding. From the decision there an appeal can be taken to the Supreme Court of the United States.[42]

Could a Convention Write a New Constitution?

A question which arises at this point has proved troublesome to a few: *If Congress calls a constitutional convention, may that convention not reopen the entire Constitution for revision?* In other words, can a convention called by the Congress under the terms of Article V, undertake to promulgate an entirely new Constitution for the United States?

Professor Orfield declares that:

> Perhaps the most important question concerning a convention is as to the extent of its powers. Could it propose a wholly new constitution? Article V says that Congress "shall call a convention for proposing amendments." If this rule were interpreted literally, it might be argued that the convention could not propose an entirely new constitution in the form of a single document superseding the existing Constitution.[43]

William A. Platz states that:

> But if the convention were to have such power [to propose a new Constitution], would not Article V so state, without leaving the matter to inference?[44]

A related question naturally suggests itself: *Can a convention which goes beyond the scope of its powers (as, for example, attempting to usurp legislative functions), be restrained by legal process?* The Supreme Court of Pennsylvania declared in 1874 in *Wells* v. *Bain* that:

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37. Rottschaefer, Henry, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (West Publishing Co. St. Paul, Minnesota, 1939), page 388.
38. Willoughby, Westel Woodbury, THE CONSTITUTIONAL LAW OF THE UNITED STATES (Baker, Voorhis and Co., New York, 1929), page 597.
39. 14 U. S. 304, 4 L. ed. 97, 103 (1816).
40. 27 A. 509, 602, 22 L.R.A. 85, 87, 88 (1893).
41. 246 U. S. 565, 663, 664 (1918).
42. Tuller, Walter K., *A Convention To Amend the Constitution—Why Needed—How It May Be Obtained*, 11 NORTH AMERICAN REVIEW 389, 392, 393 (1911).
43. Orfield, Lester Bernhardt, THE AMENDING OF THE FEDERAL CONSTITUTION (Callaghan and Co., Chicago, 1942), page 44.
44. Platz, William A., *Article Five of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 46 (1934).

> The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to delegate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an *open* court to redress at our hands.[46]

The Supreme Court of Michigan stated in 1908 in *Carton* v. *Secretary of State* that:

> Should the convention attempt to exercise authority not conferred upon it, its action can be restrained the same as can any other body acting illegally.[46]

"A convention has no *inherent rights*",[47] in the words of the Supreme Court of Pennsylvania. Therefore, the *inherent* safety in a convention! The fact that the authority of delegates to a convention is not set forth in Article V is no cause for alarm. The Supreme Court of New Hampshire declared in 1889 in *Opinion of the Justices* that: "... the authority of the delegates is not set forth. They are not endowed with the entire sovereignty of the state."[48]

Yet another problem, one of especial significance, poses itself: *Does the subject matter contained in the memorialization resolution represent to a convention only the power of suggestion, or does such subject matter constitute the only topic for proposed amendments which the convention may consider and act upon by adopting or rejecting?* The Supreme Judicial Court of Massachusetts declared in 1833 in *Opinion of the Justices* that:

> If, however, the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and, upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the Constitution not so specified.[49]

The Court of Appeals of South Carolina (now the Supreme Court of South Carolina) stated in 1834 in *The State* ex rel. *M'Cready* v. *Hunt* that:

> If . . . the people, electing delegates in their primary capacity, had, by a majority of their ballots, specified a particular measure to be considered and decided in the convention, will it be pretended that the convention would have possessed authority for any other purpose?[50]

The authorities are in agreement and support the foregoing judicial opinions to the effect that the subject matter contained in the memorialization resolutions constitutes the only topics for proposed amendments which the convention may take under consideration and act upon accordingly. Professor Thomas M. Cooley declares that:

> The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass.[51]

Professor Henry Campbell Black added:

> A constitutional convention has no authority to enact legislation of a general sort, and if the convention is called for the purpose of amending the Constitution in a specified part, the delegates have no power to act upon and propose amendments in other parts of the Constitution.[52]

Another legal question of momentous importance which we might discuss here is this: *Must the Congress convene a convention to consider and draft the suggested amendment or can the Congress itself consider and draft the proposed amendment?* Even after thirty-three state legislatures have adopted resolutions memorializing the Congress to call a convention for the purpose of considering a suggested amendment, the Congress could still consider and draft the proposed amendment itself. Or, to state the matter in another fashion, the Congress would not have to convene a convention if it considered the suggested amendment itself, provided that the Congress considered the proposed amendment within a reasonable time from the date of the thirty-third memorialization resolution. By the word "consider" in referring to the Congress considering the suggested amendment, the author means passing or rejecting.

Under the Constitution, there are two types of action recommended to the Congress in the matter of drafting an amendment: firstly, federal consideration by Congress (*i.e.*, drafting, passing and submitting the proposed amendment for ratification), and secondly, federal consideration by a convention. The former is the end or goal sought while the latter is the means sought in order to realize the end. The end represents the intention while the means merely represents an instrument by which the end may be accomplished.

Federal consideration of the proposed amendment is possible by either a convention or the Congress. Since the carrying out of the intention is the dominant or primary objective sought, as long as the Congress can effectuate intention, the Congress clearly has the legal right to act in the matter. Do we have any legal landmarks on this point?

Wayne B. Wheeler has observed, writing in the *Illinois Law Review:*

> In 1901, a number of state legislatures petitioned Congress to call a convention as provided in Article V to consider an amendment for the popular election of senators. Other states followed, until in 1909 when the last such resolution was passed, 26 states had formally made this petition.[53]

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45. *Wells* v. *Bain*, 75 Pa. 39, 57 (1874).
46. *Carton* v. *Secretary of State*, 151 Mich. 337, 346, 347, 115 N.W. 429, 432, 433 (1908).
47. *Wood's Appeal*, 75 Pa. 59, 69, 73 (1874).
48. *Opinion of the Justices*, 76 N.H. 612, 613, 85 A. 76, 782 (1889).
49. *Opinion of the Justices*, 60 Mass. 573, 575 (1833).
50. *The State* ex rel. *M'Cready* v. *Hunt*, Court of Appeals of South Carolina, 2 S.C.L. 291, 338 (1834).
51. Cooley, Thomas M., A Treatise On Constitutional Limitations (Little, Brown and Co., Boston, 1927), page 88.
52. Black, Henry Campbell, Handbook of American Constitutional Law (West Publishing Co., St. Paul, 1927), page 45.
53. Wheeler, Wayne B., *Is a Constitution Convention Impending?* 21 Ill. L. Rev. 782, 786, 788 (April 1, 1927).

And as William Logan Martin has pointed out, writing in the AMERICAN BAR ASSOCIATION JOURNAL:

> . . . the second or convention method, which has never been used to finality, but only to press Congress into action as in the single case of the Seventeenth Amendment.[54]

Thirty-three states have passed resolutions memorializing the Congress to call a convention for the purpose of proposing an amendment limiting federal income tax rates. This makes seven more states than passed resolutions memorializing the Congress to call a convention for the purpose of proposing an amendment providing for the direct election of United States Senators. If twenty-six states were enough to induce the Congress to take the initiative in the matter and propose the amendment providing for the popular election of United States Senators without the Congress waiting for action by two thirds of the states, then certainly the thirty-three states which have acted in regard to the imposition of a ceiling on federal income tax rates should be, and doubtless are, enough to cause the Congress to assume jurisdiction in the province and propose the amendment without referring it to a convention.

Because the income tax limitation movement has reached the point where apparently an impressive number of states have taken action in the matter, proposed congressional legislation has been introduced. As outlined by Robert B. Dresser, writing in the AMERICAN BAR ASSOCIATION JOURNAL:

> . . . there is the First Reed-Dirksen amendment introduced by Representative Chauncey W. Reed and Senator Dirksen in the House and Senate in the fall of 1951. This amendment deprived Congress of the power to impose death and gift taxes at any time, and limited the power of Congress to impose income taxes to a maximum rate of 25 per cent, with power, however, by a vote of three fourths of the members of each House, to raise the rate to 40 per cent each year, even in peacetime, and with further power by a like vote to suspend the limitation on income taxes completely during a major war.[55]

On February 25, 1952, at Chicago, the House of Delegates of the American Bar Association endorsed the Reed-Dirksen Amendment. Mr. Dresser concludes his outline as follows:

> . . . there is the Second Reed-Dirksen Amendment introduced by Messrs. Reed and Dirksen in January, 1953, in substitution for their first amendment. This amendment limits income taxes to a maximum rate of 25 per cent but permits Congress by a vote of three fourths of the members of each House, to exceed that rate without limit. When the top rate exceeds 2 per cent, however, it can be no more than 15 percentage points above the bottom rate. For example, if the bottom rate were 15 per cent the top rate could not exceed 30 per cent. If the bottom rate were 20 per cent the top rate could not exceed 35 per cent. If the top rate does not exceed 25 per cent, however, there is no restriction at all on the bottom rate. It could for example, be one per cent or one half of one per cent.

On April 27, 1954, and again on April 24, 1956, the Senate Judiciary Committee held hearings on the Reed-Dirksen Amendment. Of the witnesses who testified at the hearing, about three fourths went on record as in favor of the Reed-Dirksen Amendment. Upon the convening of the 85th Congress in 1957, the second version of the Reed-Dirksen Amendment was re-introduced in the Congress. The time has come for the Congress to defer to the expressed wishes of a two thirds majority of all of the forty-nine states and propose the amendment.

54. Martin, William Logan, *The Amending Power*, 40 A.B.A.J. 707 (September, 1954).
55. Dresser, Robert B., *The Reed-Dirksen Amendment*, 40 A.B.A.J. 35 (January, 1954).

Alexander Hamilton

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discusses and exhausts the question of relations between nations and the constitutionality of treaties, and reconciles the treaty power with the legislative power under the Constitution. It is ironic that these writings were not even referred to during the recent Senate debate on the treaty power.

In a letter to Rufus King, then Minister to Great Britain, Hamilton wrote:

> The object of the legislative power is to prescribe a rule of action for our own Nation, which includes foreigners among us.
>
> The object of the treaty power is to prescribe a rule of action between two nations, binding on both.
>
> These objects are essentially different, and in a constitutional sense, cannot interfere.
>
> This construction reconciles the two powers and assigns them distinguishable spheres of action.
>
> [Thus,] whatever is a proper subject of a compact between nation and nation, may be embraced in a treaty between the President of the United States, with the advice and consent of the Senate, and the correspondent organ of a foreign state.

Alexander Hamilton's last great literary service to President Washington and the United States was Washington's Farewell Address, in describing which I would join Vice President John A. Krout of Columbia University who says that if any paper deserved to be called "co-authored" this was it—co-authored by George Washington and Alexander Hamilton.

One cannot briefly describe all of Alexander Hamilton's contributions to the United States. To become familiar with them requires a good deal of reading-time. To understand them requires actual study, which means re-reading until the whole of it comes into balance, proportion and clear focus.

I hope I have touched upon enough to justify my assertion that Alexander Hamilton was "the Architect of American Union"; and that his understanding of the structure he built will serve us mightily today if we but recur to his own work, passing over what so many others—friends and foes—have said about him.

Before coming down to specific contemporary problems for which Alexander Hamilton has clear solutions, may I bring on two supporting witnesses. The first is the late Professor Ansel Daniel Morse, of Amherst, who wrote:

> Any just estimate of Hamilton's work must take into the account what he did for the education of the public. His usual method of seeking support was through appeals to the reason of thoughtful and patriotic citizens. In this his success was phenomenal. Friends and foes testified that in the qualities which enable a writer to convince, Hamilton was without a rival. In what he wrote there was rarely a trace of the partisan, never of the demagogue. Much of his work was done while questions relating to the Constitution engaged the attention of the public. For the treatment of such themes he had a singular aptitude. The extent of his writings is as remarkable as their solidarity. He wrote, often at considerable length, on every important public question which arose during the Federalist period. The result was a collection of writings which embody the best political thought of the time. Indeed, considering both range and quality, it is scarcely venturesome to say that Hamilton's works exceed in value those of any other American Statesman.

The second witness is Chief Judge Ambrose Spencer of the State of New York, who had this to say:

> Alexander Hamilton was the greatest man this country ever produced. I knew him well. I was in situations often to observe and study him. I saw him at the bar and at home. He argued cases before me while I sat as judge on the bench. Webster has done the same. In power of reasoning Hamilton was the equal of Webster; and more than this can be said of no man. In creative power Hamilton was infinitely Webster's superior... It was he, more than any other man, who thought out the Constitution of the United States and the details of the government of the Union; and, out of the chaos that existed after the Revolution, raised a fabric every part of which is instinct with his thought. I can truly say that hundreds of politicians and statesmen of the day get both the web and the woof of their thoughts from Hamilton's brains. He, more than any other man, did the thinking of the time.

I agree with Judge Spencer that Alexander Hamilton did the thinking of the time. But I would add that Alexander Hamilton has done much of the fundamental thinking for our own time. As a leader, as youthful as he was, Hamilton saw clearly what his followers and supporters saw only dimly.

In fiscal policy the detail of every Hamilton proposal was grounded in honor and integrity. For these are the bases of credit—public or private—in any political system.

In foreign policy the missionary complex was as alien to Alexander Hamilton as the Devil is to Holy Water. To him the long-term interests of the nation were paramount to every other consideration. With him international prestige was based on national strength, honor, integrity and fair dealing. Anything else was illusory, and therefore dangerous.

To Alexander Hamilton the treaty power of the United States is limited to proper objects of treaty—things over which the United States lacks complete jurisdiction and can only gain such jurisdiction by agreement with the other nation or nations concerned. By that token, objects over which we have complete jurisdiction are outside the limits of the treaty power.

Alexander Hamilton was ever clear on the principle that public officials were bound by the Constitution. Of public officials and their powers he stated:

> ...if they exceed them it is a treasonable usurpation upon the power and majesty of the people, and by the same rule that they may take away from a single individual the rights he claims under the Constitution, they may erect themselves into perpetual dictators.

Of courts, including the Supreme Court, Hamilton wrote: They "... must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."

To Hamilton the exercise of will by a court was outside the scope of judicial power and an invasion of the field of legislative power. To him judges were bound, by their oaths to uphold the Constitution, to exercise judgment *only*, on the intent of the Constitution and the laws pursuant thereto, in deciding cases at the Bar.

Recalling the case in ancient Macedonia where the condemned man appealed from Philip drunk to Philip sober, we must give consideration to situations in which appeals can be taken *from* the will of a court to its judgment. The historic rules for judgments by judges are clear enough.

To Alexander Hamilton, will was the prerogative of the legislator. But judgment was the sworn duty of the judges. It follows that the exercise of will by a high court results in a spurious edict pretending to be law but not law at all, and not binding on any other judge mindful of his own oath to the Constitution and not to the higher court.

Alexander Hamilton well knew that law long antedated the Constitution. He knew well that law was the eternal sense of justice of the community; that law *is* because law *was*, unwritten and unfolding as man moved slowly toward civilization. He knew all too well that spurious edicts of kings, courts and parliaments were struck down when the law was restored.

But Hamilton knew even better that constitutions, once adopted by the people, were fixed permanently, were *unalterable* by government, or by any branch of government, Legislative, Executive, or Judicial; and were alterable only by the people in the manner they had ordained for the making of such changes.

I suggest that Alexander Hamilton is as alive today as he was when he was laying and clarifying the foundations of the Government of the United States. Many among us are unhappy—some, even bitter—about the direction of the *drift* in American public affairs. I must confess that I, too, am uneasy in the great constitutional crisis in which we are enmeshed.

Nevertheless, I am confident that if we recur to the hard and clear thinking of Alexander Hamilton, and spurn the sentimentality of nonsensical phrases that abort "Liberty and The Republic", this nation will live forever.

[From the American Bar Association Journal, July 1960]

CONSTITUTIONAL LAW: THE STATES AND THE AMENDING PROCESS—A REPLY

(By Bernard Fensterwald, Jr., of the Massachusetts and District of Columbia Bars)

This article is in answer to an earlier one appearing in the February, 1959, issue of the Journal. The earlier article declared that Congress was duty-bound to call a constitutional convention for the purpose of proposing an amendment to the Constitution limiting the Federal Government's power to collect income taxes. This contention rested upon the author's calculation that the legislatures of thirty-three states—two thirds of the forty-nine—had submitted resolutions calling for such a convention. Mr. Fensterwald examines the problem and answers the contentions put forth in the 1959 article.

In the February, 1959, issue of this Journal there was an article calling for a constitutional convention to draft an amendment to limit federal income taxes. The author was Frank E. Packard, who is Executive Vice President of the Western Tax Council and a veteran of the Spanish-American War.

The first paragraph of his article was as follows:

"On March 2, 1957, the Legislature of Idaho passed a resolution memorializing the United States Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States limiting federal income tax rates. On March 30, 1957, the Tennessee General Assembly followed suit. This meets the requirement of Article V of the Constitution that if two thirds of the states, or thirty-three in number, petition Congress to call the convention for the purpose of proposing an amendment to the Constitution, then Congress "shall" do so. The thirty-three states which have enacted such memorializations are: Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin and Wyoming."

In the balance of the article, Mr. Packard raised and ostensibly resolved some doubts as to the validity of the applications of several states, including those of seven states which have "attempted" to rescind their actions. He clearly implies that the Congress is shirking a binding duty to call a special constitutional convention to consider an amendment to limit federal income taxes. Mr. Packard goes on to say that "if Congress refuses to call a constitutional convention . . . [it] can be forced in the matter . . . [and] an action at law of mandamus in the District Court of the United States would lie against every member of the Congress".

If Mr. Packard is correct, his charge against the Congress is a most serious one. This article is an attempt to assess the validity of his position.

Let it be made clear at the outset that no effort will be made to delve into the many complex economic and political questions raised by proposals to limit the federal taxing power. We are concerned here solely with the legal and, more particularly, the constitutional aspects of the charge of dereliction of duty leveled at the Congress by Mr. Packard.

TWO METHODS OF AMENDMENT

Article V of the Constitution provides two distinct methods for proposing amendments to the states: (1) "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments"; or (2) "[the Congress] on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments".

Method No. 1 is the only one that has been used: the Constitution has been amended twenty-two times in our one hundred and seventy years, and each time it has been the Congress which has proposed the amendment to the states, three fourths of which have ratified.

Method No. 2 has never been used. However, this lack of use does not affect its availability. If two thirds of the states validly apply for its use, the Congress shall call a convention; conversely, until two thirds validly apply, Congress has no right or power to call such a convention.

Although Mr. Packard implies throughout his article that Congress has little or no discretion in assessing the adequacy or validity of the applications, it seems patently obvious that it is the Congress itself which must pass upon this question. Otherwise it cannot carry out its constitutional responsibility.

Are there a sufficient number of valid applications on file with Congress to confer on that body both the duty and the right to call a convention to limit federal income taxes? As a 1952 congressional report correctly observes, "In view of the serious nature of the amending process and the difficulties inherent in convention proceedings, the question of determining when Congress must call a Federal convention at the behest of the States is of more than academic interest."[1] Therefore, let us see whether or not the two thirds requirement has in this case actually been met.[2]

TEN LITTLE INDIANS

Agatha Christie once wrote a very popular book ("And Then There Were None") and play ("Ten Little Indians"), both of which were based on an old nursery rhyme. Every time there was a murder in the story, another little Indian statue would disappear. Eventually there were none left.

Upon examination, the thirty-three state applications are very much like the little Indians—they keep on disappearing. Not all of them vanish, but a sizable number do.

For example, South Dakota's application relates to procedures for amending the Constitution itself rather than to an amendment with respect to federal income taxes.[3]

And then there were thirty-two . . .

Maryland's memorial was adopted by the state's House of Delegates but not by its Senate, and therefore was not an application from the "legislature" as required by the Constitution.[4]

And then there were thirty-one . . .

Identical resolutions relating to limitations of the federal taxing power were passed by the two houses of the Texas state legislature, but neither house concurred in the resolution of the other, and no application was ever filed with Congress.[5]

And then there were thirty . . .

The resolutions of two states (Nevada and Montana) and the most recent resolution of a third state (Massachusetts, which also filed an application in 1941 and a rescission thereof in 1952) called upon Congress itself to propose an amendment to the Constitution which would place a limitation on its taxing powers, but made no request for Congress to call a constitutional convention.[6] The absence of any mention of such a convention in the three later resolutions can be considered *prima facie* evidence that the states in question did not intend their resolutions to be regarded as applications for a constitutional convention, and Congress is of course under no legal compulsion to treat them as such. Indeed, it is most doubtful that Congress has the legal right to count these as valid applications if and when it must determine whether or not two thirds of the state legislatures have applied for the calling of a convention on a particular subject.

And then there were twenty-seven, or at best twenty-eight . . .

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[1] U.S. House of Representatives, Committee on the Judiciary. Staff Report: Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates. Washington: GPO, 1952, page 1.

[2] The whole question has been rendered technically moot by Hawaii's recent accession to the Union, with thirty-three states no longer constituting the necessary two-thirds before Congress must act; it now takes thirty-four. However, if Mr. Packard's contention regarding the thirty-three memorials is correct, the question remains on the horizon and cannot be so easily dismissed.

[3] Brickfield, Cyril F. Problems Relating to a Federal Constitutional Convention, Washington: GPO. 1957, page 87. (Printed for the House Committee on the Judiciary.)

[4] U.S. House of Representatives, op. cit., page 5; see also 84 Congressional Record 3320 (1939).

[5] U.S. House of Representatives, op. cit., page 6.

[6] *Ibid.*, page 66; Nevada, 98 Congressional Record 8395 (1952); Montana, 97 Congressional Record 2537 (1951); Massachusetts, 98 Congressional Record 1793 (1952).

These are the only "applications" which might well be found to be invalid *ab initio*. There are a number of others which might well be deemed defective by Congress and which might reduce the number of valid applications to approximately *one* third of the state legislatures, rather than the required *two* thirds. In the remainder of this article I shall not attempt to predict the exact number of "little Indians" that might be left after congressional scrutiny; I shall confine my remarks to several general problems which bear on the validity of the applications.

CAN STATES CHANGE THEIR MINDS?

Mr. Packard discusses at some length whether states, once they have made application to Congress for a convention, can later change their minds and rescind their applications. He lists seven states which have adopted and forwarded to Congress resolutions to rescind their original application. He refers to Alabama, Arkansas, Illinois, Iowa, Kentucky, Rhode Island and Wisconsin. A complete list would include five more states: Louisiana, Maine, Massachusetts, Nebraska and New Jersey.[7] It is not surprising that Mr. Packard expresses the view that such resolutions to rescind are "null and void".

He begins his argument by stating:

"Obviously, an amendment which arises through memorialization by states is equated with an amendment which arises through proposal by Congress. Similarly, the right of a state to withdraw memorialization *must* be equated with the right of Congress to withdraw a constitutional proposal." [Italics added.]

The first sentence is reasonable, but the use of the verb "must" in the second sentence not only seems to imply that Congress is powerless to pass upon the validity of resolutions to rescind, but also that the proposition is beyond question. Among those whom he quotes is ostensible support of his view is Professor Francis M. Burdick, who says, "It seems safe to assert that Congress, *having once submitted a proposed constitutional amendment to the States*, cannot thereafter withdraw it from their consideration." [Italics added.] Mr. Packard goes on to cite an impressive number of court decisions to the effect that interstate compacts or constitutional amendments, "when ratified by the legislature of a state . . . will be final as to such a state." He was unable to cite a single decision bearing on the finality of applications for a constitutional convention.

Mr. Packard's contention that "the right of a state to withdraw a memorialization must be equated with the right of Congress to withdraw a constitutional proposal" is open to some doubt. Obviously, memorials by states do not in themselves produce agreement on a proposed amendment to the Constitution; such memorials are—in constitutional terms—applications by state legislatures to Congress, requesting the latter to "call a convention for proposing amendments". It is the convention which proposes "an amendment" to the states for ratification.

In drafting, adopting and submitting a proposed constitutional amendment to the states for ratification, *a constitutional convention* would be performing an act analogous to that of Congress in proposing a constitutional amendment to the states. However, it is difficult to see how the analogy can be extended to include applications by states to Congress. It is more difficult to conclude, as Mr. Packard does, that, "The right of a state to withdraw a memorialization *must* be equated with the right of the Congress to withdraw a constitutional proposal." [Italics added.]

Nor are Supreme Court decisions denying the right of states to change their minds after their legislatures have already ratified interstate compacts or constitutional amendments relevant to the case in point. (Mr. Packard cites, *inter ali, State of West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951), and attempts by New Jersey and Ohio to rescind their ratifications of the Fourteenth Amendment.) Ratification is the final act by which sovereign bodies confirm a legal or political agreement arrived at by their agents; a state application to Congress to call a convention is of an entirely different nature.

On the other hand, the Supreme Court stated in *Coleman* v. *Miller* that, "The question of the efficacy of ratifications by state legislatures, in the light of pre-

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[7] Louisiana, 100 Congressional Record 9420 (1954); Maine, 99 Congressional Record, 4311 (1953); Massachusetts, 98 Congressional Record 4641 (1952); Nebraska, 99 Congressional Record 6163 (1953); New Jersey, 100 Congressional Record 11943 (1954).

vious rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendments." [8] If an attempt to rescind on so important and final a matter as the ratification of proposed constitutional amendments is "a political question" for Congress to decide, then it does not seem extravagant to suggest that the validity of attempts to rescind applications for a convention would likewise be deemed a political question subject to the verdict of Congress.

It is true that Congress might wish to stipulate a cut-off date for rescissions. For example, it might say that no rescission will be considered valid after either House, upon application of two thirds of the states, has adopted a resolution to call a constitutional convention. This circumstance of course does not apply in the present case, where Congress itself has not carried out any act in the amending process beyond recording receipt of the applications. If Congress chose to accept rescission resolutions as valid, Mr. Packard's thirty-three applications would be still further reduced—to sixteen.

CONTEMPORANEOUSNESS AND HOMOGENEITY OF APPLICATIONS

There are additional problems which arise with respect to the contemporaneousness and homogeneity of those applications which were valid in the first instance. In this regard, Corwin and Ramsey state the following sensible view:

"To be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought to be expressive of similar views respecting the nature of the amendments to be sought." [9]

The applications listed by Mr. Packard could not be called "reasonably contemporaneous" with any degree of confidence. The first application—that of Wyoming—was made twenty years ago, and eleven of the remainder, excluding those which have been renewed, were made fifteen or more years ago.

In *Dillon* v. *Glass*, the United States Supreme Court upheld the right of Congress to fix a reasonable time for ratification of a proposed amendment, and concluded that the seven years prescribed by Congress for adoption of the Eighteenth Amendment was reasonable.[10] The implications and scope of the *Dillon* v. *Glass* decision were further expanded by the Supreme Court in *Coleman* v. *Miller*, which also involved a proposed constitutional amendment. Here the Court stated:

". . . the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." [11]

In *Coleman* v. *Miller*, the Supreme Court recognized that changing political, social and economic conditions might affect the desirability of constitutional amendments proposed in response to the felt needs of a particular day, and that it was for Congress, rather than the courts, to establish time limits for ratification of proposed amendments on the basis of these "political" considerations.

Although state applications to Congress repersent an earlier stage in the amending process, changing conditions naturally have an equal effect on the

[8] 307 U.S. 433, 450 (1939).

[9] Edward S. Corwin. *The Constitutional Law of Constitutional Amendment*, 26 Notre Dame Lawyer 185, 195–196 (1951). Note also the following statement by the Supreme Court with respect to contemporaneousness of *ratifications:*

"We do not find anything in the Article [V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary" *Dillon* v. *Glass* 256 U.S. 368, 374.

[10] 256 U.S. 368 (1921).

[11] 307 U.S. 433, 453, 454.

desirability of constitutional amendments envisaged at that stage. It does not seem extravagant to suggest that the courts would probably also consider it within the province of Congress to fix reasonable time limits within which earlier stages of the amending process must be carried out, including the filing of applications by two thirds of the states. The twenty-year spread covering Mr. Packard's initially valid applications does nothing to strengthen his contention that Congress is now obliged to call a constitutional convention. After all, the demands on the Federal Government, especially demands of national defense, were considerably different before World War II, when the first application was made. The fact that a dozen states have rescinded or—to use Mr. Packard's language—attemped to rescind their applications has a bearing on this point.

Then there is the problem of homogeneity. Although the applications which were valid in the first instance would all seek to limit the federal taxing power, there is considerable variation with respect to the stipulations proposed in each application. This in itself would not appear to present any great difficulty. As the remarks of Corwin and Ramsey might suggest, it can hardly be expected that two thirds of the states will arrive at an exact consensus in the wording of a proposed amendment in their applications to Congress for the holding of a convention. That is obviously the work of the convention.

However, five of the states have submitted applications which contain specific and identical reservations bearing upon their own validity. The applications in question are those of Nebraska, New Mexico, and the most recent applications of Michigan, New Hampshire and Maine. By their own terms these applications are effective only if "two thirds of the States make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convenion would have power only to propose the specified amendment and would be limited to such proposal and would not have power to vary the text thereof nor would it have power to propose other amendments on the same or different propositions." [12] Must Congress accept these applications as being among those which are legally compelling if the stipulations set forth in them are not met? The matter is certainly open to doubt. The earlier, less restrictive applications of the latter three states were filed in 1941, 1943 and 1944, respectively, and as has been previously pointed out, their validity is not entirely certain.

A WRIT OF MANDAMUS?

In sum, a considerable number of the memorials listed by Mr. Packard either had no initial validity as relevant and proper applications, were filed fifteen or more years ago, or have been rescinded. Only about half of them are of the kind which would constitutionally oblige Congress—if there were enough of them—to call a convention for the purpose of proposing an amendment.

Mr. Packard, in asserting that two thirds of the states have filed valid applications for a constitutional convention, concluded that if Congress refused to fulfill its constitutional obligations, a writ of mandamus forcing Congress to act could be issued by the courts. However, in the case of *Mississippi* v. *Johnson*, in which the Supreme Court was asked to enjoin the President from enforcing the Reconstruction Acts, the Court declared:

"The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; through the acts of both, when performed, are in proper cases, subject to its cognizance." [13]

Under the doctrine of the separation of powers, the courts have refrained from issuing injunctions or writs of mandamus against the President, and they are not likely to serve a writ of mandamus on the Congress of the United States or its members. As we have seen, however, Mr. Packard's legal case is something less than iron-clad. And, as it turns out, he does not seriously propose to take it to the courts.

After attempting at great length to prove that it is mandatory for Congress to call a convention under present circumstances, and after rising the spectre of forcing Congress to act through a writ of mandamus, Mr. Packard states that,

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[12] Nebraska, 95 Congressional Record 7893–94 (1949); New Mexico, 98 Congressional Record 947–48 (1952); Michigan, 95 Congressional Record 5628–29 (1949); New Hampshire, 97 Congressional Record 10716–17 (1951); and Maine, 97 Congressional Record 6034 (1951).

[13] 4 Wall. 475 (71 U.S. 475), 500 (1866).

"Congress would not have to convene a convention if it considered the suggested amendment itself." He further maintains that, "Since the carrying out of the intention is the dominant or primary objective sought, as long as the Congress can effectuate intention, the Congress clearly has the legal right to act in the matter." And he concludes his article by saying that, "The time has come for Congress to defer to the expressed wishes of a two-thirds majority of all of the forty-nine states and propose the amendment."

Whose expressed wishes? Those of the states which have passed resolutions to rescind? That of Wyoming twenty years ago?

The leap which Mr. Packard takes from his earlier position, that Congress must now call a constitutional convention, to his later one, that Congress might just as well avoid all the fuss of constitutional conventions and writs of mandamus by carrying out the "expressed wishes" of two thirds of the states, makes more sense politically than it does legally. Has he not, in effect, constructed a legal paper tiger aimed at convincing Congress that it should propose a constitutional amendment to the states?

In asserting that "the carrying out of the intention is the dominant or primary objective sought", Mr. Packard refutes his earlier argument that state resolutions to rescind their applications are "null and void" despite the reversal of "intention" or "expressed wishes" thereby indicated. By thus departing from the legal aspects of the case, Mr. Packard would appear to be hoist with his own political petard.

CONCLUSION

There is no legal bar whatever to prevent the Congress from proposing to the states an amendment which would limit federal income tax rates. However, before employing the "second route" of a constitutional convention for this purpose, there must be valid applications from two thirds of the states. As of today, this requirement has not been met, and the Congress would be acting outside the scope of its constitutional authority if it succumbed to the cry that such a convention be called.

[From the American Bar Association Journal, vol. 45, November 1959]

PETITIONING CONGRESS FOR A CONVENTION: CANNOT A STATE CHANGE ITS MIND?

(By Frank W. Grinnell of the Massachusetts Bar (Boston)[1])

In the February issue of the Journal, an article by Frank E. Packard, of Chicago, stated that thirty-three states (two thirds of the forty-nine states existing at the time) had passed resolutions calling upon Congress to call a convention to propose a constitutional amendment limiting the federal power to tax incomes. In his list of thirty-three states, Mr. Packard included seven that had later withdrawn their resolutions, on the theory that a state may not rescind such a resolution once passed. Mr. Grinnell disagrees on this question of constitutional law. He sets forth his view of the problem in this article.

One of our most balanced American historians—the late Andrew C. McLaughlin—in his lectures on "American Constitutionalism" said, "The hope for successful popular government—and its justification—is based on the willingness of people to think."

That is an impressive way of reminding us of the remark Edmund Burke in 1774 in his famous address to the Electors of Bristol (his constituents): "Government and legislation are matters of reason and judgment and not of inclination."

Mr. Packard's interesting article on the amending process in the February JOURNAL is summarized on page 161 on the following headnote:

"Amendments to the Federal Constitution may be proposed either by two thirds of both houses of Congress or by a convention called by Congress at the application of the legislatures of two thirds of the states. The second method of pro-

[1] Frank W. Grinnell was admitted to the Massachusetts Bar in 1898. He is the secretary of the Massachusetts Bar Association and editor-in-chief of the Massachusetts Law Quarterly. He has been a member of the American Bar Association since 1907.

posing constitutional amendments has never been used. However, Mr. Packard points out that thirty-three states have adopted resolutions calling upon Congress to call a convention to propose an amendment to limit the power of the Federal Government as to income taxes. Although seven of the thirty-three have since tried to rescind their resolutions, Mr. Packard believes that these attempted rescissions are of no effect, and he argues that a writ of mandamus will lie to compel the Congress to issue the call for a convention."

While the article deserves to be read, that brief statement seems sufficient for the need of further discussion.

After quoting a variety of opinions of well-known authors and some state judges, he concludes:

"All of which would indicate that the attempts of the seven states to rescind their resolution calling on Congress for a convention to propose an income tax limitation amendment are null and void."

He and those whom he quotes reach this conclusion by relying on the action of Congress refusing to recognize the revocations by Ohio and New Jersey of their previous votes ratifying the Fourteenth Amendment. That amendment was adopted under peculiar circumstances during the reconstruction days after the Civil War, and the practice under those peculiar political conditions can hardly be accepted as a final settlement of this far-reaching question. The history of the Civil War amendments as told by Professor Burgess' volume on "Reconstruction and the Constitution" is worth reading in this connection.

What sound reason is there for saying that ratification by a state legislature is irrevocable if a succeeding legislature votes to revoke before the requisite number of states have ratified? Certainly it seems peculiar if a state can change its mind in favor of, it cannot also change its mind against, ratification. Is not the notion that a state can change its mind in only one direction a most stultifying doctrine to apply in these days to the representatives of the people of the United States? How do the people differ from an individual in this respect? No one knows what amendments may be submitted in the future as the result of political excitement; and, if the entire national structure is to be submitted to the hasty political action of state legislatures without any opportunity for reconsideration, the country may wake up and find itself in a most serious situation some day.

Turning now to the wording of Article V that "on application of two thirds of the several states" the Conggress "shall call a convention for proposing amendments". Mr. Packard quotes Professor Willoughby (on page 196) as suggesting that "it would appear that the act thus required of Congress is a purely ministerial one in substance if not in form" and states that Mr. Justice Story in *Martin* v. *Hunter's Lessee* said "that the word 'shall' imports the imperative and the mandatory". Mr. Packard also suggests, with some citations, that a District Court of the United States could, and would, issue a writ of mandamus to the Congress of the United States to compel the Congress to call a convention. These suggestions call for very close analysis and some consideration of the nature and structure of the Government of the United States and the relations of its branches.

In the first place, *Martin* v. *Hunter's Lessee* had no relation to the problem. In the second place, the word "shall" has very flexible meanings as indicated in a discussion of "shades of shall" illustrated by the appearance, in one section of a Massachusetts statute, of nine "shalls" with different meanings—"directory", "mandatory", etc. In the third place, Mr. Packard poses what may be called an enormous question for the Bar, the Bench and the American people generally.

We are considering three questions—first the practicable meaning of the word "shall" in Article V; second, under the constitutional relations of Congress and the Judicial Department can a district court created and subject to repeal by the Congress issue mandamus to the Congress? third, if so, in case of appeal to the Supreme Court under the "appellate jurisdiction—with such exceptions and under such regulations as the Congress shall make", could and would that court sustain the issuance of such a writ? *Marbury* v. *Madison* does not answer or even discuss these related questions.

Mr. Packard says (page 196) "The hand of the Congress can be forced in the matter." But how? No one but the Congress can "call" a convention. The courts are not authorized to do it, but to issue a writ would be an attempt by the court to do what Congress alone is authorized to do. It seems necessarily to follow that the word "shall" in Article V is a directory, and not an impossible mandatory word. If a district court should venture to issue such a writ, the

Congress could immediately abolish the court which issued it. Who could apply for such a writ? An individual, a state legislature, or a group of state legislatures? Who would be the necessarily interested parties involved in addition to every member of Congress? Certainly every citizen of every one of the United States including Alaska and Hawaii, including babies. How could they be represented? By their state legislatures, which might be changed in the midst of the litigation? Is it conceivable that any court should, would or could, precipitate such a situation between two of the independent co-ordinate departments of the government of the nation?

Returning again to the thirty-three states alleged to have asked for a convention of which seven have revoked their request, Mr. Packard lists Massachusetts. Just what did Massachusetts do? I know nothing of the contents of the alleged resolutions of other state legislatures, but this is what happened in Massachusetts:

In 1941, two years after the collection of resolves, like a collection of signatures, began in Wyoming, the Massachusetts legislature adopted a resolution requesting Congress "that it call a convention—for the purpose of proposing an amendment to said Constitution as follows." Then followed a specific form of amendment. Note that the convention was to be called not to consider but "propose".

In February, 1952, the Massachusetts legislature adopted another and quite different resolution, somewhat curiously phrased, as follows:

"*Whereas*, A limiting of the power of the federal government to impose taxes on the people would automatically curtail government spending; and

"*Whereas*, If we withhold our money, our officials cannot carry us into socialism or communism; and

"*Whereas*, A limiting of spending by our government would enable our elected officials to resist requests from those who exert great pressure for bigger handouts; and

"*Whereas*, Most of our states and municipalities are subjected to limitations in their ability to tax, to the end that they are sound while the federal government is almost bankrupt; and

"*Whereas*, We have ceilings on everything but taxes; therefore be it

"*Resolved*, That the General Court of Massachusetts memorializes the Congress of the United States to amend the Constitution of the United States to the end that all taxes levied and collected in any one year shall not exceed a certain and reasonable percentage of the national income for the nearest preceding calendar year for which figures are available, with a special provision to provide moneys for military emergencies; and be it further

"*Resolved*, That copies of these resolutions be transmitted forthwith by the state secretary to the President of the United States, to the presiding officer of each branch of Congress, and to the members thereof from this commonwealth."

Note that this resolution did not ask for a convention, but expressly asked the Congress "to amend the Constitution", which it cannot do.

Mr. Packard refers to the Fourteenth Amendment incident as a "precedent" (on page 162), but he does not tell the whole story. Secretary Seward himself expressed a doubt whether the action of the legislatures of Ohio and New Jersey in revoking a previous ratification before the requisite number of states had ratified might not be effectual in withdrawing the consent of those states. This appears in his announcement of July 20, 1868, which is quoted in Volume II of Watson's book on the Constitution, pages 1314–15, as follows:

"*Whereas*, no law expressly or by conclusive implication authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of state legislatures, or as to the power of any state legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution, and

"*Whereas*, it further appears that the Legislatures of two of the States, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or either of them to the aforesaid amendments.

"Now, therefore, be it known that I . . . do hereby certify that if the resolutions of the Legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the Legislatures of those States which purport

to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States.

On the following day, however, Congress passed a concurrent resolution:

"That the following States, including Ohio and New Jersey, having ratified the fourteenth article of amendment to the Constitution of the United States; therefore, be it resolved that said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State."

Secretary Seward then issued another proclamation certifying that:

"The said amendment has become valid to all intents and purposes to the amendments of the Constitution."

The only "precedent", therefore, appears to be a political one adopted during great political excitement in the face of doubt publicly expressed by so able a lawyer as William H. Seward.

Mr. Packard's reference (on page 162), as "a perfect analogy, to the case of *West Virginia* v. *Sims*, 341 U.S. 22, relating to the attempt to withdraw from an interstate compact *after* the compact was completed, seems to me to have nothing to do with the question he raises. At all events, whether the dogmatic resolution without reasoning by a headstrong majority of Congress in a period of vindicative politics will stand as "a precedent" if it comes before the Court as to any future amendment or not, it is a far cry to apply it as a precedent to a mere resolution by a state legislature asking the Congress to do something. Bunches of such state resolutions are passed almost every year about something. So far as I have observed few of them are seriously considered. Mr. Packard lists Massachusetts among the states that have asked Congress to call a convention, but the Massachusetts legislature changed its mind. And why should it?

Of course, I agree with Mr. Packard that a legislature in dealing with federal amendments is not legislating on state matters. They are performing federal functions with which the state governors have nothing to do. But the legislators are acting in a profoundly serious representative capacity for all the citizens of their state and their "posterity" when they act in any way concerning the Federal Constitution. They have no unrestrained powers or functions to commit their people without deliberate thinking. All of us change our minds constantly about something or other before final action if we are wise enough to do so. Surely the representatives of all of us have not only the power, but the constitutional duty, to do so if they realize before it is too late that they have made a mistake while representing us. It is our right and their duty as a matter of common sense because we may have to pay the price if they do not. While I appreciate their sincerity and earnestness, I respectfully submit that Mr. Packard and all persons whose opinions he cites are profoundly wrong on this question as a matter of common sense.

[From the American Bar Association Journal, vol. 49, December 1963]

The Role of the States in Proposing Constitutional Amendments

(By Fred P. Graham, Former Chief Counsel of the Senate Subcommittee on Constitutional Amendments*)

Drawing on the history of the article providing for amendment of the United States Constitution and the proposals that have been submitted by states for constitutional conventions, Mr. Graham concludes that the states have a vital role in the amending process in prodding Congress to act in areas involving the prerogatives of Congress itself. Too often, however, the states have allowed themselves to be used in campaigns for radical amendments that do not have popular support and to which Congress has responded by ignoring the states' requests for a convention.

During the first eight months of 1963, the legislature of eighteen states submitted to Congress thirty-eight applications calling for a constitutional conven-

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The author wishes to express his gratitude to William H. Barr for his able assistance in the preparation of this article.

tion to propose amendments to the Constitution of the United States.[1] This was almost four times as many applications as were submitted to Congress in the first century of the Constitution, and by far the largest number to be adopted in any one year. Most of the applications called for the proposal of one or more of the three so-called states' rights amendments recommended to the states by the Council of State Governments. Critics of the three proposals charged that they were "radical in the extreme" [2] and that their adoption would result in basic changes in the federal system of government. The controversy developed into a *cause célèbre* in the press; many citizens became aware for the first time that the Constitution does provide a system whereby amendments can be suggested by the states.

Unfortunately, the public controversy centered around the three proposals themselves and virtually ignored the question whether such extreme amendments could, as a practical matter, be added to the Constitution through the efforts of state legislatures. The very fact that opponents of the proposals viewed them with such alarm created the impression that they might somehow be forced into the Constitution by the pressure of state legislative efforts, without the approval of Congress and the general public. These widespread misinformed beliefs have blurred the public understanding of the actual powers of the states in proposing constitutional amendments.[3] Since there appears to be a trend toward greater use of this constitutional device by the state legislatures, it is worthwhile to examine the true role of the states in the amending process.

ARTICLE V: AN INEFFECTIVE COMPROMISE

When the delegates to the Constitutional Convention met in Philadelphia in 1787, two considerations were uppermost in their minds—the states would have to transfer more of their sovereign power to the central government and the new constitution would have to be made easier to amend than were the Articles of the Confederation. Under the Articles of Confederation, only the Congress could propose amendments, and the unanimous approval of the states was required for ratification. This requirement proved too strict, and none of the proposed amendments was ever ratified. It was only logical that the delegates should attempt a compromise under which Congress would share with the states its power to propose amendments, and the states would surrender some of their power to veto amendments.[4]

At first the convention considered giving the states the sole power to propose amendments, but the delegates later rejected this system as inconsistent with a constitution which was intended "to be paramount to the state constitutions".[5] The convention then adopted a resolution by Madison, which clearly vested in Congress the dominant role in the amending process: [6]

"The Legislature of the United States whenever two-thirds deem necessary, or on the application of two-thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States."

Several of the delegates were uneasy about a constitutional arrangement that placed the central government in a position of superiority over the states and at the same time gave the central government a veto over the amending process. Mason argued that this system would be "exceptional and dangerous" because "no amendments of the proper kind would ever be obtained by the people, if the

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[1] A list of the state applications is printed as an appendix to this article.

[2] Letter from Professor Charles L. Black, Jr., to Arthur J. Freund, Jan. 7, 1963, in 109 Congressional Record 8263–65 (1963).

[3] Former President Dwight D. Eisenhower stated in a speech on May 26, 1963, that the people could amend the Constitution "through their state legislatures and without regard to the Federal Government . . .", Washington Post, May 27, 1963. Newspaper comments on the "states rights' amendments" controversy are collected at 109 Congressional Record 8267–71, 9649–51, 10663–64, 11331–33, 12137–38 (1963).

[4] See generally, Schelps, *The Significance and Adoption of Article V of the Constitution*, 26 Notre Dame Law. 46 (1950); Martig, *Amending the Constitution Article Five: The Keystone of the Arch*, 35 Mich. L. Rev. 1253, 1267–69 (1937); Note, 70 Harv. L. Rev. 1067 (1957).

[5] 2 Farrand, Records of the Federal Convention of 1787 557–59 (5th ed. 1937). In contrast, the Constitution of the Confederate States of America did give the states the exclusive power to propose amendments. Commander Documents of American History 384 (6th of 1958).

[6] *Id.* at 559.

government should become oppressive, as he verily believed would be the case." [7] A further compromise was then proposed to require Congress, upon the application of two thirds of the states, to call a constitutional convention to propose the amendments, rather than merely to propose the amendments itself.

Madison made it clear that this modification would be an ineffective compromise, because Congress would be no more bound to call a convention upon the applications of two thirds of the states than it would be to propose the amendments itself. He also suggested that the uncertainties surrounding an unprecedented constitutional convention might inhibit its use, but his very fact tended to render the constitutional convention a more harmless sop to Mason and his followers, and it was incorporated into the final version of Article V.

As a result, Article V gives Congress exclusive control over the amending machinery, while empowering the states to act only to trigger the process. The grammatical construction of the article, however, creates the superficial impression that the state legislatures have equal power to propose amendments:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Institution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided . . . that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The practical result has been to deprive the states of any effective role in proposing constitutional amendments. All twenty-three of the present amendments, plus the proposed twenty-fourth, were proposed by Congress because proponents of amendments always found it more expedient to work directly through Congress, rather than to attempt the clumsy and uncertain method of a constitutional convention called by the states.

However, it does not follow that states are precluded from any practical role in the proposing of amendments. An analysis of the 244 state applications that have been submitted to Congress reveals that, although most amounted to little more than a political gesture and a waste of time, some of them did contribute directly to the eventual adoption of an amendment. From this study it appears that in certain peculiar circumstances the states may play a significant role in the constitutional amending process.

I. PROPOSALS NOT HAVING BROAD NATIONAL SUPPORT

A large percentage of the state applications Congress has received called for amendments which had very little national support and which would have had no chance of approval by two thirds of both houses of Congress. Many concerned sectional issues that were too narrow to obtain national support—such as tidelands oil, the Townsend plan, taxation of nonresident income, and reversal of the school desegregation decision—and amounted to little more than state legislators blowing off political steam. In recent years, however, frustrated proponents of radical proposals which do not have wide popular and congressional support have attempted serious campaigns calculated to amend the Constitution by means of state action. These efforts ignore the fact that the state application alternative for proposing amendments was designed to function only when a proposal enjoys broad national support. These radical proposals have appeared initially to make progress, in terms of numbers of state applications, but none of them has ever been taken seriously because they obviously lack the necessary support to hurdle Congress, a constitutional convention and ratification.

The experience of the income tax limitation proposals illustrates the frustrations that face these measures under Article V. Since 1939 there has been an organized effort to call a constitutional convention to limit federal tax rates on incomes, gifts and inheritances.[8] Twenty-nine states have adopted applications

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[7] *Id.* at 629.

[8] A succession of congressional hearings and staff studies have examined the development of this campaign. Staff of House Committee on the Judiciary, 87th Congress, 1st Sess., State Applications Asking Congress To Call a Federal Constitutional Convention (Committee Print 1961); S. Doc. No. 5, 87th Congress, 2d Sess. (1961); Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Congress 1st Sess (1958); Hearing Before a Subcommittee of the Senate Committee on the Judiciary on S. J. Res. 23, — Congress, 2d Sess. (1954); Staffs of the House Joint Committee on the Economic Report of the Select Committee on Small Business, — Congress, 2d Sess. (1952).

calling for a limitation (usually 25 per cent) and five have proposed total abolition of the taxes. Thus, when the legislature of Colorado adopted an application last April calling for a convention to limit the income tax and to eliminate gift and inheritance taxes, it represented the thirty-fourth application for a convention to deal with federal taxation, thereby apparently complying with the two-thirds requirement of Article V. Congress simply ignored the matter.[9]

But if Congress had bothered to defend its refusal to consider a constitutional convention, it would have found ample grounds to challenge the validity of many of the applications.[10] Twelve of the applications had been rescinded by the legislatures. One had been vetoed by the governor. Six were so defective in form or content that they appeared invalid on their face. Many were adopted so long ago that they could not be considered a valid expression of the present desires of the respective legislatures. Several were so different in wording that they might not logically be counted together. Thus, the mere adoption of a thirty-fourth application on tax limitation did not represent the broad popular mandate contemplated by Article V, and Congress was not criticized for failing to call a constitutional convention.

The important lesson for others who would attempt to force through radical amendments by state action is that Congress has the sole power to determine when a constitutional convention has been validly called for, how the convention should be selected and operated,[11] and by what means any proposed amendment would be ratified. Since the courts have made it clear that they will not intervene in these decisions,[12] Congress can ignore or block an amendment campaign unless the proposal is so popular that the voters would be aroused to retaliate at the polls.

The result is that Article V is misleading, to the extent that it appears to offer the state legislatures legal leverage in the amending process, divorced from any political considerations. In practice, a state application under Article V has no more effect than a simple memorial petition to Congress—both are judged by the political force behind them. If the state legislatures fail to appreciate this reality, they may tarnish their own prestige by allowing themselves to be drawn into highly publicized campaigns to obtain applications which do not have popular support and which are certain to be ignored by Congress.

II. APPLICATIONS ATTEMPTING TO LIMIT A CONVENTION

In the winter of 1963 a group of political conservatives, under the leadership of former Representative Ed Gossett of Texas and Former Senator Edwin C. Johnson of Colorado, launched an ingenious campaign to reform the presidential election system by means of state applications under Article V.

For many years, there has been a widespread belief in Congress that the electoral college system should be changed, but no proposed amendment has obtained the necessary two-thirds vote because of a split between Congressmen from large, urban states and those representing smaller, rural states.[13] Four basic reform plans have been considered: (1) direct popular election; (2) retention of the unit method of casting each state's electoral votes, but elimination of the office of elector; (3) division of each state's electoral votes among the candidates in the same proportion as the popular votes in the state; and (4)

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[9] Indeed, it would have been difficult for Congress to find all of the applications, if it had desired to check their validity. The applications are filed in the United States Archives, together with the memorial petitions, and no tally is kept of the number of applications received on the various proposed amendments.

[10] A running debate has been conducted in the legal periodicals on the validity of these applications. See Packard, *The States and the Amending Process*, 45 A.B.A.J. 161 (1959); Fensterwald, *The States and the Amending Process—A Reply*, 46 A.B.A.J. 717 (1960); Grinnell, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 A.B.A.J. 1164 (1959); Wheeler, *Is a Constitutional Convention Impending?* 21 Va. L. Rev. 792 (1927).

[11] See Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L. J. 957. 964–66 (1963).

[12] *Coleman* v. *Miller*, 307 U.S. 433 (1939); *United States* v. *Sprague*, 282 U.S. 716 (1931); *Dillon* v. *Gloss*, 256 U.S. 368 (1921); *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866).

[13] See *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee on the Nomination and Election of President and Vice President*, 87th Congress, 1st Sess., pts. 1–4 (1961) and 88th Congress, 1st Sess. (1963); Staff of Senate Committee on the Judiciary, 87th Congress, 1st Sess., The Electoral College (Committee Print 1961); Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 Law and Contemp. Prob. 188 (1962).

election of each state's electors from districts similar to the congressional constituencies. Congressmen from the big-city states generally favor the first two, while rural and conservative Congressmen favor the latter two.

The present state legislative campaign is calculated to call a constitutional convention that could consider only the latter two plans. The resolution, which was adopted by six states [14] this year, reads:

"*Resolved*, That application is hereby made to Congress under Article V of the Constitution of the United States for the calling of a convention to propose an article or amendment to the Constitution providing for a fair and just *division of the electoral votes within the states* in the election of the President and Vice President . . ." [italics added].

Since the two liberal plans do not contemplate a division of each state's electoral votes, neither is within the terms of the applications.

If twenty-six more legislatures approve similar limited electoral college applications, the nation will be faced with a series of unprecedented political and legal decisions.

Initially, Congress would have to decide whether to call the convention at all, and if so, whether to attempt to limit it to the alternatives contemplated by the applications. The convention would be called by means of a concurrent resolution in Congress, which requires only a majority vote. Since the proportional and district plans have received majority votes in the Senate in the recent past,[15] but were not proposed for lack of the necessary two thirds in both houses, it is conceivable that a majority in Congress would support a resolution to limit the constitutional convention to consideration of these plans.[16] If Congress called the convention, but failed to limit it to plans "providing for a fair and just division of electoral votes within the states", the courts would probably decline to intervene on the grounds that the controversy is political and outside the judicial sphere.[17]

From a practical as well as a legal standpoint, Congress would put itself in an awkward position if it called a constitutional convention to consider reforming the antiquated electoral college and tried to limit the convention in the solutions that it could consider. Most legal scholars agree that once a legislative body calls a constitutional convention into being, the convention is free to take any action within the purview of the constitutional provision that authorized its creation.[18] There are, of course, no federal cases in point, but the state courts have usually declined to intervene when a constitutional convention allegedly exceeded limitations set by the legislature, except when the convention exceeded its function of proposing amendments and attempted to legislate.[19] Thus, if the constitutional convention should conclude that the best interests of the nation would be served by, for instance, electing the President by direct popular vote, it could propose an amendment to that effect in good conscience and with impunity from judicial interference, despite any attempt by Congress to restrict it to other alternatives.

It appears that the states cannot, as a practical matter, use their powers under Article V to limit the types of proposals that may be referred for ratification. But in their efforts to do so, they may serve as the necessary force to prod Congress to break the current deadlock on electoral college reform and to propose its own solution. Since a simple majority in Congress and in the constitutional convention could approve a proposed amendment, Congress would be under heavy pressure to propose an amendment of its own, before matters slipped beyond its control. In this manner, the states would be serving a valuable function as a catalyst in the amending process.

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[14] Colorado, Kansas, Montana, Texas, Utah and Wisconsin. Arkansas and South Dakota adopted applications that seek to restrict the constitutional convention to consideration of only the district system.

[15] Sixty-five to 27 in 1950, and 48 to 37 in 1956. The proposals have had less support in the House.

[16] However, President Kennedy bitterly opposed any substantial change in the present system as a senator, and his Administration has consistently followed the same policy.

[17] On the basis of the cases cited in footnote 12, *supra*.

[18] Dodd, The Revision and Amendment of State Constitutions 72–93 (1910); Orfield, Amending the Federal Constitution 45–48 (1942); *Contra*, Jameson, Constitutional Conventions §§ 382–89 (4th ed. 1887).

[19] *Carton* v. *Secretary of State*, 151 Mich. 337, 115 N. W. 429 (1908); *Franz* v. *Autry*, 180 Okla. 561, 91 Pac. 193 (1907); *Goodrich* v. *Moore*, 2 Minn. 61 (1858) (dictum); *Loomis* v. *Jackson*, 6 W. Va. 613 (1873) (dictum). *Wells* v. *Bain*, 75 Pa. 39 (1874).

III. APPLICATIONS FOR AMENDMENTS AFFECTING CONGRESS

The states' role in the amending process has been negligible because Congress has usually been responsive to the public's political desires, and there has been little need to resort to the uncertain state legislative route to circumvent an "oppressive" Congress. When Congress is divided and unable to act, or if it is slow to act, the state legislatures can act as a prod.[20] However, there is one area in which Congress may not always act promptly to carry out amendatory changes; here state legislatures may serve a crucial purpose in forcing Congress to act. These situations arise when a proposed amendment would affect the prerogatives of Congress itself.

This situation arose at the turn of the century when public opinion favored direct election of senators, but Congress failed to propose an amendment. State legislatures began to submit applications for a constitutional convention to consider a direct-election amendment and for constitutional reform in general. It was obvious to Congress that any representative constitutional convention would approve a direct-election proposal, and there were fears that the convention, under the general mandate, might commit other constitutional mischief. So, in 1908, when twenty-three legislatures had adopted applications, Congress proposed its own direct-election amendment.[21]

Here the states were able to play a significant role in the amending process, because the applications were concurrent in time, valid in form and enjoyed sufficient public support to be approved by a convention. Since congressional opposition was obviously self-serving, no Congressman could have afforded to oppose the convention, once the required number of applications were received. So Congress was forced to act, despite the fact that the amendment was contrary to the personal interests of many of the senators. It is in such situations, where Congress may fail to propose amendments because they would detract from congressional prerogatives, that the states may find future opportunities for meaningful participation in the amending process.

In recent years Congress has been subject to increasing criticism for an alleged failure to keep pace with modern legislative needs by reforming its own methods and procedures. Critics have accused it of refusing to make changes that are obvious to most outsiders, because the changes would detract from the prerogatives of Congress or its entrenched leadership.[22] Some of the suggested reforms would require constitutional amendments, and, while their desirability is certainly questionable, they are unique among congressional reform proposals in that they can be considered and proposed through state legislative applications, by an entity other than Congress. The most recent of these was former President Eisenhower's suggestion that the nation might benefit from a limitation on the number of terms that a Congressman could serve. Another is the perennial proposal that terms of representatives be increased to four years.[23]

The most popular of these amendments has been the proposal that the President be given the power to veto specific items in appropriation bills.[24] Because this would allow the President to veto certain pork-barrel items, while allowing other appropriations to become law, the idea has been opposed vigorously in Congress, particularly by those senior Congressmen who are in a position to procure large amounts of pork for their constituencies. But the public has become increasingly uneasy about unnecessary spending and the recent phenomenon of peacetime defense budgets swollen by questionable pork-barrel items,[25] and such

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[20] As in 1931, when four states applied for the repeal of the Eighteenth Amendment, and in the early 1940's, when five applied for a limitation of presidential tenure.

[21] Before the Seventeenth Amendment was ratified on Feb. 3, 1919, Congress had received applications from thirty-two states, constituting the required two thirds.

[22] See *Hearings Before the Subcommittee on Standing Rules of the Senate of the Committee on Rules and Administration*, 88th Congress, 1st Sess. (1963), Exhibit 8, for a comprehensive bibliography of the books and articles on congressional reorganization.

[23] To meet the senatorial complaint that this would encourage representatives to run for Senate seats in their off years, some proposals would also increase Senate terms to eight years. *Cf.* S. J. Res. 62, 88th Cong., 1st Sess., 109 Congressional Record 4253–54 (1963).

[24] Item veto amendments have been introduced in nearly every Congress since 1876. Thirty-two state constitutions now give their governors this power. See *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary*, 75th Congress, 3d Sess., Ser. 15 (1938); *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Congress, 1st Sess., Ser. 13 (1957); *Hearing Before a Subcommittee on the Senate Committee on the Judiciary*, 83d Congress, 2d Sess. (1954).

[25] See, *e.g.*, the speeches of Senator George S. McGovern, 109 Congressional Record 12198–602 (1963) and United States Chamber of Commerce President Edwin P. Neilan, "Our Own Public Scandal—Vote Buying and Selling", 109 Congressional Record 13824 (1963).

an amendment might have an excellent chance to be approved by a constitutional convention.

The progress of the states' rights amendments and the Gossett-Johnson electoral college proposal has demonstrated that proponents of an amendment can obtain an impressive number of state legislative applications in a short period of time, if they conduct a co-ordinated lobbying campaign through a national organization. A campaign for an item-veto amendment might be conducted by an existing organization traditionally opposed to pork-barrel excesses, such as the United States Chamber of Commerce or the League of Women Voters, or by an ad hoc group of interested persons.

In any event, the supporters of such a measure would have the satisfaction of knowing that, by using the state legislature method of proposing the amendment, the proposal would not be judged solely by the Congress that it seeks to restrict. If an amendment affecting Congress should develop wide popular support, the states could serve a vital role in the amending process by allowing the political will of the people to be expressed without a suggestion of a conflict of interest within the proposing body.

APPENDIX

STATE APPLICATIONS TO CONGRESS CALLING FOR CONVENTIONS TO PROPOSE CONSTITUTIONAL AMENDMENTS (1787–1963)

Year	Amendment to be proposed	State	Source of reference
1788	General	Virginia	Annals of Congress 248.
1789	General	New York	H.R. Jour. (1789) 29, 30.
1790	Revision of Constitution	Rhode Island	H.R. Jour. 148, 1st and 2d Congress.
1832	General	Georgia	23 S. Jour. 65.
1833	Against protective tariff	Alabama	23 S. Jour. 194.
1861	General	Illinois	Laws of Illinois (1861).
		Indiana	S. Jour. 420, 421, 36th Congress, 2d session.
		Kentucky	S. Jour. 189, 190, 36th Congress, 2d session.
		Ohio	58 Laws of Ohio (1861) 181.
		Virginia	S. Jour. 149.
1893	Direct election of Senators	Nebraska	See note 1.
1895		Wyoming	See note 1.
1899	General	Texas	33 C.R. 219, 280.
1901	Direct election of President and Senators.	Idaho	35 C.R. 306; 45 C.R. 7114.
1901	Direct election of Senators	Arkansas	45 C.R. 7113.
		Michigan	35 C.R. 117, 293; 45 C.R. 7116.
		Minnesota	34 C.R. 2560, 2615, 2680, 2796; 45 C.R. 7116.
		Missouri	See note 1.
		Montana	35 C.R. 208.
		Nebraska	35 C.R. 1779.
		Nevada	35 C.R. 112.
		North Carolina	See note 1.
		Oregon	35 C.R. 112, 117.
		Pennsylvania	34 C.R. 2245, 2289, 2493; 45 C.R. 7118.
		South Dakota	34 C.R. 2440, 2493, 2558.
		Tennessee	35 C.R. 2344, 2338, 2382, 2707.
		Texas	45 C.R. 7119
1901	General	Washington	See note 1.
1901	General, including direct election of Senators.	Colorado	35 C.R. 112; 45 C.R. 7113.
		Kansas	See note 1.
		Oregon	34 C.R. 2290, 2354.
1902	Direct election of Senators	Kentucky	45 C.R. 7115.
1903	Direct election of Senators	Arkansas	See note 1.
		California	See note 1.
		Idaho	See note 1.
		Missouri	See note 1.
		Montana	39 C.R. 2447, 2509, 2598.
		Nebraska	45 C.R. 7116.
		Nevada	37 C.R. 24.
		North Dakota	See note 2.
		Oregon	36 C.R. 2597; 45 C.R. 7118.
		Oregon	45 C.R. 7118.
		Tennessee	See note 1.
		Utah	45 C.R. 7119.
		Wisconsin	37 C.R. 276.
1903	General, including direct election of Senators.	Illinois	45 C.R. 7114.
		Washington	45 C.R. 7119; 46 C.R. 3035.
1904	General, including direct election of Senators.	Iowa	38 C.R. 4959.

APPENDIX—Continued

STATE APPLICATIONS TO CONGRESS CALLING FOR CONVENTIONS TO PROPOSE CONSTITUTIONAL AMENDMENTS (1787–1963)—Continued

Year	Amendment to be proposed	State	Source of reference
1905	Direct election of Senators	Missouri	40 C.R. 137.
		Montana	39 C.R. 2447.
		Nevada	See note 1.
		Tennessee	45 C.R. 7119.
1905	General, including direct election of Senators.	Kansas	39 C.R. 3466.
1906	Prohibition of polygamy	Iowa	See note 1.
		New York	40 C.R. 4551.
1907	Direct election of Senators	Illinois	42 C.R. 184, 359.
		Montana	45 C.R. 7116.
		Nevada	42 C.R. 163, 895.
		New Jersey	42 C.R. 164; 45 C.R. 7117.
		Oregon	41 C.R. 2928, 3599.
		South Dakota	41 C.R. 2492, 2497, 2621; 45 C.R. 7118.
		Wisconsin	42 C.R. 165.
1907	General	Missouri	45 C.R. 7116.
1907	General, including direct election of Senators.	Indiana	45 C.R. 7114.
		Iowa	42 C.R. 204, 895; 45 C.R. 7114.
		Kansas	41 C.R. 2925, 2929, 3005, 3072.
1907	General, including direct election of Senators	Louisiana	42 C.R. 5606; 45 C.R. 7115.
		Nebraska	See note 1.
		Nevada	42 C.R. 163, 895.
		North Carolina	45 C.R. 7117.
1907	Prohibition of polygamy	Delaware	41 C.R. 3011, 3591.
		Maine	See note 1.
		North Dakota	41 C.R. 4633, 4672.
		Pennsylvania	See note 1.
		West Virginia	See note 1.
1908	Direct election of Senators	Montana	42 C.R. 225, 712.
		Ohio	H.J. Res.
		Wisconsin	45 C.R. 7119, 7120.
1908	General, including direct election of Senators.	Oklahoma	42 C.R. 894; 45 C.R. 7117.
1908	Prohibition of polygamy	Maryland	See note 1.
1909	Direct election of Senators	Illinois	See note 1.
		Kansas	45 C.R. 7114.
		Oregon	43 C.R. 2065, 2071, 2075, 2115, 2116.
		South Dakota	43 C.R. 2667, 2670.
1909	General, including direct election of Senators.	Iowa	44 C.R. 1620; 45 C.R. 7114.
1909	Prohibition of polygamy	California	See note 1.
		Minnesota	See note 1.
		South Dakota	43 C.R. 2667, 2670.
		Washington	44 C.R. 0, 127; 46 C.R. 651.
1910	Prohibition of polygamy	Washington	46 C.R. 651.
1911	Control of trusts	Illinois	47 C.R. 1298.
1911	Direct election of Senators	Arkansas	See note 1.
		California	47 C.R. 2000.
		Maine	46 C.R. 4280, 4339.
		Minnesota	See note 1.
		Ohio	46 C.R. 2413; 47 C.R. 660, 661.
		Texas	See note 1.
1911	General	Wisconsin	47 C.R. 1842, 1860, 1873, 1875, 1948, 2000, 2188 3087.
1911	General, including direct election of Senators.	Montana	46 C.R. 2411.
1911	Prohibition of polygamy	Montana	47 C.R. 98.
		Nebraska	47 C.R. 99.
		New Hampshire	See note 1.
		Ohio	47 C.R. 85, 114, 148, 660.
		Oklahoma	See note 1.
		Tennessee	47 C.R. 187.
		Texas	See note 1.
1912	Prohibition of polygamy	Vermont	49 C.R. 1433, 2464.
1913	Constitutionality of State enactments.	Missouri	50 C.R. 1796.
1913	Prohibition of polygamy	Illinois	50 C.R. 120, 121.
		Michigan	50 C.R. 2290.
		Oregon	49 C.R. 2463.
		Pennsylvania	See note 1.
		Wisconsin	50 C.R. 42, 117.
1914	Prohibition of polygamy	Maryland	See note 1.
1915	Prohibition of polygamy	Connecticut	See note 1.
		South Carolina	53 C.R. 2442.
1916	Prohibition of polygamy	Louisiana	See note 1.

APPENDIX—Continued

STATE APPLICATIONS TO CONGRESS CALLING FOR CONVENTIONS TO PROPOSE CONSTITUTIONAL AMENDMENTS (1787–1963)—Continued

Year	Amendment to be proposed	State	Source of reference
1920	Popular ratification of amendments	Louisiana	60 C.R. 31.
1925	Repeal 18th amendment	Nevada	67 C.R. 456.
1927	Taxation of Federal and State securities.	Idaho	69 C.R. 455.
1929	General	Wisconsin	71 C.R. 2590.
1931	Repeal 18th amendment	Massachusetts	75 C.R. 45.
		New York	75 C.R. 48.
		Wisconsin	75 C.R. 57.
1932	Repeal 18th amendment	New Jersey	75 C.R. 3299.
1935	Federal regulation of wages and hours of labor.	California	79 C.R. 10814.
1935	Taxation of Federal and State securities.	California	79 C.R. 10814.
1939	Limitation of Federal taxing power.	Maryland	84 C.R. 3320.
		Wyoming	84 C.R. 1973.
1939	Townsend Plan	Oregon	84 C.R. 985.
1940	Limitation of Federal taxing power. [Rescinded same year, see note 2]	Mississippi	80 C.R. 6025.
		Rhode Island	80 C.R. 3407.
1941	Limitation of Federal taxing power. [Rescinded 1945, see note 2.]	Iowa	87 C.R. 3172.
		Maine	87 C.R. 3370.
	[Rescinded 1952; 98 C.R. 4641.]	Massachusetts	87 C.R. 3812.
		Michigan	87 C.R. 8904.
1943	Limitation of Federal taxing power. [Rescinded 1945; see note 2.]	Alabama	89 C.R. 7523.
	[Rescinded 1945; 91 C.R. 11209.]	Arkansas	98 C.R. 742.
		Delaware	89 C.R. 4017.
	[Rescinded 1945; 98 C.R. 752.]	Illinois	98 C.R. 742.
		Indiana	98 C.R. 1056.
		New Hampshire	89 C.R. 3761.
		Pennsylvania	89 C.R. 8220.
	[Rescinded 1945; see note 2.]	Wisconsin	89 C.R. 7524.
1943	Limitation of Presidential tenure	Illinois	89 C.R. 2516.
		Iowa	89 C.R. 2728.
		Michigan	89 C.R. 2944.
		Wisconsin	89 C.R. 7524.
1943	Prohibition of conditions in grants-in-aid.	Pennsylvania	89 C.R. 8220.
1943	World federal government	Florida	89 C.R. 5690.
1944	Limitation of Federal taxing power. [Rescinded 1946; 97 C.R. 11195.] [Rescinded 1954; 100 C.R. 11943.]	Kentucky	90 C.R. 4040.
		New Jersey	90 C.R. 6141.
1945	Treatymaking	Florida	91 C.R. 4955.
1945	World federal government	Florida	Florida Journal.
1947	Limitation of Presidential tenure	Montana	See note 1.
1949	Limitation of Federal taxing power. [Rescinded 1953; 99 C.R. 6163.]	Michigan	95 C.R. 5628.
		Nebraska	95 C.R. 7893.
1949	Tidelands problem	Texas	101 C.R. 2840.
1949	World federal government	California	95 C.R. 4568.
		Connecticut	95 C.R. 7689.
		Florida	97 C.R. 7000.
		Maine	95 C.R. 4348.
		New Jersey	95 C.R. 4571.
		North Carolina	95 C.R. 6587.
1950	Limitation of Federal taxing power. [Rescinded 1954; 100 C.R. 9420.]	Louisiana	99 C.R. 320.
1951	Limitation of Federal taxing power.	Florida	97 C.R. 5155.
		Iowa	97 C.R. 3939.
		Kansas	97 C.R. 2936.
	[Rescinded 1953; 99 C.R. 4311]	Maine	97 C.R. 6033.
		New Hampshire	97 C.R. 10716.
		New Mexico	98 C.R. 947.
		Utah	98 C.R. 947.
1952	Distribution of proceeds of Federal taxes on gasoline.	California	98 C.R. 4003–4004.
1952	Repeal of 16th amendment	Georgia	98 C.R. 1057.
		Virginia	98 C.R. 1496.
1952	Treatymaking	Georgia	98 C.R. 1057.
1953	Revision of Article V	Illinois	99 C.R. 9864, 10052, 10623.
		South Dakota	99 C.R. 9180, 9181.
1955	Limitation of Federal taxing power.	Oklahoma	101 C.R. 9941.
1955	Revision of Article V	South Dakota	101 C.R. 2840, 2861, 2862.
		Texas	101 C.R. 2840.
1955	State control of public education	Georgia	101 C.R. 1532, 2086, 2274.
1956	Revision of Article V	Michigan	102 C.R. 7240, 7241, 7304.
1957	Balancing the budget	Indiana	103 C.R. 6474.

APPENDIX—Continued

STATE APPLICATIONS TO CONGRESS CALLING FOR CONVENTIONS TO PROPOSE CONSTITUTIONAL AMENDMENTS (1787–1963)—Continued

Year	Amendment to be proposed	State	Source of reference
1957	Limitation of Federal taxing power	Indiana	103 C.R. 6474.
1957	Oil and mineral rights	Texas	103 C.R. 8265.
1957	Preservation of states' rights	Texas	103 C.R. 35.
1957	Reapportionment	Indiana	103 C.R. 6473.
1957	Revision of Article V	Idaho	103 C.R. 4831.
		Indiana	103 C.R. 6471.
1957	Selection of Federal judges	Alabama	103 C.R. 10863.
1957	Supreme Court decisions	Florida	103 C.R. 12787.
1957	Treadymaking	Indiana	103 C.R. 6472.
1958	State taxation power over income of nonresidents.	Connecticut	104 C.R. 8058, 8085.
1959	Constitutionality of 14th amendment.	Arkansas	105 C.R. 4398.
1959	Federal preemption	Alabama	105 C.R. 3220.
1959	Repeal 16th amendment	Wyoming	105 C.R. 3085.
1959	State control of public education	Georgia	105 C.R. 2793.
1960	Repeal 16th amendment	Louisiana	106 C.R. 14401.
		Nevada	106 C.R. 10749.
1960	State control of public education	Virginia	106 C.R. 5516.
1960	Supreme Court decisions	Louisiana	106 C.R. 12310, 14315.
1961	Repeal 16th amendment	Texas	107 C.R. 10737, 1089, 11197.
1961	Supreme Court decisions	Arkansas	107 C.R. 2154.
		Georgia	107 C.R. 4715.
1962	Repeal 16th amendment	South Carolina	108 C.R. 4653.
1963	Apportionment of State legislatures.	Arkansas	109 C.R. 2630.
		Idaho	109 C.R. 2157, 2160.
		Kansas	109 C.R. 2631.
		Missouri	109 C.R. 5524, 5527.
		Montana	109 C.R. 3659.
		Nevada	109 C.R. 9856.
		Oklahoma	109 C.R. 1534.
		South Carolina	109 C.R. 9856.
		South Dakota	109 C.R. 3840.
		Texas	109 C.R. 11202.
		Washington	109 C.R. 5527.
		Wyoming	109 C.R. 4517.
1963	Court of the Union	Alabama	109 C.R. 4946.
		Arkansas	109 C.R. 2630.
		Florida	109 C.R. 1954.
		South Carolina	109 C.R. 9856.
		Wyoming	109 C.R. 4517.
1963	Electoral College	Arkansas	109 C.R. 2630.
		Colorado	109 C.R. 6301.
		Kansas	109 C.R. 6875.
		Montana	109 C.R. 4221.
		South Dakota	109 C.R. 3787.
		Texas	109 C.R. 11202.
		Utah	109 C.R. 5601, 6082.
		Wisconsin	109 C.R. 14002.
1963	Limitation of Federal taxing power	Colorado	109 C.R. 6668.
1963	National debt limit	Idaho	109 C.R. 3787.
1963	Revision of Article V	Arkansas	109 C.R. 2630.
		Florida	109 C.R. 1954.
		Idaho	109 C.R. 3112.
		Illinois	109 C.R. 3590, 4519.
		Kansas	109 C.R. 2630, 2631.
		Missouri	109 C.R. 5524, 5527.
		Oklahoma	109 C.R. 1534.
		South Carolina	109 C.R. 9856.
		South Dakota	109 C.R. 13840.
		Texas	109 C.R. 11202.
		Wyoming	109 C.R. 4517.

Note 1: Listed in the following documents but not recorded in the Congressional Record: Federal Constitutional Convention, S. Doc. 78, 71st Congress 2d session (1930); William Russell Pullen, "The Application Clause of the Amending Provision of the Constitution" (an unpublished dissertation), University of North Carolina, 1951; Staff Report of House Judiciary Committee, Problems Relating to State Application for a Convention To Propose Constitutional Limitations on Federal Tax Rates (Committee print 1952); Staff of House Committee on the Judiciary, 87th Congress, 1st session, State Application Asking Congress To Call a Federal Constitutional Convention (Committee print 1961).

Note 2: Listed in Hearings on S. J. Res. 23 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 83d Congress, 2d session (1954).

[From the Chicago Bar Record, December 1968]

Con Con at the Crossroads; Convention of the Parties or of the People?*

(By Peter A. Tomei)

> ". . . a constitutional convention is the most fundamental political institution we have, and it is precisely for this reason that the people—all of the people—should play a more significant role in its procedures and deliberations than they do in any other process of government. . . . the business of constitution-making is too important (and too highly political) to be left only to politicians." (Article, page 2)

"There is an honorable place for the clash of party and interest, but the place is not here," urged the late Senator Robert F. Kennedy in his address to the opening session of the 1967 New York Constitutional Convention.[1] But his warning came too late, for the clash of party had already been ensured by the partisan selection of convention delegates, a majority of whom were members of Senator Kennedy's own party, and the clash of interest naturally and inevitably followed. The result was a disaster.

Now, in the wake of the November 5th election, in which Con Con received one of the largest pluralities ever recorded for any candidate or any issue in Illinois history,[2] the people may properly ask whether Illinois will heed the warning of Senator Kennedy and, indeed, of many of its own political leaders,[3] or whether it will follow New York down the road to constitutional folly and rejection. Among the questions which will confront the General Assembly when it meets in 1969 to implement the November 5th call to a constitutional convention, none will be so critical as that concerning the procedure for delegate selection.

Should the General Assembly reject the non-partisan approach to delegate selection, it can be safely predicted that the prospects for genuine constitutional

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*Except where otherwise noted, data for the article is based on the following principal sources:

New York: Kaden, "The People: No! Some Observations on the 1967 New York Constitutional Convention," 5 *Harvard Journal on Legislation* 343 (1968); Ostwald, "How Not to Hold a State Con-Con," *Wall Street Journal*, Sept. 25, 1967, at 18, col. 3.

Michigan: Sturm, *Constitution-Making in Michigan, 1961–62* (Ann Arbor 1963).

Maryland: Note, "State Constitutional Change: The Constitutional Convention," 54 *U. Va. Rev.* 995 (1968); Kerrison, "Gray Day in Maryland," *The Reporter*, June 13, 1968; "Maryland Says 'No'," *The Economist*, June 1, 1968, at 29.

Illinois: Tomei, "How Not to Hold a Constitutional Convention: A Critical Look at the 1920 Illinois Constitutional Convention," 49 *Chicago Bar Record* 179 (1968); "Report of the Committee on Constitutional Revision on a Constitutional Convention for Illinois," Appendix C, 48 *Chicago Bar Record* 56, 70 (1967); Davis, "Defects and Causes of Defeat of the Proposed Constitution of 1922," 26 *Chicago Bar Record* 276 (1945).

General: Adrian, "Trends in State Constitutions," 5 *Harvard Journal on Legislation* 311 (1968); Bebout, "State Constitutions and Constitutional Revision, 1965–1967," 17 *Book of the States, 1968–1969* 3 (Chicago 1968); Graves, "State Constitutions and Constitutional Revision, 1963–1965," 16 *Book of the States, 1966–67* 3 (Chicago 1966); Graves, "State Constitutions and Constitutional Revision, 1961–1963," 15 *Book of the States, 1964–1965* 3 (Chicago 1964); U.S. League of Women Voters, *Inventory of Work on Constitutional Revision* (D.C. 1966).

[1] *New York Times*, Apr. 5, 1967, at 32, col. 7.

[2] According to official records of the Secretary of State, Con Con received 2,979,977 votes in favor and 1,135,440 votes against, or a plurality of 1,844,537 votes, out of a total vote cast in the Nov. 5, 1968 general election of 4,705,852. This represents a constitutional majority of 63.3 percent and a majority of those actually voting on the proposition of 72.4 percent. The percentage of persons not voting on the constitutional proposition was the lowest in Blue Ballot history, 12.5 percent.

The figures for Cook County are 1,695,838 votes in favor and 415,293 votes against, out of a total vote of 2,376,211. Percentage-wise, this is a constitutional majority of 71.4 percent and a majority of those voting on the proposition of 80.3 percent.

The figures for Downstate are 1,284,139 votes in favor and 720,147 votes against, out of a total vote of 2,329,641. Percentage-wise, this is a constitutional majority of 55.1 percent and a majority of those voting on the proposition of 64.1 percent.

[3] Republican Governor-elect Richard B. Ogilvie announced his support for non-partisan delegate elections on Nov. 26, 1968, and a non-partisan election bill, H. B. No. 1 cosponsored by House Speaker Ralph T. Smith (R. Alton) and Representative Harold A. Katz (D. Glencoe), was prefiled on Dec. 2, 1968. In July 1968, a non-partisan delegate election bill (H. B. No. 2769), which many thought was premature, received a favorable but insufficient vote, crossing party lines, of 72 to 64. *Journal of the House of Representatives, 75th General Assembly*, July 22, 1968, at 16–17. Non-partisan delegate elections were endorsed by the *Chicago Tribune* on Nov. 13, 1968, and by the State AFL–CIO on Nov. 14, 1968.

improvement and for voter approval of any proposed changes will be minimal, and that the value of Con Con as a meaningful political experience for all the people of this state will be doubtful.

I do not for one moment question the value of political parties in our system of government, and, indeed, I have worked actively for the candidates of my own party for regular political office at all levels. Nor do I in any sense mean to suggest that a constitutional convention is a non-political proceeding. On the contrary, a constitutional convention is the most fundamental political institution we have, and it is precisely for this reason that the people—all of the people—should play a more significant role in its procedures and deliberations than they do in any other process of government. To paraphrase an old saying, the business of constitution-making is too important (and too highly political) to be left only to politicians.

A constitutional convention is the institution through which the people exercise the ultimate power of government—the power to renew and repair the basic structure and machinery of the government under which they live. By contrast, since their inception, political parties have historically represented "a divergence of thought in government policy," [4] and have contended for the pre-eminence of their conflicting ideas of governmental policy within the arena established by the structure and machinery of government, to which the parties, whatever their policy difference, all bear common allegiance. The purpose and function of a constitutional convention transcends, therefore, the normal concerns of partisan policies.

THE LEGISLATIVE OPTIONS

The Constitution provides that "the General Assembly shall [now] provide for a convention, to consist of double the number of members of the Senate, to be elected in the same manner, at the same places, and in the same districts." [5] While there seems to be little question in people's minds that this mandate requires the election of two delegates from each of the 58 senate districts, as currently apportioned on a "one man-one vote" basis,[6] there have been some doubts expressed, particularly in legislative quarters, as to whether the phrase "in the same manner" might require not only elections but also nominations for delegates to be made in the same manner as for state senators, i.e., through party primaries.

In part, this hesitancy may be attributable to an understandable reluctance to part with old and familiar ways. Moreover, in the case of some legislators, there may be an equally understandable reluctance to encourage political competition in their own legislative districts. However, while constitutional conventions have traditionally been breeding grounds for new political leadership, the Michigan Convention experience of 1961–62 strongly suggests that there is a greater tendency to encourage political ambitions when convention delegates are selected on a partisan, as opposed to a non-partisan, basis.[7]

With respect to the legal question, a recent study has concluded that the General Assembly does indeed have the power to adopt legislation for the non-partisan selection of convention delegates, specifically insofar as such legislation eliminates party primary nominations and provides for delegate elections without party designations.[8] The principal findings of the study may be summarized as follows:

1. The Illinois Constitution itself requires only that convention delegates be directly elected by the people, that is, by qualified electors voting at free elections by means of secret ballot.

2. The party primary nominating process, unknown at the time the present Constitution was adopted, is not a demonstrable constitutional prerequisite to the elections required by the Constitution.

3. The general laws pertaining to the election of state senators cannot in any event be literally applied to the election of convention delegates, because these

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[4] *People ex rel. Lindstrand* v. *Emmerson,* 333 Ill. 606, 614 (1929).

[5] Ill. Const. art. XIV, § 1.

[6] As senate districts are currently apportioned, the City of Chicago will have 42 delegates, Suburban Cook County 18 Delegates, and the Downstate Counties 56 delegates. *People ex rel. Engle* v. *Kerner,* 32 Ill. 212, *opinion supplemented,* 33 Ill. 2d 11 (1965), *appeal dismissed,* 384 U.S. 30 (1966).

[7] See Sturm, *Constitution-Making in Michigan, 1961–1962* (Ann Arbor 1963), supra, at 114–17.

[8] Report of the Chica o Bar Association Committee on Court Revision on the Manner of Electing Delegates to a Constitutional Convention (April 17, 1968).

laws are wholly silent on the mechanics of electing two persons from the same district.

4. An unpublished and apparently contrary opinion by the Illinois Attorney General in 1919 appears to have been influenced both by its particular historical setting and by a series of Supreme Court cases which were subsequently overruled.[9]

5. In the only judicial decision dealing squarely with the issue, under a constitutional provision virtually identical to the one in Illinois, the Supreme Court of a sister state has held that delegates to a constitutional convention can be elected on a non-partisan basis, without party primaries or party designations, and with modified nominating petition requirements, pursuant to legislation which in these important respects differs from the general laws in effect for the nomination and election of state legislators.[10]

Any question as to the foregoing conclusion can be judicially determined at an early date, once legislation has been adopted by the General Assembly. The immediate problem, then, is to get some legislation on the books. This requires that the General Assembly select from among the options which are apparently available, the one which, in its judgment, seems wisest and best.

While several variants have been employed in the past for the election of delegates to state constitutional conventions, they all can be viewed most simply in terms of the three basic alternatives which they present:

1. Partisan selection, including party primaries, as used for the conventions held in New York in 1967, Michigan in 1961–62, and Illinois in 1920–22.[11]

2. Bi-partisan selection, in which each of the two major political parties is assured of an equal number of delegates, as used for the conventions held in New Jersey in 1966 and 1947, Connecticut in 1965, and Missouri in 1943.[12]

3. Non-partisan selection, in which candidates run without party designation, as used for the conventions held in Maryland in 1967-68, Alaska in 1955-56, and Hawaii in 1950.[13]

The histories of conventions in states which have adopted the partisan approach to delegate selection give strong evidence that this method, more than any other, presents the greatest obstacles to constitutional reform.

PARTISAN CONVENTIONS AND THE PROSPECTS FOR GENUINE CONSTITUTIONAL IMPROVEMENT

Elimination of "legislative detail" and concentration on "basic principles" or "fundamental law" are generally conceded to be desirable constitutional objectives. Yet, the experience of partisan conventions, i.e., those in which one political party or the other has gained control through the partisan selection of delegates, is that the partisan atmosphere encourages rather than discourages the incorporation of a vast amount of ordinary legislation into what should be the state's basic charter. This is amply demonstrated by the documents framed by the partisan conventions of New York, Michigan and Illinois.

Measured simply in terms of length, the rejected Illinois Constitution of 1922 contained one-third again as many separate sections as did the then-existing 21,000-word 1870 Constitution (233 sections as opposed to 186 sections in the 1870 document). The Michigan Constitution which was adopted in 1963 contains over 23,000 words, or 1,000 words more than its predecessor, while

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[9] *People ex rel. Lindstrand* v. *Emmerson, supra*, note 4.

[10] *Baker* v. *Moorhead*, 174 N. W. 430 (Nebr. 1919).

[11] Partisan elections without primaries were held for the convention held in Rhode Island in 1964–67, Tennessee in 1965, and New Hampshire in 1964. Candidates receiving the highest number of votes in their districts were apparently declared the winners, with no run-off elections being held.

[12] The bi-partisan assurance was the result of a constitutional provision in Missouri, statutory enactments in Connecticut and New Jersey in 1966, and the parties' agreement in New Jersey in 1947. The enabling legislation for the Pennsylvania Convention of 1967–68 guaranteed minority representation by limiting each party to two nominees per three-member district. There do not appear to have been party primaries for any of the foregoing five conventions. Candidates receiving the highest number of votes in their districts were apparently declared the winners, with no run-off elections being held.

[13] In Maryland, candidates got on the ballot simply by paying a filing fee and filing an affidavit of candidacy. In Alaska and Hawaii, nominating petitions as well as filing fees were required. Only in Hawaii were there provisions for run-off elections to ensure that delegates be elected by majority vote. In Maryland and Alaska, candidates receiving simply the greatest number of votes in their districts were declared elected. Other non-partisan conventions held in the current century include those in Rhode Island in 1944, 1951, 1955, and 1958, Nebraska in 1919–20, Massachusetts in 1917–19, and Ohio in 1912.

the rejected New York Constitution of 1967 was still half as long as the 47,000-word constitution it was designed to replace. By contrast, the Constitution proposed by the 1967–68 Maryland Convention, which was widely hailed as one of the most advanced state constitutions ever written, would have reduced the existing Constitution from 35,000 to 14,000 words. By way of further contrast, the Federal Constitution, which has endured since 1787, is only some 6,000 words in length.

Substantively, the significance of incorporating legislative detail into state constitutions can perhaps be illustrated best by the very factors which give rise to the phenomenon. The first is that which occurs when a party, which is in a minority in terms of its ability to control state government, elects a majority of the convention delegates, as happened in both the Michigan and New York Conventions.[14] In both instances, the new convention majorities demonstrated an almost irresistible urge to enact their favorite legislative programs, long frustrated in the state legislature, into the state's "basic" and not easily amendable law.

The second factor arises from the political parties' particular sensitivity, and therefore susceptibility, to the pressures of special interest groups. While clearly a constitutional convention should be a forum in which all interests are adequately represented—political, social, economic and geographic—the purpose for this representation is not to afford a beachhead for the enactment of special legislative programs, but rather to provide an opportunity for everyone to take part in structuring the government which ultimately must respond in some fashion to the competing demands of all such interests. Party delegates, who more than nonparty delegates must act in accordance with the wishes of their party leaders and of the special interest groups on whose favor their party depends, are necessarily more responsive to special interest pressures for constitutional codification of what is normally thought to be more appropriate for ordinary legislation. As one commentator has observed of Michigan's new Constitution: "Responsibility for the statutory content belongs both to party delegations and to interparty special interest blocs and alliances." [15]

A final factor which works in favor of incorporation of legislative detail into constitutional charters stems from the public confusion between constitution-making and governmental policy which almost inevitably results when constitutional conventions are under party control. For just one example, few political leaders would take serious issue, at least privately, with the notion that a modern Revenue Article should be sufficiently flexible to permit the state legislature, subject to appropriate constitutional limitations and guidelines, to adopt some form of income taxation if the need for such taxation is proven and an equitable formula for its application is feasible. However, the actual levy of an income tax, whatever its form, necessarily presupposes the resolution of a host of interrelated and highly complex factual considerations and predictions (what rates will produce what returns? what other taxes can be safely reduced or eliminated? what allocations should be made to replace local sources of revenue that have been eliminated? and so forth), all of which will vary as the factual circumstances change, and all of which are problems within the peculiar competence of a state legislature, not a constitutional convention.

Yet, if a partisan convention were to propose a flexible or even a moderately flexible Revenue Article, however, sensible from a constitutional standpoint and however far removed in fact from an actual income tax levy, there would almost inevitably be embarrassing charges that the proposing party or parties had already adopted the income tax as part of its or their immediate legislative policy—which may not at all be true, and which may indeed run counter to prior party commitments. Faced with such charges, a partisan convention may well retreat to the expedient of adopting a highly restrictive and inflexible Revenue Article, locking the state for the indefinite future into a revenue system that might be as inequitable and wasteful as is the present one. What some day might be defended as a sensible and politically feasible governmental policy, may be prohibited by what is then viewed as an "outmoded and antiquated" constitu-

[14] In both Michigan and New York the legislature was divided between a Republican Senate and a Democratic House. In New York, which had a Republican governor, the Democrats and Liberals achieved a 101 to 84 majority over the Republicans for the 1967 Convention. In Michigan, which had a Democratic governor, the Republicans achieved a landslide 99 to 45 majority for the 1961–62 Convention, the Democrats losing 21 delegate seats in districts where they had members in the state legislature.

[15] Sturm, *supra*, at 281, note 7.

tional provision which the political leaders, to their regret, were forced to adopt in the political passions of the hour.

In sum, partisan conventions, with their penchant for enlarging legislative policy into constitutional sanctity, would seem to offer only minimal prospects for genuine constitutional improvement and, in the long run, would seem to offer fewer advantages than disadvantages to the very parties to whom they may, at first blush, be so attractive.

PARTISAN CONVENTIONS AND THE PROSPECTS FOR VOTER APPROVAL

The foregoing discussion logically suggests the other major defect of partisan conventions. If one party has gained control of a convention and stamped its political or legislative preferences on the convention's product, the "losing" party and its supporters can hardly be expected to support what previously has been viewed as anathema. In a strong two-party state such as Illinois, this is likely to be the coup de grace for any constitutional change.

The proposed Illinois Constitution of 1922, which was adopted by a convention in which Republicans held a nearly six to one majority, and which contained apportionment provisions highly favorable to Downstate Republican interests, was condemned by the Cook County Democratic organization and other leading Democrats, and never had a chance. In Cook County alone, which turned out more voters than the rest of the state combined, the new Constitution was rejected by a vote of nearly 20 to one. Statewide, the Constitution was turned down by a vote of over four to one.[16]

The proposed New York Constitution of 1967 did not fare much better. Opposition cutting across party lines centered principally on the proposed repeal of the so-called Blaine Amendment, which prohibits state aid to parochial schools, but it was the Democrats who defeated a proposal for a separate ratification vote on this controversial proposal. Democratic leaders generally supported the work of their Convention, which included such favorite Democratic legislative programs as state assumption of public welfare obligations, while Republican leaders led by Mayor Lindsay of New York, and with the notable exception of Governor Rockefeller who gave nominal support to the new Constitution, were strongly opposed. At the election on November 7, 1968 the proposed Constitution was rejected by a vote of nearly three to one.[17]

The Michigan experience is hardly reassuring. The new Constitution, which had been adopted on virtually straight party-line votes by the 1961–62 Convention, at which Republicans held a two to one majority, was strenuously opposed by the Democratic Party led by former Governor Swainson, by the State AFL–CIO, the NAACP and the other Democratic-leaning groups. It survived by a razor-thin majority of 50.2 percent of the 1.6 million persons who voted at the April 1, 1963 election. That it passed at all is generally attributed to the fortuitous election to the governorship, in the interval between the Convention's adjournment and the April referendum, of the Convention's popular Republican vice-president, George Romney.[18]

Given the equally divided partisan loyalties of the present Illinois electorate,[19] and the presences of a persistent voting block generally thought to be between 10 percent and 20 percent which will automatically vote "no" on any constitutional proposition—good, bad or indifferent—it seems eminently clear that the prospects for voter approval of any constitutional changes emanating from the coming convention will be grim indeed, if those changes are the product of a convention dominated by either party. Years of effort devoted to constitutional reform by numerous organizations and individuals will have been almost totally wasted.

One other factor, more intangible in nature, is worthy of mention. Despite a great deal of early talk about constitutions being essentially bi-partisan or non-

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[16] The vote State-wide was 185,298 in favor and 921,398 against the new Illinois Constitution at the Dec. 12, 1922 election.

[17] As reported in the New York Times, the final vote was 1,309,197 in favor and 3,364,630 against the 1967 New York Constitution. Nov. 8, 1967, at 1, col. 8.

[18] Sturm, *supra*, at 285 note 7. After an official recount the final vote stood at 810,860 in favor and 803,436 against the new Michigan Constitution. Graves, 15 Book of the States, 1964–1965, *supra*, at 5.

[19] Based on the latest unofficial tallies for the November 5th election, it appears that Illinois voters have given Republican Governor-elect Richard B. Ogilvie a majority of 51.3 percent and Democratic Lieutenant Governor-elect Paul Simon a majority of 51.2 percent. See Chicago Sun-Times, Nov. 16, 1968, at 16, and Nov. 27, 1968, at 5.

partisan in nature, all three of the foregoing conventions soon gave way to intermediate partisan bickering and endless debates, decisions which were made at secret party caucuses rather than in public debate, and voting by individual delegates that appeared to be motivated more by political ambition and self-interest than by considerations of public interest.

The referenda votes in New York, Michigan and Illinois suggest that ultimately the success of any constitutional convention depends not only on the wisdom of the proposals it has made, but also, just as importantly, on public confidence in the manner in which the convention has addressed the problems with which it was faced. A substantial segment of the population, regardless of normal party preference, if it senses that partisanship has overtaken statesmanship in the serious business of drafting constitutional provisions for the structure and machinery of state government.[20]

THE BI-PARTISAN ALTERNATIVE AND THE ROLE OF THE PEOPLE

Measured purely in terms of success at the polls, recent bi-partisan conventions have fared considerably better than partisan conventions held during the same period. The proposals of all four bi-partisan conventions noted above were in fact approved by the voters, although, significantly, the two most recent ones were limited to questions of reapportionment wherein the conventions were obliged to follow the Supreme Court's "one man—one vote" mandate, while the 1947 New Jersey Convention specifically excluded consideration of the controversial issue of reapportionment.[21] While the potential for partisan bickering, decisions made in secret at party caucuses, and voting motivated by political ambition and self-interest would not seem to be greatly lessened simply because a convention is bipartisan rather than partisan, on the basis of the record to date, it may be concluded that the bi-partisan approach to delegate selection, often coupled with convention rules which require substantially more than a simple majority before proposals can be submitted to the voters,[22] offers substantially brighter prospects for voter approval of constitutional changes than does the wholly partisan approach.

In terms of resistance to special interest pressures and elimination of "legislative detail," the evidence offered by bipartisan conventions is mixed. The 1947 New Jersey Constitution is relatively brief, with approximately 16,000 words, while the 1943 Missouri Constitution is inordinately long, with 40,000 words. In assessing the prospects for genuine constitutional improvement, however, mere use of an arithmetical yardstick of the number of words employed may not be very helpful.

Because parties tend of necessity to think in short-run terms—the next election, the coming legislative battle, the capture of public support—they can reasonably be expected, when operating in enforced bi-partisan conditions, to avoid to the greatest degree possible anything which smacks of controversy and, instead, to adopt an extremely conservative approach to the process of constitutional reform. This attitude has perhaps been best expressed by some present Illinois legislators who have already indicated that in their view the primary purpose of the forthcoming convention is simply to rewrite the Amendments Article so that, hereafter, legislatively-initiated constitutional amendments can more easily be ratified by the voters. In essence, the coming constitutional convention is viewed simply as an extra session of the General Assembly.

When one weighs this attitude against the widely held belief that our 100-year-old Constitution is generally obsolete, against the indisputable mandate for change evidenced by the overwhelming vote for Con Con on November 5th, and against the over-all legislative record on constitutional reform for the past

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[20] In addition to the three partisan conventions discussed in the text, the proposals of the 1964–67 Rhode Island and 1965 Tennessee Conventions were rejected by the voters of those states, and the proposals of the 1964 New Hampshire Convention were approved only in part.

[21] The Pennsylvania Convention of 1967–68 was also limited to consideration of only four constitutional articles. Its proposals, which were greatly influenced by the work of a statewide citizens organization and the state bar association, were approved by the voters in the April 1968 primaries.

[22] Under the Illinois Constitution, it does not appear that the General Assembly has any authority to bind the convention to a particular set of convention rules. On the contrary, it appears that the convention has inherent authority to adopt its own rules of procedure, and that it can authorize submission of proposals to the voters by a simple two-thirds or any other majority it deems advisable.

several years,[23] one may reasonably ask whether the bi-partisan approach to Con Con offers any real prospect for substantial constitutional change, let alone substantial improvement, even if the voters were to approve such changes as might be proposed.

Perhaps the most serious defect in the bi-partisan approach to delegate selection, however, lies in the fact that participation in the constitutional convention, which properly speaking should be representative of the broadest spectrum of political interests, would necessarily be restricted to the relatively new individuals who are closely linked with the formal organizations of the two major political parties. The plain fact is that the largest "party" in the State of Illinois is neither the Democratic nor the Republican Party, but the great mass of independent voters who on election day generally, but not always, cast their ballots for candidates who have been put forward by one or the other of the two more organized political parties.

One need only compare the number of voters who registered and voted in two party primaries held on June 11, 1968, with the number of voters who voted in the general election held on November 5, 1968. There were nearly three times as many voters who voted in the general election as voted in the party primaries, or, stated another way, there are nearly twice as many voters who do not care to state a party preference as there are who do—for both parties combined![24] If the minimum requirement for party endorsement as a convention delegate in an election guaranteeing bi-partisan representation were simply that the candidate had voted in the party's primary, the people's range of selection for delegates (except for those few additional independents who conceivably might get their names on the ballot) would, as a practical matter, be reduced by at least two-thirds of the theoretically available choices.

Even as a party adherent, I cannot subscribe to that theory of "limited leadership" which says that only members of the Democratic or Republican Parties are capable of providing leadership for a consitutional convention. The evidence offered by the non-partisan Maryland Convention is, in fact, the other way. If delegate selection for the coming convention is conducted on either a partisan or bi-partisan basis, it is likely that many outstanding citizens, who are not closely linked with either of the two major political parties, will be discouraged from running at all. Among them may be some who have worked so long and hard to bring this convention about.

It is undeniable that strong endorsements of Con Con by the two principal gubernatorial candidates, by the Democratic and Republican party chairmen of Cook County, and by other state and local party leaders and candidates played a substantial role in passage of the November 5th referendum. But it is also undeniable that Con Con would have never received the overwhelming vote it did without the year-long efforts of the Illinois Committee for Constitutional Convention, which was supported by 70 leading business, professional, labor, agricultural, educational and civic organizations throughout the state and by over 25 local citizens committees both Downstate and in Cook County,[25] and without the splendid media coverage and editorial support which Con Con received from newspapers, radio and television. Civic-minded people contributed their time, their money and their organizational effort—right down to the precinct level—to bring the dramatic opportunities afforded by a constitutional convention before all the people of this state.

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[23] Flamm, "The Adverse Prospect—The Case Against Con Con," 49 Chicago Bar Record 326 (1968).

[24] According to official records of the Secretary of State, there were 833,498 Democrats and 739,675 Republicans registered for the June 11, 1968 primaries, or a total of 1,573,173 persons who declared their party affiliation with one or the other of the two major political parties. By contrast, there were 2,307,295 votes cast for the Republican gubernatorial candidate, 2,179,501 for the Democratic gubernatorial candidate, and 19,175 for the Socialist-Labor candidate. Or a total of 4,505,971 votes for the highest state office in the Nov. 5, 1968 general election.

[25] In Cook County, local citizens committees were active in New Trier Township, Evanston Township, Chicago's North Side, the Third Senatorial District Western Suburbs, Palos-Orland-Worth Townships, and South Suburban Cook County. Downstate, in addition to local citizens committees in Lake and DuPage Counties, there were county-wide committees in the following counties: McHenry, Kane, Will, DeKalb, Winnebago, Stephenson, Whiteside, Rock Island, Knox, Warren, McDonough, Peoria, McLean, Champaign, Madison, and St. Clair. Con Con received substantial majorities in all of the foregoing counties except the last three, and in Adams County it barely lost with 49.9 percent of the total vote cast.

In addition to the foregoing, a Student Committee for a State Constitutional Convention, comprised of college students, functioned widely and effectively in the Chicago area.

In sum, the overwhelming "grass roots" response which Con Con received on November 5th both cut across and went far beyond the normal partisan divisions which exist in this state. The General Assembly must now ask itself whether a bi-partisan convention, limited to delegates representing only two of the major political forces in this State, and likely to respond in only a limited fashion to currents of change which have overtaken our state in the last 100 years, will provide an adequate response to people's mandate of November 5th.

"NON-PARTISAN" POLITICS—SOMETHING NEW FOR ILLINOIS

Non-partisan constitutional conventions are not a new phenomenon. At least three were held during the reform era of the second decade of the present century: Nebraska in 1919–20, Massachusetts in 1917–19, and Ohio in 1912. All three proposed substantial constitutional changes which the voters approved. More recently, the non-partisan conventions of Rhode Island in 1944, 1951, 1955 and 1958, and of Alaska and Hawaii, have met with similar success, although the experience of the latter two is somewhat atypical because of the absence in those states of long-established political systems and traditions comparable to those in other states in the 20th century. Against this record of success at the polls, however, stands the glaring exception of the Maryland Convention of 1967–68.

It is generally conceded that the Maryland delegates, who were elected in a single non-partisan election, were both able and conscientious. The parties undoubtedly had their preferences, but elimination of party labels from the ballot had the predictable effect of encouraging voter selection on the basis of merit, rather than simple party affiliation. While for the most part the delegates were known as civic and professional leaders, nearly half of them had prior experience in public office. Interestingly, none of those who emerged as natural leaders during the Convention was actively engaged in party politics.

Although the opinion is frequently expressed that "party responsibility" is a valuable, if not indispensable, pre-requisite to efficient decision-making, the Maryland Convention operated as or more efficiently than the partisan and bi-partisan conventions held recently in other states. The Maryland delegates were generally resistant to the external pressures of special interest groups, but in the end, the reform document which they produced was supported by the leadership of both major political parties, by business and organized labor, and by the civic leadership of the state.

In view of this support of the massed leadership of the state, the results of the referendum on the proposed new Constitution held on May 14, 1968 were as surprising as they are instructive. Contrary to expectations that the Constitution would win approval without trouble, it was rejected by 56 percent of the 650,000 people who turned out to vote, nearly half of the state's 1.4 million registered voters.

Post-election analysis attributes two of the causes of defeat to the Convention's decision to submit its entire work to the people in a single package, and to the failure of the Constitution's proponents to mount the kind of intensive," grass roots" campaign that is always vital to the success of any constitutional referendum. The Constitution's most vocal opponents consisted mainly of two loosely organized, but nonetheless effective alliances: county officials in rural areas whose positions, secure under the 1867 Constitution, were not mentioned in the new one; and a group of Baltimore surburbanites who feared the potential development of some form of metropolitan government which, they thought, would necessarily result in higher taxes and possibly racial integration of their schools. The Maryland Convention's proposals would undoubtedly have fared better if these two opposition groups been divided by means of separate submissions and if there had been a better organized campaign for voter approval after the Convention's adjournment.

A third factor in the defeat was that both the Maryland Convention and the referendum on its proposals were held at a time of grave social unrest and civil disorder.[20] The Convention, while including the best of the state's civic leadership, did not enlist the direct participation of those people, black or white, who were most directly affected by this social crisis. A document labeled as reform, produced by those standing largely outside the swirl of social crisis, could only have increased the wariness of an already uneasy electorate.

[20] Illinois experienced a similar period of unrest during its Convention of 1862, held during the Civil War. The proposals of this Convention were also rejected by the voters. See "Report of the Committee on Constitutional Revision," Appendix C, *supra*, at 70–71.

On the whole, the Maryland experience is both encouraging and instructive. First, it demonstrates the workability of the non-partisan selection process for convention delegates. The Maryland Convention cannot be faulted in terms of either the quality of the delegates who were elected, or of the document which they produced under the full scrutiny of the news media and the public. In short, minimization of partisan and special interest pressures at a constitutional convention pays off in constitution-making as opposed to legislating. Second, the first two factors contributing to defeat of the Maryland Constitution are clearly correctable, the one by separate submissions of the more controversial proposals, and the other by an intensive post-convention campaign to increase voter understanding.

The third factor contributing to defeat of the Maryland Constitution, social crisis, is a fact of contemporary society which we cannot escape. A constitutional convention cannot itself solve all the social ills of our times. But the Maryland experience suggests, at a minimum, that if a new charter for government is to meet the people's approval, the convention which frames it should properly include the representatives of all the people whose approval is being sought.

In the end, constitution-making is not simply an exercise in legal draftsmanship. Nor can it be viewed solely in terms of the classical approach of bringing greater efficiency and economy to the operation of state government. Ultimately, the process of renewal and repair of the basic structure and machinery of government is aimed at nothing less than increasing the ability of government to respond more adequately to the tough, expensive and terribly human problems of our society. In this process, where people must strive to find common ground, there is no room for the narrower "clash of party and interest."

Con Con, then, offers both a tremendous challenge and an exciting opportunity to the people of this state. By opening the delegate selection process to all the people, and allowing full expression to be given to all the contending forces of our society, we may do much to end the mutual hostility, suspicion and divisiveness which we, as a people, cannot long endure. With patience, understanding, intelligence, and human decency toward one another, we the people of Illinois, acting within the framework of the law, can and will establish a new tone, and chart new directions, for the government under which we live.

(From the Chicago Bar Record, December, 1968)

Can Public Officials Be Delegates to the Constitutional Convention?

By WILBUR S. LEGG

WITH the approval on November 5, 1968, of a constitutional convention for Illinois, attention has turned to the composition of the convention. One of the questions now presented is whether any public official, and particularly a member of the General Assembly, can have seat in the convention.[1]

Article XIV, Section 1 of the Illinois Constitution provides that the qualification of delegates to a constitutional convention "shall be the same as that of members of the Senate."[2] In addition to requirements of citizenship, age and residence,[3] and certain disqualifications,[4] Article IV of the Constitution provides as follows in Section 3:

> "No judge or clerk of any court, Secretary of State, Attorney General, State's Attorney, recorder, sheriff, or collector of public revenue, member of either House of Congress, or person holding any lucrative office under the United States or this State, or any foreign government, shall have a seat in the General Assembly; *Provided*, that appointments in the militia, and the offices of notary public and justice of the peace, shall not be considered lucrative. Nor shall any person holding any office of honor or profit under any foreign government, or under the government of the United States, (except postmasters whose annual compensation does not exceed the sum of three hundred dollars) hold any office of honor or profit under the authority of this State."

This article is derived from a subcommittee report prepared for the CBA Committee on Constitutional Revision by the author with Robert Roos, Jr., William Singer, Chester Kamin and Peter Tomei, who contributed to the work underlying its preparation; Arnold Flamm has contributed valuable criticism.

CONCLUSIONS

The conclusions of this article are that:

1. A senator-elect to the Illinois General Assembly cannot hold any lucrative office in the Illinois, United States or any foreign government when he takes his seat in the Senate;

2. This lack of any lucrative office is a qualification of his right to take his seat in the Senate;

3. Article XIV, Section 1 requires a delegate to have the same qualifications as a senator;

4. A qualification of a delegate's right to take his seat in the convention is that he hold no lucrative office in the Illinois, United States or any foreign government at the time he takes his seat;

5. A seat in either the House or the Senate of the Illinois General Assembly is a lucrative office, as is any compensated office in the Illinois, United States or any foreign government;

6. A delegate-elect cannot hold a seat in the House or the Senate of the Illinois General Assembly or any other compensated office in the Illinois, United States, or any foreign government, when he takes his seat as a convention delegate;

7. The common law rule is that an office holder's acceptance of a second office incompatible with his first office automatically vacates his first office unless holding the first office specifically makes the holder ineligible for election or appointment to the second office;

8. A member of the Illinois House or Senate, or a holder of any compensated office in the Illinois, United States or any foreign government, who takes a seat in the Illinois Constitutional Convention thereby ipso facto vacates his seat in the House or Senate or his other office;

9. If a legal dispute arises, a circuit court has jurisdiction in mandamus action to determine that a vacancy exists in the General Assembly, and to order certification of the vacancy by the proper officer to the Governor to be filled in accordance with Article IV, Section 2 of the Illinois Constitution of 1870;

10. If a seat on the Illinois Constitutional Convention were itself an office, Article V, Section 5 of the Constitution of 1870 would make the governor, lieutenant governor, auditor, secretary of state, superintendent of public instruction and attorney general ineligible to take a delegate's seat at any time during the term of their office even if they resigned prior to the end of that term. The available authority is in conflict on whether a seat in the convention is a state office.[5] Since it is unlikely that these state officers would wish to vacate their offices to take seats as delegates, this question is not discussed at any length in this paper.

From the foregoing it can be seen that these conclusions are based, not on the general common law prohibition against one person's holding two offices simultaneously, but rather on the qualifications of a senator under Article IV, Sections 3 and 4, which Article XIV, Section 1 makes also the qualifications of a delegate.

Qualifications of a Senator and Delegate

Article XIV, Section 1 requires delegates to have the qualifications of a state senator. The qualifications of a senator are found in

Article IV, under three sections (§§ 3, 4, 5) grouped together under the heading "Eligibility And Oath." Section 3 enumerates a number of characteristics which determine whether a state senator or state representative may have a seat in the General Assembly.[6] Section 4 lists certain characteristics which bar a person from having a seat in the General Assembly.[7] Among the characteristics required in Section 3 are age, residence and citizenship requirements followed by the language quoted above to the effect that any person holding lucrative office in the government of Illinois, the United States or any foreign country shall not have a seat in the General Assembly. This grouping of required characteristics evolved quite deliberately in the Convention of 1869-70, and it appears evident from the grouping that all the required senatorial characteristics were "qualifications" of senators which were incorporated into Article XIV, Section 1 as the qualifications of delegates.

The Constitution of 1848 contained no qualifications for delegates. The legislature, however, required in the enabling act for the Convention of 1869-1870 that the delegates take an oath to qualify as members of the Convention. The legislature's authority to require such an oath was questioned in the Convention on the ground that the legislature could not require what the Constitution of 1848 had not required, and the Convention was embroiled for nearly four days at the opening of its session on this point.[8] Thereafter the sense of the Convention appeared to be to specify in the new constitution both qualifications and an oath for members.

Mr. Sedgwick early proposed as a resolution for the consideration of the Committee on the Legislative Department that "no judge of any court of law or equity, Secretary of State, Attorney General, county attorney, recorder, clerk of any court of record, sheriff or collector of the public revenue, member of either House of Congress, or person holding any lucrative office under the United States or this State, or any foreign government, shall have a seat in the General Assembly, *or in any Convention called for the purpose of revising, altering or amending the Constitution of the State;* Provided . . ."[9] (Underlining added.) Except for the underlined portion, this language was copied, with minor changes not pertinent here, from Article III, Section 29 of the Constitution of 1848. The underlined portion extended its application to delegates to a convention.

Thereafter, the Committee on Amendments submitted a majority report and two minority reports regarding the Amendments Article to the Constitution.[10] The majority report and the Haines-Springer minority report each provided for delegates in the same number and having the same qualifications as members of the House of Representatives. The Archer-Brown minority report deliberately adhered to the policy of the Constitution of 1848 by omitting any qualification for delegates. The Haines-Springer minority report was adopted by the Convention.[11] Later, because it was felt that the number of representatives would be so large as to make unwieldy a convention of similar number, the number of delegates was changed to twice the number of senators, and the qualifications to those of senators.[12]

Finally the Committee on Revisions and Adjustments incorporated into Article IV, Section 3 the prohibition of Article III, Section 29 of the Constitution of 1848, as well as the citizenship, residence and age requirements.[13] A further section providing that certain con-

victions or failure to account for or pay over public moneys made a person ineligible to the General Assembly, was inserted as Section 4 immediately following. Section 5 prescribing the oath of office for members of the General Assembly followed. The three sections were grouped together under the heading "Eligibility and Oath." Thus the characteristics required of a senator were accumulated in two consecutive sections for easy reference, and they were made "qualifications" for the office in the sense of conditions precedent to holding office. The prohibition of Article III, Section 29 of the Constitution of 1848 was thereby extended to delegates by the "qualification" language already included by the convention in the Amendments Article.[14]

Specific Prohibitions and Exceptions Applicable to Convention Delegates

Article IV, Section 3 lists judges, clerks of any court, the secretary of state, the attorney general, state's attorneys, recorder, sheriffs, collectors of public revenue, and members of either House of Congress as being specifically excluded from simultaneously holding a seat in the General Assembly. One case and a number of opinions of the Attorney General from time to time have ruled that a member of the General Assembly could not simultaneously hold his seat in the General Assembly and the offices of municipal court clerk, member of a county board of supervisors, and mayor.[15] It follows that a delegate to the convention could not at the same time hold any of these offices while he is a delegate.

In the last sentence of Article IV, Section 3, simultaneous holding of offices of "honor or profit" under a foreign or the United States government and under the Illinois government is prohibited. An office of "profit" would appear to be the same as a "lucrative" office within the meaning of the preceding sentence, since it has been held that a "lucrative" office is one "to which there is attached a compensation for services rendered."[16] It thus would appear that a number of cases and opinions holding offices of profit to be incompatible under the last sentence should also be applied to determine that these offices are "lucrative" offices incompatible with being a delegate to the convention. Such offices have included the offices of mayor, village trustee, town collector, town clerk, postmaster, assistant postmaster, city attorney, police magistrate, and commissioned officer in the U. S. Army.[17]

The Illinois Supreme Court has recently held that certain "relatively minor ministerial positions" could be held simultaneously by members of the General Assembly, because these positions were not of the kind enumerated in Article IV, Section 3 prior to its reference to "lucrative office," but rather were either honorary or more in the nature of an "employment" than an "office." *People* v. *Capuzi*, 20 Ill. 2d 486 (1960). At issue in the *Capuzi* case were the posts of president of a village whose affairs were managed by a village manager, deputy county coroner, deputy clerk and deputy bailiff of a municipal court.[18] Similarly, appointments in the militia (as distinguished from the U. S. Army) are specifically excepted from the prohibition, 1928 Rep. Atty-Gen. 98; 1916 Rep. Atty-Gen. 285, and a member of a party's state central committee is not barred because the state central committee is a party, as distinguished from a public, office, 1916 Rep. Atty-Gen. 933. Notaries public and justices of peace are specifically exempted

from the prohibition by Article IV, Section 3. Thus a delegate could hold any of these or similar positions while sitting as a delegate.

Incompatibility of Seats in the General Assembly and the Convention

Since a holder of "any lucrative office" may not have a seat as a senator, and hence under Article XIV, Section 1 may not have a seat as a delegate to a convention, the controlling question here is whether a member of the General Assembly holds "lucrative office."

The definition of "lucrative office" should begin with the definition of "office" in Article V, Section 24 of the Constitution, since the Constitution does not distinguish usage of the word in its various articles.[19] This Section distinguishes "office" from "employment" as follows:

> "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished."

The following section, Article V, Section 25, prescribes an oath of office for "All civil officers, *except members of the General Assembly* and such inferior officers as may be by law exempted . . ." A different oath for members of the General Assembly was prescribed in Article IV, Section 5. The specific exception of members of the General Assembly in Article V, Section 25 would have been unnecessary if the drafters had not regarded members of the General Assembly as "civil officers."

That they did regard members of the General Assembly as "officers" is clear from their debates on the oaths required in Article IV, Section 5 and in Article V, Section 25. In opposing the special oath for the Legislature ultimately included in Article IV, Section 5, Mr. Tincher argued:

> "If the oath is a panacea for all the ills of life, I am certainly for it; and if it is a good oath, it is certainly good for everybody. If it is good for members of the Legislature, it is good for the judiciary and the executive; and if my esteemed friend from Cook [Mr. Medill] regards this of importance, why not amend it, let it apply then to the executive, legislative and all State and county offices, and have all officers bound by the same oath?"[20]

When the oath ultimately included in Article V, Section 25 was first proposed, it was to be required of "members of the General Assembly," and all officers, executive and judicial, except such as might be exempted by law. Mr. Allen's motion to delete the words "General Assembly" was adopted after he argued that such action was necessary "to preserve the form of oath prescribed by the legislative article to the members of the General Assembly. I have no objection to the section as it applies to *other* officers of the state, but to members of the General Assembly that oath is peculiarly appropriate." (Emphasis supplied.)[21] The view of the delegates has been confirmed in cases from other states in which courts have ruled on whether a member of the legislature holds a public office.[22]

The attributes of civil office under Article V, Section 24 were stated at greater length in *McKinley* v. *City of Chicago*, 291 Ill. App. 571 (1st Dist. 1937) *rev'd on other grounds*, 369 Ill. 268 (1938), an action by two associate judges

for their salaries during the time from the election at which they were apparently defeated to the date their challenge of the election was upheld. In discussing whether they were "employees" or "officers" within the meaning of Article V, Section 24, the court said:

> "From a consideration of all the authorities it is, we think, apparent that whether the name office or employment is used, the relationship of those who render service in public positions under the laws and constitution of this State are of two classes fundamentally different in their nature. In the first class the relationship exists through a title derived from the people in whom sovereignty resides. In the second class, the right is through the pleasure of some subordinate department official or agency. In the first class the occupant holds title for a fixed and definite time declared by law, while in the second the occupant serves for an uncertain, indefinite and undetermined period. In the first class the duties to be performed by reason of the relationship are independent in their nature, partaking of the nature of that sovereignty from which the right is derived, while in the second class the duties are subordinate in their nature and within the discretion of a superior agency or officer . . ." 291 Ill. App. at 593.

Membership in the General Assembly has all of the attributes of office enumerated by the court: title derived from the people who elect the members, a term of office declared by law, independent duties. Similarly, the rationale of the Supreme Court (*People* v. *Capuzi*, 20 Ill. 2d 486 (1960)), in holding that an honorary village president, a deputy county coroner, and deputy bailiffs and deputy clerks of a municipal court were not constitutional officers, because they held only relatively minor ministerial positions at the pleasure of some other official, would imply that a seat in the General Assembly was a "lucrative office." State senators and State representatives clearly do not hold either minor or ministerial positions at the pleasure of other officials. Thus it would appear that they hold "office" within the meaning of Article V, Section 24.

Since they are compensated according to the manner provided in Article IV, Section 21, they also hold lucrative office. Moreover, a member of the General Assembly could not by waiving his salary fixed by law thereby become a holder of an office which was not "lucrative."[23]

In 1918, the contention was advanced that the phrase "any lucrative office" could not include seats in the General Assembly.[24] This contention was based on the proposition that "any lucrative office" in Article IV, Section 3 must mean "any lucrative office except a seat in the General Assembly," because a contrary construction would bar persons elected to the General Assembly from taking their seats even though they held no other lucrative office under the State of Illinois or the United States or a foreign government. Thus, it was urged that the pertinent language should be read as follows:

> "No person holding any lucrative office under this State, except a seat in the General Assembly, shall have a seat in the General Assembly."

In the alternative it was urged that a seat in the General Assembly is not an "office," a position heretofore discussed. Both these arguments go too far, however, for if "any lucrative office" does not include a seat in the General As-

sembly, one would reach the absurd result that there is no prohibition in the Constitution against one person's holding seats in both the Senate and House of Representatives simultaneously. This prohibition appears to have been so clearly understood, however, that no one has ever challenged it in Illinois by attempting to hold seats in both the Senate and the House.[25]

The better view then appears to be that a seat in the General Assembly is a "lucrative office" within the meaning of Article IV, Section 3, and that when the qualifications of Article IV, Section 3 are applied to convention delegates in accordance with the requirement of Article XIV, Section 1, a person who holds a seat in the General Assembly cannot continue to hold that seat and "have a seat" in the convention at the same time.

Effect of Incompatibility of Two Offices

The question remains whether a holder of one of the enumerated offices or of a "lucrative office" is ineligible for election to the office of convention delegate, or whether the prohibition is simply against the holding of two offices at the same time.

Mechem states the distinction as follows:

> "It is frequently declared that persons holding one office shall be ineligible to election to another, either generally or of a certain kind. These provisions being held to incapacitate the incumbent of the first office to election to the second, it follows that any attempted election to the second is void and that if, by color of it, he attempts to hold the second office he will be removed from it. It is thus the second office which is vacated instead of the first . . .
>
> "Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled, operates ipso facto to vacate the first.
>
> "No judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant."
>
> Mechem, *Public Offices and Officers*, §§428-429 (3rd ed. 1890).

No Illinois judicial opinions have dealt with the question whether an incumbent of one of the enumerated offices or of a "lucrative office" is ineligible to run for the General Assembly. In only one case has there been a challenge to the eligibility of an incumbent of a federal office of "honor or profit" to hold an office of "honor or profit" under the State, under the last sentence of Article IV, Section 3, and there the court declined to rule on the issue.[26]

On the other hand, there have been a number of cases dealing with the reverse situations. In one case, a State senator who was elected Clerk of the Municipal Court of Chicago was held to have vacated automatically his Senate seat upon his acceptance of the latter office.[27] In other cases, incumbents of offices of "honor or profit" under the State who accepted federal offices of "honor or profit" have been held to have vacated *ipso facto* their prior offices.[28] While not squarely in point, the sense of these holdings is that Article IV, Section 3 is a prohibition against the holding of two offices at one time, rather than a bar to eligibility.

Mechem supports the foregoing conclusion. Mechem's example of a provision which requires only

vacation of the first office upon qualification for another incompatible office is almost identical to Article IV, Section 3:

> "Where the Constitution provides that no person holding any lucrative office under the State, shall be a member of the general assembly, one who accepts an election to the assembly while holding the office of circuit judge vacates the latter office . . ." Mechem, *Public Offices and Officers*, § 431 (3rd ed. 1890).

From the foregoing it is reasonable to conclude that persons holding the enumerated offices or "any lucrative office" under Article IV, Section 3 are not ineligible for the office of convention delegate, unless made so by another provision of the Constitution, but that, if they were to be elected and accept the position of delegate, they would automatically vacate their prior offices.

Discussing provisions which bar eligibility, Mechem states:

> "Thus, as in the Constitution of California, it is sometimes declared that 'No person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this State;' or, as in Indiana 'that no person elected to any judicial office shall, during the term for which he was elected, be eligible to any office of trust or profit under the state, other than a judicial one' . . ." Mechem, *Public Offices and Officers* § 76 (3rd ed. 1890).

The similar provision in Article V, Section 5 of the Illinois Constitution makes the governor, lieutenant governor, auditor, secretary of state, superintendent of public instruction, and attorney-general ineligible to other state office during the period for which they have been elected.

Enforcement of Sanction Against Office Holder who Takes Delegate's Seat

Although the sanction for taking a position incompatible with an office already held is automatic vacation of the former office, it may be necessary to enforce the sanction. Where the violation is clear, an action of mandamus to compel the appropriate official to institute action to fill the vacancy has been held appropriate.[29] Where the violation is not clear, a *quo warranto* proceeding to challenge title to the first office has been deemed appropriate.[30] Without one or the other of such proceedings, it is questionable whether compensation for the first office might be withheld by administrative determination only.[31]

In view of the provisions of Article IV, Section 9 of the Constitution, conferring on the houses of the General Assembly the right to be "the judge of the election, returns and qualifications of its members . . .", it might be argued that the issue of whether a member of the General Assembly vacated his seat is properly within the jurisdiction of the legislative branch to determine. However, in *People ex rel. Myers* v. *Haas*, 145 Ill. App. 283 (1st Dist. 1908), the court held that the issue was squarely within its competence. Distinguishing between qualifications and automatic vacation the court stated:

> "Counsel for the defendant in error advance the argument that the courts of the state may not try the title and qualifications of a senator to his seat in the senate.
>
> "Undoubtedly it is true, and we dare not gainsay it because the constitution so provides, that in the General Assembly each house shall 'be the judges of the election returns, and qualifications of its members.' Far be it

from us to undertake to adjudicate in respect to the election, the election returns or the qualifications of Mr. Galpin as a state senator. For the purpose of the present inquiry we may, however, determine, and not only that but it is our duty under the law, to determine whether or not Mr. Galpin has voluntarily resigned the office of state senator of the second district." Id. at 288.

The court held that Senator Galpin had vacated his seat in the senate by his election to the office of Municipal court clerk. In so doing it relied on *People ex. rel. Fuller* v. *Hilliard,* 29 Ill. 413 (1862). In this case the Illinois Supreme Court ordered a county clerk to certify the election of Melville Fuller (later Chief Justice of the U. S. Supreme Court) to the Illinois House of Representatives in 1862, despite the contention that only the House could judge the election of its members.

Hilliard went much further than *Haas,* because the court was requiring an act which directly bore on determination of an election to the House. Such determinations are within the competence of the House under Article IV, Section 9, as the court recognized in *Hilliard.*[32]

To Summarize Again:

1. All of the "qualifications" required of State senators under Article IV, Sections 3 and 4 are also required of delegates to a constitutional convention under Article XIV, Section 1.

2. While there is no judicial precedent squarely in point, the legal authorities which do exist suggest that persons holding the offices enumerated in Article IV, Section 3 or "any lucrative office" are not "disqualified" or barred from eligibility to a seat in the Senate and, thus, that they are not "disqualified" or barred from eligibility to a seat in a constitutional convention under Article XIV, Section 1.

3. On the other hand, the legal authorities strongly support the conclusion that, if persons holding the offices enumerated in Article IV, Section 3 or "any lucrative office" are elected as convention delegates, they would, upon acceptance of their seats, automatically vacate their former offices under the provisions of Article XIV, Section 1 as that section incorporates Article IV, Section 3. Any other interpretation would render the cited provisions apparently meaningless.

4. Either a mandamus action to compel action to fill the vacancy or a *quo warranto* proceeding to challenge title to the former office may be brought to enforce the sanction of automatic vacation.

5. A "lucrative office" is a public position created by the constitution or by law, continuing during the pleasure of the appointing power or for a fixed period of time with a successor elected or appointed, to which compensation is attached by law regardless of whether that compensation is accepted or waived. The term "lucrative office," however, does not include "relatively minor ministerial positions" held at the pleasure of another official.

6. A member of the General Assembly holds "lucrative office," even though he might waive his legislative salary, and thus, while not ineligible for election as a convention delegate, would, upon acceptance of a convention seat, vacate his seat in the General Assembly under the provisions of Article XIV, Section 1 as that section incorporates the provisions of Article IV, Section 3.

FOOTNOTES

1. For convenience, delegates to the convention will be called "delegates" in this article, and

"members" will refer only to members of the General Assembly.

2. Ill. Const., art. XIV, § 1.

3. State senators must be United States citizens, must have attained the age of 25, and must have been residents for 5 years of the State and for the 2 years next preceding the election of the district from which they are elected. Ill. Const., art. IV, § 3.

4. Persons convicted of bribery, perjury or other infamous crimes, and collectors or holders of public monies who have not made an accounting as required by law, are ineligible for the General Assembly or any office of profit or trust in the State. Ill. Const., art. IV, § 4.

5. Five cases decided on this point have divided in their holdings, two holding that the delegates were officers, (*Fyfe* v. *Mosher*, 112 N.W. 725 (Mich., 1907); *Kederick* v. *Heintzleman*, 132 F. Supp. 582 (D. Alaska, 1955)), and three holding that they did not hold an office created by state law or the constitution (*State* v. *Rogers*, 70 So. 863 (La., 1916); *State* v. *Doyle*, 70 So. 322 (La., 1915); *Board of Commissioners* v. *Attorney-General*, 229 A. 2d 388, *dissent*, 230 A. 2d 61 (Md., 1967)). In each case the circumstances and constitutional provisions involved differed in material respects from the Illinois Constitution of 1870 and from the present call of a convention strictly in accordance with Article XIV, Section 1 of that constitution. Although in the Convention of 1869-70 former Justice Skinner had argued that delegates were not officers required to take an oath because their position had no continuing nature as attested by the failure to provide any means of filling vacancies in the convention (*Debates and Proceedings of the Illinois Constitutional Convention, 1869-70*, 31-32 (Springfield 1870)), the convention silenced such argument for the future by providing in Article XIV, Section 1, specifically for both a delegate's oath and the filling of vacancies in the convention. The principal difficulty in finding delegates to be officers lies in the definition of "office" as distinct from "employment" in Article V, Section 24 of the 1870 Constitution. The delegate's position meets three of the four characteristics of office prescribed in this section, but does not continue for a fixed time or during the pleasure of the appointing power. This section has been construed in *McKinley* v. *City of Chicago*, 291 Ill. App. 571, 593 (1st Dist., 1937), *rev'd on other grounds*, 369 Ill. 268 (1938), in which the court emphasized the following as characteristics of office: (1) derivation of title to the position directly from the people as distinguished from a subordinate government official or agency; (2) the independent nature of the duties of an office; and (3) tenure for a period declared by law. Again the delegate's position resembles an office more nearly than an employment in deriving title directly from the people and in having independent duties, but it has no fixed term since the convention may sit for as long as it finds it necessary to complete its work.

6. "§ 3. No person shall be a Senator who shall not have attained the age of twenty-five years, or a Representative who shall not have attained the age of twenty-one years. No person shall be a Senator or a Representative who shall not be a citizen of the United States, and who shall not have been for five years a resident of this State, and for two years next preceding his election a resident within the territory forming the district from which he is elected. No judge or clerk of any court, Secretary of State, Attorney General, State's Attorney, recorder, sheriff, or collector of public revenue, member of either House of Congress, or person holding any lucrative office under the United States or this State, or any foreign government, shall have a seat in the General Assembly: *Provided*, that appointments in the militia, and the offices of notary public and justice of the peace, shall not be considered lucrative. Nor shall any person holding any office of honor or profit under any foreign government, or under the government of the United States, (except postmasters whose annual compensation does not exceed the sum of three hundred dollars) hold any office of honor or profit under the authority of this State."

7. "§ 4. No person who has been, or hereafter shall be convicted of bribery, perjury or other infamous crime, nor any person who has been or may be a collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the General Assembly, or to any office of profit or trust in this State."

8. *Debates and Proceedings of the Illinois Constitutional Convention, 1869-70*, 7-49 (Springfield 1870), hereinafter called the *1869-70 Debates*.

9. *Id.* at 76.

10. *Id.* at 1309-1310.

11. *Id.* at 1312.

12. *Id.* at 1591.

13. *Id.* at 1778.

14. It has been suggested that the qualifications incorporated from Article IV, Sections 3 and 4, into Article XIV, Section 1, were restricted to the age, residence and citizenship requirements for state senators. In Sections 3 and 4, however, there is no distinction between these characteristics and the remaining ones specified in those sections which would warrant such a limited view of the qualifications of a state senator. Furthermore, it has been held that the disqualifying characteristics of Article IV, Section 4, have been held to be qualifications of which the members of the General Assembly are the judge under Article IV, Section 9. *Reif* v. *Barrett*, 355 Ill. 104, 125-129 (1934). It would appear that characteristics which are qualifications under Article IV, Section 9, must also be qualifications under Article XIV, Section 1, since nothing in the constitution or the debates indicates any difference in the usage of the word "qualifications" in the two sections. See also *Bond* v. *Floyd*, 385 U.S. 116, 128-129 (1966), in which the Georgia constitution's dual office prohibition was listed as a qualification for a seat in the Georgia assembly.

15. *People ex rel. Myers* v. *Haas*, 145 Ill. App. 283 (1st Dist. 1908) (municipal court clerk); 1921-22 Rep. Atty-Gen. 83 (member of county board of supervisors); 1917-18 Rep. Atty-Gen. 755 (circuit court judge); 1914 Rep. Atty-Gen. 1175, 1177 (mayor, member of county board of supervisors).

16. *Book* v. *State Office Building Commission*, 149 N.E. 2d 273, 289 (Ind. 1958). An office to which compensation is attached by law does not cease being "lucrative" because the holder thereof waives his salary. *Howard County Metropolitan Commission* v. *Westphal*, 193 A.2d 56, 60 (Md. 1963). *Cf. Hetrick* v. *County Commissioners of Anne Arundel County*, 159 A.2d 642, 645 (Md. 1960); *Commonwealth ex rel. McCreary* v. *Major*, 22 A.2d 686, 690 (Pa. 1941). However, any office for which compensation is not fixed by constitution, statute, or ordinance would not be a "lucrative office" and thus would not fall within the prohibition of Article IV, Section 3.

17. *People ex rel. Cromer* v. *Village of Maywood*, 381 Ill. 337, *cert. den.*, 318 U.S. 783 (1943) (police magistrate and captain in U.S. Army); *Fekste* v. *City of East St. Louis*, 315 Ill. 58 (1924) (city attorney and captain in U.S. Army); *People ex rel. Johnson* v. *Blake*, 144 Ill. App. 246 (2d Dist. 1924) (village trustee and postmaster receiving salary of over $300 annually); *Packingham* v. *Harper*, 66 Ill. App. 96 (2d Dist. 1896) (town collector and postmaster); 1917-18 Rep. Atty-Gen. 757, 800, 811 (lieutenant-governor or state's attorney and any commission in U.S. Army); 1915 Rep. Atty-Gen. 785, 786, 788, 791 (congressman and state's attorney; postmaster and town clerk); 1914 Rep. Atty-Gen. 1161 (mayor and assistant postmaster; county judge and postmaster). In the *Village of Maywood* case, the court stated:

> "The offices of captain in the United States Army and of police magistrate of the village of Maywood are both positions of profit and honor." 381 Ill. at 342.

At that time an army captain was paid $240 per month and the police magistrate $200 per month.

18. The posts of president of a village whose affairs were managed by a village manager, deputy coroner of Cook County, deputy bailiff and deputy clerk of the Municipal Court of Chicago were distinguished by the Court in *Capuzi* from a judge or clerk of any court, secretary of state, attorney-general, state's attorney, recorder, sheriff, collector of public revenue, and congressman which are enumerated in Article IV, Section 3. *Cf. Saxby* v. *Sonnemann*, 318 Ill. 600 (1925), in which the court held that a member of the General Assembly could not simultaneously be a Deputy Attorney-General to enforce the prohibition era's Search and Seizure Act without violating the separation of powers requirements in Article III, but did not consider Article IV, Section 3.

19. But *cf. People* v. *Capuzi*, 20 Ill. 2d 486 (1960), where the court stated, in an argument not necessary to its conclusion, that the doctrine of *eiusdem generis* applied to delimit the scope of the term "any lucrative office" to the kinds of offices previously enumerated in Article IV, Section 3. In distinguishing the relatively minor ministerial offices there involved from "any lucrative office," the court expressly relied on characteristics of "office" under Article V, Section 24 which earlier had been articulated in *McKinley* v. *City of Chicago*, 291 Ill. App. 571 (1st Dist. 1937), rev'd on other grounds, 369 Ill. 268 (1938).

20. *1869-70 Debates* at 958.

21. *Id.* at 1387.

22. *Board of Supervisors* v. *Attorney-General*, 229 A.2d 388; *dissent*, 230 A.2d 61 (Md. 1967); *In re Opinion of the Justices*, 21 A.2d 267 (R.I. 1941); *Pitts* v. *Chilton County*, 173 So. 94 (Ala. App. 1937), *cert. den.*, 173 So. 95 (Ala. 1937).

23. See *Howard County Metropolitan Commission* v. *Westphal*, 193 A.2d 56, 60 (Md. 1963). *Cf. Hetrick* v. *County Commissioners of Anne Arundel County*, 159 A.2d 642, 645 (Md. 1960); *Commonwealth ex rel. McCreary* v. *Major*, 22 A.2d 686, 690 (Pa. 1941).

24. See Legislative Reference Bureau, *Constitutional Convention in Illinois*, p. 57 (Springfield: 1918).

25. The qualification in the third sentence of Article IV, Section 3 literally says that no person holding a lucrative office under the United States, a foreign government, or this State at the time he is to take his seat in the General Assembly shall have the seat. Thus a person could hold lucrative office up to the time he was to take his seat and still take his seat if his prior office terminated immediately prior to his taking his seat. By implication also, a person who has a seat in the General Assembly and acquires another lucrative office must give up his seat in the General Assembly, because he then can no longer "have" it. It appears doubtful that the members of the Convention of 1869-70 had any subtle intention beyond covering these two basic situations, particularly in view of the history of this sentence set forth earlier. In other words, a member could hold one seat in the House or Senate but no other lucrative office. Attempts to distill a further implication from the sentence that a seat in the General Assembly is not a "lucrative office" within the meaning of Article IV, Section 3, appear to be in direct conflict with the frequent assertions of a contrary opinion by the delegates to the 1869-70 Convention.

These conceptual difficulties of the Legislative Reference Bureau in 1918 apparently did not dissuade the Attorney-General in 1919 from issuing his opinion that members of the General Assembly could not simultaneously be delegates to the constitutional convention and members of the General Assembly. Opinion of the Attorney-General, March 1, 1919 (unpublished, but referred to in Smith Hurd Ill. Stats. Ann., Const., Art. XIV, §1, annotation).

It is not possible to tell whether the unpublished Attorney-General's Opinion in 1919, holding that members of the General Assembly could not simultaneously serve as convention delegates was premised on the conclusion that General Assemblymen hold "lucrative office" so as to invoke the qualification provision of Article XIV, Section 1, or on the conclusion that convention delegates hold "lucrative office" so as to invoke the dual prohibition of Article IV, Section 3.

26. *People ex rel. Johnson* v. *Blake*, 144 Ill. App. 246 (2d Dist. 1908), where a village postmaster was elected village president. The case was decided on affidavits, and the court reversed a judgment for the defendant-office holder because of a conflict in the affidavits as to whether the defendant came within the $300 annual compensation exemption specified in the Constitution.

27. *People ex rel. Myers* v. *Haas*, 145 Ill. App. 283 (1st Dist. 1908).

28. *People ex rel. Cromer* v. *Village of Maywood*, 381 Ill. 337 (1942), *cert. den.*, 218 U.S. 783 (1943) (police magistrate who accepted commission as an officer in U.S. Army); *Fekete* v. *City of East St. Louis*, 315 Ill. 58 (1924) (city attorney who accepted commission as an officer in U.S. Army); *Dickson* v. *People ex rel. Brown*, 17 Ill. 191 (1855) (director of State institute for deaf and dumb who was appointed U.S. Marshal); *Packingham* v. *Harper*, 66 Ill. App. 96 (2d Dist. 1896) (town collector who was appointed U.S. postmaster).

29. *People ex rel. Cromer* v. *Village of Maywood*, 381 Ill. 337 (1942), *cert. den.*, 318 U.S. 783 (1943) (police magistrate who accepted commission as an officer in the U.S. Army); *People ex rel. Myers* v. *Haas*, 145 Ill. App. 283 (1st Dist. 1908) (State senator who was elected Municipal Court Clerk).

30. *People* v. *Capuzi*, 20 Ill. 2d 486 (1960) (honorary village president and minor ministerial officials who were elected to the General Assembly); *People ex rel. White* v. *Butler*, 393 Ill. 395 (1946) (county judge who was inducted into the U.S. Army as a private); *People ex rel. Johnson* v. *Blake*, 144 Ill. App. 246 (2d Dist. 1908) (postmaster who was elected village president).

31. Compare *People ex rel. White* v. *Butler*, 393 Ill. 395 (1946) (withholding of compensation improper, but award of writ of mandamus reversed because the form of action was improper), with *Fekete* v. *City of East St. Louis*, 315 Ill. 58 (1924) (withholding of compenssation held proper: judgment for defendant in action of assumpsit affirmed).

32. In a number of cases, courts have declined to pass on whether a person was duly elected to the legislature because of the customary constitutional provision that each house of the legislature shall be the judge of the election and qualifications of its members. *Annotation*, 107 A.L.R. 205, at 209-219. In one of the early cases (*People ex rel. Drake* v. *Mahaney*, 3 Mich. 481, 492-3 (1865)), Judge Cooley enunciated the rule of judicial abstinence as necessary to protect the integrity of the legislature against attack after the legislature had adjourned. *Reif* v. *Barrett*, 355 Ill. 104, 126-129 (1934) presents a similar ruling by the Illinois Supreme Court.

The *Haas* case, however, presents the question, not of the propriety of the election or original qualification to take a seat in the legislature, but of the occurrence of a vacancy by operation of law after a legislator has taken a position incompatible with retention of his seat in the legislature. In this situation, the Delaware Supreme Court has refused to adjudicate an attempt to compel the legislature to declare the seat vacant and order an election to fill the vacancy. *State* v. *Corley*, 172 Atl. 415, 420 (1934). *Corley* was followed in *In re Opinion Of the Justices*, 47 So. 2d 586 (Ala. 1950), which was decided under constitutional provisions substantially different from those of both Delaware and Illinois. The Illinois Constitution, unlike the Delaware Constitution, does not invest the General Assembly with the power to determine when it has vacancies and to order elections. The only constitutional provision on the subject is Article IV, Section 2, which empowers the Governor to call elections to fill legislative vacancies. Thus, *Corley* would not be inconsistent with *Haas*.

In *State v. Gilmore*, 20 Kan. 551 (1878), however, the court refused to hear a suit to declare a legislative seat vacant because the member had

been publicly intoxicated in violation of law. Relying only on the customary constitutional language as to determination of a legislator's election and qualifications, the court held that this exclusive power continued in the legislature throughout the session and extended to a determination whether a vacancy existed. The court relied on Judge Cooley's reasoning in *Mahaney* that such exclusive jurisdiction in the legislature was necessary to protect its integrity. This position appears untenable when the constitution empowers the governor rather than the legislature to fill vacancies, thereby showing an intention to distribute the power to act when vacancies occur among other branches of the government.

In *State* v. *Shumate*, 113 S.W.2d 381 (1938) the court, in the face of a powerful dissent, stated that it would not review the Tennessee House of Representatives' actual determination that a member had not vacated his seat even though he admitted that he had taken office as a judge and the court's majority stated that it would have declared the prior office vacant in any other situation. Here the Constitution did empower the Governor to order elections to fill vacancies in the General Assembly, and this case would appear, at least where the legislature has acted arbitrarily, to be contrary to *Haas*.

On the other hand in *State ex rel. Leland* v. *Mason*, 56 N.E. 468 (Ohio, 1900) the Ohio Supreme Court determined that a member of the Ohio house of representatives who had after his election to the house accepted a federal judgeship had vacated his seat in the Ohio legislature and was entitled to no further pay. The representative contended that the court was without jurisdiction to make this determination, because the house of representatives had not done so itself. The court replied:

> "We cannot assent to this proposition. The sections cited are to be construed with Section 4 of the same article which provides that 'no person holding office under the authority of the United States . . . shall be eligible to, or have a seat in, the general assembly.' It is the duty of the court to give force to this mandate of the constitution, and, though the general assembly does not act, the court cannot evade the duty."

See also *State ex rel. McMillan* v. *Sadler*, 58 Pac. 284, 289 (Nev., 1899) in which the court upheld the election of a new state senator to fill a vacancy created by the acceptance of the office of federal paymaster by the prior incumbent. In this case the legislature had taken no action and the election to fill the vacancy had been ordered by the governor. *Cf. State ex rel. Gettles* v. *Gillen*, 148 N.E. 86, 88 (Ohio, 1925).

Thus in the absence of a decision by the legislature, the weight of authority under constitutional provisions like those in the Illinois Constitution appears to support the decision in *Haas*.

(From Chicago-Kent Law Review, September 1952)

NOTES AND COMMENTS

Rescinding Memorialization Resolutions

Progress in the matter of memorializing the United States Congress to call a convention for the purpose of considering and proposing an amendment to the Constitution of the United States limiting federal income tax rates has reached the point where twenty-eight states have now adopted resolutions on the issue. Similar action by four more state legislatures will be necessary in order that there may be an unquestionable demand[1] by thirty-two states, or a number sufficient to meet the requirements of Article V of the Constitution, to put Congress in a position where it would be obliged to act.

The accelerated speed of the movement, developing in the past few years since the matter was first broached by the legislature of the State of Wyoming, seems to have caused some concern on the part of those presently in power in a few state legislatures for they would appear to be attempting to halt the rate of progress by securing the adoption of resolutions intended to rescind the favorable action taken by their states at an earlier date. Four of the twenty-eight state legislatures which had previously memorialized Congress calling for the submission of the amendment in question, to-wit: Alabama,[2] Illinois,[3] Kentucky,[4] and Wisconsin,[5] have since adopted resolutions purporting to rescind their earlier memorialization. The question has thereby been raised as to whether such rescission resolutions are null and void and of no legal effect. It is believed that such is the case for the reasons hereinafter set forth.

It is essential to keep in mind the amendatory process described in Article V of the federal constitution. That article contemplates that the Congress (a) shall, when two-thirds of both houses deem it necessary, "*propose* amendments" to the constitution; or (b), "on the *application* of the legislatures of two-thirds of the several states," shall call a convention for proposing amendments. The article further recites that the amendments, "*in either case,* shall be valid to all intents and purposes . . . when *ratified* by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof."[6]

[1] See Packard, "Legal Facets of the Income Tax Rate Limitation Program," 30 Chicago-Kent Law Review 128 (1952), particularly pp. 137-40, on the point of whether or not the necessary quorum has already been achieved.

[2] Ala. Acts 1945, p. 155.

[3] Ill. Laws 1945, p. 1797.

[4] Ky. Acts 1946, p. 720.

[5] Wis. Laws 1944-5, pp. 1126-7.

[6] Italics added. Article V contemplates that the mode of ratification shall be determined by Congress.

In view of the constitutional expression that either of these methods is to possess equal effect with the other it should be possible to compare the state memorialization method with the congressional method and thereby reach the result that what is true of the one is equally true of the other. If that comparison is proper, and no reason appears why it is not so, then it follows that what would be true of a congressional attempt to withdraw a proposed amendment which it had once submitted would likewise be true of the attempt by a state to rescind an action it had taken looking toward the same end.

Except as Congress may limit the time within which ratification may be given to one of its proposals, it is clear that Congress is without the power to withdraw a proposed amendment which it has once submitted. Professor Orfield is authority for the proposition that an attempt by Congress to withdraw a proposed amendment, after it had secured the necessary vote of two-thirds of both houses, would be a nullity. In his book on the subject of amending the federal constitution, he noted that the "question was directly raised in 1864 when Senator Anthony proposed to repeal the joint resolution submitting the Corwin amendment," and he declared the practice to be "to regard such a withdrawal as ineffectual," on the theory that each affirmative step taken in the passage of an amendment is irrevocable. If such were not the case, he wrote, "confusion would be introduced if Congress were permitted to retract its action."[7] Much the same view has been shared by Professor Burdick. In his textbook on the American Constitution, he wrote: "It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration."[8]

Considering the demonstrated equality between the two methods of procuring a constitutional amendment, it is not illogical to apply the same reasoning to state action intended to rescind an application made by a state legislature for the calling of a convention to consider and propose amendments. As Professor Orfield has said, "the analogy of a state legislature's attempting to withdraw its ratification of an amendment would seem apposite."[9]

Additional proof may be found in the comparison which exists between a purported congressional withdrawal of a proposal on the one hand and a state attempt to withdraw its ratification of a proposed amendment on the other. The United States Supreme Court itself once pointed

[7] Orfield, The Amending of the Federal Constitution (University of Michigan Press, Ann Arbor, Michigan, 1942), p. 52.

[8] Burdick, The Law of the American Constitution: Its Origin and Development (G. P. Putnam's Sons, New York, 1922), p. 39.

[9] Orfield, op. cit., p. 52.

out that "proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor."[10] In that endeavor, state governments do not act on the basis of their sovereign status but under a special power conferred by the national constitution. As Judge Jameson wrote, the power to amend the constitution is not a power belonging to the states "originally by virtue of rights reserved or otherwise." As a consequence, "when exercised, as contemplated by the constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity . . . [Once] ratified, all power is expended."[11]

That view also has the support of the eminent Professor Dodd. He has stated that the view "is incontrovertible, that a state, once having ratified, may not withdraw that ratification . . . to construe the Constitution otherwise, would be to permit great confusion in that no state in ratifying could know what the status of the amendment was if at the same time other states were permitted to withdraw. Of course, confusion would occur also in that it would be difficult to know when three-fourths of the states had ratified . . . The function of ratification seems to be one which, when once done, is fully completed and leaves no power whatever in the hands of the state legislature."[12]

The highest courts of two of the American states have achieved the same conclusion. In *Wise* v. *Chandler*,[13] the Court of Appeals of Kentucky said: "It is the prevailing view of writers on the question that a resolution of ratification of an amendment to the Federal Constitution, whether adopted by the Legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the 'powers and disabilities' of the two classes of representative assemblies mentioned in Article V are 'precisely the same', when a Legislature, sitting, not as a lawmaking body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection."[14] The Supreme Court of Kansas, about the same time and through the medium of the case of *Coleman* v. *Miller*,[15] declared: "It is generally agreed by lawyers, statesmen and publicists who have debated this question that a . . . ratifi-

[10] See Dillon v. Gloss, 256 U. S. 368 at 374, 41 S. Ct. 510 at 512, 65 L. Ed. 994 at 997 (1921).

[11] Jameson, A Treatise on Constitutional Conventions: Their History, Powers and Modes of Proceeding (Callaghan & Company, Chicago, 1887), §§ 579 and 581.

[12] Dodd, "Amending the Federal Constitution," 30 Yale L. J. 321 (1921), particularly p. 346.

[13] 270 Ky. 1, 108 S. W. (2d) 1024 (1937).

[14] 270 Ky. 1 at 8-9, 108 S. W. (2d) 1024 at 1028.

[15] 146 Kans. 390, 71 P. (2d) 518 (1937).

cation once given cannot be withdrawn . . . [From] historical precedents, it is . . . true that where a state has once ratified an amendment it has no power thereafter to withdraw such ratification. To hold otherwise would make article 5 of the federal constitution read that the amendment should be valid 'when ratified by three fourths of the states, each adhering to its vote until three fourths of all the legislatures shall have voted to ratify.'. . . [When] a proposed amendment has once been ratified the power to act on the proposed amendment ceases to exist."[16]

What room is there, then, for supposing that a different view should be applied to the matter of retracting a state resolution calling upon Congress for a convention to consider a proposed amendment? When a state adopts an original resolution memorializing Congress to that end, it is not exercising a sovereign power exclusively its own, nor merely legislating simply on behalf of its own people, but is engaging in a "federal" function. That fact places such activity within the exclusive domain of federal jurisdiction and completely removes the same from the pale of the state province and beyond the power of state withdrawal. The truth of this is manifest since the function of a state legislature, in memorializing Congress to call a convention for the purpose of proposing an amendment, is derived wholly from the federal constitution. It is no different, in source, than the function of Congress in proposing an amendment, or the function of a state legislature voting to ratify the same. Since the latter functions have been judicially identified as "federal functions" totally without state realm,[17] the conclusion would appear inescapable that the purported rescinding resolutions are of no effect whatever. It is submitted, therefore, that Congress should act, at the latest, when four more state legislatures vote in favor of a constitutional convention to consider the proposed income tax rate limitation amendment.

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[16] 146 Kans. 390 at 400-3, 71 P. (2d) 518 at 524-6.

[17] In Coleman v. Miller, 146 Kans. 390 at 392-3, 71 P. (2d) 518 at 520 (1937), the Supreme Court of Kansas said: "It is settled beyond controversy that the function of a state legislature in ratifying a proposed amendment to the constitution of the United States, *like the function of congress in proposing an amendment*, is a federal function derived from the federal constitution; and it transcends any limitation sought to be imposed by the people of a state. The power to legislate in the enactment of the laws of a state is derived from the people of the state, but the power to ratify a proposed amendment to the federal constitution has its source in that instrument. The act of ratification by the state derives its authority from the federal constitution, to which the state and its people alike have assented. . . . If the legislature, in ratifying a proposed amendment, is performing a federal function, it would seem to follow that ratification is not an act of legislation in the proper sense of that term. It has been so held."

Journal of Public Law

VOLUME 20

1971

EMORY UNIVERSITY LAW SCHOOL

ATLANTA, GEORGIA 30322

CONSTITUTIONAL CONVENTIONS AND STATE LEGISLATORS

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I. INTRODUCTION

RECENT EFFORTS TO AMEND THE UNITED STATES CONSTITUTION, *i.e.*, apportionment, a rewriting of article V, and legislation to implement the amending clause, have directed considerable public attention to the possibility of a constitutional convention. The recent spate of congressional and academic discussions have revealed several basic issues in this controversy, many of which have surprised public officials. With the death of Senator Everett Dirksen in 1969, and the apparent insufficient number of state petitions for a convention, the impetus for an immediate convention has dramatically diminished. Yet, the fate of congressional bills to operationalize the convention portion of article V remains indeterminate. Such legislation, in essence, would establish explicit procedures for state and federal government involvement in establishing constitutional conventions.[1] There has been little attempt to ascertain state legislative attitudes and to integrate additional data on state legislative processes on the subject of constitutional conventions. Consequently, this paper shall: (1) consider a brief history of article V, and (2) discuss four basic questions of the convention controversy and how these are perceived by state legislators throughout the United States.

II. EARLY PRECEDENTS AND DEBATES

As the Constitutional Convention of 1787 convened to consider basic plans for revising the Articles of Confederation, there were several alternative approaches to the question of future alteration of the Articles. It became ostensibly clear that a major focal point of discussion would be the inoperative amending process. Charles Pinckney, in his "plan for a Federal Constitution," urged on May 29, 1787, the following amendment procedure:

> If two-thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the

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[1]Senate bills, S. 12307, 90th Cong., 1st Sess. (1967), and S. 623, 91st Cong., 1st Sess. (1969), were the principal procedural legislative measures.

> purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the Legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.[2]

Pinckney expressed deep concern that unless alteration of the unanimous consent clause of the Articles was imminent, the nation would inevitably continue in its "depressed situation."[3]

The Virginia Plan, suggested by Edmund Randolph, contained in its Resolution XIII the reference to amendments:

> [P]rovision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.[4]

Charles Pinkey "doubted the propriety or necessity for the last clause," and Elbridge Gerry claimed that "[t]he prospect of such a revision would also give intermediate stability to the Government."[5] It was Mason who strongly advocated not requiring the assent of the national government. He asserted it was:

> better to provide for them in an easy, regular and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.[6]

There was unanimous acceptance of Randolph's proposal with the exception of the last restricting clause.

Subsequently, Alexander Hamilton presented his plan which called for adoption of the following amendment procedure:

> This constitution may receive such alterations and amendents as may be proposed by the Legislature of the United States, with the concurrence of two-thirds of the members of both Houses, and ratified by the Legislature of, or by Conventions of deputies chosen by the people in two-thirds of the States composing the Union.[7]

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[2] 1 J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 72 (E. Scott ed. 1898).
[3] 1 THE RECORDS OF THE FEDERAL CONVENTION 120 (M. Farrand ed. 1911).
[4] 1 J. MADISON, *supra* note 2, at 63.
[5] *Id.* at 110.
[6] *Id.* at 149.
[7] 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 3, at 149.

From July 26 to August 6, the Detail Committee considered the amending provision and subsequently reported the following:

> [O]n the Application of the Legislatures of two-thirds of the States in the Union, the Legislature of the United States shall call a Convention for the Purpose.[8]

On September 10, Elbridge Gerry urged reconsideration of the amending provision as he vehemently objected to the two-thirds requirement because it might subvert the Union. The reconsideration motion, though not unanimous, was given support from Madison. He prophetically declared that "there was extreme vagueness of the terms, 'calling a convention' . . . ."[9] He further inquired: "How was a convention to be formed, by what rule decided what is the force of its acts?"[10] Wilson's laborious attempt to retain the provision "of three-fourths of the states" was successful. Madison eventually proposed a slightly modified version which appeared most palatable. It read:

> The Congress of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification be proposed by the Congress.[11]

Only two short amendments were added to Madison's proposal—no amendments affecting specific items in article I before 1808, and the right of state suffrage in the Senate.[12]

Randolph and Gerry, among others, refused to sign the Constitution on grounds that the role of the Congress was objectable, and moreover, that frequent changes were extremely undesirable. Conversely, Patrick Henry accused the framers of the Constitution with attempting to make it virtually impossible for amending because the three-fourths ratification process was inordinately demanding. Madison summarized the thoughts of those supporting the amending procedures:

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[8] *Id.* at 159.

[9] 2 J. MADISON, *supra* note 2, at 693.

[10] *Id.*

[11] 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 3, at 629.

[12] *See* J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES 573 (G. Hunt & J. Scott eds. 1920), for an explanation of the two amendments.

> That use alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the state governments to originate the amendment of errors, and they may be pointed out by the experience on one side, or on the other.[13]

Ratification by the states did involve numerous deliberate discussions of the amending clause, yet the arguments were repetitious of those at the Convention. Since that time, states have utilized article V many times in requesting a congressional call for a constitutional convention.

Between 1789 and 1889, only ten petitions for a constitutional convention were registered with Congress. New York and Virginia submitted petitions, simultaneously with their Constitutional ratifications.[14] Congress rendered the convention process unnecessary, in these particular cases, by opting for the first amending procedure. In 1833, South Carolina, Alabama, and Georgia memorialized Congress to call a convention. South Carolina petitioned to secure a clarification of federal and state powers, while Georgia desired a thorough consideration of the personal freedoms of Indians.[15] Alabama sought a convention to summarily consider all amendment proposals presently before Congress.[16] Prior to the outbreak of the Civil War, Kentucky,[17] Indiana,[18] Virginia,[19] Illinois,[20] and Ohio[21] petitioned for a constitutional convention in a desperate attempt to prevent the dissolvement of the nation. This was to be accomplished in the petitions by having greater specificity written in the Constitution. The convention, in the latter case, would have been officially assigned the responsibility of preparing an authoritative interpretation of the Constitution.

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[13]THE FEDERALIST No. 43, at 286-87 (Modern Library ed. 1937) (J. Madison).

[14]H.R. JOUR. 32, 34 (1789).

[15]S. JOUR. 65-66, 83 (1833).

[16]H. AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION DURING THE FIRST CENTURY OF ITS HISTORY, H.R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2, 282, 345, apps. 625, 625a, 625b (1897).

[17]S. JOUR. 189-90 (1861).

[18]*Id.* at 420-21.

[19]*Id.* at 149.

[20][1861] Ill. Laws 281.

[21]58 Ohio Laws 181 (1861).

Subsequent to 1893, the utilization of the application process was much more prevalent. Commencing with Nebraska, some thirty-one states petitioned Congress concerning the direct election of Senators. Since the beginning of the twentieth century, Americans have witnessed a significant variety of suggested convention topics.

TABLE I

State applications to Congress for constitutional conventions, listed by subject matter.[22]

1. Direct election of Senators:

Ark. (1901, 1903, 1911); Cal. (1903, 1911), Colo. (1901); Idaho (1901, 1903); Ill. (1903, 1907, 1909); Ind. (1907); Iowa (1904, 1907, 1909); Kan. (1901, 1905, 1907, 1909); Ky. (1902); La. (1907); Me. (1911); Mich. (1901); Minn. (1901, 1911); Mo. (1901, 1903, 1905); Mont. (1901, 1903, 1905, 1907, 1908, 1911); Neb. (1893, 1901, 1903, 1907); Nev. (1901, 1903, 1905, 1907); N.J. (1907); N.C. (1901, 1907); N.D. (1903); Ohio (1908, 1911); Okla. (1908); Ore. (1901, 1903, 1907, 1909); Penn. (1901); S.D. (1901, 1907, 1909); Tenn. (1901, 1903, 1905); Tex. (1901, 1911); Utah (1903); Wash. (1903); Wis. (1903, 1907, 1908); Wyo. (1895).

2. Limitation of federal taxing power:

Ala. (1943); Ark. (1943); Del. (1943); Fla. (1951); Ga. (1952); Ill. (1943); Ind. (1943, 1957); Iowa (1941, 1951); Kan. (1951); Ky. (1944); La. (1950); Me. (1941, 1951); Mass. (1941); Mich. (1941, 1949); Miss. (1940); Neb. (1949); N.H. (1943, 1951); N.J. (1944); N.M. (1951); Okla. (1955); Penn. (1943); R.I. (1940); Utah (1951); Va. (1952); Wis. (1943); Wyo. (1939).

3. Prohibition of polygamy:

Calif. (1909); Conn. (1915); Del. (1907); Ill. (1913); Iowa (1906); La. (1916); Me. (1907); Md. (1908, 1914); Mich. (1913); Minn. (1909); Mont. (1911); Neb. (1911); N.H. (1911); N.Y. (1906); N.D. (1907); Ohio (1911); Okla. (1911); Ore. (1913); Penn. (1907, 1913); S.C. (1915); S.D. (1909); Tenn. (1911); Tex. (1911); Vt. (1912); Wash. (1909, 1910); W.Va. (1907); Wis. (1913).

4. General revision of the Constitution:

Colo. (1901); Ga. (1832); Ill. (1861, 1903); Ind. (1861); La. (1907); Mo. (1907); Mont. (1911); Neb. (1907); Nev. (1907); N.Y. (1789); N.C. (1907); Ohio (1861); Okla. (1908); Ore. (1901); Tex. (1899); Va. (1788, 1861); Wash. (1901, 1903); Wis. (1911, 1929); Iowa (1907, 1909); Kan. (1901, 1905, 1907); Ky. (1861).

5. World federal government:

Cal. (1949); Conn. (1949); Fla. (1943, 1945, 1949); Me. (1949); N.J. (1949); N.C. (1949).

[22]This is an updated version of C. BRICKFIELD, PROBLEMS RELATING TO FEDERAL CONSTITUTIONAL CONVENTION, 85th Cong., 1st Sess. 89-91 (Comm. Print 1957).

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6. Repeal of eighteenth amendment:

Mass. (1931); Nev. (1925); N.J. (1932); N.Y. (1931); Wis. (1931).

7. Limitation of presidential tenure:

Ill. (1943); Iowa (1943); Mich. (1943); Mont. (1947); Wis. (1943).

8. Treaty making of President:

Fla. (1945); Ga. (1952); Ind. (1957).

9. Taxation of federal and state securities:

Cal. (1935); Idaho (1927).

10. Against protective tariff:

Ala. (1833).

11. Federal Regulation of wages and hours of labor:

Cal. (1935).

12. Federal tax on gasoline:

Cal. (1952).

13. Tidelands control:

Tex. (1949).

14. Control of trusts:

Ill. (1911).

15. Prohibition of grants-in-aid:

Penn. (1943).

16. Popular ratification of amendment:

La. (1920).

17. Constitutionality of State enactments:

Mo. (1913).

18. Townsend plan:

Ore. (1939).

19. Revision of article V:

Ark. (1963); Fla. (1963); Idaho (1957, 1963); Ill. (1953, 1963); Ind. (1957); Kan. (1963);[23] Mich. (1956); Mo. (1963); Okla. (1963); S.C. (1963); S.D. (1953, 1955, 1963); Tex. (1955, 1963); Wyo. (1963); Va. (1965).

20. Reapportionment:

Ind. (1957); Ark. (1963); Idaho (1963); Kan. (1963); Mo. (1963); Mont. (1963); Nev. (1963); S.C. (1963); Tex. (1963); Wash. (1963); Wyo. (1963); Va. (1964); Ala. (1965); Ariz. (1965); Ark. (1965); Colo. (1965); Fla. (1965); Ga. (1965); Idaho (1965); Ill. (1965);[24] Kan. (1965);[25] Ky. (1965); La. (1965); Md. (1965); Minn. (1965); Miss. (1965); Mo. (1965); Mont. (1965); Neb. (1965); N.H. (1965); N.C. (1965); N.D. (1965); Okla. (1965);[26] S.C. (1965); S.D. (1965); Tex. (1965); Va. (1965); Utah (1965);[27] Ala. (1966); N.M. (1966); Tenn. (1966); Colo. (1967); Ill. (1967); Ind. (1967); Nev. (1967); N.D. (1967); Iowa (1969).

21. Balancing the budget:

Ind. (1957); Wyo. (1961).

22. State control of schools:

Ga. (1955, 1959, 1965); La. (1965); Miss. (1965).

23. Examination of the fourteenth amendment ratification:

Ark. (1959).

24. Repeal of sixteenth amendment:

Nev. (1960); S.C. (1962).

25. Establish a Court of the Union:

Ala. (1963); Ark. (1963); Fla. (1963); S.C. (1963); Wyo. (1963).

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[23]Rescinded in 1970.

[24]House rescinded in 1969.

[25]Rescinded in 1970.

[26]Declared null and void by State Attorney General because no executive signature.

[27]Declared null and void by federal court, 1969.

26. Presidential elections:

Ark. (1963); Colo. (1963); Kan. (1963);[24] Mont. (1963); S.D. (1963); Tex. (1963); Utah (1963); Wis. (1963); Okla. (1965); Ill. (1967); Neb. (1965).

27. Limiting and retiring the national debt.

Idaho (1963).

28. Pay pensions to certain people:

Mass. (1964).

29. Reading the Bible in schools:

Mass. (1964).

30. Prayer in schools:

Mass. (1964).

31. Sharing income tax (revenue sharing):

Ill. (1965); Ohio (1965); Ala. (1967); Tex. (1967); Fla. (1969); N.H. (1969).

32. Control of the Communist Party in the United States:

Miss. (1965).

33. Taxation:

Colo. (1963).

34. Prohibit race segregation in public schools:

Miss. (1970).

III. Current Action and Attitudes on Constitutional Conventions

As of January 1970, thirty-two states had petitioned Congress to summons a constitutional convention to consider the subject of state legislative apportionment.[25] Though this amount was two less than the requisite number, the possibility of such an occurrence presented, for some people, an unpredictable and tremendous onslaught on the constitutional foundation of this nation. Because article V stipulates state petitions and involvement, it would seem desirable to have a survey of the state legislators' views surrounding the possibility of a constitutional convention. A survey of the 1969-70 state legislatures and processes revealed some interesting information on four basic questions regarding the constitutional convention.[26] A brief examination of each question will be followed by survey results.

Must the Language of Amendments Proposed in State Petitions be Identical?

Readily noticeable in the apportionment case are three major categories

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[24]Rescinded in 1970.

[25]On July 8, 1969, the lower house of the legislature withdrew its support of its original 1965 joint resolution. On August 13, 1969, the Oklahoma Attorney-General ruled its concurrent resolution petition as not binding, as the Governor's approval was refused. The Utah resolution was declared null and void by a federal court because of the malapportionment issue. Consequently, the action in these three states leaves only twenty-nine petitions on file with Congress.

[26]Twenty-one per cent (1,589) of the 7,568 legislators responded to the questionnaire. Consequently, the reported results are not technically randomized nor conclusive and should only be considered reflective in nature.

of apportionment petitions: (1) abolishing of federal judicial review of state legislative apportionment; (2) requesting a convention to reverse the decision of *Reynolds v. Sims*;[31] and (3) establishing criteria other than mere population for apportionment determination. Constitutional writers would fundamentally disagree whether the amount of similarity is sufficient. Lester B. Orfield claimed that the "ground of the application would be immaterial, and that a demand by two-thirds of the states would conclusively show a widespread desire for constitutional changes."[32] The House Committee on the Judiciary of 1952 questioned the wisdom and practicality of requiring identical petitions:

> Conversely, there appears no valid reason to suppose that the language of the amendments requested in State applications must be identical with one another in wording. It should be enough that the suggested amendments be of the same general subject matter in order to be included in a congressional count of applications for a constitutional convention, bearing in mind, of course, that any or all of the states may at any time request a general convention should strong sentiment for such proceedings prevail.[33]

Contrariwise, Charles L. Black urged the necessity for exact form because:

> [i]t moreover is illegitimate to infer, from a state's having asked for a "convention" to vote a textually-given amendment up or down, that it desires some other sort of convention. It is not for Congress to guess whether a state which asks for the one kind of "convention" wants the other as a second choice. Altogether different political considerations might govern.[34]

The state legislative survey revealed that slightly over *57 per cent* of the 1,589 respondents considered identical language as not requisite for calling a constitutional convention. Justifications for this position included "political considerations," "substantive natures of topics rather than procedural," "expedience," and "state individuality." Many legislators maintained that a clearinghouse operation might insure similarity in state petitions, but unforeseen problems could result from the uniformity in legislative devices utilized for petitioning Congress. The legislative measures utilized by the states differ widely and lead to considerable difficulty in

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[31]377 U.S. 533 (1964).

[32]L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 42 (1942).

[33]STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES 11-12 (Comm. Print 1952).

[34]Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 956, 963-64 (1963).

determining the exact intent and legality of the legislative action. Three principal methods are generally employed in the states: joint resolution, concurrent resolution, and memorials. Norman J. Small, Legislative Attorney, American Law Division of the Congressional Legislative Reference Service, indicated the difference between memorials and petitions:

> The former are merely exhortations to the Congress to exercise its power to originate, approve, and submit for ratification a specific proposal as an amendment to the Constitution. As an exhortation, such memorials are deemed to give rise to no more than a moral obligation on the part of Congress to respond affirmatively thereto when tendered by a substantial number or even by as many as two-thirds, of the States.[35]

Small equates "petitions" with "applications," but does admit that even the "petitions" (resolutions, etc.) may be legally questionable because they had not been tested in the courts. Some of the states require 51 per cent majority, while others demand no less than 65 per cent approval. Table II indicates the various devices utilized by the state legislatures as determined by our survey. There is state consensus that combined action of both legislative houses is necessarily required. This assumption is substantiated by a study by the Staff of the House Committee on the Judiciary in 1952, which contended that identical, but separate, resolutions would not constitute a legislative measure.[36]

As Table II indicates, the governor's approval of petitions is required in at least fourteen states, depending on whether the states utilize joint or concurrent resolutions. Article V indicates that the "legislature" constitutes the petitioning body, yet this fails to delineate whether this has reference to the legislative process, or the specific representative lawmaking body. According to the United States Supreme Court, the connotation of the "legislature" depends upon the particular function engaged in.[37] For example, we note that in article I, § 4 of the Constitution, the state electoral process has explicit reference to the total lawmaking process, *i.e.*, legislative and executive. Since in 1920, the Supreme Court ruled in *Hawke v. Smith*[38] that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word,"[39] it would appear that the Governor need not be directly involved. With regards to convention

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[35]N. Small, Procedures for Amending the United States Constitution, 1965 (Library of Congress Legislative Reference Service.).

[36]STAFF OF HOUSE COMM. ON THE JUDICIARY, *supra* note 33, at 6.

[37]Smiley v. Holm, 285 U.S. 355, 366 (1932).

[38]253 U.S. 221 (1920).

[39]*Id.* at 229.

petitions, the state legislature would not be functioning in a routine legislative capacity, but as an agency of the national government. However, in 1969, the Oklahoma Attorney General explicitly contradicted this view:

> The resolution . . . was not signed by the Governor, it did not become the law of this state. It is the opinion of the Attorney General that a concurrent resolution passed by a session of the Oklahoma Legislature which does not meet the criteria of becoming law, is merely an expression of opinion of that particular body and has no binding effect on a subsequent session of the Legislature.[48]

TABLE II

DEVICE FOR
CONSTITUTIONAL CONVENTIONS

State	Bill	J. Resol.	Con. Resol.	Memorial	Governor's Approval
Alabama		x			yes
Alaska		x			yes, not to veto
Arizona			x		yes
Arkansas		x	x		no, yes
California		x			no
Colorado				x Joint	yes, not adhered
Connecticut		x			no
Delaware		x			yes
Florida			x may rescind		no
Georgia		x			no
Hawaii		x			no
Idaho		x			no
Illinois		x			no
Indiana			x		no
Iowa			x		no
Kansas			x		no
Kentucky			x		no
Louisiana			x		no

[48] 69 OP. ATT'Y GEN. 200 (1969), in 115 CONG. REC. 23,780 (1969).

Maine		x			no
Maryland		x			yes
Massachusetts		x			no
Michigan			x		no
Minnesota		x			yes
Mississippi			x		no
Missouri			x		no
Montana		x			no
Nebraska				x	no
Nevada		x			no
New Hampshire		x			no
New Jersey		x	x		yes, no
New Mexico		x		x Joint	no
New York			x		no
North Carolina		x			x
North Dakota			x		x
Ohio		x			no
Oklahoma			x		no
Oregon				x Joint	no
Pennsylvania		x can rescind	x		no, no
Rhode Island	x	x			yes, yes
South Carolina			x		no
South Dakota			x		x
Tennessee		x can rescind			yes
Texas			x		yes
Utah		x	x		no, yes
Vermont				x	no
Virginia		x			no
Washington		x		x Joint	no
West Virginia			x		no
Wisconsin		x			no
Wyoming				x	yes

How Long Should a State Petition Requesting a Constitutional Convention Remain Valid?

Article V is silent on this perplexing subject, though many would agree with the Supreme Court on the constitutional ratification procedures and attempt to utilize this as an analogy comparable to the state legislative petition process:

> [T]he first inference or implication from article V is that the ratification must be within some reasonable time after proposal [which Congress is free to fix] . . . . As ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period which of course ratification scattered through a long series of years would not do.[41]

The term "sufficiently contemporaneous" becomes the pivotal criterion on which the controversy rests. Arthur Bonfield indicates that rather than relying on such criteria as changing social, economic, and political events, the fundamental criterion should be the legislative period in which all states have had the opportunity to meet in one full regular session.[42] This approach appears to have a distinct advantage because it challenges those recommending a convention on a particular subject to provide convincing evidence from other current legislatures on the consensus of calling a convention. In theory, then, the duration factor of two years would represent a current poll of legislators' attitudes. The data from our legislative survey, particularly of the thirty-two states which urged a constitutional convention on reapportionment, gives some insight on the problem of "sufficiently contemporaneous." In 1963, petitions from the following states were received: Arkansas, Idaho, Kansas, Missouri, Montana, Nevada, South Carolina, South Dakota, Texas, Washington, and Wyoming. The following year, Virginia requested the Congress to call a convention. The 1965-66 legislative period witnessed a flurry of petitions: Alabama, Arizona, Florida, Georgia, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Tennessee, and Utah.[43] The Ninetieth Congress in 1967 received similar

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[41]Dillon v. Gloss, 256 U.S. 368, 375 (1921).

[42]Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659 (1964).

[43]The Legislative Reference Service reported that there is no record of the petition S.R. 14, submitted by Georgia. The petitions from New Hampshire and Utah, though appearing in the *Congressional Record*, were not forwarded to the Judiciary Committee in House or Senate.

petitions from Illinois, Indiana, North Dakota, and Colorado.[44] Senate Bill 2307 of the Ninetieth Congress called for a six-year petition duration, though some Congressmen and committee witnesses urged periods from two to seven years. It became conspicuously clear that unless the six-year prerequisite was adopted, the eleven petitions of 1963 would be declared void by the end of 1969. Senator Dirksen's determined efforts to gather sufficient consensus on initiating floor consideration were cut short by his illness and eventual death in September 1969. Had Dirksen been successful in securing favorable Congressional action, the implications may have been rather astounding. For example, our survey found the total number of legislators voting on the petitions in states where it was accepted amounted to 5,259. Nevertheless, in 1969, when Congress may have rendered a decision allowing a constitutional convention, 57 per cent of those original legislators voting on the petitions were no longer in the state legislatures. This significant change in personnel leaves the issue of "sufficiently contemporaneous" even more poignant. A discussion of the partisanship of the state legislatures makes the change of personnel more complicated. Assuming that an issue might be purely partisan, would the petition remain consistently representative of the current legislative attitude? Between 1963 and 1969, we observed that subsequent to the petition acceptance, there were thirteen party control turnovers, two ties, and eight nonpartisan elections. There is substantial evidence that petitions, purely partisan in nature, might be rejected and not reflect the contemporary attitude.

The legislative survey disclosed conflicting data as well as constructive suggestions for alleviating the entire question of petition duration. Nearly 80 per cent of the respondents recommended a four-year duration period or the completion of the second session. This procedure would allow a double check on whether the legislature, in the first instance, acted presumptously. Congress would be responsible for transmitting copies of the petition to all states and requesting immediate consideration. Simultaneously, as state legislators supported this conclusion, 85 per cent of them favored retaining state control of the petition by power of rescission. There was substantial fear that a specific legislative body might act contrary to the public good, necessitating a reconsideration of the petition. Yet, if the four-year duration factor existed, then the rescission power would be valid for only one attempt.

May Congress Refuse to Call a Constitutional Convention?

Edmund Randolph introduced the original resolution providing for constitutional revision.

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[44] *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., 116-17 (1967). Colorado maintains that S. J. Memorial No. 5 was forwarded to Congress, though no record can be found.

> /Resolved/ that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.[45]

Colonel Mason contended that "[i]t would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their consent on that very account."[46] Up until the last two weeks of the Convention, the primary discussion concerned the sole responsibility of the state legislatures to propose amendments. Gouvenor Morris and Elbridge Gerry moved to amend the articles to have a mandatory convention when the requisite number of states had requested. Madison strongly supported the view of mandatory congressional action.[47] One week before the convention concluded, Hamilton and Gerry successfully urged reconsideration of the amendment article because of the failure to include congressional prerogative to propose amendments. Consequently, Madison's proposal to allow both Congress and the state legislatures to make proposals was adopted. Yet, on the last day of the Convention, a compromise was enacted which allowed for both congressional and state proposals, but stipulated a convention process for the latter.

Undoubtedly the most compelling evidence of congressional obligation to summon a convention came to light immediately after the Constitutional Convention. In the *Federalist Papers* Hamilton claimed that:

> [b]y the fifth article of the plan, the Congress will be obliged "on application of the legislatures of two thirds of the states . . . to call a Convention for proposing amendments . . . ." The words of this article are pre-emptory. The Congress "*shall* call a Convention." Nothing in this particular is left to the discretion of that body.[48]

At the initial Congress, Madison implored his colleagues to consider the subject of amendments, specifically, the amendments which would contain the Bill of Rights.[49] The following day, May 5, 1789, a member of Congress displayed a state legislative petition for a convention. Madison claimed that thorough discussion of the petition would be inappropriate until the requisite number of petitions had been received and "then it is out of the power of

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[45] 1 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 3, at 194.

[46] *Id.* at 203.

[47] 2 *Id.* at 629-30.

[48] THE FEDERAIST NO. 85, at 546 (Wright ed. 1961) (A. Hamilton).

[49] 1 ANNALS OF CONG. 247 (1834). See an excellent discussion of the amendment process in Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 CASE W. RES. L. REV. 644 (1967).

Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature . . . ."[59] Consequently, the petition was placed in the archives until others would arrive.

Regardless of whether one concurs with the foregoing, a fundamental question remains: What recourse do the states have in the event Congress fails to Act? Some argue that Congress performs in a ministerial role in calling for a convention, thus the Supreme Court would have authority to issue some form of mandamus requiring it to act.[61] Unless Congress could be forced to comply, the intent of the framers would be thwarted. Cyril F. Brickfield and Arthur E. Bonfield claim, on the contrary, that the courts would not enter the controversy because of the "doctrine of the separation of powers" which prohibits injurious intrusion of one branch on another.[62] The concept of "coordinate branch respect" was not violated by the *Baker v. Carr*[63] nor the *Westberry v. Sanders*[64] cases. For example, Bonfield asserts that

> judicial review on the merits of state legislative apportionment or the drawing of congressional districts by the states only involves federal judicial superintendence of state action or inaction; but judicial review of Congress' failure to call an article V convention directly involves the federal courts in an effort to force its co-equal branch of the Government to perform a duty exclusively entrusted to it by the Constitution.[65]

How do current legislators react to the power of Congress to call a national constitutional convention? Seventy-four per cent of the 1,589 respondents favored the mandatory clause requiring Congress to initiate a convention call. The basic rationale suggested was the prohibiting of Congress of becoming completely dominant in the amending process. Allowing Congress to debate the need as indicated by the petitions would unnecessarily complicate the task of retaining the sufficient number of

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[59]1 ANNALS OF CONG. 249 (1834). Five months earlier, a letter from Madison indicated that "if two-thirds of the States apply for one, Congress cannot refuse to call it . . . ." Letter from James Madison to Mr. Eve, Jan. 2, 1789, in 5 A DOCUMENTARY HISTORY OF THE CONSTITUTION 141 (1905).

[61]Cuvillier, *Shall We Revise the Constitution*, 77 FORUM 323 (1927); Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161 (1959); Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI-KENT L. REV. 128 (1952); Tuller, *A Convention to Amend the Constitution*, 193 N. AM. REV. 379, 379-81 (1911).

[62]C. BRICKFIELD, *supra* note 22, at 27; Bonfield, *supra* note 42, at 672-73.

[63]369 U.S. 186 (1962).

[64]376 U.S. 1 (1964).

[65]Bonfield, *supra* note 42, at 673.

petitions. The "contemporaneousness" of the petitions would be brought into question. A typical legislator response was, "the 'shall' in article V stipulates precisely that—Congress must act, and unless it does, the States are relegated to complete subservience in the amending process."

Can State Legislative Petitions Control the Subject Matter Considered by the Constitutional Convention?

Basically, the question is whether the convention ought to be viewed as a premier assembly of the people possessing "conventional sovereignty," or whether the states can stipulate the subject area or areas of discussion. Article V permits the following: "The Congress, whenever two thirds of both houses shall deem it necessary, shall *propose* amendments to this constitution, or on the application of the legislatures of two thirds of the several states, shall call a convention for *proposing* amendments . . . ."[56] Professor Charles Black maintains that:

> [t]he process of "proposal" by Congress contained in the *first* alternative of Article V, obviously includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the *second* alternative, ought to be taken to denote a mechanical take-it or leave-it process."[57]

Arthur E. Bonfield supports this position by claiming that the constitutional convention would necessarily have the ability to propose amendments as solutions to the basic subject area. He categorically rejects the recent resolutions suggested by the Council of State Governments and adopted by several states because:

> the resolutions in issue (the resolutions calling Congress to establish a convention for specific reasons) really call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed" elsewhere. In this sense, the proponents of these resolutions seek to make the "Convention" part of the ratifying process, rather than part of the deliberative process for "proposing" constitutional amendment.[58]

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[56]U.S. CONST. art. V. (emphasis added).
[57]Black, *supra* note 34, at 962.
[58]Bonfield, *supra* note 42, at 662-63.

Allowing the convention to select the most acceptable format of amendment to be voted on by the legislatures or conventions in the various states, would give the constitutional convention a propitious opportunity to conduct deliberations on the proposal.

Our survey data appeared to support contrary positions. A substantial 77 per cent claimed the state applications would control the particular subjects discussed at the convention. Congress would only summon the convention for a particular time and location and would make but one limitation on the convention—a perfunctory statement of what subject the state legislators wanted considered. A total of 1,334 legislators (84 per cent) supported the single amendment convention, which suggests they viewed the *convention as a ratifying rather than a deliberative body*. There was a general fear expressed (83 per cent) that a premier assembly, possessing inherent power to determine subjects of discussion and the power to recommend amendments, would prove detrimental to the constitutional framework. One might assume, as a result of the variety of convention subjects recommended in the survey, that the legislators would prefer having issue clarification before submitting them to a constitutional convention.

IV. Present Demands for a Constitutional Convention

Legislators in the 1969-70 survey had neither reached a general consensus on the need for a convention, nor the topics which might be considered. In addition to the 557 requests for an immediate constitutional convention on apportionment, there were an additional 499 requests for other issue considerations. The following limited list gives some indication of subjects which were *specifically recommended* by our respondents.

TABLE III

SUBJECTS FOR STATE PETITIONS

1. State rights
2. Changing electoral college
3. Busing students
4. National debt
5. Eavesdropping
6. Income tax limit
7. Outlawing communists
8. Judicial reform
9. Bill of Rights
10. Judges' retirement
11. Prayer in school
12. Right to bear arms
13. Apportionment
14. Fifth amendment
15. Voting age
16. Curbing the Supreme Court powers
17. Military spending
18. Welfare
19. Law and order
20. Education and local control
21. Presidential powers
22. Item veto for president
23. Rights of white race
24. Federal grants
25. Executive department power
26. General constitutional review

Though the foregoing list is inconclusive and represents a minute proportion of potential state legislative respondents, the data does render an indication of potential convention subjects.

It is not inconceivable that such topics as "electoral college revision' might evoke sufficient support that the nation would be confronted with chaotic imbroglio. One state legislator, with fifteen years experience, expressed the following sentiment regarding the ease with which the requisite number of petitions might be secured:

> It is possible that with pressure from such groups as the Council of State Governments, plus a well planned drive to have each state introduce and consider a particular petition, that within four years there would be more than ample requests for a convention.

Though there may be sufficient number of legislators who advocate numerous changes, the intensity and intention of those supporters may be questioned. One legislator, reflecting the apparent fear of an open constitutional convention, made this statement:

> I have talked with many of my colleagues who were also frightened that a convention may completely undo the fundamental principles of our constitution. Many of them voted to have Congress call a convention, not because they wanted one necessarily, but because they wanted Congress to know how the legislators felt. From now on we will not petition for a convention, but simply urge the Congress to propose an amendment about a specific subject. This way, we know that there will be only one amendment, which we here in the states can accept or reject.

This statement does have some empirical support. Nearly three-fourths of all petitions seek constitutional revision, but not for the convention process.

Our survey responses reveal a wide range of attitudes, many of them expressing distrust of the convention, while others anticipate some significant results from the convening of a national constitutional convention:

> I think that each state should take two consecutive sessions and consider major areas and then transmit their actions to the Congress.

> I believe that we need to have a public referendum, requiring at least two thirds of those voting in the last election, before the state legislature considers the possibility of adopting a constitutional petition.

I see no real threat in conducting a constitutional convention, because all of its proposals have to be accepted by the States.

My colleagues, representing one of the largest states, feel that there ought to be a continuous constitutional convention. Each section of the constitution would receive a thorough hearing throughout the country during one year's time, after which any new amendment proposals would be voted on in convention and dispatched to the state legislatures for their consideration.

It would be possible for the Congress to actually solve many of the problem areas which are bothering the state legislatures. A convention might open Pandora's box.

V. Conclusion

Many people have argued that the convention process of amending the Constitution is an anomaly in the law. Nevertheless, state legislatures continue to petition Congress for establishment of conventions. Fifteen state legislatures had resolutions pending which called for a convention on the eighteen-year-old vote issue. The Ninety-second Congress recently adopted, and the states ratified, an amendment directed to this subject. With the pre-emptive action by Congress, the unused originating power of the state legislature remains to be tested. Pertinent legislation, giving clarification of the state petition and convention processes, has been explored in the Senate; yet, no decision has been concluded.

Any projections on the future direction of and the number of state petitions must certainly consider three basic factors: the intensity of the issue resulting in reaction by the state legislatures; the extent of organized pressure group activity throughout the country; and, the attitude of Congress toward the issue. Speculations on potential areas giving rise to numerous state petitions might include presidential powers and judicial review, though nearly all issues appearing in Table III could be ameliorated by legislative processes or by the first amendment procedure.

The four basic questions discussed in the preceeding pages deserve a final note. It would appear that a federal law requiring an identical form of petition and process is essential to eliminate the present state legislative application confusion. States have failed to initiate procedures achieving uniformity in petitions and processes and the outlook for any action seems negligible. The question of petition duration appears to be self-liquidating as more states adopt the philosophy of requiring two successive legislatures to give tacit or implied sanction to a petition. Because of the increasing tendency of Congress to give greater credence to public attitudes in the past five years, it appears that Congress would only in an unusual circumstance refuse to call a constitutional convention. An initial congressional response would most likely be in the form of an amendment for ratification by the states. Should the Congress establish a constitutional convention, state legislatures would undoubtedly conduct the proceedings as if the convention were merely a ratifying body rather than a deliberative structure. This attitude, plus the lack of federal laws governing the total petition and convention process, appears to leave the entire initiative of the indeterminate second amendment procedure in the realm of state control. Though the apportionment issue aroused public attention to the amendment question, it will require an additional highly volatile issue to provide the catalytic action necessary for resolution of the constitutional convention problem.

University of Florida Law Review

VOLUME XXVI FALL 1973 NUMBER 1

A LIMITED FEDERAL CONSTITUTIONAL CONVENTION

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Article V of the United States Constitution provides that constitutional amendments may be initated in two ways – by two-thirds of both houses of Congress or by a convention called by Congress at the request of two-thirds of the state legislatures.[1] The second initiation option was provided to afford states an opportunity to bypass congressional refusal to originate amendments of significant state and national concern.[2] Although the architects of the Constitution evidently viewed the two methods as equivalent alternatives, initiation through state legislative application has never been accomplished; each of the twenty-six ratified amendments has been proposed by Congress.[3] As a result of this historical preference, little precedent exists relating to state initiation of amendments.[4]

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1. The full text of article V reads: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

2. "The founders included the convention alternative in the amending article to enable the states to initiate constitutional reform in the event the national legislature refused to do so." Ervin, *Proposed Legislation To Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 885 (1968).

3. Between 1788 and October 1971 the states submitted a total of 304 applications for a constitutional convention. The following subjects have received the support of at least ten states: reapportionment (33), 1957-1969; direct election of Senators (31), 1893-1911; limitation of federal taking power (28), 1939-1960; prohibition of polygamy (27), 1906-1916; general constitutional revision (22), 1788-1929; and return portion of federal taxes to states (15), 1965-1971. 117 CONG. REC. 16,519 (1971). Subsequent to this report by Senator Ervin, four additional states submitted revenue sharing applications. *See* note 6 *infra*.

4. Responding to the lack of clarity concerning article V convention procedures, Senator Ervin introduced S. 2307 in the 90th Cong., 1st Sess. Ervin, *supra* note 2, at 875. *See Hearings on S. 2307 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 Hearings*]. The bill was revised and reintroduced in the 91st Cong., 1st Sess. as S. 623. The Subcommittee reported

The paucity of understanding concerning the unused article V convention procedure became apparent when national organizations representing state legislators joined forces in 1970 to prod congressional action on federal revenue sharing.[5] Pursuant to article V, a united effort was commenced to secure applications from thirty-four states requesting Congress to convene a constitutional convention dealing solely with revenue sharing. Thirteen states had enacted a model application,[6] or a similar version, by the time revenue sharing was passed into law.[7]

The most perplexing of the several questions raised by the revenue sharing convention campaign was whether a convention created by state application may be limited to a single subject or whether such a convention must open the entire Constitution to revision. The authority of the states and Congress to impose limitations on an article V convention is not evident through a literal construction of the article's language.[8] Moreover, the Supreme Court has been noticeably silent regarding questions raised by the amendment process.[9] The convention route has been useful in the past,[10] however, and it is

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S. 623 to the full Committee on June 19, 1960, but no action was taken by the Judiciary Committee. The legislation was reintroduced in the 92d Congress on Jan. 26, 1971, as S. 215 [hereinafter cited as *Ervin Bill*]. On April 27, 1971, the Subcommittee on Separation of Powers reported the measure to the full Committee on the Judiciary. On July 31, 1971, the Committee reported S. 215 to the Senate with an accompanying report, S. REP. No. 92-336, 92d Cong., 1st Sess. (1971) [hereinafter cited as 1971 REPORT]. S. 215 passed the Senate on Oct. 19, 1971, 117 CONG. REC. 16,569 (1971). However, it received no action by the House Judiciary Committee during the 92d Congress. The bill has been reintroduced in the 93d Congress as S. 1272, sponsored by Senators Ervin and Brock.

5. These organizations were the National Legislative Conference, the National Society of State Legislators, and the National Conference of State Legislative Leaders.

6. States that applied to Congress for a convention on revenue sharing during this campaign were: Arizona, Delaware, Florida, Iowa, Massachusetts, New Jersey, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, and West Virginia. Louisiana passed the model application with slight variations.

7. The State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, was enacted by the House on October 12, 1972, and by the Senate on Oct. 13, 1972.

8. Article V states that Congress shall call "a Convention for proposing Amendments." If these words are literally construed, it might be argued that a convention could not create an entirely new instrument to supersede the present Constitution, since its work would be confined to proposing amendments. Nevertheless, the convention could propose the equivalent of a new Constitution by a series of separate amendments. *See* C. BRICKFIELD, PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85th Cong., 1st Sess. (Comm. Print 1957) [hereinafter cited as BRICKFIELD, 1957]. *But cf.* Black, *Amending the Constitution: A Letter to a Congressman*, 83 YALE L.J. 196 (1972): "It is my contention that Article V, properly construed, refers, in the phrase 'a Convention for proposing Amendments,' to a convention for proposing such amendments as to that convention seem suitable for being proposed."

9. It has been suggested that many of the significant questions raised by article V will not be resolvable by the courts. *See* L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 7-36 (1942); Dowling, *Clarifying the Amending Process*, 1 WASH. & LEE L. REV. 215 (1940); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067 (1957). In Coleman v. Miller, 307 U.S. 433 (1939), the Supreme Court held that the effectiveness of a state's ratification of a proposed amendment, which it had previously rejected, and the period of time within which a state could validly ratify a proposed amend-

clear from the revenue sharing campaign that the limitation issue must be clarified before legislatures will confidently employ their constitutional prerogative to initiate amendments.[11]

This article will examine the limitation issue, initially analyzing the legislative history of article V. Additionally, the practical effects of the framers' decision to provide both the national and state legislatures an opportunity to initiate federal constitutional change will be examined.

History of the Amendment Process at the 1787 Constitutional Convention

The Virginia Plan, consisting of fifteen resolutions, was presented to the convention delegates by Edmund Randolph on May 29. Resolution thirteen dealt directly with amendments:[12]

> 13. Resolved that provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

Randolph's resolution was considered by the Commitee of the Whole on June 5 in a discussion focusing on the proposition "that provision ought to be made for [hereafter] amending the system now to be established, without requiring

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ment were non-justiciable political questions within the exclusive determination of Congress. Strong dicta in a concurring opinion by Justice Black suggests that all questions arising in the amendment process may be non-justiciable: "Undivided control of [the amending] process has been given by the article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." *Id.* at 459 (concurring opinion). However, there is evidence from several cases that some of the questions arising in the amendment process can be settled by the judiciary. *Compare* Leser v. Garnett, 258 U.S. 130 (1922); Dillen v. Glass, 250 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, 253 U.S. 221 (1920). *See also* Trombatta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973), wherein the court held article 10, §1 of the Florida constitution unconstitutional under article V of the United States Constitution. The Florida article provided that the state legislature could not take action on any proposed amendment to the United States Constitution unless a majority of the members thereof were elected after the proposed federal amendment is submitted for state ratification.

10. "The campaign for direct election of Senators was stymied for decades by the understandable reluctance of the Senate to propose an amendment that jeopardized the tenure of many of its members. Frustrated by the Senate, the reform movement shifted to the States, and a series of petitions seeking to invoke the convention process were submitted to Congress. Rather than risk its fate at the hands of a convention, the Senate then relented and approved the proposed amendment, which was speedily ratified." 1971 Report, *supra* note 4, at 6.

11. Regarding the introduction of S. 215, Senator Ervin has commented: "Most important, there is no law on the books that would confine a convention to a specific amendment. If we are to avoid the possibility of a runaway convention and a constitutional crisis, I believe it is imperative that orderly procedures be established for the conduct of a constitutional convention." 117 Cong. Rec. 16,510 (1971).

12. 1 M. Farrand, The Records of the Federal Convention of 1787, at 22 (1911) [hereinafter cited as Records].

the assent of the National Legislature."[13] Although Pinckney "doubted the propriety or necessity of it,"[14] Gerry favored the resolution and expressed the view that: "The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Government." Gerry further noted that "nothing had yet happened in the States where this provision existed to prove its impropriety."[15] Nevertheless, further consideration of the proposition was postponed.[16]

On June 11 Randolph's resolution was again considered by the Convention. Madison reports that "several members did not see the necessity of the [Resolution] at all, nor the propriety of making the comment of the National Legislature unnecessary."[17] Colonel Mason, however, urged the adoption of such a provision:[18]

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their consent on that very account.

The Committee of the Whole failed to accept the last portion of Mason's argument, but supported the proposition "that provision ought to be made for the amendment of the Articles of the Union, whensoever it seems necessary."[19]

Late in July the policy conclusions reached during the early sessions were submitted to a drafting committee known as the "Committee of Detail."[20]

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13. *Id.* at 121.

14. *Id.* at 121-22.

15. *Id.* Provisions for amending the colonial constitutions were incorporated into the charters of eight colonies. *See* S. FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 178-80 (1910). In Delaware, Maryland, and South Carolina use of the amendment process was reserved to the legislature. In Georgia, Massachusetts, New Hampshire, Pennsylvania, and Vermont amendments were to be made by conventions. Both of these methods were joined in article V. *See* BRICKFIELD, 1957, *supra* note 8, at 2.

16. Seven states voted to postpone consideration; three voted to debate the amendment process immediately. RECORDS, *supra* note 12, at 202.

17. *Id.* at 202-03.

18. *Id.* Article XIII of the Articles of Confederation authorized amendment only upon the assent of Congress and the legislatures of all the states. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED AT THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 84 (J. Elliot ed., reissue 1907) [hereinafter cited as DEBATES].

19. RECORDS, *supra* note 12, at 203.

20. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 97 (1911) [hereinafter cited as 2 RECORDS]. John Rutledge of South Carolina was designated chairman and Edmund Randolph, James Wilson, Oliver Ellsworth, and Nathaniel Gorham were elected to the Committee.

Article XIX of the Committee draft presented to the Convention on August 6 and adopted without amendment on August 30,[21] provided:[22]

> On application of the Legislatures of two-thirds of the states in the Union, *for an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*

Careful consideration should be given the language of this article. Although some controversy existed concerning Congress' role in the amendment process,[23] the development of a specific amendment procedure was left to the Committee of Detail. Article XIX embodied a compromise between those delegates favoring state initiation of amendments, unfettered by the National Legislature, and those members wishing to preserve some national role in the amendment process. Hence, the draft enabled the states to apply for "an amendment" to the Constitution, and mandated Congress to assemble a convention "for that purpose." Of significance is the clause "for that purpose," which directly modifies "Convention." If two-thirds of the states apply for an amendment, article XIX clearly mandates that a convention called by Congress pursuant to such applications must be limited to the purpose or general subject matter contained in the state applications. Moreover, by employing the specific language "an amendment," the draftsmen of the Constitution demonstrated a clear intention to enable state legislatures to request a convention for consideration of limited constitutional change. Such intent was not modified by subsequent Convention action.

On September 10 Gerry moved to reconsider the Convention's adoption of article XIX. Since the Constitution was to be paramount to state constitutions Gerry was concerned with the possibility that "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether."[24] Hamilton seconded Gerry's motion, but with a different view in mind. "It had been wished by many and was much to have been desired," Hamilton observed, "that an easier mode for introducing amendments had been provided by the articles of confederation."[25] Hence, Hamilton contended:[26]

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21. *Id.* at 188 (emphasis added).

22. When the Convention took up article XIX on August 30, Gouverneur Morris suggested "that the Legislatures should be left at liberty to call a Convention, whenever they please." However, no delegate support was forthcoming for this concept and the article was adopted in the form proposed by the Committee on Detail. *Id.* at 468.

23. RECORDS, *supra* note 12, at 22, 121.

24. 2 RECORDS, *supra* note 20, at 557-58.

25. *Id. See also* RECORDS, *supra* note 12, at 121.

26. 2 RECORDS, *supra* note 20, at 557-58 (emphasis added). Madison joined the argument and attacked the "vagueness of the terms" previously adopted by the Convention. "How was a Convention to be formed? By what rule decide? What would be the force of its act?" queried Madison. *Id.* Substantive responses to these questions are provided in the *Ervin Bill*, *supra* note 4.

> It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers — the National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought *also* to be empowered, whenever two thirds of each branch should concur, to call a Convention. . . .

Gerry's motion to reconsider carried[27] and, following several proposed amendments relating to granting the National Legislature initiating power,[28] Madison, seconded by Hamilton, proposed a substitute for the entire articles:[29]

> The Legislature of the United States whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States.

The Madison-Hamilton compromise was adopted by the Convention, 9-1.[30]

Significantly, the Madison-Hamilton proposal did not attempt to limit or restrict in any manner the power of state legislatures to initiate particular amendments. Legislatures clearly were granted such authority under the originally adopted article XIX. Hamilton was concerned only with granting the National Legislature amendment parity with the state legislatures so as to preserve the federal-state balance of power; hence, his argument that the National Legislature "ought also to be empowered . . . to call a convention."[31] Scrutiny of convention debate and the legislative antecedents of article V thus

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27. The vote was 9-1. Only New Jersey voted to retain the language adopted on August 30. 2 RECORDS, *supra* note 20, at 557-58.

28. Sherman, seconded by Gerry, moved to add to the article the words: "[O]r the Legislature may propose amendments to the several States for their approbation but no amendments shall be binding until consented to by the several States." Wilson offered a motion to make consent of two-thirds of the states sufficient, which was rejected 5-6. A later motion to permit three-fourths of the states to make an amendment effective was adopted without dissent. *Id.*

29. *Id.* at 559.

30. *Id.* The single "no" vote was Delaware. *See* Kurland, *Article V and the Amending Process*, in D. BOORSTIN, AN AMERICAN PRIMER 130 (1966): "The nature of the political compromises that resulted from the 1787 Convention was reason for those present not to tolerate a ready method of undoing what they had done. Article V, like most of the important provisions of the Constitution, must be attributed more to the prevailing spirit of compromise that dominated the Convention than to dedication to principle." *See also* HOUSE COMM. ON JUDICIARY, PROBLEMS RELATING TO STATE APPLICATION FOR A CONVENTION TO PROPOSE A CONSTITUTIONAL LIMITATION ON TAX RATES, 82d Cong., 2d Sess. 4 (1952) [hereinafter cited as 1952 REPORT].

31. 2 RECORDS, *supra* note 20, at 557-58.

reveals that Madison and Hamilton viewed the two modes of initiating amendments as equivalent alternatives and that they envisioned a process whereby both the state and National Legislatures would be able to apply to Congress for specific constitutional amendments.[32]

On September 15 the Convention considered the report of the Committee on Style, which had been appointed "to revise and place the several parts" approved by the Convention "under their proper heads."[33] The Committee integrated former article XIX, as amended, into a new article V. Initially, Gouverneur Morris moved to amend article V so as to require a convention on application of two-thirds of the states.[34] The previously adopted language of the Madison-Hamilton proposal would have required the states to petition Congress, which would presumably propose and develop specific amendments. Morris' proposal would enable two-thirds of the states to require Congress to call a convention to propose amendments. Madison "did not see why Congress would not be as much bound to propose *amendments applied for by two thirds of the states* as to call a convention on the *like application*."[35] Nevertheless, he raised no objection to the Morris motion, which was adopted unanimously.[36]

Finally, and significantly, two further acts of the delegates merit consideration. Sherman moved to amend article V in a manner so as "to leave future conventions to act like the present Convention, according to circumstances."[37] Additionally, Randolph moved "that amendments to the plan might be offered by the State Conventions, which should be submitted to and finally decided on by another general Convention."[38] Both of these proposals were rejected by the 1787 Convention. Opposing the motions, Pinckney reflected the general feeling of the delegates: "The Deputies to a second Convention coming together under the discordant impressions of their Constituents, will never agree. Conventions are serious things, and ought not be repeated . . . ."[39] All states rejected the Sherman and Randolph proposals, thus evincing a definite desire not to open the Constitution to general revision in the future. Such action by the delegates reflects their concern that general conventions are indeed "serious things, and ought not to be repeated" whenever a particular amendment is desired. Hence, they insured that the Constitution, through article V, provided

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32. The Senate Judiciary Committee has concluded that the framers "refrained from any evaluation or differentiation of the two procedures for amendment incorporated into Article V; they tended to view the convention merely as an alternative safeguard available to the States whenever Congress ceased to be responsive to popular will and persisted in a refusal to originate and submit constitutional amendments for ratification." 1971 RECORDS, *supra* note 4, at 4.

33. 2 RECORDS, *supra* note 20, at 554.

34. *Id.* at 629.

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.*

38. *Id.* at 631. Randolph and Mason were concerned that: "This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it." *Id.* at 631-32.

39. *Id.*

both Congress and the states with a constitutional mechanism to correct particular and specific constitutional infirmities. Such action effectively obviated the need for frequent general conventions, which might vitiate the fruits of the delegates' labor during the summer of 1787.

A General Convention — Argument and Rebuttal

Dual Purpose Argument

Opponents of a limited federal constitutional convention[40] have suggested that by providing two different processes for originating amendments, the framers of article V contemplated different responses to different problems. It is therefore contended that, since one process clearly contemplates congressional initiation of particular amendments, the alternative process may be used by the states only to initiate a call for a general constitutional convention.[41]

Certainly the final language of article V lacks clarity on this point.[42] No specific power is explicitly granted the legislatures to initiate individual amendments; however, it is suggested that the states may petition Congress to convene a limited federal constitutional convention.[43] Initially, three points should be noted. First, if the framers intended that the legislatures should be able to request only a general convention, would they not have explicitly provided for such authority, instead of leaving it to inference?[44] Second, the dual purpose argument presumes the framers intended that the convention called

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40. *See, e.g.*, Black, *supra* note 8, at 201: "Nothing 'desirable or practical' is to be served by the alternative route, except a possible need . . . . to take care of a *general* dissatisfaction with the national government, or a breakdown thereof." *See also* Wheeler, *Is a Constitutional Convention Impending?*, 21 Ill. L. Rev. 782, 795 (1927). *But cf.*, Child, *Revolutionary Amendments to the Constitution*, 10 Constitutional Rev. 27 (1926), *quoted in* Brickfield, 1957, *supra* note 8, at 19: "Conventions must be limited to specific subject matter and under no circumstances could it be given general revisionary powers . . . ."

41. Convention must be general in scope and a state application calling for a specific amendment can have no binding or legal effect on a convention. Wheeler, *supra* note 40, at 795.

42. *See* note 8 *supra*.

43. *Ervin Bill*, *supra* note 4, §2, authorizes state legislatures to request the calling of a convention for the purpose of proposing one or more amendments to the Constitution. Questions concerning the adoption of a state resolution are to be determined solely by Congress (§3(b)). State applications remain in effect seven years (§5(a)). This approach is consistent with a 1957 draft prepared by Dr. Brickfield for the House Committee on the Judiciary, which authorizes state legislatures to request either a general convention or a convention to propose specific amendments. Brickfield, 1957, *supra* note 8, at 27-28.

44. State constitutions have explicitly reserved to the voters the power to convene a general constitutional convention to consider a revision of the entire constitution. *E.g.*, Fla. Const. art. XI, §4(a). Prior constitutions of this state enabled the legislature to call a convention to propose amendments or to propose an entirely new constitution. Fla. Const. art. XIV, §§1-3 (1838, 1861, 1865). *See also* Alas. Const. art. XIII, §4: "Constitutional Conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention." *But cf.* Nev. Const. art. 16, §2; N.Y. Const. art. 19, §1; Tenn. Const. art. 16, §3.

by the states could conceivably have no relationship to the subject that originally motivated the applications.[45] Finally, if the states may initiate a call for only a general convention, must it follow that Congress may only propose individual amendments and be precluded from proposing a general convention? Such an unreasonable conclusion must necessarily be drawn from the premise offered by the dual purpose argument, which, as will be shown, is totally unsupported by convention action and debate, as well as the framers' intent supplied in *The Federalist Papers.*

The history of the 1787 Convention provides helpful insight as to the legislative compromise that ultimately became article V. As previously noted, the framers were concerned with developing a reasonable procedure for amending the Constitution, which at the same time would be responsive to popular will and would secure a stable governmental foundation. Meeting only four years after the end of the Revolutionary War, the delegates were understandably sensitive to the possibility that rights and powers delegated in the Constitution might need to be withdrawn or rearranged in light of the exigencies of future years. Experience under the Articles of Confederation had revealed the undesirability of binding the new government to an amendatory process requiring consent of every state.[46] Hence, the original Virginia Plan recognized the necessity for, in Colonel Mason's words, "an easy, regular, and Constitutional" amendatory process.[47] The proposal of the Committee on Detail adopted by the Convention on August 30, explicitly empowered the state legislatures to apply to Congress for "an amendment" to the Constitution. The Madison-Hamilton substitute, which provided the basic article V framework, skillfully meshed the philosophies of states rights supporters and staunch centralists by providing dual initiation procedures. The compromise met the objections raised by both camps: (1) that the national government would be loathe to correct its own failings and that such abuses could only be constitutionally remedied by state initiative; and (2) that improprieties in the states and deficiencies in national power would most likely be corrected only through initiative taken by the National Legislature. Hence, the Madison-Hamilton substitute was not an attempt to limit in any manner the power of state legislatures to initiate particular amendments. The substitute merely sought to grant the National Legislature initiation parity with state legislatures. The two amendment processes, therefore, must be viewed as equal alternatives.[48] The reports of the Convention do not rebut this conclusion and provide no indication that the framers intended for state legislatures to concern themselves only with total constitutional revision, while Congress alone would initiate specific

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45: *See* text accompanying notes 50-53 *infra* for a more intensive consideration.

46. *See* text accompanying note 18 *supra.* Charles Pinckney of South Carolina expressed the general dissatisfaction with the unanimous consent requirement for amendments by stating: "It is to this unanimous consent the depressed situation of the union is undoubtedly owing." 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 601 (1911).

47. RECORDS, *supra* note 12, at 202-03.

48. HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION 7 (Comm. Print 1959) [hereinafter cited as STATE APPLICATIONS (1959)].

amendments. In addition, the Convention's September 15 vote to reject proposals that would have required general national convention consideration of proposed amendments further reveals the delegates' reasonable intention that a general convention "ought not to be repeated" whenever a particular amendment is desired.

This interpretation is further supported by reference to article V in *The Federalist Papers*. In *Federalist*, No. 43, Madison explained:[49]

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It *moreover equally enables the General and the state Governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.*

Consistent with the Convention debate, Madison's commentary clearly draws no distinction between the prerogatives of the state and national governments to originate "an amendment of errors," as revealed through experience with the Constitution over a period of time.[50]

Moreover, Hamilton, in the 85th *Federalist*, convincingly supported the authority of state legislatures, as well as the Congress, to originate specific amendments:[51]

> *Every* amendment to the Constitution, if once established, would be a *single proposition*, and might be brought forward *singly*. There would then be no necessity for management or compromise, in relation to any other point—no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten states, were united in the desire of a *particular* amendment, that amendment must infallibly take place.

Hamilton specifically emphasized the desirability of isolating support for each amendment as a safeguard against logrolling through a general revision of the Constitution. Careful attention, therefore, must be given the language "single proposition," "singly," and "particular amendment." Again, any dis-

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49. *As quoted in* 1971 REPORT, *supra* note 4, at 8 (emphasis added).

50. Judge Story, commenting on the framers' intent as to the amendment process has observed: "It was obvious, too, that the means of amendment might avert, the most serious perils to which confederated republics are liable and by which all have hitherto been shipwrecked. . . . They knew the price and jealousy of state power in confederacies; and they wished to disarm them of their potency, by providing a safe means to break the force . . . which would, from time to time . . . be aimed at the Constitution. They believed that the power of amendment was . . . the safety-valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery when out of order or in danger of self-destruction." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 599 (1891).

51. *As quoted in* 1971 REPORT, *supra* note 4, at 8 (emphasis added).

tinction between "single" amendments originating with the states and those derived from Congress is noticeably absent.

In addition, as a practical matter, tying state applications exclusively to a call for a wide-open convention would effectively destroy the legislatures' power to propose amendments.[52] Given the sole option of petitioning Congress for a general convention, it is unrealistic to expect states to exercise article V powers.[53] Thus barring massive national discontent with the existing constitutional framework, the power of state legislatures to originate the "amendment of errors" contemplated by Madison would effectively be vitiated if every state petition for a specific amendment were interpreted as a request for a general convention.

Finally, Congress has long recognized the prerogative of states to petition for a single purpose convention or for a general convention. Congress has treated as substantively separate, rather than cumulative, the over 300 state requests for a convention.[54] To treat these diverse requests for limited reformation as requests for general revision would be illogical and contrary to the stated desires of the petitioning states. For example, article V would be reduced to an absurdity if Congress were forced to call a general convention upon the application of ten states seeking to outlaw busing, seven states desiring to modify the income tax, eleven states wanting revenue sharing, and six states supporting a reversal of federal reapportionment policy. If cumulative treatment had been intended, a general convention is clearly long overdue. Fortunately, Congress has concluded that a convention shall be assembled only when the petitions dealing with a particular subject are received from two-thirds of the states.

1787 Convention Precedent Argument

Arguably, since the original 1787 Convention was not limited to the specific subject areas that were ostensibly the reasons for convocation, precedent for wide-open article V conventions does exist. However, any possible precedential value is weakened by the fact that the 1787 Convention was called to amend the Articles of Confederation, which lacked reasonable and effective provisions for amendment,[55] whereas the Constitution does not suffer from such infirmity.

Additionally, although the 1787 Convention's actions were clearly ultra vires and beyond the scope of the Convention call, Congress ratified the Con-

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52. BRICKFIELD, 1957, *supra* note 8, at 20: "The convention method . . . would be reduced to an unworkable absurdity both from the standpoint of the states having a voice in the convention process and from the magnitude of the operation and its ultimate effect on our government, if only general conventions were permissible under Article V."

53. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 912 (1968).

54. *See* 117 CONG. REC. 16,519 (1971) (remarks of Senator Ervin); STATE APPLICATIONS (1959), *supra* note 48, at 7.

55. The Federal Constitutional Convention called by the Congress of the Confederation under the Articles was "for the sole and express purpose of revising the Articles of Confederation." Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 46 (1927).

vention's action and transmitted the proposals to the states. At no time did the Convention seek to bypass or overrule the Congress.[56] There is, therefore, precedent for submitting the work product of the Convention to congressional scrutiny before transmittal to the states, allowing Congress to disapprove convention proposals that vary from the general subject matter outlined in the convention call.[57] In addition, if a convention today proposed amendments on subjects other than those specified in the call, those proposals and any implementing legislation enacted pursuant thereto could arguably be deemed unconstitutional under article V. Hence, the Constitution provides a possible limitation on a runaway convention through the courts and a definite limitation through the ratification process that were not formally available under the Articles of Confederation.

Constitutional Sovereignty Argument

An additional stance espoused by general convention proponents suggests that a constitutional convention is a "premier assembly" of the people, charged by the people with the duty of framing, amending, or revising a constitution. For such purposes the convention is vested with the total sovereign power of the citizens and is therefore supreme to all other branches of government.[58] From this premise, it is argued that neither Congress nor the states may limit the scope of the convention's deliberations.[59] This argument initially implies

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56. J. Beck, The Constitution of the United States: Yesterday, Today — and Tomorrow? 173 (1924), *quoted in* Brickfield, 1957, *supra* note 8, at 17. Jameson has drawn a useful distinction between "revolutionary" and "constitutional" conventions. Revolutionary conventions consist of bodies that in time of crisis assume or are provisionally delegated the functions of government. Hence, they either supplant or supplement the existing government. In contrast, constitutional conventions are creatures of the government's fundamental law and therefore "ancillary and subservient and not hostile and paramount" to the existing government. J. Jameson, Constitutional Conventions 6, 10 (4th ed. 1867). A convention convened pursuant to article V clearly would be of the constitutional type and subservient to the strictures and limitations placed upon it in the convocation call. *See also* Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 404 (1951), wherein Judge Learned Hand rejected the theory that a convention once convened may disregard directions and article V procedures and adopt extra legal means to establish a new Constitution. The Supreme Court, in affirming, observed that the Constitution can only be changed by peaceful and orderly means. United States v. Dennis, 341 U.S. 494, 501 (1951).

57. *Ervin Bill*, *supra* note 4, §10(b), provides that questions concerning the scope of the convention's work are to be determined solely by Congress. Section 11(b)(1) enables Congress to disapprove a proposed amendment on the ground that it pertains to a subject different from that described in the resolution calling the convention. Pursuant to such action, the ultra vires proposal would not be transmitted to the states for ratification. *But cf.* Note, *Amending the Constitution*, 85 Harv. L. Rev. 1631 (1972), for a critique of this enforcement mechanism.

58. Brickfield, 1957, *supra* note 8, at 16; 46 Cong. Rec. 2769 (1911) (remarks of Senator Heyburn). "A constitutional convention even if elected under a congressional mandate that it could deal with only one subject, could run away. After all, it would be a duly created constitutional convention, and it could propose any amendments which it decided it wished to propose, subject to ratification." 113 Cong. Rec. 10,108 (1967) (remarks of Senator Javits).

59. *See* Livermore v. Waite, 103 Cal. 113, 36 P. 424, 426 (1894); Koehler & Lange v. Hill,

that the people cannot, or prefer not to, delegate to a convention a portion of their sovereign power, as opposed to surrendering total sovereignty.[60] No grounds for such an unreasonable conclusion are suggested by the proponents of the sovereignty argument. Moreover, such a contention ignores the fact that a convention is not *sui generis* – it cannot exist by itself, but must be convened by Congress pursuant to article V.[61] The convention, therefore, exercises no governmental power beyond that granted by congressional call.[62] Further, the product of the convention would not have the force of law until ratified by the requisite number of states, pursuant to article V. A constitutional convention that exceeds the bounds of existing constitutional and statutory provisions must be considered extra-legal and its acts would not alter existing provisions.[63]

Congressional Responsibility To Call a Convention

Given that state legislatures may initiate a call for a limited convention pursuant to article V, the question naturally arises whether Congress must call a convention upon receipt of the requisite number of state applications. A number of commentators have viewed Congress' responsibility in calling a convention as obligatory.[64] For example, Senator Ervin has commented:[65]

> Article V states that Congress "shall" call a convention upon the applications of the legislatures of two-thirds of the states. I have absolutely no doubt that the article is peremptory and that the duty is mandatory, leaving no discretion to the Congress to review the wisdom of the state applications. . . . To concede to the Congress any discretion to consider the wisdom and necessity of a particular convention call would in effect destroy the role of the states.

Support for this position is gleaned from Hamilton in *Federalist*, No. 85:[66]

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60 Iowa 543, 14 N.W. 738, 751 (1883); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); McMullen v. Hodge, 5 Tex. 34, 73, 77 (1849); Loomis v. Jackson, 6 W. Va. 613, 708 (1873).

60. *Cf.* the Pennsylvania Supreme Court's declaration in Wood's Appeal, 75 Pa. 59, 70 (1874): "The right of the people is absolute in the language of the bill of rights, 'to alter, reform, or abolish their government in such manner as they may think proper.' This right being theirs, they may impart so much or so little of it as they deem expedient."

61. *See* discussion in note 56 *supra*.

62. *See* Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949, 993 (1968); Brickfield, 1957, *supra* note 8, at 16; Note, *The Constitutional Convention, Its Nature and Powers and the Amending Process*, 1916 Utah L. Rev. 403, 404.

63. *See* discussions of Jameson's revolutionary-constitutional convention distinction, note 56 *supra*. *See also* discussion of *Ervin Bill* §11(b)(1), *supra* note 57.

64. 1952 Report, *supra* note 30, at 15; Bonfield, *supra* note 62, at 977; Brickfield, 1957, *supra* note 8, at 19. For a discussion of a possible ninth amendment remedy if Congress refuses to call a convention upon proper state application, see Ritz, *The Original Purpose and Present Utility of the Ninth Amendment*, 25 Wash. & Lee L. Rev. 17 (1968).

65. Ervin, *Proposed Legislation To Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 885 (1968).

66. 1971 Report, *supra* note 4, at 12 (emphasis added).

> By the fifth article of the plan the Congress will be *obliged,* "on the application of the legislatures of two-thirds of the states [which at present amounts to nine] to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The Congress "*shall* call a convention." Nothing in this particular is left to discretion.

Thus, under constitutional mandate, Congress must assemble a convention when the required two-thirds of the states have submitted petitions.

A Limited Convention

Although little controversy exists regarding Congress' duty to call a convention when article V requirements are satisfied, there is substantial argument concerning congressional authority to restrict the deliberations of a federal constitutional convention.[67] Although without clear legal or historical precedent, it appears that, since Congress must call the convention and since no specifics concerning the nature of the conventions' proceedings are constitutionally provided, Congress is vested with implied power under the necessary and proper clause[68] to establish policy concerning such procedural matters as the time and place of the meeting, the number of delegates, the manner and date of delegate elections, the nature of representation at the convention, as well as voting and adoption procedures.[69] Moreover, given the breadth of the necessary and proper executing authority, it is further suggested that Congress may define and limit the substantive parameters of the convention's work.[70] Such congressional limitation would directly implement the federal constitutional prerogative of the states under article V, and would further enable Congress to execute its article V responsibilities. Congressional restriction would therefore adequately meet the Supreme Court's test in *McCulloch v. Maryland* that "any means which tended directly to the execution of the constitutional powers of the government, [are] in themselves constitutional."[71]

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67. *See* notes 8, 41, 52, 58, 59 *supra.*

68. U.S. Const. art. I, §8.

69. L. Orfield, The Amending of the Federal Constitution 43-44 (1939); 1952 Report, *supra* note 30, at 15; Note, 70 Harv. L. Rev., *supra* note 9, at 1067, 1075-76.

70. *See* Brickfield, 1957, *supra* note 8, at 16, 19. "[N]one but the legislature can either prescribe or indicate the purposes for which it [the convention] is to assemble. Accordingly, as we shall see, our legislatures nearly always expressly declare, with more or less precision, those purposes, whether to make a general revision of the Constitution, or to consider specific subjects, accompanying that declaration sometimes with a prohibition to consider other subjects." J. Jameson, *supra* note 56, at 364.

71. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819). "But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

Thus, Congress may restrict convention consideration to a single subject, a limited number of subjects, or a total revision of the Constitution.[72] This conclusion requires only that the convention's will must be exercised within the framework set by the act or resolution calling the convention,[73] and does not restrict the convention's freedom to exercise its will and develop specific substantive responses to issues presented.

A more difficult question arises regarding the power of state legislatures to restrict the work of the convention through state application. Although neither the states nor Congress may limit an article V convention to the specific terms of a proposed amendment, the history of article V suggests that Congress has a constitutional duty under article V to reflect the will of the state legislative applications in its convention call. An article V convention should therefore be restricted through the call to proposing amendments dealing with the general subject matter contained in state applications.[74]

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72. Congress' role in the article V convention process is similar to the role state legislatures play in convening state constitutional conventions. Although the people exercise ultimate control over a state convention, as a practical matter, the legislature plays an effective and controlling role in convening the convention. Specifically, the powers of state conventions may be effectively limited by the terms of the legislative act calling it into existence, if the approval for such limitation is obtained from the people at an election for that purpose. *See* Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239 (1871); Gaines v. O'Connell, 305 Ky. 397, 408, 204 S.W.2d 425, 431 (1947); State v. American Sugar Refining Co., 137 La. 407, 415, 68 So. 742, 745 (1915); Opinion of the Justices, 60 Mass. (6 Cush.) 573, 575 (1853); State *ex rel.* Wineman v. Dahl, 6 N.D. 81, 85-86, 68 N.W. 418, 420 (1896); Wells v. Bain, 75 Pa. 39, 48, 15 Am. Rep. 563, 572-73 (1874); Woods' Appeal, 75 Pa. 59, 69-70 (1874); *In re* The Constitutional Convention, 55 R.I. 56, 98-99, 178 A. 433, 452-53 (1935); State *ex rel.* McCready v. Hunt, 9 S.C. (2 Hill) 1, 222-23 (1854); Cummings v. Beeler, 189 Tenn. 151, 171-78, 223 S.W.2d 913, 921-24 (1949); Staples v. Griemer, 183 Va. 613, 622-23, 33 S.E.2d 49, 54-55, 158 A.L.R. 495, 515 (1945). *See also* 1 T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 84-85 (8th ed. 1927). Sturm reports that during the 31 year period, 1938-1968, there were 23 referenda in 16 states on the question of unlimited conventions and 10 in five states on a limited convention. Referenda on limited convention calls resulted in a higher percentage of public approval than those dealing with unlimited authorizations. Sturm concludes that the limited convention has grown greatly in popularity and the authority of such assemblies has been successfully limited to stated subjects. A. STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING: 1938-1968, 64-67 (1970). *See also* A. Sturm, *State Constitutions*, in 19 THE BOOK OF THE STATES: 1972-73, at 10 (1972).

73. STATE APPLICATIONS (1959), *supra* note 48, at 3-4: "There is little argument concerning the power of the convention to develop specific responses to the problems presented to it. The process of proposing amendments clearly requires convention consideration of a number of possible alternative solutions to a problem before a specific proposal is developed. Hence, development of the specific wording of a proposed amendment should be left to the convention. *But cf. Amending the Constitution To Strengthen the States in the Federal System*, 36 STATE GOV'T 10 (1963).

74. *Ervin Bill*, *supra* note 4, §6(a), provides that if both Houses of Congress determine that the requisite number of states have applied for a convention on the same subject, Congress must convene a convention on that subject. Section 8 restricts the convention's work to the subject or subjects named in the congressional resolution convening the convention. As a further safeguard, delegates would be required to subscribe to an oath to refrain from proposing or voting in favor of any proposed amendment not named in the convention resolution. *But cf.* Note, *Proposing Amendments to the United States Constitution by Con-*

This contention, however, has not received universal support. The suggestion has been made that the nature of the right conferred upon state legislatures in requesting Congress to call a convention is nothing more than the right of petition.[75] Moreover, it has been insisted that, since Congress must call the convention and specify the details relative to such convocation, only the National Legislature, in its discretion, may define the convention's agenda.[76] Hence, the assertion that:[77]

> State legislatures . . . have no authority to limit an instrumentality set up under the federal constitution. . . . The right of the legislatures is confined to applying for a convention and any statement of purposes in their petition would be irrelevant as to the scope of powers of the convention.

These arguments lack appreciation of the framers' intent in providing the convention alternative. The drafters included the convention method in the amending article to enable states to initiate constitutional reform if the National Legislature refused to do so.[78] The first version of article V endorsed by the 1787 Convention explicitly provided that a constitutional convention shall be limited by Congress to the subject matter contained in state applications.[79] Subsequent Convention action did not modify such policy. This view is supported by debates in the state ratifying conventions revealing that proponents of the proposed Constitution clearly contemplated that the work of a convention would cohere to state wishes.[80] Moreover, in view of the trend in the states to request only a limited convention, the Judiciary Committee of the House of Representatives has concluded:[81]

> [T]here would seem to be no logical reason whatsoever for overlooking the language contained in the petitions of the states and forcing a gen-

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vention, 70 HARV. L. REV. 1067, 1076 (1957) (the convention is morally obligated to restrict its debates to the subject matter set out in the state applications. Nevertheless, Congress may not properly limit the scope of the convention's deliberations through the call).

75. Wheeler, *supra* note 40, at 795.

76. 1952 REPORT, *supra* note 30, at 15.

77. L. ORFIELD, *supra* note 69, at 45.

78. "Sir, the most powerful obstacle to the members of Congress betraying the interest of their constituents is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essays at treachery." Remarks of Alexander Hamilton, New York State Ratifying Convention, as quoted in 2 DEBATES, *supra* note 18, at 261.

79. *See* text accompanying notes 18-23, *supra*.

80. *See* remarks of Mr. Adams (Mass.) and Mr. Stillman (Mass.), 2 DEBATES, *supra* note 18, at 136, 173-74. A similar view is reflected in the editorial by a contemporary advocate of the Constitution, James Sullivan of Massachusetts: "The 5th Article also provides that the states may propose any alterations which they see fit, and that Congress shall take measures for having them carried into effect." Cassius XI, *The Massachusetts Gazette*, No. 894, Dec. 25, 1787, *quoted in* P. FORD, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 45 (1892).

81. 1952 REPORT, *supra* note 30, at 11-12. In 1931, New York State applied for a convention to repeal the 18th amendment "and no other Article of the Constitution," 75 CONG. REC. 48 (1931).

eral convention upon those states requesting nothing more than a single amendment to the Constitution. A contrary determination would oftentimes be at variance with the very wishes of those States submitting applications to the Congress as well as constitute a very narrow and restrictive interpretation of Article V itself.

Additionally, since article V requires Congress to call a convention only when a consensus exists among two-thirds of the states with regard to the subject of a proposed change, the convention should not be allowed to ignore such a consensus and address problems not contemplated by state applications. Madison, in *The Federalist*, No. 43, recognized article V as a means to enable the general and state governments to originate "the amendment of errors pointed out by experience."[82] That both the National Legislature and the states may initiate useful alterations suggested by their unique perspectives and experiences is evident. If Congress does not incorporate the consensual desires of the states into the convention call, the experiences of the states would effectively be ignored.

Moreover, Madison expressed concern in this same tract with "that extreme facility which would render the Constitution too mutable."[83] If the general subject matter of the convention were not limited by Congress to the problem agreed upon by at least thirty-four states, the Constitution would indeed "be rendered too mutable." Constitutional change should not be considered by a convention until two-thirds of the states conclude that such change is desirable. If thirty-four states request a convention on a particular subject, and Congress refuses to limit the convention to such subject, the National Legislature would be empowered to convene a convention totally disassociated from the state consensus that served as the constitutional prerequisite for its creation and legitimate action.[84]

Finally, since it would require only a majority vote of Congress to adopt a convention resolution,[85] the National Legislature, if allowed to ignore the will of the states in defining the convention's work, would be able to bypass the article V requirement that two-thirds of both Houses must support a congressionally initiated amendment. Such a process would dilute the two-thirds mandate by subjecting the Constitution to change at the will of only a congressional majority, and would clearly render the Constitution more mutable than intended under the procedures envisioned by the framers.

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82. *As quoted in* 1971 REPORT, *supra* note 4, at 8.

83. *Id.*

84. *See* Bonfield, *supra* note 62, at 992-98.

85. "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, etc., where not otherwise expressly provided." L. Deschler, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 439, 91st Cong., 2d Sess. 252 (1971). Since article V simply provides that Congress shall call a convention, only a majority vote of the Congress is required to convene such a convention. The *Ervin Bill*, *supra* note 4, §6(a), provides Congress shall convene a convention by concurrent resolution of both Houses. Since such a resolution is not legislative in nature, it is not sent to the President for approval. L. DESCHLER, *supra* at 186.

Conclusion

The foregoing analysis reveals that state legislatures may petition Congress to convene a constitutional convention for proposing amendments dealing with a particular subject, several subjects, or general constitutional revision. Congress, by virtue of its necessary and proper clause powers, may define and restrict the work of an article V convention through the convention call. Finally, consistent with the reasonable intent of the framers, Congress is obliged to limit the scope of a convention to the general subject matter or problem at which the state applications are directed. Concomitantly, Congress should not recognize the validity of proposals developed by a convention that exceed congressional strictures reflected in the convention call.

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Harvard Journal of Legislation 127 (1973)

NOTE

LIMITED FEDERAL CONSTITUTIONAL CONVENTIONS: IMPLICATIONS OF THE STATE EXPERIENCE

Introduction

Article V of the United States Constitution offers two distinct procedures for constitutional amendment: initiation by two-thirds of each House of Congress and ratification by three-fourths of the states, or a convention called on petition of two-thirds of the states and ratification of its proposals by three-fourths of the states.[1] No constitutional amendment has ever successfully traveled the convention route. Indeed, there has not been a federal constitutional convention since 1787.[2] The convention clause is hardly a "dead letter," however, for there have been numerous efforts to call an article V convention.[3] As recently as 1967, unrest attributable to the Supreme Court's "one man-one vote" decisions of the early 1960's[4] had affected state legislatures to the extent that arguably 32 states — only two short of the required 34 — had petitioned Congress for a constitutional convention.[5]

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1 The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

U.S. CONST. art. V.

2 There have been federally called state conventions, however. *See* text at notes 73-85 *infra*.

3 *See* Prager & Milmoe, *Table of State Applications for an Article V Convention*, in ABA Special Constitutional Convention Study Committee, Report of American Bar Association Constitutional Convention Study Committee app. B [hereinafter cited as ABA Report]. The table records over 300 convention applications from state legislatures.

4 Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *Lucas*, invalidating an apportionment plan which had been approved and instituting one defeated in a statewide popular referendum, generated particular discontent.

5 *See* Graham, *Efforts to Amend the Constitution on Districts Gain*, N.Y. Times, Mar. 18, 1967, at 1, col. 6. For a general background on the effort and its rationale, see Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968).

One consequence of this activity was the introduction into Congress of legislation to establish procedures for the calling and holding of a national constitutional convention. The bill, authored by Senator Sam Ervin (D.-N.C.), passed the Senate 84 to 0 in 1971, but died in the House.[6] It was reintroduced in the 93d Congress, and the Senate passed it again in July 1973.[7] The Ervin Bill stimulated renewed interest in constitutional conventions. The American Bar Association soon became involved; in July 1971 it created a Special Constitutional Convention Study Committee to "evaluate the ramifications of the constitutional convention method of initiating amendments."[8]

The Special Committee had much to study, for the vagueness of the Article V convention clause has given constitutional scholars ample opportunity to debate the form, powers, and procedures of a federal convention. In the vacuum created by lack of firm federal precedent, convoluted exegesis and painstaking dissection of the "legislative history" of article V (*i.e., The Federalist,* and the various Notes on the convention of 1787[9]) have flourished.[10] Madison's objection to the convention mechanism, voiced in 1787, has proven to be prophetic: "difficulties might arise as to the form, the quorum, etc., which in Constitutional regulations ought to be as much as possible avoided."[11]

Of the many disputes which have arisen in the contemplation of a national convention, none has been so hotly debated as whether or not such a convention can be "limited." Can the petitioning states, or Congress, or both, legitimately restrict the matters to be considered by an article V convention? The question

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6 117 CONG. REC. 36,808-06 (1971). *See also* S. REP. NO. 336, 92d Cong., 1st Sess. (1971); 117 CONG. REC. 35,764, 35,988, 36,442, 36,753, 46,642 (1971); *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. (1967).

7 The bill was reintroduced in the Senate as S. 1272, 119 CONG. REC. S5017-19 (daily ed. Mar. 19, 1973); favorably reported by the Judiciary Committee, *id.* at S12,462 (daily ed. June 29, 1973); and passed by the Senate, *id.* at S12,728 (daily ed. July 9, 1973).

8 ABA Report, *supra* note 3, at 2.

9 The Notes are collected in THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911) [hereinafter cited as FARRAND].

10 *See, e.g.,* ABA Report, *supra* note 3, at 13-16; Kauper, *The Alternative Amendment Process: Some Observations,* 66 MICH. L. REV. 903 (1968).

11 2 FARRAND, *supra* note 9, at 630.

clearly is fundamental, for it goes to the very basis of the convention's powers and its relationship to the other organs of government.

On one side in the dispute stand those who would proclaim a convention "the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law."[12] "The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the Constitution of the United States."[13] In the view of these opponents of limited conventions, a convention ought to be free to consider and propose whatever amendments it desires.

On the other side stand those who would permit the states, Congress, or both to limit the convention, either by forbidding it to discuss specified matters (thereby leaving the convention free to deal with all other subjects at its discretion), or listing those topics which the convention may take up and precluding the consideration of all others. Delegates to a convention, in this view, "are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law which authorizes their selection and assemblage."[14]

That the issue is at once divisive and critical is demonstrated by the peculiar fact that the Special Constitutional Convention Study Committee unanimously agreed that a national convention could be properly limited "to the subject matter on which the legislatures of two-thirds of the states request a convention,"[15] whereupon the Council of the ABA's Section on Individual Rights and Responsibilities (SIRR) "voted, without dissent, to reject and oppose the basic recommendations"[16] of the Special

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12 Walker, *Myth and Reality in State Constitutional Development*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 15 (W. Graves ed. 1960) (denominated a "myth").

13 Livermore v. Waite, 102 Cal. 113, 117, 36 P. 424, 426 (1894) (dicta).

14 Quinlan v. Houston & T.C. Ry., 89 Tex. 356, 376, 34 S.W. 738, 744 (1896).

15 ABA Report, *supra* note 5, at 11.

16 Letter from Professor Jefferson B. Fordham to the Honorable Judge C. Clyde Atkins, Aug. 17, 1973. The Special Committee's Report was approved unanimously by the ABA House of Delegates at the latter's convention during the summer of 1973, an event attributable more to the absence of its enemies than the depth of its support. In rejecting the Special Committee's Report, the SIRR was disowning its

Committee. At least one member of the SIRR — who is also on its Committee on National Constitutional Conventions — has commented that the "fundamental weakness" of the Special Committee's report was "its infirmly supported position that the legislatures applying for the call of a convention could limit convention jurisdiction to one or more specific subjects."[17] Though there never has been an article V convention, this Note suggests that the controversy surrounding limitation of such a body may be resolved, or at least focused, through examination of the state experience with limited conventions.

Conventions have been the preferred instrument for thoroughgoing revision of state constitutions since the Delaware, New Hampshire, and Massachusetts gatherings of the late 1770's. To date there have been approximately 225 state constitutional conventions:[18] New Hampshire has convened the most (15 — until 1964 the New Hampshire constitution could be amended in no other way), while 11 states have convened only one. Four-fifths of the states provide for such conventions in their constitutions, and in the remainder conventions have been held, often with judicial approval.[19] If, as has been claimed, the constitutional convention is one of the original and significant American contributions to democratic political theory,[20] it is the state experience which gives substance to that assertion. It is in the crucible of state legislatures, courts, and ballot boxes that the theoretical bases of the institution have been hammered out, and its relation to the more ordinary governmental bodies established.

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own child, inasmuch as the Special Committee was set up at the behest of SIRR's Council in 1971. *See* ABA Report, *supra* note 5, at 1.

17 Letter from Professor Jefferson B. Fordham to the Honorable Judge C. Clyde Atkins, Aug. 17, 1973.

18 Sturm, *State Constitutions and Constitutional Revision, 1970-1971*, in COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1972-73, at 10 (1972).

19 *See* A. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING; 1938-68, app. C, 132-37 (tabular presentation of each state's provisions for constitutional conventions); Sturm, *State Constitutions and Constitutional Revision, 1970-1971*, in COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1972-73, at 24 [this table is hereinafter cited as *Procedures for Calling Constitutional Conventions*]; Note, *State Constitutional Conventions: Limitations on Their Powers*, 55 IOWA L. REV. 244, 247 (1969) [hereinafter cited as Iowa Note].

20 R. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS AND LIMITATIONS 1-3 (1917) [hereinafter cited as HOAR]; J. WHEELER, THE CONSTITUTIONAL CONVENTION: A MANUAL ON ITS PLANNING, ORGANIZATION AND OPERATION xi (1961).

This Note argues that the theoretical framework developed to support the prevailing view that state conventions may be limited is persuasive, that the similarities and differences between the state and federal levels make the case for limited article V conventions still more persuasive, and that the state experience sheds light on potential problems of limited article V conventions. The Note concludes that a limited federal convention is appropriate and that denying the states the opportunity to call a limited convention would be inappropriate under article V.

I. Limitability: The State Experience

"The customary manner of calling constitutional conventions in the United States is by resolution of the legislature followed by a submission of the question to the electorate,"[21] though there have been exceptions.[22] The customary scenario proceeds somewhat as follows: the legislature passes a resolution initiating the convention; this is submitted to the electorate for approval; after approval the legislature passes an enabling act to provide for a budget, temporary officers, and the election of delegates; the delegates are elected; the convention meets; and the final product is submitted to the electorate for approval. The details of the process vary by state — in particular, 12 states have constitutional provisions which require that the question of calling a convention be submitted to the electorate periodically, thus bypassing the legislature at the initial stage of the procedure — but the basic structure is surprisingly uniform throughout the nation.[23]

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21 Annot., *Power of State Legislature to Limit the Powers of a State Constitutional Convention*, 158 A.L.R. 512 (1945).

22 Most of these occurred before the present century. Examples include the first state conventions of the late 18th century, which were "revolutionary" in origin as well as outlook; the congressionally instigated conventions preliminary to statehood, discussed in part II(A) *infra*; and the Reconstruction conventions held after the Civil War. Modern exceptions include conventions in those states in which the state constitution provides that the convention question shall be submitted to the people periodically, and those conventions called by popular initiative in states allowing such procedures. *See Procedures for Calling Constitutional Conventions*, *supra* note 19.

23 *See Procedures for Calling Constitutional Conventions*, *supra* note 19. This is not to suggest that the details of the process of amending a constitution through a constitutional convention always are handled smoothly or without legal questions. *See generally, e.g.*, Dodd, *State Constitutional Conventions and State Legislative*

As noted above,[24] conventions historically have been used primarily for major revisions of state constitutions. Indeed, in the absence of explicit provisions in its enabling act or in the legislative resolution submitting the convention question to the electorate, a convention is presumed to be *un*limited and to possess plenary powers to propose revision and amendments as it sees fit.[25]

Little mention is made of limited conventions in the 39 state constitutions which explicitly provide for constitutional conventions. At least one state constitution (Alaska's) forbids limited conventions;[26] and the Alabama constitution of 1901, framed by a convention which itself exceeded limitations placed upon it, affirms the unlimited authority of future conventions.[27] Tennessee's constitution, on the other hand, explicitly grants the legislature and electorate the right to convene limited conventions.[28] And several early state constitutions appear to have envisioned limited conventions.[29]

In a number of the states whose constitutions require that the question of calling a convention be submitted periodically to the electorate (*e.g.*, Michigan, Missouri, and New York), the convention article lays out convention procedures in a manner that suggests limitations are precluded. New York's constitution specifies the form in which the question is to be presented for a popular vote: "Shall there be a convention to revise the constitution and amend the same?"[30] This might eliminate the possibility of a limited convention, at least under the analysis below; but a limited convention has been upheld in Virginia under a virtually identical provision.[31] In any event, many states over the past two

Power, 2 VAND. L. REV. 27 (1948); Iowa Note, *supra* note 19, at 247-52, 254-59; Note, *Constitutional Revision by a Restricted Convention*, 35 MINN. L. REV. 282, 287-88, 292-93 (1951) [hereinafter cited as Minnesota Note]; Annot., 158 A.L.R. 512 (1945). For a discussion of potential issues in the article V amendment process, see ABA Report, *supra* note 3, at 33-42. The scope of this Note is restricted to limitability, enforcement of limitations, and legislative refusal to call a convention.

24 See text preceding note 18 *supra*.

25 W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 76-77 (1910) [hereinafter cited as DODD].

26 ALASKA CONST. art. 13, § 4.

27 ALA. CONST. art. 18, § 286.

28 TENN. CONST. amend. 1.

29 ABA Report, *supra* note 3, at 18-20.

30 N.Y. CONST. art. 19, § 2.

31 Staples v. Gilmer, 183 Va. 613, 625, 33 S.E.2d 49, 52, 158 A.L.R. 495 (1945) (per

centuries have successfully convened limited conventions,[32] although efforts to limit a convention have occasionally failed.[33]

A. *Forms of Limitation*

A convention may be limited in a number of ways. Explicit limiting directives may, in the first instance, be either procedural (*i.e.*, dealing with such matters as recordkeeping, printing of convention records, etc.) or substantive (going to the subject matter which a convention may discuss and on which it may propose amendments). Procedural limitations have usually been invalidated.[34] A convention "has full control of all its proceedings."[35] Indeed, some have said that a convention may properly ignore efforts at outside control of its internal procedures.[36] This Note deals almost exclusively with substantive limitations; but the distinction should be kept in mind, for at least two cases often cited in support of unlimited constitutional conventions in fact hold only that such matters as choice of printer, date of submission of the convention product, etc. are beyond legislative control.[37]

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curiam). *See* J. WHEELER, SALIENT ISSUES OF CONSTITUTIONAL REVISION 52 (1961); A. STURM, *supra* note 19, at 67.

32 Approximately 35, or nearly 15 percent, of all state constitutional conventions have been substantively limited. And the proportion of limited conventions has been higher since World War II. For details on many of the pre-1940 conventions, see HOAR, *supra* note 20, at 105-28; J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS AND MODES OF PROCEEDING §§ 382-82(c) (4th ed. 1887) [hereinafter cited as JAMESON]. On the post-1940 conventions, see A. STURM, *supra* note 19, at 56-60, 113.

33 Examples of limited conventions which overrode limitations are those in Georgia (1789), Minnesota (1857), Pennsylvania (1872), Alabama (1901), Virginia (1901), and Michigan (1908). *See* HOAR, *supra* note 20, at 111-15.

34 *See, e.g.*, Iowa Note, *supra* note 19, at 259-60; Minnesota Note, *supra* note 23, at 290; Annot., 158 A.L.R. 512, 522-23 (1945). The ABA Special Committee concluded that an article V convention should not be subject to procedural limitation. ABA Report, *supra* note 3, at 22-23.

35 Goodrich v. Moore, 2 Minn. 61, 66 (1858).

36 The leading cases, although their holdings do not directly support the point, are Carton v. Secretary of State, 151 Mich. 337, 340, 115 N.W. 429, 430 (1908), and Goodrich v. Moore, 2 Minn. 61, 66 (1858). *See* HOAR, *supra* note 20, at 117-18, 175, 177; JAMESON, *supra* note 32, §§ 453-56; Dodd, *supra* note 23, at 51.

37 Carton v. Secretary of State, 151 Mich. 337, 115 N.W. 429 (1908); Goodrich v. Moore, 2 Minn. 61 (1858). The Delaware and Hawaii Constitutions explicitly grant this power to conventions. DEL. CONST. art. XVI, § 2; HAWAII CONST. art. XV, § 2. There may be some difficulty in drawing the line between such "housekeeping" matters as the legislature may regulate in its enabling act and the internal procedure of the convention, which only the convention may regulate. The former are

Substantive limitations take many forms. A convention may be prohibited from amending one or more portions of the state constitution, but otherwise left free to alter as it wishes.[38] Alternatively, a convention resolution or enabling act may specify certain subjects to be considered and prohibit discussion of any others — as has every limited convention since 1945, except New Jersey's in 1947. New Jersey's experience since World War II illustrates the difference: its 1947 convention was permitted to make changes in any area except the apportionment of the state legislature, while its 1966 convention was prohibited from considering any issue except legislative apportionment.[39]

Variations abound. A convention may be required to consider some matters and left free to deal with others as it wishes.[40] Perhaps the most complex and bizarre set of limitations was imposed upon the North Carolina convention of 1835. It was required to author amendments on four topics, permitted to treat 16 more, and prohibited from acting upon anything else.[41] Most recent limited conventions have been restricted to proposing amendments on one or a few subjects. There are no theoretical differences between the various forms of limited conventions, however, and accordingly this Note will make no distinctions among them.

B. *Sources of Limitation*

It is an axiom of modern democratic theory that the legitimacy and authority of a government depend upon the consent of the governed. In America "the people, in their collective and national capacity, established the present constitution . . . acting as sover-

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apparently such details as are required to start up and house the convention; the latter concerns the convention's course and rules after it has come into being.

38 Examples include North Carolina's convention of 1875, Law of Mar. 19, 1875, ch. CCXXII § 4, [1875] N.C. Laws 505; and Louisiana's conventions of 1898, Act. No. 52, § 3(a)(b), [1896] La. Acts 85; 1913, Act No. 1, §§ 1(3)(a)-(c), [1913] La. Acts 2d Extra Sess. 3; and 1921, Act. No. 180, § 1(4), [1920] La. Acts 292.

39 Law of Feb. 17, 1947, ch. 8, § 2, [1947] N.J. Laws 24; Law of May 10, 1965, ch. 43, § 2, [1965] N.J. Laws 101.

40 One example is Alabama's convention of 1875, which was required to provide for a public school system. Law No. 24, § 9, [1875] Ala. Laws 112. Another is Connecticut's court-ordered convention of 1965, required to consider only legislative apportionment. *See* Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965) (per curiam). It was not restricted in any other way and ultimately rewrote the entire state constitution.

41 JAMESON, *supra* note 32, § 382(a).

eigns of the whole country."[42] It follows, from the very definition of sovereignty, that changes in the fundamental law (the constitution) can be made only by the electorate or those to whom the electorate has delegated its powers to amend. The legitimacy of a constitutional convention, therefore, rests on the delegation by the electorate of authority to propose amendments.[43] Delegates to a convention "derived their power and authority from the people in their sovereign capacity."[44] Nearly unanimous agreement on the foregoing propositions has not led to agreement on which, if any, of the numerous potential sources of limitations — constitutional, executive, judicial, legislative, and popular — comport with those propositions.

At the state level, the Constitution and laws of the United States clearly limit state constitutional conventions through the supremacy clause.[45] Arguably, those provisions of a constitution governing the amendment process itself are binding upon any constitutional convention called pursuant to that process.[46] The role of the executive is less clear.[47]

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42 Chisholm v. Georgia, 2 U.S. (2 Dall.) 440, 462 (1793) (Jay, C.J.). The position has received consistent support from the Supreme Court, political philosophers such as Jameson and Woodrow Wilson, and popular interpretation of the democratic state. It has also been criticized as a philosophical, rather than legal, conclusion. *See* L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 141-48, 141 n.26 (1942). For an excellent analysis of the evolution of popular support for the idea in early America, see G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, ch. 9 (1969).

43 "A convention has delegated, and not inherent, rights." *Ex parte* Birmingham & Atl. Ry., 145 Ala. 514, 521, 42 So. 118, 125 (1905). *See also, e.g.*, Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960); State v. American Sugar Ref. Co., 137 La. 407, 68 So. 742 (1915); Opinion of the Justices, 60 Mass. (6 Cush.) 573, 574-75 (1835); Erwin v. Nolan, 280 Mo. 401, 217 S.W. 837 (1920); Frantz v. Autry, 18 Okla. 561, 91 P. 193 (1907); *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935); State *ex rel.* M'Cready v. Hunt, 20 S.C.L. 1, 222-23 (1834); Quinlan v. Houston & T.C. Ry., 89 Tex. 356, 34 S.W. 738 (1896); Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49, 158 A.L.R. (1945); Loomis v. Jackson, 6 W. Va. 613 (1873).

44 Frantz v. Autry, 18 Okla. 561, 589, 91 P. 193, 202 (1907).

45 *See* DODD, *supra* note 25, at 92. But the ability of Congress to explicitly limit a state constitutional convention, even as a condition for admission to the Union, is much less clear. *See* Iowa Note, *supra* note 19, at 262-63; part II(A) *infra*.

46 *See, e.g.*, provisions cited notes 26-28, 30 *supra*. *See generally* Dodd, *supra* note 23; Annot., *Power of State Legislature to Limit the Powers of a State Constitutional Convention*, 158 A.L.R. 512 (1945).

47 At the state level, *see* Iowa Note, *supra* note 19, at 268. At the federal level, *see* ABA Report, *supra* note 5, at 28-33. *But see* Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 206-10 (1972).

The judiciary obviously is not an independent source of limitations on constitu-

The debate on limitability has focused upon the roles of the legislature and the electorate. At least three distinct positions have emerged: that the legislature alone may limit a convention; that the electorate (directly *or* by ratification of a legislative resolution) may impose limitations; and that the convention is sovereign and inherently "illimitable."

C. *The Debate over Limitability: Legislature and Electorate*

In the first major treatise on the subject, Jameson concluded that constitutional conventions ought to be subject to such limitation as state legislatures saw fit to impose (except for internal convention procedures).[48] Jameson's position elicited some support,[49] and a great deal of vitriolic opposition.[50]

Much of what is reputed to be opposition to limited conventions as a whole has been expressed as opposition to legislatively limited conventions, as if legislative limitations were the only kind possible. For example, one case asserted that

> the legislature is prohibited from any control over the method of revising the Constitution. The convention is an independent and sovereign body whose sole power and duty are to prepare and submit to the people a revision of the Constitution . . . . It is elected by the people, answerable to the people, and its work must be submitted to the people through their electors for approval or disapproval.[51]

One judge "had no difficulty" in concluding that "a constitutional convention lawfully convened does not derive its powers from the legislature, but from the people . . . that the powers of the consti-

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tional conventions. However, the ability and willingness of courts to enforce limitations is necessary if limitability is to have meaning in the event of a convention which purports to exceed limitations imposed by the people. *See* part III *infra*.

48 JAMESON, *supra* note 32. Jameson's reasoning was influenced by the controversies surrounding the Illinois Conventions of 1862 and 1869. His work was largely a polemic in support of the legislature's position during those troubled gatherings.

49 A particularly glowing reference may be found in *Ex parte* Birmingham & Atl. Ry., 145 Ala. 514, 519, 42 So. 118, 119 (1905).

50 *See, e.g.*, Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); Frantz v. Autry, 18 Okla. 561, 91 P. 193 (1907). Both HOAR, *supra* note 20, at 58-79, 105-20, and DODD, *supra* note 25, at 72-93, make major assaults on Jamesosn's thesis. After being abandoned for most of the 20th century, it has apparently been revived, at least implicitly, in the Ervin Bill. *See* part III(C) *infra*.

51 Carton v. Secretary of State, 151 Mich. 337, 340-41, 115 N.W. 429, 430 (1908) (Grant, C. J.).

tutional convention are in the nature of sovereign powers . . . that the legislature can neither limit or [*sic*] restrict them in the exercise of these powers . . . ."[52] "In the area of constitutional drafting," concludes one commentator, "the convention must be completely free of legislative restrictions since its authority derives from the sovereignty of the people."[53]

This opposition to limited conventions, rooted in the metaphysics of sovereignty, does have some support. A number of state courts have favored the position, though generally in dicta handed down over 60 years ago.[54] The Federal Convention of 1787 and early state and colonial conventions are frequently cited to support the point that a convention may not be limited,[55] but such citation reflects failure to distinguish between "revolutionary" conventions (extra-constitutional in nature and resulting from the manifestation of power sufficient to change the form of government) and "constitutional" conventions (called under the aegis of an existing legislature and constitution).[56]

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52 Loomis v. Jackson, 6 W. Va. 613, 708 (1873) (obiter dicta).

53 Iowa Note, *supra* note 19, at 266.

54 *See, e.g.*, Livermore v. Waite, 102 Cal. 113, 36 P. 424 (1894) (dictum); Koehler v. Hill, 60 Iowa 543, 14 N.W. 738 (1883); Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892); Anderson v. Baker, 23 Md. 531 (1865); Carton v. Secretary of State, 151 Mich. 337, 115 N.W. 429 (1908); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); Lawson v. Jeffries, 47 Miss. 686 (1873); Frantz v. Autry, 18 Okla. 561, 91 P. 193 (1907); Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903); Loomis v. Jackson, 6 W. Va. 613 (1873). The only recent case to so hold is Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 229 A.2d 388 (1967). The issue in that case was whether the legislature was bound by an act, approved by the electorate, which mandated a constitutional convention within two years; and the court held that the legislature was so bound: "[H]aving submitted the question to the people in proper legal fashion, it bound itself to the mandate expressed by them." 246 Md. at 445, 229 A.2d at 403 (quoting the unpublished decision below). The court thus, in effect, enforced a "limitation" because it was approved by the people, which weakens the case as authority for the position that conventions are sovereign. The opinion was phrased, as are all, in the language of the people's sovereignty and their sole right to delegate that sovereignty.

55 Thus Note, *The Legal Effect Under American Decisions of an Alleged Irregularity in the Adoption of a Constitution or Constitutional Amendment*, 10 ST. LOUIS L. REV. 279, 295 (1925) [hereinafter cited as St. Louis Note], cites Kamper v. Hawkins, 1 Va. Cas. 20 (1793), in which several opinions stress the revolutionary nature of colonial conventions.

56 *See* Erwin v. Nolan, 280 Mo. 401, 217 S.W. 837 (1920); State *ex rel.* Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972); Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49, 158 A.L.R. 495 (1945); HOAR, *supra* note 20, at 15-16, 34-39; JAMESON, *supra* note 32, at 10-11; Hendricks, *Some Legal Aspects of Constitutional Conventions*, 2 TEXAS L. REV. 195, 195-96 (1924); Braxton, *Powers of Conventions*, 7 VA. L. REG. 79 (1901); Iowa Note, *supra* note 19, at 245-46; Minnesota Note, *supra* note 23, at 285-86.

Limited conventions also have been opposed on more practical grounds. Professor Graves has advanced the theory that the limited convention is a tool of various interest groups seeking to block substantive reform:

> To those who do not want general revision and who do not really believe in the democratic process anyway, it provides a made-to-order means of avoiding the opening up of the whole array of constitutional problems for general discussion. . . . More than that, it makes readily available a tool by which powerful special interest groups may, with a high degree of certainty, protect whatever type of sacred cow in which they happen to be interested.[57]

Some who favor limited conventions suggest that those ostensibly opposed only to limited conventions in fact look with disfavor upon the convention mechanism generally. These opponents argue against limited conventions, the theory claims, because they know many people fear that an unlimited convention might become a "runaway" and tamper with basic constitutional guarantees.[58] If a limited convention can be blocked, these strategists count on public sentiment against unlimited conventions to complete the plan and assure that no convention will be called.[59]

Many proponents of limited conventions, in contrast to advocates of Jameson's position of legislative supremacy over conventions and in contrast to opponents of all limited conventions, maintain that

> where the legislature, in the performance of its representative function, asks the electors if they desire a convention to

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57 Graves, *Current Trends in State Constitutional Revision*, 40 NEB. L. REV. 560, 570 (1961). *See also* Bebout, *Recent Constitution Writing*, 35 TEXAS L. REV. 1071, 1074-75 (1957).

58 With reference to "runaways," see Sorenson, *The Quiet Campaign to Rewrite the Constitution*, SATURDAY REVIEW, July 15, 1967, at 17; 113 CONG. REC. 10,102-03, 10,108-09, 10,112 (1967) (remarks of Senators Tydings, Proxmire, Javits, and Dirksen); N.Y. Times, Mar. 18, 1967, at 1, col. 6.

59 For obvious reasons the position is not espoused publicly. The closest thing to public admission of the goal is probably in Black, *Amending the Constitution; A Letter to a Congressman*, 82 YALE L.J. 189 (1972), where opposition to a limited convention and opposition to article V conventions in general is intermingled. *See* Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1628-29 & n.88 (1972) [hereinafter cited as Harvard Note].

> amend or revise a certain part of the Constitution but not the whole Constitution, an affirmative vote of the people on such a question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the Constitution suggested to them by the legislature. The wishes of the people are supreme.[60]

In distinguishing themselves from both Jameson and the opponents of all limited conventions, these advocates of conventions limited by the sovereign electorate draw

> a clear distinction between the lack of power of the legislature to control the convention, and the power of the people to control it. This distinction is the real answer to the question whether the convention is bound by the convention act. If the convention act be the creature of the people, the convention *is* bound.[61]

That the convention act can be "the creature of the people" is explained as follows:

> If, at the time the question of calling the convention is submitted to them, the people are informed of the scope of the convention and the manner in which it is to conduct its deliberations . . . then a convention called in this manner will be limited as therein set forth and the convention will then be bound to confine itself within the stated limits of the act of the assembly. The reason for this is that it is the people, under such circumstances, who prescribe the conditions in the legislative act by approving the call for the convention in accordance with the provisions of such act. The legislature merely proposes the conditions. It is the vote of the people for the convention that ratifies them and makes them binding upon the delegates.[62]

Perhaps the point most in contention between opponents and proponents of limited conventions is the weight to be accorded electoral approval of a limited convention resolution proffered by the legislature. Opponents claim that the choice given the electorate when told to accept a limited convention as proposed by the legislature (in the initiating resolution) or have no convention at

60 Staples v. Gilmer, 183 Va. 613, 627, 33 S.E.2d 49, 158 A.L.R. 495 (1945).
61 HOAR, *supra* note 20, at 120-21.
62 *In re* Opinion to the Governor, 55 R.I. 56, 99, 178 A. 433, 452 (1935).

all is an illusory one. It is said that true popular control in such a situation does not exist, since real power remains in the hands of the legislature — a claim which raises all of the arguments advanced with great force against Jameson's position of legislative supremacy.[63] Only the people can change the fundamental law — the constitution — of which the legislature is a creation, not a master. Proponents counter with "the fact that there would be no convention unless the people voted affirmatively, that an affirmative vote would result in holding exactly the sort of convention in every detail provided in the act, and that the people are presumed to know the terms of the act under which they vote."[64]

The favored solution to this problem is a two-step popular vote on the convention question: first, on the convention in general; and second, on the proposed limitations.[65] Under such a system, the people can convene an unlimited convention if they so choose. In its absence, the only popular check is said to be the clumsy and ineffectual mechanism of electing legislators who will offer the electorate the kind of convention it desires.[66] In any case the legislature should be prohibited from making further changes after the electorate has approved a given set of proposed limitations.[67]

At least from the perspective of classic democratic theory, there is no question but that, as between those who would permit limited conventions approved by the electorate and opponents of all limited conventions, the former have the better of the argument. If, as all agree, the power of constitutional amendment rests ultimately with the sovereign people, then no authority can exist which may rightfully limit the people's discretion in delegat-

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63 *See* Dodd, *supra* note 25, at 74-76; Gooch, *The Recent Limited Constitutional Convention in Virginia*, 31 Va. L. Rev. 708, 717 (1945); Iowa Note, *supra* note 19, at 264; Minnesota Note, *supra* note 23, at 286-87.

64 Hoar, *supra* note 20, at 71. In some state legislatures (*i.e.*, Georgia, Maine, and Mississippi), no popular referendum is required and the legislature can convene a convention on its own motion. Presumably in such states limited conventions would not be appropriate under the theoretical model developed here. Other states permit popular calling of a convention by initiative, without need for legislative action (in Florida, this is the only way to call a convention). In those, the problem is moot. *See Procedures for Calling Constitutional Conventions*, *supra* note 19.

65 *See* Iowa Note, *supra* note 19, at 264 & n.170.

66 *See* Wells v. Bain, 75 Pa. St. 39, 47 (1874); Staples v. Gilmer, 185 Va. 615, 85 S.E.2d 49, 158 A.L.R. 495 (1945).

67 Hoar, *supra* note 20, at 98-99.

ing that power. Such an authority would be above the people, and if sovereignty means anything it is that no power may restrict the sovereign without his consent. Against this doctrinally compelled conclusion, the opponents of limited conventions can raise only the practical objection, discussed above, that electoral power over legislative restrictions is illusory.[68]

The outcome in practice is clear. The position upholding limited conventions when the electorate has approved the limitations has gained nearly universal acceptance in state courts and legislatures. With one arguable exception,[69] no state court in over 60 years has reached any conclusion other than that "a convention is not bound by legislative restrictions which apply to the work of such organ, but that the mandate of the people, either in calling the convention or in approving the convention act, is controlling."[70]

The one arguable question in this area is how late in the convention process the legislature can impose limitations which may be validated by electoral approval. At least two state courts have upheld legislative limitations imposed after electoral approval of the initiating resolution, on the theory that by the act of electing convention delegates the electorate implicitly ratifies any limita-

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68 Whatever its validity at the state level, this objection is of no import whatsoever to an article V convention. *See* text at note 101 *infra*.

69 Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 229 A.2d 388 (1967) (discussed in note 54 *supra*).

70 A. STURM, METHODS OF STATE CONSTITUTIONAL REFORM 102 (1954). *See generally* Opinion of the Justices, ___ Del. ___, 264 A.2d 342 (1970); Bradford v. Shine, 13 Fla. 393 (1871) (dictum); Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960); Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947); Hayne v. Assessor, 143 La. 697, 79 So. 280 (1918); Foley v. Democratic Parish Comm., 138 La. 220, 70 So. 104 (1915); State v. American Sugar Ref. Co., 137 La. 407, 68 So. 742 (1915); Louisiana Ry. & Nav. Co. v. Madere, 124 La. 635, 50 So. 609 (1909); Loring v. Young, 239 Mass. 349, 132 N.E. 65 (1921); Opinion of the Justices, 60 Mass. (6 Cush.) 573 (1853); Erwin v. Nolan, 280 Mo. 401, 217 S.W. 837 (1920); State *ex rel.* Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972); Wood's Appeal, 75 Pa. 59 (1874); Wells v. Bain, 75 Pa. 39 (1874); *In re* Opinion to the Governor, 55 R.I. 56, 178 A. 433 (1935); State *ex rel.* M'Cready v. Hunt, 20 S.C.L. 1 (1834); Illustration Design Group, Inc. v. McCanless, 224 Tenn. 284, 454 S.W.2d 115 (1970); Cummings v. Beeler, 189 Tenn. 151, 223 S.W.2d 913 (1949); Quinlan v. Houston & T.C. Ry., 89 Tex. 356, 34 S.W. 738 (1896); Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49, 158 A.L.R. 495 (1945); Nespereira c. Alcalde del Distrito Central, Sent. No. 72, 12 Mayo 1931, 29 GAC. OF. (22 Mayo 1931) 9285 (Cuban Supreme Court decision discussed in Ireland, *Constitutional Amendments —Power of Conventions*, 6 TULANE L. REV. 75 (1931)). *See also* HOAR, *supra* note 20, at 21, 120-21.

tions contained in the convention enabling act providing for the elections.[71] The better rule is that only those limitations contained in the initiating resolution — and thus explicitly before the people when they authorize the convention — are binding.[72]

II. The Theory of a Limited Federal Convention

A. *Reasons to Examine the State Experience*

Looking to the state experience in considering the permissible nature of an article V constitutional convention is justified because there is no directly relevant federal experience, while there is a rich state experience upon which to draw.

The federal experience, after the convention of 1787, consists wholly of federally called state conventions. Commencing with the act providing for the admission of Ohio,[73] Congress has often provided for the calling of a convention and the drafting of a state constitution as part of the process of admission to statehood. Since the act admitting Louisiana,[74] Congress has been in the habit of mandating certain provisions and prohibiting others in state constitutions-to-be. Thus the Louisiana act required that the state's constitution, among other things, guarantee trial by jury and "contain the fundamental principles of civil and religious liberty."[75] The act providing for the admission of Utah[76] included substantive limitations in at least four areas, one of which requires that in the state constitution "polygamous or plural marriages are forever prohibited."[77] Virtually all of the admitting acts after 1811, up to and including Hawaii's in 1959, contain such limitations, as well as detailed instructions on how the convention is to be called, the election and apportionment of delegates, etc.[78]

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71 *Ex parte* Birmingham & Atl. Ry., 145 Ala. 514, 42 So. 118 (1905); Wells v. Bain, 75 Pa. 39 (1874); Annot., 158 A.L.R. 512, 518-20 (1945).

72 *See, e.g.*, Carton v. Secretary of State, 151 Mich. 337, 115 N.W. 429 (1908). *See also* Hoar, *supra* note 20, at 98-99.

73 Act of Apr. 30, 1802, ch. 40, 1 Stat. 173.

74 Act of Feb. 20, 1811, ch. 21, 2 Stat. 641.

75 *Id.* § 3, 2 Stat. 642.

76 Act of July 16, 1894, ch. 138, 28 Stat. 107.

77 *Id.* § 3, 2 Stat. 108.

78 *See, e.g.*, the admitting and/or enabling acts for Missouri, Act of Mar. 6, 1820, ch. 22, 3 Stat. 545; Indiana, Act of Apr. 19, 1816, ch. 57, 3 Stat. 289; Mississippi,

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Two factors undercut the utility of these conventions as precedents for an article V convention. First, "The instances of successful restraint of territorial conventions by Congress are not in point, for Congress is an outside sovereign, not at all comparable to the legislature of the territory itself."[79] Congress power to govern and admit the Territories[80] is not subject to the problems which attend the attempted exercise of power by one body over another when both are at least arguably of equal stature and authority.

Second, Congress (paradoxically) has very little real discretion over the *kinds* of restrictions which it can validly impose on prospective state constitutions. In 1845 the Supreme Court held that once Congress had admitted a state, it was forbidden to inquire into whether a condition of religious liberty which was part of the state's enabling act had been violated.[81] Later the Court went further yet and held that Congress could impose no restrictions upon the admission of a state which had not been imposed upon other states of the Union.[82] Congressional commands in areas of federal authority (*e.g.*, public lands) were to be obeyed, but those on subjects which (after statehood) would be within the sole province of the state to decide (*e.g.*, the location of the state capital) were held void and of no effect.[83] The question still arises occasionally,[84] but there are clearly grave difficulties in using congressional control of territorial conventions as a precedent for article V conventions, if only because of the unique complexity of the former.[85]

Act of Mar. 1, 1817, ch. 23, 3 Stat. 348; Illinois, Act of Apr. 18, 1818, ch. 67, 3 Stat. 428; Alabama, Act of Mar. 2, 1819, ch. 47, 3 Stat. 489; Texas, J. Res. of Mar. 1, 1845, No. 8, 5 Stat. 797; Wisconsin, Act of Mar. 3, 1847, ch. 53, 9 Stat. 178; Nevada, Act of Mar. 21, 1864, ch. 36, 13 Stat. 30; Colorado, Act of Mar. 3, 1875, ch. 139, 18 Stat. 474; Nebraska, Act of Apr. 19, 1864, ch. 59, 13 Stat. 47; North Dakota, South Dakota, Montana, & Washington, Act of Feb. 22, 1889, ch. 180, 25 Stat. 676; and Arizona & New Mexico, Act of June 20, 1910, ch. 310, 36 Stat. 557.

79 HOAR, *supra* note 20, at 111.

80 U.S. CONST. art. IV, § 3.

81 Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845). The condition is quoted in text at note 75 *supra*.

82 Coyle v. Smith, 221 U.S. 559 (1911).

83 *Id.*

84 *See, e.g.*, Island Airlines, Inc. v. CAB, 363 F.2d 120 (9th Cir. 1966).

85 *See generally* Plowman v. Thornton, 52 Ala. 559 (1875); Bradford v. Shine, 13 Fla. 393 (1871); Frantz v. Autry, 18 Okla. 561, 91 P. 195 (1907); Quinlan v. Houston

The states have held many constitutional conventions without congressional stimulus, while we still await the first article V convention. More important, the gross structures of the state and federal governments are remarkably similar. All provide for three branches of government: an executive, a bicameral legislature (except Nebraska), and an independent judiciary. Above all branches is set a written constitution.

As Justice Brandeis declared, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[86] Justice Brandeis was defending a state statute from attack, but the metaphor is a sword as well as a shield. For, as he observed elsewhere in his opinion, "advances have been due to experimentation. . . . There must be power in the States and the Nation to remould, through experimentation, our . . . institutions to meet changing social and economic needs."[87]

The import of Brandeis' words is clear; the federal government can learn from the states, even as the states can profit from its example. Such "cross-fertilization" is a fruit of the federal system. That it has taken place on a large scale throughout our history is testimony to the structural similarities between the governments, which are extensive enough to allow entire institutions to be lifted from one level and used on another. Emancipation, women's suffrage, prohibition, minimum wage and workmen's compensation laws, public housing, the enfranchisement of 18-year-olds, and the direct election of Senators were all state "experiments" subsequently adopted at the national level, many by incorporation into the Constitution itself. Reflection of the state convention experience of two centuries, modified as required by the differences between state and federal situations, in the theoretical underpinnings and practical development of an article V

& T.C. Ry., 89 Tex. 356, 34 S.W. 738 (1896); Wickersham, *New States and Constitutions*, 21 YALE L.J. 1, 9-15 (1911); Iowa Note, *supra* note 19, at 262-63. The cases, except *Frantz v. Autry*, deal with Reconstruction conventions called and restricted by congressional acts or Presidential proclamations.

86 New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932).

87 *Id.* at 310-11.

convention would be no more than continuation of a long line of precedent.

B. *Comparison of State and Federal Convention Processes*

State and article V conventions can be compared on structural and functional bases. The parallels and contrasts between them in these respects illuminate the extent to which the theoretical foundation of limited state conventions can be utilized in analyzing the propriety of a limited federal convention. The model below demonstrates striking structural similarities (and one important difference) between the convention process at the state and federal levels.[88]

STAGE	STATE MECHANISM	FEDERAL MECHANISM
Initiation	Legislature	Informal[89]
Authorization	Popular vote	⅔ of states
Calling[90]	Legislature (& electorate)	Congress (& states or electorate)

88 It is important to note that the state procedure used in the model is not the only, nor the universal, method for conducting state constitutional conventions. It *is* the usual way to do so. Differences, notably at the initiation stage, do exist. *See* notes 22 and 64 *supra*. Clearly, the function or purpose of a state convention may be altered if the legislature is to be intentionally circumvented or ignored at the initiation stage.

At the ratification stage, Delaware alone provides for legislative proclamation of constitutional convention products without popular ratification. DEL. CONST. art. XVI, § 1. Occasionally other states will forego a popular vote for special reasons, as did Virginia in 1945. Ch. 1, § 1(B) [1944/45] Va. Acts Ex. Sess. 4.

It might be argued that an article V convention is more closely analogous to a state convention called by popular initiative than to a legislatively initiated convention, but the latter form dominates the state experience, so in this Note the term "state convention" generally means a legislatively initiated convention unless otherwise specified explicitly or by context. If the legislature does not fully control legislatively initiated conventions, it clearly should not fully control popularly initiated conventions, and if the legislature may be limited by popular vote on a legislatively submitted proposition, it clearly may be limited by direct popular initiative. Thus, the distinction between popular (or state) and legislative (or congressional) initiation of conventions does not diminish the value of comparing legislatively initiated state conventions with state initiated article V conventions.

89 The usual mechanism here has been a "groundswell" led by a prominent national leader or body, *e.g.*, the efforts of Senator Dirksen (R.-Ill.) in the mid-sixties to secure a convention to override the Supreme Court's "one man-one vote" decisions. *See* N.Y. Times, Mar. 18, 1967, at 1, col. 6. The Council of State Governments was active in the early 1960's in attempting to secure a convention to consider three amendments which it proposed. *See* ABA Report, *supra* note 3, at 5 & n.7.

90 The Calling consists of the legislative act funding the convention, setting up

Proposal of amendments	Convention	Convention
Ratification	Popular vote	¾ of states

The model discloses a number of obvious structural parallels (the stages into which the process is easily divided, legislative role in the calling, the convention itself) and contrasts (the method of initiation, participation by the electorate versus participation by the state governments) between the state and federal procedures. Functionally, both share the same ultimate end — the change of fundamental law.

More subtly, perhaps, the states play the same roles at the same stages of a federal constitutional convention as are played by the electorate in state conventions. In each case, the group in question is responsible for both the authorization and ratification stages. Viewing the convention as the sovereign's means of directly altering the fundamental law, the provision for dual review is especially reasonable. Touching base twice with the source of amending authority emphasizes the convention's accountability and ensures that its work will meet with the approval of the body from which it receives all of its powers.

Extending the structural analogy would seem to imply that the states, seen from the perspective provided by the convention process, are sovereign in the United States, as is the electorate in the states.[91] Yet it is modern constitutional dogma that the question of state sovereignty was resolved in the negative by the Civil War, if not before. Invoking dogma, however, cannot settle the matter. First, the convention clause is not a 20th century product, but dates from 1787, when "the states were in a position of at least nominal sovereignty, and were considering whether to unite."[92] Second, a number of commentators, reasoning that the power to change the fundamental law is the essence of sovereignty, have in fact defined the sovereign in America as the equivalent

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delegate selection procedures, naming temporary officers, etc. The stage also includes the election of delegates — hence the parenthetical additions.

91 Recall that the clear thrust of state experience is that only popularly approved limitations are binding. *See* part I(C) *supra*, especially text at notes 69-72 *supra*.

92 Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 964 (1963).

of the amending body. Insofar as the convention clause may be said to give the (*united*) states power both necessary and sufficient to amend the Constitution, some have proclaimed the states united as sovereign in the United States.[93] That view was disputed by Orfield, who would have included the Congress as well, as it must call a convention even when the states have petitioned for one, and it may choose the mode of ratification. Orfield does not, however, dispute the assertion that the "amending body" is the legal sovereign.[94]

In short, the sovereign is whoever has the last word. The Convention of 1787, after a great deal of discussion, decided that the states, and not Congress, would have the last word with respect to amendments. Indeed, "early discussions and proposals centered on the question of excluding Congress from a significant role in the amendment process."[95] The chief advocate of this position was Mason, a strong anti-Federalist who sought and achieved provision for independent state initiation of the amendment process because of his belief that it was needed as a check on potential congressional abuses.[96]

> What finally emerged from the convention was what may be described as the compromise set forth in article V, whereby a power of initiative was to reside in both Congress and the states pursuant to the two alternative methods, with the final authority of ratification under both methods in the states. . . . It is evident from the discussion at the time that the alternative method recognizing state initiative was considered an important safety valve to guard against abuses of federal

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93 *See, e.g.*, 1 J. AUSTIN, JURISPRUDENCE 268 (4th ed. 1879); J. HURD, THE THEORY OF OUR NATIONAL EXISTENCE 159-40, 374 (1881).

94 L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 153-67 (1942).

95 Kauper, *The Alternative Amendment Process; Some Observations*, 66 MICH. L. REV. 903, 905 (1968). The Virginia Plan contained provision for the amendment of the prospective Constitution without congressional consent. 1 FARRAND, *supra* note 9, at 22.

96 *See* 1 FARRAND, *supra* note 9, at 202-03 (Mason's speech of June 11, 1787); 2 *id.* at 629 n.8 (Mason's marginal notes on article V); 2 *id.* at 629-30 (final debate on the convention clause). On Mason's anti-Federalism, see MITCHELL, A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES 37-38 (1964). It is noteworthy that all three of the delegates who refused to sign the Constitution in 1787 were among those who had striven mightily for the convention clause as it ultimately was adopted. *Id.* at 118-19.

> power which would not be corrected if the power to initiate amendments was vested solely in Congress.[97]

If the basis of the convention clause was fear of congressional tyranny and a desire to assure that the states could override it, then it should come as no surprise that article V casts the states in the role of final authority. The convention clause was not a unique provision, for the Constitution originally gave the states ultimate authority with respect to both selection of Senators and election of the President, as well as amendment of the organic law.[98]

C. *Limitability at the Federal Level*

Once it is seen that the states are meant to be the final authority in article V convention matters just as the electorate is the final authority in state conventions,[99] the further parallel is suggested that just as the electorate may delegate less than all of its authority and thereby limit state conventions,[100] so may the states delegate less than all of their authority in order to limit an article V convention. No reason appears why delegation should be possible on the state but not on the federal level. Indeed, the opposite is the case, for there are two factors providing stronger support for such delegation, and hence for limited constitutional conventions, on the federal than on the state level.

First, the purely structural difference between the federal and state convention initiation procedures (the initiation of a federal convention is informal, while initiation of a state convention is most often a task for the legislature) removes a principal objection to limited state conventions — that the sovereignty of the electorate in authorizing a limited convention is a legal fiction because the electorate becomes a mere pawn of the state legislature by being reduced to accepting the convention limits defined by the

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97 Kauper, *supra* note 95, at 905.

98 Much authority in the federal system is still exercised by the states. *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

99 *See* part II(B) *supra*.

100 *See* part I(C) *supra*, especially text at notes 69-72 *supra*.

legislature or doing without a convention.[101] An article V convention could not be criticized on such grounds. Each state petitions individually for a convention. There is no ratification of the act of another body, so the states have full and untrammeled authority to specify those limitations they individually desire and to establish those upon which they can agree. The price paid for this high degree of control is the chaos of the informal initiation process. We have never had an article V convention, perhaps largely because it is so difficult to get two-thirds of the states to agree at any one time on any one set of limitations. Provided that the states alone can establish limitations, and that Congress must honor those limitations, adding none of its own, the power to limit an article V convention would in fact be lodged in the amending authority, and the objection that the procedures for limiting a state convention do not square with the theory would be of no force at the federal level.

A second factor lending stronger support to limitability at the federal than at the state level arises from the significant functional difference underlying the structural dissimilarity between the methods of initiation of state and article V conventions. Functionally, a state convention may be a vestigial organ, a means of effecting thoroughgoing revision of the fundamental law, or a device for achieving rapid adoption of amendments.[102] But, with rare exceptions, it cannot be a device for overruling or sidestepping the legislature, because the legislature is normally the initiator of the convention proceedings.[103] By contrast, the clear purpose of the article V convention mechanism is to provide "an alternative to the proposal of amendments by Congress in order to ensure that the states [can] correct congressional abuses of power or propose amendments which Congress refuse[s] to propose."[104]

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101 *See* part I(C) *supra*.

102 As far as thoroughgoing revision is concerned, see Keith, *Recent Constitutional Conventions in the Older States*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 58 (W. Graves ed. 1960). With reference to rapid adoption, see Graves, *State Constitutional Law: A Twenty-Five Year Summary*, 8 WM. & MARY L. REV. 1, 8-9 (1966).

103 It should be remembered that alternative means of initiation exist. *See Procedures for Calling Constitutional Conventions*, *supra* note 19; note 88 *supra*.

104 Harvard Note, *supra* note 59, at 1618 (citing Kauper, *supra* note 95, at 904-05 & n.2). *See* 1 FARRAND, *supra* note 9, at 202-03; 2 *id.* at 629-31.

This difference in function can only strengthen the argument for the power of the states to limit a federal convention convened at their behest. If a federal convention is to be a device for circumventing Congress, it would be uncontrollable in the absence of state controls. The role of the convention as the states' special tool is inconsistent with the position that the states cannot in some way define its work and agenda. To deny the states the power to limit a federal convention is to argue that the framers intended that the states be compelled to risk the entire structure of government whenever they sought to make a minor constitutional adjustment over the objections of Congress.[105]

The foregoing analysis suggests that the justification for limited state conventions applies with at least equal, and perhaps greater, force to federal conventions, both because a principal objection to limited state conventions does not apply to article V conventions, and because the different function of an article V convention provides a justification for limitability not found at the state level. To oppose a limited article V convention denies the right of the final authorities on the amendment of the Constitution — the states — to delegate less than all of their power to suggest amendments.[106]

III. Potential Problems of Limited Article V Conventions

Clearly the state experience is useful insofar as it provides theoretical insights into the possibility of a limited convention at the federal level. Beyond that narrow purpose, state precedents may prove helpful in considering the various problems which might confront a limited article V convention. In particular, the

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105 *See* ABA Report, *supra* note 3, at 18-19; Harvard Note, *supra* note 59, at 1629 & n.92.

106 The attempt to deny such a power of partial delegation has been made. A number of the state decisions cited above, indicating that nothing can restrain a convention save the United States Constitution, would seem to imply that no mandate of the sovereign people can block the convention, which is itself sovereign. *See, e.g.*, Livermore v. Waite, 102 Cal. 113, 35 P. 424 (1894). But that view has not prevailed at the state level, *see* part I(C) *supra*; and the argument is particularly inadequate at the federal level, where all of the powers held by the government are nothing more than the partial delegation of the people's and states' own sovereignty. U.S. Const. art. X.

questions of enforcing valid limitations and coping with a congressional refusal to call an article V convention after petition by two-thirds of the states may be answered by an examination of how the states have confronted similar problems. In the same vein, the Ervin Bill's provisions concerning judicial review and congressional supervision of convention procedures may be profitably reexamined in the light of state experience.

A. *Enforcement of Limitations*

One can imagine a number of ways in which attempts by a convention to exceed valid limitations might be thwarted. Most obviously, the electorate (at the state level) or the states (at the federal level) can refuse to ratify the work of such a convention. However, that solution may be unsatisfactory for at least two reasons. Desired amendments might be lost if the convention's work were submitted as a whole with no opportunity for the ratifying body to choose from the lot those amendments it wished to adopt. Alternatively, the "runaway" amendment(s) might be ratified, thereby nullifying valid limitations properly imposed. While in theory the latter possibility ought not be repugnant — on the grounds that approval by the amending authority is in reality the only basis for judging an amendment, and that such approval, if forthcoming, can atone for all manner of past procedural irregularities — it would be a clear departure from anticipated procedures, upon which many will have relied, and a blow to the integrity of the amendment process.

Jameson proposed enforcement of limitations on state conventions by requiring delegates, prior to the opening of the convention, to take an oath to comply with the restrictions and limitations in the enabling act. Exceeding the limitations would violate the oath, subjecting violators to criminal penalties.[107] As Jameson himself admitted, however, conventions have on occasion refused to take, or taken and then ignored, such oaths, with no consequence but the elimination of the limitations the oath was to secure. The Ervin Bill would adopt this approach at the federal level, requiring an oath of prospective delegates that they will

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107 JAMESON, *supra* note 32, § 381.

limit their considerations to the subjects specified in the convention call.[108]

The courts are probably more effective for enforcing (and testing) convention limitations than is dependence on the executive to bring criminal charges for violation of an oath. Courts have taken jurisdiction over controversies concerning the propriety of the practices and procedures employed in amending constitutions at both the state[109] and federal[110] levels. State courts, however, have been loath to interfere with the work of constitutional conventions. Conventions are seen as the voice of the electorate (*i.e.*, the sovereign), and thus less amenable to judicial scrutiny than other amendment procedures.[111] Consequently, courts have held that, even if a convention has exceeded proper limitations, general acceptance of its work "obtained either by acquiescence in a revision promulgated by a convention without submission, or by a formal vote of approval at the time of submission"[112] will legitimate the changes, shielding them from attack.[113] "The change made by the people in their political institutions, by the adoption of the proposed Constitution . . . forbids an inquiry into the merits of this case. The question is no longer judicial. . . ."[114] Acquiescence has, at the extreme, been used to preclude judicial review of state constitutions which, in defiance of the general law and their own enabling acts, were promulgated by conventions without being submitted to the electorate for ratification.[115]

The foregoing doctrine is by no means universally adhered to. Many jurisdictions refuse to recognize it, treating the work of a convention like that of any other amending process. Courts have

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108 S. 1272, 93d Cong., 1st Sess. § 8(a) (1973).

109 *See* Iowa Note, *supra* note 19, at 266-68; Minnesota Note, *supra* note 23, at 294-97; St. Louis Note, *supra* note 55.

110 *See* ABA Report, *supra* note 3, at 24 n.44; Harvard Note, *supra* note 59, at 1636.

111 *See* sources cited note 109 *supra*.

112 Minnesota Note, *supra* note 23, at 295.

113 Wood's Appeal, 75 Pa. St. 59 (1874); Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892); Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903) (dictum).

114 Wood's Appeal, 75 Pa. St. 59, 68-69 (1874).

115 *See* Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892); Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903).

struck down ordinances passed by conventions with authority only to propose constitutional change and have even declared null and void sections of state constitutions passed by limited conventions without authority to consider the subject of the invalidated article.[116]

In any event, review is never certain. Courts may refuse to interfere with a convention before its work is completed and can be reviewed as a product rather than a mere proposal (the "ripeness" problem). Alternatively, ratification increases the pressures on a court to accept amendments, now imprinted with the seal of sovereign approval. Often courts wash their hands of the entire affair, branding it a political question.[117] Limitations seemingly are best enforced either immediately after the convention adjourns[118] or just after electoral approval, but before the challenged provisions have become part of the fabric of government.[119] Thus state precedent regarding constitutional conventions and both state and federal precedent regarding other modes of amendment suggest that courts might be willing, at least in some circumstances, to halt "runaway" amendments.

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116 *See, e.g.*, Hayne v. Assessor, 145 La. 697, 79 So. 280 (1918); Foley v. Democratic Parish Comm., 138 La. 220, 70 So. 104 (1915); State v. American Sugar Ref. Co., 137 La. 407, 68 So. 742 (1915); Louisiana Ry. & Nav. Co. v. Madere, 124 La. 695, 50 So. 609 (1909). *See also Ex parte* Birmingham & Atl. Ry., 145 Ala. 514, 42 So. 118 (1905) (invalidated ordinances); HOAR, *supra* note 20, at 160 (also invalidated ordinances).

117 *See generally* DODD, *supra* note 25, at 93-103; HOAR, *supra* note 20, at 149-64; White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1149 (1952); Iowa Note, *supra* note 19, at 266-68; St. Louis Note, *supra* note 55, at 280-84. As to the political question issue at the federal level, see Harvard Note, *supra* note 59, at 1634-41.

118 Possible methods of obtaining review include refusal of government officers to take some action with respect to the amendments (*e.g.*, refuse to submit them to a ratification vote in order to force backers of the amendments to bring a writ of mandamus or declaratory judgment action) and a suit by private parties to enjoin submission (perhaps parties with a special interest at stake to confer standing). *See* Harvard Note, *supra* note 59, at 1641-44; Minnesota Note, *supra* note 23, at 296-97. Review might not be available prior to ratification because the possibility that the proposals would not be ratified means that no case or controversy exists. *See* Harvard Note, *supra* note 59, at 1641 n.150.

119 How long is too long to wait? The answer probably depends upon the degree to which substantial expectations have arisen due to the changes and the degree to which actions have been taken based upon such expectations. *See, e.g.*, Annot., 158 A.L.R. 512, 515 (1945).

B. *Refusal to Call a Convention*

A perhaps more likely problem is that Congress would refuse to call a convention, even after petition by two-thirds of the states. The problem is relatively rare at the state level, because the legislature generally initiates the convention process, making the passage of enabling legislation a foregone conclusion.[120] A federal convention, however, would be called not in furtherance of congressional desires but rather to circumvent congressional refusal to approve a desired amendment or amendments.[121]

The language of article V is mandatory; if two-thirds of the states petition for a convention, the Congress "shall" convene one. Virtually all authorities, including Senator Ervin,[122] recognize the mandatory nature of Congress duty under the convention clause. Hamilton (himself a foe of state initiation of amendments) wrote in *The Federalist* that "[t]he words of this article are preemptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about their disinclination to a change, vanishes in air."[123]

Nevertheless, the problem is a real one. At the federal level, efforts to block a convention might well be made in Congress. The absence of procedures in the Constitution by which to determine when and how to implement the article V convention machinery suggests a role for Congress in convention implementation.[124] At least one Senator refused to see himself as bound to vote to call a convention despite identical petitions from 34 states, asserting that Congress should not accept a petition to overrule the Supreme Court's apportionment decisions from a malapportioned state

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120 In those states in which the convention process may be initiated by the electorate, legislative approval could not be taken for granted. Indeed, the problem was foreseen in some such states, in which the constitutions contain detailed provisions for calling the convention into existence. *See* Iowa Note, *supra* note 19, at 252.

121 *See, e.g.*, Dirksen, *supra* note 5. The effort to convene a federal convention to consider the apportionment problem was begun only after Congress refused to pass the "Dirksen Amendment."

122 *See* Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 885-86 (1968).

123 THE FEDERALIST, No. 85, at 403 (Hallowell, Masters, Smith & Co. ed. 1852) (A. Hamilton).

124 *See* part III(C) *infra*.

legislature[125] and further that "Congress clearly has the authority to rule out petitions on the ground that circumstances which led to their submission have materially changed."[126] At the state level, legislatures have occasionally refused to pass enabling legislation, even in the face of a popular mandate for a convention.[127] And a number of state courts have refused, notwithstanding constitutional language similar to article V, to issue writs of mandamus to state legislatures which balked at calling conventions authorized by the electorate.[128] In *Wells v. Bain* the court did not see the people's authorization as compelling: "It was not even a mandate, further than the moral force contained in an expressed desire of the people."[129]

The early authorities evidently viewed the legislative prerogatives in this politically charged area as unchallengeable,[130] but Jameson (rather uncharacteristically) affirmed the rights of a convention to provide for its own financial support and meeting place should the legislature refuse either out of pique or politics.[131] Recent cases have indicated that the legislature, in calling a convention after the electorate's affirmative vote on the convention resolution, is performing a mere ministerial act, and that failure to call the convention is grounds for a writ of mandamus.[132] The same reasoning would appear to apply to congressional refusal to call an article V convention.[133]

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125 113 CONG. REC. 10,101 (1967) (remarks of Senator Tydings).

126 *Id.* at 10,102.

127 Examples include New Hampshire in 1860 and 1864; New York for eight years after popular approval in 1886; Iowa in 1920; California in 1934, 1945, and 1946; and Maryland in 1950.

128 *See, e.g.*, Fergus v. Marks, 321 Ill. 510, 512, 152 N.E. 557, 560 (1926). *See also* HOAR, *supra* note 20, at 118-19.

129 Wells v. Bain, 75 Pa. 39, 50 (1874).

130 *See generally* DODD, *supra* note 25, at 53-57; HOAR, *supra* note 20, at 116-18; Iowa Note, *supra* note 19, at 252-53.

131 HOAR, *supra* note 20, at 117-18, 177-78; JAMESON, *supra* note 32, §§ 453-56.

132 Chenault v. Carter, 352 S.W.2d 623, 626 (Ky. 1960); Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 445, 229 A.2d 588, 603 (1967).

133 The problem is complicated by the unique historical interrelationships among the three branches of the federal government. This may well mean that the courts would only declare Congress constitutional duty and refuse directly to order Congress to act. *See* Powell v. McCormack, 395 U.S. 486 (1969); Harvard Note, *supra* note 59, at 1641-44. *But see* Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 978-85 (no mandamus to compel Congress to call a convention — the article predates *Powell*).

C. *The Ervin Bill, the Role of an Article V Convention, and the State Experience*

The Ervin Bill grants Congress sole authority to judge state petitions and to specify the limitations (through perusal of the state petitions) binding upon the convention.[134] Given the absence of implementing provisions in article V, a role for Congress here is probably both necessary and desirable.[135] However, making Congress the *sole* arbiter, as the Ervin Bill does by barring judicial review,[136] would be neither. Congress might avoid blunt refusal to call a convention under the guise of finding the state petitions inadequate or dictate its own limits under the guise of interpreting state-created limits.

More seriously, the Ervin Bill permits Congress to refuse to submit amendments to the states for ratification if, in its judgment, they exceed in scope the limits placed on the convention which authored them.[137] Though congressional supervision of the convention process before the convention can be justified, such a role after the convention has completed its work is unwarranted. Congress may play a part in interpreting state petitions, but there is no reason why the states themselves or the courts cannot police the convention itself. Congressional participation at this stage opens the door to congressional abuses in the guise of enforcing previously established limitations.

Judicial resolution of the question of congressional power over article V conventions ordinarily would be expected, but the Ervin Bill purports to prohibit judicial review.[138] If it becomes law, constructive use of state precedent may be precluded in determining what power Congress has to determine the judicial role in article V conventions. However, one doubts that judicial review may be excluded. It may be particularly noteworthy that the issue is not merely one of general congressional power to regulate the jurisdiction of the federal courts, but also a question of the extent of

134 S. 1272, 93d Cong., 1st Sess. § 6 (1973). *See* Harvard Note, *supra* note 59, at 1630-32.

135 *See generally* ABA Report, *supra* note 3, at 20-22; Harvard Note, *supra* note 59, at 1615-18.

136 S. 1272, 93d Cong., 1st Sess. §§ 3(b), 5(c), 10(b), 13(c) (1973).

137 *Id.* § 11(b)(1).

138 *Id.* §§ 3(b), 5(c), 10(b), 13(c) (1973).

congressional discretion under a constitutional provision explicitly mandating particular congressional action.[139]

The very purpose of the article V convention clause was to provide a means for circumventing Congress. Therefore it seems desirable to restrict the opportunities for congressional meddling, and hence to minimize congressional discretion, as much as possible. Conceding the necessity for a congressional role in determining whether the conditions invoking its duty to call a convention have been satisfied, in defining the limitations contained in the state petitions, and in calling a convention, still the courts must be able to review the congressional determinations if the purpose of the convention clause is to be effectuated.

The need for a congressional role in enforcing convention limitations, as by power to refuse to submit convention proposals for ratification, is much less clear and the need for judicial review of such determinations thus the more clear. Indeed, both the inherent conflict of interest between Congress and an article V convention[140] and analogy to the state experience with legislative limitations imposed after electoral authorization[141] suggest that only the states may limit an article V convention and that the contemplated congressional role in enforcing limitations is singularly inappropriate, perhaps even unconstitutional.[142] While a few state courts have upheld such legislative limitations on the theory that in voting for convention delegates the people implicitly con-

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139 The issue is beyond the scope of this Note. On judicial review, *see generally* ABA Report, *supra* note 3, at 23-27; Harvard Note, *supra* note 59, at 1634-48.

140 *See* text at note 104 *supra*. Conflict between Congress and the convention could be more apparent than real in some circumstances. It may fairly be assumed that no serious attempt to call an article V convention would be made unless attempts to have Congress initiate amendments had already failed. But a two-thirds vote of both Houses is required to propose amendments, while presumably only a majority vote would be required in the exercise of its functions in the article V convention process. Thus, if a simple majority of those voting, but less than two-thirds of the entire Congress, favored an amendment on the subject in question, Congress might not be inclined to impede the convention process. However, minimizing the role of Congress as suggested herein is still appropriate because this situation likely would not always exist and the alternatives — enforcement as discussed in part III(A) *supra* and judicial review of congressional action — are equally appropriate even when this situation does exist.

141 *See* text at notes 71-72 *supra*.

142 *See* Harvard Note, note 59 *supra*, at 1630-33. *But see* ABA Report, note 3 *supra*, at 8, 21, 67-69.

done the legislature's actions,[143] the position is not only an unsound minority one, but also clearly inapplicable to a federal convention.[144]

The provision of the Ervin Bill substituting the judgment of Congress for that of the federal courts as final arbiter of convention disputes should be deleted.[145] The provision making Congress an enforcer of convention limitations might well be deleted.[146] If the Ervin Bill is passed without such changes, judicial decisions restricting the scope of congressional discretion in this matter would accord best with both the theory of the article V convention and the state experience.

Conclusion

The theoretical foundations of constitutional conventions at the state level clearly permit limited constitutional conventions, and this conclusion is supported by both experience and judicial opinion. Federal article V conventions and state conventions operate on much the same principles and with similar procedures. Moreover, what differences there are make the argument for limited constitutional conventions more compelling at the federal level. Thus, article V should be interpreted to allow limited constitutional conventions. The limitations to be imposed would be those, and only those, found in the petitions of at least 34 states.

If limited article V conventions do occur, the state experience in enforcing limitations on limited conventions and dealing with legislative refusal to call electorally mandated conventions may

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143 *See* note 71 *supra*.

144 The presumption that in voting for delegates the people implicitly ratify the enabling act is derived from the earlier presumption that the people, in approving the legislature's convention resolution, have approved all the limitations contained therein. *See* text at notes 68-70 *supra*. A federal convention would have no legislative resolution and hence no need for the first presumption. There would thus be no basis for the questionable reasoning involved in asserting that electing delegates necessarily implies embracing the entire convention act, especially when to do so would impose new and previously unrequested restrictions.

145 S. 1272, 93d Cong., 1st Sess. §§ 3(b), 5(c), 10(b), 13(c) (1973). *See* Harvard Note, *supra* note 59, at 1632-33. *See generally* the excellent discussion of this problem in ABA Report, *supra* note 3, at 23-28; and the suggested new section of S. 1272, *id.* at 75-76.

146 S. 1272, 93d Cong., 1st Sess. § 11(b)(1) (1973).

be useful in predicting and dealing with problems at the federal level. Those provisions of the Ervin Bill dealing with congressional power over article V conventions seem inconsistent with the rationale underlying article V conventions and should be modified before the bill becomes law.

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(Harvard Law Review 1957)

PROPOSING AMENDMENTS TO THE UNITED STATES CONSTITUTION BY CONVENTION. — Article V of the Constitution provides two methods of proposing amendments.[1] Congress itself may propose amendments, or amendments may be proposed by a convention called by Congress

[166] See, *e.g.*, Dep'ts of State & Defense, *supra* note 4, at 12; OFFICE OF THE STAFF JUDGE ADVOCATE, U.S. ARMY, HQ. USAREUR COMMUNICATIONS ZONE, BASIC GUARANTEES IN CRIMINAL ACTIONS IN FRANCE UNDER THE STATUS OF FORCES AGREEMENT (undated).

[167] Interview with Office of the Judge Advocate General, Army, Nov. 1956; see S. REP. No. 2558, 84th Cong., 2d Sess. 3 (1956). In that case an American serviceman was not permitted to confront a witness against him. Although the conviction was allowed to stand, the French government apologized and remitted the fine. HOUSE COMMITTEE HEARINGS pt. 1, at 257–58.

[168] Interview with Office of the Judge Advocate General, Army, Nov. 1956; see SENATE SUBCOMMITTEE HEARINGS 23. For example, several cases of non-confrontation were not reported. *Id.* at 58.

[169] See *id.* at 23.

[170] See HOUSE COMMITTEE HEARINGS pt. 1, at 299; SNEE & PYE, *op. cit. supra* note 51, at 66–70.

[171] See *id.* at 67.

[172] See *id.* at 27–31. An accused is generally informed by military officials before trial of his rights under the treaty. See *id.* at 25–26.

[173] See *id.* at 29–30. Although the Department of Defense admits that it is unable to have a legally trained observer at each trial, HOUSE COMMITTEE HEARINGS pt. 1, at 335, the Judge Advocate General's Office of the Army says an observer is present at all trials. Interview with Office of the Judge Advocate General, Army, Nov. 1956.

[1] The text of article V is as follows:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three

upon the application of the legislatures of two thirds of the states. Although applications requesting conventions have been filed from time to time,[2] such a convention has never been called. However, in the near future Congress may have to take this action, since twenty-six states have requested that a convention be called to consider an amendment to limit the federal taxing power.[3] This Note will discuss the problems which arise when the states attempt to secure the proposal of amendments by the convention method.[4] A number of questions concern the validity of the applications themselves. Once the required number of valid applications has been received, additional problems are raised because article V neither indicates how the convention is to be organized nor defines the scope of the convention's deliberations. Finally, and most important, the Constitution nowhere deals with the roles of Congress, the judiciary, and the states in resolving any of the above problems.

The Role of the Courts. — For several reasons it is unlikely that the courts will play a significant role in resolving the problems raised by the convention method of proposing amendments. It is doubtful that an individual would have standing to contest a congressional determination that the prerequisites for an article V convention have or have not been met; until a proposed amendment has been ratified by three fourths of the states it cannot affect the individual's legally protected interests.[5] If Congress should determine that the prerequisites of a convention have not been met, it might be argued that a state would have standing to contest this determination on the theory that a constitutional right to use the convention method for the proposal of amendments has been denied.[6] However, even if standing were found, a judicial decision that the congressional determination was erroneous would be without effect, since it would seem improper for the court either to order action by a coequal branch of the Government[7] or to assume for itself the power to call the convention.

Moreover, in view of the Supreme Court's decision in *Coleman v. Miller*,[8] it would seem that the problems raised by the convention method of proposing amendments would be "political" questions and hence not justiciable. In *Coleman* the legislature of Kansas had voted to ratify the child-labor amendment, which it had rejected twelve

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fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . .

[2] The most recent compilation of all applications filed is S. Doc. No. 78, 71st Cong., 2d Sess. (1930). See also Martig, *Amending the Constitution — Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1267–69 (1937).

[3] See House Committee on the Judiciary, *Problems Relating to State Applications for a Convention To Propose Constitutional Limitations on Federal Tax Rates*, 82d Cong., 2d Sess., following p. 18 (Staff Report 1952); 99 CONG. REC. 320–21, A1991–92 (1953).

[4] Some of these problems were foreseen by the framers of the Constitution. See 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 558 (1911).

[5] *Cf.* McChord v. Louisville & N.R.R., 183 U.S. 483 (1902).

[6] *Cf.* Missouri v. Holland, 252 U.S. 416 (1920).

[7] See Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1866) (dictum).

[8] 307 U.S. 433 (1939).

years earlier. The state senate had been equally divided on the second ratification resolution and the Lieutenant Governor had cast the deciding vote. The plaintiffs, a group of senators and representatives, contested the validity of the resolution on the grounds that the Lieutenant Governor could not resolve the equal division, that a state cannot ratify an amendment it has once rejected, and that the proposed amendment could no longer be ratified because an unreasonable period of time had elapsed since its proposal by Congress. The Kansas Supreme Court denied mandamus to compel the Secretary of the Senate to erase his endorsement on the resolution.[9] In affirming the state court, the Supreme Court held that at least some of the petitioners had standing to sue [10] but that the effect of a prior rejection of a proposed amendment as well as the effect of the passage of time on the validity of the proposed amendment were political questions to be decided by Congress. The Court was equally divided on the issue whether the participation of the Lieutenant Governor raised a political question. In deciding that the effect of Kansas' rejection of the proposed amendment was a political question to be resolved only by Congress, the Court relied on the fact that the questions whether states which had rejected the fourteenth amendment could later ratify it and whether states which had ratified that amendment could withdraw their ratification had been decided by Congress rather than the courts. In holding the effect of the passage of time upon a proposed amendment to be a political question, the Court observed that even though the Congress had the power to fix a reasonable time for ratification of an amendment [11] it did not follow that when Congress failed to exercise that power the Court must decide what constitutes a reasonable time. To do so, reasoned the Court, would involve an appraisal of a great variety of relevant political, social, and economic conditions, consideration of which would not be an appropriate judicial function. Mr. Justice Black, joined by Justices Roberts, Frankfurter, and Douglas, in a concurring opinion stated that "Undivided control of . . . [the amending] process has been given by . . . Article [V] exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." [12]

On the same day, the Supreme Court dismissed a writ of certiorari in *Chandler v. Wise*, [13] in which an injunction had been sought to re-

[9] Coleman v. Miller, 146 Kan. 390, 71 P.2d 518 (1937), *aff'd*, 307 U.S. 433 (1939).

[10] Petitioners included all the senators who had voted against ratification, one senator who had voted for ratification, and three members of the state House of Representatives. The Court held that at least the senators who had voted against ratification had standing.

[11] See Dillon v. Gloss, 256 U.S. 368 (1921).

[12] 307 U.S. at 459 (concurring opinion). In a separate concurring opinion Justice Frankfurter, joined by Justices Roberts, Black, and Douglas, stated that the petitioners lacked standing to sue. *Id.* at 460. Justices Butler and McReynolds dissented on the ground that too long a period had elapsed for the proposed amendment still to be valid. *Id.* at 470.

[13] 307 U.S. 474 (1939).

quire the Governor of Kentucky to notify the Secretary of State of the United States that a resolution of the state legislature purporting to ratify the child-labor amendment was void.[14] The respondents had argued that the attempted ratification by the Kentucky legislature was ineffective because of the legislature's prior rejection of the proposed amendment. In addition, the respondents contended that an unreasonable length of time had passed between the submission of the proposed amendment to the states and the attempted ratification by Kentucky. The Supreme Court, in a brief opinion, held that since the Governor had already forwarded the certified copy of the resolution there was no longer a controversy susceptible of judicial determination.[15] Justices Black and Douglas stated in a concurring opinion that they did not believe "state or federal courts have any jurisdiction to interfere with the amending process."[16] Although the Court did not explain why it was of the opinion that no justiciable controversy existed, it would appear that since the copies of the state resolution had already been sent to Congress the Court thought the question of the validity of the ratification was a "political" question for Congress to decide.

In *Coleman v. Miller* the Supreme Court failed to distinguish or to overrule earlier decisions[17] in which it had resolved controversies arising under article V. Because of this fact some writers have taken the view that the Court has characterized as political only the particular questions involved in *Coleman* and that other questions arising from the amending process might still be justiciable.[18] It would seem, however, that the rationale of *Coleman v. Miller* was not that narrow. The Court pointed out that in defining the scope of political questions the dominant considerations are "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination . . . ."[19] Since under these standards the questions raised in proposing amendments by convention appear to be political, it seems that the answers to these questions must come from Congress rather than from the judiciary.[20]

The Role of Congress in Calling an Article V Convention. — In

[14] Respondents had obtained a restraining order in the state court, but the Governor had forwarded certified copies of the resolution before he had been served with the order. Respondents then filed an amended complaint.

[15] Justices Butler and McReynolds dissented, *id.* at 478, for the reasons stated in their dissent in *Coleman*, see note 12, *supra*.

[16] 307 U.S. at 478 (concurring opinion).

[17] United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, 253 U.S. 221 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

[18] See ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 18–22 (1942); 53 HARV. L. REV. 134 (1939).

[19] 307 U.S. at 454–55.

[20] See Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 186 (1951). Problems arising from the amendment of state constitutions have been held justiciable in state courts. See, *e.g.*, Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1 (1912); McConaughy v. Secretary of State, 106 Minn. 392, 119 N.W. 408 (1909). *But see* Miles v. Bradford, 22 Md. 170 (1864).

providing for the proposal of amendments by a convention the framers intended to furnish a method by which an amendment desired by the states could become part of the Constitution even though Congress did not approve of the language and substance of the amendment.[21] Therefore, when the conditions specified have been met, article V imposes upon Congress the duty of calling a convention.[22] But Congress must of necessity decide whether the conditions exist which give rise to this duty,[23] and, to the extent that this power to decide is subject to abuse, the intention of the framers may be frustrated. Because the courts are unwilling to intervene in the amending process, improper interference with the right of the states to propose amendments by convention can be avoided only by the self-restraint of Congress and the force of public opinion.[24]

In determining what conditions give rise to the congressional duty to call a constitutional convention it must be assumed the framers intended that changes in the fundamental law would be adopted only after careful and complete discussion and deliberation. Therefore it may also be assumed that each step in the amending process was intended by the framers as a method of determining through meaningful

[21] The original resolution, introduced by Edmund Randolph, was as follows: "[Resolved] that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." See 1 FARRAND, *op. cit. supra* note 4, at 22. When this proposal was presented to the convention, some members did not see the need for the resolution. 1 *id.* at 202. Colonel Mason replied, "It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account." See 1 *id.* at 203. When final debate on article V began, the convention had before it a draft which provided that "the Congress, whenever two thirds of both Houses shall deem it necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may by proposed by Congress . . . ." See 2 *id.* at 629. Madison wrote, "Col: Mason thought the plan of amending the Constitution exceptional & dangerous. As the proposing of amendments is in both modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case." See *ibid.* Mr. Gouverneur Morris and Mr. Gerry moved to amend the article to require a convention on application of two thirds of the states. *Ibid.* "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, &c. which in Constitutional regulations ought to be as much as possible avoided." 2 *id.* at 629–30. See also 4 ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 177–78 (1901); THE FEDERALIST No. 85, at 573 (Modern Library ed. 1937) (Hamilton).

[22] 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 331 (2d ed. 1929); Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI.-KENT L. REV. 128, 133–34 (1952). *Contra*, Platz, *Article Five of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 44 (1934).

[23] See Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 781, 790 (1927).

[24] See ORFIELD, *op. cit. supra* note 18, at 41; *cf.* Colegrove v. Green, 328 U.S. 549, 556 (1946).

debate whether significant agreement exists among the states on the desirability of particular changes in the fundamental law. The Supreme Court in *Dillon v. Gloss*[25] indicated its approval of this assumption by suggesting that in order to be "effective," ratification of an amendment proposed by Congress "must be sufficiently contemporaneous in [three fourths of the] . . . states to reflect the will of the people in all sections at relatively the same period . . . ."[26] Ratification by the states at widely separated times is likely to provide neither meaningful debate nor significant agreement, since conditions may have changed to such an extent that the question debated by the legislatures cannot be said to have been the same, and the formal concurrence between their conclusions cannot be said to have significance as an expression of the "will of the people in all sections at relatively the same period." It would seem that meaningful debate and significant agreement, defined as agreement which results from the contemporaneous consideration by the states of the same question, should also be required at the proposal stage of the amending process. Thus, the duty of Congress to call a convention for the proposal of amendments should arise only when contemporaneous debates in two thirds of the states have produced agreement that change is desirable in the whole or some particular aspect of the Constitution.

The clearest example of a lack of meaningful debate and significant agreement would be presented if Congress were faced with applications from two thirds of the states each proposing that a different constitutional change be considered by an article V convention.[27] Although it might be argued that such a situation demonstrates a desire for extensive constitutional reform and that a convention should therefore be called by Congress,[28] the better view would seem to be that a number of applications, each dealing with a different aspect of the Constitution, does not represent a general dissatisfaction with the Constitution as a whole.[29] Calling a convention for the purpose of considering a general revision of the Constitution is an act of such importance that it should not be done unless the requisite number of states have made clear their desire for a convention of this scope. The convention method of amending the Constitution should produce meaningful debate and significant agreement at three stages — application, convention, and ratification. If a convention were called on the basis of diverse applications, the requirement of meaningful debate and significant agreement at the application stage would not be satisfied.

Similarly, this requirement is not satisfied if because of changes in

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[25] 256 U.S. 368 (1921).

[26] *Id.* at 375.

[27] The significant agreement required is merely that the suggested changes each deal with the same subject matter and not that the changes suggested in that subject matter coincide. Thus there is significant agreement between all the applications which attempt to limit the federal taxing power. See House Committee on the Judiciary, *supra* note 3, following p. 18.

[28] See ORFIELD, *op. cit. supra* note 18, at 42.

[29] See House Committee on the Judiciary, *supra* note 3, at 11–12; Corwin & Ramsey, *supra* note 20, at 195–96.

economic and social conditions the questions debated by the state legislatures were in fact different. For example, several applications which manifested a desire to reduce greatly the federal taxing power under the sixteenth amendment were filed before the entry of the United States into World War II.[30] Since that time the revenue needs of the nation and the purposes for which revenue is spent have changed radically. The prewar debates by the legislatures of those states cannot, therefore, be regarded as meaningful debates on the question whether such a change is desirable under present conditions, nor can the results of those debates, despite a formal concurrence with postwar applications, be viewed as part of a significant agreement.[31] In this situation, it would seem that Congress should reject the prewar applications. The extent to which changed economic and social conditions should be regarded as affecting the validity of an application will vary according to the character of the amendment which the application seeks to have considered by a convention. For example, it is unlikely that a change in economic and social conditions would affect the validity of an application directed toward amendment of article V.[32] Congress should be cautious in determining that any application has been invalidated by economic and social changes, since it may be presumed that those who propose an amendment to the Constitution realize that fundamental law should be capable of withstanding such changes. The power to determine whether changed circumstances have invalidated applications for an article V convention could, of course, be abused by Congress. But if meaningful debate and significant agreement are to be assured at the application stage of the amending process, Congress must be given discretion to decide whether the legislatures of two thirds of the states have decided the same question. Moreover, the states whose applications are thus invalidated can reconsider the question in light of present circumstances and file valid applications.

The validity of an application may also be affected by the fact that an amendment concerning the same subject has since been proposed by Congress and ratified by three fourths of the states. Since ratification indicates some measure of general approval of the congressional solution, and since it is not a difficult matter for dissatisfied states[33] to submit a second application, it would not seem unreasonable for Congress to regard as invalid all applications filed prior to the ratifi-

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[30] Iowa (87 CONG. REC. 3172 (1941)); Maine (87 *id.* at 3370–71 (1941)); Massachusetts (87 *id.* at 3812–13 (1941)); Michigan (87 *id.* at 8904 (1941)); Mississippi (86 *id.* at 6025 (1940)); Rhode Island (86 *id.* at 3407 (1940)); Wyoming (84 *id.* at 1973 (1939)).

[31] In fact, four of these states have attempted to rescind their applications: Iowa (91 *id.* at 2383–84 (1945)); Maine (99 *id.* at 4311 (1953)); Massachusetts (98 *id.* at 4641 (1952)); Rhode Island (95 *id.* at 8286 (1949)).

[32] South Dakota has applied for a convention to consider such an amendment. 99 *id.* at 9180–81 (1953).

[33] These may include both states which did not ratify the amendment and states which ratified only because they felt that the congressional solution was better than none at all.

cation.[34] A related problem would arise if applications dealing with a particular subject were followed by legislation which dealt with the same subject. In that situation it would seem that since the states had desired an amendment rather than legislation the prior applications should be considered valid.

Congress may also encounter the problem of whether a state can rescind an application.[35] One writer has argued that under article V only forward steps can be taken[36] — that is, a state cannot withdraw a ratification,[37] Congress cannot withdraw an amendment it has submitted to the states,[38] and a state cannot withdraw an application for a convention. Although this view would facilitate amendment of the Constitution, it would seem improper in that it bases the legitimacy of an amendment upon a mechanical process of addition rather than upon the existence of a significant agreement not only at each stage of the amending process but also between the proposing body and the ratifying states. If Congress withdrew an amendment which it has proposed, ratification of that amendment by the states could not be significant agreement since at no time would two thirds of both houses of Congress and three fourths of the states have agreed on the change. Similarly, significant agreement among the states cannot be said to exist if some states withdrew their ratifications before three fourths of the states had approved an amendment. Thus, it would seem proper for Congress, in determining whether two thirds of the states have applied for a convention, to disregard applications which have been rescinded.[39]

An additional problem is the effect to be given a governor's veto of an application by a state legislature for a constitutional convention.[40] The solution to this problem turns on whether the term "legislature" in the application provision of article V means the legislative process of the state as determined by the state constitution or the representative lawmaking body only. What the term "legislature" means in a

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[34] Thus applications which requested a convention to limit the President's tenure of office to two terms, *e.g.*, Michigan (89 *id.* at 2944 (1943)), are invalidated by the twenty-second amendment. Similarly, an application filed before that amendment was ratified would be invalidated although it was directed toward a shorter or longer limitation.

[35] Some states have purportedly rescinded their applications for a convention to limit federal taxing power. See House Committee on the Judiciary, *supra* note 3, following p. 18; 101 CONG. REC. 99 (1955); 100 *id.* at 9420 (1954); 99 *id.* at 4311, 6163 (1953).

[36] Packard, *Rescinding Memorialisation Resolutions*, 30 CHI.-KENT L. REV. 339 (1952).

[37] The only historical precedent of a refusal by Congress to allow a state to withdraw a ratification occurred when several states attempted to withdraw ratifications of Civil War amendments. See 15 STAT. 706–07, 709–10 (1868); Coleman v. Miller, 307 U.S. 433, 448–49 (1939). It would seem, however, that the political circumstances surrounding these amendments cast doubt on the value of this precedent.

[38] Although a withdrawal of an amendment has been proposed, see CONG. GLOBE, 38th Cong., 1st Sess. 522 (1864), Congress has never decided whether it has the power to take such action.

[39] See House Committee on the Judiciary, *supra* note 3, at 13–14.

[40] At least one such veto has been reported. Pa. Laws 1943, at 922.

particular clause of the Constitution depends upon the type of activity that the "legislature" is called upon to perform.[41] For example, it has been held that when the state legislature prescribes the time, place, and manner of holding elections pursuant to section 4 of article I it is enacting legislation, and the term "legislature" therefore embraces the entire legislative process of the state government as determined by its constitution, including the executive veto.[42] On the other hand, the term "legislatures" in the ratification section of article V was interpreted by the Supreme Court in *Hawke v. Smith*[43] to mean the representative lawmaking body only, since "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word."[44] The Court therefore held that a state constitutional provision which provided for a referendum on the action of the general assembly in ratifying any proposed amendment to the Federal Constitution was in conflict with article V. If the term "legislature" is interpreted to mean the representative lawmaking body in the ratification section of article V, there is no apparent reason for giving a different meaning to that term in the application section and Congress should disregard an executive veto.

Finally, several states have passed resolutions which call upon Congress to propose an amendment to the Constitution but which make no request for a convention.[45] It would seem proper for Congress to decide that such a resolution is not an "application" for a convention within the meaning of article V since the resolution requests the judgment of Congress rather than the judgment of a convention on the question whether the suggested constitutional change is desirable.[46]

The Article V Convention. — Article V does not expressly prescribe the organization of a convention, the mode of its operations, or the scope of its deliberations. It would seem that Congress, under its power to call a convention, has implied power to decide some of these questions.[47] Under this implied power, Congress could properly designate a time and place for the convention. In addition, it can be argued that Congress has implied power to decide whether the delegates to the convention are to vote by states or by population.[48] Although the framers may have contemplated representation by states,[49] nothing

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[41] Smiley v. Holm, 285 U.S. 355 (1932).

[42] *Ibid.*

[43] 253 U.S. 221 (1920).

[44] *Id.* at 229. *Contra*, State *ex rel.* Mullen v. Howell, 107 Wash. 167, 181 Pac. 920 (1919). An approach similar to that of *Hawke v. Smith* has been taken by state courts with regard to state constitutional amendments. See, *e.g.*, Mitchell v. Hopper, 153 Ark. 515, 241 S.W. 10 (1922); Larkin v. Gronna, 69 N.D. 234, 285 N.W. 59 (1939).

[45] Massachusetts (98 CONG. REC. 1793 (1952)); Montana (97 *id.* at 2537 (1951)); Nevada (98 *id.* at 8395 (1952)).

[46] On the other hand, it may be argued that Congress should either count the request as an application for an article V convention or accede to the request that it propose the amendment.

[47] See ORFIELD, *op. cit. supra* note 18, at 47; *cf.* Dillon v. Gloss, 256 U.S. 368, 373 (1921).

[48] See ORFIELD, *op. cit. supra* note 18, at 47; Wheeler, *supra* note 23, at 798.

[49] The article V provision for a separate ratification stage was adopted after

in article V would seem to require that method of representation as a constitutional matter. It would be difficult for the convention or the states to resolve this issue, since before a vote could be taken on the system of representation the states would have to decide the very issue which they were to decide. Therefore, it would seem proper for Congress to determine which of a number of alternative methods of representation should be adopted. Congress might follow the precedent of the Constitutional Convention and provide equal votes for the states. Or it might determine that representation at the convention stage should be by population, since each state is given equal power at the ratification stage.[50]

It would seem proper for each state to determine the procedure for the election of its delegates and the qualifications of the electors, since matters of this kind have traditionally been left to the states.[51] The convention should choose its own officers, adopt its own rules of procedure, and pass on the qualifications of its members.[52]

Since the framers intended the convention method to be as free as possible from congressional interference,[53] Congress, in calling a convention, cannot properly attempt to limit the scope of its deliberations.[54] However, the convention should consider itself obligated to restrict its debates to the subject matter set out in the applications. A constitutional change should not be debated in the convention unless two thirds of the states after meaningful debate have reached a significant agreement that change in a particular part of the Constitution is desirable.

Conclusion. — The convention method of proposing amendments to the Constitution poses many problems as yet unanswered. In view of the reluctance of the courts to interfere in the amending process, the task of resolving the many problems involved, will fall upon Congress. However, it is possible that Congress may attempt to avoid these problems by proposing the desired amendment itself. This action would seem proper only if all the applications agree in detail on the amendment to be proposed and the amendment proposed by Congress does not differ from that proposed by the states. However, it would be improper for Congress to propose an amendment in order to substitute its judgment for that of the states, since such action would be contrary to the intention of the framers of the Constitution.

it was pointed out in the debates that if the convention were given the power both to propose and to adopt amendments, a majority of the states could bind the whole Union. 2 FARRAND, *op. cit. supra* note 4, at 557–59.

[50] A possible compromise is a bicameral convention, with representation patterned after that in Congress.

[51] See U.S. CONST. art. I, §§ 2, 4; *id.* amend. XVII.

[52] See ORFIELD, *op. cit. supra* note 18, at 47.

[53] See note 21 *supra*.

[54] There is some authority, however, for the proposition that state constitutional conventions are subject to restrictions contained in the call for the convention. The theory is that the legislature's call is a law and the delegates are elected under the terms of that law. See Wells v. Bain, 75 Pa. 39, 51 (1874). *But see* Goodrich v. Moore, 2 Minn. 49, 53 (1858) (dictum). For debate on both sides of this question, see 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1872–73, at 52–61 (1873).

(The Harvard Law Review, June 1972)

PROPOSED LEGISLATION ON THE CONVENTION METHOD OF AMENDING THE UNITED STATES CONSTITUTION

Article V of the United States Constitution provides that

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

To date only Congress has proposed amendments to the Constitution. The convention method of proposing amendments has never been used because two-thirds of the states have never applied for a convention to propose amendments dealing with the same general subject matter.

However, in March, 1967, Congress found that it had received applications from thirty-two states requesting a convention to propose an amendment which would overrule the Supreme Court's reapportionment decisions[1] and permit at least one house of a state legislature to be apportioned on a basis other than population.[2] Although this campaign never succeeded in acquiring the requisite thirty-four applications, the incident did demonstrate that no guidelines exist which delineate the procedures to be followed by the states, Congress, and the convention in performing their roles in the alternative amendment process. Moreover, the near success of this campaign may not have been a singular occurrence. During the past few decades sizeable numbers of applications for conventions dealing with given subjects have been received by Congress,[3] and recent

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[1] The Supreme Court had held in a series of cases that the equal protection clause of the fourteenth amendment requires that each house of a state legislature be apportioned by population. *See, e.g.*, Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

[2] N.Y. Times, Mar. 18, 1967, at 1, col. 6; *see* Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968).

[3] Since 1965, 15 states have applied for a convention to propose an amendment dealing with federal-state revenue sharing. 117 CONG. REC. S16,519 (daily ed. Oct. 19, 1971). From 1953 to 1965, 13 states applied for a revision of article V which would abolish the constitutional convention and allow states to propose and ratify

dissatisfaction with various Supreme Court decisions may lead the state legislatures to mount another convention campaign in the near future.[4] Such a move by the states could give rise to actions causing serious disputes over important constitutional questions. For example, Congress might refuse to call a convention on the pretext that applications were not sufficiently contemporaneous to evidence a current consensus about the need for a convention, or that the applications did not evidence total agreement concerning the scope of the convention or the subject matter to be considered by it. Or the convention, once convened, might proceed beyond the purposes for which it was called and propose fundamental changes in the structure of the federal government. In order to minimize the potential for such contentious actions, Senator Sam Ervin introduced a bill[5] in 1967 to prescribe procedures for the convention method of amending the Constitution. In October, 1971 the bill passed the Senate.[6] It has been sent to the House and referred to the Committee on the Judiciary.[7]

This Note explores the responses made by the Ervin Bill to the difficult problems posed by the convention method of amending the Constitution. After synopsizing the major provisions of the bill, the Note briefly discusses the desirability of legislation governing the alternative amendment process and the constitutional power of Congress to enact such legislation. The Note then considers several of the more important provisions of the Ervin Bill and recommends changes in some of these provisions.

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amendments without any form of federal control. *Id.*; *see* Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963). Between 1939 and 1960, 28 states applied for a convention to propose amendments limiting the federal taxing power. 117 CONG. REC. S16,519 (daily ed. Oct. 19, 1971).

[4] Within the past year, amendments purporting to overturn Supreme Court decisions in at least two areas have been introduced in Congress. One amendment would have made nondenominational prayers in public schools constitutional; it was rejected by the House. N.Y. Times, Nov. 9, 1971, at 1, col. 5. Three amendments have been introduced to eliminate busing to achieve racial integration. S.J. Res. Nos. 164, 165, 92d Cong., 1st Sess. (1971); H.J. Res. No. 620, 92d Cong., 1st Sess. (1971). Whether these amendments, failing proposal by Congress, could muster the support of thirty-four states is uncertain, but it is interesting to note that lobbyists from thirty-two states have been active in supporting antibusing legislation. N.Y. Times, Oct. 27, 1971, at 9, col. 1.

[5] S. 2307, 90th Cong., 1st Sess. (1967). The bill, with minor changes, was reintroduced in subsequent Congresses as S. 623, 91st Cong., 1st Sess. (1969), and S. 215, 92d Cong., 1st Sess. (1971) [hereinafter cited as Ervin Bill].

[6] 117 CONG. REC. S16,569 (daily ed. Oct. 19, 1971).

[7] *See* 117 CONG. REC. H9859 (daily ed. Oct. 20, 1971).

I. An Overview of the Ervin Bill

A. Limitations on the Scope of the Bill

The Ervin Bill was not intended to cover all article V conventions called to propose amendments, but only those limited as to subject matter by the state applications. Thus, when the bill requires that state applications specify the subject matter of amendments to be proposed, and that the convention be limited to this subject matter, it does not represent a judgment by Congress that article V requires a convention to be so limited. Indeed, it would be inconsistent with the language of article V if the states were not permitted to request an open convention or a convention with the express purpose of generally revising the Constitution.[8] The Senate Judiciary Committee limited the scope of the Ervin Bill merely because it felt state requests for general constitutional revision would be unlikely, at least in the near future, and because the calling of such a broad convention might require different procedures.[9]

B. Procedures Prescribed by the Bill

The Ervin Bill covers all stages of the convention amendment process — the requirements for state applications, the calling of the convention by Congress, the membership and procedure of the convention, the proposal of amendments by the convention, and the ratification of proposed amendments by the states. The bill provides that a state legislature should make application by submitting to Congress a resolution requesting a convention to propose an amendment of a specified "nature."[10] In adopting this resolution, a state legislature is to follow its normal procedures for passing a statute, except that the governor's approval is not required.[11] The application is to remain effective for seven years following submission to Congress,[12] during which time it may be rescinded by the state legislature in the same manner in which it was made.[13]

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[8] *See Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 67 (1967) (remarks of Professor Bickel) [hereinafter cited as *Hearings*]; Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 Notre Dame Lawyer 659, 675 (1964); Kauper, *The Alternative Amending Process: Some Observations*, 66 Mich. L. Rev. 903, 912–13 (1968).

[9] S. Rep. No. 336, 92d Cong., 1st Sess. 2 (1971) [hereinafter cited as Senate Report]. The Committee did not suggest what procedures might be followed if states applied for an open convention.

[10] Ervin Bill § 2.

[11] *Id.* § 3(a).

[12] *Id.* § 5(a).

[13] *Id.* § 5(b).

When Congress receives applications from two-thirds of the states dealing with the same "subject," each house is obligated to pass a resolution calling a convention, designating a place and time, and setting forth the nature of the amendment or amendments, as defined by the state applications, to be considered.[14] Each state is to send as many delegates to the convention as it has Senators and Representatives in Congress,[15] and each delegate is to be entitled to one vote on any question before the convention.[16] Amendments are to be proposed by a two-thirds vote of the total number of delegates.[17]

Provided Congress judges a proposed amendment to be of the same "nature" as that suggested by the states which made application, and provided Congress finds the procedures followed by the convention to be in "substantial conformity" with the Ervin Bill, Congress is to submit the proposed amendment for ratification and to specify whether the ratification is to be performed by state legislatures or conventions.[18] The state legislatures are to formulate rules of procedure for ratification, whether ratification is performed by the legislature or by a convention.[19] When three-fourths of the states have ratified without subsequent rescission, a proposed amendment is to become part of the Constitution.[20]

The Ervin Bill further provides that congressional determinations of the sufficiency of state applications, rescissions, or ratifications, or the validity of the amendments proposed by a convention, are not to be subject to judicial review.[21]

II. The Desirability of Legislation Governing the Convention Method of Amending the Constitution

The most significant advantage of legislation defining the procedures to be followed by Congress, the convention, and the states, and placing limitations on their respective powers, is that it would allow the states to make the amendment process conform to their intentions. For example, by specifying the steps which

[14] *Id.* § 6(a).

[15] *Id.* § 7(a).

[16] *Id.* § 9(a).

[17] *Id.* § 10(a).

[18] *Id.* § 11(b)(1). If Congress fails to act on the proposed amendment within "the first period of ninety days of continuous session," *id.*, the proposed amendment is to be automatically submitted to the states for ratification by state legislatures. *Id.* § 12(c).

[19] *Id.* § 12(b). A ratification may be rescinded in the same manner as performed, so long as three-fourths of the states have not yet ratified. *Id.* § 13(a).

[20] *Id.* § 14.

[21] *Id.* §§ 3(b), 5(c), 10(b), 13(c).

states must follow to require Congress to call a convention, legislation would help ensure that a convention would be called when a consensus existed among two-thirds of the states as to the need for a convention. Given explicit procedures, states would be less likely to diffuse their efforts in ignorance of the necessary actions to be taken. At the same time, by providing that applications may be rescinded and by imposing a time limit on the viability of applications, legislation would help ensure that a convention would not be called when a current consensus did not exist. In addition, by limiting the scope of the convention to the subject matter defined in the state applications, legislation such as the Ervin Bill could prevent a consensus among the states concerning the need for a particular constitutional amendment from leading to a convention which would propose far-reaching constitutional change beyond the contemplation or desires of the states.

Of course, legislation governing the calling of a constitutional convention would not bind future Congresses.[22] Future congressmen could not be foreclosed from effectively overruling the prior legislation by determining for themselves the sufficiency of applications, the scope of the convention to be called, and the validity of amendments proposed at the convention.[23]

But the legislation will nonetheless serve some purpose, since a future Congress is not likely to ignore existing legislation governing the amendment process.[24] Where a substantial segment of the nation's population favored a constitutional convention,

[22] *See* Black, *Latest Move in the "Convention" Game*, 113 CONG. REC. 33,674 (1967); Federal Bar Council, *Bulletin of Reports Concerning Legislation: Proposed Federal Constitutional Convention Amendment Act*, 117 CONG. REC. S16, 528–29 (daily ed. Oct. 19, 1971).

[23] Professor Black has argued that laws dictating congressional action on grave questions of policy and constitutional interpretation ought to be independently weighed by each Congress before a course of action is chosen. *See* Letter from Professor Charles L. Black, Jr. to The Honorable Emmanuel Celler, Chairman, House Committee on the Judiciary, Feb. 28, 1972, at 2–4, on file at the *Harvard Law Review* [hereinafter cited as Black Letter]. He contends that such decisions on "prudential questions" should not be made at present because future conditions are not known, *id.* at 5–6, and because issues concerning constitutional conventions are not now receiving national attention and therefore profiting from public debate. *Id.* at 5. The last argument, however, overlooks the influence of the scholars who have participated in hearings on the Ervin Bill, including Professors Bickel, Mendelson, Kurland, and McCloskey, and who have submitted opinions to the Senate Subcommittee, including Professor Freund and Professor Black himself. In addition, it may be argued that the more detached consideration of the Ervin Bill today is preferable to a struggle to agree on procedures in the heat of a national debate concerning the merits of a particular amendment sought by the states.

[24] *See* Kauper, *supra* note 8, at 906; Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 886 (1968).

the fulfillment of existing statutory requirements defined by a previous Congress would make it politically difficult for Congress to justify a refusal to call a convention. And if a future Congress considered certain provisions of the legislation ill-advised or contrary to the dictates of article V, and decided to modify the provisions, preexisting guidelines would nevertheless serve to channel much of the conduct of Congress, the states, and the convention. Legislation would thus help avoid the chaos and substantial delay which might result if Congress had to make, on an ad hoc basis following receipt of thirty-four applications, all decisions concerning the sufficiency of applications, the convening of the convention, and the procedures to be followed by it.[25]

III. Congressional Power to Prescribe Procedures Regulating the Convention Amendment Process

A. The Source of Congressional Power

Article V of the Constitution imposes on Congress the express duty to call a convention on the application of two-thirds of the state legislatures. Since the article does not specify the form of the applications, the procedures which the states must follow, or the terms on which the convention is to be assembled or operated — questions which must be decided before a convention can be called — it can reasonably be inferred that Congress must regulate these "housekeeping matters."[26] Further justification for this conclusion can be found in the "necessary and proper" clause of the Constitution,[27] which allows Congress to select the means necessary to perform its duties.[28]

Two Supreme Court decisions also support the conclusion that Congress has the power to legislate in this area. In *Dillon v. Gloss*[29] the Court ruled that Congress has the authority to set a definite period of time for ratification of a proposed amendment as an incident to its power to designate the mode of ratification.[30]

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[25] *See* Senate Report 2.

[26] *See Hearings* 238 (memorandum of Professor McCloskey); Kauper, *supra* note 8, at 906–07; Bonfield, *supra* note 8, at 675. Professor Bickel has asked who but Congress could settle the "housekeeping matters" involved in calling a constitutional convention. *Hearings* 61. The thirty-four states which applied for a convention could not be expected to formulate procedures for it, and the convention could not bring itself into existence. *Id.*

[27] U.S. Const. art 1, § 8.

[28] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *see Hearings* 238 (memorandum of Professor McCloskey); Black, *supra* note 3, at 964.

[29] 256 U.S. 368, 375–76 (1921).

[30] *See* U.S. Const. art V.

And in *Coleman v. Miller*[31] the Court refused to fix a period of time after which ratification of a proposed amendment would be invalid, holding that such determinations were to be made by Congress. If "housekeeping matters" related to the ratification process are within the authority of Congress by virtue of Congress' power to choose the mode of ratification, then the authority to regulate procedural matters related to calling a convention should follow from Congress' duty to call such a convention.

B. Limitations on Congressional Power

Although Congress appears to have the constitutional power to prescribe procedures for the alternative amendment process, there are limitations on this power. The convention method of proposing amendments was provided as an alternative to the proposal of amendments by Congress in order to ensure that the states could correct congressional abuses of power or propose amendments which Congress refused to propose.[32] It would defeat the purpose of the alternative amendment process if Congress could impose restraints under the rubric of procedure which effectively blocked access of the states to the process, or which allowed Congress selectively to obstruct amendments when it disagreed with their substance.

Therefore, the power of Congress to regulate the alternative amendment process should be limited to those "housekeeping matters" which are necessary aspects of the implementation of Congress' duty to call a convention or its power to choose the mode of ratification of proposed amendments. Further, in the exercise of even these limited powers, Congress must not impose restrictions inconsistent with the requirements of article V. These limitations on the role performed by Congress in the alternative amendment process should be an important factor in evaluating the desirability and constitutionality of specific provisions of the Ervin Bill.

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[31] 307 U.S. 433 (1939). The Court held the time limit on ratification was a political question. *Id.* at 454; *see* pp. 1635–36 *infra*.

[32] *See generally* Kauper, *supra* note 8, at 904–05 & n.2; Kurland, *Article V and the Amending Process*, in AN AMERICAN PRIMER 130–31 (D. Boorstin ed. 1966). Madison's first draft of article V, providing that Congress was to propose amendments either on its own initiative or on petition by two-thirds of the states, was objected to by Colonel Mason of Virginia on the ground that the states would have no means of correcting abuses of power by Congress. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202–03 (H. Farrand ed. 1911). The result of this objection was the draft of the present article, which was accepted with relatively little discussion. *See* 2 *id.* at 629–31.

IV. Questions Raised by Specific Provisions of the Ervin Bill

A. How Long Should Applications Submitted to Congress Remain Valid?

Section 5(a) of the Ervin Bill, as it passed the Senate, provides that "an application . . . shall remain effective for seven calendar years after the date it is received by the Congress." The figure of seven years was presumably taken from the traditional time limit on ratification of proposed amendments[33] and from the reasoning of the Supreme Court in *Dillon v. Gloss*,[34] which upheld Congress' power to fix a deadline of seven years for ratification. In *Dillon* the Court reasoned that since article V treats the proposal and ratification of an amendment as "succeeding steps in a single endeavor," these steps were not intended to be separated by any great length of time, and that since ratification was intended to represent the "expression of the approbation of the people . . . , [the] fair implication [is] that it must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period . . . ."[35] The Court concluded that seven years satisfied this test.[36]

Although *Dillon* strongly supports the constitutionality of the seven-year time limit as applied to ratification, the Senate Judiciary Committee may well have erred in adopting this time limit for the application stage of the process. Contrary to the Committee's assumption,[37] the practical difficulties of securing the views of state legislatures with respect to ratification of a proposed amendment may well be greater than the difficulty of securing their views concerning the desirability of a constitutional convention.[38] At the ratification stage a proposed amendment has been formulated and the state must consider its particular provisions and ramifications before deciding whether it should become a constitutional amendment. But to apply for a con-

[33] *See* Senate Report 11; 117 Cong. Rec. S16,525 (daily ed. Oct. 19, 1971) (remarks of Senator Hruska). A recent example is the 26th amendment extending the franchise to persons over 18 years of age. *See id.*

[34] 256 U.S. 368 (1921).

[35] *Id.* at 374–75. *See* J. Jameson, A Treatise on Constitutional Conventions — Their History, Powers, and Modes of Proceeding § 585 (4th ed. 1887).

[36] 256 U.S. at 376.

[37] *See Hearings* 237 (memorandum of Professor Kurland, Chief Legal Adviser to the Senate Subcommittee on Separation of Powers); 117 Cong. Rec. S16,525 (daily ed. Oct. 19, 1971) (remarks of Senator Hruska).

[38] *See* Letter from Professor Freund to Senator Hart, 117 Cong. Rec. S16,528 (daily ed. Oct. 19, 1971) (application and ratification stages are not "logically or practically equivalent").

vention, a state need only express a desire for constitutional change on a given subject.

Nor does *Dillon* stand for the proposition that a seven-year period will best ensure a contemporaneous consensus. *Dillon* merely accepted seven years as a "reasonable" period to evidence a consensus; the decision does not necessarily mean that seven years is the best time for this purpose. Indeed, the Court may have accepted seven years simply to avoid having to choose a time limit after which the proposed amendment would no longer be viable.[39]

In order to be most certain of the existence of a contemporaneous consensus as to the need for a constitutional convention, the time limit on applications should be as short as is practicably possible.[40] Since some state legislatures meet only once every two years,[41] some commentators have urged a two-year time limit on applications.[42] This period of time is too restrictive, because some legislatures may not want to crowd further a tight agenda with debate on a convention application when a recently begun convention campaign appears futile. However, a period of four years, in which advocates of a constitutional convention

[39] *See* Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 629 (1953). Eighteen years after *Dillon* the Court was asked to set a time limit on the viability of a proposed amendment. The Court refused on the ground that this was a nonjusticiable political question. Coleman v. Miller, 307 U.S. 433 (1939); *see* pp. 1635–36 *infra*.

[40] L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 41–43 (1942); Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 963–64 (1968); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAWYER 185, 195–96 (1951). A good example of the disappearance of a consensus within a short period of time is the interest of states in the reapportionment issue. Now that state legislatures have been reapportioned, many legislatures whose applications are still in the hands of Congress have probably lost interest in an amendment on the issue. *See* 113 CONG. REC. 10,101, 10,105 (1967) (remarks of Senators R. Kennedy and Tydings); Bonfield, *supra*, at 962.

The fact that legislatures are able to rescind their applications, *see* Ervin Bill § 5(b), does not necessarily mean that a failure to do so after several years indicates that a state is still interested in a convention. *See* Ervin, *supra* note 24, at 890–91. A state legislature may have had more pressing business before it, and it may have felt that 34 states were unlikely to request a convention on a subject, making rescission unnecessary.

[41] *See Hearings* 23 (remarks of Senator Proxmire); *id* at 38–39 (remarks of Mr. Sorensen).

[42] *See Hearings* 37–39 (remarks of Mr. Sorensen); *cf.* Bonfield, *supra* note 40, at 963 (two and one-half years). One justification given for a two-year time limit is that Congress has only two years in which to initiate and pass proposed amendments. *See Hearings* 37 (remarks of Mr. Sorensen). However, in practice, actions taken by Congress are often initiated by bills and resolutions introduced in previous Congresses. Witness, for example, the history of the Ervin Bill itself. *See* note 5 *supra*.

would have a full chance to mount a campaign, and in which all states would have a second opportunity to evaluate the desirability of a constitutional convention, should be a sufficient amount of time.[43] Congress would have the constitutional power to impose a four year time limit, because such a limit would not obstruct access of the states to the alternative amendment process, and because it is necessary, as a practical matter, for Congress to set a time limit to determine whether the requisite consensus exists for a convention.[44]

B. Can the President Be Excluded from the Amendment Process?

Article I, section 7 states that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" must be submitted to the President for his approval, and if vetoed by him, must be passed by a two-thirds vote of the House and Senate. Yet the Ervin Bill does not provide for presidential approval of congressional action in calling a convention or in submitting proposed amendments for ratification. The Committee on the Judiciary concluded that article I, section 7 did not apply to congressional actions in the amendment process because the function performed by Congress in this process does not require making legislative judgments but rather merely providing the machinery by which the desires of the states can be effectuated.[45]

The position taken by the Committee has been criticized [46] as contrary to a literal reading of article 1, section 7, which requires presidential approval of any congressional action having the force of law.[47] The calling of a convention, it is argued, would have

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[43] *See Hearings* 9, 23 (remarks of Senator Proxmire); Ervin, *supra* note 24, at 891. A further consideration which supports a shorter time limit on the validity of applications is that if a campaign to secure applications from two-thirds of the states is moving slowly, states whose applications were submitted early in the campaign could "renew" them to keep them alive. It may be more likely that states interested in a convention would renew stale applications, given a short time limit on their validity, than it is that states which lost interest would take the time to rescind applications still considered valid by Congress if a long time limit were adopted. *See* note 40 *supra*.

[44] *See* pp. 1617–18 *supra*.

[45] SENATE REPORT 12–13.

[46] *See Hearings* 23–24 (remarks of Senators Tydings and Proxmire); Bonfield, *supra* note 40, at 986; Black Letter 18–19.

[47] "Having the force of law" has been interpreted as excluding only intermediate votes of the houses of Congress, resolutions expressing opinions, resolutions governing internal congressional appropriations or operations, or resolutions delegating powers to the President. LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND

the force of law as much as legislation creating any other body,[48] and the number of nonmechanical judgments made by Congress before calling a convention — such as when and where it should be held and what procedures it should follow — are properly subject to the presidential veto power.[49]

However, this reasoning ignores the unique, nonlegislative function which Congress performs in the amendment process. This function is limited to the regulation of only those matters necessary to the implementation of article V requirements. As noted above,[50] Congress may not make any judgments on the substance of amendments sought by the states.

In this context the President has no meaningful role to perform. The President, like Congress, would not be free to interfere with the amendment process if constitutional requirements had been met, regardless of his views on the constitutional changes sought by the states. The only important contribution to the process which the President might provide [51] would be to ensure that Congress had acted consistently with article V. But the need for review of these constitutional questions by another political branch is doubtful, since the courts, the government branch primarily responsible for constitutional interpretation and protection,[52] will not give effect to amendments which have not satisfied the requirements of article V.[53] The only significant advantage of a presidential veto on constitutional grounds, if it were exercised in good faith, would be to save the trouble and expense of a constitutional convention whose efforts would be wasted if the Supreme Court subsequently ruled invalid the amendments which it passed.[54] However, this advantage would be outweighed by the undesirability of putting the President in a position to block the alternative amendment process — a process whose purpose is to free the states from dependence on the

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INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 135–36, quoted in SENATE REPORT 12–13.

[48] *See* Black Letter 18.

[49] *See* Bonfield, *supra* note 40, at 986.

[50] *See* pp. 1617–18 *supra*.

[51] The President might have reasons for objecting to a trivial matter, such as who is to preside until the convention elects a presiding officer, a function given to the Vice President by section 8(a) of the Ervin Bill. However, the President's interest in raising such a picayune objection is outweighed by the undesirability of allowing him to obstruct the amendment process.

[52] *See* Cooper v. Aaron, 358 U.S. 1, 17–19 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[53] *See* pp. 1643–44 *infra*.

[54] The Court would presumably refuse to rule on the constitutionality of congressional action until an amendment had gone into effect, because of the lack of a "case or controversy" before this point in time. *See* note 150 *infra*.

federal government in the area of constitutional change. The President could probably find some constitutional pretext for blocking any amendment with whose substance he disagreed, and Congress might not be able to muster the two-thirds vote necessary to override his veto.[55]

It would not be inconsistent with the original purpose of the presidential veto to exclude the President from the amendment process. The veto power was intended to allow the executive branch to defend itself against the annihilation of its powers by Congress and to guard against legislation contrary to the nation's interests.[56] Since neither Congress nor the President can constitutionally exercise any substantive control over amendments sought by the states, the President's veto could not legitimately protect the nation against the calling of a convention or the submission for ratification of a proposed amendment which the President deemed contrary to the nation's interests. Nor could the veto be used to safeguard the powers of the executive branch. The only threat to the executive branch from congressional action in the alternative amendment process would arise from the substance of amendments proposed, over which the President can exercise no control.

An early decision by the Supreme Court would support the exclusion of the President from the amendment process. In *Hollingsworth v. Virginia* [57] the Court stated in an unreasoned opinion that the President "has nothing to do with the proposition or adoption of amendments to the constitution," [58] and held that the President did not have to approve amendments proposed by Congress.[59] The case is deemed inapplicable to the convention

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[55] *Cf.* SENATE REPORT 13 (a presidential veto would make the alternative amendment process impossible). A question arises whether the President should even sign the Ervin Bill if it is passed into law. Although the bill merely governs a process in which the President would have no say, the most important reason for excluding the President from the process is that he should not be in a position to interfere with the desires of the states in a particular convention campaign. If the Ervin Bill is passed well in advance of its application to particular convention campaigns, the President's disapproval of parts of the bill will not interfere with the access of the states to the amending process. In this case, it is worthwhile for the President to air his constitutional objections so that the most satisfactory solutions can be formulated in the bill for problems raised by the convention amendment process.

[56] *See* THE FEDERALIST No. 73, at 494–95 (J. Cooke ed. 1961) (A. Hamilton).

[57] 3 U.S. (3 Dall.) 378 (1798).

[58] *Id.* at 380 note (a).

[59] Since *Hollingsworth*, the President's approval has never been deemed necessary for the proposal of amendments by Congress, and when the President has signed proposed amendments, Congress has subsequently passed resolutions denying the need for his signature. *See* L. ORFIELD, *supra* note 40, at 50 n.30; *Hearings*

amendment process by some commentators and legislators [60] who urge that the probable ground for the decision was the uselessness of requiring presidential approval when the amendment had already been proposed by a supermajority of Congress sufficient to override a presidential veto. In the convention amendment process only a simple majority is required, by the terms of the Ervin Bill,[61] to call a convention or to submit proposed amendments for ratification.

However, the ground for decision in *Hollingsworth* may well have been that the President was simply not intended to have any role in the amendment process. Evidence for this conclusion is found in the arguments of the litigants. The Attorney General, arguing in support of the amendment, did not attempt to justify the failure to obtain presidential approval on the ground that a two-thirds vote and already been required to propose the amendment. On the contrary, he merely argued that the proposal of amendments was much different from Congress' ordinary legislative business, and therefore did not fall within the policy of article I, section 7.[62] Moreover, a narrow ground of decision that a veto would be futile would not have met the argument of opposing counsel that a presidential veto, with reasons,[63] could change the minds of many congressmen.[64]

C. Representation at the Convention

Section 7(a) of the Ervin Bill provides that the convention is to be "composed of as many delegates from each state as the state is entitled to Senators and Representatives in Congress," with each state electing two delegates at large and one from each congressional district. The result of this scheme is that the people of less populated states will have proportionately greater representation at the convention than the people of more populated states, despite the fact that the voters of the less populated states already carry more weight at the application and ratification stages.

The present apportionment scheme seems to have arisen as a compromise between the plan of the original Ervin Bill and

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235 (memorandum of Professor Kurland), quoting A. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 635 (1935).

[60] *See Hearings* 65 (remarks of Professor Bickel); *id.* at 23–24 (remarks of Senators Tydings and Proxmire); Black, *supra* note 3, at 965.

[61] *See* Ervin Bill §§ 6(a), 11(b)(1).

[62] 3 U.S. (3 Dall.) at 380.

[63] When the President vetoes a resolution, he must give his reasons. U.S. CONST. art. I, § 7.

[64] 3 U.S. (3 Dall.) at 378–79.

strictly proportional representation.[65] The original bill allowed each state only as many delegates as the state had Representatives in Congress,[66] but it negated the value of this equal population representation by providing for voting at the convention by state bloc, with each state afforded an equal voice.[67] Severe criticism of this plan [68] caused the bill to be changed to provide for voting by individual delegate. But at the same time the scheme of equal representation was somewhat distorted in favor of the inhabitants of less populous states.

The justification for weighting the convention in favor of less populous states may be found in the considerations which presumably caused Senator Ervin originally to provide for voting by state bloc at the convention: (1) each state had an equal voice in the original constitutional convention,[69] and (2) the provision for voting by state at the application and ratification stages evinces an intention on the part of the framers to permit constitutional change through compact among the several states,[70] rather than through a supermajority consensus of the nation's people as a whole. However, the original convention can be distinguished as a unique meeting of thirteen quasi-sovereigns not yet combined in a federal union. And the fact that the states are given an equal voice at the application and ratification stages does not compel adherence to the same principle at all stages of the amendment process. There is nothing in the language of article V to indicate that convention delegates were intended to be the agents of their states or state governments.[71]

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[65] *See* Black, *Latest Move in the "Convention" Game*, 113 CONG. REC. 33,675 (1967). The Senate Report on the Ervin Bill gives no justification for the plan. It might be argued that since the convention, in proposing amendments, parallels the function of Congress in the amendment process, its composition as provided in the present Ervin Bill might be justified as "mirroring" that of Congress. The convention, like Congress, would have 100 members elected at large in their respective states and 435 members elected from congressional districts. However, when Congress proposes constitutional amendments, it does so through the independent vote of two separate houses, one of which represents the people on a one man-one vote basis. If the convention were to reflect the makeup of both houses of Congress *combined*, there would be no independent check by an equal representative body in the amendment process. *See* New York Bar Ass'n Comm. on Federal Legislation, Proposed Procedures for Federal Constitutional Conventions (S. 215), at 20 (printer's copy Mar. 27, 1972).

[66] S. 2307, § 7(a), 90th Cong., 1st Sess. (1967).

[67] *Id.* § 9(a).

[68] *See, e.g., Hearings* 15–19 (remarks of Senator Proxmire); *id.* at 32 (remarks of Professor Bickel).

[69] *See id.* at 15–16 (remarks of Senator Hruska).

[70] *Id.* at 33 (remarks of Senator Hruska).

[71] *Cf. id.* at 32 (remarks of Professor Bickel); *id.* at 49 (remarks of Professor Mendelson) (nothing in the language of article V compels voting by state bloc at the convention).

Even if the framers did assume, based on their own experience, that a constitutional convention would give the states an equal voice, the meaning of article V should not be forever fixed by this assumption. The Constitution should be interpreted, consistent with its express language, in the way in which it can best function in accordance with its underlying principles, even if changed conditions require an interpretation inconsistent with possible specific assumptions of its framers.[72] The framers may have anticipated that the alternative amendment avenue would allow the states to modify the terms of their federation if the constitutional scheme proved imperfect after a short test.[73] In such a case, it would have been appropriate for states to have an equal voice in the proceedings. Today, however, the states are tightly bound in a strong federal union.[74] The people of the entire nation, and not the states as entities, are seen as the ultimate sovereigns of the nation.[75] The alternative amending process is more meaningfully justified today as the exercise by the American people of their power to change the terms on which they are governed than as the reconsideration by the states of the terms on which they compacted to unite themselves. Therefore, article V can justifiably be interpreted as permitting, if not compelling,[76] proportionate representation at the convention on a population basis.

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[72] *Cf.* L. HAND, THE BILL OF RIGHTS 14–15 (1958) (justifying the Supreme Court's reading into the Constitution the authority to review the constitutionality of congressional legislation in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). The notion that the Constitution is a static document which must be interpreted according to the exact or probable intent of its framers has not always been adhered to by the Supreme Court. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489–90 (1954). The "intent" of the framers should be read to include not only the actual or presumed intent based on conditions existing when the provision was drafted but also an intent that the Constitution be made to work in accordance with its underlying purposes, even if changed conditions necessitate an application which the framers could not have imagined. *Cf.* L. HAND, *supra*, at 23–25. Indeed, to rigidly limit a constitutional provision to the discernible intent of the framers may well contradict the fundamental nature of a written constitution, which is more than an ephemeral enactment designed to solve a specific problem. *See id.* at 14–15; Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58–59, 64–65 (1955); tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 664, 680 (1938). In interpreting article V, a broad scope of judicial construction is especially appropriate because of the paucity of indicia of specific intent and because of the change in our nation from a loose federation of recently sovereign states to a tightly bound and interdependent federal union.

[73] *See* Black Letter 11.

[74] *See Hearings* 65 (remarks of Professor Bickel); Black, *supra* note 3, at 964–65.

[75] *See* Bonfield, *supra* note 40, at 991.

[76] A very strong argument can at least be made that the original Ervin Bill

Since the amendment process ought to provide all citizens with an equal voice to the extent consistent with the express words of the Constitution, the one man-one vote rule currently applied to the House of Representatives [77] and to state legislatures [78] ought to be applied to the convention. The fact that the nation's population is not proportionately represented at either the application or ratification stages of the amendment process makes it especially important that a consensus in favor of constitutional change at the convention reflect a similar consensus among the entire population. Thus, section 7(a) of the Ervin Bill should be changed to provide that one convention delegate be elected from each congressional district. Further, the clause in section 7(a) which now provides for election of delegates "in the manner provided by state law," should be changed to "in the manner provided by state law for the election of Representatives to Congress." [79] The purpose of this latter change would be to guarantee the application of the one man-one vote requirement to the election of delegates, since the states are constitutionally bound to apply the rule to the election of Representatives to Congress.[80]

D. To What Extent Can the Powers of the Convention Be Limited, and Who Has the Authority to Limit Them?

Following the realization in 1967 that Congress was close to being compelled to call a constitutional convention, commentators

provision for voting by state bloc at the convention, with each state given an equal voice, was unconstitutional. Given today's population variances, this plan might have made it possible for less than a majority of the American people to bring about constitutional change, if only the inhabitants of thirty-eight of the more thinly populated states supported a particular amendment. *See Hearings* 19 (remarks of Senator Proxmire). This would be inconsistent with the entire constitutional scheme, for it would make constitutional amendment easier than ordinary legislation, which requires a majority vote of the House of Representatives representing the people on a one man-one vote basis. If a constitution is to be justified, constitutional amendment must be more difficult than passing legislation; otherwise, constitutional limitations on the legislative power would be meaningless. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

[77] *See* Wesberry v. Sanders, 376 U.S. 1 (1964).

[78] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[79] Of course, even if the Ervin Bill provided for one delegate from each of the nation's congressional districts, this would not be a strict application of the one man-one vote rule, for a few of the most thinly populated states would be entitled to one delegate representing less population than each of the delegates from the more populous states. *See* Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 945 (1968). However, the small variance in representation which would result from the provision would be preferable to the increased total number of delegates which would be necessary to achieve accurate equal representation. *See id.*

[80] Wesberry v. Sanders, 376 U.S. 1 (1964).

and legislators expressed the fear that the convention, once convened, would go beyond the subject matter defined by the applicant states and propose amendments significantly altering the structure of the federal government or abolishing the Bill of Rights.[81] In apparent response to such fears, the Ervin Bill provides that applications, to be aggregated toward the two-thirds requirement, must deal with the same "subject," [82] that the congressional resolution calling the convention must define this subject for the convention,[83] and that the convention may only propose amendments of the same "nature" as that stated in the resolution.[84] These provisions give rise to questions whether and to what extent the convention can constitutionally be limited as to subject matter, and whether the bill's provisions would empower Congress to impose excessive limitations. A further question which arises is whether Congress should be the institution to enforce those limitations which can be imposed on the convention.

1. Can a Convention Be Limited as to Subject Matter, and If So, to What Extent? — As noted above,[85] the Ervin Bill does not represent an attempt by Congress to preclude states from applying for an open convention. Rather, the bill attempts to provide a means by which the states may restrict the convention when they agree on the need for only limited constitutional change.

Although it would be contrary to article V if Congress attempted to limit the scope of a convention when the states had applied for an open convention,[86] it would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the express desires of the applicant

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[81] *See* 113 CONG. REC. 10,102–03, 10,108–09, 10,112 (1967) (remarks of Senators Tydings, Proxmire, Javits, and Dirksen); Sorensen, *The Quiet Campaign to Rewrite the Constitution*, SATURDAY REVIEW, July 15, 1967, at 18.

[82] Ervin Bill § 6(a). Whether applications seeking a convention for different reasons should be counted together toward the requisite two-thirds of the states is not at issue in this discussion, since it is undisputed that they should not be. The Senate Judiciary Committee noted that "two centuries of practice" support the conclusion that a convention should not be called unless the application of two-thirds of the state legislatures deal with the same subject matter. SENATE REPORT 9. Indeed, if article V requires a consensus among two-thirds of the states as to the desirability of a constitutional convention, *cf.* p. 1620, an important part of this consensus would necessarily be similar views respecting the subject matter of the amendments desired. *See* Corwin & Ramsey, *supra* note 40, at 195–96. *But see* L. ORFIELD, *supra* note 40, at 42.

[83] Ervin Bill § 6(a).

[84] *Id.* § 10(b).

[85] *See* p. 1614 *supra.*

[86] It would clearly be consistent with article V for the states to request an open convention to revise generally the Constitution. *See* p. 1614 & note 8 *supra.*

states. If article V requires that a convention be called by Congress only when a consensus exists among two-thirds of the states with regard to the extent and subject matter of desired constitutional change,[87] then the convention should not be free to go beyond this consensus and address problems which did not prompt the state applications.[88]

Even the specific intent of the framers lends support to the conclusion that the convention need not be unlimited in scope.[89] Madison conceived of the amendment process as the amendment of specific "errors," [90] and Hamilton viewed article V as requiring that whenever the requisite number of states are "united in the desire of a particular amendment, that amendment must infallibly take place." [91] Moreover, to interpret article V as not permitting a limited convention would impair the function of the alternative amendment process. States would be less likely to take advantage of the convention method of amendment if they believed a convention, once convened, would be free to propose drastic changes in the present constitutional scheme.[92]

Nevertheless, article V should be read to require that the

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[87] *See* note 82 *supra*.

[88] *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2D SESS., REPORT ON FEDERAL CONSTITUTIONAL CONVENTIONS 15–16 (Comm. Print 1952); Bonfield, *supra* note 8, at 677. The only justification for requiring an unlimited constitutional convention would be the theoretical argument that such a convention is, by its nature, a sovereign body unrestricted by the Constitution which it was called to amend. *See* 46 CONG. REC. 2769 (1911) (remarks of Senator Heyburn); *cf.* Kauper, *supra* note 8, at 912 (language of article V can support the argument that the convention is free to propose whatever amendments it wants); Black Letter 11–13 (fact that most pre-twentieth century convention applications called for unlimited conventions evidences framers' intent to provide for conventions unlimited in scope). However, a convention called pursuant to article V is surely subject to the express limitation imposed by the article that an amendment may not be proposed to change the representation of states in the Senate. U.S. CONST. art. V. Since the article empowers the states to contract toward the convening of a constitutional convention, the convention should also be subject to limitations imposed by the agreement among the states. *See* BRICKFIELD, PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 18 (Staff Report for the House Comm. on the Judiciary, 85th Cong., 1st Sess.) (Comm. Print. 1957); *cf. Hearings* 128 (American Enterprise Institute, *Special Analysis*) (convention should not have "primacy over other branches of government having equally responsible functions" in the amendment process). If a convention were not subject to limitations imposed by article V or by state legislatures exercising powers delegated by the article, it could not claim its legitimacy from the existing Constitution, but effectively would be a revolutionary convention. *See* J. JAMESON, *supra* note 35, at 10–11 (distinguishing a "constitutional convention" from a "revolutionary convention").

[89] *See* SENATE REPORT 8; *Hearings* 45 (remarks of Professor Mendelson). *But see* Black Letter 8.

[90] THE FEDERALIST No. 43, at 296 (J. Cooke ed. 1961) (J. Madison).

[91] THE FEDERALIST No. 85, at 592 (J. Cooke ed. 1961) (A. Hamilton).

[92] *See* Kauper, *supra* note 8, at 912.

convention be given some leeway in formulating the best solution to the states' grievance. Article V provides that the states are to submit "applications" for a convention and that the convention is to "propose amendments." It would be inconsistent with this language if states submitted texts of proposed amendments and asked the convention simply to vote them up or down.[93] A constitutional convention is required by article V to propose amendments because of the importance of having a deliberative body, national in scope and imbued with a sense of responsibility to the nation as a whole, deal with fundamental problems of national concern.[94] In order for the convention to perform this important function, it must have the freedom to decide whether the grievance expressed by the applicant states is best corrected by means of constitutional amendment, and if so, in what manner the amendment should approach the problem.[95]

2. Does the Ervin Bill Empower Congress to Impose Excessive Limitations on the Convention? — Section 6(a) of the Ervin Bill requires Congress to define the "subject" of a convention in the concurrent resolution by which the convention is called, while section 10(b) limits the convention to proposing amendments of the "nature" specified by Congress. Section 11(b) provides Con-

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[93] *See Hearings* 61–62, 65, 68, 75, 77–89, 231 (remarks of Professor Bickel); Black, *supra* note 3, at 962–63. *But see Hearings* 52 (remarks of Professor Mendelson); Ervin, *supra* note 24, at 881–83.

[94] *See* Black, *supra* note 3, at 962–63; Bonfield, *supra* note 8, at 662–63. It is not certain, of course, that a large group of delegates representing local interests would suddenly become concerned about national long-term goals and fundamental constitutional principles at the expense of these local interests. However, a group which meets at the national level and recognizes its important role of changing the nation's fundamental law is at least likely to feel some responsibility to the nation as a whole. The extensive publicity the delegates would receive would add to this sense of responsibility.

[95] The campaign to secure an amendment to combat reapportionment of state legislatures provides an example of different approaches which might be used by a convention to attack a given problem. Twenty-nine of the applications for a convention sought an amendment authorizing at least one house of a bicameral state legislature to be malapportioned. Three applications suggested that the power of the federal courts to deal with apportionment be abrogated. Of the 29 states seeking a more direct approach to the problem, some wanted both houses of a bicameral legislature to be malapportioned, some wanted only one, and some went so far as to say that all local government was to be free to apportion itself as it saw fit. *See* Bonfield, *supra* note 40, at 970–72.

The fact that a convention must have some freedom in formulating a proposed amendment does not mean that a convention cannot be limited to deliberation on a given subject matter. It is possible to deal with only one grievance expressed by the states while still being free to approach the problem from whatever direction seems appropriate. *See Hearings* 61–62 (remarks of Professor Bickel) (Subcommittee urged to find a "middle ground" between unlimited revision of the Constitution and mere endorsement of an amendment proposed by the states).

gress with a sanction to enforce 10(b), allowing it to disapprove any proposed amendment which "relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution."

These provisions may be unconstitutional insofar as they permit Congress to impose excessive limitations on the convention and to block disfavored amendments. As noted above, a convention called to propose amendments to remedy particular grievances must be free to formulate the best solutions to these grievances. If, for example, a convention had been called to propose an amendment overruling the Supreme Court's reapportionment decisions,[96] the convention might have preferred an amendment which would limit the Supreme Court's jurisdiction to rule on the apportionment of state legislatures rather than one which would directly authorize state legislative apportionment on a nonpopulation basis.[97] Pursuant to article V, the convention must be free to propose an amendment taking either of these approaches. Yet the terms of the Ervin Bill would seemingly permit Congress to block an amendment taking the former approach on the ground that it "related to" or "included" the subject of federal court jurisdiction as well as that of legislative apportionment.

Not only might the bill enable Congress in this way to exercise excessive control over the scope of a convention, it might also permit the states, by their applications, to define too narrowly the subject matter of a convention. Applicant states might define a particular approach to be taken by an amendment or even submit a text of a proposed amendment. If Congress determined that the narrowly drawn approach was the "subject" of such applications, it might, in accordance with the expressed desires of the states, limit unconstitutionally the scope of the convention.[98] Or if state applications were too specific simply because of confusion about how accurately the "nature" of an amendment must be defined, Congress could misconstrue the states' actual intent and call a convention with a purpose narrower than would be consistent with both article V and the states' intent.

In order to prevent state and congressional attempts to limit excessively the scope of a convention and to eliminate the misreading of applicant states' intentions by Congress, several changes should be made in the language of the Ervin Bill. All stages of the process should focus on the grievance which motivated state legislatures to apply for a convention rather than on the nature

[96] *See* p. 1612 & note 1 *supra*.

[97] *See* note 95 *supra*.

[98] Alternatively, Congress might reject the applications for failure to request an amendment-proposing convention consistent with the meaning of article V. *See* Bonfield, *supra* note 40, at 954–55.

of the amendments to be proposed. State applications should be required to specify only the problem or problems which are believed to be best remedied by constitutional amendment,[99] and Congress should merely restate the problem in the concurrent resolution by which it calls the convention. In order to protect the freedom of the convention to deal with this problem as it sees fit, the convention should be empowered to propose any amendment whose principal purpose is to remedy the grievance or grievances expressed by the states, regardless of whether the amendment "relates to" some other "subject."

3. Who Should Enforce the Limitations on the Scope of the Convention? — The Ervin Bill has designated Congress as the institution to decide whether proposed amendments go beyond the subject matter defined in state applications and to disapprove the proposed amendments if they do not satisfy this test.[100] Although this designation seems logical since Congress performs the function of generally administering the alternative amendment process, it may be contrary to article V because it provides Congress with powers which might be abused to block disfavored amendments, even if the bill is amended to incorporate the "primary purpose" test.

As previously noted,[101] Congress must not be in a position to obstruct the alternative amendment process — a process intended to bypass an obdurate Congress [102] — unless it is necessary, as a practical matter, to the implementation of Congress' duty to call a convention or of Congress' power to choose the mode of ratification. The enforcement by Congress of subject-matter limitations on the convention is not one of the "housekeeping matters" which must be performed in order to bring the convention into existence. The convention, once called, can use its own judgment to define limitations imposed by the applicant states, subject to a check by the states at the ratification stage or by courts when asked to interpret a new amendment as a rule of law in a case before them.[103] Nor can Congress justify its authority as incident to its power to choose the mode of ratification. Determining whether to submit a proposed amendment for ratification is unrelated to choosing the mode of ratification or the procedures, such as time limitations,[104] to be followed in ratification.

Thus, although the Ervin Bill should continue to limit the

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[99] Of course, state applications could include as a mere suggestion or illustration a specific text or approach of a desired amendment.

[100] Ervin Bill § 11(b)(1).

[101] *See* pp. 1618–19 *supra*.

[102] *See* p. 1618 & note 32 *supra*.

[103] *See* pp. 1642–43 *infra*.

[104] *See* Dillon v. Gloss, 256 U.S .368 (1921).

subject matter which could be considered by a convention called pursuant to the bill, it should leave the enforcement of these limitations to the convention itself, subject to check only by the ratification process and by the courts.

E. Should Amendments Be Proposed by Vote of a Simple Majority or a Two-Thirds Majority of the Delegates to the Convention?

Immediately prior to the passage of the Ervin Bill, section 10(a) was amended by a vote on the Senate floor to require a two-thirds vote of the convention delegates to propose amendments.[105] Advocates of the two-thirds requirement noted that article V did not specify the convention voting requirement and argued that it should not be easier for a convention to propose amendments than it is for Congress.[106] It was further argued that the requirement of applications from two-thirds of the states did not provide an adequate check on the process, because the question of whether a convention is needed to propose amendments is far different from the question of whether a particular amendment should be proposed.[107]

However, no argument satisfactorily dealt with the fact that article V expressly required a supermajority consensus for convention applications, ratifications, and the proposal of amendments by Congress, but does not require a supermajority vote for the proposal of amendments by a convention.[108] Even more significantly, advocates of a two-thirds requirement ignored Congress' narrow role in the alternative amendment process. As noted above,[109] any requirement imposed by Congress which is not necessary for Congress to bring a convention into existence or to choose the mode of ratification is outside Congress' constitutional authority. Since a convention, once underway, could itself decide what vote should be required to propose amendments, the two-thirds requirement predetermined by Congress would appear to be unconstitutional.

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[105] 117 CONG. REC. S16,531 (daily ed. Oct. 19, 1971).

[106] *See Hearings* 37 (remarks of Mr. Sorensen); *id.* at 239 (memorandum of Professor McCloskey); 117 CONG. REC. S16,526 (daily ed. Oct. 19, 1971) (remarks of Senator Bayh); Bonfield, *supra* note 8, at 676. Professor Mendelson has stated that if a two-thirds vote is required in Congress, where one house is checking another, "it seems incredible" that Congress could not require a two-thirds majority for proposal of amendments by a convention. *Hearings* 47.

[107] *See* Letter from Professor Freund to Senator Bayh, 117 CONG. REC. S16,526 (daily ed. Oct. 19, 1971).

[108] *See* 117 CONG. REC. S16,524–25 (daily ed. Oct. 19, 1971) (remarks of Senator Hruska).

[109] *See* pp. 1618–19 *supra*.

To be sure, Congress must specify an initial voting requirement by which a convention would decide how it should operate, and it might be contended that a two-thirds voting requirement for this purpose is reasonable. However, if Congress required a two-thirds vote subject to change by a convention, a minority of slightly more than one-third of the delegates could block any change in the two-thirds requirement, thereby compelling its application to the proposal of amendments. Since Congress could easily provide for initial voting by simple majority at the convention subject to modification by a vote requiring a stronger consensus for the proposal of amendments, this congressional obstruction is not necessary as a practical matter and is therefore beyond Congress' constitutional authority to implement the alternative amendment process.

F. Will Judicial Review of Congressional Action Be Possible?

The Ervin Bill provides that determinations made by Congress regarding the procedural sufficiency of state applications, rescissions, and ratifications shall be "binding on all others, including State and Federal courts." [110] The bill similarly precludes judicial review of congressional determinations of whether amendments proposed by a convention are of the same "nature" as those specified in the resolution calling the convention.[111] These provisions seem an attempt to bar judicial review not only of determinations made within the bounds of Congress' constitutional authority — determinations which the Court, of course, would not review anyway — but also of congressional determinations which exceed the limits of this authority.

The Senate Judiciary Committee did not articulate its reasons for Congress' authority for barring judicial review. Nor was the question discussed in any detail during hearings on the bill. Participants in the hearings seemed to assume that the courts would refuse to review any questions decided by Congress in the amendment process on the ground that they were nonjusticiable political questions.[112]

Whether this assumption of nonjusticiability is correct is the first of three questions raised by the Ervin Bill's attempts to preclude judicial review. The second is whether, if amendment-related issues are in fact justiciable, the Ervin Bill will still effectively bar judicial review on the basis of Congress' control over

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[110] Ervin Bill §§ 3(b), 5(c), 13(c).

[111] *Id.* § 10(b). Questions arising from the amendment process are to be submitted first to the Committees on the Judiciary. *See* SENATE REPORT 14.

[112] *See Hearings* 107 (Library of Congress Legislative Reference Service, Procedures for Amending the United States Constitution).

the jurisdiction of the federal courts and the appellate jurisdiction of the Supreme Court. The final question is whether, even if the issues are justiciable and Congress did not effectively preclude review, judicial review will nonetheless fail in some instances because there is no defendant against whom the courts could grant relief.

1. The Justiciability of Issues Related to the Amendment Process. — The Supreme Court has applied the "political question" doctrine to a broad range of cases in holding actions of the legislative or executive branch of government conclusive on the courts.[113] When the Court deems a political question to be involved in a case, it does not merely give the political branches broad discretion; it rules the issue entirely nonjusticiable.

It has been argued that any determination of Congress related to the amending process constitutes such a political question.[114] The Supreme Court decision in *Coleman v. Miller* [115] is often cited in support of this argument. In *Coleman* the Court refused to rule on whether a state could ratify a child labor amendment fifteen years after its proposal by Congress. The Court deferred to Congress on this question, reasoning that the political, social, and economic factors which prompted the amendment should determine whether the proposed amendment was still viable,[116] and therefore susceptible to ratification, and that these factors could not properly be weighed by the courts.[117] Four Justices criticized the narrowness of the holding [118] and stated that the amending process "itself is 'political' in its entirety, from sub-

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[113] *See, e.g.*, Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948) (question whether President followed statutory standards in reviewing CAB grant of application to engage in overseas air transportation); *Ex parte* Peru, 318 U.S. 578 (1943) (question whether foreign vessel is immune from suit because owned by a foreign sovereign, when the State Department has so certified); Field v. Clark, 143 U.S. 649 (1892) (question whether an enrolled Act of Congress conforms to the bill as passed by both houses). *See generally* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

[114] *See* BRICKFIELD, *supra* note 88, at 27; L. ORFIELD, *supra* note 40, at 41; Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1068 (1957).

[115] 307 U.S. 433 (1939).

[116] The amendment in *Coleman* had been proposed by Congress to overrule Hammer v. Dagenhart, 247 U.S. 251 (1918), which held unconstitutional federal statutes regulating child labor. Substantial changes in economic and social conditions after proposal could have made such federal protection of children no longer necessary and placed in doubt the continued viability of state ratifications performed when the protection was badly needed.

[117] 307 U.S. at 451–56.

[118] Seven Justices, including the four who desired a broader decision, joined in the "Opinion of the Court." Two Justices dissented.

mission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point." [119]

However, prior to *Coleman* the Supreme Court had reached the merits in deciding several issues related to the amending process. For example, in *Dillon v. Gloss* [120] the Court ruled that seven years was a "reasonable" time limit for Congress to place on ratification of an amendment. And in *Leser v. Garnett*,[121] the Court held that state legislatures, in ratifying proposed amendments, could not be bound by procedural requirements imposed by their state constitutions.[122] Since *Coleman* did not overrule these cases,[123] and since the Court based its holding on the particular relevance of the economic and social issues involved, *Coleman* does not stand for the proposition that absolute nonjusticiability attaches to all questions related to the amendment process. Indeed, the political, social, and economic factors which the Court felt ill-equipped to consider in *Coleman* will not control most issues in the alternative amendment process. Since the purpose of the alternative method of amendment is to allow citizens to bypass an obdurate Congress in bringing about constitutional change,[124] Congress is not free to weigh political, economic, and social factors before calling a convention or submitting proposed amendments for ratification. Moreover, many of the issues which might arise from the process — such as how narrowly Congress can limit the convention as to subject matter — will involve constitutional interpretation, and are thus issues which belong presumptively in a court of justice.[125]

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[119] 307 U.S. at 459 (Black, J., concurring).

[120] 256 U.S. 368 (1921).

[121] 258 U.S. 130 (1922).

[122] The Court ruled that state constitutional provisions purporting to invalidate certain state legislative ratifications of the nineteenth amendment were of no effect because the legislatures were performing a "federal function" in ratifying an amendment to the federal Constitution. If the Court had desired to reach the same result by ruling questions relating to the amendment process "political questions," it would have ruled that Congress, by accepting the ratifications of the states, had determined that they were valid and that the Court would not inquire into that determination.

The appellees in *Leser* did argue that the issue was nonjusticiable. *See* Brief for Appellees at 40–45. *See also* Brief for the United States as Amicus Curiae at 4–9. But the Court's opinion did not mention the "political question" issue.

[123] The Court distinguished *Dillon* on the ground that the *Dillon* Court had not been asked to choose its own time limit on ratification but simply to approve or disapprove the deadline imposed by Congress. *Id.* at 452–53. The Court therefore did not accept Justice Black's argument that the *Dillon* Court's inquiry into the merits of the seven year period should be disapproved. *Id.* at 459 (concurring opinion).

[124] *See* p. 1618 & note 32 *supra*.

[125] *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

Furthermore, *Coleman* may be read narrowly by the Supreme Court today because of recent developments of the political question doctrine. In *Baker v. Carr* [126] the Court, in ruling that the issue of state legislative apportionment is not a political question, mapped out a more active role for the federal courts in the treatment of alleged political questions. *Baker* established the following criteria for identifying a nonjusticiable political question: [127]

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Court stated that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability . . . ." [128]

Application of relevant [129] *Baker v. Carr* criteria to issues arising from the alternative amendment process demonstrates that those issues would not be nonjusticiable political questions. Judicial review of amendment-related issues would not be excluded on the basis of a "textually demonstrable constitutional commitment" of the issues to Congress.[130] The mere fact that the Constitution gives Congress the duty to call a convention and the power to choose the mode of ratification should not be considered a textual commitment of unlimited discretionary power over the entire amendment process.

To be sure, the duty imposed on Congress by article V implies certain powers incident to fulfilling that duty.[131] However, the Constitution commits numerous powers to the political branches without committing absolute and unreviewable discretion in the

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[126] 369 U.S. 186 (1962).

[127] *Id.* at 217.

[128] *Id.*

[129] At least one of the *Baker v. Carr* criteria does not seem at all relevant to review of congressional decisions in the alternative amendment process. There could be no "impossibility of deciding [a question] without an initial policy determination" of a political branch where the courts would be reviewing the constitutionality only of determinations already made by Congress.

[130] Justice Black failed to convince the Court in *Coleman* that article V did textually commit these issues to Congress. 307 U.S. at 458–59 (Black, J., concurring).

[131] *See* pp. 1617–18 *supra*.

exercise of those powers. Generally, political questions arise not simply because issues are "committed" to the political branches, but because some other *Baker* criterion is present, such as a "lack of judicially manageable standards" or the "potentiality of embarrassment from multifarious pronouncements." [132] That the constitutional grant of a power to Congress, standing alone, will not make its exercise unreviewable is amply demonstrated by the fact that the Court has traditionally reviewed the exercise of powers, such as Congress' power to regulate commerce, which are far more explicitly committed to Congress than powers merely implied from the article V duty to call a convention.[133] In this normal judicial review, the Court ensures that the limits of the power granted are not exceeded and that other constitutional provisions are not infringed.

Indeed, in *Powell v. McCormack* [134] the Court indicated that an issue is not necessarily a political question even when a constitutional provision seems explicitly to commit the determination of its meaning to Congress. The Court in *Powell* did not demur in the face of the constitutional provision that each house of Congress "shall be the Judge of the Elections, Returns and Qualifications of its own Members." [135] Rather, the Court itself determined that the qualifications which Congress had the power to judge did not extend to those upon which Congressman-elect Adam Clayton Powell was excluded from the House.[136] Thus, in the alternative amendment process, if Congress acted beyond the powers given it by article V, as interpreted by the Court, the Court could apply the reasoning of *Powell* to justify a finding

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[132] *See* Baker v. Carr, 369 U.S. 186, 217 (1962). The "textual commitment" of a power has most often been found with regard to the foreign relations powers of the political branches. *See id.* at 211–212; Scharpf, *supra* note 113, at 541.

[133] *See* Scharpf, *supra* note 113, at 540. For example, article 1, § 8 of the Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ." But the Court will nevertheless inquire whether congressional action has exceeded the bounds of the power granted by the Constitution. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Hammer v. Dagenhart, 247 U.S. 251 (1918).

[134] 395 U.S. 486 (1969).

[135] U.S. CONST. art. I, § 5.

[136] 395 U.S. at 547–48. The House had excluded Congressman-elect Powell and had refused to pay his salary on grounds of misconduct and deceit regarding the use of committee funds. The Court interpreted "qualifications" in article 1, § 5 to mean only the age, citizenship, and residency requirements imposed on Congressmen by article 1, § 2, and not their prior behavior.

It might well be questioned whether the Court, despite the language of *Powell*, would have felt itself limited by even article 1, § 5 if there had been a congressional determination that the Congressman-elect was only twenty years old, and hence not eligible to be a Representative. U.S. CONST. art. 1, § 2.

that a question decided by Congress was not textually committed to it.

Nor is there a lack of judicially manageable standards for resolving constitutional issues arising from the amendment process. The Court in *Coleman* rested its finding of nonjusticiability on a lack of judicially manageable standards to evaluate historical developments.[137] But, unlike the issue in *Coleman*, many of the questions which the Ervin Bill commits to Congress will not involve appraisals of economic and social developments. For example, determining whether state applications deal with the same subject, or whether a proposed amendment is of the "nature" defined by the concurrent resolution calling the convention, would involve only facial comparisons of documents without consideration of the underlying social conditions which motivated their adoption.[138]

Nor would "unquestioning adherence to political decisions already made" justify the refusal to review the contemporaneous actions of Congress in the amending process.[139] Reliance on a new amendment would be minimal, because litigation brought to test it would move quickly through the courts.[140]

A pronouncement by the Supreme Court that Congress had overstepped its constitutional bounds in refusing, for example, to call a convention when article V requirements had been met could well embarrass Congress and evidence some "lack of repect" of the Court for Congress. However, the "embarrassment from multifarious pronouncements" parameter of the *Baker* test

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[137] *See* 307 U.S. at 451–56; p. 1635 *supra*.

[138] It is conceivable that the Court might even find standards for reviewing the time limit placed on state applications. Although the *Coleman* Court would not set a deadline on ratification of a particular amendment, a Court reviewing the lifespan set by statute for all applications, regardless of subject matter, would only have to consider the constitutional requirement of a reasonably contemporaneous consensus, *see* p. 1620 *supra*, and could determine reasonableness by the duration and frequency of state legislative sessions. *See* pp. 1620–21 *supra*.

[139] This particular *Baker* test would, however, provide the grounds on which the Court would refuse to review the procedural sufficiency of longstanding amendments to the Constitution, such as the Reconstruction amendments. *Cf.* Luther v. Borden, 48 U.S. (7 How.) 1, 7 (1849) (if Court were to recognize one government within a state over another, laws passsed by the one would be nullities, taxes wrongfully collected, salaries illegally paid, public accounts improperly settled, judgments and sentences null and void, and state officers trespassers).

[140] The recent case of New York Times Co. v. United States, 403 U.S. 713 (1971), was resolved by the Supreme Court within eighteen days of the beginning of the controversy. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 200 (1971). A constitutional amendment would probably have even more far-reaching and immediately felt implications, meriting equally expeditious judicial review.

has been applied almost exclusively to avoid embarrassment of the Government in the area of foreign relations.[141] For example, when a question such as the duration of a war is at issue, the Court has felt the American position best defined by the political departments.[142] In other areas, despite the language of *Baker*, the Court has risked causing embarrassment and showing "lack of respect" to the President and Congress by ruling unconstitutional a number of actions to which those branches had committed their prestige. For example, in declaring unlawful President Truman's seizure of the steel mills during the Korean crisis,[143] and in overruling President Roosevelt's New Deal legislation,[144] the Court frustrated the goals of the political branches instead of declining jurisdiction on the grounds that it faced a political question.

Even more significant, perhaps, is the Court's treatment of the possibility of embarrassing Congress in the post-*Baker* case of *Powell v. McCormack*.[145] In rejecting the "political question" defense, the Court disposed quickly of the claim that the potentiality of embarrassing confrontation between coordinate branches made the question nonjusticiable. Determining that adjudication would require only "an interpretation of the Constitution," the Court stated that it could not abdicate this responsibility: [146]

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[141] *See* Baker v. Carr, 369 U.S. 186, 211–14 (1962); *Scharpf*, *supra* note 113, at 573–77.

[142] *See* Scharpf, *supra* note 113, at 575.

[143] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[144] *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[145] 395 U.S. 486 (1969).

[146] *Id.* at 549.

One further factor, unique to the constitutional amendment process and not considered in *Baker*, could arguably make it proper for the Court to decline adjudication of amendment-related issues. Just as the Court provides a check on the constitutionality of congressional actions, the amendment process is the only means by which the people can "overrule" the Court's decisions to ensure that the basic values the Court reflects do not deviate excessively from those of the people. *See* Scharpf, *supra* note 113, at 588–89. The Court should therefore be careful not to interpret article V to preserve its own decisions. As Professor Scharpf argues:

> [T]he amendment process is . . . one instance in which the Court cannot assume responsibility for saying what the law is without undermining . . . the legitimacy of its power to say so. . . . [J]udicial review in a democracy remains defensible only to the extent that the Court itself will be defenseless against the processes through which the community may assert and enforce its own considered understanding of its basic code.

Id. at 589.

However, Congress, too, would probably be unsympathetic to the constitutional change sought; the use of the convention process would indicate that Congress had been unwilling to propose the constitutional change at issue.

Given the potential partiality of both Congress and the Court, the Court should

> Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

2. Will the Ervin Bill Bar Judicial Review? — The fact that most constitutional issues arising from the alternative amendment process will not be considered nonjusticiable political questions raises the issue whether the Ervin Bill itself will compel the courts to decline consideration of controversies falling within its terms. Congress has considerable power over the jurisdiction of lower federal courts,[147] the appellate jurisdiction of the Supreme Court,[148] and the jurisdiction of state courts when federal questions are involved.[149] But because of the ways in which controversies will arise, the provisions of the Ervin Bill barring review will not preclude judicial consideration of justiciable constitutional issues.

Controversies related to the amendment process could arise in two ways. First, Congress could take affirmative action, such as calling a convention, submitting a proposal for ratification, or declaring an amendment properly ratified, when constitutional requirements allegedly had not been met. A dispute over the validity of the amendment, once promulgated,[150] would enter the

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have the final say in interpreting article V. The Court's usual function of applying principles of law to the issues before it would hopefully make its interpretation of the Constitution more impartial, or at least more widely respected, than similar interpretations by Congress, whose usual role involves the making of political judgments rather than the application of legal analysis. *See* Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 74 (1961); McCloskey, *Foreword: The Reapportionment Case, The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 67 (1962).

[147] The constitutional authority of Congress to "ordain and establish" the lower federal courts, *see* U.S. CONST. art. III, § 1, has long been held to include the power to define the jurisdiction of these courts and to withhold from them jurisdiction over enumerated controversies. *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

[148] The appellate jurisdiction of the Supreme Court is subject to "such Exceptions . . . as the Congress shall make." U.S. CONST. art. III, § 2; *see Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). *But see* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) ("the exceptions [to the Supreme Court's appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan") [hereinafter cited as Hart].

[149] *See* Bowles v. Willingham, 321 U.S. 503, 511–12 (1944); The "Moses Taylor," 71 U.S. (4 Wall.) 411 (1867); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348–50 (1816).

[150] No party is likely to be permitted to challenge the constitutionality of congressional action until the 38th state has ratified. Before this time the possibility

federal courts under their federal-question jurisdiction.[151] For example, if the amendment purportedly created a criminal or civil cause of action, suits brought under the amendment would be federal questions, and the invalidity of the amendment would be asserted as a defense. If, on the other hand, the amendment purported to abolish a federal cause of action, the plaintiff, suing under the federal rights which existed before the amendment, would assert the invalidity of the amendment after the amendment had been raised as a defense. For example, if the amendment provided that the fourteenth amendment guarantees no one a right to attend racially integrated schools, and if the amendment resulted in a return to segregated schools, a black plaintiff could allege a violation of his federal rights as defined by the equal protection clause and *Brown v. Board of Education*,[152] thereby raising a federal question. Before the suit could be dismissed, the court would have to determine whether the amendment was indeed valid and had overruled the *Brown* doctrine.

Once a controversy was within the general jurisdiction of a federal court, it would determine the validity of the amendment involved. Since a court cannot be made to apply a rule of law which it finds to be unconstitutional,[153] congressional attempts to exclude judicial review of an amendment's validity would be to no avail.[154] The court would examine the constitutionality of

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that an amendment would not become part of the Constituion would presumably prevent a party from showing any actual or imminent injury, and therefore the requisite "case or controversy" would not exist. *See* U.S. CONST. art. III, § 1.

[151] 28 U.S.C. § 1331 (1970). It might be argued that an invalid amendment could not give rise to a federal question and that a defendant sued by a plaintiff claiming a right under an invalid amendment would properly assert as a defense the court's lack of jurisdiction over the subject matter, FED. R. CIV. P. 12(b)(1), rather than the plaintiff's failure to state a claim on which relief could be granted. FED. R. CIV. P. 12(b)(6). But federal-question jurisdiction is present when the outcome of a controversy depends on the validity of a federal law, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 57 (2d ed. 1970), and would surely also be present when the outcome depended on the validity of a constitutional amendment.

[152] 347 U.S. 483 (1954).

[153] *See* Yakus v. United States, 321 U.S. 414, 463–68 (1944) (Rutledge, J., dissenting) (Congress cannot confer jurisdiction and direct that it be exercised in a manner inconsistent with constitutional requirements); United States v. Klein, 80 U.S. (13 Wall.) 128, 147–48 (1872) (Congress, when granting the Supreme Court jurisdiction over a category of cases, cannot prescribe the application of an unconstitutional rule of law by forbidding the Court to give effect to presidential pardons); Hart 1373, 1378–79, 1387–96. *But see* Duncan v. The "Francis Wright," 105 U.S. 381 (1882) (the authority to limit jurisdiction carries with it the authority to exclude review of particular issues).

[154] *See* Lipke v. Lederer, 259 U.S. 557 (1922) (Court exercising federal question jurisdiction enjoined summary collection of tax held to be a penalty, in spite of statutory prohibition of injunctions against federal taxes); Wong Wing v.

congressional determinations in the amendment process and refuse to enforce the amendment, either as the original source of the federal right on which the action was based or as a defense to an otherwise valid federal action, if constitutional requirements had not been met.[155]

The second and probably more likely situation from which amendment-related controversies would arise would be an allegedly unconstitutional refusal by Congress to proceed at some stage of the amendment process, even though constitutional requirements had been met by the states. In such a case, the party most likely to be aggrieved and to have standing to sue would be one of the states whose legislature had initiated the process.[156] The controversy would be one to which a state is a party and therefore within the original jurisdiction of the Supreme Court,[157] which Congress cannot limit.[158] Again, congressional attempts to bar review of congressional determinations would be unavailing because the Court surely cannot be prevented from vin-

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United States, 163 U.S. 228 (1896) (Court exercising habeas corpus jurisdiction invalidated "nonreviewable" summary proceedings and severe punishment for Chinese thought to be in the country unlawfully); Hart 1387–88.

[155] If the court treated an allegation of an amendment's invalidity as a defense to the court's jurisdiction, *see* note 151 *supra*, it still would have to determine the issue of validity in evaluating its jurisdiction, *see* C. WRIGHT, *supra* note 151, at 52–53, and at that point would refuse to give effect to an unconstitutional amendment.

[156] Since the state legislature is the entity whose right to initiate the process of amending the Constitution is guaranteed by article V, there is little question that a sufficiently fundamental state interest exists to give the state standing to sue when Congress refuses to proceed with the amendment process. A state's rights under article V are certainly as fundamental as those state proprietary rights which have been sufficient to confer standing. *See, e.g.*, Alabama v. Arizona, 291 U.S. 286 (1934); Kentucky v. Indiana, 281 U.S. 163 (1930).

[157] U.S. CONST. art. III, § 2. The Supreme Court can decline to exercise its original jurisdiction when another forum is available, when issues are tied to questions of local law, or when complicated factual questions are presented with which the Court is not equipped to deal. *See* Ohio v. Wyandotte Chem. Corp., 401 U.S. 493 (1971); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 694–700 (1959). However, it is unlikely that the Court would decline to rule on the questions of constitutional interpretation which are likely to predominate in disputes arising from the amending process. Moreover, the framers provided for Supreme Court original jurisdiction over controversies in which a state is a party in part to provide a prestigious forum for issues involving adjustments within the federal structure, and for litigants who are sovereigns in their own right. *See* THE FEDERALIST No. 81, at 548 (J. Cooke ed. 1961) (A. Hamilton); Note, *supra*, at 665. It would be inconsistent with this intention for the Court to decline jurisdiction over questions related to the important process of amending the federal Constitution.

[158] Congress has the power to make exceptions to the Court's appellate jurisdiction, but not to its original jurisdiction. U.S. CONST. art. III, § 2.

dicating, in suits properly before it, constitutional rights which have been violated.

Of course, relief in cases where Congress has unconstitutionally forestalled the alternative amendment process would probably be limited to declaratory judgments. The Supreme Court, in order to preserve comity between the separate branches of the federal government, would be unlikely to order Congress to call a convention or to submit a proposed amendment for ratification.[159] But declaratory relief may force Congress to act. If, as is likely, Congress' only justification for refusing to proceed in carrying out the alternative amendment process was that constitutional requirements had not been met, a declaration by the Supreme Court that constitutional requirements had been met would eliminate this justification. And since two-thirds of the state legislatures, presumably representing a large segment of the population, would have expressed a desire for constitutional change, political exigencies would probably compel congressional action once its constitutional reasons for inaction had been undercut.

3. When a State Brings an Action Against Congress, Who Can Be Named as a Defendant? — If a state were to bring an action after Congress had failed to call a convention or to submit a proposed amendment for ratification, it might have some difficulty finding a defendant against whom the Court would afford even declaratory relief.

The logical defendants would be a few members of each House of Congress, perhaps including the Speaker of the House and the President *pro tempore* of the Senate, as representatives of the class of persons serving in Congress.[160] However, the speech and debate clause [161] of the Constitution is likely to be raised as a defense in abatement by members of Congress named as defendants.

The clause provides that "for any Speech or Debate in either House, . . . [Senators and Representatives] shall not be questioned in any other place." This protection originated in the seventeenth century efforts of the English Parliament to prevent

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[159] *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867). In Powell v. McCormack, 395 U.S. 486 (1969), the Court granted only declaratory relief, stating that Powell had been unconstitutionally excluded by Congress and his pay unlawfully withheld. *Id.* at 550. However, the Court left open the possibility that the lower court, on remand, might compel the Sergeant at Arms, by writ of mandamus, to give Powell his back pay. *Id.* Such mandamus would have indirectly forced Congress to act, since the Sergeant at Arms could not reasonably be expected to pay Powell without a congressional appropriation.

[160] *See* Powell v. McCormack, 395 U.S. 486, 493 (1969).

[161] U.S. CONST. art. I, § 6.

intimidation by the king and a judiciary in concert with the king.[162] The clause still serves to preserve the independence and integrity of legislators by allowing them to exercise their own judgment in representing their constituents without fear of having to defend themselves in court.[163]

However, a strong argument can be made that the clause would not extend to protect congressional activity involved in administering the alternative amendment process. To be sure, the speech and debate clause protects not only words spoken in Congress but also all legitimate legislative activity, including voting, investigations, and written reports,[164] even if the activity is undertaken for an "unworthy purpose."[165] But the protection of the clause is limited to "legitimate legislative activity." In four major Supreme Court cases applying the clause, the Court first assured itself that the actions protected were indeed legitimate legislative activity.[166] Arguably, the role performed by Congress in the alternative amendment process is not legislative at all. Congress is required to perform administrative acts to implement a convention; it is not permitted to exercise legislative judgment about the merits of the constitutional change sought by the states. The purpose of the speech and debate clause — preservation of Congress' freedom to carry out its policies without fear of harassment — is inapplicable where Congress is not free to make policy determinations.

However, if the Court did not accept this narrow reading of "legitimate legislative activity," and if it applied the speech and debate clause to protect members of Congress, the plaintiff-states would have to look elsewhere for defendants against whom declaratory judgments could be secured. Though this search might be difficult in some cases, it would probably not be futile. When the courts have applied the speech and debate clause to bar relief against legislators, they have generally vindicated the constitutional rights of plaintiffs in other ways. In *Powell* and two earlier

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[162] *See* United States v. Johnson, 383 U.S. 169, 178, 181–82 (1966).

[163] *See* Powell v. McCormack, 395 U.S. 486, 503 (1969); United States v. Johnson, 383 U.S. 169, 179–80 (1966); Tenney v. Brandhove, 341 U.S. 367, 373–75 (1951).

[164] Kilbourn v. Thompson, 103 U.S. 168 (1881).

[165] Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

[166] Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967); United States v. Johnson, 383 U.S. 169, 177 (1966); Tenney v. Brandhove, 341 U.S. 367, 376 (1951); Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). In Powell v. McCormack, 395 U.S. 486 (1969), the Court found that adequate relief could be afforded against the House employees named as defendants, *id.* at 504–06; it therefore expressly refused to decide the question of whether Congress' unconstitutional exclusion of Powell was outside the scope of legitimate legislative activity. *Id.* at 501–02.

cases, relief was afforded against employees of Congress.[167] Powell obtained a declaratory judgment that the Clerk of the House had unlawfully threatened to refuse to perform the services due him, that the Sergeant at Arms had unlawfully refused to pay his salary, and that the Doorkeeper had unlawfully threatened to deny him admission to the House chamber. The Court in *Powell* expressly left open the question whether an action might be maintained against members of Congress "where no agents participated in the challenged action and no other remedy was available." [168]

This statement in *Powell* may be an indication that the Court will find a defendant whenever constitutional rights are being violated. Indeed, the use of congressional employees as defendants represents only a means of placing a nominal defendant before the Court in order to circumvent the language of the speech and debate clause. In *Kilbourn v. Thompson*,[169] for example, the Court held actionable a claim against the House Sergeant at Arms who had arrested the plaintiff pursuant to an unconstitutional order of Congress, though it is difficult to conceive of the Sergeant at Arms defying Congress by refusing to carry out at least a colorably constitutional order.

In the case of suits brought by states alleging unconstitutional inaction on the part of Congress in the amendment process, it may be more difficult to name a congressional employee as a defendant. Unlike *Kilbourn* and *Powell*, where congressional employees performed an act or failed to perform a duty on specific order by Congress, congressional inaction in the amendment process would make it difficult to find participation by a congressional employee in the infringement of constitutional rights. To declare that a congressional employee had acted unconstitutionally in failing to call a convention, where Congress had not

[167] Dombrowski v. Eastland, 387 U.S. 82 (1967) (suit for conspiracy to seize records in violation of fourth amendment held actionable against chief counsel of Senate subcommittee); Kilbourn v. Thompson, 103 U.S. 168 (1881) (suit for false imprisonment held actionable against the House Sergeant at Arms).

The two cases where the Court did apply the speech and debate clause to protect legislators without simultaneously finding legislative employees to serve as defendants can be distinguished. In United States v. Johnson, 383 U.S. 169 (1966), the speech and debate clause prevented a Congressman's speech from being used against him in a criminal trial; therefore the application of the clause did not result in a denial of a remedy to a plaintiff in a civil action. In Tenney v. Brandhove, 341 U.S. 367 (1951), the plaintiff failed to obtain relief against California state legislators for violations of his first amendment rights by prosecution for his refusing to testify before a legislative committee. However, the plaintiff failed to name any legislative employees as defendants. If he had done so, he might have obtained at least declaratory relief.

[168] 395 U.S. at 506 n.26.

[169] 103 U.S. 168 (1881).

authorized him to act or given him any guidelines, is even more absurd than to declare that the Sergeant at Arms in *Powell* had unlawfully withheld salary where guidelines for payment existed but where Congress had refused to appropriate the money.

However, since congressional employees are only nominal defendants, and since only declaratory relief would be afforded, it would not be unreasonable to name as defendants congressional employees who could not have called a convention without authorization and guidelines from Congress. Thus the Administrator of General Services, who is to send proposed amendments to the states for ratification unless Congress disapproves them,[170] might be named as a defendant when Congress' disapproval of the proposed amendment is alleged to be unconstitutional. If Congress refused to call a convention, the Clerk of the House and the Secretary of the Senate could be named as defendants, since they have the obligation to maintain a record of applications received on each subject[171] and presumably to transmit to the states the concurrent resolution calling the convention.[172]

If the Court refused to consider the inaction of these congressional employees to be sufficiently responsible for the violation of the plaintiff-states' right to a constitutional convention, the Court would have the alternative of following its suggestion in *Powell* that absent an agent of Congress against whom relief could be secured, the speech and debate clause might not protect members of Congress. Or, to repeat, the Court might deem the nonlegislative function of Congress in the amendment process to be outside the scope of the clause's protection. It would certainly be odd if the states could not vindicate their constitutional right to have access to the amendment process merely because a defendant could not be found for purposes of awarding declaratory relief.

4. Conclusions Regarding Judicial Review. — Few of the constitutional issues arising out of the alternative amendment process are likely to be treated as nonjusticiable political questions by the Supreme Court. And the Court will not decline to rule on these matters on the ground that Congress has expressly excluded judicial review. Further, in cases where a state is suing due to congressional inaction, the Court will probably find some party against whom declaratory relief can be afforded.

Thus, the constitutionality of congressional action or inaction will probably be reviewed by the Supreme Court, the provisions

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[170] Ervin Bill § 11(c).

[171] *Id.* § 6(a).

[172] The Ervin Bill does not name the person responsible for this action. *See id.* § 6(a).

of the Ervin Bill notwithstanding. And if the Court should decline to review a given determination of Congress, it will do so not because the Ervin Bill bars review, but because the issue is either a political question, falling within a class of issues governed by *Coleman v. Miller*, or is within the constitutional limits of Congress' discretion.

Since the provisions of the Ervin Bill purporting to bar review serve no purpose, and since they could potentially exacerbate the embarrassment caused Congress by the Court's review, it would be advisable to strike them from the bill.

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(University of Michigan Journal of Law Reform, Fall 1973)

ARTICLE V: CHANGING DIMENSIONS IN CONSTITUTIONAL CHANGE

Francis H. Heller*

To anyone raised under the Constitution of the United States, that document's declaration that it is "the supreme law of the land"[1] may appear as a commonplace assertion. In some other nations the constitution is not viewed as law, but is seen as a primarily political document.[2] In fact, some foreign constitutions are formally proclaimed to be "political constitutions."[3] The writers of the American Constitution were well aware that they were engaged in fashioning an arrangement for the exercise of *political* functions and the peaceful adjustment of *political* conflict.[4] And, however much validity there continues to be to de Tocqueville's famous dictum that in America every issue of policy is translated into constitutional terms and debated as a legal issue,[5] it is also a historical fact that, by long-standing precedent of the Supreme Court, some issues arising under the Constitution are candidly designated "political questions,"[6] while others are often avoided by the selective application of judicially developed rules of caution.[7]

A constitution, viewed as a political document, is a framework

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[1] U.S. CONST. art. VI.

[2] C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY, ch. 9 (4th ed. 1968).

[3] *See, e.g.*, POLITICAL CONST. OF COLUMBIA, Preamble (1886). *See also* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flantz eds. 1971), a comprehensive loose-leaf collection of current constitutional texts.

[4] THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *passim* (rev. ed. M. Farrand 1937); Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 815 (1961), also in J. ROCHE, SHADOW AND SUBSTANCE 91-126 (1964).

[5] 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (H. Reeve transl. 1898). Note also Corwin's observation that "[m]any other countries have . . . constitutions, but 'the constitutional lawyer' is a unique product of our system. . . ." E. CORWIN, THE TWILIGHT OF THE SUPREME COURT xxii (1934).

[6] Baker v. Carr, 369 U.S. 186, 210-27 (1962); Luther v. Borden, 48 U.S. (7 How.) 1 (1849). Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

[7] Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). A. BICKEL, THE LEAST DANGEROUS BRANCH 119-27 (1962); Corwin, *Judicial Review in Action*, 74 U. PA. L. REV. 639, 642-51 (1926).

for the exercise of power in the polity. Legal rules, by contrast, purport to determine the broad range of societal relationships.[8] When a constitution is treated as just another form of law, there results an ambiguity of thought that tends to overshadow significant functional differences.

What is properly a subject for inclusion in a constitution? Even the most superficial perusal of the *Index Digest of State Constitutions*[9] reveals a bewildering array of topics, from Advertising to Zoning, which one would find difficult to characterize as directly related to the exercise of governmental powers. Many of these topics have come to be included as constitutional provisions because the process of constitutional change in the respective states made it relatively easy to clothe what would otherwise be statutory matters with the aura of constitutional dignity. Some state constitutions are clearly too easy to amend;[10] elsewhere, the process is so resistant to change that recourse has been sought in the federal courts.[11]

How easy (or how difficult) should it be to amend a constitution? John Locke, in the fashion of his time, proclaimed that the "fundamental laws" he had drafted for the government of Carolina should "be and remain the sacred and unalterable form and rule of government . . . forever."[12] William Penn, by contrast, had observed in the preface to his Frame of Government of Pennsylvania that he did not "find a model in the world, that time, place, and some singular emergences have not necessarily altered" and then proceeded to provide a method of amendment by a qualified majority.[13] But Penn acknowledged differences even within a frame of government. The Charter of Privileges which he approved in 1701 declares that

> because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences . . . I do hereby solemnly declare, promise and grant, for me, my Heirs and Assigns, That the first Article of this Charter relating to

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[8] *See generally* H. HART, THE CONCEPT OF LAW (1961) and J. STONE, THE PROVINCE AND FUNCTION OF LAW (1946).

[9] INDEX DIGEST OF STATE CONSTITUTIONS (2d ed. R. Edwards 1959).

[10] Prior to 1971, California had amended its constitution 375 times; South Carolina, 398 times; Louisiana, 496 times; and Georgia, 691 times. 19 BOOK OF THE STATES 1972–73, at 21 (1972).

[11] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[12] 1 Z. CHAFEE, DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 146, 153 (paperback ed. 1963); Cahn, *An American Contribution*, in SUPREME COURT AND SUPREME LAW 1, 6 (E. Cahn ed. 1954).

[13] 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1518–20 (2d ed. B. Poore 1878), quoted by Cahn, *supra* note 12, at 9–10.

> Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without an Alteration, inviolably for ever.[14]

Liberty of conscience was to be permanently enshrined because it was essential to "the happiness of mankind." Natural law principles were widely accepted in the decades preceding the American Declaration of Independence.[15] Since the principles were considered to be immutable (and "inalienable"), the written constitution which embodied them—or to the extent that it embodied them—also acquired the character of immutability.[16] Thus the language of the Articles of Confederation ("and Perpetual Union") was entirely in keeping with the spirit of the times in its assumptions that nothing in the Articles would need change, and that certainly nothing should be changed except by unanimous consent of all the member states.[17]

A number of the framers apparently maintained the view that there was no need to provide machinery for constitutional change. The Virginia Plan had called for the inclusion of an amendment provision in the new instrument of governance, but, when the matter came up in the Committee of the Whole, a majority voted to postpone its consideration.[18] When the matter was brought up again, "several members," so James Madison recorded, "did not see the necessity of the resolution at all."[19] But George Mason, supported by Edmund Randolph, reminded the delegates that they were in Philadelphia precisely because the Articles of Confederation had been found wanting and it stood to reason that the new document would also have defects. "Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular and constitutional way than to trust to chance and violence."[20] The argument must have been persuasive: there were no negative votes as the proposition to provide for orderly amend-

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[14] 1 Z. CHAFEE, *supra* note 12, at 166.

[15] R. POUND, THE FORMATIVE PERIOD OF AMERICAN LAW, ch. 1 (1938); Cohen, *A Critical Sketch of Legal Philosophy in America*, in 2 LAW: A CENTURY OF PROGRESS 266, 269–80 (A. Reppy ed. 1937).

[16] Cahn, *supra* note 12, at 8.

[17] NATIONAL ARCHIVES AND RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION, THE FORMATION OF THE UNION 37 (1970).

[18] A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 685–86 (1941). This is a most convenient rearrangement by topics of Madison's notes. The most comprehensive documentation of the proceedings of the Philadelphia Convention is THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. M. Farrand 1937); Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME LAWYER 46 (1950).

[19] A. PRESCOTT, *supra* note 18, at 685.

[20] *Id.* at 686.

ment was approved, first in the Committee of the Whole and then by the Convention.[21]

The debate that followed the report of the Committee on Detail is significant because, if one believes Madison's notes, the Convention never returned to the issue of immutability versus flexibility. The focus was entirely on the role the states should play in future changes of the Constitution. The proviso accepting equal representation in the Senate was added to quiet the fears of the small states, as was the alternative method for proposing amendments by the states through a convention.[22] The late Professor Edmond Cahn speculated that

> the statesmen of 1787 would be astonished to learn that at this remote date the Constitution remains in force at all. . . . Could we consult them today, I think the framers would inquire why we have not exercised the power of amendment more frequently and more extensively.[23]

Indeed, one recent author has described the formal amendment process as "comatose."[24] One would assume that the adjective is used in a very loose sense; the definition of "coma" is "a state of deep unconsciousness caused by disease, injury, or poison."[25] While one may validly assert that article V has not been overworked, it is arguable whether this relative inaction can be attributed to factors so deleterious as to be compared to "disease, injury, or poison."

How inactive the amending process has been, can perhaps easiest be shown in tabular form.

CONSTITUTIONAL AMENDMENTS
BY DECADE
1790–PRESENT

Ten Year Period	*Number of Amendments*
1790-1800	11
1800-1810	1
1810-1820	—
1820-1830	—
1830-1840	—
1840-1850	—
1850-1860	—
1860-1870	3

[21] *Id.*
[22] *Id.* at 688–91.
[23] Cahn, *supra* note 12, at 10–11; Bates, *Foreword* to L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION at vii-viii (1942).
[24] Dixon, *Article V: The Comatose Article of our Living Constitution*, 66 MICH. L. REV. 931 (1968).
[25] THE NEW MERRIAM-WEBSTER POCKET DICTIONARY 97 (1971).

Ten Year Period	*Number of Amendments*
1870-1880	–
1880-1890	–
1890-1900	–
1900-1910	–
1910-1920	3
1920-1930	–
1930-1940	1
1940-1950	1
1950-1960	1
1960-1970	3
1970-	1

If one accepts the propositions that the first ten amendments are really part of the initial constitution-writing effort and amendments eleven and twelve correct technical deficiencies of the original document,[26] then this tabular presentation suggests not that the amendment process is dormant (perhaps a better word than comatose), but that it appears to have shown more life in the last twenty-five years than at any other time in the nation's history.

It must also be asked whether this numerical showing reflects qualitative significance. Have the really important changes been accomplished by the article V amendment process or have they come about by judicial review? It would be idle to argue the point: the landmark decisions of the Supreme Court have done more to adapt the nation to change than has any amendment.[27]

Is there, then, something in the amending process that saps it of its potential vitality? Why have we not used it more extensively in the past? As a corollary, why, in recent decades, has there been so much interest in the convention method of constitutional amendment?

If one compares the amending process in the United States with provisions for constitutional change in other countries having a federal system of government,[28] it is evident that the process in the United States is more complex and potentially more time-consuming than it is elsewhere. Indeed, ours is the only constitution to involve the legislative bodies of the states constituting the Union in this process.[29] In some otherwise ostensibly federal

[26] Dixon, *supra* note 24, at 931-32.

[27] A SUTHERLAND, CONSTITUTIONALISM IN AMERICA 203 (1965); Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 917 (1968).

[28] McWhinney, *Amendment of the Constitution*, in STUDIES IN FEDERALISM 790-815 (1954). *See also* W. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE (1956).

[29] McWhinney, *supra* note 28, at 792.

constitutions (Austria, New Zealand, the Soviet Union, West Germany), there is no provision involving the component units in the amending process.[30]

This comparison, however, also reveals that formal arrangements that are very similar in kind may produce entirely different results. Australia and Switzerland employ amending procedures that are quite similar. The federal legislature proposes an amendment which is then submitted to popular referendum; to become a part of the constitution, the amendment must be approved by a majority of all those voting, and also by a majority of those voting in a majority of states (cantons in Switzerland).[31] In a comparable fifty-year period (1901–51), Australian voters approved only four out of twenty-four submitted proposals, while the Swiss record was twenty-six adopted out of thirty-one submitted.[32] Similarly, the Mexican Constitution's amending provisions are almost identical to those of the United States; yet, the politcal dominance of one party has produced results in Mexico that are starkly different from those in this country.[33]

What this detour into comparative government demonstrates is that results cannot be related to form. If the formal amending process has been used relatively infrequently in the United States, the reason cannot be found in the nature of the process.

Nevertheless, the advocates urging the adoption of the American Constitution used the availability of an amending process as an effective argument in the fight for ratification:

> [W]hat a virtue [the framers] . . . made of it! It became one of the standard arguments in the campaign for ratification, a big gun which was reserved for use after every other debating weapon had failed to repel the opposition, then wheeled systematically into place, loaded with the ammunition of ostensible reasonableness, and discharged point-blank in the adversary's face—to his discomfort at least, often to his devastation. Does this or that provision in the draft seem unwise? Does the gentleman persist in his objection? Very well, since

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[30] W. LIVINGSTON, *supra* note 28, at 301. In the Federal Republic of Germany, however, the upper house (Bundesrat) consists of officials of the Länder (state) governments, so that state views are reflected in that portion of the federal legislative machinery.

[31] AUSTRALIA CONST. ch. 8, § 128 (1901); SWITZERLAND CONST. arts. 118–23 (1874, *amended* 1891).

[32] W. LIVINGSTON, *supra* note 28, at 118, 185–87. The figures for Switzerland do not include proposals submitted by popular initiative. There were thirty-six such proposals, of which six were adopted. In addition, seven propositions advanced as counter-proposals to initiative proposals received the requisite number of votes. Altogether, therefore, the Swiss Constitution was amended thirty-nine times in fifty years—or, roughly ten times as often as the Australian Constitution.

[33] W. LIVINGSTON, *supra* note 28, at 303. *See also* R. SCOTT, MEXICAN GOVERNMENT IN TRANSITION ch. 3 (1959).

> the times do not admit of delay, let us proceed to ratify in haste, then we can go about amending at leisure.[34]

And amend they did—no less than a dozen times in the first fifteen years. Alexander Hamilton[35] and his allies appeared to be sound prognosticators. Then, for sixty-two years, nothing.

Was there no change for sixty-two years? Obviously, anyone familiar with the history of the Constitution knows the answer. It is embodied in *McCulloch v. Maryland*,[36] *Trustees of Dartmouth College v. Woodward*,[37] *Cohens v. Virginia*,[38] *Gibbons v. Ogden*,[39] to name but a few, none thinkable without *Marbury v. Madison*.[40]

There is a brief passage in *Marbury v. Madison* that deserves to be brought into this discussion. Here are Chief Justice Marshall's words:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; *nor can it, nor ought it to be frequently repeated.*[41]

Certainly, the great Chief Justice did not accept Thomas Jefferson's oft-quoted proposition that every generation needed to establish its own claim to the fruits of liberty.[42] Marshall's language clearly implies that there should be a renewal of the constituent act—just not too frequently. But, if one accepts Marshall's dictum, how often would be too frequently?

There are numerous scholars who believe that the Civil War wrought a transformation of American political life of major significance, in that, for all practical purposes, it converted a confederacy into a true union.[43] Under this view, the Civil War

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[34] Cahn, *supra* note 12, at 11.

[35] THE FEDERALIST No. 85, at 607 (H. Dawson ed. 1863).

[36] 17 U.S. (4 Wheat.) 316 (1819) (prohibiting the states from taxing the Bank of the United States).

[37] 17 U.S. (4 Wheat.) 518 (1819) (barring the states from impairing contractual obligations by amending legislatively granted corporate charters).

[38] 19 U.S. (6 Wheat.) 264 (1821) (sustaining the Court's appellate jurisdiction to review state criminal proceedings).

[39] 22 U.S. (9 Wheat.) 1 (1824) (upholding the plenary power of the federal government to regulate interstate commerce).

[40] 5 U.S. (1 Cranch) 137 (1803).

[41] *Id.* at 176 (emphasis added).

[42] "The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's [*sic*] natural manure." Letter from Thomas Jefferson to W.S. Smith, November 13, 1787, in 4 THE WRITINGS OF THOMAS JEFFERSON 465, 467 (P. Ford ed. 1894).

[43] *E.g.*, A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 407 (4th ed. 1970).

amendments to the Constitution were the formal manifestation of this change. Thus, to borrow Marshall's phrase, the second "great exertion" came roughly seventy years after the first one.

Another seventy years later, the nation again faced the question of whether the Constitution was adequate to the needs of the day.[44] The crisis involved the Court's failure to sustain measures designed to allow government regulation of private economic relationships. A first attempt to change the Constitution by the process of formal amendment failed to produce timely results.[45] The constitutional crisis of 1937[46] did not produce the violence of the crisis of 1861, but one may well say that, constitutionally, it was a "great exertion" indeed. The resolution, however, came by judicial fiat rather than constitutional amendment.[47]

But suppose the "switch in time"[48] had not occurred? One cannot speculate on either the time required or the bloodshed engendered, but it stands to reason that the changes now reposing in the pages of 301 U.S. (and later volumes) would have come about constitutionally. Amendments twenty-two to twenty-six might have dealt with social security, labor relations, minimum wages, and agricultural adjustment.

Thus, in 1937, the Court saved the nation from the full force of a "great exertion" of constitutional reform. But the incremental nature of judicial review rarely has the impact, symbolic or otherwise, of an actual constitutional enactment. In addition, in the decades since the turn of the century, the almost unqualified veneration of the Constitution that was so characteristic of the late nineteenth century[49] had given way to an increasing realization of the role of judicial temperament, initiative and judgment.[50]

Typical of this shift was the change in the personal perspective of Charles Evans Hughes.

> Charles Evans Hughes, who in earlier years had been made to writhe by misuse of his statement torn out of context that

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[44] E. CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934); J. SMITH, STUDIES IN THE ADEQUACY OF THE CONSTITUTION (1939).

[46] The Child Labor Amendment had been proposed by Congress in 1924 (43 Stat. 670), but failed to receive the necessary number of ratifications. *See also* Coleman v. Miller, 307 U.S. 433 (1939).

[46] *See* J. ALSOP & T. CATLEDGE, THE 168 DAYS (1938); L. BAKER, BACK TO BACK: THE DUEL BETWEEN F.D.R. AND THE SUPREME COURT (1967).

[47] E. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 64–79, 95–115 (1941).

[48] The phrase is Joseph Alsop's. J. ALSOP & T. CATLEDGE, *supra* note 46, at 135.

[49] "The divine right of kings never ran a more prosperous course than did [the] unquestioned prerogative of the Constitution to receive universal homage." W. WILSON, CONGRESSIONAL GOVERNMENT 4 (1885).

[50] E. ROSTOW, THE SOVEREIGN PREROGATIVE 23–44 (1962); W. RUMBLE, AMERICAN LEGAL REALISM 214 *passim* (1968); Miller, *Some Pervasive Myths about the United States Supreme Court*, 10 ST. LOUIS U.L.J. 153 (1965).

> "the Constitution is what the judges say it is," was more careful in his phrasing in a book published in 1928, but he did say there that since the Supreme Court's appellate power was determined by Congress, a body representing the people, it was the will of the people that sustained and made effective the extraordinary power of the Court. He seemed to be saying, indeed, that although Congress and the people were governed by decisions of the Court in matters of constitutional interpretation, the will of the people in the long run determined what the Court said about the content of the Constitution. The spread of such sentiments and the promotion of more realistic understanding of the Constitution and of the Court which defined its meaning may have incidentally jeopardized the hitherto prevailing reverence for the Constitution and for the Court as its interpreter.[51]

The nineteenth century witnessed limited use of the formal constitutional amendment process because (1) the Constitution was held in high reverence, and (2) much of what needed changing was accomplished by Court interpretation. On the other hand, the twentieth century sees increased recourse to the formal amending procedure because (1) realist perspectives have stripped the Constitution of its aura of superiority, and (2) Court interpretations either have failed to meet societal needs (as in the thirties), or have served to create new or to aggravate existing social tensions.

Moving Congress to the point where two-thirds of the members of each of the two houses[52] will agree to propose an amendment is, however, a task of no mean dimensions. The alternative article V amendment process, getting thirty-four state legislatures to agree to petition Congress to call a constitutional convention, might appear to involve even greater difficulties, but experience suggests otherwise. State legislatures rather notoriously spend little time on amendments which they are called upon to ratify,[53] and studies of interest group activities indicate that resistance to pressure and influence is considerably less pronounced at the state level than it is at the national level.[54] The convention process of article V thus loomed increasingly attractive.

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[51] Swisher & Nelson, *In Convention Assembled*, 13 VILL. L. REV. 711, 715-16 (1968) (footnotes omitted).

[52] This does not mean that two-thirds of the total membership must vote approval. The amendments of 1789 were submitted by two-thirds of the members *present*. The Supreme Court specifically sustained this practice in The National Prohibition Cases, 253 U.S. 350, 386 (1920). *See* L. ORFIELD, *supra* note 23, at 49-50; Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAWYER 185, 190-91 (1951).

[53] *See* D. MORGAN, CONGRESS AND THE CONSTITUTION 243-45 (1966) for two illustrations.

[54] H. ZEIGLER, INTEREST GROUPS IN AMERICAN SOCIETY ch. II (1964).

The language of article V[55] leaves a number of questions unanswered. A literal interpretation would lead to the conclusion that whenever the number of applications received from the states equaled two-thirds of the number of states then in the Union, the condition of article V has been met and a convention should be called. Conceivably, this situation may have occurred at some time in the nineteenth century; a reliable count of state resolutions requesting a convention is not available.[56] The first concerted effort to produce constitutional change through the article V convention-amendment process occurred between 1901 and 1909, when twenty-six states asked for an amendment to bring about the popular election of United States Senators.[57] Simultaneously, momentum gained for an amendment to make polygamy a federal offense. Between 1906 and 1911, twelve states petitioned Congress to call a convention to consider the proposed anti-polygamy amendment. Eight of these states had also joined in the campaign for the popular election of Senators.[58] Since, at the time, the critical number of states needed was thirty-one, the unduplicated number of petitioning states was short by one, and the question of sufficiency, despite disparity of subject, did not arise.

Almost as soon as the eighteenth amendment had become a part of the Constitution, agitation began at the state level to seek its repeal by the convention method.[59] Wayne B. Wheeler, the General Counsel of the Anti-Saloon League of America, argued that Congress had rejected the "mandatory" construction of article V, a construction which maintained that once two-thirds of the states had asked for a convention, the role of Congress in calling the convention was purely ministerial. Wheeler took the position that there had been a sufficient number of state petitions during a period in which no less than seven Congresses had been sitting. Congress had been given seven opportunities to act and

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[55] Article V of the Constitution reads in part:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

U.S. CONST. art V.

[56] L. ORFIELD, *supra* note 23, at 42. Senator Ervin counted 304 applications between the years 1789 and 1971, but conceded that an accurate count was not possible. 117 CONG. REC. 36754 (1971).

[57] L. ORFIELD, *supra* note 23, at 43; Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 786–87 (1927).

[58] Wheeler, *supra* note 57, at 787–88.

[59] *Id.* at 782, 788–89.

had failed to do so. The conclusion Wheeler drew from this congressional inaction was that there was no way to activate the convention method without Congress wanting to do so.[60]

The theory that congressional calling of a convention was a ministerial function appeared to be supported by the weight of authority at the time. W.W. Willoughby's magisterial treatise noted that "the act thus required of Congress . . . is stated in imperative form by the Constitution."[61] A later writer asserts unequivocally that "all writers on the subject are in agreement on the point that, when a sufficient demand is made, it is mandatory upon Congress to call a convention."[62]

Wheeler, in his concern for the preservation of the eighteenth amendment, was primarily interested in demonstrating why, in spite of the imperative language of the Constitution, Congress should *not* act. Frank Packard, a strong partisan of the proposed constitutional limitation of the income tax rate, was concerned with how Congress could be *made* to act. Noting that state courts had issued writs of mandamus against legislative bodies[63] and that the Supreme Court had mandamused the legislature of West Virginia,[64] Packard concluded that mandamus would be available to compel Congress to call a convention. Somewhat naively, he added that

> [w]hether the writ would be obeyed, or whether the claim might be advanced that one department of the federal government is powerless to assert its authority over another and co-ordinate branch of the same government, are questions which could not be answered at this time and *may, for that matter, never arise.*[65]

In view of the fact that *Coleman v. Miller*[66] had been decided thirteen years earlier, Packard's position is difficult to justify. In *Coleman*, four justices had urged that the amending process

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[60] *Id.* at 790, 802.

[61] 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 597 (1929). Willoughby cited Justice Story's opinion in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–33 (1816), as authority for the proposition that when the word "shall" is used in the Constitution, a mandatory duty is imposed. Curiously enough, Willoughby ignored Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), which held that "it shall be the duty" was not a mandate or imperative, but only imposed a moral obligation.

[62] Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI.-KENT L. REV. 128, 134 (1952).

[63] *Id.* at 135, citing State v. Town Council, 18 R.I. 258, 27 A. 599 (1893).

[64] *Id.* at 135, citing Virginia v. West Virginia, 246 U.S. 565 (1918). *See also* Heller, *The Supreme Court: Its Role in the Balance of the Federal System*, 6 J. PUB. L. 319, 326–27 (1957).

[65] Packard, *supra* note 62, at 137 (emphasis added). In the same vein is Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837, 871 (1968).

[66] 307 U.S. 433 (1939).

should not be "subject to judicial guidance, control or interference at any point."[67] Three other members of the Court (including Chief Justice Hughes) agreed that the key issue of "the efficacy of ratification by state legislatures, in the light of previous rejection or attempted withdrawal" should be treated as a "political question," but they were not prepared to negate all judicial competence to review the amending process.[68] By shying away from the all-inclusive position taken by the concurring justices, Justices Hughes, Stone, and Reed avoided the necessity of overturning the precedent of *Dillon v. Gloss*,[69] in which the Court had entertained—and affirmatively answered—the question of Congress' authority to set a seven-year limit on the time allowed to states to ratify a proposed amendment.

Lester Orfield summarized the state of the law after *Coleman:*

> If the Supreme Court is not ready to apply the doctrine of political questions to all phases of the amending process, as four members of the Court wish, it will apply it to some phases of the amending process and *what such phases are remains largely uncertain.*[70]

Coleman v. Miller was decided thirty-four years ago. There has been no decision[71] of the Supreme Court interpreting article V in the years since, although five amendments have been added to the Constitution (and a sixth one has been proposed by Congress and is currently awaiting ratification by the requisite number of states). The uncertainties bequeathed by *Coleman* are still with us.

Indeed, given the lapse of time, it could be argued that *Coleman* itself is of doubtful value as a precedent. Of the justices who participated in *Coleman*, only one—Justice Douglas—is still on the Court. Justice Douglas was one of the four justices who would have favored a complete "hands-off" position, contending that all questions arising from the amending process belonged in the category of "political questions."

In *Baker v. Carr*,[72] Justice Brennan, writing for a six-member majority of the Court, quoted *Coleman's* language that

> [I]n determining whether a question falls within [the political question] category, the appropriateness under our system of

[67] *Id.* at 459 (concurring opinion).
[68] *Id.* at 450.
[69] 256 U.S. 368 (1921).
[70] L. ORFIELD, *supra* note 23, at 36 (emphasis added).
[71] Chandler v. Wise, 307 U.S. 474 (1939), while appearing in the reports after Coleman v. Miller, was decided on the same day.
[72] 369 U.S. 186 (1962).

> government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.[73]

In the subsequent discussion of representative cases, Justice Brennan carefully described the *Coleman* holding in the limited terminology of Chief Justice Hughes.[74] Justice Douglas' concurring opinion explicitly avoided the discussion of the doctrine of political questions,[75] while Justice Frankfurter, in dissent, quoted the last part of the same sentence by Hughes that Brennan had used.[76]

Chester Antieau, in his treatise on constitutional law, asserts that "whether amendments to the Federal Constitution have been properly ratified is a political question."[77] In light of the carefully limited description of the *Coleman* holding in the *Baker* opinion, it would appear that Orfield[78] was more accurate in stressing the remaining areas of uncertainty.

Past decisions, to be sure, have answered a number of questions relating to the amending process.[79] The Court has ruled that the *content* of an amendment to the Constitution cannot be challenged and that an explicit finding of necessity is not required.[80] Early in the nation's history presidential approval of a proposal adopted by Congress was held not required by the language of article V.[81] In *Dillon v. Gloss*,[82] the Court suggested that proposals, which had been pending so long as to be out-of-date, might have lost their force and held that, by reasonable extension, Congress could provide for a time limit for ratification.

The Court has further held that Congress has complete freedom of choice between the two modes of ratification provided by article V;[83] that if Congress elects ratification by legislatures, the states may not substitute a popular referendum or make legislative ratification subject to voter approval by referendum;[84] and that an amendment becomes an operative part of the Constitution on the

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[73] *Id.* at 210.
[74] *Id.* at 214.
[75] *Id.* at 242–43 (Douglas, J., concurring).
[76] *Id.* at 283 (Frankfurter, J., dissenting).
[77] 2 C. ANTIEAU, MODERN CONSTITUTIONAL LAW 672 (1969), citing Coleman v. Miller, 307 U.S. 433 (1939).
[78] *See* note 68 and accompanying text *supra*.
[79] L. ORFIELD, *supra* note 23, at 8–126. *See also* Corwin & Ramsey, *supra* note 52.
[80] National Prohibition Cases, 253 U.S. 350 (1920).
[81] Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).
[82] 256 U.S. 368 (1921). All amendments proposed since that time have carried a seven-year time limitation within which ratification must occur.
[83] United States v. Sprague, 282 U.S. 716 (1931).
[84] Leser v. Garnett, 258 U.S. 130 (1922); Hawke v. Smith, 253 U.S. 221 (1920).

day on which a sufficient number of states have in fact ratified it, rather than on the date of the proclamation of ratification by the Secretary of State.[85]

But a number of questions remain unanswered. Without pretending to be exhaustive, these questions may be listed as follows:

> 1. May Congress on its own initiative call a convention to amend or revise the Constitution?
> 2. If a convention is called, whether in response to state petitions or not, is Congress at liberty to determine its composition and procedures?
> 3. If a convention is called, may Congress limit it to a specific proposal or topic?
> 4. If Congress has transmitted a proposed amendment to the states and the ratification process has not been completed, may Congress withdraw the proposal?
> 5. If a state has acted to ratify a proposed amendment, may it recall that action in favor of rejection?
> 6. If a state acts on ratification, must its action be in accord with its own legislative procedures or may Congress prescribe procedures for this purpose?[86]

The call for "a new Constitution" is heard with some regularity, usually from academic quarters.[87] These proposals rarely have aroused much response. Yet the time may come when political forces consider the time ripe for such a move. A restrictive interpretation of article V might suggest that Congress must await receipt of petitions from thirty-four states before it can call a convention. The better view seems to be that of Corwin and Ramsey:

> [I]f we assume that the machinery which is prescribed in Article V for amending the Constitution is a particular organization of the inherent power of the people of the United States to determine their political institutions, then it would seem that Congress' obligation to call a convention upon the application of the legislatures of two-thirds of the States was not thought to exhaust its power in this respect, but was

[85] Dillon v. Gloss, 256 U.S. 368, 376 (1921). The role of the Secretary of State in the amending process derives from an Act of Congress, Act of April 20, 1818, ch. 80, § 4, 3 Stat. 439. It was transferred to the Administrator of General Services by 1 U.S.C. § 106b (1970) (originally enacted as Act of Oct. 31, 1951, Pub. L. No. 248, § 106b, 65 Stat. 710).

[86] This list draws on Corwin & Ramsey, *supra* note 52, and Gilliam, *Constitutional Conventions: Precedents, Problems, and Proposals*, 16 ST. LOUIS U.L.J. 46 (1971).

[87] *E.g.*, BALDWIN, REFRAMING THE CONSTITUTION (1972); W. ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM (1935); W. MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA (1921); R. TUGWELL, A MODEL FOR A NEW CONSTITUTION FOR A UNITED REPUBLIC OF AMERICA (1970).

> intended merely to specify a contingency in which it would be under the moral necessity of exercising it.[88]

If a convention embodies "the inherent power of the people of the United States," may its powers be restricted? John Jameson, whose treatise long served as the principal authority on constitutional conventions, maintained that a convention could be restricted to a limited mandate.[89] Dodd and Hoar, writing two generations later, took the view that a convention was bound by the existing constitution but could not be limited by the legislature.[90] The case against limitation was perhaps most clearly stated by Gooch:

> [N]o legal limitation can exist upon the legally defined method of amending a constitution. The proposition is well recognized by serious students of jurisprudence. Denial of the proposition involves a contradiction in terms. In civilized states that are subject to law, the highest law is the constitution. Legal power to amend the constitution is the highest form of authority to make law. For any legal limitation on this power to exist, the limitation would have to be contained in and defined by a higher form of law. But since the Constitution is the highest form of law, this is an impossibility.[91]

Conceptually, this position would seem unassailable. In practice, however, the weight of decisions has been the other way.[92] The decisions are, however, those of *state* courts dealing with *state* conventions in the light of *state* constitutions. The works of Jameson, Dodd, and Hoar likewise all deal with conventions at the state level. It is at least arguable that, because of the federal aspects involved, a national convention differs sufficiently from state conventions that state decisions need not necessarily control. Therefore, generalizations based on state decisions are not necessarily applicable.

Senator Sam Ervin, who is the author of legislation intended to implement the convention method,[93] has stated that the argument

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[88] Corwin & Ramsey, *supra* note 52, at 196.

[89] J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWER, AND MODES OF PROCEEDINGS (4th ed. 1887).

[90] W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 73, 77-80 (1910); R. HOAR, CONSTITUTIONAL CONVENTIONS 91 (1917).

[91] Gooch, *The Recent Limited Constitutional Convention in Virginia*, 31 VA. L. REV. 708, 724 (1945), citing W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 103-04 (1924).

[92] *See e.g.*, Staples v. Gilmer, 183 Va. 338, 32 S.E.2d 129 (1944); Frantz v. Autry, 18 Okla. 561, 91 P. 193 (1907).

[93] S. 215, 92d Cong., 1st Sess. (1971); S. 623, 91st Cong., 1st Sess. (1969); S. 2307, 90th Cong., 1st Sess. (1967). These bills, virtually identical in content, would provide procedures for calling a constitutional convention under article V. Sections two through

against a limited convention "can be wrenched from Article V—but only through a mechanical and literal reading of the words of the Article, totally removed from the context of their promulgation and history."[94] The Senator's reading of the historical record persuaded him that the framers "did not appear to anticipate the need for a general revision of the Constitution" and that they expected a "specific amendment or amendments rather than general revision."[95]

It is possible to quarrel with this reading of the record. Far more compelling is the practical argument advanced by the Senator:

> If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the states to call a convention in the absence of a general discontent with the existing constitutional system.[96]

Paul Kauper made the same point with perhaps even greater poignancy:

> [T]he usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the states will be defeated if the states are told that it can be invoked only at the price of subjecting the nation to all the problems, expense, and risks involved in having a wide open constitutional convention.[97]

Thus the limiting language of the Ervin bill,[98] while it is not compelled by legal logic, is clearly more in keeping with practical considerations and political feasibility.

The Ervin bill supplies an equally realistic solution to the question of whether a state may recall its ratifying action:

> SEC. 13 (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it

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five define procedures to be used by the states in making application to Congress for the calling of a constitutional convention. Sections six through ten establish procedures for congressional calling of a convention and regulate the convention's organization and conduct. Section eleven provides that congressional approval of any amendment agreed upon by the convention must occur within ninety days; sections twelve and thirteen deal with the ratification process.

[94] Ervin, *Proposed Legislation to Implement the Convention method of Amending the Constitution*, 66 MICH. L. REV. 875, 881 (1968).

[95] *Id.* at 882.

[96] *Id.* at 883.

[97] Kauper, *supra* note 27, at 912.

[98] The bill originally introduced by Senator Ervin read:

> No convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the conventions.

S. 2307, 90th Cong., 1st Sess. § 10(b) (1967). *See also* Ervin, *supra* note 94, at 900.

ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.[99]

Section 13(b) confirms prior practice and the specific ruling in *Coleman v. Miller*.[100] Section 13(a), on the other hand, breaks new ground but addresses itself to a problem which, subsequent to the drafting and introduction of the Ervin bill, appeared as a concrete issue.[101] Again it would appear that the solution is founded less in consideration of the legal constraints than in the perspective of the practicalities of the political process.

If the action of a state legislature on a proposed amendment to the Constitution of the United States were viewed as an ordinary legislative act, rescission of the amendment would be permissible, essentially as if it were the repeal of a statute. But the established view is that ratification is not a legislative function. When Congress proposes an amendment, its power to do so derives from article V; and when a state legislature acts on the proposal, it does so by virtue of, and in accordance with, article V.[102] The legislature acts in a *constituent* capacity, not a legislative one. It could be asserted that constitution-making, as distinguished from law-making, is an event of unique impression and that the states are called upon to engage in this function but once for each proposal. The logic of this reasoning would, of course, require rejection of the present rule that ratification following rejection is a valid exercise of the state's role under article V.

Even without considering the practical aspects, this "one-chance-only" approach stands on weak foundations. Conceptually, one could argue that a constituent act is an exertion of the will of the people *at one time*. However, article V precludes this by dividing the constituent act into two phases, one of which (the proposal) has to precede the other (the ratification).[103] Once this separation is made, and given further the lack of coincidence in time of state legislative sessions, it seems difficult to maintain that the second phase of the constituent act cannot take place at

[99] S. 215, 92d Cong., 1st Sess. § 13 (1971). *See also* Ervin, *supra* note 94, at 902.

[100] 307 U.S. at 433. *See* note 66 and accompanying text *supra*.

[101] In the spring of 1973, resolutions were introduced in the legislatures of several states seeking rescission of a previous ratification action of the Equal Rights Amendment. Nebraska's legislature acted to rescind. N.Y. Times, Mar. 16, 1973, § 1, at 1, col. 4; N.Y. Times, Mar. 17, 1973, § 1, at 13, col. 3.

[102] Hawke v. Smith, 253 U.S. 221, 229 (1920); Opinion of the Justices, 118 Me. 544, 546–47, 107 A. 673, 674 (1919). *See also* L. ORFIELD, *supra* note 23, at 62–63.

[103] *See* note 55 *supra*.

any time within the period allowed by Congress. Within that period, can the constituent will be required (or expected) to remain constant? The answer would seem to be that, if the constituent will is sovereign, one can hardly forbid it to change.

Permeating the Ervin bill is the assumption, derived from the concurring opinion in *Coleman*, that the amending process is political and properly the exclusive province of Congress. Earlier it was suggested that *Coleman v. Miller* might not be as strong a precedent today as it seemed even two decades ago.[104] The Ervin bill would make this question entirely academic, for it proposes to withdraw the amending process from judicial review altogether.[105] As Paul Kauper observed,

> whether Congress can insulate the questions as thoroughly from judicial review as is proposed in the Ervin bill is not clear, although as a practical matter it may be supposed that the courts will accord Congress a wise discretion both in interpreting the article V language and in administering the legislation designed to implement it.[106]

Since these words were written, the personnel of the Supreme Court has undergone major change, with the newer members displaying a marked tendency to defer to Congress.[107] The Ervin bill's foreclosure of judicial review probably runs less risk of judicial nullification today than it did five years ago.

Meanwhile, activity on the amendment front continues unabated. Applications for a convention to amend the Constitution appear to have become the preferred mode of response by those who dislike a given ruling by the Court.[108] It must be expected that, sooner or later, there will be a congruence of applications compelling a congressional call for a convention. Hopefully, the Ervin bill (or an equivalent) will have prepared for the event.

Once a convention has taken place and the feasibility of this process has been demonstrated, it can be anticipated that the device will be employed with increasing frequency. *Formal* amendment will then assume new importance in the constitutional scheme and in the political life of the nation. Presumably, a

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[104] *See* note 71 and accompanying text *supra*.

[105] S. 2307, 90th Cong., 1st Sess. §§ 3(b), 5(c), 10(b), 15(c) (1967).

[106] Kauper, *supra* note 27, at 908.

[107] Kauper, *A Look at the Burger Court and a Look Back at the Warren Court*, 17 LAW QUADRANGLE NOTES (Univ. of Mich.) 6, 11 *passim* (1973).

[108] In response to Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), twelve State legislatures petitioned Congress, within five months of the decisions, for a convention to amend the Constitution by providing a definition of "person" to include a fetus at any state of development after the moment of conception. POPULATION CRISIS, July-Aug., 1973, at 1.

concomitant consequence would be a decline in the importance of *informal* amendment—and hence in the role of the Supreme Court.

Whether this is or is not desirable is an issue of great dimensions. Involved are such basic propositions as the ability of democratic government to be responsive to the public's needs and wants, and the perennial question of the balance among the three branches of a government based on a separation of powers. These are issues that are quite clearly political to the highest degree. Thus the essence of the American constitutional scheme is, as in other nations, revealed as preeminently political. The change foreseen by the concurring justices in *Coleman*[109] may in fact be imminent and appropriate.

[109] *See* note 67 and accompanying text *supra*.

(The Minnesota Law Review, May 1967)

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The Alternative Amending Clause in Article V: Reflections and Suggestions

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I. INTRODUCTION

Current efforts to amend the Constitution to reverse or modify *Baker v. Carr*[1] and allow state legislatures to apportion themselves on standards other than the Supreme Court's "one man, one vote" standard necessitate a review of the Constitution's amending provisions.[2] Article V of the Constitution provides two methods for proposing constitutional amendments. First, amendments may be proposed by two-thirds of both Houses of Congress. Second, "on the application of the Legislatures of two-thirds of the several states, [Congress] shall call a convention for proposing amendments." Since 1787, the Constitution has been amended twenty-five times. In each case, the amendments were proposed by Congress pursuant to the first alternative.[3] As a result, the appropriate powers and procedures relating to the first alternative are clearly understood.[4]

Given Congress' apparent unwillingness to take the initiative concerning a reapportionment amendment,[5] the question becomes whether Congress will be forced to call a Constitutional Convention under the second alternative. Since the *Baker* decision in 1962, at least thirty-two state legislatures have sent forty-seven separate communications to Congress urging the proposal of a reapportionment amendment.[6] Many of these communications

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1. 369 U.S. 186 (1962). See also Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

2. Perhaps the "Dirksen amendment" best typifies these current efforts. On January 6, 1965, Senator Dirksen and a number of other Republicans proposed that the Constitution be amended "to preserve to the people of each State power to determine the composition of its legislature and the apportionment of the membership thereof." S. J. Res. 2, 89th Cong., 1st Sess. (1965). See also 111 CONG. REC. 166, 235 (daily ed. Jan. 6, 1965) (remarks of Senators Dirksen and Douglas).

3. Dillon v. Gloss, 256 U.S. 368, 373-74 (1921). See also Christian Science Monitor, April 3, 1967, p. 9.

4. See, *e.g.*, Coleman v. Miller, 307 U.S. 433 (1939) (adoption and ratification); Dillon v. Gloss, 256 U.S. 368 (1921) (proposal procedures); Keogh v. Neely, 50 F.2d 685, *cert. denied*, 284 U.S. 583 (1931) (methods).

5. The Dirksen proposal was sent to the Senate Judiciary Committee where it died.

6. Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota,

requested Congress to call for a Constitutional Convention,[7] while others asked Congress to take the initiative as they have with previous amendments.[8] Some states requested both procedures,[9] resulting in uncertainty as to which should control. Even though the requests have not been uniform in substance or form, application by two-thirds or more states would appear to impose a mandatory obligation on Congress to call a Convention under the second alternative. This Article will consider the heretofore unused alternative in article V, the problems involved in its operation, and its proper role in the amending process.

II. GENERAL PRINCIPLES OF THE AMENDING CLAUSE

In general, the scheme of the Constitution's amending procedure is not very complex. Article V provides that amendments may be proposed either by two-thirds of both Houses of Congress or by a Convention called at the request of two-thirds of the states. The method of ratification of the proposed amendments is determined by Congress; ratification may be by three-fourths of the state legislatures or by three-fourths of state conventions.

The President has no power or place in the amending process,[10] and, except to the extent construction of the law is required, neither has the judiciary.[11] The states, with respect to their role in the amending process, may resist any federal interference,[12] except that Congress necessarily dominates before a call is issued and in the designation of the ratification method.[13]

Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Christian Science Monitor, April 3, 1967, p. 9. In addition, California and Rhode Island have expressed some dissatisfaction with the *Baker* result so that, in effect, the required two-thirds of the state legislatures have expressed some form of dissatisfaction with the existing state of the law. However, dissatisfaction must be translated into a constitutional form, which is the question here examined.

7. Alabama, California, Florida, Louisiana, Nevada, North Dakota, Oklahoma, Rhode Island, and Utah.

8. See, *e.g.*, Mississippi, North Carolina, and South Carolina.

9. See, *e.g.*, Alabama, Florida, and North Dakota.

10. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). Neither has the Vice-President, even though he is the President of the Senate. See also Pierce Butler in the United States Senate on November 23, 1803, 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 400 (1911) [hereinafter cited FARRAND, RECORDS].

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

12. The major question implicit here, and throughout this paper, is the extent to which federal law will control the freedom of the states to act under article V.

13. See U.S. CONST. art. V; Coleman v. Miller, 307 U.S. 433 (1939).

Hence, while the federal government may be somewhat bypassed[14] through state application and ratification, the states are always indispensable in the amending process.

III. THE STATE LEGISLATURE'S ROLE

A. The Nature and Composition of an Applying Legislature

The Supreme Court, in *Leser v. Garnett*,[15] held that amendment ratification by the state legislature is "a Federal function derived from the Federal Constitution" and "transcends any limitations sought to be imposed by the people of the state."[16] However, it is generally recognized that the state legislature's composition is the state's own affair, except where a constitutional right may be involved.[17] For example, this view does not

14. This bypassing involves the substantive content of a proposed amendment. Of course, procedures with respect to the call, etc., are initially within the federal jurisdiction. In the political theory of 1787, this procedure would make a nonresponsive federal body subject to the will of the people, although both of the bodies involved are representatives of the same people and should therefore reflect their desires. However, the federal-state type of governmental division, with its states' rights coloration and the fear of a sprawling gargantua, may conceivably also be found here, *e.g.*, congressmen are federal, not local, officers. See Preston v. Edmondson, 263 F. Supp. 370, 372-73 (N.D. Okla. 1967). At the same time, state legislators are local officers. Since ratification is always a local function, and the local bodies are given a means of proposing amendments equal to the federal power, does this indicate a desired ultimate supremacy on the local level?

15. 258 U.S. 130 (1922). *Leser* involved the nineteenth amendment's extension of the vote to women. Two of several objections were: (1) the character of the amendment required a state's affirmative consent (Maryland's legislature had refused to ratify it), which the Court rejected; and (2) several of the state constitutions had specific provisions which rendered inoperative the ratifications by their legislatures, *i.e.*, they were without power to do so. The argument involved the states' bill of rights which allegedly forbade the legislatures "to impair [the people's] right of self-government," and also Tennessee's provision forbidding the legislature to ratify any federal amendment proposed subsequent to their election. Justice Brandeis disposed of this summarily by stating that the Tennessee (and West Virginia) legislatures "had power to adopt the resolutions of ratification" (in effect refusing to go into a fact question that in West Virginia a first vote had rejected the proposal, and the second vote of ratification was unlawful under the state law), and that their "official notice to the Secretary [of State], duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts." *Id.* at 137. *Cf.* Forkosch, Constitutional Law 60-61 (1963).

16. 258 U.S. at 137.

17. *E.g.*, Baker v. Carr, 369 U.S. 186 (1962); Bond v. Floyd, 251 F. Supp. 333 (N.D. Ga.), *rev'd*, 87 S.Ct. 339 (1966) (criticism of government protected by first amendment and not grounds for refusing to seat duly elected representative).

authorize or justify federal intrusion into the bicameral or unicameral[18] nature of the applying legislature. A single-bodied legislature is just as effective for purposes of ratification and, *pari passu*, application for a Constitutional Convention, as is a double body.

However, in light of *Baker v. Carr*[19] and the cases following it, the question might arise whether a particular state legislature, at the time of its application, is a duly elected and valid body for purposes of the second alternative. It is submitted that this issue, subject to the exceptions herein noted, is peculiarly one of state law. Recognizing that a state legislature may now be under a legal obligation to reapportion, it does not follow that the legislature may not act until reapportionment is effectuated, or that if it does act all statutes, resolutions, and "applications" are subject to a later declaration of infirmity.

When the judicial determination of unconstitutional apportionment is subsequent to the questioned legislative action, the formalistic and logical *ab initio* argument[20] is either completely erroneous[21] or must be substantially qualified.[22] A *reductio ad absurdum* argument is possible if ratification and not application is examined. Since the twenty-third amendment was

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18. Presently, Nebraska has a unicameral legislature. NEB. CONST. art. III, § 1.

19. 369 U.S. 186 (1962).

20. See, *e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886), where it was held that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

21. See, *e.g.*, 39 OPS. ATT'Y GEN. 22 (1937), advising the President that the Supreme Court's 1937 overruling of a 1923 decision meant that the congressional statute originally declared unconstitutional is now a valid act because the "statute continues to remain on the statute books" notwithstanding the 1923 declaration of unconstitutionality and may therefore now "be administered in accordance with its terms."

22. In Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940), the court stated:

> The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. . . . [I]t is manifest . . . that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

See also Griffin v. Illinois, 351 U.S. 12, 26 (1956), where Justice Frankfurter concluded that "adjudication is not a mechanical exercise nor does it compel 'either/or' determinations."

finally ratified just one year prior to the *Baker* case, it is likely that the Tennessee legislature was unconstitutionally apportioned at the time. Further, it is reasonable to assume that many other legislatures were malapportioned when they ratified the twenty-third amendment.[23] Yet, is there any serious dispute whether a United States citizen residing in the District of Columbia is able to vote in a Presidential election?

It seems even clearer that when the legislature merely requests a Convention rather than ratifies an amendment, an objection to the application on the basis of unequal apportionment will not be sustained. Moreover, such a contention overlooks political and pragmatic considerations. Subsequent constitutionally apportioned legislatures will be able to recall, rescind, or otherwise void the former applications,[24] for apparently there is no restriction upon rescission as there seemingly is with respect to ratification.[25]

B. The Mechanics of Making an Application

Procedural details relating to the time, place, etc., of legislative sessions in which an application for a Convention call may be made are clearly within the state's discretion.[26] While a legislature may desire a special session for this purpose, it seems that this matter could be handled during a general session. The only real procedural question concerns the vote required to make an application. The answer will depend on the form the application takes and what a particular state's consti-

23. Justice Harlan, dissenting in Gray v. Sanders, 372 U.S. 368 (1963), pointed to "at least 30 state legislatures [which] had been challenged in state and federal courts, and, besides this one, 10 electoral cases of one kind or another are already on this Court's docket." The assumption is that at least one-quarter plus one of the states in 1960-61 were improperly apportioned when the twenty-third amendment was proposed and ratified.

24. At least twenty-six of the thirty-two legislatures which have applied for reconsideration of the *Baker* decision, were malapportioned at the time of application. Twenty of these legislatures have subsequently reapportioned, including Alabama, Nebraska, Maryland, Minnesota, and Tennessee. The reapportioned Maryland legislature in March, 1967, considered rescinding their communication and failed to do so by only one vote. But consider the situation where there is a continuing malapportionment or the reapportioned legislature is still not constitutional and the legislature rescinds. What result?

25. See Coleman v. Miller, 307 U.S. 433 (1939), as discussed in Forkosch, Constitutional Law 92-93 (1963).

26. See, *e.g.*, Coleman v. Miller, 307 U.S. 433 (1939), which holds that the efficacy of the internal rejection-and-then-ratification procedure by a legislature to be a political question.

tution, statutes, or legislative rules require. Presently, some applications can be made when supported by fifty-one per cent of the legislature. Other legislatures, however, cannot apply unless sixty-five per cent of their members favor such action. Arguably, some uniformity should be sought.

Several state constitutions require a referendum before the legislature may apply. This requirement has been held unconstitutional for purposes of amendment ratification,[27] but it need not follow that for purposes of application the same result is required. However, since the constitutional language makes it clear that the legislatures have to make the applications, one may predict that mandatory referenda will be frowned upon. At the same time, if the legislature chooses to adopt a permissive referendum procedure, it seemingly has not violated its constitutional responsibility, for it must still make the ultimate decision to apply.[28]

Perhaps the most important question facing the legislatures applying for a Convention call is the appropriate form for the application. In the past, Congress has received, *inter alia*, "memorials,"[29] "petitions," "resolutions," and "statutes."[30] Are these documents effective? Do they each manifest the same thing in the present context? Historically, the term "application" was adopted in its generic sense, albeit within the framework of existing legal definitions. The Constitution's draftsmen, moreover, did not indicate any desire that a technical construction be

27. In Hawke v. Smith, 253 U.S. 221 (1920), the Court condemned the use of popular referenda during the ratification of the eighteenth and nineteenth amendments. The rationale was that a federal function is involved which "transcends any limitations sought to be imposed by the people of a State." Leser v. Garnett, 258 U.S. 130, 137 (1922).

28. If the referendum is to be binding when discretionarily held, a different problem would be presented, although here again the above conclusion seems applicable. See Hawke v. Smith, 253 U.S. 221 (1920).

29. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1534 (2d ed. unabr. 1934) gives several definitions, one being "a statement of facts, addressed to the government . . . often accompanied with a petition or remonstrance." BLACK, LAW DICTIONARY 1136 (4th ed. 1951) defines it as "a document presented to a legislative body . . . containing a petition . . . ."

30. In late 1964, the annual General Assembly of the States, sponsored by the Council of State Governments, published a model petition which called upon Congress to convene a Constitutional Convention to propose an amendment to permit one house of a state's legislature to be apportioned on a basis other than population. This model, however, has not been uniformly adopted. The model, in part, provided "The Legislatures of the State of ....., pursuant to joint resolution hereby makes Application to the Congress of the United States to call a Convention for proposing amendments to the Constitution of the United States."

given to the term. Since the state executive may not veto the application, because no law is being created,[31] there is no reason why a "joint resolution" should not qualify as a proper application from the state legislature.[32] The result would be analogous to the use of a congressional Joint Resolution in proposing the twenty-first amendment under the first alternative.[33] In any event, the ultimate decision concerning the appropriate form will be made by Congress. While a uniform application form is desirable, any communication substantially manifesting a legislative desire that such a convention be called should suffice.

While consideration has focused thus far on the form of the application, several points concerning the substantive requirements should be noted. The prime question is what the application must say. Clearly, it should express the legislature's desire for a convention and should apply to Congress to call such a body into existence. Further, there appears to be no reason to require that the application be limited to one particular amendment as article V speaks of "amendments."

Finally, the amending clause clearly provides that each application must be made to Congress. There may be, however, some question as to what the term "Congress" means in this context. The Constitution creates "a Congress . . . which shall consist of a Senate and House . . . ."[34] While joint sessions of Con-

31. Smiley v. Holm, 285 U.S. 355 (1932), where a federal census necessitated a loss of representation in the House of Representatives, the legislature reapportioned but the governor vetoed, and the Supreme Court upheld this gubernatorial participation in the lawmaking function, is distinguishable. The Court has refused to uphold a state legislature's concurrent resolution increasing the number of representatives, Koenig v. Flynn, 285 U.S. 375 (1932), or a bill decreasing them, Carroll v. Becker, 285 U.S. 380 (1932), where not submitted to the governor as required by their constitutions.

32. Recognizing that "legislature" has a particular meaning in article I, § 4, clause one of the Constitution, and the Governor may participate therein, it does not necessarily follow that such a construction must be given in all cases. As Chief Justice Hughes wrote:

> The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V . . . . It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view. . . .

Smiley v. Holm, 285 U.S. 355, 365-66 (1932).

33. See Hollingworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

34. U.S. CONST. art. I, § 1.

gress are authorized by the Constitution,[35] delivery to these sessions should not be required. The more realistic procedure would be to recognize the applications as delivered when they are deposited with the presiding officer and the keeper of the records of both Houses.

IV. CONGRESS' ROLE

A. The Appropriate Test for Proper Application

Since Congress determines whether a proper and valid ratification has occurred, arguably it has a similar power with respect to applications. The rationale is that some body must have the power to decide such questions and, with judicial withdrawal or impotence,[36] Congress is the only body external to the individual states capable of making this determination. Bootstrap validity to a state's application cannot be granted, even though congressional power may be exercised unwisely, for in this latter situation the state involved may easily reapply in a correct and valid manner. A hodge-podge of conflicting and even peculiar procedures is thus avoided, as a congressional determination in one instance will provide a precedent for the rest of the states.

In construing applications against the language of article V, the test appears to be whether the document substantially manifests a legislature's desire that a Convention call be made. Given that Congress will be the final arbiter, political rather than legal considerations will be involved. It is opined that when the basic political temper of thirty-four states is evidenced in slightly different fashions, as herein considered, Congress will not be likely to nit-pick the applications. Rather, applications will be given liberal constructions. At the same time, however, where an express limitation or requirement is set forth in such an application, restricting the scope of the Convention's authority, so that the application is inconsistent with the other applications, the Judiciary Committees of both Houses will have no choice but to ignore the document or, preferably, to reject and return it to the state legislature with an adequate explanation.

Another consideration in determining whether a proper application has been made is the timeliness of the application. More particularly, is there any time limitation imposed by Con-

35. U.S. Const. art. II, § 3.

36. *Cf.* Coleman v. Miller, 307 U.S. 433 (1939). The Court held that Congress, not the courts, is the body to determine whether a proper ratification has been made, for the question is "political" rather than "legal."

gress or the Constitution within which the required number of applications must be received? Several recent proposed amendments have required that ratification must occur within seven years to be effective.[37] The child labor amendment, however, contained no such limitation.[38] Thirteen years later, it still had not been ratified. In the interim there had been rejections, refusals to ratify, ratifications, and even some states taking one position and subsequently reversing it. In *Coleman v. Miller*,[39] the Court considered a twelve year lapse of time in the Kansas legislature's ratification.[40] Three Justices reasoned that "in the absence of a limitation by the Congress, the Court can [not] and should [not] decide what is a reasonable period within which ratification may be had . . . [as] the questions they involve are essentially political and not justiciable."[41] Four concurring Justices felt that even this holding was beyond the Court's power for "undivided control of that [amending] process has been given by the [Fifth] Article exclusively and completely to Congress."[42] By analogy, therefore, Congress has complete power to determine the reasonableness of the time within which the required two-thirds of the legislatures must apply and, regardless of its decision, no judicial relief is possible. However, if the ratification period heretofore used for certain proposed amendments is any criterion, there is support for the view that seven years between the first application by a legislature and that of the last could and should be the standard. As with ratification, a seven

37. See the congressional proposals for the eighteenth, twentieth, twenty-first, and twenty-second amendments.

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

39. 307 U.S. 433 (1939).

40. As noted in *Coleman*, the Kansas Legislature had, *inter alia*, rejected the amendment in 1925. Twelve years later the legislature reversed its position and ratified the amendment. *Id.* at 435-36.

41. *Id.* at 452, 454.

42. *Id.* at 459. The two dissenters felt the Court should and could decide that more than a reasonable time had elapsed. They quoted at length from and based their dissent upon Dillon v. Gloss, 256 U.S. 368, 375 (1921), although there a congressional requirement of 7 years for ratification of the eighteenth amendment was met in a year and half. Included in this quotation was:

> [T]here is a fair implication [in article V] that [ratification] must be sufficiently contemporaneous in that number [three-quarters] of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. . . .

Id. at 472. One may therefore conclude that *Dillon v. Gloss* has lost its judicial gloss but, it is suggested, the policy may still be applicable to applications because Congress, and not the judiciary, decides this matter.

year period for application would afford states, whose legislatures do not meet annually, sufficient time to consider the proposal adequately while allowing for local discussion.[43] Yet, such a period would require that the necessary number of legislatures must agree, somewhat contemporaneously, that such a convention is necessary.

B. The Convention Call—Mandatory or Permissive?

Assuming that the required number of state legislatures make proper applications, the question arises whether the term "shall," found in the second alternative, places a mandatory obligation on Congress to issue the convention call. To illustrate the importance of this issue, one need only consider the 1929 communication from the Wisconsin legislature informing Congress that with its own application more than two-thirds of the state legislatures had submitted applications for a Constitutional Convention (although on various subjects), that the constitutional language was mandatory, and that Congress should perform its duty.[44] Congress failed to act or even acknowledge the request. If, in disregard of support for a Constitutional Convention, Congress ignores such applications, and the judiciary refuses to exert jurisdiction because of the political nature of the issues involved, then what value can the alternative have?

Further, "shall" has been interpreted by the judiciary as meaning "may"[45] or "must" depending on the particular context.

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43. Of course these great debates are not a necessity, as the "sleeper" applications—applications passed by one legislature and subsequently reconsidered by the same legislature—seemingly indicate. However, it does seem desirable to allow sufficient time for such discussion.

44. See Martig, *Amending the Constitution—Article Five: The Keystone of the Arch*, 35 Mich. L. Rev. 1253, 1267, 1269, 1270 (1937), where it is stated that since 1789 "at least thirty-six of the states have at one time or another made application to Congress for a convention. . . ." Since the early applications concerned the later-ratified Bill of Rights, these can be subtracted so that between 1833 and 1929 at least 32 requests were made. However, some of these may be time-condemned and, after 1893 eleven of the thirty-three states applying were satisfied when the seventeenth amendment was submitted and ratified.

45. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873) held that "shall" in the context of article IV, § 2, clause 2 is not absolute and is qualified by the requirements of the surrounding states. This decision is surprising because earlier Congress had imposed a mandatory duty upon the governors to deliver up fleeing criminals. 1 Stat. 302 (1793), 18 U.S.C. § 3182. See also Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861) (federal statute imposed nonmandatory obligation on recalcitrant official).

If the former meaning is attributed to the amending provision, it would result in the circumscription of the state legislature's role in amending the Constitution.[46] While the members of Congress are subjected to some political pressure from their constituents, this begs the question and is an unsatisfactory safeguard for such a crucial matter.

The more reasonable construction, in view of the alternatives in article V, is that Congress has a mandatory obligation to call the Convention. Thus, Congress is relegated to a purely intermediate role under the second alternative with no power to consider the wisdom and necessity of a Convention call.

The 1787 Convention debates appear to sustain this construction. Madison's Notes disclose that Morris of Pennsylvania, when the amending article was being discussed just two weeks before the Convention terminated, "suggested that the [national] Legislature should be left at liberty [exclusively][47] to call a convention, whenever they please. The art: was agreed to nem: con: [without contradiction]."[48] To that time the major proposals reaching the Convention limited the institution of the amending process to the state legislatures, with Congress required to follow suit, *i.e.*, it "shall call a Convention for that purpose" when two-thirds of the state legislatures make "application" therefor.[49] Morris wanted to have only Congress "at liberty to call a convention, whenever they please,"[50] and the Pinckney Plan,[51] with

46. This was the fear expressed by Mason on September 17, 1787 when he successfully moved the amendment of the proposed article. This stifling of the people's will could be done, for example, in the Senate by a minority of the members where they constitute a majority of a minimum quorum to transact business or where they engage in a filibuster.

47. Mason gives this account of what transpired:

> Anecdote. the constn as agreed at first was that amendments might be proposed either by Congr. or the legislatures a commee was appointed to digest & redraw. Gov. Morris & King were of the commee. one morng. Gov. M. moved an instrn for certain alterns (not ½ the members yet come in) in a hurry & without understanding it was agreed to. the Commee reported so that Congr. shd have the exclusve. power of proposg. amendmts. G. Mason observd it on the report & opposed it. King denied the constrn. Mason demonstrated it, & asked the Commee by what authority they had varied what had been agreed. G. Morris then impudently got up & said by authority of the convention & produced the blind instruction beforementd. which was unknown by ½ of the house & not till then understood by the other. they then restored it as it stood originally.

3 FARRAND, RECORDS 367-68.

48. 2 FARRAND, RECORDS 466.

49. *Id.* at 467, n.23.

50. See note 48 *supra* and accompanying text. It is susceptible to the intrepretation that "also" may be inserted between "Legislature"

both alternative methods utilized, seemed to have been ignored. However, one week before the delegates terminated their labors both Gerry of Massachusetts and Hamilton of New York contended that the inability of Congress to propose amendments was a defect too great to be permitted,[52] whereupon a motion to reconsider was passed. Madison, seconded by Hamilton, successfully moved a new proposal[53] which modified the desires of Morris slightly. The original major plans and suggestions placed the proposing power exclusively in the hands of the states, (the Virginia Plan specified "that the assent of the National Legislature ought not be required,")[54] so that the states' application required Congress to call an amending convention. Madison and Hamilton wanted to permit only the Congress itself to propose amendments, without any convention, but such proposals were to be made either when both legislative bodies so desired or when the states applied to Congress to propose an amendment. Despite early fears that the Congress may abuse its power,[55] the

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and "should." If this is the intrepretation then Morris, in effect, was adopting a modified version of the Pinckney alternatives. See note 51 *infra*. The text intrepretation is utilized, although even with this alternative intrepretation the same conclusions would result.

51. The Pinckney Plan provided:

> If Two Thirds of the Legislatures of the States apply for the same The Legislature of the United States shall call a Convention for the purpose of amending the Constitution—Or should Congress with the Consent of Two thirds of each house propose to the States amendments to the same—the agreement of Two Thirds of the Legislatures of the States shall be sufficient to make the said amendments Parts of the Constitution.

3 FARRAND, RECORDS 601.

52. 2 FARRAND, RECORDS 557-59.

53. *Ibid.* The Madison proposal was that the Congress "whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments . . . ."

54. 1 FARRAND, RECORDS 22.

55. "13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto." 1 FARRAND, RECORDS 22. For Randolph's additional views on why article V may not be a sufficient protection against the Constitution's imperfections, see his letter to the Speaker of the Virginia House of Delegates on Oct. 10, 1787. 3 FARRAND, RECORDS 126-27.

The first discussion by the Convention (as a Committee of the Whole House) of this proposal discloses that "several members did not see the necessity of the [entire] Resolution at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary." 1 FARRAND, RECORDS 202. Mason urged the necessity of the Resolution. Concerning the role of the federal legislature, he felt:

> It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an

Madison-Hamilton language was retained until the last day of the Convention's labors, but the new and additional fears expressed by Mason and others resulted in the language now found in the Constitution.[56]

It may be remarked that Hamilton, in seconding Madison's proposal, was playing a somewhat foxy game. He did not like the Virginia Plan which expressly placed the amending power out of reach of the federal government, but he did not care (dare?) to make a direct assault upon it. His objections stressed the contention that state amending power would be exercised only to increase the states' powers, whereas the Congress would be the first to perceive and would be most sensitive to the need for amendment on behalf of the new federal Union; therefore, this federal body "ought *also* to be empowered . . . to call a Convention— There could be no danger in giving this power, as the people would finally decide in the case."[57] In other words he would merely add to the pending proposal a second method and body able to call a Convention. Madison's proposal, however, went even beyond Hamilton's desires and the latter, therefore, enthusiastically and quickly seconded it, utilizing Madison's respect and influence amongst the delegates to attain a stronger central government. But, it must be concluded, that when Hamilton's new plan eventually failed, he willingly settled for what still was more than he had suggested. If Congress now could itself propose, without the states, then the states, without the Congress (save for the ministerial call) could have a Convention called for "proposing" new amendments.

This background of conflicting plans, the apparent compromise at the last moment, and the language ultimately adopted, suggests that the draftsmen's intent was that Congress should be able to propose amendments directly and that the states should be able to accomplish the same indirectly. Therefore, unless one does violence to the legislative history, it is clear that

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abuse, may be the fault of the Constitution calling for amendment.

1 FARRAND, RECORDS 203. Randolph "enforced" these arguments, and the final clause, *i.e.*, without the consent of the Congress, was postponed, while the first provision was passed. 1 FARRAND, RECORDS 202-04. Eventually, of course, this final clause was deleted, other changes made, and Congress given independent power to propose.

On June 19th the Committee of the Whole House, by a 7-3 vote of the states, decided not to agree to the Jersey propositions but to report those offered by Mr. Randolph. 1 FARRAND, RECORDS 313.

56. See, *e.g.*, the language of the Pinckney Plan, note 51 *supra*.

57. 2 FARRAND, RECORDS 558 (Emphasis added).

the term "shall" in the present context imposes a mandatory obligation on Congress to call a proposing Convention when two-thirds of the state legislatures properly apply.[58]

Even under the above construction, there is a problem of enforcement should Congress choose to ignore proper and sufficient applications. Arguably, legal recourse is available. The federal judiciary might conceivably take the position that it has jurisdiction to interpret the term "application." It is highly unlikely, however, that the courts would become so involved, let alone attempt to force Congress by a writ of mandamus or otherwise to issue such a call. However, the states may be able to achieve the necessary action by applying political pressure. Were two-thirds of the state legislatures uniformly to move for a Convention, it is politically unrealistic to expect that Congress would ignore the matter. Additionally, personal communications from

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58. Madison's contributions to the Federalist, number forty-three, is the only one of the eighty-five papers that significantly mentions the amending article. In the eighth subdivision only one paragraph is found on this power. The fifth sentence reads: "It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. . . ."

In the First Congress Madison, on May 4, 1789, gave notice "that he intended to bring on the subject of amendments" so as to comply with the (implied) promises to the ratifying conventions that a Bill of Rights would be added to the Constitution. 1 ANNALS 247 (Gales ed. 1834). [This is discussed in greater detail in Forkosch, *Who Are the "People" in the Preamble to the Constitution?*, 51 WEST RES. L. REV. — (1967).] The next day Bland (Va.) presented an application by that state's legislature for amendments, attempting thereby to follow the alternative amending procedures. Objections were made to its consideration until the proper number of states "concurred in similar applications," and Madison also "doubted the propriety of" the procedures:

> until two-thirds of the State Legislatures concurred in such application, and then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature. . . . From . . . [the Fifth (Amending) Article's language] it must appear, that Congress have no deliberative power on this occasion . . . .

Therefore, he suggested the Virginia application be entered on the House minutes and remain on file until the proper number of "similar applications" arrive. The objecting member agreed with these views but the introducing member, Bland, while agreeing that Congress was "obliged to order the convention when" the proper number of legislatures applied, still felt that as the present application contained "a number of reasons why it is necessary to call a convention," these reasons should "be properly weighed" now in a Committee. A few others discussed this briefly and one member suggested the applications be placed in the minutes and wait for others, the original to be deposited in the archives; to this Bland agreed. *Ibid.* at 249-251.

constituents and state legislators should sufficiently motivate any Congressmen interested in re-election. Beyond this, unfortunately, Congress may be free to ignore its obligation if it so chooses. This, perhaps, is the most important defect in the amending provision.

C. The Mechanics of a Convention Call

Assuming that the necessary two-thirds of the states satisfy the above requirements, how does Congress call a Convention? It seems that a Joint Resolution, analogous to the one employed for the ratification of the twenty-first amendment, should be sufficient. Moreover, a simple majority of each House should be able to pass such a resolution, as the two-thirds requirement applies only to the state legislatures' applications. This is proper since Congress' function is procedural, and a majority vote should be sufficient to determine how the call is to be worded.

Further, a congressional "call" implies that Congress will do more than inform the states that the requisite number of applications has been received. The importance of this call must not be overlooked. It becomes the guideline for all procedures up to the time of the Convention and, to an extent, is the jurisdictional support for that body. It is, therefore, essential that the call be drafted with care and foresight. The Congress may, of course, delegate some of the procedural matters to the states as it did with respect to ratification of the twenty-first amendment.[59] In any event, the call should make clear who has the power to establish procedures.

V. THE CONSTITUTIONAL CONVENTION

Assuming that Congress issues a call, it is fairly well established that each state need not affirmatively respond. Historical support for this proposition is found in the 1787 Convention.[60] There Rhode Island refused to participate or even sign the proposed Constitution, and it did not ratify until more than a year after the required ninth state had so done.[61] Simi-

59. *Compare* Lincoln, *Ratification by Conventions*, 18 Mass. L. Q. 287 (1933) (contending for exclusive state power), *with* Comment, *Ratification of Constitutional Amendment by State Conventions*, 2 Geo. Wash. L. Rev. 216 (1934) (contending for congressional power).

60. The Journal of the Convention discloses that "sundry Deputies . . . appeared . . . ." 1 Farrand, Records 1.

61. On May 29, 1790. The required ninth state had ratified on June 21, 1788, followed by Virginia (June 25) and New York (July 26).

larly, not all states have ratified all proposed and adopted amendments. Still others have rescinded prior ratifications.[62] It would, therefore, appear that a state may not only refuse to support the Convention but, judicially, no method exists to compel participation.[63]

A. Selection of Convention Delegates

The amending provision is silent on the method of choosing delegates to the Convention. It seems clear that even if Congress has the authority to designate a method of selection, such decisions should be left to the respective states. It is further submitted that a special election, totally unconnected with any other issues, should be held in each state to select the delegates.[64] Such elections should take place no less than thirty days after the final nomination of delegates so as to allow adequate local discussion. This approach is clearly consistent with the tradition, political theory, and spirit of article V.

The qualifications of the voters in such a special election should present little difficulty. Congress could either establish the necessary requirements or delegate this power to the states. Although the Constitution[65] permits Congress to alter regulations (except as to the places of choosing Senators) adopted by the states for national elections, it has not exercised this power. It would seem unlikely that Congress would now attempt to exercise such powers under the alternative amending clause. And since the voters "in each state shall have the qualifications requisite for [voters] of the most numerous branch of the state legislature," state law may be employed to define these qualifications.[66]

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62. *E.g.*, New Jersey, Ohio, and Oregon later rescinded their ratifications of the fourteenth amendment.

63. While the original jurisdiction of the Supreme Court permits a recusant state to be sued, and procedurally a suit is therefore feasible, the substantive cause of action remains unclear regardless of whether the Court would undertake to pass upon the question. Carried to an extreme, suppose not one or two states so refrained but one more than one-third, so that there would be an insufficiency if two-thirds of the states were required to propose under article V.

64. The importance of the Convention and its work suggest a special election. Where ratifying conventions were used for the twenty-first amendment, the delegates were elected.

65. U.S. Const. art. 1, § 4, cl. 1.

66. U.S. Const. art. 1, § 2, cl. 1; see Brudlove v. Suttles, 302 U.S. 277 (1937); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874). The right to vote is itself a federal constitutional one, United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

The amending provision does not cover expressly or implicitly qualifications and requirements for other delegates to a Constitutional Convention or delegates to a ratifying convention. Thus, a degree of parallel interpretation may be used, and the method and manner of qualifying delegates for a ratifying convention may be drawn upon by analogy.

The initial question is whether Congress has the power to prescribe qualifications for the Convention delegates. The Constitution's silence allows one to argue that by omitting qualifying language the 1787 Convention intended to give Congress such a discretionary substantive power.[67] This position finds some support in the composition and qualifications of the delegates to the 1787 Constitutional Convention.[68] The call by Congress for the original Convention was simply for "delegates who shall have been appointed by the several states."[69] This call, in effect, permits the inference that Congress could have specified the necessary requirements but chose to leave the matter with the states.[70]

Further support for this position is found in the fact that Constitutional Conventions are a federal function. Since ratifying legislators, when Congress chooses this mode, engage in a federal function,[71] a proposing Convention and its delegates, by parity of reasoning, should be similarly viewed as engaging in a

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Thus, all applicable federal constitutional and statutory limitations upon the states, and rights of persons would apply; e.g., the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1971 and the Civil Rights Acts of 1957, 1960, and 1964. See also 28 U.S.C. § 1343; 18 U.S.C. § 241.

67. This finds support in the February 21, 1787, call by Congress for a convention "of delegates who shall have been appointed by the several states" implying that the qualifications might have been stated but were being left up to the states. 3 FARRAND, RECORDS 13-14.

68. For example, while there were only four delegates under thirty, namely, Dayton (27, N.J.), Mercer (28, Md.), Pinckney (29, S.C.), and Spaight (29, N.C.), there were fifteen in their thirties. Franklin, at eighty-one, was the elder of the Convention. The average age of the delegates was 42. Whether or not the qualifications for a future Senator included the attainment of the age of thirty because of the large number above that age, or shortly to meet it, is conjectural; but the fact that the age for the House was set at twenty-five, when only Dayton (a nonentity) was, for practical purposes, then ineligible for the Senate, suggests that the preponderance of young men in the Convention predisposed youthful qualifications.

69. 3 FARRAND, RECORDS 14.

70. For example, at the New York Convention ratifying the twenty-first amendment, the qualifications for the convention delegates were silent as to age. This was not astonishing as the state constitution omits any requirement of age as a qualification for the state legislature.

71. See notes 27, 31 *supra*.

federal function. Either by analogy to the preceding conclusions, or because Congress issues the call, or because the process results in one national convention, as opposed to fifty local ones, a federal function is clearly involved in the second alternative.

While it would appear that Congress has the power to establish the qualifications for future Convention delegates, practical political considerations make it unlikely that this power will be exercised. It is far more consistent with a politician's behavioral pattern for him to follow a parallel method, where none else is available, than to blaze new trails. Once a precedent is established, the procedure is thereafter continued save where substantial defects are disclosed. Accordingly, common sense and political considerations conduce to the suggestions hereafter made.

Assuming, therefore, that Congress directs that the delegates to the proposing Convention be selected locally, the question becomes what probable substantive qualifications must the delegates satisfy? The experience under the twenty-first amendment's ratifying conventions should supply part of the answer. There, a congressional Joint Resolution[72] was deposited in the Department of State calling for ratifying conventions, and the state legislatures were promptly notified. The legislatures then passed statutes calling for a "state convention" to be held at a specified time, place, and hour "to consider and act upon the ratification of the proposal."[73] In other words, a procedure had to be improvised, and, to allay any objection, the legislature carefully established procedures consistent with those used in the state functions. The New York statute, for example, provided that one hundred fifty delegates to the Convention were

> to be elected from the state at large, each of whom shall be a citizen and inhabitant of the state. . . . A person qualified at the time of such election to vote . . . for a member of assembly [the lower or more popular body] . . . shall be qualified . . . . Statutes disqualifying a person for public office because he then holds another public office shall not apply . . . .[74]

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72. 47 Stat. 1625 (1933).

73. See, *e.g.*, N.Y. Sess. Laws, 1933, ch. 143, pp. 525-33.

74. *Id.* at § 2. There was no primary election but nominations were to be by petition, which was then described (§ 3); election details, ballot sample, etc., were then set forth in §§ 4-7; other provisions led up to the convention itself, with delegates to "take the constitutional oath of office" and to be called to order by the governor or lieutenant governor acting as temporary president (§ 10); the "convention shall be the judge of the election and qualification of its members . . ." enact its own rules, elect officers, etc. (§ 11); ratification was to be by "a majority of the total number of delegates" and a certificate, in triplicate, by the con-

The election and convention were duly held and the amendment was ratified without any objection as to the procedural matters. It should be noted that delegates did not have to possess the same qualifications as a congressman or a senator. Rather, citizenship and inhabitancy were the only requirements.[75]

By analogy, delegates to a proposing Convention should not have to satisfy constitutional requirements imposed upon senators or congressmen. Two factors, however, seem to militate against this conclusion. The Constitution permits ratification by state legislatures or state conventions, and no great violence is done to this language if such legislators or delegates, chosen locally, satisfy local qualifications. But with respect to proposing Conventions, it is a national legislature or convention which is involved, and it would appear that the states are, therefore, completely proscribed from any substantive intrusion.[76] This

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vention's president and secretary was to be deposited with the state's secretary who would transmit one each to the United States Secretary of State, to the Senate's presiding officer, and to the House's presiding officer "in the manner in which amendments to the Constitution of the United States, submitted to the legislature for ratification are certified . . . ." (§ 12). It may be noted that such notice of ratification to the Secretary of State was held to be binding upon him and, when certified by his own proclamation, conclusive upon the courts. See Leser v. Garnett 258 U.S. 130, 137 (1920). This ministerial function has been transferred to the administrator of General Services, 65 Stat. 710-11 (1951), 1 U.S.C. § 112 (1964).

75. Of course, state requirements for its lower house applied, but this was by choice

76. Are the states proscribed from determining substantive qualifications unless and until Congress affirmatively so permits? Or may the states act, assuming Congress fails so to do, unless and until Congress prevents them from so doing? These usual proscription-preemption doctrines briefly state that where the subject-matter involved is national in character and requires national uniform legislation the states are proscribed from action, assuming they can act otherwise (*e.g.*, constitutionally they cannot declare war in any conceivable situation), unless and until Congress permits it. See, *e.g.*, Leisy v. Hardin, 135 U.S. 100 (1890); *In re* Rahrer, 140 U.S. 545 (1891). However, where such character and uniformity are not found, and assuming the states can otherwise act, the states may do so unless Congress either denies state action, even though it does not itself act, or acts thereon and thereby preempts the subject-matter. Congress may specifically permit the states to act until federal legislation is enacted, as in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

In the instant situation it would appear that the substantive qualifications of proposing delegates is very definitely a national matter requiring uniformity, and thus precluding state action. But does this proscription mean that Congress may affirmatively permit the states, when Congress issues the Convention call, to set any substantive qualifications? Proscription has a coin-face, namely, that in certain instances the states can never act, and Congress has no authority to delegate any

means that Congress, in its Convention call, must set the qualifications, because the states, lacking this power, either cannot hold elections or must attempt to utilize some undefined minimum.[77] In such a call it is simple for Congress to follow the Constitution's qualifications for the House of Representatives and require that delegates be at least twenty-five years of age, a United States citizen for at least seven years, and an inhabitant of the state from which he was chosen.[78] Of course, the good sense of the voters may be urged as a sufficient safeguard against unqualified candidates, but this is a rather slim reed upon which to build a Convention empowered to alter our constitutional framework.

A separate question is whether any limitations are imposed by the Constitution precluding otherwise qualified candidates from becoming Convention delegates. For example, article I, section six, clause two, states that Congressmen shall not "be appointed to any civil office under the authority of the United States" created, or having its emoluments increased, "during the time for which he was elected." The key words in this article are "appointed" and "civil office." Since the delegates are elected, no reason should be found in this clause to preclude members of Congress from being delegates. Further, the delegates do not hold a "civil office." Although a federal function is involved, the delegates are more like legislators than civil servants. Clearly, the original clause sought to prevent corruption[79] that would ruin government by conflicts of interest and patronism.[80] Arguably, the Constitutional Convention does

such power, *e.g.*, to declare war. It is suggested this aspect of proscription be applied in the instant situation.

77. Although not further discussed, it would be simple for the states, if the Congressional call omits the suggested clause, to follow the constitutional requirements for the House of Representatives, whereupon, it is opined, the Supreme Court will find it difficult to hold that Congress intended otherwise.

78. U.S. CONST. art. 1, § 2, cl. 2, & § 3, cl. 3. The call might simply state that "Delegates are to possess the qualifications required of a member of the House of Representatives of the United States at the time of their elections [convening]." The bracketed choice is analogized to the situation when Senator Rush D. Holt was elected before reaching the minimum age of thirty but waited to take the oath of office until reaching the required age. S. REP. No. 904, 74th Cong., 1st Sess. (1935), 79 CONG. REC. 9651-653 (1935).

One might even suggest Senatorial years as the minimum, and not be too far out of line with the 1787 Convention, see note 68 *supra*.

79. Rutledge also used this term, 1 FARRAND, RECORDS 386, as did others, *e.g.*, Martin (reporting to the Maryland Legislature Nov. 29, 1787), 3 FARRAND, RECORDS 201.

80. See 1 FARRAND, RECORDS 376, where Butler spoke of the exper-

not come within this fear, for betterment by conflicts of interest should result from participation. Moreover, in light of the delegates' function and possible impact on the constitutional scheme, it seems desirable that interested members of Congress be allowed to participate. Finally, the fact that some of the delegates to the 1787 Convention were legislators under the Articles of Confederation should create a significant precedent in favor of congressmen's eligibility.[81]

Similarly, it should be noted that nothing in the Constitution or the legislative history precludes members of the federal judiciary[82] from being Convention delegates. Seemingly, arguments favoring the eligibility of congressmen are equally persuasive in this context. It is suggested, however, that federal judges should refrain from becoming delegates. In fact, Congress may be wise to exclude the judiciary expressly in the call and in its regulation of federal courts.[83] This conclusion is based on policy considerations, rather than dictated by constitutional law. The rationale is that a proposing Convention is distinguishable from a ratifying convention in purpose and in function, and that the Convention may desire to reverse judicial decisions, with resulting embarrassment, conflicts of interest, and a possibility that discussion will be inhibited or restricted if the federal judiciary is present.

The final question in the selection of delegates involves the total number to be selected and their apportionment among the states. The 1787 Constitutional Convention consisted of sev-

ience in Great Britain; Mason also spoke of this, 1 FARRAND, RECORDS 387. Martin, *supra* note 79, was still more caustic.

81. If the precedent of ratifying conventions is applicable, then either all those conventions having federal legislators are (perhaps) void and the twenty-first amendment has not been duly ratified, or else such an interpretation was never given or was rejected. See, *e.g.*, note 74, *supra* where the New York ratifying convention stated the non-application of disqualifying statutes. In the current New York Constitutional Convention (for New York's own constitution) meeting during 1967, there are included as members forty-one present or former legislators. Present legislators occupy all the important majority and minority positions. Any conflicting federal statutes could easily be removed from application temporarily.

82. The question whether administrative bodies, whose members at times exercise quasi-judicial power, are subsumed under the article III language must be answered in the negative, for decisions to the contrary are legion. See, *e.g.*, FORKOSCH, ADMINISTRATIVE LAW § 43 (1956). New York's current convention has several former and present judges serving on committees.

83. An objection as to its application to current judges may be made but, it is opined, even if such a statute may be so questioned, judges will undoubtedly not avail themselves of this possible flaw.

enty-four appointed delegates, but only fifty-five ever attended. Moreover, as a result of absentees and abstentions only thirty-nine signed the final proposal.[84] This example, however, should not be adopted as controlling precedent. The ideal Convention must not prove unwieldy but must at the same time fairly represent the people in order to be consistent with its nature and purpose. It is submitted that the number of delegates called for by Congress should equal the number of congressmen as established by the Constitution—presently five hundred and thirty-eight—and a sufficient number of alternates so that full representation throughout the convention can be guaranteed. By allowing each person to vote for one delegate from his congressional district (or at-large as may now be required) plus two delegates at-large in the state (by analogy to senators), this number could easily be selected.[85]

B. The Convention's Authority

The function of the Convention, as expressly stated in article V, is to propose constitutional amendments. The question remains, however, whether there are any limitations upon the power or scope of the Convention to propose such amendments.

Article V, for example, contains the proviso "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." Since the amending article was incorporated to overcome the inability of the states to amend the Articles of Confederation, and since the Great Compromise gave the smaller states equal senatorial representation, this express language clearly means that there can be no amendment depriving any objecting state of its equal senatorial suffrage.[86] Similarly, arti-

84. Forkosch, Constitutional Law 5 (1963).

85. Alaska, in 1958, and Hawaii, in 1960, each elected one Representative, raising the total to 437, with Hawaii thereafter (1962, 1964) electing 2 (also at-large). Representative "at-large" seats are not discussed in any detail, on which see, *e.g.*, U.S. Bureau of the Census, Statistical Abstract of United States 379 (80th ed. 1965), for notes on single and double seats through at-large elections. On the problem of equitableness in such at-large seats see, *e.g.*, Hacker, Congressional Districting 73, n.4 (1963).

86. See, *e.g.*, 2 Farrand, Records 630-31. On September 15th, the last day when the Convention debated the numerous proposals, this proviso to article V was adopted in the identical language found there today, with Madison's Notes stating: "This motion dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no." See also Jonathan Dayton's remarks in the Senate on November 24, 1803, given in 3 Farrand, Records 400-01.

cle IV, section three, clause one, empowers Congress to admit new states:

> but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

However, it appears that these limitations would also have been incorporated[87] in article V if the desire of the Constitutional Convention of 1787 was to prevent future amendment without the consent of the state. While the quoted clause seeks to continue the territorial dignity and relative power of all states vis-a-vis each other and in the federal-state relationship, the only conclusion possible is that the only proviso constitutionally protected from change by amendment is the one included in article V.[88]

Constitutional limitations aside, article V gives both Congress and the Convention authority to propose amendments.[89] The enabling language in each alternative is identical save for the infinitive-gerund distinction. The use of the plural "amendments" in the second alternative indicates that the Convention may propose as many amendments as it deems necessary and that Congress is constitutionally unable to restrict this right.

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87. See, *e.g.*, U.S. CONST. art. I, § 9, cl. 1, preventing Congress, before 1808, from prohibiting the importation of slaves, and *id.* cl. 4, concerning taxes, which are repeated in article V's proviso.

88. See also Madison's views, note 58 *supra*, where the last two sentences are:

> The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by the principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

The other proviso has lapsed because of its built in time limitation, *i.e.*, no amendment prior to 1808 is to be made concerning the importation of slaves, or permitting direct taxes except as there given. The thirteenth amendment, of course, additionally acts upon all those persons covered by the first such item, and the sixteenth amendment has replaced the second.

89. The 1787 Convention is a true illustration of a runaway body. It was called for a single purpose. 3 FARRAND, RECORDS 14. The Randolph-Patterson confrontation pointed up the clash between those who desired to create a new government and those who desired to amend the old. See, *e.g.*, BOWEN, MIRACLE AT PHILADELPHIA 104-08 (1966); FORKOSCH, CONSTITUTIONAL LAW 5-7 (1963).

From this it may be concluded that any federal Constitutional Convention has a precedent to enable it to propose any and all amendments, save as otherwise constitutionally limited.

Reference to the article's legislative history supports this conclusion.[90] Throughout the chronological entirety of the Convention's proposals, committee reports, debates, and re-formulations, the assumption seeps through that amendments (plural) were to be proposed by a Convention initially applied for by the legislatures. Hamilton, Madison, and Mason, even though at odds with respect to exact procedure, all consistently referred to the Convention's power by using plurals. Thus, there can be little doubt that the Constitution's draftsmen never intended that article V be so narrowly construed as to limit the power of the Constitutional Convention to propose more than one amendment.

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90. The Convention adjourned on July 26, 1787, referring its proceedings to a Committee of Detail, chaired by Rutledge of South Carolina and including Wilson of Pennsylvania, see 1 FARRAND, RECORDS at xxii, to report a proposed constitution on August 6th. FARRAND, RECORDS inserts, between these dates, a nearly complete series of documents representing the various stages of the work of the Committee. One of these states that "This Constitution ought be be amended . . . and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that purpose." [2 *id.*, Document VIII, at 159. Farrand notes this is from a document found among the Wilson papers]. From the chronological background of this reference on July 26th it would appear that the Virginia (Randolph) Plan, proposed on May 29th, influenced these committee views, although the amending portion of the Pinckney Plan, proposed immediately after the Virginia one, seems eventually to have carried the day. It is, however, notable that even this latter Plan's two methods commenced with the convention and then, seemingly as an inserted after-thought, included the Congress. Notwithstanding the ultimate form, the Committee of Detail reported back a proposed constitution which included language practically identical to the Virginia proposal: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose." 2 FARRAND, RECORDS 188, 557.

The Convention proceeded to take up each of the proposed twenty-three separate articles and it was not until August 30th that the nineteenth was reached. The Journal discloses that "On the question to agree to the 19 article as reported it passed in the affirmative," but Madison's Notes disclose that a suggestion by Morris was accepted. On the 31st of August the entirety of the proceedings were referred to an elected Committee of Eleven. On the following day and thereafter Brearley reported partially each time on behalf of the Committee, and the Convention debated the items so reported, but it was not until September 10th that, on Gerry's motion to reconsider, the amending proposal was taken up. Both Gerry and Hamilton felt that the proposal then was deficient, though for different reasons, as did Madison. See notes 47-74 *supra* and accompanying text, for an account of what then occurred.

This broad power in the Convention, and the absence of anything contrary in the proposals, debates, or the Constitution itself, also seem to indicate that no time limit is imposed upon the Convention's ability to propose amendments. Thus, a "runaway" Convention may ape the charge that the Supreme Court is a continuing constitutional convention and, at least theoretically, could remain in session indefinitely. Even practical obstacles, such as appropriations and places to meet, need not deter the members from adjourning from month to month or year to year. Apparently, no way out of this political dilemma exists, for the judiciary cannot intervene, and the call cannot restrict. As a practical matter this conjured fear is like the proverbial straw man, albeit when the situation materializes it becomes steel.[91]

C. Voting Requirements in the Convention

Given the above, the Convention's efforts may, and theoretically should, result in proposals. By implication, neither the Congress nor the judiciary has the power to supervise or review the Convention's procedures.[92] Thus, once the Convention is convened, it is free to establish any voting requirements, rules of order, and other procedural framework it desires. For most matters, a simple majority of a quorum should suffice. However, with respect to the method of voting, the Convention should adopt the policy that each delegate may vote individually,

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91. See, *e.g.*, Holmes' comment in Buck v. Bell, 274 U.S. 200, 208 (1927): "It is the usual last resort of constitutional arguments to point out shortcomings of this sort. . . ."

92. Article V states the Convention is called "for proposing Amendments," so that it appears that Congress has no degree of superintendence, especially as it has its own separate power to propose. Neither has the Supreme Court any power to review procedural or substantive determinations.

The analogy is not to an "ordinary" statute or act of legislation by Congress but to the political concepts inhering in such a body. For example, the 1787 Convention was called "for the sole and express purpose of revising the Articles of Confederation," but, as Madison phrased it, "the absolute necessity of the case" permitted it to go beyond this mandate. Forkosch, Constitutional Law 5-6 n.10 (1963). So, if the Supreme Court, for example, is able to examine procedure or substance, a constitutional convention becomes another congress and now not only is subject to judicial review but has its endeavors treated as statutes, not amending proposals. In this respect Justice Black's concurring language in Coleman v. Miller, 307 U.S. 433, 456-60 (1939) (concurred in by Douglas, Frankfurter, and Roberts, J.J.), should apply even more forcefully.

not as part of a state or political party unit.[93] Any other procedure would be contrary to the Constitution's spirit and legislative history, for it would deprive the people of their fundamental right to propose amendments. If required, there are appropriate analogies to the Congress and the ratifying conventions for the twenty-first amendment, where the participating representatives each cast a separate vote.

For the purpose of adopting amendment proposals, a voting requirement analogous to the two-thirds of those entitled to vote on such proposals in Congress and the state legislatures may be appropriate even though such a requirement is not expressed anywhere in the Constitution or its legislative history. Numerous reasons may be advanced for the two-thirds requirement. First, little justification can be found for lowering this figure when such a vote is required of Congress to propose amendments. Also, whatever the number of delegates selected, the chances of combining politicking, emotionalism, bias, prejudice, and other shortsighted subjective considerations to obtain a simple majority are too great to allow. The primary consideration, therefore, should be our historical and political approach to such an important vote and, accordingly, the Convention's rules should require a two-thirds vote to propose an amendment.

VI. RATIFICATION OF THE CONVENTION'S PROPOSALS

Once the Convention has proposed one or more constitutional amendments the question of ratification becomes relevant. The basic question is whether the Convention is to forward the proposals to the states, or whether Congress is to intervene to establish the mode of ratification. Both constitutionally and practically, the solution is for the Convention to forward its proposals to Congress and then dissolve, leaving Congress to handle the ratification procedure. This conclusion stems from language in article V which provides that amendments are valid "when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ." Clearly, Congress has the sole power to determine which alternative mode of ratification will be employed. Moreover, article V seems to indicate that the Convention's sole purpose is to propose amendments, for it is not mentioned

93. Any analogy to the 1787 Convention would be disastrous and not in accord with the requirements of article V.

in any other place. Thus, any mention of the mode of ratification by such a Convention will be viewed as surplusage by Congress, but such surplusage cannot be construed to render a proposal invalid.[94]

It is further suggested that the original call should express the mode of ratification, as the amendment proposals then would not have to be returned to Congress except for mere mechanical or procedural effectuation. A contrary procedure would give Congress a superintending power to withhold submission if the proposed amendments did not conform to its desires without fear of judicial interference.[95] Congress has its own independent machinery to propose amendments in the first alternative, and to give Congress the power to review the proposals necessarily deprives the second alternative of its independence. As a result, Congress would become supreme, and article V would automatically read that "The Congress . . . shall call a[n advisory] Convention for proposing Amendments [to it] . . . ." This would be an adoption of the very system rejected by the 1787 Convention. Therefore, the best time and place to make such a choice is in the call, and thereafter any further congressional function should be extremely and strictly limited to simple procedural duties.

While the method of selection is basically a policy consideration, it is suggested that ratification by state legislatures should be the mode selected by Congress in its call. The people already have elected delegates to one proposing convention, and having a second ratifying convention would be asking the same people to approve their own handiwork. In theory there should be two different bodies, one to check on the other; the different sets of delegates to the Convention and to the state's legislature may and should produce different reasons and ar-

94. See, *e.g.*, United States v. Sprague, 282 U.S. 716, 732-33 (1931), where the eighteenth amendment was attacked because of the tenth amendment's distinction between powers reserved to the states and those reserved to the people; the argument was that states could ratify only their own reserved rights, but that only the conventions could ratify the people's reserved rights; and, since the eighteenth amendment involved the reserved rights of the people, the ratification by states' legislatures was invalid. The Court unanimously rejected this contention: "This court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress." *Id.* at 732. The Court also stated that the people in adopting the original Constitution, "deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. . . . Congress must [so] function as the delegated agent . . . ." *Id.* at 733.

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

guments for so amending the Constitution. Expenses, time, effort, and difficulties, not only of the states but of their delegates, would increase to a regressive point if a separate body was again convened.

In proposing amendments in the past Congress has, in several instances, placed a seven-year limitation for ratification by the states. Does the Convention have such a power under the alternative method or is it still in Congress, through the latter's power to propose the mode of ratification? The amendments which have been so limited have contained the language as a separate section; it would appear that Congress has, by such use, indicated its substantive nature. From this point of view the Convention must have this power, but the counter-argument, based upon Congress' ability to determine the mode of ratification, may prove more persuasive. If a choice must be made, the Convention's power to limit is here accepted, but there is no reason why any difference or disagreement need develop. From a policy approach, a seven-year limit is suggested for all amendments proposed through the alternative method because otherwise the judiciary may enter the picture.[96]

Finally, upon receipt of the official notification of the proposed amendments, the state should promptly begin the process of ratification. Assuming this occurs, properly authenticated and certificated copies of ratification should be promptly forwarded to the appropriate official—the Administrator of General Services.[97] While the date of ratification by the last required state is the operative date of an amendment,[98] a central federal location for purposes of binding the United States and, when "certified to by . . . proclamation, conclusive upon the courts,"[99] is advisable to obviate all objections as to regularity.

VII. CONCLUSION

The foregoing analysis permits the formulation of a suggested procedure whereby the alternative method of amending the Constitution may be effectuated. Criticism and counter-suggestions may thus be provoked, hopefully with the result that a useful uniform mode can be set before the state legislatures, the Congress, and the Supreme Court. Such a plan or

96. *Ibid.*
97. 65 Stat. 710-11 (1951), 1 U.S.C. § 112 (1964).
98. Dillon v. Gloss, 256 U.S. 368, 376 (1921).
99. Leser v. Garnett, 258 U.S. 130, 137 (1922).

procedure, it is submitted, should contain the following points.

First, the application by state legislatures should be by at least majority vote for a (joint) resolution, not requiring a governor's approval, and should be couched in the language suggested: The Legislature of the State of ....., pursuant to (Joint) Resolution, hereby makes application to the Congress of the United States to call a Convention for proposing amendments to the Constitution of the United States.

Second, in accordance with the states' own procedures, but sufficient to qualify under the Federal Rules of Civil Procedure for introduction as an exhibit in a federal district court trial, such an application should be certified by the necessary and required officers as an official document of the state, and officially forwarded in an appropriate manner to and filed with at least the parliamentary officers of the House and the Senate. While there is no constitutional need to file with the Secretary of State, the Administrator of General Services, or any other officer, no harm can result therefrom. The forwarding language might be: To the [officer, title, and description] of the United States: Please be informed and take notice that the following (Joint) Resolution was adopted by at least a majority of both houses of the legislature of the State of ..... on the ..... day of ....., 19....., is properly certified as such in accordance with all applicable laws, and is forwarded to you as an officer of the Congress of the United States required to be notified so that application to the said Congress is duly now made and completed: [set forth resolution, certification, etc., and conclude entire notice with names, titles, etc., of the forwarding officials].

Third, the federal officials receiving such an application should respond in an appropriate manner: To the [state's forwarding official]. This will acknowledge receipt this day of your notice dated the ..... day of ....., 19.....

Fourth, when two-thirds of such, or analogous, applications have been received, the persons so receiving them, and now exercising a ministerial function, should forward all such applications to the Senate and House as per their own respective internal procedures, assuming that the next paragraph does not apply, notifying each body of the receipt and date of receipt of each such application and, because of a possible lack of uniformity, perhaps also pointing this out, although this is not strictly required as the forwarded applications will so indicate.

Fifth, depending upon the internal procedures of the two Houses, provision should be had for automatically raising such

applications on the floor of each body when the required number has been duly received, or else, if not so presented, then when each House is notified.

Sixth, depending upon the internal procedures of the Senate and House, such applications and notifications may possibly be referred to the appropriate committees. After examination,[100] and if required, verification of the application, the Committee should be required promptly to report back to its legislative body with a proposed Joint[101] Resolution[102] directing issuance of a call for a Constitutional Convention.

Seventh, this combined Joint Resolution call must be detailed, and may include an overall procedure to be followed to the point where, as in an amending proposal by Congress itself, the proposed amendment is forwarded to the states for ratification and the notification by the states thereof. The proposed call given below indicates details which may be utilized.

Eighth, a majority of each House is sufficient to pass such a Joint Resolution call, official copies thereafter being sent to all states as all other official notices and documents are sent.

Ninth, upon receipt of such official calls each state, in accordance with its official legislative procedures and machinery, should enact the appropriate legislation for a special election of delegates who, after the necessary formalties, should be certified as such by the necessary state officials just as federal congressmen are certified by them.[103]

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100. This may include hearings, although no reason superficially appears why these should ordinarily be necessary.

101. A Concurrent Resolution may be utilized and, in the sense that one body may institute and adopt the procedures and the call *in toto*, the analogy is to a bill enacted by the House or Senate independently of the other body and then sent over. The form of the Resolution is a political determination to be settled initially by the first Congress confronted by the question and thereafter, perhaps, the precedent is established. What is being suggested in the text makes for an earlier Resolution and call.

102. Both committees may easily correlate their work on the details of this Joint Resolution so as to obviate the necessity for a later conference to iron out differences in language, as there is nothing here of a major substantive nature. However, if the respective committees do not so cooperate, a conference must then so do and the Conference Report will then be utilized; future such Joint Resolutions would then have this as a precedent.

103. There is no provision made in article V concerning travel or other personal expenses, payment for serving, etc., and, it is suggested that these should all be provided for by the states. The costs of the Convention itself should be defrayed by the federal government.

Tenth, at the time and place called for, and under temporary officers set forth in the call, the delegates should meet, approve credentials, choose permanent officers, adopt their own rules, propose amendments, debate, enact, and otherwise function in accordance with the call.

Eleventh, a majority of the Convention delegates, assuming a quorum present, should be sufficient to determine organizational and procedural rules and matters, but at least two-thirds of those present and voting should be required to pass amendments to be proposed for ratification.

Twelfth, the Convention should, as part of its organizational rules, provide that all proposed amendments be forwarded to the appropriate congressional officials so designated for the purpose of processing amendments proposed by Congress, and also that a time limit of seven years be set within which the proposals may be ratified. Moreover, the call by Congress should contain appropriate parallel requirements.

Thirteenth, the mode of ratification being left to Congress, the call should contain this choice and, as a matter of policy, ratification should be by the state legislatures.

Fourteenth, the call should also contain a provision that proper certificates of ratification are to be filed with the Administrator of General Services, and that he, in turn, when the required number of proper certificates is received by him, is to make due proclamation thereof.

Finally, given the importance of the congressional call in view of the role it plays with regard to substantive and procedural matters before and after the Convention, the following is submitted as a form that may well be adopted by Congress:

A PROPOSED CALL BY CONGRESS

Whereas pursuant to article V of the Constitution of the United States at least two-thirds of the Legislatures of the several States of the United States have duly and validly made proper and timely application to the Congress of the United States to call a Convention for proposing amendments to the said Constitution, namely, the States of . . .; be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That this Joint Resolution be and be required to be considered as and is a call, pursuant to article V of the Constitution of the United States, for a Convention for proposing amendments to the said Constitution as is more fully set forth hereafter.

Sec. 2. This Joint Resolution is directed to be duly forwarded by the appropriate officers of both Houses of this Congress to the appropriate officials of each of the several States of the United States within five (5) days after it is approved.

Sec. 3. The appropriate officials of each of the several States of the United States shall thereafter take such action and perform such acts as may be required by or in consonance with their applicable laws to enforce and comply with this Joint Resolution and call.

Sec. 4. No later than [date] each of the said States is to conduct a special election for the sole purpose of electing delegates to said Convention, in accordance with each State's duly enacted or to be enacted laws, Provided, however, that at least thirty days elapse between final nominations for delegates and the election; that the number of delegates elected be equal to the number of Congressmen each said State is then represented by with one to be chosen within each Congressional district within said State plus two at-large; that the qualifications of the voters for delegates be no different than those required for the more numerous body of the State's legislature; that delegates are to possess the qualifications required of a member of the House of Representatives of the United States at the time of convening; and that all statutes of the United States and the several States disqualifying a person for public office because he then holds another public office shall not apply except as to the judges and justices of the United States.

Sec. 5. The delegates so duly elected and properly certified shall meet on the [date] at [place, building, hall] in Washington, District of Columbia, at ten o'clock in the forenoon, present their credentials to the temporary secretary who is hereby designated as [name or office], meet under the temporary chairmanship of [name or office], and when at least a majority thereof is so assembled then duly and regularly organize and deliberate for the purpose for which called, Provided, however, that any amendments to the Constitution of the United States which may be proposed shall receive the approval of at least two-thirds of the members then present and voting at the said Convention.

Sec. 6. The said Convention may authorize and direct that all such proposed amendments be forwarded to the appropriate officials designated by the Congress of the United States for the purpose of forwarding to the States amendments proposed by the said Convention, and said officials are hereby authorized and directed so to act and forward said proposed amendments within five (5) days after receipt thereof, together with a copy of the section following.

Sec. 7. All such proposed amendments shall be inoperative unless they shall have been ratified as amendments to the Constitution by the legislatures of [or by conventions in] the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States.

Sec. 8. Copies of all said ratifications, properly and duly authenticated and certified, shall be forwarded to and filed with the Administrator of General Services of the United States who is hereby authorized and directed to receive and file the same and, when the required number thereof pursuant to article V of the Constitution has been so received and filed, shall make appropriate proclamation thereof.

Sec. 9. There are hereby authorized to be appropriated not more than [$.....] for necessary expenses in conducting and defraying the costs of such Convention, but none of these moneys is to be used for any travel, pay, allowances or like purposes of any delegates to or member of such Convention.[104]

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104. If there is any question concerning the necessity for a statute, requiring the President's signature, this can be easily accomplished. However, does this mean that the President may veto the Convention? Or that if two-thirds of Congress cannot be mustered the Convention will not be held? It is suggested that here, if at all, is a justification for an appropriation by Joint Resolution, without such a signature being required.

(North Dakota Law Review 1979)

AMENDING THE CONSTITUTION BY THE ARTICLE V CONVENTION METHOD

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I. INTRODUCTION

Article V of the United States Constitution reads as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight-hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the First Article; and that no State, without its Consent, shall be deprived of its equal Sufferage in the Senate.[1]

Two methods of amending the Constitution are provided for in this Article. Under one method, the amendment is initiated by Congress. Under the alternative method, Congress, after being petitioned by the states, calls a convention to propose amendments. Since our Constitution was adopted in 1787, it has been amended only twenty-six times. If the first ten amendments, the Bill of

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1. U. S. CONST. art. V.

The "Authorization to Sell Reserved Mineral Interests to Surface Owners" ignores two already existent solutions to the conflicts in surface development with reserved mineral rights. The land developer is, like any other citizen, free under the mining laws to locate mining claims in good faith. He must do the required annual assessment work thereafter, but such assessment work provides for exploration and development work on a gradual and continuing basis,[55] which is precluded by selling the mineral rights at a point in time when an existent mineral value may be much lower than the value future circumstances and developments could realize. The second solution possible under present mining laws is a withdrawal of the land from mineral entry. If the surface development of public land is desirable, Congress has the power to withdraw that piece of land from mineral entry.

But just as the courts have found it easier to entrust the mining laws to land agencies, so the Congress puts up little resistance to easing its responsibilities with regard to withdrawing public land from mineral entry. The despotism of administrative law fills the void at the expense of all the practicality inherent in American mining law. Without the mining laws, which are our heritage, we will be without a true and tested system of mineral development. Administrative law is already without representation from mineral development people, without judicial control, and without the immediate desire to develop minerals. Lacking these, the liquidators of our mineral wealth can not truly concern themselves with a better system. A triumph for the "rule of man" in the Department of the Interior is no triumph for Man.

55. Mining Law, 30 U.S.C. §28 (1872); *See generally:* MINING RIGHTS ON THE PUBLIC DOMAIN, *supra*, note 25, at 108-137.

Rights, (which were adopted almost simultaneously with the adoption of the Constitution, and can therefore be considered a part of the original document) are excluded from this count, the Constitution has been amended a mere sixteen times in nearly two hundred years.

To date, all of the amendments to the Constitution have been proposed by Congress. There has never been a constitutional convention, "despite the fact that in the years since the Constitution was ratified . . . [several hundred] resolutions have been submitted to Congress by the States calling for national constitutional conventions."[2]

The Article V convention method has been called a "constitutional curiosity,"[3] the forgotten part of the article,[4] and "[o]ne of the best-known 'dead letter' clauses in the federal Constitution."[5]

While there has never been a constitutional convention, the Article V provision has not been without effect in our nation's history.[6] During the ratification of the Constitution, the Anti-Federalists expressed concern that the Constitution did not contain any provisions for the protection of certain basic rights of mankind. Virginia and New York petitioned Congress to call a convention to deal with this perceived defect. This led to Congress' proposing, in 1789, the Bill of Rights to quell these concerns.[7] At the turn of the century, public agitation grew for an amendment to the Constitution for the direct election of Senators. On several occasions between 1893 and 1902, the House of Representatives had passed resolutions calling for such an amendment. The Senate, naturally reluctant to propose an amendment which would place in jeopardy the tenure of its current members, refused to act. After a significant number of states petitioned Congress for a constitutional convention to deal with the problem, Congress, afraid of the peoples'

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2. Comment, *Amendment by Convention, Our Next Constitutional Crisis?*, 53 N.C.L. REV. 491 (1975) [hereinafter cited as Comment].

For a comprehensive list and analysis of the state resolutions calling for a constitutional convention *see* American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution By the Convention Method Under Article V* App. B, at 59-77 (1974) [hereinafter cited as A.B.A. Study].

3. Comment, *supra* note 2, at 492.

4. Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968) [hereinafter cited as Dirksen].

5. Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 943 (1968) [hereinafter cited as Dixon].

6. Comment, *supra* note 2, at 499.

7. *See* A.B.A. Study, *supra* note 2, at 69-70.

reaction should such a convention come into being, proposed the seventeenth amendment providing for the direct election of Senators.[8]

In recent times, a significant attempt was made to invoke an Article V convention to reverse the Supreme Court decisions of *Baker v. Carr*,[9] and *Reynolds v. Sims*,[10] concerning state legislative reapportionment. The Council of State Governments and the late Senator Everett M. Dirksen of Illinois led an attempt to amend the Constitution to permit one house of a state legislature to be exempt from the "one man, one vote" rule.[11] After the Congressional route failed, the Article V convention method was pursued. By March 1967, "thirty-two states had submitted arguably valid applications to Congress — only two shy of the magic number representing two-thirds of the States."[12] On March 18, 1967, a *New York Times'* story caught the nation off guard, with these comments:

"(A) campaign for a Constitutional convention to modify the Supreme Court's 'one man-one vote' rule is nearing success. It would be the first such Convention since the Constitution was drafted in Philadelphia in 1787."[13]

While this attempt to call a constitutional convention did not succeed, it did serve to stimulate a great deal of scholarly and Congressional debate over the Article V convention method. As a direct result, Senator Sam J. Ervin, Jr., of North Carolina introduced comprehensive legislation to deal with the Article V convention method on August 17, 1967.[14] Senator Ervin's

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8. "The history of the 17th amendment illustrates the usefulness of having a method by which a recalcitrant Congress can be bypassed when it stands in the way of the desires of the country for constitutional change." S. REP. No. 93-293, REPORT OF THE COMM. ON THE JUDICIARY UNITED STATES SENATE TOGETHER WITH ADDITIONAL VIEWS TO ACCOMPANY S. 1272, 93d Cong., 1st Sess. 6 (1973) [hereinafter cited as S. REP. No. 93-293]. *See also* A.B.A. Study, *supra* note 2, at 72.

9. 369 U. S. 186 (1961).

10. 377 U. S. 533 (1964).

11. *See* Dirksen, *supra* note 4.

12. Comment, *supra* note 2, at 502.

13. New York Times, March 18, 1967 (city ed.) at 1, col. 6.

14. The legislation was first introduced as S. 2307, 90th Cong., 1st Sess. (1967). Hearings were held on the bill. *Hearings on S. 2307 Before the Sub-Committee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings on S. 2307*]. Thereafter the bill was revised and reintroduced. S. 623, 91st Cong., 1st Sess. (1969). The Subcommittee reported S. 623 to the full Committee on the Judiciary but no action was taken during the 91st Cong. The legislation was reintroduced in the 92d Cong., as S. 215. The Subcommittee reported the bill to the full Committee which reported the bill to the Senate on July 20, 1971. With one amendment the bill passed by a vote of 84-0. The bill was then referred to the House Judiciary Committee. No action was taken on the bill by the House during the 92d Cong. The legislation was reintroduced in the 93d Cong., 1st Sess. as S. 1272, which was identical to S. 215. The Subcommittee reported the bill to the Committee which reported the bill favorably to the full Senate. *See* S. REP. No. 93-293, *supra* note 7. The bill was again passed by the Senate, and again referred to the House Judiciary Committee. Again, no further action was taken. During the 94th Congress the "Ervin" legislation was introduced as S. 1815 by Senator Abourezk. The bill was referred to the Senate Judiciary Committee. No action was taken. During the 95th Congress, the "Ervin" legislation was introduced

legislation was the first comprehensive attempt by Congress to deal with the Article V convention method, though it had previously touched upon the problem.[15] Senator Ervin's efforts received much attention and stimulated long-needed discussion.[16] Senator Ervin gave these reasons for introducing the legislation:

> The scant information and considerable misinformation and even outright ignorance displayed on the subject of constitutional amendment, both within the Congress and outside it — and particularly the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth — prompted me to introduce in the Senate a legislative proposal designed to implement the convention amendment provision in article V.[17]

Congress to date, however, has refused to take action on comprehensive legislation dealing with the Article V convention method.[18]

It has been observed that "the primary importance of Article V may be found in the *in terrorem* effect of an ultimate appeal to the people for the correction of the abuses of their government."[19] In the past, states applied to Congress for a constitutional convention because they thought such a convention would be desirable. However, "[b]eginning with the twentieth century . . . the process has been used primarily as a prod in the side of Congress to force that body to propose a specific amendment."[20] Currently there are

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as H.R. 7008 by Congressman Hyde, and as S. 1880 by Senator Helms. H.R. 7008 was referred to the House Judiciary Committee which referred it to its Subcommittee on Civil and Constitutional Rights. S. 1880 was referred to the Senate Judiciary Committee. No action was taken on either bill.

Because Senator Ervin was the first to consider this issue and draft legislation and because subsequent Congressional legislation has been substantially identical to Senator Ervin's, this article will cite Senator Ervin's legislation, S. 1272, as exemplifying the Congressional approach.

15. *See, e.g., Hearings on Amending the Constitution Relative to Taxes on Income, Inheritance, and Gifts Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958); *Hearings on S. J. Res. 23 Before the Subcommittee of the Senate Committee on the Judiciary*, 83d Cong., 2d Sess. (1954); STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION (Comm. Print 1959); STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 82d CONG., 2d SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES (Comm. Print 1952).

16. *See, e.g.*, Black, *Amending The Constitution: A Letter To a Congressman*, 82 YALE L. J. 189 (1972) [hereinafter cited as Black]; Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972).

17. Ervin, *Proposed Legislation To Implement The Convention Method of Amending The Constitution*, 66 MICH L. REV. 875 (1968) [hereinafter cited as Ervin].

18. *See also* H. Con. Res. 340, 95th Cong., 1st Sess. (1977); H. Con. Res. 28, 94th Cong., 1st Sess. (1975).

19. Kurland, *Article V and the Amending Process*, in AN AMERICAN PRIMER 148, 152. (D. Boorstin ed. 1966).

20. Comment, *supra* note 2, at 500, *citing*, W. Pullen, The Application Clause of the Amending

attempts to have an Article V convention call on the issues of forced school busing,[21] abortion,[22] and a balanced federal budget.[23]

Even though there has never yet been an Article V convention, the possibility of one being convened is not so remote that the issues raised by the convention method should be ignored. The attempt to call a constitutional convention to deal with reapportionment of state legislatures came very close to success. As long as the states use the convention method to prod Congress, the prospect exists that someday a convention may be brought into being.

It further seems that the convention method is well suited to highly controversial and emotional issues. The congressional method of amending the Constitution depends upon the actions of the Members of Congress. In all practicality there is little effective recourse which can be taken by a dissatisfied group against a Congressman who votes against its proposed Constitutional amendment. They could only work for his defeat in the next general election, where his vote on the amendment would be just one of many which the voters would have to decide upon. Also, proposed amendments are often killed in committees, thereby giving all but a few Members the opportunity of avoiding responsibility for the fate of the amendment. A citizen or group, however, has much greater impact with members of a state legislature, where a single vote on one issue can be very important. It thus seems likely that those favoring constitutional amendments dealing with emotional and controversial issues will increase use of the Article V convention method.

The purpose of this article is to explore the issues raised by the Article V convention method.

II. THE GENESIS OF ARTICLE V AND THE CONVENTION METHOD

As has been observed, "[t]he idea of amending the organic instrument of a state is peculiarly American."[24] Prior to adoption

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Provision of the Constitution 105 (1951) (unpublished thesis in Wilson Library, University of North Carolina at Chapel Hill) [hereinafter cited as W. Pullen].

21. Comment, *supra* note 2, at 503 n.64.

22. As of August 3, 1978, 13 states had petitioned Congress for a constitutional convention on the subject of a pro-life amendment to the Constitution. Interview with Edward Zorinsky, U. S. Senator (Aug. 3, 1978).

23. As of August 3, 1978, 23 states had filed petitions with Congress calling for a convention to produce an amendment which would require a balanced federal budget. Interview with Edward Zorinsky, U. S. Senator (Aug. 3, 1978).

24. L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 1 (1942) [hereinafter cited as L. ORFIELD].

of the Constitution, several states had provisions for amending their constitutions. Article XIII of the Articles of Confederation provided for such amendment in the following manner:

> And the Articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every state.[25]

The unanimous consent requirement created many difficulties for the united colonies after the Revolution.[26] As Charles Pinckney of South Carolina observed, "it is to this unanimous consent, the depressed situation of the Union is undoubtedly owing."[27]

On February 21, 1787, Congress passed a resolution calling a convention,

> for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.[28]

It was inevitable that this convention would consider a provision permitting admendments with the consent of less than the whole number of states.[29]

In May, 1787, the convention convened at Philadelphia. Several plans of proposed government, which contained provisions for amendment, were presented during the convention.[30] Of the

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25. Martig, *Amending the Constitution, Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1255 (1937) [hereinafter cited as Martig]. *citing*, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. No. 398, 69th Cong., 1st Sess. 35 (1927).

26. For a review of the events leading up to the 1787 convention, *see, e.g.*, M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 4-5 (1962); Martig, *supra* note 25, at 1253-61.

27. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 120 (1937) [hereinafter cited as M. FARRAND].

28. 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120 (2d ed. 1896) [hereinafter cited as J. ELLIOT].

29. Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME LAW 46, 48 (1950).

30. On May 29, Edmund Randolph of Virginia introduced his plan (The Virginia Plan). On the same date, after Randolph had introduced his plan, Charles Pinckney of South Carolina introduced his plan. Article 16, which provided as follows:

> If Two Thirds of the Legislatures of the States apply for the same The Legislature

various plans presented, the resolutions of Edmund Randolph of Virginia are the most important,[31] and are the proper place to begin an inquiry into the genesis of the Article V convention method. Resolution 13 of the Randolph Resolutions (the Virginia Plan) provided as follows: "Resd. that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."[32]

Resolution 13 was discussed on June 11th, with the convention resolved into a Committee of the Whole House. Several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary.[33] Colonel George Mason of Virginia argued in favor of the necessity of such a provision by stating the following:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust them to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.[34]

Randolph supported Mason's arguments.[35] However, the latter

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of the United States shall call a convention for the purpose of amending the Constitution — or should Congress with the Consent of Two Thirds of each house propose to the States amendments to the same — the agreement of Two Thirds of the Legislatures of the States shall be sufficient to make the said amendments Parts of the Constitution.

The Ratifications of the Conventions of _____ States shall be sufficient for organizing this Constitution.

1. M. FARRAND, *supra* note 27 at 23;3 M. FARRAND, *supra* app. D, at 601.

On June 15, William Patterson of New Jersey introduced nine resolutions (The New Jersey Plan). Resolution 2 of the plan provided that "in addition to the powers vested in the U. States in Congress, by the present existing article of Confederation, they be authorized . . . to alter and amend in such manner as they shall think proper . . ." 1 M. FARRAND, *supra* at 243.

On June 18, Alexander Hamilton of New York read a sketch of a plan of government, which was never formally placed before the convention. Article IX, Section 12 of Hamilton's plan provided the following:

> This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two thirds of the members of both Houses, and ratified by the Legislatures of, or by Conventions of deputies chosen by the people in, two-thirds of the States composing the Union. 3 M. FARRAND, *supra* at 630.

31. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 68 (1962).
32. 1 M. FARRAND, *supra* note 27, at 22.
33. *Id.* at 202.
34. *Id.* at 202-03 (Madison's notes).
35. *Id.* at 203.

part of the resolution, providing that the consent of the national legislature should not be required, was lost.[36] The remainder of the resolution was accepted and referred to the Committee of Detail[37] wherein the provision for amending the Constitution was discussed.[38]

On August 6, the Committee of Detail presented the first draft of the Constitution to the full convention. Article XIX of the draft read as follows:

"On the application of the Legislatures of two thirds of the states in the Union, for an amendment, of this Constitution, the Legislature of the United States shall call a Convention for that purpose.[39]

This draft was printed for the use of the convention delegates and occupied their discussions for over a month. Article XIX of the draft came up for discussion on August 30th. Gouverneur Morris of Pennsylvania suggested that the Legislature should be left at liberty to call a convention whenever they pleased.[40] Thereafter the article was unanimously agreed to.[41]

On September 10th, Elbridge Gerry of Massachusetts moved to reconsider Article XIX of the first draft on the grounds that since the Constitution was to be paramount to the state constitutions, two-thirds of the states could obtain a convention wherein a majority could bind the union to innovations which might subvert the state constitutions.[42] Alexander Hamilton of New York seconded Gerry's motion to reconsider, citing the following different reasons:

> He (Hamilton) did not object to the consequences stated by Mr. Gerry — There was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State — It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State

36. *Id.*
37. *Id.* at 237; 2 M. FARRAND, *supra* at 83.
38. *Id.* at 148, 152, 159, 174.
39. *Id.* at 188.
40. *Id.* at 468.
41. *Id.*
42. *Id.* at 557-58.

> Legislatures will not apply for alterations but with a view to increase their own powers — The National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention — There could be no danger in giving this power, as the people would finally decide in the case.[43]

James Madison of Virginia also favored the motion to reconsider, perceiving the vagueness of the provision.

"Mr. Madison remarked on the vagueness of the terms 'call a Convention for the purpose' as sufficient reason for reconsidering the article. How was a Convention to be formed? By what rule Decide? What the force of its act?"[44]

The motion to reconsider was passed.[45] James Wilson of Pennsylvania and Roger Sherman of Connecticut then moved to amend the proposed article.[46] Consideration of this was postponed upon a motion by Madison, who suggested the following provision in place of what had previously been agreed to:

> The Legislature of the U.S. — whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[47]

Madison's motion was seconded by Hamilton. John Rutledge of South Carolina moved to amend Madison's proposal to protect slavery interests.[48] His amendment was accepted by the convention, and Madison's proposal, as amended, approved.[49]

Article XIX of the first draft of the Constitution was reported

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43. *Id.* at 558 (Madison's notes).
44. *Id.*
45. *Id.*
46. *Id.* at 558-59.
47. *Id.* at 559.
48. *Id.*
49. *Id.*

out of the Committee of Style and Revision as Article V of the second draft of the Constitution. Article V then read as follows:

> The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this consitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several scates, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the____ and ____ sections of article _____.[50]

Article V came up for discussion on September 15. Sherman expressed fears that three-fourths of the states might abolish particular states or deprive them of their equal representation in the Senate, and felt that the Article V provision which prevented use of the amendment power to affect slavery should be expanded to provide that no State could be affected in its internal police power or deprived of its equality in the Senate.[51] Mason thought that the plan for amending the Constitution as proposed was exceptionable and dangerous. He pointed out that as proposing amendments, under both modes, depended either immediately or ultimately upon the Congress, no amendments could ever be obtained by the people should the government become oppressive, as he believed it someday would.[52] Upon Mason's objections, Gouverneur Morris and Eldbridge Gerry moved to amend the article so as to require a Convention upon the application of two-thirds of the states.[53] Madison stated that he did not see why the Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a convention on like application. He added, however, that he saw no objection against providing for a Con-

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50. *Id.* at 629. The blanks were filled in to read, "affect the first and fourth sections of Article I."

51. *Id.*

52. *Id.* In the margin of his copy of the second draft (September 12) Mason wrote as follows:

> Article 5th — By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental rights and liberties of the people.

Id. n.8.

53. *Id.* at 629.

vention for the purpose of proposing amendments, except for the difficulties which might arise as to the form, the quorum, etc., which he thought in Constitutional regulations ought to be avoided as much as possible.[54] The Morris and Gerry amendment was accepted. After further discussion, Article V was amended a final time, to quell the fears raised by Sherman and the smaller states, adding the proviso, "[t]hat no State, without its consent shall be deprived of its equal sufferage in the Senate."[55] Article V thus assumed its present form.

When the Constitution was before the various state conventions for ratification, the amendment procedure in Article V appears generally to have been viewed positively, a reason for ratification.[56]

James Madison, in *The Federalist No. 43*, made these observations regarding Article V:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore, that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against the extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables that general and state governments to originate the amendment of errors as they may be pointed out by experience on one side or another.[57]

Article V, like numerous other constitutional provisions, is a result of compromise. The majority of convention members recognized that the new Constitution should contain a method whereby it could be altered or amended if such need should arise in the future. One faction did not trust giving the states the amending power for fear that they would use this power either to weaken the strong national union being forged or to destroy and discriminate

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54. *Id.* at 629-30.

55. *Id.* at 631.

56. Before North Carolina's ratifying convention James Iredell argued, "it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people." 4 J. ELLIOT, *supra* note 28, at 176-77.

57. THE FEDERALIST No. 43 (Cooke ed. 1961).
Justice Story also spoke highly of the usefulness and propriety of the amending provision.
J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1827-28(5th ed. 1891)(hereinafter cited as J. STORY).

against other states. The other faction did not trust the national legislature with sole possession of the amending power, fearing that if the government became oppressive, it would never permit amendments to end the abuses.

The debates of 1787 make it clear that the convention method of amending the Constitution was devised as a protection against this latter concern. There was to be an amending process whereby Congress would be bypassed, and the people could initiate amendments, despite opposition from Congress.[58] When trying to resolve the issues and questions raised by the Article V convention method, this purpose must be clearly kept in mind.

III. ISSUES RAISED BY THE ARTICLE V CONVENTION METHOD

Article V speaks in general terms. It neither describes nor defines the convention which it contemplates. The debates of the 1787 convention are not very helpful in attempting to perceive the constitutional shape of such a convention. It would appear initially that an Article V convention must be some sort of deliberative body.[59]

Many questions have been raised concerning the Article V convention method, some of which have been satisfactorily resolved. Others continue to plague those concerned in this area. This section of the article will discuss these questions.

A. Can Congress Call a Constitutional Convention Absent State Applications?

One question that has arisen is whether Congress on its own initiative can call an Article V convention. It is generally agreed that Congress does not have the power to do so. The argument against Congress' power to do so, has been thusly stated:

> Congress is neither authorized nor compelled to summon an Article V convention prior to the submission by two-thirds of the state legislatures of proper and timely applications for such a convention. The reasons for this are

58. Comment, *supra* note 2, at 498.

59. *See* Bonfield, Proposing Constitutional Amendments by Convention: Some Problems, 39 Notre Dame Law. 659, 662 (1964); Platz, Article V of the Federal Constitution; 3 Geo. Wash. L. Rev. 17, 45 (1934) [hereinafter cited as Platz].

> several. Since the United States is a government of delegated powers, it possesses no authority except that conferred upon it by the Constitution. Article V, the only provision in the Constitution dealing with its amendment, must therefore be deemed exhaustive and not merely illustrative of the federal government's power in this regard. That provision explicitly sets out two modes for proposing constitutional amendments, only one of which contemplates the convening of a convention empowered to propose amendments. Such a convention is authorized by Article V only when two-thirds of the state legislatures have made 'Applications' for a convention. As a result, applications within the meaning of Article V from two-thirds of the states legislatures must fairly be deemed absolute prerequisites to the summoning of such a body.[60]

A contrary argument, however, has been advanced.[61]

Nothing in the 1787 convention debates supports the view that Article V was merely meant to be illustrative of one method of constitutional amendment,[62] and that Congress could therefore, in the absence of state applications, call a convention.[63]

B. Is Congress Obligated to Call a Constitutional Convention when Properly Petitioned?

It has been argued that the terms of Article V, providing that Congress shall call a constitutional convention when petitioned, are

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60. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949, 951 (1968) [hereinafter cited as Bonfield]. *See also* L. Orfield, *supra* note 24, at 37, 40.

61. *See* Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 Notre Dame Law 185, 196 (1951) [hereinafter cited as Corwin & Ramsey].

62. On August 30, Morris suggested that the national legislature should be at liberty to call a convention whenever they pleased. *Supra* note 40 and accompanying text. On September 10, Hamilton also suggested that the national legislature should be empowered to call a convention absent state application. *Supra* note 43 and accompanying text.

These actions clearly would not support an argument that Article V is merely illustrative. At the time these actions were taken, the only method contemplated by the convention for proposing amendments was to call a convention for that purpose. Thus Morris and Hamilton were merely stating their viewpoint that the national legislature should also be able to initiate amendments — not conventions — without the need for state request, which ultimately it was given the power to do.

63. It could be argued that Congress does in fact have such a power. By accepting the liberal interpretation that all applications from the States, regardless of their reasons, should be counted together to meet the two-thirds requirement, and by accepting a lengthy period during which applications would be counted, at almost any given point, Congress would have no difficulty in finding the Article V prerequisites to a constitutional convention arguably met.

64. *See, e.g.*, Dodd, *Judicially Non-Enforceable Provisions of the Constitution*, 80 U. Pa. L. Rev. 54, 82 1931); Platz, *supra* note 59, at 44.

not mandatory but merely permissive.[64] There has been strong objection to this viewpoint.[65] The evidence that Article V places a mandatory duty upon Congress to call a convention, when properly petitioned, is overwhelming.

The wording of Article V supports this argument. Article V provides that "on the Application of the Legislatures of two-thirds of the several States (Congress) *shall* call a Convention for proposing Amendments . . . "[66] In *Martin v. Hunter's Lessee,*[67] the Supreme Court interpreted the word "shall" as having a mandatory effect in the contest of the Constitution.[68]

It seems clear that the framers intended that Congress be subjected to a mandatory duty to call a convention when properly petitioned.[69] In *The Federalist No. 85*, Hamilton wrote:

> In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portions of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone I think there is little weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing thirteen states at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion constantly impose on the national rules the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But

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65. *See Bonfield, supra* note 60, at 976; *Ervin, supra* note 17, at 886.

66. U.S. Const. art. V.

67. 14 U.S. (1 Wheat.) 304 (1816).

68. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 327 (1816).

69. In a letter on the subject, Madison observed that the question concerning the calling of a convention, "will not belong to the Federal Legislature. If two-thirds of the states apply for one, Congress cannot refuse to call it: if not, the other mode of amendments must be pursued." Letter from Madison to Mr. Eve, dated January 2, 1789, reprinted in 5 U. S. Bureau of Rolls & Library, Documentary History of the Constitution of the United States of America 1786-1870 143.

One delegate to the North Carolina ratifying convention explained Article V as follows: ". . . that it is very evident that . . . [the proposal of amendments] does not depend on the will of Congress: for . . . the legislatures of two-thirds of the states were authorized to make applications for calling a convention to propose amendments, and, on such applications, it is provided that Congress shall call such convention, so that they will have no option."

4 J. Elliot, *supra* note 28, at 178. *See also* Corwin & Ramsey, *supra* note 61, at 195.

> there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obligated 'on the application of the legislatures of two thirds of the States (which at present-amount to nine), to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.' The words of this article are peremptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air.[70]

Further, keeping in mind the purpose behind the Article V convention method; *i.e.,* insuring that the people would always have at their disposal a method of correcting defects in the system should the national government become oppressive and refuse to initiate changes, it becomes apparent that the duty imposed upon Congress must be mandatory. Were Congress to have discretion over the calling of a convention, the purpose behind the provision would be nullified.

C. State Applications for a Constitutional Convention

The duty of Congress to call a convention when properly petitioned is mandatory. Congress, however, has the power to ascertain whether the prerequisites to this duty have been met.[71] Article V states that Congress shall call a convention "on the Applications of the Legislatures of two-thirds of the several states."[72] This provision raises several questions. How long should Congress count state applications? Should only those applications which deal with the same subject matter be counted together, or should all states applications regardless of subject matter be included? May a state rescind its application for a convention?

It is generally agreed that Congress should consider only those applications which are submitted reasonably contemporaneously

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70. The Federalist No. 85 (Cooke ed. 1961).
71. Wheeler, *Is a Constitutional Convention Impending?*, 21 Ill. L. Rev. 782, 790 (1927) [hereinafter cited as Wheeler].
72. U.S. Const. art. V.

with one another when determining whether the prerequisites of its Article V duty have been met.[73] The framers intended that the Constitution be modified only when there was significant agreement among the states and the people to do so.[74] The framers thus provided that Congress must call a convention only when two-thirds of the states petitioned for one; that an amendment would not be ratified unless three-fourths of the states agreed thereto; and that two-thirds of both Houses of Congress must concur before the amendment was initiated. The framers required significantly more than mere majority agreement at all phases of the amending process. The implicit requirement of substantial agreement, when applied to the application process, calls for two-thirds of the states to agree that the convention procedure be invoked. Inherent in the concept of agreement is a contemporaneous convergence of desire for a specified course of action.

The next issue then is what constitutes a contemporaneous period during which to count applications? One writer has suggested that applications tendered during one "generation" be counted together.[75] Another suggests that Congress count only those applications which it receives during one session.[76] The best view appears to be that there be no definite period since what is contemporaneous in each case will vary, depending on factors such as the issues involved and the political climate. In *Coleman v. Miller*,[77] involving the validity of Kansas' ratification of the proposed Child Labor Amendment, the Supreme Court held that the validity of a state's ratification of a proposed amendment, nearly thirteen years after it has been proposed, was nonjusticiable.[78] The Court stated that the question of a reasonable time for ratification involved considerations of political, social, and economical conditions prevailing since the amendment was submitted for ratification and that Congress, not the Court, was in the best position to evaluate these.[79] Applying the same rationale to applications, the converse side of the amending process, in determining whether the prerequisites of its duty to call a convention have been met, Congress would analyze the above

73. *See* Bonfield, *supra* note 60, at 958; Corwin & Ramsey, *supra* note 61, at 195-96.
74. Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1071-72 (1957).
75. L. ORFIELD, *supra* note 24, at 42.
76. Sprague, *Shall We Have a Federal Constitutional Convention, and What Shall it Do?*, 3 ME. L. REV. 115, 123 (1910) [hereinafter cited as Sprague].
77. 307 U.S. 433 (1939).
78. Coleman v. Miller, 307 U.S. 433, 450 (1939).
79. *Id.* at 453-54.

mentioned factors and decide whether contemporaneous agreement for a constitutional convention was present.[80]

Congress may, if it so desired, choose to set a definite period during which applications calling for a convention to deal with a particular subject would be counted. In *Dillon v. Gloss*, [81] the Supreme Court upheld the validity of a definite period imposed by Congress for state ratifications. The Court held:

> We do not find anything in the Article [V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective . . . First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time . . . . [A]s ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.'[82]

Applying the rationale of *Dillon* to the application process, Congress may impose a reasonable period during which state applications would be considered together.[83] Such a definite period would have the advantage of removing the subjective determinations previously mentioned, but would not unduly burden the use of the convention method, as state legislatures could

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80. *See* Bonfield, *supra* note 60, at 961.
81. 256 U.S. 368 (1921).
82. Dillon v. Gloss, 256 U.S. 368, 374-75 (1921).
83. *Accord*, A.B.A. Study, *supra* note 2, at 31-32.

periodically renew their applications, if they retained their interest in calling a convention.

The Ervin legislation provides that an application submitted to the Congress by a state shall remain effective for seven calendar years after the date it is received by Congress.[84] Presumably this time period was suggested by analogy to the limitation period set for ratifications.[85] It has been suggested, however, that the considerations pertinent to ratification are not the same for the application process, and that four years might be a more appropriate period.[86]

Another issue raised is whether only those applications which deal with the same issue should be counted together, or whether all state applications requesting a constitutional convention, regardless of the reasons cited by the state in its application therefor, should be included.

Initially, in order to be an "application" within the meaning of Article V, a state's communication with Congress must somewhere contain a request for a constitutional convention.[87] It also appears that Congress may not require the state's application to be in any particular form.[88]

Article V seems to require a general consensus among two-thirds of the states that a constitutional convention be called. Thus, only those applications which request a convention to deal with the same issue should be counted together. If one state, for example, desires a constitutional convention to propose a pro-life amendment, and another state desires a convention to propose an amendment requiring a balanced federal budget, there is a general consensus or agreement that a convention be called, but a basic disagreement exists regarding what the convention should consider. If two states, however, request a convention to consider a balanced budget amendment, then the requisite agreement exists. The Ervin legislation adopts this approach, counting together only those applications which call for a constitutional convention to deal with "the same subject."[89]

Another issue concerning state applications is whether a state may rescind its application for a constitutional convention. The Ervin legislation permits such recission up until the required number of states have petitioned Congress for a convention.[90] This

84. S. 1272, *supra* note 14, § 5(a).
85. *See* S. REP. No. 93-293, *supra* note 8, at 11.
86. Note, 85 HARV. L. REV. *supra* note 16, at 1620-21; A.B.A. Study, *supra* note 2, at 32.
87. A.B.A. Study, *supra* note 2, at 30.
88. *See* Dirksen, *supra* note 4, at 864; S. REP. No. 93-293, *supra* note 8, at 10.
89. S. 1272, *supra* note 14, §§ 5(a), 6(b).
90. *Id.* § 5(b).

is clearly the correct approach. State applications for a convention should show a general consensus among the requisite number of states that a constitutional convention be held. A state can hardly be said to be part of a consensus to call a convention after it has rescinded its application. After the requisite number of states have petitioned Congress and invoked its duty to call a convention, a state has other courses of action open to it should it, after reconsidering, no longer desire the convention. Allowing a state to rescind its application after the required number of states have submitted applications and the duty to call the convention has arisen would amount to giving a single state, or handful of states, a veto power over the convention method after it has been set in motion.

A final issue with state applications is the effect of calling a constitutional convention upon previously submitted applications. If one accepts the viewpoint that a duly convened constitutional convention has the power to propose amendments on any subject, it would appear that all previously submitted applications would lose their validity once the convention is held, since each state would have the right to seek adoption by the convention of amendments on any subject. If the viewpoint is accepted that the convention can be limited in scope to consideration of the topic placed by Congress in the call, then only those state applications dealing with that topic should lose their validity once the convention is held.

D. THE ROLE OF THE PRESIDENT, STATE GOVERNORS, AND THE VICE-PRESIDENT IN THE ARTICLE V CONVENTION METHOD.

Article 1, Section 7 of the Constitution in part provides as follows:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules of Limitations prescribed in the case of a Bill.[91]

91. U.S. CONST. art. I, § 7.

The Supreme Court has held that provisions of the Constitution must be read in light of each other.[92] Consequently, it has been argued that the President has the power to veto Congress' call of a constitutional convention.[93] It is pointed out that Congress must enact legislation, pursuant to its call of the Convention, which is similar to other types of legislation which Congress normally deals with, and therefore, no logical reason exists to exclude the convention process from the scope of Article I, Section 7.[94] The President, it is urged, would be under a duty to veto a call if he believed the constitutional prerequisites were not met[95] or if he believed that the convention was not in the nation's best interests.[96]

This viewpoint is clearly untenable. Despite the surface similarity between legislation which Congress must enact incidental to a convention call and other types of legislation over which the President possesses the veto power, Congress, when enacting legislation pursuant to the call of a constitutional convention, is performing a unique function delegated to it by a specific article of the Constitution. Congress is not acting in its regular lawmaking role. Congress is merely the agency selected by the framers through which this process is to be effectuated.[97]

The history of Article V lends no support to the proposition that the President has a role in the amendment by convention process. Article V speaks only of Congress. No mention is made of the President, nor can a role for him be inferred into the article from its specific language or from the 1787 debates.[98] Were the President given a veto power over the Article V convention method a great obstacle would stand in the way of the people as they attempt to amend the Constitution. The Article V convention method was designed to insure the people a way to amend the Constitution in the event the national government, presumably including the President, should ever become oppressive. To include

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92. *See* Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964); Prout v. Starr, 188 U.S. 537 (1902).

93. *See, e.g.*, Black, *supra* note 16, at 206-09.

94. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L. J., 957, 965 (1963) [hereinafter cited as Black]; Bonfield, *supra* note 60, at 986.

95. *See, e.g.*, Bonfield, *supra* note 60, at 986.

96. Black *supra* note 94, at 965.

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> Since Article V is a grant of power to Congress, and not to the Federal Government, as we have seen, and since Congress is bound to call a convention upon the application of the requisite number of states, it would seem that such act should not be subject to the President's veto.

Platz, *supra* note 59, at 37.

98. *See* Gilliam, *Constitutional Conventions: Precedents, Problems, and Proposals*, 16 ST. LOUIS U.L.J. 46, 48 (1971) [hereinafter cited as Gilliam].

the President in this process would be contrary to the intent of the framers. Presumably, the act of calling a convention, and all legislation incidental thereto, would require a mere majority vote of both houses.[99] If the President had the power to veto matters relating to the call of such a convention, each house would be required by Article I, Section 7 to repass the measures by a two-thirds vote. This would greatly inhibit the effectiveness of the convention method.[100]

The first ten amendments were submitted to the states for approval without having first been sent to President Washington.[101] In *Hollingsworth v. Virginia*,[102] the Supreme Court considered a case involving the validity of the eleventh amendment. It was argued that the amendment was void because it was not proposed in the form prescribed by the Constitution, having never been submitted to the President for his approval, as it was contended was required under Article I, Section 7.[103] Counsel argued that the President's concurrence was required in matters of infinitely less importance than amending the Constitution and that the language of Article I, Section 7 applied equally, whether on subjects of ordinary legislation or of constitutional amendment.[104] *Hollingsworth* involved the congressional method of amending whereby amendments are proposed by two-thirds of the members of each house. Counsel stated as follows:

> . . . . it is no answer to the objection, to observe, that as two-thirds of both houses are required to originate the proposition, it would be nugatory to return it with the president's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proposition.[105]

The Attorney General pointed out that the same course (not requiring the approval of the President) had been followed in all the other amendments which had been adopted. He argued that the case of amendments is a substantive act, unconnected with the

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99. Platz, *supra* note 59, at 37.

100. The A.B.A. Study, *supra* note 2, supports the opinion that the President has no role in the amendment process. *Id.* at 26-28.

101. Annot., Article 1, Section 7, in THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 136 (1964 ed.).

102. 3 U.S. (3 Dall.) 378 (1798).

103. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 378-79 (1798).

104. *Id.* at 379.

105. *Id.* at 378-79.

ordinary business of legislation, and not within the policy or terms investing the President with a qualified negative on acts and resolutions of Congress.[106] In a footnote to the Attorney General's argument, Justice Chase wrote, "[t]here can, surely, be no necessity to answer that argument. The negative of the president applies only to ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution."[107]

In 1803, a motion to submit the twelfth amendment to the President was defeated in the Senate. In 1861, a proposed amendment on slavery was presented to and signed by President Buchanan. In 1865, the proposed thirteenth amendment was submitted to President Lincoln and signed by him, in apparent inadvertence. This matter was discussed in the Senate and a resolution was passed declaring that the President's signature was unneccessary, that his actions were inconsistent with previous practice and that this should not constitute a precedent for the future. In 1866, President Andrew Johnson made clear, in a report sent to Congress, that actions taken by the President relating to amendments were ministerial in nature and did not commit the President to a role in the process. Since that time, no proposed amendment has been submitted to the President.[108] Finally, in *Hawke v. Smith, No. 1,*[109] the Supreme Court, citing *Hollingsworth*, stated unequivocably that, "[A]t an early day this court settled that the submission of a constitutional amendment did not require the action of the President."[110]

While *Hollingsworth* dealt with the Congressional amendment process, there is no reason to believe that had the question arisen in connection with the Article V convention method that a different result would have been reached. The Ervin legislation provides that the convention shall be called by the passage of a concurrent resolution which does not require the signature of the President.[111]

Another issue concerns the role of a state governor in the Article V convention method. May the governor veto a state's application to Congress for a constitutional convention? Article V provides that, "[c]ongress . . . on the Application of the Legislatures of two-thirds of the several States, shall call a

106. *Id.* at 380.
107. *Id.*
108. A.B.A. Study, *supra* note 2, at 27.
109. 253 U.S. 221 (1920).
110. Hawke v. Smith, No. 1, 253 U.S. 221, 229 (1920).
111. S. 1272, *supra* note 14, § 6(a).

convention for proposing Amendments. . . ."[112] The answer to the question concerning the role of the state governor in this process revolves around the meaning of the word "Legislatures" as used in Article V.

The Supreme Court has held that the term "legislature" in a particular clause of the Constitution depends upon the type of activity that the legislature is called upon to perform. In *Smiley v. Holm,*[113] the Supreme Court held that when a state legislature prescribes the time, place, and manner of holding elections under Article I, Section 4 of the Constitution, it is enacting legislation and in that context "legislature" means the entire legislative process of the state, including the executive veto. As stated by the Court, "[w]herever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view."[114]

In *Hawke v. Smith, No. I,*[115] the Supreme Court struck down a provision in Ohio's constitution requiring ratification of proposed constitutional amendments by popular referendum. The Court found this to be invalid because Article V required ratification by "legislatures" and that a popular referendum was not a "legislature" within the sense the term was used in Article V. The Court wrote as follows:

> The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by *"Legislatures"*? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.[116]

Ratification of a proposed amendment, the Court stated, was not an act of legislation within the proper sense of the word, but merely an expression of assent for which no legislative action is authorized or required. The Court further held that the power to ratify a proposed amendment to the Federal Constitution had its source in the Federal Constitution; and the act of ratification by a state

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112. U.S. Const. art. V.
113. 285 U.S. 355 (1932).
114. Smiley v. Holm, 285 U.S. 355, 366 (1932). *See also* Note, 70 Harv. L. Rev., *supra* note 74, at 1074.
115. 253 U.S. 221 (1920).
116. *Id.* at 227.

derived its authority from the Federal Constitution to which the state and its people had assented.[117]

The term "legislatures" in Article V thus means the representative body which ordinarily makes the laws. The function given to this agency by Article V is a federal function derived from the Constitution. Consequently, when state legislatures apply to Congress for an Article V convention they are not acting as lawmakers under their state constitutions but as federal agents performing a federal function. They are representatives of the people of the State under the power granted by Article V. The article imports a function different from that of lawmakers and renders inapplicable the conditions which usually attach to the making of state laws, such as the governor's approval. [118] The Ervin legislation follows this viewpoint by providing that a state's application for a convention need not be approved by the state's governor.[119]

The final issue for discussion is whether the Vice-President has a role in the Article V convention process. Article I, Section 3 provides that, "[t]he Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."[120] If the Senate is equally divided on the calling of a constitutional convention, may the Vice-President cast his vote to break the tie? As in the case of the President, Article V makes no specific reference to the Vice-President, nor do the debates of 1787. There exists, however, evidence that the framers did not intend for the Vice-President to have a role in the amending process.[121]

In applying the same reasoning to the Vice-President as applies to the role of the President, it appears that the Vice-President should likewise have no role in the amending process. Just as the power of the President to veto legislation under Article I,

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117. *Accord*, Leser v. Garnett, 258 U.S. 130, 137 (1922). *See also* Petuskey v. Rampton, 307 F. Supp. 235 (1969), *rev'd on other grounds*, 431 F.2d 378 (10th Cir. 1970), *cert. denied*, 401 U.S. 913 (1971).

118. C. BRICKFIELD, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 10-11 (Comm. Print 1957) [hereinafter cited as C. BRICKFIELD]. *See* State ex. rel. Sanstead v. Freed, 251 N.W.2d 898 (N.D. 1977) (lieutenant governor could not vote upon final disposition of resolutions proposing amendments to the U. S. Constitution); Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977) (signature of Governor not required on resolutions calling for a national convention).

119. S. 1272, *supra* note 14, § 3(a); *But see* Black, *supra* note 16, at 209-10, where the author argues that state governors should not be excluded from the amendment by convention process of Article V.

120. U.S. CONST. art. I, § 3.

121. In 1803, Pierce Butler, then Vice-President of the United States, who had been a delegate from South Carolina to the 1787 Convention, stated on the floor of the Senate, "It was never intended by the Constitution that the Vice-President, should have a vote in altering the Constitution."

3 M. FARRAND, *supra* note 27, at 400.

Section 7 applies only to ordinary legislation, so should the power of the Vice-President to cast a deciding vote in the Senate. It would be anomalous if the Vice-President were to have a role in the amending process, but not the President or the state governors. *Hollingsworth* and *Hawke,* which held that the President had no role in the amendment process should apply to the Vice-President by analogy. Provision is made in the Ervin legislation for the Vice-President to convene the constitutional convention, administer the oath of office, and preside until the delegates elect a presiding officer.[122]

E. Representation At and Delegates To an Article V Convention.

One of the most important issues concerning an Article V convention is representation. Should each state have one vote, should delegates be apportioned strictly on the basis of population, or according to some other scheme?

It seems reasonable that the framers, when devising the convention method, contemplated a convention substantially similar, if not identical, to the one they were then attending. The 1787 convention was organized on the basis of state representation. Each state had one vote. Seven states, a simple majority, constituted a quorum, a majority of those states present being competent to decide all questions.[123] The provision in Article V for a separate ratification stage was adopted after it was pointed out in the debates that if the convention were to have both the power to propose and to adopt amendments,[124] a majority of the *states* could bind the whole union.

The entire scheme for amendment as provided for in Article V is evidence that the framers viewed amendments to the Constitution as alternations in the fundamental compact between the states. In this compact each state is the theoretical and legal equal of the others, regardless of such differences as wealth or population. Article V provides that whenever two-thirds of the legislatures of the *several states* apply, a convention shall be called. This convention shall then propose amendments which when ratified by the legislatures of three-fourths of the several *states* or by conventions in the *states*, shall be valid. The states have an equal

122. S. 1272, *supra* note 14, § 8(a).
123. M. Farrand, The Framing of the Constitution of the United States 57 (1962).
124. *Supra* note 42 and accompanying text.

voice in both the application stage and in the ratification stage of the amending process. It would be illogical to assume that the framers did not intend for the states to have an equal voice during the convention.[125] Madison wrote in *The Federalist No. 43* concerning Article V, "[i]t moreover equally enables the general and *state governments* to originate the amendment of errors as they may be pointed out by experience on one side or another."[126] While the amendment power ultimately rests with the people, it is exercised by them through the states, and, in the legal contemplation of the Constitution, each state is regarded as an equal. As stated by one eminent authority, Article V:

> recognizes the concept of dual constituency of the Federal Government. A ratification signifies not only the assent of a section of the *people* of the United States, expressed by their agent, but that of a *state,* regarded as a political community, as well, and the vote of New York . . . has no more weight than that of . . . Nevada. Likewise, no state may be deprived of its equal sufferage in the Senate without *its* consent. Finally, a convention is to be called upon the application of two-thirds of the states, and here also the shout from New York has no more weight than the whisper from Nevada.[127]

It is interesting to note that the legislation originally drafted by Senator Ervin provided for representation modeled after the 1787 convention; *i.e.*, each state having one vote.[128] Senator Ervin, however, was forced to modify this, after hearings, presumably as the result of political pressure from the populous states. S. 1272 provides that a convention shall be composed of as many delegates from each state as it is entitled to Senators and Representatives in Congress.[129]

The American Bar Association's Special Study Committee believes that convention representation should be guided by the Supreme Court's "one man, one vote" rule. It suggests representation identical to that of the states in the House of

125. *See Hearings on S. 2307, supra* note 14, at 33 (remarks of Senator Hruska); Note, 85 HARV. L. REV., *supra* note 16, at 1625.

126. THE FEDERALIST No. 43 (Cooke ed. 1961) (emphasis added).

127. Platz, *supra* note 59, at 29.

128. "[I]n voting on any question before the convention each state shall have one vote which shall be cast as the majority of the delegates from the state, present at the time, shall agree." S. 2307, 90th Cong., 1st Sess., § 9(a) (1967).

129. S. 1272, *supra* note 14, § 7(a).

Representatives.[130] Another writer has suggested a bicameral convention modeled after Congress.[131]

Those who disagree with the idea of representation at an Article V convention patterned after the 1787 convention either ignore the clear intent of the framers,[132] or in the alternative argue that even if this was their intent we should no longer be bound to follow it.[133]

If the argument that a convention should be based upon proportionate representation is followed to its logical conclusion, then representation at an Article V convention should be totally on the basis of one man, one vote. There is no compelling reason, once the intent of the framers is cast aside, to accord each state even a minimum of one delegate, since even this would result in population deviations of up to fifty percent.[134] While the specific language of Article V arguably does not bar a convention based upon proportionate representation according to population, such a convention would be an anomaly within the Article V scheme of amendment. The application and ratification provisions of Article V clearly give each state an equal vote. This language cannot be ignored. What would be the advantage of having a convention, based solely upon proportionate representation by population, propose amendments which would have to be ratified with each state having one vote. Such an interpretation would merely place a barrier upon the practical use of this method. If each state had an equal vote at an Article V convention, amendments proposed from such a convention would stand a far greater chance of adoption because majority agreement and compromise would already have been hammered out between the states at the convention level.

The clear intent of the framers, that an Article V convention should be based upon equal state representation, is an inherent constitutional requirement of Article V. While on occasion, when exceptional circumstances were present, the Supreme Court has wandered away from the strict intent of the framers,[135] the traditional approach of the Court being to follow the clear intent of

130. A.B.A. Study, *supra* note 2, at 35-36.

131. Note, 70 HARV. L. REV., *supra* note 74, at 1076 n.50.

132. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 909 (1968) [hereinafter cited as Kauper]; Note, 70 HARV. L. REV., *supra* note 74, at 1075.

133. Bonfield, *supra* note 60, at 988; McClesky, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1006-07 (1968); Note, 85 HARV. L. REV., *supra* note 16, at 1625-27; A.B.A. Study, *supra* note 2, at 35.

134. *See* A.B.A. Study, *supra* note 2, at 36.

135. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489 (1954); Home Building Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1933); Missouri v. Holland, 252 U.S. 416, 433 (1920); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

the framers when interpreting the Constitution.[136] If this requirement of Article V is outmoded and archaic, like the electoral college is argued to be, then the proper remedy is to amend the Constitution not to ignore the clear intent of the framers or to rationalize it away.

Accepting the viewpoint that each state has one vote at an Article V convention on all matters, it follows that each state should be allowed to select its delegates, in any manner it chooses.[137] A State should have members of its delegation either elected or appointed. The states' legislatures would be in charge of the delegation selection. A state could put in its delegation as many persons as it desired, though each state would have but one vote at the convention. Presumably, however, practical and financial considerations would prevent an excessive number from being sent. If the 1787 convention precedent is followed, and a state appoints its delegation, supposedly only those best qualified, *e.g.*, respected elder statesmen and state political leaders, would be appointed. Prudent men, not likely to be given to any excesses or abuses of the convention process, certainly would be chosen.

The Ervin legislation, proceeding upon the premise that Congress has the power to prescribe the selection of delegates to an Article V convention, provides that two delegates shall be elected at large and one elected from each congressional district according to state law. Any vacancy occurring in a state delegation is to be filled by appointment by the state's governor.[138]

A final issue is whether there are any constitutional limitations upon whom may be a delegate to an Article V convention. Article I, Section 6 of the Constitution states the following:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office un-

136. *See, e.g.*, South Carolina v. United States, 199 U.S. 437, 448 (1905); Knowlton v. Moore, 178 U.S. 41, 95 (1900); Lake County v. Rollins, 130 U.S. 662, 670 (1889); Ex parte Bain, 121 U.S. 1, 12 (1887); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 722 (1838).

The Supreme Court has held that if the meaning of a constitutional provision is at all doubtful, wherever reasonably possible to do so, the doubt should be resolved in a way to forward the evident purpose with which the provision was adopted. Maxwell v. Dow, 176 U.S. 581 (1900); Jarrolt v. Moberly, 103 U.S. 580 (1880).

The Supreme Court has long recognized the propriety of drawing upon the debates of the 1787 Convention, *The Federalist*, and other writings of the founding fathers to construe vague constitutional provisions. Missouri Pac. R.R. v. Kansas, 248 U.S. 276 (1919); Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

137. "It would seem proper for each state to determine the procedure for the election of its delegates and the qualifications of the electors, since matters of this kind have traditionally been left to the states." Note, 70 HARV. L. REV., *supra* note 74, at 1076. *See also* Platz, *supra* note 59, at 37-38.

138. S. 1272, *supra* note 14, § 7(a).

> der the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[139]

Are members of Congress prevented by this provision from being delegates to an Article V convention? The Supreme Court has suggested that an "Office under the Authority of the United States" must be one created under Article II's appointive provisions,[140] consequently excluding the position of delegate to a constitutional convention, which arises under Article V. Selection of a member of Congress by a state to a position on its delegation to an Article V convention clearly does not come within the policy behind Article I, Section 6, and thus should not be barred.[141] The Articles of Confederation contained a prohibition similar to the present Article I, Section 6,[142] yet several delegates to the 1787 convention were members of the Continental Congress.[143] Theoretically state laws and state constitutions may prescribe directly or indirectly who may not serve as Article V convention delegates, *e.g.*, minors, incompetents, criminals, etc.

F. Financial Issues Pertaining to an Article V. Constitutional Convention.

Article V is silent about the financing of a constitutional convention. It would seem that Congress has inherent power and the responsibility, incidental to its power to call the convention, to provide reasonable funds for the convention. Congress' minimal responsibility should be to provide the actual costs of the convention, leaving to the states the burden of travel expenses and personal expense money of the delegates.[144] Nothing, however, would preclude Congress from paying for the expenses of convention delegates. Hopefully, whether it be the federal or the state government, some one will pay the expenses of the delegates, so that being

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139. U.S. Const. art. I, § 6.

140. United States v. Smith, 124 U.S. 525 (1888); United States v. Germaine, 99 U.S. 508 (1878).

141. *See* Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 Minn. L. Rev. 1053, 1072-73 (1967) [hereinafter cited as Forkosch].

142. Article V of the Articles of Confederation provided that "nor shall any person being a delegate [to Congress], be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees, or emolument of any kind."

M. Farrand, The Framing of the Constitution of the United States 213 (1962).

143. A.B.A. Study, *supra* note 2, at 37.

144. Forkosch, *supra* note 141, at 1082 n.103.

a delegate to a constitutional convention would not become a privilege accorded only to the affluent.

An interesting question would arise if Congress, disfavoring the convention, were to attempt to use the "power of the purse" over it, and totally deny it funding or appropriate an insufficient fund. One writer has suggested that in such a case, the convention would have inherent power to appropriate its own funding.[145] This position is untenable at best. A convention could not enforce such an "appropriation." In our era of electronic media, however, should a convention duly convened find itself without funding, it could likely make a successful appeal to the American people and thus raise sufficient funds. Furthermore, a duly convened convention, as an agency of the United States, probably could charge its expenses, and possibly those of its delegates, to the credit of the United States, leaving creditors with the right to recover such sums against the United States in the federal courts.

The Ervin legislation authorizes the payment of such sums as may be necessary for the payment of the expenses of such a convention,[146] and provides that the concurrent resolution calling for the convention shall set delegate compensation for each day of service and for travel.[147]

G. The Power of the States over an Article V. Constitutional Convention and the Alternative Amending Process.

The initial question which arises in this area is whether states have the power, via their applications to Congress, to limit the scope of an Article V convention. If thirty-four states petition Congress for an Article V convention to propose a pro-life amendment, can this convention, so formed, expand its deliberations beyond that topic? The authorities overwhelmingly believe that the states have no such power.[148] In the words of one writer:

> even though the application were for a limited purpose, it would seem that the state legislatures would have no authority to limit an instrumentality set up under the Federal Constitution. In reality, the right of the

145. Platz, *supra* note 59, at 47.
146. S. 1272, *supra* note 14, § 8(b).
147. *Id.* § 7(d).
148. *See* Bonfield, *supra* note 60, at 995; Platz, *supra* note 59, at 45; Wheeler, *supra* note 71, at 795.

> legislatures is confined to applying for a convention, and any statements of purpose in their petitions would be irrelevant as to the scope of the powers of the convention.[149]

Another question concerning this issue is whether a state has the power to order its delegation home if it becomes dissatisfied with the way the convention is proceeding, or whether it can direct its delegation to vote a certain way at the convention, or only upon certain matters. the answer to these questions would seem to be no. If the viewpoint is accepted that a state cannot limit the scope of the convention directly via its application, then it should not be able to do so indirectly by controlling the actions of its delegates in the convention. The framers contemplated that an Article V convention would be a deliberative body which would discuss freely and fully any proposed constitutional changes.[150] In *Hawke v. Smith, No. 1*,[151] the Supreme Court, commenting upon the ratification process, stated that "both methods of ratification, by legislatures or *conventions*, call for action by *deliberative assemblages*. . . ."[152] The deliberative nature of a constitutional convention would be destroyed if delegates were subject to control by their state governments like puppets on a string, and their powers of participation limited. In conjunction with this area, it would seem appropriate that some sort of immunity be given to delegates to an Article V convention for their actions in connection therewith.[153]

Once two-thirds of the states have petitioned Congress for an Article V convention, and the call has been issued, must a state attend? One author suggests that a state need not attend an Article V convention,[154] though it seems unlikely in this day and age that a state would waive its opportunity to participate in such an assemblage.

Finally, Article V gives the states power to ratify proposed amendments, whether proposed by Congress or by a convention. In *Coleman v. Miller*,[155] the Supreme Court held that the question of the effect of a previous rejection of a constitutional amendment on a subsequent ratification was a political one to be determined by Congress. The Court held that absent a fixed period for

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149. L. ORFIELD, *supra* note 24, at 44-45.
150. Bonfield, *supra* note 60, at 992.
151. 253 U.S. 221 (1920).
152. *Id.* at 226 (emphasis added).
153. The Ervin legislation follows this approach. *See* S. 1272, *supra* note 14, § 7(c).
154. Forkosch, *supra* note 141, at 1067-68.
155. 307 U.S. 433 (1939).

ratification, the question of what was a reasonable time for ratification was a political question for Congress to decide. Following *Coleman* by analogy, Congress would have the power to decide if a state could rescind its ratification of a proposed amendment prior to ratification by the required number of states. In the past, Congress has determined that a state cannot rescind its ratification of a proposed amendment. The current trend, however, seems to be towards allowing a state to withdraw or rescind its own ratification prior to ratification by the required number of states. Since a consensus is required throughout the amendment process, recission is consistent because this consensus no longer exists as to a rescinding state. The Ervin legislation follows this approach.[156]

When analyzing the relationship of the states to the Article V convention method, it must be remembered that Article V is superior to state law under the "Supremacy Clause."[157] The states thus possess no powers which go contrary to the letter and spirit of Article V.

H. The Power of Congress over the Article V Convention Method

Congress has the power, incidental to its ministerial duty to call a convention, to ascertain whether the prerequisites of its duty to call exist.[158] The power of Congress over the Article V convention method is primarily based upon the fact that, under Article V, it is to "call" the convention. Congress' powers are said to be incidental to, or implied by, its power to call the convention.[159] Since Article V speaks in general terms, Congress, it is said, is best suited to fill the gaps in the convention method.[160] In *Dillon v. Gloss*,[161] the Supreme Court stated as follows:

> An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments.[162]
>
> . . . .
>
> As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail

156. S. 1272, *supra* note 14, §§ 13(a), 13(b). *See also* S. Rep. No. 93-293, *supra* note 8, at 19-20 (additional views of Senators Bayh and Cook).
157. U. S. Const. art. VI, 2d.
158. Kauper, *supra* note 132, at 906.
159. *Id.* at 906-07.
160. *See* Black, *supra* note 94, at 964.
161. 256 U.S. 368 (1921).
162. *Id.* at 373.

> as the public interests and changing conditions may require; and Article V is no exception to the rule.[163]

In *Dillon,* the Supreme Court upheld the power of Congress to set a time period for ratification. In *Coleman v. Miller,*[164] the Supreme Court held that, absent a set time limit upon ratification, Congress was best suited to determine what constituted a reasonable period for ratification of a proposed amendment, and that the Courts would not interfere in that determination.

Support for Congress' power over the Article V convention method is also found in Article I, Section 8 of the Constitution, the "necessary and proper" clause, which provides that "Congress shall have Power. . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[165] Added to this is the sweeping pronouncement by Justice Marshall in *McCulloch v. Maryland,*[166] "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[167]

Congress' power over the Article V convention method is subject only to the limitations which the Constitution places upon it. When ascertaining the powers of Congress in this area, the purpose behind the convention method must always be kept in mind. This method of amendment was placed in the Constitution to insure that the states would always have an avenue of amending open to them should the national government become oppressive. In exercising its powers over the Article V convention method, Congress could severely inhibit the use of this alternative method.[168] Keeping the purpose behind the convention method in mind, it would seem that whenever there is a serious doubt as to whether Congress has a particular power over the Article V

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163. *Id.* at 376.
164. 307 U.S. 433 (1939).
165. U.S. CONST. art. I, § 8, cl. 18.
166. 17 U. S. (4 Wheat.) 316 (1819).
167. *Id.* at 421.
168. Senator Ervin recognized this possibility when drafting his legislation.
> This legislation can be drawn so as to place as many hurdles as possible in the way of effective use of the process; or it can be drawn in a manner that will make such a process a possible, however improbable, method of amendment. The first alternative would be a flagrant disavowal of the clear language and intended function of Article V. I have assumed that the Congress will wish to take the second road, and the bill is drawn with that principle in mind.

Ervin, *supra* note 17, at 880.

convention method, a presumption against the existence of such a power should arise.

The proper view with respect to Congress' power over the Article V convention method is that the only powers which Congress possesses are those concerning housekeeping matters.[169] It would seem proper for Congress to set the date and location of the convention; put a reasonable time limit upon the length of its deliberations (it can hardly be suggested that an Article V convention once convened can continue in existence forever); and to appropriate a reasonable amount to finance the convention's expenses. Under the view accepted in this article, Article V implies a convention where each state has an equal vote. Consequently Congress cannot otherwise constitute the convention, *e.g.*, base representation on population or other factors. If the opposite view is accepted then Congress could determine the composition of the convention on some reasonable basis.

Under *Dillon*, Congress may set a time limit for states to ratify a proposed amendment. By analogy, Congress may set a time limit for the validity of applications for an Article V convention. It would appear then that an Article V convention would have inherent power to determine its own internal rules of procedure,[170] and any attempt by Congress to try to determine the convention's procedures would be futile.

I. The Scope of an Article V Convention's Authority.

As previously discussed, it is generally agreed that states have no power, via their applications, to limit the scope of an Article V convention's deliberations. One of the most vexing questions is whether Congress, in its call of a convention, can limit the subject matter upon which the convention may deliberate and act.

The observation has been made that "[t]here is a general aversion to tinkering with the Constitution . . . "[171] In his Farewell Address, President Washington warned, "[o]ne method of assault (against the Union) may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown."[172] Overall, the American people are quite satisfied

169. Note, 85 Harv. L. Rev., *supra* note 16, at 1617.
170. Note, 70 Harv. L. Rev., *supra* note 74, at 1076.
171. Wheeler, *supra* note 71, at 803.

with our constitutional system. Justice Felix Frankfurter once observed the following:

> For the general scheme of our constitutional system there is deep acquiescence and even attachment. One hears occasionally loose talk that our form of government is an anachronism, and dissatisfaction with some act of government or some failure to act is vaguely charged against our constitutional mechanism. But much more significant than these expressions of episodic discontent is the absence of any widespread or sustained demand for a general revision of our Constitution.[173]

There have been, however, occasional suggestions that our entire national framework of government be revised.[174]

Our present Constitution, amended relatively few times, has been in existence nearly two hundred years during which time a complex social, political and economic system has developed. Our present Constitution protects many vested interests, be they property rights or civil liberties. Many people regard the prospect of an Article V convention as an unknown, uncertain element in our system, having the potential to stir constitutional waters.[175] Some suggest that an Article V constitutional convention once called into being might cast aside its mandate, draft an entirely new constitution, declare it effective, and invite the states and existing government to acquiesce in it.[176] It has even been wildly speculated that an Article V constitutional convention could simply declare itself the new national government.[177] These arguments arise from the theory of "convention sovereignty." In 1911, Senator Hayburn stated the theory as follows: "When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal every section of it because they are the peers of the people who made it."[178] It has been properly pointed out that there is no merit to this theory.[179] Of course, it is possible that an Article V

172. Washington's Farewell Address, *quoted in* J. BECK, THE CONSTITUTION OF THE UNITED STATES: YESTERDAY, TODAY — AND TOMMORROW? 269 (1924).

173. F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 51 (1930).

174. *See, e.g.*, Tugwell, *Rewriting the Constitution: A Center Report*, CENTER MAGAZINE 18 (Mar. 1968).

175. *See, e.g.*, Sorensen, *The Quiet Campaign to Rewrite the Constitution*, SATURDAY REVIEW. 17, 18 (July 15, 1967).

176. Wheeler, *supra* note 71, at 801-02.

177. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV., 921, 922-23 (1968) [hereinafter cited as Carson].

178. 46 CONG. REC. S 2769 (1911) (remarks of Senator Hayburn).

179. Bonfield, *supra* note 60, at 993.

convention could take such actions as declaring itself to be the new national government or proclaiming a new constitution. This, however is highly improbable. The chances of this ever happening are small, and the chances of the success of such a move even smaller.

In addition to these unfounded and exaggerated concerns, a more reasonable concern has been aired; *i.e.*, that once an Article V convention is formed, its delegates might propose amendments to the Constitution on subjects different from those placed by Congress in the call and cited by states in their applications.[180] Some have suggested that an Article V convention, if it desires, could choose to redraft the Constitution and submit the new draft to the states for ratification.[181] Even though these proposals stand little chance of ultimate ratification, it apparently is felt that their mere proposition by a prestigous body, as would be an Article V convention, would be greatly disruptive and bring into question the basic fabric of our national government.

The Ervin legislation attempts to limit the scope of an Article V convention's deliberations and actions. It provides that Congress, when calling the convention, shall in its concurrent resolution set forth the nature of the amendment or amendments which the convention is called to consider.[182] Each delegate to the convention is to subscribe to an oath, before taking his seat, that he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed constitutional amendment relating to any subject not named or described in the concurrent resolution calling the convention.[183] The legislation provides specifically that no convention called under the act may propose any amendment or amendments of a different nature than those stated in Congress' concurrent resolution.[184] Finally, the legislation provides that all amendments proposed by the convention be sent to the states for ratification, unless Congress passes a concurrent resolution disapproving the submission of a proposed amendment on the grounds that it includes a subject different from or not included among the subjects named in our described in Congress' concurrent resolution calling for the convention.[185]

180. 113 CONG. REC. S 5458 (daily ed. Apr. 19, 1967) (remarks of Senator Javits); *id.* at S. 5462 (remarks of Senator Proxmire).
181. L. ORFIELD, *supra* note 24, at 44-45; Platz, *supra* note 59, at 31.
182. S. 1272, *supra* note 14, § 6(a).
183. *Id.* § 8(a).
184. *Id.* § 10(b).
185. *Id.* § 11(b)(1)(B).

Several policy arguments support the concept of a limited Article V convention. First, if an Article V convention were "wide-open" once the convention were convened, it would immediately become the focal point of every dissident group in the nation seeking constitutional change. Delegates to the convention would be subjected to intense pressure from many groups resulting in the impairment of the deliberative quality of the convention. The 1787 convention decided to hold its deliberations in secret, hiding from the public its day to day shift in temperament and announcing only its final product.[186] An Article V convention, held now, would find it most difficult to duplicate this.[187] As a result of the hectic conditions inherent in a wide-open convention, the ultimate product might not reflect thoughtful deliberation. Such a wide-open convention could become a circus. However, were the convention limited in its discussions and in its ability to propose amendments, the debate need not be sidetracked.

Another argument in favor of limiting the scope of an Article V convention would be that it would allow an intelligent choice of delegates.[188] If the convention were called, for example, to propose a pro-life amendment, then the state, when selecting its convention delegates, could choose persons with knowledge and expertise in the particular area.

Finally, it can be argued that the concept of a wide-open convention might discourage the states from using the convention method. The states will make greater use of this method if they know that the authority of the convention will be limited to discussion of the problem which they, and the other thirty-three states, are interested in correcting.[189]

It appears desirable to limit the scope of an Article V convention to the subject matter placed in the call by Congress on the basis of these policy arguments. The determination of whether Congress may limit the scope of an Article V convention rests, however, not upon policy considerations, but upon whether the

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186. The 1787 convention kept its deliberations secret because, "it was considered important that the delegates should be protected from criticism and that their discussions should be free from the pressure of public opinion."
M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, 58 (1962).

187.
> [T]he proceedings of convention delegates will be conducted in the intense glare of publicity. Every word will be transcribed. Imputations of motive, analyses, and predictions will fill the newspaper columns and flood the airways. Television will obtrude itself on the proceedings, in the name of the so-called 'right of the people to know.' A multitude of issues clamoring for attention will leave no time for reflection or long-range thought.

Carson, *supra* note 177, at 927.

188. A.B.A. Study, *supra* note 2, at 17.

189. Kauper, *supra* note 132, at 911-12. *See also* Comment, *supra* note 2, at 513.

Constitution mandates that an Article V convention be free from such a limitation.

To determine whether Article V contemplates limited conventions, an attempt must be made to ascertain the probable intent of the framers in this regard. The argument that the framers envisioned Article V conventions as limited conventions when they drafted the provision is presented first, followed by the opposite argument.

It is argued that pre-1787 state convention practices support the idea of limited conventions.[190] The framers, it is urged, had this type of convention in mind when they provided for one in Article V. Support for this contention is allegedly found in Article XIX of the first draft of the Constitution, delivered to the full convention on August 6th by the Committee of Detail, and passed by the convention on August 30th. That Article read as follows: "On the application of the Legislatures of two-thirds of the States in the Union, for *an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*[191]

Support for this view is also found in *The Federalist No. 43* where Madison wrote that Article V, "equally enables the general and the state government to originate the *amendment of errors* as they may be pointed out by experience on one side or another."[192] Hamilton in *The Federalist No. 85,* had the following to say concerning the amendment power:

> [E]very amendment to the Constitution, if one established, would be *a single proposition,* and might be brought forward *singly.* There would then be no necessity for management or compromise in relation to any other point — no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather 10 States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete constitution.[193]

190. A.B.A. Study, *supra* note 2, at 11-17.
191. 1 M. FARRAND, *supra* note 27, at 188 (emphasis added).
192. THE FEDERALIST No. 43 (Cooke ed. 1961) (emphasis added).
193. THE FEDERALIST No. 85 (Cooke ed. 1961) (emphasis added).

These two extracts from *The Federalist Papers* have been interpreted to indicate that the framers intended Article V conventions to be limited in scope, having only the power to rectify particular errors and not to redraft the whole Constitution. This interpretation, however, has been met with some disagreement.[194]

The argument in favor of a wide-open convention being envisioned by the framers finds its strongest support in the very words of Article V, that "Congress. . . on the Application of the Legislatures of two-thirds of the several States, shall call *a Convention for proposing Amendments* . . . "[195] The use of the word "Amendments" rather than a phrase such as "for proposing an amendment" is clear evidence, it is argued, that Article V conventions were meant to have wide-open powers, and that a convention once convened has the authority to propose anything which it deems to be in the best interests of the nation, regardless of the reasons for which the convention was requested by the states, and regardless of the limitations which Congress may attempt to place on the convention.

Support for this position is also found in the precedent of the 1787 convention which clearly exceeded its powers.[196] That convention was called ". . . for the sole and express purpose of revising the Articles of Confederation. . . "[197] The Convention was not authorized to draft an entirely new frame of government. Additionally, the Constitution provided that it would become effective when ratified by nine states, contrary to the provision in the Articles of Confederation which required unanimous consent before the Articles could be altered.[198] The framers clearly recognized that no plan of government is perfect.[199] Therefore, they surely must have contemplated that the plan they were then creating might someday be required to give way to an entirely different framework of government. That being the case, and given the precedent of the 1787 convention where they admittedly went beyond their powers,[200] surely they realized and intended that a convention called under Article V might someday have to draft a totally different framework of government or otherwise address problems which it perceived in addition to the ones for which it was called.

194. *See, e.g.*, Black, *supra* note 16, at 197, wherein the author argues that *The Federalist, Nos. 43 and 85* do not support the idea of a limited convention.
195. U.S. CONST. art. V (emphasis added).
196. Martig, *supra* note 26, at 1256.
197. J. ELLIOT, *supra* note 28.
198. *Supra* note 25.
199. *Supra* notes 29, 34, 43, and 57.
200. Comment, *supra* note 2, at 506.

Those who disagree with this view attempt to distinguish the 1787 convention on grounds that it was a "revolutionary" convention and that Article V only contemplates "constitutional" conventions. Judge Jameson, in his treaties, defined the two types of conventions. A "revolutionary" convention is said to

> consist of those bodies of men, who in times of political crisis, assume or have cast upon them, provisionally, the function of government. They either supplant or supplement the existing government organization . . . [t]hey are not subaltern or ancillary to any other institution whatever, but lords paramount of the entire political domain . . . In short, a Revolutionary Convention is simply a PROVISIONAL GOVERNMENT.[201]

A constitutional convention

> differs from the [revolutionary convention] in being as its name implies, *constitutional*; not simply as having for its object the framing or amending of Constitutions, but as being within, rather than without, the place of the fundamental law; as ancillary and subservient and not hostile and paramount to it. . . . It is charged with a definite, and not a discretionary and indeterminate function. It always acts under a commission. . . . It never supplants the existing organization. It never governs.[202]

The 1787 convention, it is said, took place during extraordinary times and its actions were justified solely on the basis of the circumstances which had led the united colonies to the brink of dissolution. The Articles of Confederation, it is argued, had no viable amendment provision like the present Constitution. The circumstances surrounding the 1787 convention are unlikely to happen again. The framers believed that they had created a strong federal union. They did not contemplate an Article V convention ever having the potential of a "revolutionary convention." It was to be a "constitutional convention." It also is pointed out that even though the 1787 convention did exceed its authority, its actions were subsequently ratified by Congress and the states.[203]

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201. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTION 6 (4th ed. 1887).
202. *Id.* at 10.
203. A.B.A. Study, *supra* note 2, at 14.

The 1787 convention seems to fit somewhere between Jameson's two definitions. It clearly went beyond its express mandate, but it did not function as, or purport to be, a provisional government. Naturally, the framers intended an Article V convention to be a "constitutional" convention operating within the framework of the Constitution. But what was this framework meant to be? Does Article V contemplate a convention with the powers to propose anything which it feels to be in the best interests of the nation, or does it contemplate a limited convention?

Here again, the purpose behind the convention method must be considered. The Article V convention method was designed to be an alternative amending process, for use of the states in the event that Congress became oppressive. With this in mind, it seems that Congress must not be allowed to have the power to limit the scope of the convention's deliberations and actions. Congress' only powers should be over housekeeping matters. A power in Congress to limit the scope of the convention goes to the very heart of the reason behind the convention method, and for this reason, Congress does not have the power to limit the scope of an Article V convention's deliberations and actions.[204] The Ervin legislation's attempt to limit the scope of an Article V constitutional convention to the same subject matter placed by Congress in the call would therefore be unconstitutional.

There is, however, no reason to fear such an interpretation of an Article V convention's powers. An Article V convention only has the power to "propose" amendments. Any amendments, or new Constitution, have to be ratified by three-fourths of the states in order to take effect.[205] If a proposition is issued by an Article V convention and subsequently ratified by the required number of states, one can hardly be in a position to complain about it.[206] Even if the mere propostion of proposals by an Article V convention causes great debate and discussion, and calls into question the basic fabric of the national government, such discussion would only result in a stronger national government.

It has been pointed out that Congress, which has power to initiate constitutional amendments upon the vote of two-thirds of the members of both houses, has not yet "run away" with the

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204. Black, *supra* note 16, at 203; Platz, *supra* note 59, at 46; Wheeler, *supra* note 71, at 796; Note, 70 HARV. L. REV., *supra* note 74, at 1076.

205. Dirksen, *supra* note 4, at 873.

206. J. STORY, *supra* note 57, §§1830, 1831.

Constitution or otherwise abused the amendment powers.[207] There is no valid reason to expect an Article V constitutional convention to do so either.

The proper statement of an Article V convention's powers would be that such a convention is a deliberative body, created ministerially by Congress at the request of the states which, when duly convened, possesses the amendment power under Article V, that power being subject to no limitations other than those in the constitution.[208] If Congress has no power to limit the scope of an Article V convention's deliberations and actions, then it cannot refuse to transmit to the states for ratification any and all propositions which the convention originates.

If and when the first Article V convention is held, it would be desirable for the delegates selected thereto to voluntarily refrain from proposing any amendments upon subjects other than those cited in the call or in state applications, and thus establish, by precedent, a self-imposed limitation upon the convention, which could always give way in times of crisis.

J. Should Article V Itself Be Amended?

Over the years there have been numerous attempts to amend Article V.[209] Some have been aimed at Article V's convention method.[210] Others have suggested that the convention method be stricken from Article V.[211] Still others have urged that it be replaced by a different method of allowing the states to initiate amendments to the Constitution.[212] It has also been suggested that, rather than eliminating or replacing Article V's convention method, it be amended in order to clear up the present ambiguities.[213]

The Article V convention method should neither be eliminated from Article V nor replaced. While it has never recently

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207. 113 Cong. Rec. 11113 (1967) (remarks of Senator Hruska).

208. L. Orfield, *supra* note 24, at 45; Wheeler, *supra* note 71, at 796.

209. *See* Martig, *supra* note 25, at 1275-83, for a review of the efforts up to 1937 to amend Article V.

210. *See* L. Orfield, *supra* note 24, at 168-72 wherein the author reviews proposed reform of the national convention amendment procedure.

211. Martig, *supra* note 25, at 1284. *See also Hearings on S.J.R. 134*, 75th Cong., 3d Sess. (1938) at 3-4, 65, 79, 84.

212. *See* Black, *supra* note 94, at 958; 117 Cong. Rec. S 16, 519 (daily ed. Oct. 19, 1971).

213. *See, e.g.*, Platz, *supra* note 59, at 47-49, (where the writer suggests several changes in Article V to clear up ambiguities in it); Comment, *supra* note 2, at 526-539 (where the writer suggests that Article V be amended to clear up present uncertainties and offers a proposed draft of a new Article V).

been used, it has in the past and still serves a useful function. The reasons behind its creation are still potentially valid.

Article V should, however, be amended to overrule the Supreme Court's decision in *Hawke v. Smith, No. 1*[214] In that case, the Court struck down a provision in the Ohio state constitution which required all proposed constitutional amendments to be submitted to a popular referendum. The Court found this to be contrary to the requirement in Article V that ratification be by "legislatures" and that a popular referendum was not a legislature as contemplated by the framers, a legislature being in their mind a deliberative representative body which was charged with making the laws which governed the people.

The amendment process, at all stages, should be accompanied by thoughtful deliberation. The framers provided that a state's ratification of proposed amendments be either by action of the state legislature or by convention, leaving Congress to choose the mode of ratification. To date, with one exception, Congress has chosen ratification by state legislatures. Article V should be amended to permit Congress a third choice, by popular referendum. In 1920, when *Hawke* was decided, a meaningful debate could not have been conducted on a statewide basis prior to a popular referendum. Thus, ratification by referendum would not have been accompanied by thoughtful deliberation prior to the state's action. However, with radio, television, and other mass media of our time, a thoughtful debate and disscussion could easily be had on a statewide basis on a proposed constitutional amendment prior to a popular referendum. This would allow for deliberation at the ratification stage, were ratification to be by popular referendum.

The framers typically entrusted ratification to the representative body of the people in the state rather than to the people themselves because of their general distrust of government by the masses. This attitude is clearly out of date, and there is no valid reason today to prohibit ratification by popular referendum. In fact, it should be the preferred method.

K. Justiciability of Questions Arising under Article V

The Ervin legislation attempts to cut off judicial review of questions arising under the Article V convention method by providing that questions concerning adoption of a state's application, questions pertaining to the ability of the convention to

214. 253 U.S. 221 (1920).

initiate proposals different from or additional to those placed by Congress in its concurrent resolution calling the convention, and questions concerning a state's ratification or rejection of proposed constitutional amendments, "shall be determined solely by the Congress of the United States, and its decisions shall be binding on all others including State and Federal courts."[215]

It has long been settled that the Supreme Court has appellate jurisdiction, "with such Exceptions, and under such Regulations as the Congress shall make."[216] Therefore, it would seem that Congress could successfully cut off appellate review of Article V constitutional questions from the Supreme Court. Congress, however, has no power to limit the Supreme Court's original jurisdiction. The Constitution provides that, "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction."[217] It is probable that many potential suits over Article V will involve a state as a party. In such cases, Congress' attempt to limit the determination of questions over the Article V convention method would be to no avail.

Even if jurisdiction in the Supreme Court is obtained, the question remains whether the Court might voluntarily refrain from deciding the issue raised on the grounds that it is a "political question." State courts have almost uniformly held that the question of amending the state constitution is justifiable.[218] After reviewing the relevant Supreme Court decisions, however, one can only speculate what the Court might do if presented with a suit arising out of the Article V convention method.

In the 1798 case of *Hollingsworth v. Virginia,*[219] the Supreme Court held that the eleventh amendment was validly enacted and that Article I, Section 7 of the Constitution did not require the approval of the President in the amendment process. At this early date the Supreme Court seemed to be of the view that controversies over the amendment of the Constitution were justiciable, though the issue was not specifically presented to them in those terms.

Chief Justice Taney, in *Luther v. Borden,*[220] indicated that the Court believed that questions concerning the amendment of constitutions

215. S. 1272, *supra* note 14, §§ 3(b), 5(c), 10(b) and 13(c).
216. U.S. CONST. art. III, § 2; Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).
217. U.S. CONST. art. III, § 2.
218. Comment, *supra* note 2, at 516.
219. 3 U.S. (3 Dall.) 378 (1798).
220. 48 U.S. (7 Howard) 1 (1849).

were nonjusticiable political questions.[221] In *Dodge v. Woolsey*,[222] Justice Wayne determined that the power to amend the Constitution was constitutionally limited.[223] The Supreme Court, in *White v. Hart*,[224] said of the validity of a state's ratification of a constitutional amendment, "[t]he action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it."[225] It would seem that by the end of the nineteenth century, the Supreme Court felt that questions regarding amending the constitution were political and nonjusticiable.

In *Myers v. Anderson*, it was argued that the fifteenth amendment was invalid, if construed to apply to state and municipal elections, on grounds that it violated the provisions of Article V which state that no state, without its consent, shall be deprived of its equal representation in the Senate.[227] The Court ignored the argument. In *Hawke v. Smith No. 1*,[228] the Supreme Court held that a provision in the Ohio constitution which required that all proposed constitutional amendments be submitted to a popular referendum was violative of the terms of Article V, a popular referendum not being within the definition of the terms "legislatures." The Court also reaffirmed the holding of *Hollingsworth*. The Solicitor General argued in the *National Prohibition Cases*,[229] that the question of whether the eighteenth amendment was within the amending power was one committed to the political, not the judicial branch of the government.[230] The Court ignored the plea and held that the eighteenth amendment was duly enacted and that its substantive content was within the

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221.
In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.
Luther v. Borden, 48 U.S. (7 Howard) 1, 38-39 (1849).

222. 59 U.S. (18 Howard) 331 (1855).

223.
"[The Constitution] is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them. . . ." Dodge v. Woolsey, 59 U. S. (18 Howard) 331, 348 (1855).

224. 80 U.S. (13 Wall.) 646 (1871).

225. White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871).

226. 238 U.S. 368 (1915).

227. Myers v. Anderson, 238 U.S. 368, 374 (1915).

228. 253 U.S. 221 (1920).

229. 253 U.S. 350 (1920).

230. National Prohibition Cases, 253 U.S. 350, 381-82 (1920).

power to amend reserved by Article V. In *Dillon v. Gloss,*[231] the Court held that Congress could set a reasonable time for ratification of proposed constitutional amendments, and that the seven year period set by it was a reasonable time. The Court stated the following:

> Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.[232]

Fairchild v. Hughes,[233] and its companion case, *Leser v. Garnett,*[234] both involved the validity of the nineteenth amendment. In *Fairchild,* the Court held that a taxpayer lacked standing to challenge the constitutionality of the amendment prior to its ratification by the states. In *Leser,* the Court held that the proclamation by a state's Secretary of State that the state had ratified the amendment was "conclusive upon the courts."[235] The Court, in *Druggan v. Anderson,*[236] held that the moment the eighteenth amendment was ratified by the required number of states it became law, and that Congress could legislate in anticipation of its effective date of operation. In *United States v. Sprague,*[237] the Court held that the choice of the mode of ratification of amendments was in the sole discretion of the Congress. The Court in a later case took judicial notice of the fact that the twenty-first amendment, which repealed the eighteenth amendment, had been ratified, and held that neither the Congress nor the Courts could give it continued validity.[238] These early twentieth century cases seem to show a general willingness on the part of the Court at that time to decide both substantive and procedural questions concerning the amendment process.

The most important case in this area is *Coleman v. Miller,*[239] wherein the Supreme Court showed a definite shift in attitude. The Court there held that the question of the effect of a previous

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231. 256 U.S. 368 (1921).
232. *Id.* at 376.
233. 258 U.S. 126 (1922).
234. 258 U.S. 130 (1922).
235. *Id.* at 137.
236. 269 U.S. 36 (1925).
237. 282 U.S. 716 (1931).
238. United States v. Chambers, 291 U.S. 217 (1934).
239. 307 U.S. 433 (1939).

rejection of a proposed constitutional amendment by a state on its subsequent ratification was a political question to be settled by Congress.[240] The Court also held that the question of what constitutes a reasonable time for ratification, absent a set time limit by Congress, was likewise a political question for the Congress to decide.[241] It was contended that the vote of the Lieutenant Governor should not have been counted towards the subsequent ratification because he was not part of the "legislature" within the meaning of Article V. The Court stated that it was split on this point and expressed no opinion as to its justiciable nature.[242]

In a concurring opinion, Justice Black, joined by Justices Douglas, Frankfurter, and Roberts, contended that the entire constitutional amendment process was nonjusticiable.

> [t]o the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments we are unable to agree. . . . The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. . . . No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.
>
> . . . .
>
> Congress, possessing exclusive power over the amending processes, cannot be bound by, and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgement of exclusive Congressional power over the political process of amendment is mere admonition to

240. *Id.* at 450.
241. *Id.* at 454.
242. *Id.* at 447.

> the Congress in the nature of an advisory opinion, given wholly without constitutional authority.[243]

In the companion case, *Chandler v. Wise*,[244] Justices Black and Douglas adhered to their views.[245] The Court, in 1967, again touched upon the amendment process in *Whitehall v. Elkins*.[246]

The important question which remains is whether *Coleman* stands for the proposition that all questions arising out of the Article V amendment provisions are nonjusticiable political questions. It has been strongly argued that *Coleman* does not stand for absolute nonjusticiability of all questions related to the amendment process.[247] In *Coleman*, the Court stressed the fact that the particular issue it was asked to decide involved determinations of political, social, and economic conditions which the Court found Congress to be better equipped to handle. All questions arising out of Article V, particularly the convention method, will not involve determinations of these kinds.[248]

Since Coleman, the Supreme Court has significantly expounded upon the concept of the political question. In *Baker v. Carr*,[249] the Court held that state legislative reapportionment raised a justiciable controversy and laid down guidelines on what was involved in a political question.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments.[250]

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243. *Id.* at 458-60.

244. 307 U.S. 474 (1939).

245. "[W]e do not believe that state or federal courts have any jurisdiction to interfere with the amending process." Chandler v. Wise, 307 U.S. 474, 478 (1939) (Black, Douglas, J., concurring).

246. 389 U.S. 54 (1967). "[T]he Constitution prescribes the method of 'alteration' by the amending process in Article V; and while the procedure for amending it is restricted there is no restraint on the kind of amendment that may be offered." *Id.* at 57.

247. *See* Note, 85 HARV. L. REV., *supra* note 16, at 1636.

248. *Id.*

In *Powell v. McCormack,*[251] the Court held that Congress had no right to exclude Congressman-elect Adam Clayton Powell from his seat in the House of Representatives. Powell had requested a declaratory judgment stating that his exclusion from the House was unconstitutional, being in violation of Article 1, Section 2 of the Constitution. The Court held that this presented a justiciable controversy, stating that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the court's avoiding of their constitutional responsibility."[252]

In *Baker v. Carr,* the Supreme Court stated that one of the criteria for a political question was a "textually demonstrable commitment of the issue to a coordinate political department."[253] In *Coleman,* which involved the congressional method of amending the Constitution, the four concurring Justices stressed the fact that Article V gives power over the amending process to Congress. When the Court is faced with a question arising out of the congressional method of amending, it seems totally appropriate to treat this as a political nonjusticiable issue. It does not follow, however, that the convention method of amendment should be treated likewise. One must keep in mind the purpose behind the convention method, *i.e.,* a remedy for the possible oppressiveness of the government. Congress is merely the agency through which certain acts are performed. It is to perform these acts in a ministerial and functional way, exercising only minimal discretion. The convention method is not "committed" to the Congress to the extent that the congressional method of amending is, and hence, it should not be treated as giving rise to political, nonjusticiable questions. Keeping in mind the purpose behind the convention method, the courts, which are charged with interpreting the Constitution,[254] should not regard the questions arising out of the convention method as nonjusticiable political ones.[255] It is the Court's responsibility to insure that this method be kept available to the states to use, something which would not occur were the Court to treat Article V convention method issues as nonjusticiable political questions. Were the Court to treat these issues as political,

249. 392 U.S. 186 (1962), 36.9 U.S. 186 (1961).
250. *Id.* at 217.
251. 395 U.S. 486 (1969).
252. Powell v. McCormack, 395 U.S. 486, 549 (1969).
253. 369 U.S. at 217.
254. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

it would, in effect, be surrendering the convention method to Congressional control and dominance, clearly hostile and contrary to the reasons for placing it in the Constitution.

Assuming that the Court would find Article V convention issues justiciable, questions arise concerning remedies. The areas ripe for controversy would include the situation where two-thirds of the states had arguably submitted valid applications for a convention to Congress and that body refused to call a convention, or where the convention adopted amendments on subjects additional to that placed in the call by Congress or cited by the states in their applications, and Congress subsequently refused to transmit such amendments to the states for ratification.

It has been argued by some, on the basis of *Marbury v. Madison,*[256] that a writ of mandamus should issue against the Congress, compelling action on its part.[257] It is questionable whether the Court would do this. Standing in its way is the doctrine of *Mississippi v. Johnson.*[258] In that case, the Court refused to enjoin President Andrew Johnson from enforcing certain Reconstruction Acts stating the following:

> The Congress is the legislative department of the government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.
>
> . . . .
>
> If the President refuse obedience, it is needless to observe that the court is without power to enforce its process.[259]

It has been suggested that this doctrine has since been eroded. *Youngstown Sheet & Tube Co. v. Sawyer,*[260] given as an example of such a case, arose when President Truman issued an executive Order directing the Secretary of Commerce to take control of the nation's steel mills and operate them in order to avert a nationwide strike. The district court enjoined the Secretary from continuing

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255. Some have argued that the courts should treat questions involving the amendment process as nonjusticiable because many proposed amendments are designed to overturn unpopular Supreme Court decisions. Bonfield, *supra* note 60, at 980.

256. 5 U.S. (1 Cranch) 137, 163, 170, 179-80 (1803).

257. Dirksen, *supra* note 4.

258. 71 U.S. (4 Wall.) 475 (1866).

259. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500-01 (1866).

260. 343 U.S. 579 (1952).

possession of the plants and the Supreme Court affirmed. Another case mentioned as weakening the doctrine of *Mississippi v. Johnson* is *Powell v. McCormack,*[261] where the Supreme Court held that the Speech and Debate Clause of the Constitution[262] does not prevent action by the Court against legislative employees.[263] In *Powell* the Court left open the possibility of direct action against Members of Congress.[264]

One can merely speculate as to whether the Supreme Court would order Congress to call a convention, or submit an Article V convention's proposals to the states for ratification. If the Court did issue such a writ against Congress, and Congress refused to comply, what would, and what could the Court do? Some have suggested that the Court take charge of the calling and setting up of the convention,[265] although others have disagreed.[266] Due to the inability of the Court to fashion effective relief in the event that its directive against Congress is ignored, several writers have concluded that the sole remedy should Congress refuse to perform its duties in regard to the Artice V convention method, lies with the people.[267]

A more probable path to be followed by the Court is that taken in *Powell.* Were Congress to refuse to call a convention, or to submit an Article V convention's proposals to the states for ratification, it would attempt to justify its actions on the grounds that the constitutional prerequisites to its duty to call the convention were not met, or that the convention had exceeded its constitutional powers. A declaratory judgment by the Supreme Court to the contrary would certainly undercut Congress' justifications and stir public opinion.[268]

Precisely what the Supreme Court would do when faced with a question arising under the Article V convention method is presently a matter of mere conjecture. Given cases such as *Coleman, Baker,* and *Powell,* there is ample precedent for the Court to go either direction, *i.e.,* to find Article V convention issues political

261. 395 U.S. 486 (1969).

262. U.S. Const. art. I, § 6.

263. *See also* Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1881). In both, suits were brought against Congressional employees.

264. "Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available." 395 U.S. at 506 n.26.

265. Carson, *supra* note 177, at 921.

266. Kauper, *supra* note 132, at 906.

267. Bonfield, *supra* note 60, at 983; Wheeler, *supra* note 71, at 792; Note, 70 Harv. L. Rev., *supra* note 74, at 1071.

268. *See* Note, 85 Harv. L. Rev., *supra* note 16, at 1644.

and nonjusticiable, or to go the opposite way. As a matter of judicial policy, it is hoped that the Court would elect to find Article V convention method questions justiciable, even though the scope of its remedial powers raises questions.[269]

A final question concerns standing to raise Article V convention litigation. In *Coleman v. Miller*,[270] the majority held that twenty state senators who had voted against ratification of the proposed Child Labor Amendment had standing to bring suit. The Court stated as follows:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contention their votes would have been sufficient to defeat ratification. We think that these senators have a plain direct and adequate interest in maintaining the effectiveness of their votes.[271]

Four Justices dissented on the issue of standing. "No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge, except by those who have some specialized interest of their own to vindicate apart from a political concern which belongs to all."[272]

Under the majority view espoused in *Coleman*, it would seem that a proper party to bring suit regarding Article V convention questions would be, for example, state senators who voted in favor of an application for an Article V convention, or conceivably, a member of the Article V convention who voted in favor of the proposals which Congress refused to transmit to the states for ratification. Certainly a state which has petitioned for a convention would have standing. Finding a plaintiff with proper standing to raise questions concerning the Article V convention method would seem to raise no great difficulties.

IV. CONCLUSION

In the closing moments of the 1787 convention, Charles Pinckney of South Carolina remarked, "[c]onventions are serious

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269. *See* L. ORFIELD, *supra* note 24, at 7-36; Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621 (1953).
270. 307 U.S. 433 (1939).
271. *Id.* at 438.
272. *Id.* at 464 (Frankfurter, J., dissenting).

things and ought not to be repeated."[273] When there was talk of having a second constitutional convention, shortly after the Constitution had been proposed, James Madison aired the following feelings:

> [An Article V Constitutional Convention] would consequently give greater agitation to the public mind; an election to it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of the flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts, but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I should tremble for the result of a second.[274]

That attitude has persevered through the ages. Generally the prospect of an Article V convention has been ignored, disfavored, and even feared.[275] Over the years there has been much discussion about Article V's convention method, ranging from wild, unfounded speculation to serious scholarly debate. It seems desirable for Congress to settle as many of the issues raised over the Article V convention method, prior to the actual calling of such a convention, as it constitutionally can.

In the abstract, scholars can and no doubt will, debate these issues endlessly. Most of these questions, however, will never be

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273. 2 M. FARRAND *supra* note 27, at 632.

274. Letter of James Madison to G. L. Turberville (November 2, 1788), reprinted in 5 U.S. BUREAU OF ROLLS & LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 104-05.

275. A notable exception, however, was President Lincoln, who preferred the convention method of amending the Constitution. In his First Inaugural Address, he stated as follows:

> [T]he convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse. . .

S. Jour., 36th Cong., Spec. Sess. 404 (1861).

resolved until the day that an Article V convention is actually held. And then, as one writer has observed, "a Convention would be a new thing and what it would do would depend mostly upon the men composing it, upon the issues before the people and the strength of public feeling and opinion at the time."[276]

276. Sprague, *supra* note 76, at 123.

(Notre Dame, Lawyer, 1964)

OBSERVATIONS ON THE PROPOSED ALTERATION OF THE CONSTITUTIONAL AMENDATORY PROCEDURE*

*Albert E. Jenner***

The enactment of the amendments now under consideration would, I feel, lead to an outright revolution in this country, a revolution not in the gradual sense, but a fighting one conducted by the nation's great majorities who would be, in that eventuality, under the complete domination and subjection of minorities of both states and people.

The first of these proposals, the subject of the present inquiry, would alter the amendatory process prescribed by Article V of the Constitution. It is designed to vest the amendatory power in the state legislatures to the exclusion of the Congress.

The sponsors of these amendments seem to have erred, strategically at least, in going beyond their first proposition for it is the remaining two amendments, that calling for the overruling of *Baker v. Carr* and the last to create a "Court of the Union" to review the rulings of the United States Supreme Court, which betrayed their underlying purpose and intent, thus giving warning of the extremes to which the minority group of states and the minorities within these states might go.

The adoption of the first of these amendments would effect a complete redistribution of governmental power, channelling to the states much of which now rests with the federal Congress. The ultimate result would be a confederation or league of states similar to that under the Articles of Confederation of 1777. No longer would we maintain in the central government the power and jurisdiction so essential to the preservation of the Union. While the states would be afforded sufficient sovereignty to devote their attentions to purely local problems, their participation in the national picture would be barely adequate to make known the parochial views of the fifty separate jurisdictions. It should be noted in this connection that this process would not be a mere transference of power to the states *as states,* but to the state *legislatures.* The importance of this distinction is obvious upon the slightest consideration of the present maldistribution of representation in the legislative bodies. The inequalities presented by these apportionments would thus be preserved, and, by the increase of power, worsened. A representative form of government would vanish.

Apparently, then, the lessons of the errors and impracticality of the Articles of Confederation have been lost to the amendments' sponsors. The blood bath of the Civil War, fought in great part to accentuate the indissolubility of the Union, will have been for naught.

Political, as well as legal, repercussions would ensue. There would be

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* The following article is Mr. Jenner's oral presentation at the Notre Dame Law School on February 29, 1964, as edited by the Editorial Board of the *Lawyer.*

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precluded any possibility of a national forum for the debate of *national* and international issues. Limited debating societies would obtain in each of the fifty states. With Nebraska as the only state with a unicameral legislature, we would be left with ninety-nine such societies.

How, then, did such proposals ever come about? While there is general agreement that the danger of their passage is slight, the meandered method of their genesis is highly pertinent to a fair evaluation. The sponsorship rests with the general assembly of the Council of State Governments, a normally conservative group and one of our most highly respected organizations and institutions. It consists almost exclusively of legislators of considerable prominence and ability from each of the several states selected from commissions on interstate cooperation existing in each of the states. The National Legislative Council, an affiliate of the Council of State Governments, was the initial proponent and drafter of the amendment. While this National Legislative Council meets annually, the general assembly convenes only half as often. This fact, as we shall see, becomes quite significant. In September of 1962, with a meeting of the general assembly but three months distant, the National Legislative Council met, fully realizing that whatever proposals were not submitted in December to the general assembly would not be acted upon for at least two additional years. It issued a report critical, in a fairly statesmanlike but direct fashion, of the action of the Congress and the executive department of the federal government over the preceding decade, which action, it alleged, had served to erode the powers and functions of the states, an erosion which had progressed to that point where the Union itself might be adversely affected. While it is true that the Union depends upon alert, dynamic and powerful states for its most effective functioning, the Council, rather than discuss the central requisites of that delicate balance between Union and state, chose to devise a "meat-cleaver" method of rectification. Rather than restore the scale's balance, if such seemed necessary, the Council's amendments so weighted the opposite pan as to plummet the scale to the ground.

This report was circulated among the delegates and a committee drawn up to draft the present amendments. The actual draft of these amendments was not submitted to the delegates of the general assembly until the opening day of its convention. In the course of but one day, the day following the opening, the delegates read, debated, and acted favorably upon all three of these amendments. Hence, as a special order of business, on the sixth of December, 1962, it was proposed completely to revamp the government of the United States. The complete unpreparedness of these delegates to pass upon motions of such moment is perhaps best evidenced by the fact that the second amendment received fewer favorable votes than the first, and the third still fewer. This suggests that the delegates became relatively more informed as the afternoon wore on.

Under Article V of the Constitution, amendments may be initiated either by the Congress or by the legislatures of the several states; the latter method has never been used. Under the former, the Congress, on a two-thirds vote of both Houses, submits the proposal to the state legislatures or to state con-

ventions. The proposal becomes a constitutional amendment when and if it is ratified by three-fourths of such legislatures or conventions, depending upon which avenue Congress has chosen. At present, then, the consent of thirty-eight such legislatures or conventions conditions the adoption.

The alternative method *requires* the Congress, upon the application of two-thirds of the state legislatures, to "call a convention for proposing amendments." Nothing further is said concerning what this convention is to do. The proposals which emanate from that convention take effect in the same manner provided for the alternative passage, namely, ratification by three-fourths of the state legislatures or state conventions.

The general assembly's proposal seeks to eliminate completely the national convention method of amendment. It further proposes to abolish the *state* convention alternative method of amendment regardless of whether the original proposal was initiated by Congress or by a national convention. It is intended, then, that the state legislatures control the amendatory process. Also, if three-fourths of the state legislatures submit identical proposals by way of application, then the Congress is required, by purely ministerial procedures, to certify these proposed amendments to ***the very same state legislatures***. This empty course of action serves to circumvent completely the Congress, relegating the entire amendatory procedure to the mercy of the state legislatures. The potential effects of this procedure to the Constitution need not be listed. The combined effects of this and the other two amendments would possibly include the destruction of the Supreme Court of the United States, the elimination of Congress, and the sharp modification of at least the first eight amendments to the Constitution, at least as applied to the states *via* the Fourteenth Amendment.

As an incidental point, it is interesting to note that Section Two of these resolutions recites that the article shall be inoperative unless ratified, within seven years of the date of its submission, by the legislatures of three-fourths of the several states. This is apparently an adroit attempt to prevent the Congress from employing the state convention alternative method, which it is empowered to do under the Constitution. Yet it is only through this alternative method that any semblance of representation of all the people can be obtained.

Finally, the amendment under consideration is perhaps the most extraordinary and astounding governmental proposal of recent times. If there is at present an imbalance in the federal-state area of action (and such an imbalance is by no means conceded), correction of the defect lies in the strengthening of the states under our present system and not in the virtual demolishing of the Congress by its reduction to a pleasant debating society.

PROPOSAL II AND THE NATIONAL INTEREST IN STATE LEGISLATIVE APPORTIONMENT

*Carl A. Auerbach**

Shortly after President Eisenhower asked Congress, in May, 1953, to permit the personal income tax cuts scheduled for January 1, 1954, to go into effect, I had occasion to lunch with Thurman Arnold. I asked Mr. Arnold what he thought of the impending tax cut and he replied, "Fine, we can enjoy it privately and kick like hell publicly." Remember, this was before we were told by President Kennedy and President Johnson that what we can do most for our country is to pay less taxes.

My initial reaction to the Supreme Court's decision in *Baker v. Carr*[1] was like Thurman Arnold's response to President Eisenhower's first venture into deficit financing. As a private citizen, suburbanite and member of the Democratic Party, I relished the result. But as a student of constitutional law, I agreed with Mr. Justice Frankfurter that legislative apportionment was none of the Supreme Court's business. I intended to kick about it publicly — at this symposium, in fact.

However, as I studied the three so-called states' rights amendments to which our symposium is devoted, I came to doubt my original conclusion that the Supreme Court had overstepped the bounds of its proper role in our democracy when it decided *Baker v. Carr*.

Provisions of Proposal II. For our immediate purpose, however, it is important to point out that even those who agree with Mr. Justice Frankfurter's dissenting opinion in *Baker v. Carr* have reason to oppose the constitutional amendment which purports to overrule the Court's decision in that case. For the proposal — which I shall refer to as Proposal II — goes far beyond its alleged purpose. Section 2 of Proposal II provides that:

> The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy, relating to apportionment of representation in a state legislature.[2]

This section, however, is ancillary to the basic aim of Proposal II set forth in Section 1, which provides that:

> No provision of this Constitution, or any amendment thereto, shall restrict or limit any state in the apportionment of representation in its legislature.[3]

Proposal II and the State Courts. If Proposal II contained only its second section and, thus limited, became part of the Constitution, the Supremacy Clause of Article VI would still obligate the state courts to decide apportion-

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1 369 U.S. 186 (1962).

2 The texts of the three states' rights amendments are set forth in *State Government*, Winter 1963, p. 10.

3 *Ibid.* Section 3 of Proposal II provides that the proposed amendment "shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission." *Ibid.*

ment cases in the light of the requirements of the federal Constitution. In all likelihood, then, the state courts would not interpret these requirements uniformly, with the anomalous result that the existence and vindication of federal constitutional guarantees would depend upon the immaterial circumstance of where the case was brought.

Granting, then, that the proposed limitation on the federal judicial power is justified, it makes sense to impose the same limitation upon the state courts — so far as the enforcement of federal constitutional guarantees is concerned. This may have been all that the draftsmen of section 1 of Proposal II intended. But as drafted, section 1 would accomplish a great deal more than even its supporters have not sought to defend.

Proposal II and Racial Discrimination. Dissenting in *South v. Peters,* Mr. Justice Douglas remarked: "I suppose that if a State reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote, we would strike the law down."[4] But if these shameful objectives were achieved under the guise of state laws apportioning representation in state legislatures, section 1 of Proposal II would not only bar the federal courts from striking the laws down, but would also bar the state courts from striking the laws down under the authority of the federal Constitution.

We are not dealing with a remote contingency. If Proposal II had been in effect, no court could have prevented the racial discrimination which the Alabama legislature tried to perpetrate in *Gomillion v. Lightfoot.*[5] The Alabama courts would have been bound by state law. Speaking for the Court in *Gomillion v. Lightfoot,* Mr. Justice Frankfurter held that federal court intervention was warranted precisely because abstention "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions."[6]

Clearly, then, Proposal II would abridge the national guarantees of equality imbedded in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. But surely we will not permit the long, historic, and increasingly successful struggle of the Negro citizen for the right to vote to culminate in districting and apportioning schemes which deprive him of the fruits of victory.

Proposal II and Congressional Power. Under Proposal II, the Congress of the United States would also be deprived of authority to take action against the kind of racial discrimination involved in *Gomillion v. Lightfoot.* Section 1 would strip Congress of its powers under the enforcement sections of the three Civil War Amendments whenever legislative districting or apportionment was used as the vehicle for discrimination.

Proposal II and Presidential Power. Proposal II is aimed at the President, as well as Congress. It would curtail the powers of the President and Congress under Article IV, Section 4 of the federal Constitution which requires that the "United States shall guarantee to every State in this Union a Republican form of government." I agree with Mr. Justice Frankfurter that the Tennessee

4 339 U.S. 276, 277 (1950).
5 364 U.S. 339 (1960).
6 *Id.* at 345.

citizens and voters who brought suit in *Baker v. Carr* were asserting "a Guarantee Clause claim."[7] As Professor Willard Hurst has written:

> No issue is more at the heart of "a Republican form of government" than the basis on which men and women are represented in their legislature. Indeed, fair representation in a freely elected legislature is what is meant by "a Republican form of government."[8]

On no other basis, I would add, is there government with the consent of the governed.

The apparent aim of the advocates of Proposal II, to preserve the past rulings of the Supreme Court that the Guarantee Clause is not judicially enforceable, does not justify the obliteration of Congressional and Presidential power to enforce the Clause. It is not inconceivable that in a time of strife, districting and apportionment of representation in a state legislature might become the instruments of totalitarian rule in a particular state. It is pointless to insist that this will never happen here, or that, if it does, the President and Congress will act anyway, with or without an amendment. Professor Hurst reminds us that:

> A constitution has no more important function than to provide an accepted, legitimate framework of values and procedures within which men may confront crisis. . . . In declaring that no agency of the federal government may concern itself with subversion of the key element of the republican form of government of a state of the Union, the proposed amendment would reverse a basic value judgment written into the Constitution of the United States. In doing so the proposal would depart from a wise conservatism.[9]

It is impossible to know whether the advocates of Proposal II really intend to write into the Constitution the principle that it shall never be the nation's business how a state apportions representation in its legislature. That many of its supporters intend precisely such a result is evidenced by the fact that they insist on describing the three proposals as states' rights amendments. By now, however, their intent is immaterial. As of June 17, 1963, Proposal II, as presently worded, passed both houses of thirteen state legislatures (Arkansas, Idaho, Kansas, Louisiana, Missouri, Montana, Nevada, Oklahoma, South Carolina, South Dakota, Texas, Washington and Wyoming) and one house of two state legislatures (Colorado and Mississippi). It also passed the unicameral legislature of Nebraska but was vetoed by Governor Frank Morrison. Both houses of the Utah legislature adopted a resolution somewhat different in language from that of the standard Proposal II.

Proposal II and States' Rights. Is Proposal II a states' rights amendment? This depends upon how we define "states' rights." It is a fact, however, that the Advisory Commissions on Intergovernmental Relations under both the Eisenhower and Kennedy Administrations blamed malapportionment in large part for the relative decline of state governmental power. In 1955, the Kestnbaum Commission warned:

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7 369 U.S. at 289-97.

8 Hurst, *Memorandum Regarding Pending Proposals to Amend the United States Constitution*, 36 WIS. BAR BULL. No. 4 (1963), pp. 7, 11.

9 *Ibid.*

> If states do not give cities their rightful allocation of seats in the legislature, the tendency will be toward direct Federal-municipal dealings. These began in earnest in the early days of the depression. There is only one way to avoid this in the future. It is for the states to take an interest in urban problems, in metropolitan government, in city needs. If they do not do this, the cities will find a path to Washington as they did before, and this time it may be permanent, with the ultimate result that there may be a new governmental arrangement that will break down the constitutional pattern which has worked so well up to now.
>
> One result of State neglect of the reapportionment problem is that urban governments have bypassed the States and made direct cooperative arrangements with the National Government in such fields as housing and urban development, airports, and defense community facilities. Although necessary in some cases, the multiplication of National-local relationships tends to weaken the State's proper control over its own policies and its authority over its own political subdivisions.
>
> Paradoxically enough, the interests of urban areas are often more effectively represented in the National legislature than in their own State legislatures.[10]

The present Advisory Commission similarly fears the "eclipse of state government because the people will turn to a more broadly responsive National Government to obtain their needs" if "minority interests are permitted to control the legislative branch of State Government. . . ."[11]

Yet those who raise the banner of states' rights to justify Proposal II are not eager to make state government stronger and more responsible so that it will be able and willing to cope with the problems which now receive either national attention or no attention at all. For them, states' rights is synonymous with state inaction. Their only complaint is that state inaction is not accompanied by federal inaction, which is their ultimate goal.

Enactment of Proposal II would assure continued state inaction. It would also have profound implications for our federal system, particularly if the proposed method of amending the Constitution is also adopted. As a first step, for example, the minorities controlling the state legislatures could reach out to alter the popular character of the Presidency by changing the composition of the Electoral College. Obviously, these so-called states' rights amendments impinge upon vital national interests.

Proposal II and the Presuppositions of Democratic Government. These proposals for constitutional change have more general and, for a constitutional lawyer, more absorbing implications. Mr. Chief Justice Hughes taught us that behind "the words of the constitutional provisions are postulates which limit and control."[12] I have argued elsewhere that Article V of the Constitution postulates the illegitimacy of an amendment which would destroy the democratic character of our system of government — for example, an amend-

10 Advisory Commission on Intergovernmental Relations, Report to the President 39-40 (1955).

11 Advisory Commission on Intergovernmental Relations, Report on Apportionment of State Legislatures 71, 24-28 (1962).

12 Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

ment, even if supported by a majority of the people, which would establish the framework for totalitarian dictatorship in the United States.[13] Certainly such an amendment would upset the basic system of government envisaged in the Constitution at least as much as an amendment depriving the states, without their consent, of their equal representation in the Senate — which Article V prohibits expressly. That the federal government will remain republican in form is a postulate on which the whole Constitution is based; there was no need to make it explicit.

I am not suggesting that the Supreme Court should undertake to declare that certain amendments to the Constitution are unconstitutional. The Court itself would probably not survive the kind of change in government I am supposing. But the people would then have the moral right to overthrow the anti-constitutional totalitarian government established by constitutional amendment.

What has all this to do with Proposal II? Let us see. Under Proposal II, minority rule of state legislatures could be perpetuated. Congress, the President and the federal courts could do nothing about it. Nor could the people remedy the situation in any state in which the state Constitution may be amended only at the initiative, or under the control, of the state legislature. Based on past experience, too, the state courts cannot be relied upon for assistance even in cases in which minority state legislatures ignore state constitutional provisions governing state legislative apportionment.

The critics of *Baker v. Carr* may protest that I am assuming its correctness and that a particular system of districting or apportionment can be said to enthrone minority, rather than majority, rule. But surely some systems of districting and apportionment can easily be imagined which, even the critics of *Baker v. Carr* would have to agree, do impose minority rule. In any case, the crucial point is that adoption of Proposal II, together with the proposal to revise the method of amending the Constitution, would make it impossible for those who think that each state legislator should represent an approximately equal number of people from ever having their way. No matter how large a majority of the people they might win to their view, the path of further constitutional amendment could be closed to them by the minority legislatures of no more than thirteen states.[14] It is inconsistent with the presuppositions of democratic government to make the possibility of peaceful change depend exclusively on the ability of the majority to persuade the minority to abdicate its power.

How then can the advocates of Proposal II ever win by constitutional means? They can not and should not win, if we adhere to democratic principles. Every principle of democracy is flouted if a minority of the people effectuates constitutional change in a manner which perpetuates its rule.

A Look at Baker v. Carr. Would there be more to say for Proposal II if

13 See Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186-202 (1956).

14 It should be recalled that the proposal to revise the method of amending the Constitution would abolish the alternative now provided by Article V of submitting amendments proposed by two-thirds of each house of Congress for ratification by conventions in three-fourths of the states.

it had left intact the power of Congress and the President to act under the Guarantee Clause and Congress' power to enforce the Civil War Amendments? The answer to this question brings us closer to the merits of *Baker v. Carr* and to Mr. Justice Jackson's question as "to what extent Supreme Court interpretations of the Constitution will or can preserve the free government of which the Court is a part."[15]

Before considering these questions briefly, I should say — in partial sympathy with the draftsmen of Proposal II — that it is difficult to draft a constitutional amendment overruling *Baker v. Carr* which would not have undesirable side effects. An editorial in the Journal of the American Judicature Society highlights one of the inevitable bad effects:

> [T]here is something very wrong in a movement to remove a court's jurisdiction to speak simply because of dissatisfaction with the way it has spoken. To do this is to attack not only the rule that was announced but also the court that announced it, and this is something we do not believe Americans really want to do.[16]

To this criticism, Dean Fordham adds:

> Were the approach freely used, the generality of the Constitution would be destroyed by a scatteration of specific denials of power having no necessary sensitivity to the basic theory and design of the Constitution.[17]

While I approve these sentiments in general, I do not think they are pertinent here. The principled opposition to *Baker v. Carr* — voiced by Mr. Justice Frankfurter — is based on the argument that the issue of apportionment is not justiciable. From this standpoint, the principled purpose of a constitutional amendment overruling *Baker v. Carr* is to save the Court from itself. This purpose can be shared even by those who would like to see apportionment based exclusively on population. Such advocates of a constitutional amendment overruling *Baker v. Carr* would not necessarily be interested in writing into the federal Constitution any particular principle or rule for state legislative districting and apportionment. They would merely want to get the Supreme Court out of the "political thicket." How else can this objective be attained except by an amendment withdrawing the Court's jurisdiction over the kind of controversy involved in *Baker v. Carr?*

In judging the wisdom of the Court's involvement in apportionment issues, it must be remembered that the evils of malapportionment have been with us since the turn of the century. For more than 60 years, they have been ignored by a good many state legislatures and by the Congress of the United States. In *Baker v. Carr*, the Court pointed out, the Tennessee legislature, since 1901, had ignored the requirements of the State constitution that both houses of the legislature, with minor modifications, should be apportioned according to population. There was no provision for popular initiative and referendum to impose a new districting and apportionment plan. And the state courts had declined to afford any relief. Resort to the federal courts was the last

15 JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57-58 (1955).
16 47 J. AMER. JUD. SOC'Y 4-5 (June, 1963).
17 Fordham, *The States in the Federal System — Vital Role or Limbo?*, 49 VA. L. REV. 666, 672 (1963).

hope of the Tennessee citizens and voters who sought to revitalize the democratic process in Tennessee. In *Baker v. Carr*, the Supreme Court made itself and the lower federal courts available for this purpose. Mr. Justice Frankfurter, on the other hand, would have acknowledged that "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power."[18]

No case was more likely to draw a sharp and bitter line between the "judicial activists" and the advocates of "judicial self-restraint" — and it did. So it is not surprising that Professor Emerson, representing the judicial-activist wing of the Yale Law School, should hail *Baker v. Carr* as "indeed a 'massive repudiation' of the school of thought of which Mr. Justice Frankfurter has been the intellectual and spiritual leader."[19] Professor Bickel, representing those at Yale who extol the Court's "passive virtues," retorts: "It is an irony . . . that the super-democrats should look to the unrepresentative courts for an arbitrary decision that they resent when it is made by a faulty representative legislature, acting in concert with a majoritarian governor."[20] I do not find my views compatible with those of Professor Emerson or Professor Bickel.

I agree with Mr. Justice Frankfurter that our system of judicial review "is a deliberate check upon democracy through an organ of government not subject to popular control."[21] I am also a majoritarian — so long, I should again add, that no existing majority seeks to close the avenues of peaceful change to all future majorities. But I agree with Professor Hook that the "dictatorship of the majority" is a "bugaboo which haunts the books of political theorists but has never been found in the flesh in modern history."[22] Consequently, I do not think that a Supreme Court declaration of constitutionality is needed to confer legitimacy upon an act of the legislature.[23] Furthermore, it is positively baneful to assume that because the Supreme Court has upheld the constitutionality of a legislative act, it must be a good or wise measure. The legislature in a democracy should be able to make a fool of itself and still be accountable for its foolishness only to the people.

Nor do I look exclusively to the Supreme Court to be "the pronouncer and guardian" of the "enduring values" of our society.[24] As I reflect upon our history, I must conclude that the enduring values of our society have been embodied more in the acts of our legislatures than in the decisions of the Supreme Court declaring some of these acts unconstitutional.[25] Let us not forget

18 369 U.S. 186, 270 (1962).
19 Emerson, *Malapportionment and Judicial Power*, 72 YALE L. J. 64, 79 (1962).
20 Bickel, Reapportionment and Liberal Myths, Commentary, June, 1963, p. 490.
21 FRANKFURTER, OF LAW AND MEN 17 (Elman ed. 1956).
22 HOOK, THE PARADOXES OF FREEDOM 66 (1962).
23 See BLACK, THE PEOPLE AND THE COURT 34 ff. (1960).
24 See BICKEL, THE LEAST DANGEROUS BRANCH 24 (1962).
25 For the values reflected in legislation, see Auerbach, *Law and Social Change in the United States*, 6 U.C.L.A. L. REV. 516 (1959). Professor Bickel seems to assume, quite erroneously in my opinion, that because legislatures are guided by interest and expediency, their acts cannot also embody enduring values. This assumption leads him to justify the Supreme Court as "an institution which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle." Bickel, *op. cit. supra* note 24, at 25. But I do not know any "principle" which does not emerge from the "clash of interests." I also find it difficult to accept the enunciation and application of "enduring basic values" by 5-4 votes.

that in the first three decades of this century, the Supreme Court upheld the sanctity of private property against the claims of a majority of the people which the legislatures sought to satisfy. While no one should underestimate the historic significance of the Court's role in the current struggle for racial equality, let us also not forget that the Court held basic Civil Rights Acts of the Reconstruction Period to be unconstitutional in 1883,[26] upheld the separate-but-equal doctrine in 1896[27] and as late as 1935 ruled, unanimously, that political parties were purely private organizations entitled to bar Negroes from voting in their primaries.[28]

Bickel's jibe at Emerson is warranted, but he fails to appreciate its full significance. Although Emerson thinks *Baker v. Carr* "moves broadly in the direction of developing and supporting procedures necessary for the effective operation of a modern democratic system,"[29] he is not a "super-democrat." He proves this by preceding his praise of the Court for *Baker v. Carr* with an aside criticizing the Court for its decisions in the Smith and McCarran Act cases which he thinks "have no future in the democratic process."[30] While Emerson professes to see the Court "as an institution for supporting and vitalizing the mechanisms of the democratic process without undertaking to supervise the results reached by that process,"[31] it is a fair guess that he would not approve the decisions in the Smith Act and McCarran Act cases even if these acts had unanimously passed a Congress elected from districts of strictly equal population and had been signed enthusiastically by a President elected by an overwhelming majority of the popular vote.

But there is also paradox in the position of the champions of judicial self-restraint on the apportionment issue. Restraint is called for because of majoritarian assumptions — that the Court is reviewing the acts of representatives who are elected by a majority of the people and who can be turned out of office if their acts are disapproved by a majority of the people. But when malapportionment frustrates the possibility of majority rule, the case for judicial restraint is weakened considerably. Judicial intervention under these circumstances is not nearly as intolerable as the self-perpetuation of minority rule. No more suitable role for the Court can be envisaged than to make it possible for majority rule to function because, without it, the whole idea of self-government is debased. And past experience gives us every reason to think that the scope of freedom — including the protection of minority rights — will expand progressively as the electoral base of our representative institutions becomes broader and more democratic. Those who share Mr. Justice Frankfurter's intellectual outlook do him a disservice by disparaging the underlying assumptions of democratic self-government in order to discredit *Baker v. Carr*.

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26 Civil Rights Cases, 109 U.S. 3 (1883).
27 Plessy v. Ferguson, 163 U.S. 537 (1896).
28 Grovey v. Townsend, 295 U.S. 45 (1935).
29 Emerson, *supra* note 19, at 64.
30 *Ibid.* Professor Emerson cites "Dennis v. United States, 341 U.S. 494 (1951). See also, Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961)." *Id.* n. 3.
31 *Id.* at 68.

THE COURT OF THE UNION
or *JULIUS CAESAR* REVISED

*Philip B. Kurland**

Dean O'Meara's subpoena was greeted by honest protests from me that I had nothing to contribute to the "Great Debate" over the proposed constitutional amendments that are the subject of today's conference. The Dean, apparently of the belief that suffering might help this audience toward moral regeneration, suggested that I come anyway. I proceed then to prove my proposition and to test his hypothesis.

I have chosen as a title for this small effort: "Julius Caesar Revised." "Revised" because, unlike Mark Antony, I have been invited here not to bury Caesar but to praise him. Our Caesar, the Supreme Court, unlike Shakespeare's Julius, does not call for a funeral oration, because the warnings of lions in the streets — instead of under the throne — were timely heeded as well as sounded. Caesar was thus able to rally his friends to fend off the death strokes that the conspirators would have inflicted. The conspiratorial leaders were the members of the Council of State Governments. The daggers they proposed to use were the chief justices of the various high state courts, to whom they would entrust, under the resounding label of "The Court of the Union," the power to review judgments of the Supreme Court of the United States whenever that tribunal dared to inhibit the power of the states. It should be made clear that the chief justices of the states would be the instruments of the crime and not its perpetrators. You will recall that when these chief justices spoke through their collective voice, the Conference of Chief Justices, in condemnation of some of the transgressions of the Supreme Court, they asked only that the physician heal himself. They did not propose any organic changes, however little they liked the Court's work. Their report stated:[1]

> . . . when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos.

Even in the absence of Caesar's murder, however, it is possible to pose the issue raised by Brutus: whether our Caesar has been unduly ambitious and grasping of power. And implicit in this question is a second: if Caesar's ambitions do constitute a threat to the republic, is assassination the appropriate method for dealing with that threat?

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1 REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, August, 1958.

The second question is easier to answer than the first. Whether Caesar be guilty or not, it would seem patently clear that his murder, as proposed, must be resisted. Its consequences could only be costly and destructive civil conflict resulting in the creation of a new Caesar in the place of the old one, a new Caesar not nearly so well-equipped to perform the task nor even so benevolent as Julius himself.

It is probably because of the obvious absurdity of the method chosen for limiting the Supreme Court's powers that there is today even more unanimity in opposition to the proposal than existed when Caesar was last attacked — not by the current self-styled patricians, but by the plebeians under the leadership of Franklin Delano Roosevelt. For then it was only the conservatives that came to the defense of the Court; the liberals were prepared to destroy it. Today, as Professor Charles Black has made clear, even if in rather patronizing tones, the conservatives are solidly lined up in defense of an institution many of whose decisions are repugnant to them.[2] The conservatives would seem to be concerned with the preservation of the institution; the liberals with the preservation of the benefits that the current Court has awarded them. For the latter the contents of Caesar's will appears to make the difference.

It would seem, therefore, that only those close to the lunatic fringe, the Birchers and the White Citizens Councils and others of their ilk, are prepared to support the purported court-of-the-union plan. Even in the Council of State Governments the proposed amendment was supported by a majority of only one vote. The few legislatures that have voted in support of this amendment are those normally concerned with their war on Robin Hood and similarly dangerous radicals. I do not mean to suggest that the Court is not in danger of being restrained. But I do think that the proposed method of destruction is not a very real threat unless this country is already closer to Gibbon's Rome than to Caesar's.

On the other hand, to say that the plan for a Court of the Union is an absurdity is not to answer the question whether Caesar suffers from an excess of ambitions. The Great Debate called for by the Chief Justice at the American Law Institute meeting last May has not really concerned itself with this problem. The Great Debate has taken the form of rhetorical forays. Each side argues that the proposed limitation on the powers of the Court would result in the removal of national power and the enhancement of the power of the states. The forces of Cassius and Brutus argue that this is a desirable result because the dispersal of government power is the only means of assuring that individual liberty will not be trodden under the tyrannous boots of socialist egalitarianism. Antony contends that the adoption of the proposal would be to return us to a fragmented confederation impotent to carry on the duties of government in the world of the twentieth century. Roosevelt's words about a "horse and buggy era" are this time used in defense of the Court. With all due respect, I submit that the essential question remains unanswered. The Talmud tells us that ambition destroys its possessor. Does the Court's behavior invite its own destruction?

2 Black, The Occasions of Justice 80 (1963).

In what ways is it charged that this Caesar seeks for power that does not belong to him? Some such assertion can be rejected as the charges of disappointed suitors. But there are others that cannot be so readily dismissed on the ground of the malice of claimant. Allow me to itemize a few of the latter together with some supporting testimony:

Item: The Court has unreasonably infringed on the authority committed by the Constitution to other branches of the Government.

Listen to one of the recent witnesses:

> The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.
>
> This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

This is not the charge of a Georgia legislator. These are the words of Mr. Justice Harlan, spoken as recently as last February 17, in *Wesberry* v. *Sanders*.[3]

Item: The Supreme Court has severely and unnecessarily limited the power of the states to enforce their criminal laws.

Thus one recent critic had this to say:

> The rights of the States to develop and enforce their own judicial procedures, consistent with the Fourteenth Amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the "struggle for personal liberty." But the Constitution comprehends another struggle of equal importance and places on [the Supreme Court] the burden of maintaining it — the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: "One more such victory . . . , and we are utterly undone."

This, I should tell you, is not the Conference of Chief Justices complaining about the abuses of federal habeas corpus practices; it is Mr. Justice Clark expressing his dissatisfaction in *Fay* v. *Noia*.[4]

Item: The Court has revived the evils of "substantive due process," the cardinal sin committed by the Hughes Court, and the one that almost brought about its destruction.

Here another expert witness has said:

> Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached

3 376 U.S. 1, at 48 (1964) (dissenting opinion).
4 372 U.S. 391, 446-47 (1963) (dissenting opinion).

> today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

This is the hand as well as the voice of Mr. Justice White in *Robinson* v. *California*.[5]

Item: The Court has usurped the powers of the national legislature in rewriting statutes to express its own policy rather than executing the decisions made by the branch of government charged with that responsibility.

Listen to two deponents whose right to speak to such an issue is not ordinarily challenged.

> What the Court appears to have done is to create not simply a duty of inspection, but an absolute duty of discovery of all defects; in short, it has made the B&O the insurer of the condition of all premises and equipment, whether its own or others, upon which its employees may work. This is the wholly salutary principle of compensation for industrial injury incorporated by workmen's compensation statutes, but it is not the one created by the F.E.L.A., which premises liability upon negligence of the employing railroad. It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional common-law rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obliged to apply.

No, those are not the words of Mr. Justice Frankfurter, but those of his successor, Mr. Justice Goldberg, in *Shenker* v. *Baltimore & Ohio R. Co.*[6]

Listen to the same criticism in even more strident tones:

> The present case . . . will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature.

Here we have Mr. Justice Douglas in dissent from the opinion of Mr. Justice Black in *Arizona* v. *California*.[7]

Item: The Court writes or rewrites law for the purpose of conferring benefits on Negroes that it would not afford to others.

I offer here some testimony endorsed by Justices Harlan, Clark, and Stewart, in *N.A.A.C.P.* v. *Button*:[8]

> No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved. No worse setback could befall the great principles established by *Brown* v. *Board of Education*, 347 U.S. 483, than to give fair-minded persons reasons to think otherwise. With all respect, I believe that the striking

5 370 U.S. 660, 689 (1962) (dissenting opinion)
6 374 U.S. 1, 14-15 (1963) (dissenting opinion).
7 373 U.S. 546, at 628 (1963) (dissenting opinion).
8 371 U.S. 415, 448 (1963) (dissenting opinion).

> down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession.

Item: The Court disregards precedents at will without offering adequate reasons for change.

Mr. Justice Brennan puts his charge in short compass in *Pan American World Airways, Inc.*, v. *United States:*[9]

> The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other.

Item: The Court uses its judgments not only to resolve the case before it but to prepare advisory opinions or, what is worse, advisory opinions that do not advise.

The testimony here includes the following:

> The Court has done little more today than to supply new phrases — imprecise in scope and uncertain in meaning — for the habeas corpus vocabulary of District Court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.
>
> More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case . . . and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date.

This is not the plea by academic followers of Herbert Wechsler for principled decisions nor even an argument by Wechsler's opponents for *ad hoc* resolutions. It is the view of Mr. Justice Stewart in *Townsend* v. *Sain.*[10]

Item: Not unrelated to the charge just specified is the proposition that the Court seeks out constitutional problems when it could very well rest judgment on less lofty grounds.

Here is the Chief Justice himself speaking in *Communist Party* v. *Subversive Activities Control Board:*[11]

> . . . I do not believe that strongly felt convictions on constitutional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of non-constitutional questions upon which this phase of the proceedings can and should be adjudicated. . . . I do not think that the Court's action can be justified.

Item: The Court has unduly circumscribed the Congressional power of investigation.

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9 371 U.S. 296, 319 (1963) (dissenting opinion).
10 372 U.S. 293, 327 (1963) (dissenting opinion).
11 367 U.S. 1, 116 (1961).

The testimony I offer here is not that of the chairman of the House Un-American Affairs Committee nor that of the Birch Society. It derives from Mr. Justice White's opinion in *Gibson* v. *Florida Legislative Investigation Committee*:[12]

> The net effect of the Court's decision is, of course, to insulate from effective legislative inquiry and preventive legislation, the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence.

Item: I will close the list with the repeated charge that the Due Process Clause of the Fourteenth Amendment as applied by the Court consists only of the "evanescent standards" of each judge's notions of "natural law." The charge is most strongly supported by the opinions of Mr. Justice Black in *Adamson* v. *California* [13] and *Rochin* v. *California*,[14] which I commend to you.

I close the catalogue not because it is exhausted. These constitute but a small part of Brutus's indictment and an even smaller proportion of the witnesses prepared to testify to the Court's grasp for power. These witnesses are impressive, however, for they are not enemies of the Court but part of it. Moreover, their depositions may be garnered simply by thumbing the pages of the recent volumes of the United States Reports, which is exactly the way my partial catalogue was created.

Let me make clear that this testimony does not prove Caesar's guilt, but only demonstrates that these charges cannot be dismissed out of hand. The fact that they are endorsed by such irresponsible groups as would support the proposed constitutional amendment does not add to their validity. But neither does such support invalidate them.

What then of Antony's defenses of Caesar?

First is the proposition that our Caesar has done no more than perform the duties with which he is charged. We have it from no less eminent an authority than Paul Freund that the Court has not exceeded its functions and he defines them thus:[15]

> First of all, the Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitations on that power. . . .
>
> A second great mission of the Court is to maintain a common market of continental extent against state barriers or state trade preferences. . . .

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12 372 U.S. 539, 585 (1963) (dissenting opinion).
13 332 U.S. 46, 68 (1947) (dissenting opinion).
14 342 U.S. 165, 174 (1952) (concurring opinion).
15 Freund, *The Supreme Court Under Attack*, 25 U. Pitt. L. Rev. 1, 5-6 (1963).

> In the third place, there falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. . . . Responsive government requires freedom of expression; responsible government demands fairness of representation.

And so, Professor Freund suggests, the Court has done no more than its duty and he predicts that we shall be grateful to it:[16]

> The future is not likely to bring a lessening of governmental intervention in our personal concerns. And as science advances into outer and inner space — the far reaches of the galaxy and the deep recesses of the mind — as physical controls become possible over our genetic and our psychic constitutions, we may have reason to be thankful that some limits are set by our legal constitution. We may have reason to be grateful that we are being equipped with legal controls, with decent procedures, with access to the centers of decision-making, and participation in our secular destiny, for our days and for the days we shall not see.

It is not clear to me that the second defense is really different from the first. Here we are met with the proposition that the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible. In short, the Court has acted because the other branches of government state and national have failed to act. And a parade of horribles would not be imaginary that marched before us the abuses that the community has rained on the Negro; the evils of McCarthyism and the continued restrictions on freedom of thought committed by the national legislature; the refusal of the states and the nation to make it possible for the voices of the disenfranchised to be heard, either by preventing groups from voting, or by mechanisms for continued control of the legislature by the politically entrenched, including gerrymandering, and subordination of majority rule by the filibuster and committee control of Congress; the police tactics that violate the most treasured rights of the human personality, police tactics that we have all condemned when exercised by the Nazis and the Communists. This list, too, might be extended almost to infinity. There can be little doubt that the other branches of government have failed in meeting some of their essential obligations to provide constitutional government.

The third defense is that which I have labelled the defense of Caesar's will. It is put most frankly and tersely by Professor John Roche in this way:[17]

> As a participant in American society in 1963 — somewhat removed from the abstract world of democratic political theory — I am delighted when the Supreme Court takes action against "bad" policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle's dictum that the essence of political tragedy is for the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, *inter alios,* that Supreme Court Justices could proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954,

16 *Id.* at 7.
17 Roche, *The Expatriation Cases: "Breathes There the Man, With Soul So Dead. . . ?"* 1963 SUPREME COURT REVIEW, 325, 326 n.4.

> I would unhesitatingly have supported the constitutional death-sentence on racial segregation, even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them.

There then are the pleadings. I do not pretend to a capacity to decide the case. It certainly isn't ripe for summary judgment on the pleadings. I am fearful only that if the case goes to issue in this manner, the result will be chaos whichever side prevails. For, like Judge Learned Hand, I am apprehensive that if nothing protects our democracy and freedom except the bulwarks that the Court can erect, we are doomed to failure. Thus, I would answer the question that purports to be mooted today, whether the court-of-the-union amendment should be promulgated, in the words of that great judge:[18]

> And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of "right and wrong — between whose endless jar justice resides." You may ask then what will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know — that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

I find then that I have come neither to praise nor to bury Caesar. I should only remind those who would destroy Caesar of the self-destruction to which the noble Brutus was brought; nor can the Antonys among us — who would use Caesar for their own ends — rejoice at his ultimate fate. For Caesar himself, I should borrow the advice given Cromwell by Wolsey: "I charge thee, fling away ambition: By that sin fell the angels."

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18 HAND, THE SPIRIT OF LIBERTY 164 (2d ed. 1953).

(Notre Dame Lawyer, Symposium 1964)

PROPOSING CONSTITUTIONAL AMENDMENTS BY CONVENTION: SOME PROBLEMS

*Arthur Earl Bonfield**

All of the existing amendments to the United States Constitution were proposed to the states by a two-thirds vote of both Houses of Congress. Proponents of the three provisions under discussion here seek to avoid this procedure. They are attempting to invoke an alternative means of submitting to the states amendments to our fundamental law. In addition to the direct Congressional initiation of the amending process, Article V[1] provides that "on the Application of the Legislatures of two-thirds of the several states [Congress] shall call a Convention for proposing amendments." The present paper will consider some of the difficult questions raised by the current effort to utilize this particular mode of "proposing" amendments to our Constitution.

At the outset, it should be noted that many of the significant questions that will arise in the present attempt to propose amendments to our fundamental law by convention will not be resolvable in the courts.[2] Strong dicta even go so far as to insist that *all* questions arising in the amending process are nonjusticiable.[3] But there is evidence of a substantial nature to the contrary. It would indicate that some of the questions which may arise in this process can be settled on the merits by the judiciary.[4] However, those that are beyond the capacity of the courts to decide because they are nonjusticiable

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1 U.S. Const. art. V.

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of the Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

2 See Coleman v. Miller, 307 U.S. 433, 457 (1939) (concurring opinion). Dowling, *Clarifying The Amending Process*, 1 Wash. & Lee L. Rev. 215 (1945). In Coleman v. Miller, the Court held that the effectiveness of a state's ratification of a proposed amendment which it had previously rejected, and the period of time within which a state could validly ratify a proposed amendment, were nonjusticiable political questions within the exclusive and irrevocable determination of Congress.

3 See *id.* at 457-59 (concurring opinion).

> Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation. . . . Undivided control of [the amending] process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety . . . and is not subject to judicial guidance, control or interference at any point.

See also text accompanying note 22 *infra*, and Dowling, note 2 *supra*.

4 See Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, No. 1, 253 U.S. 221 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

This article will *not* attempt to fully explore the extent to which the Courts can or should take it upon themselves in suits properly before them to independently resolve the vari-

political questions will be resolvable solely by Congress. Its decision in such cases will be final and conclusive on the courts.[5] Nevertheless, "in the exercise of that power Congress . . . is [still] governed by the Constitution."[6]

I.

The first question raised by the current effort to propose amendments to our National Constitution via a convention concerns the sufficiency of the resolutions sponsored by the Council of State Governments for this purpose.[7] Are they proper applications for a "Convention" within the meaning of Article V? If they are not, their adoption by the legislatures of two-thirds of the states would neither authorize nor compel Congress to summon a convention empowered to propose amendments to the Constitution. The reasons for this are several.

In the first place, the United States is a government of delegated powers. Consequently, it possesses no authority save that conferred upon it by the Constitution. Article V, the only provision in the Constitution dealing with its amendment, must therefore be deemed exhaustive and not merely illustrative of the Federal Government's powers in this regard. That provision explicitly provides two modes for proposing constitutional amendments. Only one of these contemplates the convening of a convention empowered to propose amendments. Such a "Convention" is authorized by Article V only when two-thirds of the state legislatures have made "Applications" for one. As a result, applications within the meaning of Article V from two-thirds of the state legislatures must fairly be deemed absolute prerequisites to the summoning of such a body.[8]

There is a second reason why valid Article V applications from the requisite number of state legislatures must be deemed prior conditions to the summoning of any convention empowered to propose amendments. If these applications are not prerequisites to such a convention call, on its own say-so, a majority of Congress could validly summon such a body.[9] By the same simple majority, Congress could determine the convention's make-up and mode of operation. It could therefore provide that the convention could propose amendments to the states by a mere majority of its delegates.

But Article V insists that a two-thirds vote be required by both Houses of Congress, or that two-thirds of the state legislatures make "Application" for a "Convention," before an amendment to the Constitution may be proposed

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ous questions that may arise in the amending process. On the justiciability of questions arising in the amending process see ORFIELD, AMENDING THE FEDERAL CONSTITUTION 7-36 (1942); Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621 (1953); Note, 70 HARV. L. REV. 1067 (1957).

5 Coleman v. Miller, 307 U.S. 433 (1939); *cf.* United States v. Sprague, 282 U.S. 716 (1931).

6 Coleman v. Miller, *supra* note 5, at 457 (1939).

7 *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10 (Winter No. 1 1963).

8 See ORFIELD, AMENDING THE FEDERAL CONSTITUTION 40 (1942); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW, 185, 196 (1951); Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962-64 (1963).

9 The terms of Article V in no way suggest that Congress may not convene such a body by the usual vote required for Congressional action. Consequently, no more than a majority vote would seem to be required to "call a Convention."

to the states. This reflects the conviction of the founding fathers that the seriousness of this kind of action demands a national consensus of the sort required to achieve such two-thirds votes. Permitting a majority of Congress, on it own say-so, to call a convention empowered to propose constitutional amendments approved by a simple majority of the latter's delegates would, therefore, frustrate the well-reasoned intentions of the founding fathers in this respect; for the kind of consensus required to secure a two-thirds vote of Congress or applications for a "Convention" from two-thirds of the state legislatures would no longer be required to trigger the amending process.

There is a further reason why Congress may not call a convention empowered to propose amendments to the Constitution until it has received the kinds of applications contemplated by Article V from the requisite number of state legislatures. "A high degree of adherence to exact form . . . is desirable in this ultimate legitimating process."[10] Because of the uniquely fundamental nature of a constitutional amendment, attempts to alter our Constitution should not be filled with highly questionable procedures which could reasonably cast doubt on the ultimate validity of the provision produced. The procedure followed in any effort to amend the Constitution should be so perfect that it renders unequivocal to all reasonable men the binding nature of the product. Consequently, Article V must insist upon a firm and unyielding adherence to the precise procedures it provides. This unusual need for certainty in the process of amending our fundamental law also lends additional force to the assumption that the precise procedures provided in Article V must be deemed exclusive.

Prior discussion demonstrates that in the process of "proposing Amendments" to the Constitution by "Convention," Congress resembles those state legislatures that are empowered to create such a body only after a demand for such action by the people at the polls.[11] That is, Congress may not call a convention empowered to "propose" amendments to the Constitution unless it receives from two-thirds of the state legislatures the kinds of applications for such action that are contemplated by Article V. As a consequence, the resolutions sponsored by the Council of State Governments and adopted by the legislatures of several states must be carefully scrutinized in order to determine their adequacy in this respect. If these resolutions are not applications for a convention within the meaning of Article V in no case would Congress be authorized or obligated to call a "Convention" pursuant thereto.

The resolutions sponsored by the Council of State Governments provide as follows:

> Resolved by the House of Representatives, the Senate concurring that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States. [The text of one of the three desired constitutional amendments is then inserted.][12]

10 Black, *supra* note 8, at 963.

11 See Iowa Const. art. X, § 3; Nev. Const. art. XVI, § 2; N.Y. Const. art. XIX, § 1; S.D. Const. art. XXIII, § 2; Tenn. Const. art. XI, § 3.

12 *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11-14 (Winter No. 1 1965).

It can be argued with substantial persuasiveness that these resolutions are not applications for an Article V "Convention."

Article V clearly specifies that Congress "shall call a Convention for *proposing* Amendments." The process of *proposing* amendments contemplates a conscious weighing and evaluation of various alternative solutions to the problems perceived. As Professor Charles Black has noted:

> The process of "proposal" by Congress, contained in the *first* alternative of Article V, obviously [and necessarily] includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the second alternative, ought to be taken to denote a mechanical take-it or leave-it process.[13]

Common sense alone suggests that Article V contemplates a deliberative convention that would itself undertake fully to evaluate a problem, and propose those particular solutions that it deems desirable. The reason for this is that amendments to our National Constitution are chiefly matters of national concern. Consequently, all the alternatives should be carefully explored and debated on a national level, and the details of any proposed amendments fully worked out on a national level, before they are sent to the states for their more locally oriented action of ratification.

With this in mind, it can reasonably be assumed that the two modes provided for "proposing" amendments found in Article V were to be symmetrical. Whether "proposed" by Congress or a "Convention," the problem at which any amendment is directed is to be "considered as a *problem*, with [an evaluation] of a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power."[14] Consequently, the "Convention" contemplated by Article V was to be a fully deliberative body — with power to propose to the states as amendments any solutions to the problem submitted to the "Convention" that it deemed best.

If Article V contemplates this kind of a "Convention . . . for proposing Amendments," the resolutions sponsored by the Council of State Governments should be deemed insufficient applications within the meaning of that provision. Instead of requesting a deliberative convention with full power to propose to the states any amendments dealing with the subject in question that it thinks proper, these resolutions demand "a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States."[15] As a result, the resolutions in issue really call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed" elsewhere. In this sense, the proponents of these resolutions seek to make the "Convention" part

13 Black, *supra* note 8, at 962.
14 *Id.* at 963 (emphasis added).
15 See text accompanying note 12, *supra*.

of the *ratifying* process, rather than part of the deliberative process for "proposing" constitutional amendments.[16] Consequently, the resolutions in question should not empower Congress to call a convention authorized to submit amendments to the states for ratification. They are not "Application[s for a] Convention . . . for *proposing* amendments" as Article V demands; rather, they are applications for a convention empowered solely to approve or disapprove the submission to the states of particular amendments "proposed" elsewhere.

Furthermore, Congress has no authority to treat the resolutions sponsored by the Council of State Governments as applications for the kind of convention Article V does contemplate. It cannot be inferred from these resolutions requesting a convention empowered solely to approve or disapprove particular amendments for submission to the states, that the state legislatures tendering them would be satisfied or willing to have a plenary convention consider the problems at which these amendments were directed, and submit to the states the solutions to those problems that *the convention* deems best. "It is not for Congress to guess whether a state which asks for one kind of a 'convention' wants the other as a second choice. Altogether different political considerations might govern."[17]

A further defect in the resolutions may preclude their characterization as valid Article V applications. The text of each of the amendments contained in the propositions sponsored by the Council of State Governments specifies that it is to be ratified by "the state legislatures."[18] Article V clearly indicates that regardless of the mode of an amendment's proposal, *Congress* is to decide whether it shall be ratified by three-fourths of the state legislatures or three-fourths of special ratifying conventions held in each state.[19] As a result, the resolutions in question may also be deemed insufficient as Article V applications because they are attempting to achieve an illegitimate end. They seek to deny Congress the discretion to choose the mode whereby the states might ratify any product of the convention they seek.

Prior discussion should demonstrate that Congress could not legitimately treat the resolutions in question as valid applications for an Article V convention. Consequently, it should have no authority to call such a "Convention for proposing Amendments" to the Constitution pursuant thereto. Since precedent does exist for the proposition that courts will review the validity of a constitutional amendment on the merits in light of *some* procedural defects that may have vitiated its proper proposal or adoption,[20] there is a possibility that amendments proposed by any convention called pursuant to *these* resolutions

16 Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A.J. 631, 633 (1963). He specifically notes that the purpose of including the actual text amendments was to insure that the "applicants" for a convention retained control over the amendments ultimately proposed.

17 Black, *supra* note 8, at 964.

18 *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11-14 (Winter No. 1 1963).

19 United States v. Sprague, 282 U.S. 716 (1931).

20 The courts will adjudicate on the merits the validity of a constitutional amendment in light of any alleged procedural defects that may have vitiated its proper proposal or adoption. See Dillon v. Gloss, 256 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, No. 1, 253 U.S. 221 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

would be held invalid in an appropriate judicial proceeding. Indeed, at the behest of a proper litigant a court might even enjoin the election of delegates to any convention called on the basis of such inadequate Article V applications.

However, it can be argued with great force that the sufficiency for Article V purposes of the resolutions sponsored by the Council of State Governments is a nonjusticiable political question,[21] whose resolution is committed exclusively and finally to Congress. While there is no case directly on point, the dicta of four Justices of the United States Supreme Court in the case of *Coleman v. Miller*[22] should be recalled. "Undivided control of [the amending] process has been given by . . . Article [V] exclusively and completely to Congress. The process itself is 'political' in its entirety from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."[23]

Furthermore, there may be a "textually demonstrable constitutional commitment of the [particular] issue to a coordinate political department."[24] That is, since Congress is to call the Article V convention on receipt of applications from the proper number of states requesting such a body, Congress alone may be empowered to decide whether those applications tendered are sufficient. By the same token it can be argued that the validity of these resolutions as applications for an Article V convention is nonjusticiable because of "the impossibility of a court's undertaking independent resolution [of the question] without expressing lack of respect due coordinate branches of government."[25] If this is true, and the validity of these resolutions as applications for an Article V convention is "not meet for judicial determination," the decision of Congress on this question, whatever it is, will be conclusive on the courts for all purposes.

II.

The next question presented by the current effort to propose amendments to the Constitution by convention concerns the role of state governors in the application process. Must applications for an Article V convention be approved by the legislatures *and* the governors of two-thirds of the states to be effective? Or, is legislative approval of these applications by the required number of states alone sufficient to empower Congress to call a convention for proposing amendments?

It should be noted that the Council of State Governments specifies that the resolution it sponsors "should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto."[26] The correctness of the approach taken by the Council of State Governments in this respect depends on whether the term "legislature" in the application provision of Article V means the

21 See Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 791-92 (1927); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1071 (1957).
22 Coleman v. Miller, 307 U.S. 433 (1939).
23 *Id.* at 459 (1939) (concurring opinion).
24 Baker v. Carr, 369 U.S. 186, 217 (1962).
25 *Id.* at 217.
26 *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11 (Winter No. 1 1963).

whole legislative process of the state — as defined in the state constitution — or only its representative lawmaking body. As we will see, close analogies suggest that this is a justiciable question.

The 1920 case of *Hawke v. Smith, No. 1*[27] interpreted "legislatures" in the ratification clauses of Article V to mean the representative lawmaking body only, since "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word."[28] If the term "legislature" is interpreted to mean only the state's representative lawmaking body in the ratification clauses of Article V, it should bear the same meaning in the application clauses of that provision. There would seem to be no valid reason for according a different meaning to the one term in these two different clauses of the same constitutional provision.

Further support for the view that the governor of a state need not sign its application for an Article V convention can be gleaned from the case of *Hollingsworth v. Virginia*.[29] In that suit counsel argued that the Eleventh Amendment was invalid because after it had been approved for proposal to the states by a two-thirds vote of Congress, it had not been tendered to the President for his signature. On this basis it was asserted that the Amendment had never been properly submitted to the states for their ratification. Mr. Justice Chase answered this contention by asserting that "the negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition, or adoption, of amendments to the Constitution."[30]

It is easy to apply this reasoning to the powers of state governors and conclude similarly that the executive of the state has no function to perform in the application process under Article V. The governor's approval of such an application for a convention is unnecessary; and an executive veto may be disregarded. Consequently, effective applications for an Article V convention need only be approved by a state's legislature[31] — and in this respect, the theory upon which the resolutions sponsored by the Council of State Governments is predicated is correct.

III.

The current effort to seek a constitutional convention through the application process also raises a question of timing. That is, in order to be effective,

27 253 U.S. 221 (1920). That case held that a state could not restrict the ratifying power of its legislature by providing for a binding popular referendum on the question.

28 *Id.* at 229. As a result, the Court held that a state constitutional provision that provided for a referendum on the action of the General Assembly in ratifying any proposed amendment to the United States Constitution was in conflict with Article V. *Contra*, State *ex rel.* Mullen v. Howell, 107 Wash. 167, 181 Pac. 920 (1919). An approach similar to that of *Hawke v. Smith, No. 1* has been taken by state courts with regard to state constitutional amendments. See Mitchell v. Hopper, 153 Ark. 515, 241 S.W. 10 (1922); Larkin v. Gronna, 69 N.D. 234, 285 N.W. 59 (1939).

29 3 U.S. (3 Dall.) 378 (1798).

30 *Id.* at 381. "The most reasonable view would seem to be that the signature of the chief executive of a state is no more essential to complete the action of the legislature upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment." Ames, *The Proposed Amendments to the Constitution of the U.S. During the First Century of Its History*, H.R. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., 298 (1897).

31 See Staff of House Comm. on the Judiciary, 82nd Cong., 2d Sess., Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates 7-8 (Comm. Print 1952); Note, 70 Harv. L. Rev. 1075 (1957).

within what period must the resolutions be adopted by two-thirds of the state legislatures? There would seem little doubt that Congress would neither be empowered nor under a duty to call an Article V convention unless it receives "relatively contemporaneously," proper applications from the required number of state legislatures.[32] The reason for this is that each step in the amending process is meant to demonstrate significant agreement among the people of this country — *at one time* — that changes in some particular part or the whole of our fundamental law are desirable. Nothing less would seem acceptable in a process of such significance and lasting impact.

The case of *Dillon v. Gloss*[33] lends support to the assumption that a convention can properly be called pursuant to applications for an Article V convention only if they are made relatively contemporaneously by the legislatures of two-thirds of the states. In that suit the United States Supreme Court sustained the power of Congress to fix the time period during which ratification of a pending amendment could be effective. After noting that Article V was silent on this question, the Court commented as follows:

> What then is the reasonable inference or implication? Is it that ratification may be had at any time as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?[34]

After admitting that neither the debates in the Federal Convention nor those in the state conventions ratifying the Constitution shed any light on this question, the Court concluded that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal, which Congress is free to fix."[35] The Court's rationale was:

> As ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people

32 Additionally, Congress may not properly call an Article V Convention unless a sufficient number of timely applications also agree on the problem or *general subject matter* that such a body should consider. But they need not be otherwise identical. That is, it is sufficient if the specific constitutional changes suggested by each application concern the same general subject matter; it is not necessary that each application propose the *same* changes in that subject matter. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG. 2d SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 195-96 (1951); Note, 70 HARV. L. REV. 1067 (1957). *But see* ORFIELD, *op. cit. supra* note 8, at 42; Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 795 (1927).

The prior position seems correct for many of the same reasons that such applications must be reasonably contemporaneous to be effective. Sufficient national agreement to warrant the calling of an Article V Convention is evidenced only if the legislatures of two-thirds of the states agree that a convention is needed to deal with the *same* general problem or subject matter. Consequently, applications for a convention dealing with divergent subjects such as some dealing with the treaty power, some dealing with the taxing power, and some desiring a general constitutional revision, should not be counted together. The problem of whether heterogeneous applications should be considered together does not really arise in the present case since the Council of State Governments proposes that two-thirds of the states adopt identical resolutions. Twelve states have already adopted one of these resolutions. Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175, 1182-83 (1963).

33 256 U.S. 368 (1921).

34 *Id.* at 371.

35 *Id.* at 375.

> in all sections at relatively the same period which of course ratification scattered through a long series of years would not do.[36]

This logic would seem equally compelling in regard to the process of proposing amendments to the Constitution. Article V is silent as to how long applications for a convention are to retain their vitality. But to exhibit any significant or meaningful agreement as to the desirability of such a convention, applications from two-thirds of the states must be "sufficiently contemporaneous . . . to reflect the will of the people in . . . [different] sections at relatively the same period." That is, "to be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then, would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought also to be expressive of similar views respecting the . . . [subject matter] of the amendment sought."[37]

While *Dillon v. Gloss*[38] seems to establish the authority of Congress to fix reasonable time limitations for the application as well as the amending process, it does not solve the problem as to what would be considered sufficient contemporaneity in absence of such a stipulation. The case of *Coleman v. Miller*[39] is relevant to this inquiry, since it held that the period of time within which the states could validly ratify a proposed amendment was a nonjusticiable political question. That is, in the absence of any edification from Congress as to what constitutes a reasonable time in the ratification process, the Court refused to make such a determination. Its rationale was that

> . . . the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.[40]

While the previous discussion only directly considers the role of the judiciary in defining time limits in the ratification process, it probably also means that the courts will not independently determine whether applications from two-thirds of the states for an Article V convention have been tendered to Congress

36 *Id.* at 375. The Court quotes JAMESON, CONSTITUTIONAL CONVENTIONS § 585 (4th ed. 1887) at this point to the effect that: "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

37 Corwin & Ramsey, *The Constitutional Law of a Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 195-98 (1951).

38 256 U.S. 368 (1921).

39 307 U.S. 433 (1939).

40 Coleman v. Miller, 307 U.S. 433, 453-54 (1939).

with sufficient contemporaneity. *Coleman v. Miller* would seem to indicate that this question is solely for Congress, and its decision on the matter will be binding on the judiciary for all purposes.

How, then, should Congress determine whether tendered applications are sufficiently contemporaneous to be counted together? It has been suggested that the current Congress might only consider those applications submitted during its tenure.[41] That is, in order to ascertain whether it is empowered or under an obligation to call an Article V convention, each Congress need only look to those applications tendered during its life. The 88th Congress need not consider any applications tendered during the 87th Congress, since the life of an application is only as long as the particular Congress to which it is tendered.

This standard of contemporaneity seems unacceptable for a variety of reasons. In the first place, ten applications tendered the last day of one Congress, and thirty submitted the first day of the following one would be insufficient even though they may have been submitted only three months apart. Additionally, it should be recalled that the state legislatures do not address their applications to any specific Congress.

It has also been suggested that at maximum only those applications tendered within the last generation be counted with each other; that is, that the effective life of an application not exceed a generation.[42] However, no measure of the precise length of a generation is provided; nor is any satisfactory rationale offered to justify Congress' counting applications together that have been tendered over such an appreciable time period.

Congress might determine the effective life of an application, and therefore whether it can properly be counted with later applications on the same subject, by engaging in a full analysis of the application itself and all surrounding circumstances. This was at least suggested in *Coleman v. Miller*.[43] Among the factors that could be considered in determining the continuing vitality of an application might be the political tenor of the times, then and now; intervening or changing circumstances relevant to the subject matter of the application since its filing; the transitory or long-term nature of the problem to which the application for a convention addresses itself; whether the problem is still considered grave by most Americans; and so on. The difficulty with this approach is that it requires Congress to make a determination with regard to many variables that are unusually difficult if not impossible for even that politically oriented body properly to evaluate or handle.

A more persuasive and perhaps more sensible approach to the question of reasonable contemporaneity can be devised than any of the prior possibilities. In counting applications for an Article V convention, Congress should properly consider only those tendered in that period, prior to the most recent applica-

41 Sprague, *Shall We Have a Federal Constitutional Convention, and What Shall It Do?*, 3 MAINE L. REV. 115, 123 (1910). The author admits that as a practical matter, such a requirement of contemporaneity would render the application process incapable of fulfillment.

42 ORFIELD, *op. cit. supra* note 8, at 42.

43 307 U.S. 433 (1939).

tion, during which all of the state legislatures have had an opportunity to consider the question at a full regular session. That is, the maximum time between those applications that can be counted together should not exceed that period during which all state legislatures have met once for a full regular session. In no case could the time period involved exceed about two and a half years.[44]

The advantage of this approach seems evident. The burden should always be on those who invoke this process to demonstrate clearly by sufficient contemporaneity of their applications that there is a present agreement among two-thirds of the states as to the desirability of a constitutional convention. Such a present consensus can only be realistically demonstrated by limiting the count of such applications to those made during the most recent period during which all state legislatures have had a reasonable opportunity to consider the question. Only applications filed during this period would accurately represent the results of the most recent poll that could reasonably be taken on the subject.

There are other advantages to limiting the life of an application to that period during which all other state legislatures have had a subsequent opportunity to consider similar action during a full regular session. Once applications for a convention are filed, attempts to withdraw them are not likely to be strenuously pressed. This is true even though the legislature may have changed its mind — or would no longer make such an application as a de novo proposition.[45] The requirement suggested here would cure this by forcing a reasonably frequent reconsideration of the desirability of such a convention in each state that had previously applied for one. Some assurance is thereby provided that such an extraordinary body will be convened only if applications from two-thirds of the states clearly demonstrate by the most recent, hence most reliable poll practicable, a present agreement on the subject.

The suggested requirement is neither unduly onerous, nor necessarily destructive of the "Application" process. States generally will not act alone in such matters. Indeed, the founding fathers probably contemplated some concert of action in such attempts to obtain a convention. The present effort is an excellent example. Furthermore, once a state legislature tenders such an application it can continually renew that application in its subsequent sessions. If there really is substantial agreement on the desirability of such a convention, debate on subsequent renewals of such applications should be relatively perfunctory, and the renewals easy to obtain.

The precise formulation that is offered for measuring the required contemporaneity of the applications may be fruitfully tested against the treatment

44 If legislature A made such an application at the very start of its session, say in February 1962, its application would retain its validity until the end of the next full regular session of all the state legislatures. Since many states meet only every other year, and one of those might make such an application at the end of its session, for example, as late as June or July 1964, a period of two and a half years may elapse between the first and last applications that may be counted together.

45 But note that in a good number of cases, states have attempted to rescind applications for an Article V Convention that they had previously tendered. 49 A.B.A.J. 1181-82 (1963).

of the same problem in the ratification process. The two situations seem closely analogous and probably would be treated similarly by Congress.[46]

In four of the last seven amendments that Congress proposed to the states it specified that the latter were to have up to seven years to effectively ratify them.[47] Congress has also deemed all of the twenty-four amendments to the Constitution properly ratified within a time period sufficiently short to demonstrate a contemporaneous agreement among the people in three-fourths of the states, despite the fact that one took as long as four years from the date of its submission and another three and a half years.[48]

So far, Congress has therefore rejected any test of contemporaneity as stringent as that suggested here. However, on the basis of its express action in four of the last seven amendments it submitted to the states, Congress may be inclined to consider seven years the absolute maximum period allowable to demonstrate a "current" agreement among the people in all sections of the country in respect to any question dealing with amendments to the Constitution. If this is so, proponents of the three "states' rights" amendments will have to secure the endorsement of their resolutions by the legislatures of two-thirds of the states within that period of time.

Congress could, of course, greatly reduce this period and quite reasonably choose to ignore any applications submitted prior to that most recent period during which all state legislatures had an opportunity to consider the question during a full regular session. But it seems rather unlikely that Congress would adopt a standard of contemporaneity in the "Application" process so much stricter than that which it has recently used in the ratification process.

IV.

The next major issue likely to arise in the current effort to convene a constitutional convention is the right of states tendering such applications to withdraw them. *Coleman v. Miller*[49] held that "the efficacy of ratifications by state legislatures, in light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in Congress."[50] It is likely that the courts would treat the closely analogous question of the effect of a state's "withdrawal" of its application for an Article V convention in a similar way. If this is true, the judiciary will refuse independently to resolve the question, feeling itself conclusively bound by Congress' decision in the matter.

How should Congress handle this problem? It has been argued that under

46 It might be contended that applications for a convention need not be made contemporaneously to be effective because the calling of a convention empowered only to *propose* amendments is far less significant than ratification. But this notion should be rejected. All parts of the amending process are too important to demand anything less than the kind of contemporaneous agreement suggested here.

47 U.S. CONST. amend. XXII; U.S. CONST. amend. XXI; U.S. CONST. amend. XX; U.S. CONST. amend. XVIII; see also Dillon v. Gloss, 256 U.S. 368 (1921).

48 The Constitution of the United States of America 47-48, 54 (Corwin ed. 1952). The 16th Amendment was proposed July 12, 1909, and ratification was completed on February 3, 1913, while the 22d Amendment was proposed on March 24, 1947, and ratification was completed on February 27, 1951.

49 307 U.S. 433 (1939).

50 *Id.* at 450 (1939).

Article V only forward steps can be taken and therefore a state cannot effectively withdraw an application for a convention.[51] This view seems entirely erroneous and untenable. It would base the presence of a sufficient number of applications solely upon a mechanical process of addition and ignore the extent to which each application reflects the existence of the required contemporaneous agreement that an Article V convention is desired. Consequently, in determining whether two-thirds of the states have applied for a convention, applications which have been rescinded should be disregarded;[52] for they no longer evidence any present agreement that a convention should be called.

Any precedent that may exist for denying states the right to rescind their ratifications of interstate compacts[53] or constitutional amendments[54] is not apposite here. Ratification is the "final act by which sovereign bodies confirm a legal or political agreement arrived at by their agents."[55] Applications for a constitutional convention, however, are merely "formal requests" by state legislatures to Congress, requesting the latter to "call a Convention for proposing Amendments" because there is a present consensus that such action is desirable. Consequently, they do not share the same dignity or finality as ratifications which might justify the latter's irrevocable nature.[56]

V.

Assuming that the resolutions in question are deemed to be valid Article V applications and are tendered to Congress by two-thirds of the states within a "reasonable" time of each other, is Congress under a duty to call a constitutional convention? Or, does it have discretion to use its judgment as to whether such a convention is really desirable or necessary? The former conclusion seems most plausible.

Article V states: "On the Application of the Legislatures of two thirds of the several States [Congress] *shall* call a Convention for proposing Amendments." From this language alone it would seem clear that Congress was to be under a firm and nondiscretionary obligation to call a Convention when sufficient applications from two-thirds of the states are tendered. The word "shall" as used in Article V is clearly mandatory.

More, however, is available than the bare language itself to support this conclusion. The debates of the Constitutional Convention indicate that in pro-

51 See Note, *Rescinding Memorialization Resolutions*, 30 CHI.-KENT. L. REV. 339 (1952).

52 Fensterwald, *Constitutional Law: The States and the Amending Process — A Reply*, 46 A.B.A.J. 717, 719 (1960); Grinnel, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 A.B.A.J. 1165 (1959); Note, *Proposing Amendments to the United States Constitution by Amendment*, 70 HARV. L. REV. 1067, 1071 (1957). *Contra*, Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161 (1959).

53 See West Virginia v. Sims, 341 U.S. 22 (1950).

54 There is precedent for Congressional refusal to permit a state to withdraw its ratification. Congress did so during Reconstruction when several states attempted to withdraw their ratification of the post-Civil War amendments. The decision of Congress in that case seems clearly wrong. Its action may be attributed to the unusual temper of the times. See Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 624-26 (1953); Grinnel, *supra* note 52, at 1165.

55 Fensterwald, *supra* note 52, at 719.

56 The common sense of Article V, however, would seem to be that ratifications can also be effectively rescinded anytime before three-fourths of the states lend their assent to the proposed amendment. *But see* note 54 *supra*.

viding for the proposal of amendments by convention the founding fathers intended to furnish a method by which the Constitution could be altered even though Congress was opposed.[57] Further support for the mandatory and nondiscretionary nature of Congress' duty to call a convention when the prerequisites are met can be found in the *Federalist Papers*. In paper No. 85 Hamilton insisted:

> By the fifth article of the plan, the Congress will be obligated "on application of the legislatures of two thirds of the states . . . to call a Convention for proposing amendments . . ." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body.[58]

It therefore seems clear that if Congress receives applications for an Article V convention from two-thirds of the state legislatures within a "reasonable time period," it is absolutely bound to convene such a body.[59]

However, it should be relatively clear that the courts would never attempt to force Congress to call such a convention[60] since the latter's decision as to whether many of the prerequisites to such a call have been met will probably be conclusively binding on the former. For example, prior discussion demonstrates that the intrinsic adequacy as applications for an Article V convention of any resolutions tendered to Congress, their timeliness, and their continuing validity in light of attempts to withdraw them, are all likely to be considered by the judiciary as nonjusticiable political questions. If this is so, Congress' decision on these matters will conclusively bind the courts, and necessarily disable the latter from playing any positive role in forcing a convention call.

It should also be noted that the courts have never issued an injunction or writ of mandamus directly against the President or Congress because of the doctrine of separation of powers embodied in our National Constitution, and the consequent obligation of respect owed co-equal branches of the National Government by the federal judiciary.[61] To do so here would reflect a "lack of

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57 When final debate on Article V began in the Constitutional Convention the draft being considered provided that "the Congress, whenever two-thirds of both Houses shall deem necessary, or on the applications of two-thirds of the Legislatures of the several States shall propose amendments to this Constitution . . ." 2 FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTION 629 (1911).

"Col. Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the national government should become oppressive . . ." 2 FARRAND, *op. cit. supra*, at 629. As a result, Mr. Gouverneur Morris and Mr. Gerry moved to amend the article to require a convention or application of two-thirds of the states. 2 FARRAND, *op. cit. supra*, at 629. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a call (sic) a convention on the like application." 2 FARRAND, *op. cit. supra*, at 629-30.

58 THE FEDERALIST No. 85, at 546 (Wright ed. 1961) (Hamilton).

59 See 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 331 (2d ed. 1929); Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI.-KENT L. REV. 128, 133-34 (1952); Note, 70 HARV. L. REV. 1067 (1957). *Contra*, Platz, *Article V of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 44 (1934).

60 See 1 WILLOUGHBY, *op. cit. supra* note 59, § 331; Fensterwald, *supra* note 52, at 720. *Contra*, Packard, *supra* note 52, at 196.

61 In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866), the Supreme Court unanimously held that the President himself is not accountable to any court save that of impeach-

respect" for the actions of a coordinate branch of the Federal Government in regard to a subject that may even textually be exclusively committed to its judgment by the Constitution.[62] Therefore, aside from the very practical inability of the courts adequately to enforce any decree directing Congress to call such a convention,[63] sound reasons and well-established precedent dictate the correctness of the assumption that it lacks the authority to do so.

Recent cases holding that the courts can force the states to reapportion their legislatures conformably to equal protection,[64] or that the courts can force state legislatures to draw congressional districts so that they are as nearly equal in population as practicable[65] are inapposite here. The reason for this is that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and *not* the federal judiciary's relationship to the States which gives rise to the 'political question'."[66] That is, "the nonjusticiability of a political question is primarily a function of the separation of powers."[67] Judicial review on the merits of state legislative apportionment or the drawing of congressional districts by the states only involves federal judicial superintendence of *state* action or inaction; but judicial review of Congress' failure to call an Article V convention directly involves the federal courts in an effort to force its co-equal branch of government to perform a duty exclusively entrusted to it by the Constitution.

VI.

What is the President's role in the calling of an Article V convention? Does the call for a convention, like any ordinary piece of legislation, require his signature or a two-thirds vote of Congress for it to be valid?

The previously discussed case of *Hollingsworth v. Virginia*[68] would seem to indicate that the need for Presidential concurrence in any convention call is justiciable, but that his signature is never required for the valid issuance of such a call. Consequently, the President's failure to join in the Congressional summons of such a convention would in no way impair the validity of any amendment the latter body proposed. The language of Article V directly supports this conclusion since it asserts that *"the Congress"* is to call a "Convention for proposing Amendments" on "the Application of the legislatures of two-thirds of the several states."

However, a contrary argument of substantial weight has been made.[69] Article I, Section 7 of the Constitution provides that

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ment either for the nonperformance of his constitutional duties or for the exceeding of his constitutional powers.

"The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." Mississippi v. Johnson, *supra* at 500.

62 Baker v. Carr, 369 U.S. 186, 217 (1962).

63 How could the courts force Congress to call a convention when all the details of such a body seem to be left to the unreviewable discretion of Congress? Would a court call one itself if Congress failed to follow a court decree directing it to do so?

64 Baker v. Carr, 369 U.S. 186 (1962).

65 Westberry v. Sanders, 84 S. Ct. 526 (1964).

66 Baker v. Carr, *supra* note 64, at 210. (Emphasis added.)

67 *Id.* at 210.

68 3 U.S. (3 Dall.) 378 (1798).

69 See Black, *supra* note 8, at 965.

> . . . *every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a Bill.

Hollingsworth v. Virginia carved an exception to this rule as far as Congress' proposal of Constitutional Amendments was concerned. But it can be argued that this mode of proposing constitutional amendments was taken out of the veto process by the Supreme Court in that case solely because "the congressional proposal must be by two-thirds in each house [and] it [therefore] may have been thought that the requirement for overriding the veto was already met."[70] This ground would not exist if Congress called a constitutional convention to propose amendments by a simple majority vote.

As a result, it can be argued that the commands of Article I, Section 7, apply to the convention call since it is an "Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives [are] . . . necessary." If this is true, the President must sign any call by Congress for a constitutional convention and if he vetoes it, Congress can override him only by a two-thirds vote of both Houses.

Further support for this point of view can be gleaned from the fact — to be shortly noted — that Congress can specify how the convention is to be chosen, its organization, rules, etc. This being so, Congress must necessarily make more than a mere call for a convention. Such a call would be meaningless without the inclusion of the specific terms upon which such a body is to be constituted, organized, and conducted. These terms to be spelled out by Congress would appear similar to the general kinds of legislation with which Congress normally deals. Consequently, no reason of logic dictates its different treatment in respect to the need for Presidential approval.

This conclusion is bolstered by the desirability of such a requirement. The President is the only official who is elected by and responsible to the American people as a whole. His concurrence in the summoning of such a convention that would intimately affect the concerns of all individual Americans, and our Nation as a whole, therefore seems most logical and desirable.

The President's duty in such a case would be the same as that of Congress; to participate in such a call only if, in good conscience, he deems the requisites for such a convention to have been properly met. If Article V demands Presidential concurrence in such a call, the refusal of the chief executive to act, like that of Congress, would probably be conclusive on the courts,[71] subject however to the right of Congress to override his judgment by a two-thirds vote. However, it should be reiterated that the need for Presidential concurrence in any congressional convention call might well be decided otherwise on the basis of

70 *Id.* at 965.
71 See note 61 *supra* and the text accompanying that note.

Article V's specific language directing *"The Congress"* to call a convention, and the analogous case of *Hollingsworth v. Virginia*.[72]

VII.

If Congress does call an Article V convention pursuant to the resolutions in question here, on what terms may it do so? How would such a convention be constituted, how would it operate, and what would be the scope of its authority? The terms of Article V give us little help. Indeed, Madison worried about these questions at the Convention of 1789. "He saw no objection . . . against providing for a convention for the purpose of proposing amendments, except only that difficulties might arise as to the form, the quorum, etc."[73]

Since Article V empowers *"Congress"* to call the "Convention" when the requisites for the summoning of such a body are met, and Article V does not indicate the terms upon which such a convention is to be constituted, organized, or operated, Congress must be authorized to decide such questions. Under its power to call a convention, Congress therefore has implied authority to fix the time and place of meeting, the number of delegates, the manner and date of their election, whether representation shall be by states or by population, whether voting shall be by number of delegates or by states, and the vote in convention required to validly propose an amendment to the states.[74]

If the broad dictum of *Coleman v. Miller*[75] is any guide to present judicial conviction Congress' determination in the above matters may be conclusive on the courts for all purposes. Such a refusal by the courts to review on the merits the propriety of the organizational ground rules imposed by Congress on an Article V convention might be defensible on the assumption that in Article V there is a "textually demonstrable constitutional commitment of th[is] issue to a coordinate political department."[76] Even if the courts are conclusively bound for all purposes by the congressional specifications regarding the terms upon which such a convention must be constituted, organized and operated, Congress will still be bound in its action on these questions by the Constitution and its judgment of the popular will. However, here as in most places in the amending process, the only available remedy for Congressional abuse may be political — resting with the electorate at the polls.

In calling an Article V convention Congress would not be justified in following by analogy the Constitutional Convention of 1787 where representation and voting were by states.[77] Nothing in the terms of Article V requires representation or voting in such a body to be on that basis. Furthermore, at the time of the 1787 Constitutional Convention the states

> . . . were in a position of at least nominal sovereignty, and were

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72 3 U.S. (3 Dall.) 378 (1798).

73 2 FARRAND, *supra* note 57, at 630.

74 See ORFIELD, *op. cit. supra* note 8, at 43-44; Black, *supra* note 8, at 959; Note, 70 HARV. L. REV. 1067, 1075-76 (1957). This continuing hand of Congress in the convention process need not appear unduly strange since Article V explicitly gives it the power to decide between modes of ratification regardless of the mode of proposing the amendment to the states.

75 307 U.S. 433 (1939).

76 Baker v. Carr, 369 U.S. 186, 217 (1962). However, a good argument can be made to the contrary.

77 FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 57 (1962).

> considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of a new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluble union; there is a whole American people. The question in an amending convention now would [only] be whether innovations, binding on dissenters, were to be offered for ratification.[78]

As a result, the propriety of a vote or representation by states in the 1787 Convention cannot settle the propriety of similar action in a convention today.

More appropriate than representation or voting by states in any Article V convention would be an apportionment of the delegates and voting power in such a body on the basis of population alone. Such an approach makes good sense not only because it would conduce to the most accurate expression of the national will, but also because regional interests are more than adequately weighted at the ratification stage where each state is given an equal voice. Congress should therefore provide that delegates to any Article V convention be elected from districts of equal population, and that each delegate have one vote.

Congress should also provide that an affirmative vote of two-thirds of the delegates would be required to propose any given amendment to the states. In this way it would assure a symmetry of concurrence in the bodies empowered to propose constitutional amendments — whether the body was Congress or a convention. Such symmetry is desirable because it would assure the same kind of overwhelming consensus in one route to proposal as the other, thereby avoiding possible forum shopping. A two-thirds requirement in such a convention would also guarantee that no amendment, regardless of its means of proposal, is ever submitted to the states before an overwhelming consensus as to its desirability is evidenced in a nationally oriented body.

From all of the above, it would seem clear that "no Senator or Representative [or the President if his concurrence is required] is bound to vote for a convention call which in its form fails to safeguard what he believes to be vital national interests."[79] And as noted previously, their decision in this regard would seem to be unreviewable in the courts. That is, the sole remedy available to check an abuse of Congress' judgment in this matter may be at the polls.

A further question is raised by the current effort to propose amendments to the Constitution by convention. Can either the states or Congress limit the scope of such a convention's authority in any way? It should be recalled that the resolutions sponsored by the Council of State Governments avowedly attempt to restrict the convention to the approval or rejection of the precise amendments contained in those resolutions. Prior discussion has already demonstrated that an Article V convention is to be a fully deliberative body empowered to propose those solutions to a problem that *it* deems best. Consequently, such a convention cannot be limited by the state applications upon which it is predicated to the approval or rejection of the text of any particular amendments

78 Black, *supra* note 8, at 964-65.
79 *Id.* at 964.

contained therein. By the same token, Congress may not limit such a convention to the approval or rejection of any particular amendments.[80]

While neither the states nor Congress may limit an Article V convention to the consideration of the terms of any particular provision, they should be able to restrict such a body to the proposal of amendments dealing with the same general subject matter as that contained in the applications upon which the convention is predicated. Indeed, of their own force, the state applications should limit any convention called by Congress to the proposal of amendments dealing with the same general subject matter as that requested in those applications. The reason for this is as follows.

An agreement is required among two-thirds of the state legislatures that a Convention ought to be held before Congress is empowered to convene such a body. No Article V convention may be called in absence of such a consensus. If the agreement is that a convention is desired only to deal with a certain subject matter, as opposed to constitutional revision generally, then the convention must logically be limited to that subject matter. To permit such a body to propose amendments on any other subject would be to recognize the convention's right to go beyond that consensus which is an absolute prerequisite for its creation and legitimate action.

If the prior conclusion is correct, and the state applications of their own force can bind any convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter requested in those applications, then Congress should disregard any amendment proposed by such a body which is outside of that subject matter. Here, as elsewhere, the courts will be bound by Congress' decision on the question if the issue is nonjusticiable. This, regardless of whether Congress deems a proposed amendment ineffective because it is beyond the scope of the convention's authority, or effective because it is within the scope of the convention's authority. On the other hand, if this question is justiciable, the courts may independently determine whether an amendment proposed by such a convention is beyond the general subject matter requested by the state applications. If such an amendment is outside that subject matter the courts might enjoin its ratification, or set the amendment aside afterwards because it was never properly proposed.

The notion that state applications can limit a convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter as that contained in those applications is not widely accepted. It has been insisted that "the nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition."[81] The Convention itself is a Federal instrumentality set up by Congress under powers granted to it by the Constitution. Since Article V directs *Congress* to call the convention, and is silent as to the details of such a body, Congress is the only authority entitled to specify

80 There is another reason why *Congress* cannot properly limit a convention to the approval or rejection of the text of any particular amendment. The framers of the Constitution probably intended the convention method of proposing amendments to be as free as possible from Congressional interference so that the "Convention" could propose any amendments it deemed desirable in spite of any Congressional objections to the provision. See note 57 *supra*.

81 Wheeler, *supra* note 21, at 795.

those details. Consequently, if any power can limit such a convention to the proposal of amendments dealing with the same subject matter as that contained in the state applications, it can only be Congress.[82] "State legislatures . . . have no authority to limit an instrumentality set up under the federal Constitution. . . . The right of the legislatures is confined to applying for a convention, and any statement of purposes in their petition would be irrelevant as to the scope of powers of the convention."[83]

If this is true, and the state applications cannot themselves bind a convention to a consideration of only the same subject matter requested in those applications, then Congress should be able to do so pursuant to its implied power to fix the terms upon which such a body shall operate.[84] A convention called pursuant to the resolutions in question here, for example, should not be permitted to propose amendments concerning the treaty power.[85] The reason for this is that the applications specifically request a convention for another purpose. A constitutional change should never be proposed by a convention unless two-thirds of the states have previously agreed that an amendment dealing with the particular subject matter involved is desirable, or that a convention was needed to consider a general constitutional revision. For this reason, it would seem anomalous were Congress powerless to limit the scope of a convention's authority to the general subject matter requested in the text of the applications upon which it is predicated. Certainly it would be under a duty to call a general convention if two-thirds of the state legislatures properly ask for one. Equally obvious should be its right and obligation to limit the scope of a convention to the same subject matter requested by the state applications.

Some authority for Congressional power in this respect can be gleaned from those state cases insisting that state constitutional conventions are subject to the restrictions contained in the call for the convention. The theory is that the legislatures call is a law and the delegates are elected under the terms of that law.[86] Consequently, they can exercise no powers beyond that conferred by such a statute or the Constitution itself.

Prior discussion should demonstrate that at least Congress can limit the scope of any Article V convention to the "subject matter" or "problem" at which the state applications were directed. Clearly, Congress is at least morally bound to do so. And in any subsequent litigation, the courts should respect

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82 STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2d SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952).

83 ORFIELD, *op. cit. supra* note 8, at 45.

84 *Contra*, 46 Cong. Rec. 2769 (1911) (remarks of Senator Heyburn). ORFIELD, *op. cit. supra* note 8, at 45; Wheeler, *supra* note 21, at 796; Note, 70 HARV. L. REV. 1067, 1076 (1957).

85 See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2d SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS AND MODES OF PROCEEDING 10, 11, 493 (4th ed. 1887).

86 See Wells v. Bain, 75 Pa. 39, 51 (1874). *But see* Goodrich v. Moore, 2 Minn. 49, 53 (1858) (dictum). For debate on both sides of this question, see 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1872-73, 52-61 (1873).

such a limitation imposed by Congress and disregard any provisions proposed by a convention that were beyond the latter's authority as so limited. Of course, the notion that the state applications can themselves limit the scope of a convention's authority solely to a consideration of the same subject matter as that contained in those applications should not be ignored. However, if that theory is rejected, the people of the United States will have to rely on Congress to expressly limit any Article V convention it calls to the proposal of amendments dealing with the same general subject matter as that contained in the state applications.

VIII.

If the amendments sponsored by the Council of State Governments were proposed by a validly convened and constituted convention, the states would still need to ratify them. As previously noted, the terms of the three "states rights" amendments specify that they are to be ratified by the *legislatures* of three-fourths of the states. Even if these precise amendments could be validly proposed by a convention called pursuant to the resolutions in question here, Congress would not be bound in this respect. Article V clearly empowers *Congress* to determine in its sole discretion which of the two modes of ratification specified in that provision shall be utilized;[87] this regardless of the method of the particular amendment's proposal. Consequently, that decision would still rest with Congress in the case at hand, and the courts would be bound in all respects by its choice in the matter. Congress could, therefore, choose to have any amendment proposed by such a convention "ratified by the Legislatures of three-fourths of the several states, or by Conventions in three-fourths thereof . . . ."

87 United States v. Sprague, 282 U.S. 716 (1931).

(North Carolina Law Rev.--1975)

COMMENT

Amendment by Convention: Our Next Constitutional Crisis?

On September 15, 1787, in the waning moments of the Philadelphia Convention, which drafted the United States Constitution, Charles Cotesworth Pinckney of South Carolina observed that "conventions are serious things and ought not to be repeated."[1] Americans have apparently taken Pinckney's wisdom to heart, for in our long history as a constitutional republic, there has never been another federal constitutional convention. This is true although the Constitution expressly authorizes "a Convention for proposing Amendments,"[2] and despite the fact that in the years since the Constitution was ratified approximately two hundred sixty-nine resolutions have been submitted to Congress by the States calling for national constitutional conventions.[3]

Article V is the part of the Constitution that provides for its own amendment. It reads as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as a part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Under article V there are two means of proposing constitutional amendments: either by a two-thirds vote of both Houses of Congress,

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1. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 632 (1911) [hereinafter cited as FARRAND].

2. U.S. CONST. art. V.

3. State Applications Calling for a Constitutional Convention to Propose Amendments to the Constitution of the United States: 1787 to July 1, 1974 (unofficial list prepared by the staff of the United States Senate Subcommittee on Separation of Powers, as revised, September 25, 1974) [hereinafter cited as State Applications].

or by a constitutional convention called by Congress in response to petitions of two-thirds of the state legislatures. The powers of Congress or of the constitutional convention are limited to *proposing* amendments. Proposed amendments become part of the Constitution only when ratified by three-fourths of the States. Congress, regardless of how the amendments are proposed, has the exclusive power to determine the method of ratification[4] and must choose to have the proposed amendments ratified either by the state legislatures or by conventions held in each state for that purpose. Each of the present twenty-six amendments to the Constitution were initially proposed by the Congress. Since the national convention procedure has never been used, it remains a constitutional curiosity. As is clear from the language of article V, the convention would be a truly national forum with the authority to propose important changes in our system of government. But beyond this literal reading, article V is tantalizingly vague.

American constitutional law and history have developed within the long shadow cast by the Philadelphia Convention of 1787, and students and practitioners of our national political system have generally shared Gladstone's opinion of the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." It is, then, understandable that constitutional scholars from James Madison[5] to Senator Sam J. Ervin, Jr.[6] have approached the subject of a new constitutional convention with a prudent degree of apprehension bred by proper respect for the enduring vitality of the Constitution. Much of the fear of a constitutional convention, which might, for example, seek to undermine important rights and freedoms guaranteed by the Bill of Rights, springs undoubtedly from the language of article

4. United States v. Sprague, 282 U.S. 716, 730 (1931).

5. [An article V national convention] would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides; it wd probably consist of the most heterogenous characters; would be the very focus of that flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberation of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a second.

Letter of James Madison to G.L. Turberville, November 2, 1788, in 5 U.S. BUREAU OF ROLLS AND LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 104-05 (1905).

6. *See, e.g.*, Senate Subcommittee on Separation of Powers, Press Release, Aug. 17, 1967.

V itself, which leaves unanswered numerous questions concerning the nature and scope of the powers of a national constitutional convention.[7]

The heat of the controversy surrounding article V represents the constitutional friction generated by the insertion of a new deliberative body into a political system carefully balanced by the doctrine of separation of powers and limited by the principles of federalism.[8] Who determines the validity of state applications? Where would the convention be held and how long would it last? May Congress refuse to call a convention, given a sufficient number of valid applications? Are questions such as these justiciable in the courts, or are they "political questions"[9] to be left to other departments of government?

Since there has never been a constitutional convention under article V, there exists no precedent to suggest solutions for these difficult problems. Likewise, there are no Supreme Court cases directly on point, and precious few on the amendment process generally.[10] Congress, though it has considered the problem on several different occasions,[11] has passed no legislation on the subject. Fear and uncertainty, in many cases justified, have left the convention procedure much ignored and little understood. Yet so long as the words remain in the Constitution, a national constitutional convention is a possibility. Fundamental wisdom and common sense on so important a matter would thus seem to require that the problems in the article V conven-

7. Concern over the wording of the national convention procedure is as old as article V itself: "Mr. Madison remarked on the vagueness of the terms, 'call a Convention for the purpose,' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?" 2 FARRAND, *supra* note 1, at 558 (quoting Madison's notes).

8. Professor Orfield has suggested that an article V convention would be, in effect, a fourth branch of government, coequal with the Congress, the Executive and the Judiciary. *See* L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 47-48 (1942).

9. For a discussion of justiciability and the political question doctrine see text accompanying notes 130-34 *infra*.

10. *See* text accompanying notes 137-67 *infra*.

11. *See, e.g., Hearings on S. 1272 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION (Comm. Print 1959); *Hearings on Amending the Constitution Relative to Taxes on Incomes, Inheritances, and Gifts Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958); *Hearings on S.J. Res. 23 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. (1954); STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES (Comm. Print 1952).

tion process be anticipated and dealt with effectively. Given the dearth of contemporary authority, investigation into the meaning and requirements of article V, as with other parts of the Constitution, might best begin with the comments of the men who wrote it.[12]

I. Background and History of Article V

Although today it might seem that an amendment clause should be an indispensable part of any national charter, this view was by no means common among eighteenth century political theorists. In fact, just the opposite was true; the idea of making changes in a constitution was foreign to European political systems. The power of amendment was a unique product of the American experience,[13] arising out of the conviction that ultimate sovereignty is in the people. This radical conception of state sovereignty found power in the people not only to make a constitution, but, as a necessary corollary, to amend and to revise it.[14] It was the impotence of the national government under the Articles of Confederation,[15] manifested in part by the unanimity requirement for amendment, that led Congress in 1787 to call for a federal conven-

12. The Supreme Court has long recognized the propriety of drawing upon the debates in the Philadelphia Convention of 1787, the essays of *The Federalist* and other writings of the Founding Fathers as aids in construing vague and ambiguous constitutional provisions. *See, e.g.*, Missouri Pac. R.R. v. Kansas, 248 U.S. 276 (1919); Missouri v. Illinois, 180 U.S. 208 (1901); Pollack v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895); Transportation Co. v. Wheeling, 99 U.S. 273 (1878); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

13. *See, e.g.*, C. Brickfield, House Comm. on the Judiciary, 85th Cong., 1st Sess., Problems Relating to a Federal Constitutional Convention 1 (Comm. Print 1957); Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 Notre Dame Law. 46, 48 (1950).

14. L. Orfield, *supra* note 8, at 1. For the first time in the history of written constitutions, an amending provision appeared in the Pennsylvania Frame of Government drawn up by William Penn and his colonists in 1683. By 1787 the constitutions of eight states contained clauses dealing with amendment; five provided for amendment by convention and three, by the legislature. W. Pullen, The Application Clause of the Amending Provision of the Constitution 1 (1951) (unpublished thesis in Wilson Library, University of North Carolina at Chapel Hill). In states such as Virginia, whose constitution did not permit amendment, the need for an amending clause was strongly felt. During debate on article V, Madison lamented that "[t]he Virginia state government was the first which was made, and though its defects are evident to every person, we cannot get it amended. The Dutch have made four several attempts to amend their system without success. The few alterations made in it were by tumult and faction, and for the worse." 1 Farrand, *supra* note 1, at 476.

15. Article XIII provided (in part): "The Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration shall be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." Documents of American History 115 (8th ed. H. Commager 1968). Note, incidentally, that article XIII made no provision for a constitutional convention.

tion "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation of the Union."[16]

A. Prerequisite Conditions for Amending the Constitution

In the proceedings and debates of the 1787 Convention, some general philosophical and political considerations emerged as to the intent of the Framers regarding the amendment process generally and the function of an article V convention specifically. Broadly speaking, written into the language of article V as it appears today are three prerequisite conditions for amending the Constitution:

(1) "Perfection" and the Amendment Process

The Constitution proposed by the Philadelphia Convention was intended to be the ultimate expression and statement of the sovereignty of the American people. Continued acceptance by the people of the authority and legitimacy of the Constitution requires that amendments be the product of an orderly, controlled and procedurally correct constitutional process.[17] Professor Bonfield summarizes the argument in this manner:

> Because of the uniquely fundamental nature of a constitutional amendment, attempts to alter our Constitution should not be filled with highly questionable procedures which could reasonably cast doubt on the ultimate validity of the provision produced. The procedure followed in any effort to amend the Constitution should be so perfect that it renders unequivocal to all reasonable men the binding nature of the product.[18]

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16. 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120 (2d ed. 1836).

17. The Constitution expressly provides that all amendments "shall be valid to *all Intents and Purposes, as part of this Constitution* . . ." U.S. CONST. art. V (emphasis added). As Professor Black has written, "a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all." Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 963 (1963).

18. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659, 661 (1964). The point was also made during debate on article V at the Philadelphia Convention. Col. Mason argued that "[a]mendments will therefore be necessary, and it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence." 1 FARRAND, *supra* note 1, at 202-03. James Iredell of North Carolina, later a United States Supreme Court Jus-

(2) The Need for a National Consensus

A procedurally "perfect" amendment process should operate to change the Constitution only when there exists a national consensus for change.[19] Such a national consensus is virtually assured by the requirement of article V that amendments be proposed only by a two-thirds majority in both Houses of Congress, or by a convention called at the request of two-thirds of the States. In addition, after the amendments are proposed, they do not become part of the Constitution until ratified by three-fourths of the States in the manner chosen by Congress. Thus at every stage of the amendment process the consent of supermajorities is required, under the presumption that it will be impossible to achieve such majorities without widespread national agreement on the need for amendment.[20]

(3) Deliberation and Debate Before a National Forum

Given a procedurally correct amendment process and a national consensus for change, the Framers further intended that amendment proposals be brought before a national assembly of representatives of the people.[21] As the United States Supreme Court noted in *Hawke*

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tice, argued before the state convention considering ratification of the Constitution that "it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people." 4 J. ELLIOT, *supra* note 16, at 176-77. Likewise Madison commented in *The Federalist*:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty, which might perpetrate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendments of errors, as they may be pointed out by the experience on one side, or on the other.

THE FEDERALIST No. 43, at 315 (B. Wright ed. 1961) (J. Madison).

19. Professor Dodd has written, "in bringing about a change in the federal Constitution . . . two elements must unite: (a) the sentiment of the people in favor of change, and particularly in favor of the specific change being urged; and (b) operation of the machinery for the purpose of effecting such a change." Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 354 (1921).

20. *See, e.g.*, Dillon v. Gloss, 256 U.S. 368 (1921). The provisions of article V thus illustrate "the conviction of the Founding Fathers that the seriousness of this kind of action demands a national consensus of the sort required to achieve such two-thirds votes." Bonfield, *supra* note 18, at 661.

21. "On principle, it appears to me that the point is that no constitutional changes should go forward to ratification without having first undergone examination and debate in a national forum, whether it be Congress or a convention." *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 60, 62 (1968) (statement of A. Bickel).

v. Smith,[22] "This article [V] makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed."[23] Once the national forum, whether Congress or convention, is satisfied with the proposal and has submitted it to the States for ratification, article V insures yet further debate and discussion by requiring that the amendment be ratified either by the State legislatures or State conventions, "which it was assumed would voice the will of the people."[24]

B. Proposing Amendments by Convention: An Alternative to Congress

The above-mentioned conditions are satisfied under the procedure whereby Congress proposes amendments. Yet article V provides for an alternative process—proposing amendments by constitutional convention. Since the congressional procedure works effectively, is technically simple in its operation, and has built around it a formidable body of constitutional-amendment law based upon precedent and repetition, what distinguishable purpose is the convention procedure intended to serve?

The delegates to the Philadelphia Convention of 1787 were in sharp disagreement as to how amendments ought to be brought about. At the center of the dispute was the role of the Congress.[25] Some of the delegates were deeply suspicious of allowing the national government to interfere in the amendment process.[26] Eventually a major

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22. 253 U.S. 221 (1920).

23. *Id.* at 226. "*What is a convention*? A constitutional convention . . . must be a deliberative body, but beyond that it cannot be accurately described." Platz, *Article V of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 45 (1934).

24. Hawke v. Smith, 253 U.S. 221, 226-27 (1920).

25. As Madison noted, "the exclusion of the National Legislature from the process was at issue." 1 FARRAND, *supra* note 1, at 202. Some, like Col. Mason, believed that the Congress should not be a part of the amending process. 1 J. ELLIOT, *supra* note 16, at 182. Others, such as Gouverneur Morris, advocated a role for Congress. *Id.* at 498.

26. Resolution 13 of the Virginia Plan introduced by John Randolph provided that "the assent of the National Legislature ought not to be required" to amend the Constitution. 1 FARRAND, *supra* note 1, at 22. Col. Mason defended this position, noting that "[i]t would be improper to require the consent of the Nat'l Legislature, because they may abuse their power and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment." *Id.* at 203.

Hamilton displayed somewhat greater confidence in the integrity of future Congresses: "The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature

compromise was reached, albeit over Madison's misgivings.[27] The Convention drafted article V to require Congress to call a constitutional convention for proposing amendments upon application of two-thirds of the states.[28] This procedure was to be a genuine alternative to the procedure under which Congress proposes amendments.

As the debates make clear,[29] the article V convention provision was inserted to allow the people of the States to propose amendments should the Congress be unwilling to do so. The compromise was motivated by the fear of some that the Congress might someday abuse, neglect, or exceed its constitutional powers and would then be most unlikely to propose amendments on the issue of its own wrongdoing.[30] The convention procedure was conceived as yet another of the fundamental checks and balances written into our constitutional system.

There is nothing to suggest that the Framers intended the congressional procedure to be the predominant amendment process. To the contrary, they felt that they had struck a proper balance in distributing the power to propose amendments, intending to express a preference for neither method.[31] The popular appeal of the alternative amendment process was frequently exploited as delegates pleaded with their various state conventions to ratify the new Constitution.[32] Hamilton defended article V by characterizing the alternative amendment process as a safeguard against a reluctant or despotic Congress. He felt that the process of collecting the required number of state ap-

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will be the first to perceive and will be most sensible to the necessity of amendments. . . . —There could be no danger in giving [Congress] this power [to call a convention], as the people would finally decide in the case." 2 *id.* at 558.

As a result of this disagreement, the Committee of Style and Revision reported back a revised draft of article V that made no provision for proposing amendments independent of the Congress. *Id.* at 602. In the margin of his copy of the revised draft, an outraged Col. Mason scribbled his objection that "should [Congress] prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." *Id.* at 629 n.8.

27. *Id.* at 629-30.

28. *Id.*

29. *See* note 26 *supra.*

30. *Id.*

31. The Senate Judiciary Committee in 1973 concluded that "[t]here is no evidence whatsoever that the Framers did not regard this means to be as desirable and as viable as that which allows for constitutional amendment at the initiation of Congress." SENATE COMM. ON THE JUDICIARY, FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. No. 293, 93d Cong., 1st Sess. 7 (1973).

32. Madison felt that article V "equally enables the general and the State governments to originate the amendments of errors . . . ." THE FEDERALIST No. 43, at 315 (B. Wright ed. 1961).

plications and calling the convention under article V manifested "one of those rare instances in which a political truth can be brought to the test of mathematical demonstration."[33]

C. *Historical and Political Significance of Article V*

Although a national convention has never been called, still the alternative amendment procedure has played a significant role in the American political process.[34] The constitutional history of the United States is replete with state applications calling for a convention,[35] and more than once the awesome spectre of an impending constitutional convention has inspired an otherwise reluctant Congress to act.[36]

For example, following the adjournment of the Philadelphia Convention during the State ratification debates, anti-federalists in control of legislatures in Virginia[37] and New York[38] led the way in calling for a new constitutional convention. Pressure from these influential states resulted, on September 25, 1789, in the proposal by Congress of twelve amendments.[39] This made the second convention unnecessary, for ten of the proposals, the present Bill of Rights, were ultimately ratified by the States.[40]

Other significant national movements for a second convention arose in the late 1820's and early 1830's during the nullification controversy,[41] and during the crisis period immediately preceding the outbreak of the Civil War.[42]

The twentieth century brought a new period of article V activism among the States. During this century Congress has been flooded with

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33. *Id.* No. 85, at 546 (A. Hamilton).
34. For an excellent general treatment of the historical importance of article V's alternative amendment procedure in national policy-making see W. Pullen, *supra* note 14.
35. *See* State Applications, *supra* note 3.
36. *See, e.g.*, W. Pullen, *supra* note 14, at 105-13.
37. *Id.* at 10-11.
38. *Id.* at 21.
39. *Id.* at 30.
40. U.S. CONST. amends. I-X.
41. W. Pullen, *supra* note 14, at 33-67. The doctrine of Nullification, or State Interposition, held that the States, as sovereigns, retained the power to "veto" or "nullify" acts of Congress when the state legislature determined that the congressional statute was, in its sole opinion, unconstitutional. Calhoun and others were fierce advocates of the doctrine, convinced that it was the only possible way the Union could be preserved short of civil war. *See generally* J. BLUM, B. CATTON, E. MORGAN, A. SCHLESINGER, JR., K. STAMPP, & C. WOODWARD, THE NATIONAL EXPERIENCE (2d ed. 1968).
42. W. Pullen, *supra* note 14, at 68-84.

applications for a convention.[43] And as the number of applications has increased sharply, the purpose of the States in submitting them has also changed. States have seized upon the alternative amendment process as a tactical device to catch the attention of Congress.[44]

This shift in purpose is perhaps best illustrated by the national controversy in the early 1900s over direct election of United States Senators.[45] The States played upon the chronic fear of the American people, Congressmen and Senators included, of another constitutional convention, and in the end compelled Congress to propose the seventeenth amendment.[46] Some Senators who were opposed to direct election preferred the submission of the amendment by Congress rather than risk a convention.[47] Between 1893 and 1911, thirty-one applications were collected,[48] and under intense pressure to call the convention, the Congress in 1912 chose to avert a constitutional crisis by proposing the seventeenth amendment. Thus, even though an article V convention was never called, the possibility, or rather the apparent inevitability, of a national convention eventually compelled Congress to take action favored by the people. In this manner, then, the alternative amendment process served precisely the function intended by the Framers.[49]

The most recent effort by the States to have Congress call a

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43. From 1906 to 1916, twenty-seven petitions were filed to propose an amendment banning polygamy; from 1939 to 1960, twenty-eight states called for a convention to limit the taxing power of the federal government; from 1943 to 1949, six states petitioned for a convention on the issue of world federal government; and scattered applications have been filed on such far flung issues as controlling the Communist Party, balancing the federal budget and limiting the tenure of federal judges. *See* State Applications, *supra* note 3. *See also* Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175 (1963).

44. "In the [past], application was made by a state because a convention was thought to be desirable. Beginning with the twentieth century, however, the process has been used primarily as a prod in the side of Congress to force that body to propose a specific amendment." W. Pullen, *supra* note 14, at 105.

45. *Id.* at 105-13.

46. S. REP. No. 293, *supra* note 31, at 6.

47. "'In this country, just as soon as a constitutional convention was assembled they would be seeking to open every door to access and to carry out or make impossible the carrying out of the fallacies, the fads, and the fancies of the imagination of the people who talk about Government and the Constitution of the United States as glibly as though they knew something about it . . . .'" W. Pullen, *supra* note 14, at 111, *quoting* remarks of Senator Heyburn.

48. *See* State Applications, *supra* note 3.

49. "The history of the 17th amendment illustrates the usefulness of having a method by which a recalcitrant Congress can be bypassed when it stands in the way of the desires of the country for constitutional change." S. REP. No. 293, *supra* note 31, at 6. Also recall the intentions of the Framers in providing a genuine alternative to Congress discussed in text accompanying notes 25-33 *supra*.

national convention came in the 1960's in the wake of the landmark Supreme Court decisions on the malapportionment of state legislatures. In 1962 in *Baker v. Carr*[50] the Court held that the issue of state legislative reapportionment was justiciable,[51] abruptly reversing its long-standing position to the contrary.[52] *Baker v. Carr* provoked an explosive reaction among the States. In December 1962 the Council of State Governments passed resolutions urging state legislatures to petition Congress for a national convention to consider constitutional amendments aimed at stripping the federal courts of jurisdiction in maters of legislative reapportionment.[53] Then, in 1964 with *Reynolds v. Sims*[54] as its flagship case,[55] the Supreme Court established the principle of "one-man, one-vote."[56] Following this decision, the Seven-

50. 369 U.S. 186 (1962).

51. "[T]he complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment." *Id.* at 237.

52. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 552 (1946) ("due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."); *cf.* Radford v. Gary, 352 U.S. 991 (1957) (per curiam); Anderson v. Jordan, 343 U.S. 912 (1952) (per curiam); Remmey v. Smith, 342 U.S. 916 (1952) (per curiam); South v. Peters, 339 U.S. 276 (1950) (per curiam); MacDougall v. Green, 335 U.S. 281 (1948) (per curiam); Colegrove v. Barrett, 330 U.S. 804 (1947) (per curiam); Cook v. Fortson, 329 U.S. 675 (1946) (per curiam).

53. *The Sixteenth General Assembly of the States*, 36 STATE GOV'T 2, 10-15 (1963). The Council passed three resolutions calling for amendment of article V designed to overturn the *Baker v. Carr* decision and recommended

> [t]hat the attached joint resolutions, dealing with proposed amendments to the United States Constitution be adopted by every State Legislature *without change* and in a uniform manner which will leave no question as to the intent of the several States:
>
> a. A resolution to amend Article V so as to simplify state initiation of proposed amendments.
>
> b. An amendment to eliminate federal judicial authority over the apportionment of State Legislatures.
>
> c. An amendment to establish a "Court of the Union" with authority to review Supreme Court decisions relating to the rights reserved to the States under the Constitution.

Id. at 11. The Council proposals created quite a stir. *See, e.g.*, Caldwell, Freund & Bernard, *Debate of Three Proposed Constitutional Amendments*, 53 ILL. B.J. 1040 (1965); Hurst, *Memorandum Regarding Pending Proposals to Amend the United States Constitution*, 36 WIS. B. BULL., Aug. 1963, at 7; Monroe, *To Preserve the United States: A Brief for the Negative on Three Current Plans to Amend the Constitution*, 8 ST. LOUIS U.L.J. 533 (1964); Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A.J. 631 (1963).

54. 377 U.S. 533 (1964).

55. *See also* Lucas v. Forty-fourth Gen. Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA v. Lomenzo, 377 U.S. 633 (1964).

56. "[A]s a basic constitutional standard, the Equal Protection Clause requires

teenth Biennial General Assembly of the States passed a resolution urging States to petition Congress for a convention to propose an amendment that would permit states to apportion one house of a bicameral legislature on some basis other than population.[57] This "quiet campaign to rewrite the Constitution"[58] steadily gained momentum and was abetted by the active support of certain members of Congress.[59] By March 1967, thirty-two states had submitted arguably valid applications to Congress—only two shy of the magic number representing two-thirds of the States.[60]

Senator Sam J. Ervin, Jr. of North Carolina then introduced, for the first time in our nation's history, legislation[61] on article V national conventions.[62] The Ervin Bill was designed to establish effective procedures for the calling and functioning of the convention and to delineate carefully the nature and scope of the convention's powers. Unfortunately, though the Ervin Bill has twice passed the Senate unanimously, it remains languishing in the House Judiciary Committee.[63]

Since 1967 the two additional state applications required to initiate the article V convention process have not been forthcoming. Indeed, the possibility of a constitutional convention has now dimmed considerably since several states have sought to withdraw their applications. At the present, it seems certain that the two-thirds requirement will not be met on reapportionment.

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that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. at 568.

57. *The Seventeenth Biennial General Assembly of the States*, 38 STATE GOV'T 39, 62 (1965).

58. Sorenson, *The Quiet Campaign to Rewrite the Constitution*, 50 SAT. REV., July 15, 1967, at 17.

59. Chief among them was United States Senator Everett McKinley Dirksen of Illinois. *See, e.g.*, Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968).

60. "At this point," Senator Sam J. Ervin, Jr. recalls, "the situation attracted the first attention in the press. . . . The immediate reaction was a rash of newspaper editorials and articles, almost uniformly critical of the effort to obtain a convention, and a flurry of speeches on the subject in the Congress." Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 877 (1968).

61. S. 2307, 90th Cong., 1st Sess. (1967).

62. 113 CONG. REC. 23005 (1967).

63. No action was taken by the Congress until October 19, 1971, when the Ervin Bill, slightly amended and renumbered, S. 215, 92d Cong., 1st Sess. (1971), passed the Senate eighty-four to nothing. 117 CONG. REC. 36804 (1971). Action by the House was not forthcoming on the Ervin Bill during the ninety-second congress, and so Senator Ervin reintroduced the bill, S. 1272, 93d Cong., 1st Sess. (1973), in the ninety-third congress in March 1973. 119 CONG. REC. S. 5017 (daily ed. March 19, 1973). On July 9, 1973, S. 1272 passed the Senate on a voice vote with no opposition. 119 CONG. REC. S. 12728 (daily ed. July 9, 1973).

The excellent study, research and scholarship fostered by America's flirtation with a constitutional convention during the late 1960's should not, however, be filed away simply because a convention appears to be a short-term improbability. Today, in a political atmosphere not cankered by partisanship on issues that might be the subject of state applications, is the perfect time for article V to be considered on its own merits.[64] The serious constitutional problems inherent in article V's vagueness ought to be resolved in anticipation of a future time when the Congress finds itself in possession of the required number of state applications. Given that the amendment process in a constitutional political system should be "perfect," unhappily the procedure for assembling and conducting the business of an article V convention is not at all clear, precise or perfect. If past experience is any guide, were a national constitutional convention held today, with no legislative or other authority to guide and limit its activities, it is doubtful that all segments of the population would accept the product of that convention as constitutionally binding.[65]

The most conceptually difficult questions left unanswered by article V concern the powers of Congress and the federal judiciary over the convention. Initially, it is essential to define and analyze the power of Congress, if any, to limit the scope and subject matter of an article V convention. Secondly, to what extent does the power of the federal judiciary extend to the amendment process generally and to national conventions particularly? These twin considerations cannot be resolved independently of one another, for any effort made by Congress to legislate in this field will be limited ultimately by the constitutional

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64. There is now in progress, however, a movement to have a convention called on the issue of forced busing of schoolchildren to achieve racial balance in public schools. To date, the following twelve states have sent applications to Congress asking for a convention on this issue: Alabama, 119 CONG. REC. S. 15869 (daily ed. Sept. 5, 1973); Delaware, 119 CONG. REC. S. 15869 (daily ed. Sept. 5, 1973); Georgia, 119 CONG. REC. H. 5158 (daily ed. June 21, 1973); Louisiana, 116 CONG. REC. 5479 (1970), 111 CONG. REC. 164 (1965); Massachusetts, 120 CONG. REC. S. 7035 (daily ed. May 6, 1974); Michigan, 117 CONG. REC. 41210 (1971); Mississippi, 119 CONG. REC. S. 4839 (daily ed. March 15, 1973), 116 CONG. REC. 6097 (1970); Nevada, 119 CONG. REC. S. 9728 (daily ed. May 29, 1973); Oklahoma, 119 CONG. REC. S. 8316 (daily ed. May 7, 1973); Tennessee, 118 CONG. REC. 16214 (1972), 112 CONG. REC. 44 (1966); Texas, 119 CONG. REC. S. 6878 (daily ed. April 10, 1973); Virginia, 119 CONG. REC. H. 2400 (daily ed. April 3, 1973).

65. For example, the movement in the 1960's for a convention in the wake of *Baker v. Carr* and *Reynolds v. Sims* led to much bickering over whether a malapportioned state legislature could submit a constitutionally-valid application to Congress on the issue of its own malapportionment. *See, e.g.*, 113 CONG. REC. 1010 (1967) (remarks of Senator Tydings).

power and political disposition of the Supreme Court. When presented with such legislation the Court might choose to ignore the issue as properly a "political question,"[66] to uphold the constitutionality of the legislation on the merits, or to toss it on the mile-high scrap heap of congressional dreams wrecked by that relentless engine Judicial Review.

II. The Power of Congress to Limit the Scope and Subject Matter of an Article V National Convention

The problem of delineating congressional power[67] springs from the difficulty in reconciling the express language of article V with the purpose the convention procedure is intended to serve. If the Framers intended to eliminate Congress entirely from the alternative amendment process, the language of article V is uncharacteristically misleading. The article clearly establishes an important role for Congress in the convention process. For example, before a convention can be assembled Congress must first perform an affirmative act in calling for it.[68] It is also Congress and not the convention that determines how amendments proposed by the convention shall be ratified by the States.[69]

On the other hand, the convention procedure was intended to be an *alternative* to Congress.[70] Therefore, a search for that proper degree of control that Congress may exert over the convention involves balancing the unambiguous language of article V against the intent of the Framers that the two methods of proposing amendments be genuine alternatives.

The desire of some to have Congress limit the scope and subject matter of a national convention is undoubtedly rooted in the age-old fear of the "runaway" convention.[71] This apprehension is most likely engendered by the rather embarassing realization that our own political

66. *See* text accompanying notes 130-34 *infra.*

67. Discussion of Congress' power to limit the convention should focus upon procedural rather than substantive aspects of the amendment process. There are few constitutional restrictions on the substantive content of a constitutional amendment. *See* text accompanying notes 154-55 *infra.* Procedural uncertainties are the source of difficulty. Thus, the *subject-matter* validity of an amendment proposed by convention must be determined in its *procedural* context.

68. U.S. Const. art. V.

69. *Id.*

70. *See* text accompanying notes 25-33 *supra.*

71. *See, e.g.,* Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions,* 51 Minn. L. Rev. 1053, 1077 (1967).

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system is acually the product of clearly *ultra vires* acts committed by a small group of federalist partisans meeting secretly in Philadelphia in 1787.[72] In complete disregard of the Articles of Confederation and their congressional mandate,[73] the delegates to the Philadelphia Convention wrote an entirely new constitution, "the product of a revolution, bloodless though it was."[74] Members of the convention later frankly admitted that the Convention had acted beyond the scope of its authority, but defended the procedure on grounds of absolute necessity.[75] The fear that modern-day convention delegates might fancy themselves similarly inspired has led many to conclude that Congress should protect the nation from such a convention by requiring the States to disclose in their applications the general subject matter or problem area to be considered by the convention.[76] As a corollary to this point, advocates of a limited convention would have Congress refuse to submit for ratification any proposed amendments that deal with any other issue. Others vigorously insist that Congress has no such power.[77]

This latter group stresses the need for the convention to remain independent of Congress.[78] They acknowledge Congress' function in calling the convention and prescribing the mode of ratification, but contend that any other authority Congress may have is limited strictly to routine "housekeeping" functions such as providing for the date, place and financing of the convention.[79] Arguably the purpose of the alternative amendment process would be defeated if Congress could impose substantive restraints disguised as procedure that would effectively block state access to the process or that would allow Congress to ob-

72. *See, e.g.*, Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921, 925 (1968).

73. The mandate of the Philadelphia Convention was expressly limited to proposing amendments to the existing Articles of Confederation. *See* text accompanying note 16 *supra*.

74. L. ORFIELD, *supra* note 8, at 10.

75. Martig, *Amending the Constitution Article V: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1257 (1937).

76. *See, e.g.*, Bonfield, *supra* note 18; *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 233 (1967) (memorandum from Philip B. Kurland to Senator Sam J. Ervin, Jr.); *id.* at 46 (remarks of Professor Wallace Mendelson); *id.* at 36 (remarks of Theodore C. Sorenson).

77. *See, e.g., id.* at 231 (letter from Alexander M. Bickel to Professor Philip B. Kurland); Black, *supra* note 17.

78. Professor Black contends that the idea that article V conventions can and ought to be limited in scope is "a child of the *twentieth century*." Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 203 (1972).

79. *See, e.g., Hearings on S. 2307, supra* note 76, at 7 (statement of Senator Hruska).

struct amendments with which it disagreed.[80] Therefore, the autonomy of the convention must be preserved,[81] and Congress must not impose restrictions inconsistent with the implied requirements of article V.[82]

This position finds some support in the debates of the Philadelphia Convention and in the language of article V itself. The phrase "convention for proposing *Amendments*,"[83] using the plural form of the noun, indicates that the convention might be able to propose as many amendments as it finds necessary and that Congress is constitutionally unable to restrict this right.[84] Furthermore, it can be argued that the Constitution's draftsmen never intended article V to be so narrowly construed as to limit the power of the convention to propose more than one amendment.[85]

Proponents of an unlimited convention have, in addition, generally taken the position that Congress may not limit the constitutional effect of state applications to the subject or issue, if any, stated therein as the motivation for requesting a convention. Thus, all state applications, regardless of subject, should be counted together in computing the two-thirds requirement.[86] In 1929 the state legislature of Wisconsin concluded that a constitutional convention was long overdue,[87] in the process taking the argument to its extreme. The legislature passed a joint resolution[88] reminding Congress that since the first petition filed in 1788,[89] a sufficient number of state applications had been submitted to Congress in the intervening one hundred forty-one years so that, when counted all together, the two-thirds requirement was satisfied.[90] The more reasonable inference is that "such petitions must be pre-

80. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1618 (1972).

81. Platz, *Article V of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 46 (1934).

82. Note, 85 HARV. L. REV., *supra* note 80, at 1618.

83. U.S. CONST. art. V (emphasis added).

84. Forkosch, *supra* note 71, at 1075.

85. *Id.* at 1076.

86. *See, e.g.*, L. ORFIELD, *supra* note 8, at 42; W. Pullen, *supra* note 14, at 155.

87. Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 195 (1951). *See also* 71 CONG. REC. 3369 (1929).

88. STATE OF WISCONSIN JOINT RESOLUTION 83 (Sept. 23, 1929), FEDERAL CONSTITUTIONAL CONVENTIONS, S. Doc. No. 78, 71st Cong., 2d Sess. 32 (1930).

89. *See generally* W. Pullen, *supra* note 14, at 145.

90. The resolution then requested "that the Congress of the United States perform the mandatory duty imposed upon it by the above quoted Article V and forthwith call a convention to propose amendments to the constitution of the United States. . . ." STATE OF WISCONSIN JOINT RESOLUTION 83, *supra* note 88, at 32.

sented within a sufficiently reasonable time to justify the belief that they represented the state of public sentiment at the time."[91]

The arguments put forward by those who find in article V a requirement for an unlimited convention reveal a certain fascination for the *concept* of a national convention and betray an exaggerated notion of the proper powers of a truly *constitutional* convention. As Cyril Brickfield has noted, "[t]hose who deny that Congress has the power to bind a convention rely heavily on the so-called doctrine of 'conventional sovereignty.' "[92] And as Senator Heyburn explained on the floor of the Senate in 1911: "When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it."[93]

Supporters of this doctrine of conventional sovereignty attempt to soothe fears of a runaway convention by correctly pointing out that a convention can only *propose* amendments, not ratify them.[94] Although the convention would have no power to change the Constitution, it would have the complete power to propose changes. Therefore, when one speaks of an "unlimited convention" this means only that the Convention would be free to propose amendments on any subject it saw fit. Ratification of these proposals by the States would still be required.

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91. Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 794 (1927). *See also* Dillon v. Gloss, 256 U.S. 368, 375 (1921); text accompanying notes 19-20 *supra*.

92. C. BRICKFIELD, *supra* note 13, at 16.

93. 46 CONG. REC. 2769 (1911). Cyril Brickfield has noted that

> [a]ccording to this [Heyburn's] theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign powers and therefore is supreme to all other Government branches or agencies.

C. BRICKFIELD, *supra* note 13, at 16.

94. The power of the convention is thus viewed as equal to, but not greater than that of Congress. The convention can only set into motion the amendment process in the same sense as Congress, which is free at any time to propose any amendment whatever upon which two-thirds of both Houses agree. "Why does not this Congress amend in every conceivable manner the Constitution . . . ? It can propose amendments all over the place if it wants to. Why does not this Congress run away in its effort to amend the Constitution? Common sense and good faith restrains it. For the same reason I would be very confident and extend every good faith to the representatives in a national convention." 113 CONG. REC. 10113 (1967) (remarks of Senator Hruska). *See also Hearings on S. 2307, supra* note 11, at 7.

On the other hand, a compelling argument can be made that the power of amendment in article V is itself *constitutionally limited.*[95] This approach sees article V as only one part of a fragile and delicately balanced political structure in which the equilibrium between article V's express language and the need for an independent convention is more properly weighted in favor of greater congressional control. Thus Congress should have the power to restrict the convention to those amendments that dealt with the general issue or problem that had inspired two-thirds of the States to call for a convention.[96]

The conceptual framework for this approach to article V appears in Judge Jameson's classic treatise on constitutional conventions.[97] Central to Jameson's analysis in his distinction between the *revolution-*

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95. One of the first acts of the fledgling Congress under the new Constitution was designed to make clear that the overall authority of the Constitution was superior to the power to amend contained in article V. In 1789, reacting to amendments proposed by James Madison, Roger Sherman objected to the idea of interweaving amendments into the text of the original Constitution, urging that the latter sprang from a higher authority than the amending power. 1 ANNALS OF CONG. 707-08 (1789). Accordingly, Sherman suggested that the original text of the Constitution be left undisturbed, and that amendments be proposed as supplementary to it. *Id.* Sherman's proposal eventually prevailed, and the precedent thus created has been followed ever since. Amendments appear as additions to the original document, as is illustrated, by way of example, by the eleventh amendment, which clearly supersedes the original language of portions of article III.

96. Within this general area the convention would have a free hand to propose any amendment it felt necessary to resolve the problem. Outside that area the convention would have no power to act, and Congress might justifiably refuse to submit to the States for ratification any *ultra vires* amendment proposal. *See, e.g.*, STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES 16 (Comm. Print 1952).

The Ervin Bill, discussed in note 63 *supra*, would require a valid state application to specify "the nature of the amendment or amendments to be proposed," S. 1272, 93d Cong., 1st Sess. § 2 (1973), and would give Congress the power to refuse to submit for ratification an amendment proposed by the convention "because such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called . . . ." *Id.* § 11(b)(1)(B).

The Ervin Bill is likewise careful to preserve the right of a state to call for a *general* revision of the Constitution. S. REP. No. 293, *supra* note 31, at 1. Those who favor a limited convention do not deny or doubt a power in the States to call for a wide-open convention to propose amendments which, if ratified, would amount to a general revision of the Constitution. They do insist, however, that a general convention should not be called unless the States expressly ask for one. That is, there should be general popular dissatisfaction with the Constitution and a national consensus for wide-ranging reform. Such a consensus should not be inferred from the fact that two-thirds of the States had applied for a convention on a variety of different subjects. *See, e.g., Hearings on S. 2307, supra* note 11, at 67 (remarks of Professor Bickel); Bonfield, *supra* note 18; Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903 (1968).

97. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS (4th ed. 1887).

ary and the *constitutional* convention. A revolutionary convention

> consists of those bodies of men who, in times of political crisis, assume, or have cast upon them, provisionally, *the function of government*. They either supplant or supplement the existing governmental organization. . . . [*t*]*hey are not subaltern or ancillary to any other institution whatever, but lords paramount of the entire political domain*. . . . In short, a Revolutionary Convention is simply a PROVISIONAL GOVERNMENT.[98]

The Philadelphia Convention of 1787 meets all of Jameson's criteria for a revolutionary convention.[99] Likewise Jameson implies that most state constitutional conventions held during the independence movement were clearly revolutionary.[100]

In opposition to the revolutionary convention is the constitutional convention.

> It differs from the [revoluntary convention] in being, as its name implies, *constitutional*; not simply as having for its object the framing or amending of Constitutions, but as being within, rather than without, the pale of the fundamental law; as ancillary and subservient and not hostile and paramount to it. . . . It is charged with a definite, and not a discretionary and indeterminate, function. It always acts under a commission, for a purpose ascertained and limited by law or by custom. . . . It never supplants the existing organization. It never governs.[101]

Jameson then notes that the two concepts are mutually exclusive, and that a convention may not at the same time claim to be a constitutional convention while exercising revolutionary powers.[102] He objects to the doctrine of conventional sovereignty, calling it promotive of "a degree of omnipotence to which, in a government of law, there can be found no parallel, and which is inconsistent with the fundamental principles of American liberty."[103] Using Jameson's terminology, plainly article V contemplates a constitutional convention as opposed to a revolutionary one.[104]

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98. *Id.* at 6.
99. Although Jameson is loath to admit it. *See id.* at 377-80.
100. *Id.* at 9.
101. *Id.* at 10.
102. Jameson contends that a convention which at any stage of its proceedings overreaches itself becomes *ab initio* a revolutionary convention. *Id.* at 10-11.
103. *Id.* at 15.
104. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 994 (1968). For example, Jameson postulates that the legislative branch retains considerable power over a convention. As to routine housekeeping matters, "it is in general the right and the duty of a legislature to prescribe *when*, and *where*, and *how* a Convention shall meet and proceed with its business. . . ." J. JAMESON, *su-*

The Jameson analysis is widely accepted,[105] for it blends more smoothly into our constitutional system and more accurately reflects both the expectations of the Framers and the practical realities of modern American politics. Properly understood, the power to amend the Constitution expressed by article V is a constitutionally limited power and can have only the effect that the Constitution, taken as a whole, permits.[106] The express limitations set out in the language of article V contradict the theory that the power to amend springs from the same source as the Constitution itself.

The Founding Fathers apparently felt that, although the Constitution was fundamentally sound, certain defects would be certain to emerge. Thus article V was included as a device by which the Constitution could be adapted to new realities and situations while leaving certain indispensable rights and freedoms undisturbed.[107] Hamilton in The Federalist remarked that "every amendment to the constitution, if once established, would be a single proposition, and might be

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pra note 97, at 365. On the broader question of congressional power generally, he refers to the legislative branch as "the sentinel on duty," charged with protecting the republic against a runaway convention, an obligation which the legislature "cannot rightfully abdicate." *Id.* Furthermore, the legislature, and only the legislature, "has a clear constitutional right, in its discretion, to prescribe the scope of duties of the Convention it calls. . . ." *Id.* at 364.

105. *See, e.g.*, C. BRICKFIELD, *supra* note 13; Bonfield, *supra* note 104; Gilliam, *Constitutional Conventions: Precedents, Problems, and Proposals*, 16 ST. LOUIS U.L.J. 46 (1971).

106. *See, e.g.*, Dodge v. Woolsey, 59 U.S. (18 How.) 331, 347-49 (1855). Furthermore, the restrictions upon amendment imposed by article V itself contradict the theory that the power to amend springs from the same source as the Constitution. For example, article V clearly prohibited any amendment before 1808 which would have interfered with the African slave trade. Article V also forbids any amendment that would deprive any State of its equal representation in the Senate without its consent. Arguably the Senate could be reorganized on some basis other than equal representation for every State, but this could be accomplished only if every State in the Union consented to the change, for article V's prohibition applies only insofar as a change is attempted without the consent of a State. To illustrate, reorganization of the Senate on some basis otber than equal representation can be accomplished under the Constitution. Yet such a change cannot be made under the proposal/ratification procedure in article V. If only one State, for example, failed to ratify an amendment changing the representation formula of the Senate, then presumably that State could not be compelled to accept the change, even though ratified by three-fourths of the other States. Likewise, if *all* fifty States indicated their consent to the change in some manner acceptable to all, but different from the ratification process of article V, then such an expression of consent might be sufficient to amend effectively article I of the Constitution. The power and procedure of amendment under article V are thus not exclusive, reinforcing the idea that the power to amend is constitutionally limited.

107. Madison, in *The Federalist*, speaks of article V only in relation to the "amendment of *errors*," and suggests a constitutionally limited power of amendment by noting that the article is "under two exceptions." THE FEDERALIST No. 43, at 315 (B. Wright ed. 1961) (J. Madison) (emphasis added).

brought forward singly. . . . There can therefore be no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete constitution."[108]

When taken as a constitutionally limited power of amendment, article V must be made consistent with other powers created and distributed by the Constitution, and, in particular, the power to amend must be reconciled with the power of Congress. For example, although article V is silent on Congress' ability to restrict a convention, persuasive authority for the existence of such powers is found in the general grant of legislative authority in article I. The broad scope of the "necessary and proper"[109] clause was first sketched out in 1816 by the Supreme Court in *Martin v. Hunter's Lessee*.[110] The Court held that:

> The constitution unavoidably deals in general language. . . . Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.[111]

As Chief Justice Marshall wrote for the Court three years later in *McCulloch v. Maryland*:[112]

> [T]here is no phrase in the Constitution which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.
>
> . . . .
>
> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[113]

One hundred two years later the Supreme Court applied the principles established in these two cases directly to the scope of congressional power in the amendment process. In *Dillon v. Gloss*[114] the Court held that the necessary and proper clause authorized Congress to impose time limits upon the ratification process.[115] Thus the as-

108. *Id.* No. 85, at 545 (A. Hamilton).
109. U.S. CONST. art. I, § 8.
110. 14 U.S. (1 Wheat.) 304 (1816).
111. *Id.* at 326-27.
112. 17 U.S. (4 Wheat.) 316 (1819).
113. *Id.* at 406, 421.
114. 256 U.S. 368 (1921).
115. "As a rule the Constitution speaks in general terms, leaving Congress to deal

sumption that Congress has a broad power to fashion the ground rules for the convention and to prescribe basic procedures is well founded.[116]

There is, then, a close relationship between the principal congressional power conferred under article V and the supporting or ancillary powers, conferred under the necessary and proper clause, to execute the principal power.[117] Without this supporting power, the principal power could not exist.[118] These powers apply not only to procedural functions such as calling the convention, but also extend to the vital function of determining the ultimate scope of the convention.[119]

Although the unlimited convention concept does attempt to guarantee a convention as independent of Congress as is constitutionally possible, in doing so it rides roughshod over an equally compelling element of the amendment process. As noted above,[120] regardless of the procedure used, the Framers clearly intended that amendments be proposed only when there exists a broad national consensus for change. While the two-thirds supermajority required before Congress may propose amendments is a proper measure of this consensus, an independent, wide-open convention could easily be the source of proposals that reflect no national consensus at all. Accordingly, the notion that all state applications should be counted together in computing the two-thirds requirement for a convention seems to contradict the need for a national consensus. Equally inconsistent is the argument that the convention, once assembled, is free to propose amendments on any subject it chooses.[121] Manifestly, it is more reasonable to conclude that Congress, having been delegated the exclusive authority to call the con-

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with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule." *Id.* at 376 (footnote omitted).

116. Kauper, *supra* note 96, at 906. "The national legislature is obviously the most appropriate body for exercising a supervisory authority, for the duty to call a convention necessarily embraces the authority to determine whether the conditions which create the duty are satisfied." *Id.* at 906-07.

117. C. BRICKFIELD, *supra* note 13, at 19.

118. *Id.*

119. *Id.*

120. *See* text accompanying notes 19-20 *supra*.

121. As a 1952 House Judiciary Committee Staff Report concluded,

> To argue that Congress must launch the cumbersome, costly, and confusing proceedings of a national convention whenever 32 States fortuitously submit resolutions requesting a convention for one purpose or another does not seem sound when viewed from a realistic standpoint. . . . [T]o transform every petition asking for a specific remedial amendment into a request for a general convention by classifying it with every other application asking for constitutional change would constitute a strained interpretation of article V wholly at variance with the present needs and desires of the States.

STAFF OF HOUSE COMM. ON THE JUDICIARY, *supra* note 96, at 11.

vention, has the power to see to it that all required elements of the amendment process, including the national consensus, are present before issuing such a call. Practically speaking, Congress should not count all applications together regardless of timeliness or subject matter. Moreover, Congress should require that the nature of a particular problem be stated in the language of the state application and should refuse to submit for ratification amendments proposed by the convention unrelated to that problem. Only in this way can the Constitution's national consensus requirement be fulfilled. The independence of the convention can be protected by giving the convention a totally free hand to propose any and all amendments it deems necessary that reasonably relate to the general problem area or subject matter stated in the applications.

Ironically, the wide-open convention approach, which in the abstract seems to facilitate the convention mode of proposing amendments, would in all probability have precisely the opposite effect.[122] States that desire constitutional changes only within a particular problem area will be more reluctant to petition Congress for a convention if they know that their limited applications will be counted together with others dealing with completely different subjects.[123]

In conclusion, an analysis of congressional power over the alternative procedure of article V must take into account the three requisite conditions in the amendment process: perfection, national consensus, and deliberation and debate over a national forum. Additionally, the independence of the convention from Congress must be preserved. Both the congressional and convention procedures satisfy the national forum requirement. The unlimited convention approach emphasizes the independence of the convention, but in so doing loses sight of the need for national consensus, thereby creating the possibility that the perfection of the amendment process will be spoiled by the proposal of amendments that do not reflect the national mood. The proper balance between congressional power and conventional independence can be achieved, however, by an acknowledgement of the power of Congress to limit the subject matter of the convention, but a denial of any power in Congress to interfere with or limit the convention in pro-

122. *See, e.g.*, Ervin, *supra* note 60, at 883.

123. "Indeed, the usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the states will be defeated if the states are told that it can be invoked only at the price of subjecting the nation to all the problems, expense, and risks involved in having a wide open constitutional convention." Kauper, *supra* note 96, at 911-12; *see, e.g.*, S. REP. No. 293, *supra* note 31, at 9.

posing any and all amendments within that general area. This analysis, it is submitted, successfully integrates all relevant policy considerations germane to the amendment process generally and would provide a climate in which the states could take advantage of the alternative process with hope for success and without fear of provoking a serious constitutional crisis.[124]

III. The Courts and Article V

A. Introduction

The second great mystery shrouding article V involves the latent power of the federal courts over a constitutional convention. The powers of Congress must be considered in light of the justiciability of issues arising under article V, for it is in the courts that the issue of congressional authority will finally be decided. Should the courts find these issues justiciable, any attempt by Congress to control the convention will most surely be made in anticipation of how the Supreme Court might react. On the other hand, if these problems are found non-justiciable, the only check upon congressional power will be the good faith of Congress itself.[125]

At first blush it seems axiomatic that the great constitutional issues raised by article V are within the scope of the judicial power. There are those who suggest that an issue is rightly before a federal court when its resolution depends upon the construction of the laws or Constitution[126] of the United States,[127] for "the federal judiciary is supreme in the exposition of the law of the Constitution . . . ."[128] Under this view, any question involving the amendment procedure in

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124. This is the approach taken by the Ervin Bill, S. 1272, 93d Cong., 1st Sess. (1973), discussed in note 63 *supra*. *See also* S. Rep. No. 293, *supra* note 31, at 6-7.

125. Concededly, the Congress cannot be forced by the courts or by the provisions of this bill to convene a convention when the constitutional prerequisites have been satisfied. And since the obligation to call the convention is given to Congress, neither the President nor the Supreme Court could act in its stead. However, every Member of Congress has taken an oath to support the Constitution and it is inconceivable that Congress would refuse to perform its duty. No adequate argument has been brought forth to suggest a different conclusion.

S. Rep. No. 293, *supra* note 31, at 9.

126. "[T]he basic operating principle of American federalism [is] that the ultimate determination of federal constitutional questions rests with the Supreme Court of the United States . . . ." Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 Geo. L.J. 1, 38 (1963).

127. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821).

128. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

article V presents a federal question that must ultimately be decided by the Supreme Court.[129]

But the issue of judicial authority and article V is not so easily resolved, for over the years the federal courts have imposed upon themselves restrictions in certain areas of constitutional law. The "political questions" doctrine,[130] for example, is a theory of judicial self-restraint whereby the courts refuse to find many constitutional issues[131] justiciable on the grounds that the subject matter involved is more suited to the "political departments" of the government.[132] Through the years the standards formulated by the Supreme Court for determining which issues present nonjusticiable political questions have reflected the Court's self-perception of its own authority. In 1962 the Court substantially revised its approach to political questions,[133] and the new guidelines[134] put forward have thickened the fog of uncertainty shadowing the justiciability of the amendment process.

To further exacerbate the problem, since there has never been an article V convention, the Supreme Court has never had reason to focus its attention directly upon the subject. However, the Court has on numerous occasions considered questions raised by the amendment process generally. As a result, an inquiry into the power of the judiciary over national conventions must proceed in two parts: first, a review of past cases in which the Supreme Court has ruled on issues regarding constitutional amendment generally; second, a bit of speculation as to how the Court might react to particular problems springing from a national convention.

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129. *In re* Opinions of the Justices, 204 N.C. 806, 809, 172 S.E. 474, 476 (1933).

130. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 14 (2d ed. 1970); Scharpf, *Judicial Review and the Political Question: A Functional Anaiysis*, 75 YALE L.J. 517 (1966).

131. For example, the Court has determined that the issue of the validity of the Constitution itself is non-justiciable. Luther v. Borden, 48 U.S. (7 How.) 1, 39 (1849).

132. "The non-justiciability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint." C. WRIGHT, *supra* note 130, § 14, at 45. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164-66 (1803) (Marshall, C.J.).

133. *E.g.*, Baker v. Carr, 369 U.S. 186 (1962).

134. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

Id. at 217.

B. *Justiciability of the Amendment Process*

Although state courts have almost uniformly held that the question of amendment of state constitutions is justiciable,[135] the federal courts have been somewhat less than confident in handling the subject, and the Supreme Court has left a trail of confusing decisions.[136] During the nineteenth century,[137] the drift of Supreme Court opinions tended toward nonjusticiability.[138] With the exception of a 1798 case,[139] in which neither the parties nor the Court considered the issue,[140] the Court generally was of the opinion that, with regard to constitutional amendments, "the judicial is bound to follow the action of the political department of the government, and is concluded by it."[141]

It was not until after the turn of the century that the Supreme Court tipped the scales of justiciability in the opposite direction.[142] The Court asserted its power in a number of cases to decide positively several issues of constitutional amendment law, obviously confident of its authority to pass upon both procedural and substantive aspects of the amendment process.[143]

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135. *See, e.g.*, Collier v. Frierson, 24 Ala. 100 (1854); Carton v. Secretary of State, 151 Mich. 337, 115 N.W. 429 (1908); Wells v. Bain, 75 Pa. 39 (1874).

136. *See, e.g.*, Annot., 122 A.L.R. 717 (1939); Annot., 87 A.L.R. 1321 (1933); Annot., 83 A.L.R. 1374 (1933).

137. The Supreme Court was for the first time confronted with the issue of the validity of a constitutional amendment in Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). *See* note 140 *infra*.

138. In 1849, Chief Justice Taney strongly hinted that constitutional amendments presented nonjusticiable political questions. Luther v. Borden, 48 U.S. (7 How.) 1, 39, 47 (1849). Nevertheless, in 1855 Justice Wayne concluded that the power to amend the Constitution is a constitutionally limited one. Dodge v. Woolsey, 59 U.S. (18 How.) 331, 348 (1855). In 1871 the Court, in an aside, held that insofar as the validity of the Civil War Amendments was concerned, action by Congress was conclusive upon the courts. White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871).

139. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

140. Neither party to the suit maintained that the issue of constitutional amendment ought to be a political question, and the Court, in its brief five-line opinion, did not discuss the problem. *See, e.g.*, L. ORFIELD, *supra* note 8, at 7.

141. White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871).

142. First of the twentieth century amendment cases was Myers v. Anderson, 238 U.S. 368 (1915), in which it was argued that the fifteenth amendment was invalid insofar as it applied to state or municipal elections, on the grounds that when so applied the amendment had the effect of depriving the state of its equal representation in the Senate. *Id.* at 374. The Court ignored the point.

143. In Hawke v. Smith, 253 U.S. 221 (1920), the Court held that constitutional amendments can be ratified only in the manner provided for by Congress and that the role of the state legislature in the ratifying process is a federal function, derived not from the people of that State, but rather from the United States Constitution. The Court also reaffirmed Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), that the decision of the Congress to propose an amendment to the States for ratification was not subject to the veto power of the President. *See id.* at 381 (the famous footnote by Justice

Perhaps the most important case in the area of justiciability of constitutional amendment issues came in 1939 in *Coleman v. Miller*.[144] This case involved the validity of Kansas' ratification of the proposed Child Labor Amendment and is significant in that the Court expressly found two areas of constitutional amendment law nonjusticiable. The Court held that the effect of a previous rejection of an amendment by a State "should be regarded as a political question."[145] The Court also held that the validity of a State's ratification of a proposed amendment nearly thirteen years after it had been proposed was also nonjusticiable.[146]

Chase).

Despite protests by the Solicitor General that the issues presented were nonjusticiable, in the National Prohibition Cases, 253 U.S. 350 (1920), the Court ruled that the substantive content of the eighteenth amendment was within the scope of the amendment power and that the amendment had been properly adopted. The Court also held that the required two-thirds vote in each house is a vote by two-thirds of those members present, presuming a quorum, and not a vote by two-thirds of the total elected membership.

Dillon v. Gloss, 256 U.S. 368 (1921), held that constitutional amendments must be ratified within a reasonable time after they are proposed, and that Congress has the power to set a reasonable time limit upon the ratification process. Query: does Congress also have the power to set time limits for ratification of amendments proposed by convention?

Fairchild v. Hughes, 258 U.S. 126 (1922), and Leser v. Garnett, 258 U.S. 130 (1922), both involved the validity of the nineteenth amendment. In the former case the Court held that a taxpayer lacked standing to challenge the constitutionality of the amendment prior to its ratification by the States. In the latter case, the Court held that equal suffrage was a proper subject for amendment under article V, and restated the federal function of state legislatures in ratifying proposed amendments. At this point, however, the Court's engine of justiciability ran out of steam. The opinion revived the political question doctrine to hold that the proclamation of an amendment by the Secretary of State is conclusive upon the courts. *Id.* at 137.

In Druggan v. Anderson, 269 U.S. 36 (1925), the Court held that, although by its own terms the eighteenth amendment would not go into force until one year from the date of ratification, the amendment itself became effective upon its ratification. As a result, Congress was held to have power to legislate in anticipation of enforcement of the amendment and was not obliged to wait until the year had expired.

Six years later, in United States v. Sprague, 282 U.S. 716 (1931), the Court rejected the argument that amendments dealing with personal rights and individual liberties must be ratified by state conventions rather than state legislatures. The Court expressly held that regardless of the substantive content of a proposed amendment, Congress has the unqualified power to choose the one or the other method of ratification. *Id.* at 732. More importantly, the language of the opinion is such as to induce the belief that the Court regarded the amending process as generally justiciable. L. ORFIELD, *supra* note 8, at 18.

The effect of the absolute repeal of a constitutional amendment was the issue in United States v. Chambers, 291 U.S. 217 (1934). The Court first took judicial notice of the ratification of the twenty-first amendment and then declared the eighteenth amendment "inoperative," *id.* at 223, holding that "neither the Congress nor the courts could give it continued vitality," *id.* at 222.

144. 307 U.S. 433 (1939).

145. *Id.* at 450.

146. The Court distinguished Dillon v. Gloss, 256 U.S. 368 (1921), by noting that

The case owes its fame, however, to the concurring opinion of Justice Black,[147] who contended that the entire constitutional amendment process was nonjusticiable:

> To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments we are unable to agree.
>
> . . . The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. . . . No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.
>
> . . . .
>
> Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.[148]

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in *Dillon* the Court had merely upheld Congress' determination that seven years would be the maximum period for ratification. In *Coleman*, Congress had imposed no such time limit, and the Supreme Court was reluctant to provide one, concluding it lacked the proper criteria for such a determination. It held that the issue "can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." 307 U.S. at 454.

In a fit of schizophrenia, however, the Court expressly declined to hold nonjustifiable whether the lieutenant governor is part of the "legislature" as contemplated by article V. The majority opinion noted that the Court was "equally divided" on the issue, and "therefore the Court expresses no opinion upon that point." *Id.* at 447. The practical difficulties presented by an "equally divided" nine-man Court are discussed, tongue-in-cheek, in Note, *Sawing a Justice in Half*, 48 YALE L.J. 1455 (1939). It appears, however, that no High Court prestidigitation was involved, for Mr. Justice McReynolds was absent on the day of decision. *See, e.g.*, 28 GEO. L.J. 199, 200 n.7 (1939).

147. He was joined by Justices Roberts, Frankfurter and Douglas.

148. 307 U.S. at 458-60. Black and Douglas clung to their convictions in the companion case of Chandler v. Wise, 307 U.S. 474 (1939), where they stated in a concurring opinion that "we do not believe that state or federal courts have any jurisdiction to interfere with the amending process." *Id.* at 478.

The impact of *Coleman v. Miller* has been enormous. Some commentators have concluded, presumably on the basis of Black's concurring opinion, that the case stands for the complete repudiation of judicial power over the amendment process.[149] A number of lower federal courts have so interpreted the case.[150] However, viewed in its historical context and given the proliferation of opinions filed in the case, *Coleman v. Miller* more properly appears to offer extremely weak precedential authority for advocates of nonjusticiability. Since it did not overrule earlier cases such as *Dillon v. Gloss*,[151] and since the Court based its holding on the particular relevance of the economic and social issues involved, *Coleman v. Miller* clearly does not stand for the proposition that absolute nonjusticiability attaches to all questions related to the amendment process.[152] As Professor Orfield remarked, "[i]f the Supreme Court is not ready to apply the doctrine of political questions to all phases of the amending process . . . it will apply it to some phases of the amending process and what such phases are remains largely uncertain."[153]

In 1967 the Supreme Court again touched upon the substantive content of constitutional amendments. In *Whitehill v. Elkins*,[154] Justice Douglas observed that "the Constitution prescribes the method of 'alteration' by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered."[155]

The cases thus reveal three distinct periods in which the attitude of the Supreme Court toward the justiciability of amendment issues has shifted to and fro. In the cases decided in the eighteenth and nineteenth centuries, with the exception of *Hollingsworth v. Virginia*,[156] the Court tended to view article V as a political issue. Then, in the nationwide turmoil over both the eighteenth and nineteenth amendments, the Court jumped headlong into the amendment business, apparently un-

149. *See, e.g.*, Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931 (1968).

150. *See, e.g.*, Maryland Petition Comm. v. Johnson, 265 F. Supp. 823 (D. Md. 1967); United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954).

151. 256 U.S. 368 (1921).

152. *See* Note, 85 HARV. L. REV., *supra* note 80, at 1636.

153. L. ORFIELD, *supra* note 8, at 36.

154. 389 U.S. 54 (1967).

155. *Id.* at 57.

156. 3 U.S. (3 Dall.) 378 (1798). But recall that the political question issue was not raised in this case. *See* text accompanying notes 145-46 *supra*.

moved by protests of nonjusticiability.[157] And then, just as suddenly, in *Coleman v. Miller*[158] the Court reversed its ground, reverting to the idea of nonjusticiability and political questions, and coming within a whisper of declaring *all* issues involving the amendment process beyond the scope of the judicial power. In the confused aftermath of *Coleman v. Miller*, the historical record of the Supreme Court can be all things to all men.

Advocates of nonjusticiability emphasize the uniqueness of the amendment process in that it provides the American people with their only means of correcting "errors" in the Supreme Court's interpretation of the Constitution.[159] They argue that since the only way to overturn an unpopular Supreme Court decision is by Constitutional amendment,[160] the Court and all lower federal courts should decline to interfere with the amendment process.

Those who favor justiciability insist that all questions of constitutional law should be resolved ultimately by the Supreme Court, and stress that the Court cannot be coerced into acting upon the basis of any amendment which it does not believe has the force of law.[161] Theoretically, the power to adjudicate amendments is identical to the power to declare laws unconstitutional.[162] Once the Court determines in good conscience that it does have jurisdiction, the argument continues, there is no power in the "political department" capable of stopping the judiciary from hearing the case and deciding the issue.[163]

In conclusion, it seems reasonable to assume the present inclination of the Supreme Court would be to favor justiciability. Since *Coleman*, the Court has reworked its entire conceptual approach to political questions.[164] *Baker v. Carr*,[165] for example, strongly suggests that the

157. *See* note 143 *supra*.
158. 307 U.S. 433 (1939).
159. Note, 85 HARV. L. REV., *supra* note 80, at 1640 n.140.
160. Indeed, the eleventh, fourteenth, sixteenth and nineteenth amendments all operated to nullify prior Supreme Court decisions, and had the Child Labor Amendment been ratified, it would have had the same effect. *See, e.g.*, I. BARRON & A. HOLTZHOFF, FEDERAL PRACTICE § 54.1, at 303 (C. Wright ed. 1960).
161. *See* Yakus v. United States, 321 U.S. 414 (1944); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). *See also* Black, *supra* note 78, at 211.
162. L. ORFIELD, *supra* note 8, at 13.
163. "The issue is whether Congress may tell the courts, state or federal, that they may not inquire into certain issues of law, in cases where they *do* have jurisdiction. Unless the whole theory of *Marbury v. Madison* is wrong, it is inconceivable that Congress has such power." Black, *supra* note 78, at 211.
164. Baker v. Carr, 369 U.S. 186 (1962). *See* note 134 *supra*.
165. 369 U.S. 186 (1962).

Court will not remain the shrinking violet of the *Coleman v. Miller* era, and possibly forecasts an expanded role for the federal courts in previously uncharted "political thickets." It would appear that many potential amendment-related issues would not fall within the class held by *Baker v. Carr* to constitute political questions,[166] and in the Court's own words, "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability . . . ."[167]

C. *Justiciability of Issues Raised by National Conventions*

The Supreme Court has never ruled directly on any aspect of the alternative amendment process. Should a national convention ever be called, however, there could arise any number of legal challenges to the power of the federal judiciary over that amendment procedure. For purposes of discussion, then, the amendment process in general will be presumed to be justiciable.[168] The discussion is thus left free to focus upon the particular problems raised by a constitutional convention and to speculate about which of these could ultimately be resolved in the courts.

A serious question looms at the very threshold: the power of the courts to compel the doing of an affirmative act by an elected Congress. This problem might arise in at least two obvious contexts: first, if Congress refused to call a convention, despite submission of a sufficient number of arguably valid state applications to warrant such an act; second, if Congress refused to submit proposed amendments for ratification on the grounds that the convention had exceeded its authority. In these situations, can Congress be *forced* to act?

As to the initial calling of the convention, it was without question the understanding of the Framers that the duty imposed upon the Congress in article V is mandatory rather than discretionary.[169] The express language of article V requires that Congress "*shall* call a Convention."[170] In *Martin v. Hunter's Lessee*,[171] the Supreme Court con-

166. *See generally* Note, 85 HARV. L. REV., *supra* note 80.
167. 369 U.S. at 217.
168. *See* text accompanying notes 130-34 *supra*.
169. "[T]he national rulers, whenever nine states concur, will have no option upon the subject. . . . The words of this article [V] are peremptory. The Congress '*shall* call a convention.' Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air." THE FEDERALIST No. 85, at 546 (B. Wright ed. 1961) (A. Hamilton) (emphasis added).
170. U.S. CONST. art. V (emphasis added).
171. 14 U.S. (1 Wheat.) 304 (1816).

strued the word "shall" in its constitutional context as having mandatory effect.[172] As a result, a number of commentators have generalized that in the two circumstances mentioned above, a coercive writ of mandamus should issue to compel Congress in the first instance, to call the convention, and later to submit all amendments proposed by the convention to the States for ratification.[173] During the height of the reapportionment controversy,[174] when it seemed inevitable that two-thirds of the States would apply for a convention, Senators Dirksen and Hruska vigorously argued for such a broad interpretation of the judicial power,[175] citing as authority Chief Justice Marshall in *Marbury v. Madison*.[176] They claimed that *Marbury* stood for mandamus as a proper remedy to compel the doing of nondiscretionary, purely ministerial acts.[177] At least one authority has concluded that given a refusal by Congress to perform the acts required of it by article V, the Supreme Court itself should call the convention.[178]

This position distorts and exaggerates the power of the federal judiciary and brutalizes the doctrine of separation of powers. The Supreme Court, in contrast, has traditionally upheld the inherent limitations upon the judiciary. In *Mississippi v. Johnson*,[179] the Court, in refusing to enjoin President Andrew Johnson from executing certain Reconstruction Acts, held that "the Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial Department. . . ."[180] Accordingly, the courts have never issued an injunction or

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172. "[W]henever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded, without violating the first principles of public duty." *Id.* at 327-33.

173. *See, e.g.*, Carson, *supra* note 72; Dirksen, *supra* note 59; Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI.-KENT L. REV. 128 (1952); Tuller, *A Convention to Amend the Constitution—Why Needed—How May It Be Obtained?*, CXCIII N. AM. REV. 369 (1911).

174. *See* text accompanying notes 50-63 *supra*.

175. *See, e.g.*, Dirksen, *supra* note 59; 113 CONG. REC. 12267 (1967) (remarks of Senator Hruska).

176. 5 U.S. (1 Cranch) 137 (1803).

177. *See, e.g.*, 113 CONG. REC. 12272 (1967) (remarks of Senator Hruska).

178. "A deliberate refusal on the part of Congress to call a convention, once the requisite number of state applications were in hand, may be expected, by enlarged analogy to what has been done in the recent civil rights cases and what is being proposed in the electoral apportionment cases, to bring into play the powers of the Supreme Court to direct the setting up of the national convention." Carson, *supra* note 72, at 921. *But cf.* Kauper, *supra* note 96, at 906 ("I find it difficult to believe that the Supreme Court would . . . take it upon itself to prescribe the procedures for a convention").

179. 71 U.S. (4 Wall.) 475 (1866).

180. *Id.* at 500.

writ of mandamus directly against the President or the Congress.[181]

The better view is that article V imposes an "imperfect obligation"[182] upon Congress in which the duty is defined, but the sanction is withheld. Accordingly, while Congress has a clear constitutional obligation under article V, the courts will not compel the discharge of that duty.[183] The proper remedy for congressional inaction is that which congressmen know best and fear most—the ballot box.[184]

In a similar vein, the power of the courts to enjoin the proceedings of the convention once assembled poses a crucial problem. Numerous charges could be raised to present an attractive case for injunctive relief. For example, it could be alleged that the petitions used as a basis

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181. Bonfield, *supra* note 18, at 672. As Professor Dodd has written:

> Although there are elements of judicial enforceability in certain constitutional provisions requiring affirmative legislative action, these elements are usually not present, and where they are, courts are loath to take advantage of them. In general, therefore, constitutional provisions that the legislature "shall" do a certain thing are equivalent to statements that the legislature "may" or "shall have the power." The Federal Constitution provides that Congress, "on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments" to the constitution, but there is no compulsion upon Congress to call a convention.

Dodd, *Judicially Non-enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54, 82 (1931).

182. Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1018 (1929).

183. Wheeler, *supra* note 91, at 792. It has been suggested that the doctrine established in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866), has not been scrupulously observed. *See, e.g.*, Gilliam, *supra* note 105, who suggests that subsequent Supreme Court cases have seriously eroded the separation of powers doctrine. *Id.* at 51 n.35. Examples of such cases, suggests Gilliam, are Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (President Truman held without power to seize steel mills during Korean conflict; Secretary of Commerce enjoined from enforcing Executive Order to that effect); Powell v. McCormack, 395 U.S. 486 (1969) (Congress' exclusion of Powell held improper; although Court barred from issuing direct order to members of Congress, Speech and Debate Clause does not prevent action by Court against legislative employees charged with unconstitutional activity). These two cases, along with Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880), seem to suggest, in their cumulative effect, that whenever the Supreme Court desires a particular response from a coequal branch of government, a proper party can be found against whom the Court can act to achieve its purpose. Indeed in Powell v. McCormack, *supra*, the Court left open the frightening prospect of action directly against members of Congress: "we need not decide whether under the Speech and Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available." *Id.* at 506 n.26. The Court, it should be noted, still has stopped short of ever ordering a coequal branch or its agents to perform a positive, affirmative act. Both Youngstown Sheet & Tube Co. v. Sawyer, *supra*, and Powell v. McCormack, *supra*, involved essentially negative directives. *See* Dixon, *supra* note 149.

184. As the Supreme Court held in Colegrove v. Green, 328 U.S. 549 (1946), "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Id.* at 556.

for the convention were invalid in some respect, or that the convention had acted wrongfully or was about to usurp powers not granted to it by the Constitution.

State courts that have considered this problem in the state constitutional convention context have concluded that there exists no provision for court supervision of constitutional conventions, and that the state courts will not anticipate the action of a proposed convention or control it when assembled.[185] That the convention has full control of its proceedings has also been held,[186] but these decisions have not had the effect of precluding subsequent judicial review by state courts of the validity of the convention's work product.[187] In the federal scheme, Professor Orfield views an article V national convention as essentially a fourth branch of government, co-equal with the judiciary and thus entitled to the same respect and autonomy as the executive and legislative branches.[188] Orfield suggests that just as injunctive relief against another branch of government is beyond the power of the courts, these same limitations would apply to a national convention.[189]

Although the Supreme Court would most likely not compel a co-equal branch of government either to do or to stop doing a thing, the federal courts could nevertheless rule upon constitutional issues presented by article V, yet refrain from upsetting the separation of powers equilibrium by exercising their power to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."[190] In cases in which the courts felt that an issue raised by article V was properly justiciable, they could hand down declaratory judgments. The courts would presumably rely upon the good faith of the parties to give such judgments their full effect. If Congress' only justification for refusing to call a convention were that the constitutional requirements of article V had not been met, a declaration by the Supreme Court that the requirements had in fact been satisfied would undermine the excuse.[191] Pressure upon Congress to call the convention in light of such a decision would be

185. Wheeler, *supra* note 91, at 800.
186. *Id.* at 800-01.
187. Bonfield, *supra* note 18, at 672-73.
188. L. ORFIELD, *supra* note 8, at 47-48.
189. *Id.*
190. Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1970). *See also* FED. R. CIV. P. 57. For a general review of declaratory judgments in the federal scheme see C. WRIGHT, *supra* note 130, § 100.
191. Note, 85 HARV. L. REV., *supra* note 80, at 1644.

well-nigh irresistible. In *Powell v. McCormack*,[192] the Supreme Court ruled that despite article I, section 5 of the Constitution,[193] Representative Adam Clayton Powell, Jr., of New York was entitled to a declaratory judgment that he had been unlawfully excluded from the House of Representatives for the Ninetieth Congress. The Court said that a "court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."[194] Thus, although the courts may lack power to compel Congress to act, this lack of authority should not deter the use of declaratory relief to decide justiciable article V issues.

The Ervin Bill[195] attempts to bar all judicial review of its provisions by insisting that constitutional issues "shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal Courts."[196] However, there is serious question of the effectiveness and constitutionality of this approach. The Congress has considerable power over the jurisdiction of lower federal courts, the appellate jurisdiction of the Supreme Court, and the jurisdiction of state courts when federal questions are involved.[197] However, Congress has no power to expand or limit

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192. 395 U.S. 486 (1969).

193. This section assigns to each house of Congress the exclusive power to judge the elections and qualifications of its members, and to punish them for disorderly conduct. U.S. CONST. art. I, § 5.

194. 395 U.S. at 499. Some pages later the Court elaborated upon the appropriateness of declaratory relief under the circumstances:

> Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to "mold effective relief for resolving this case." . . . We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued . . . . The availability of declaratory relief depends upon whether there is a live dispute between the parties, . . . and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate.

Id. at 517-18.

195. S. 1272, 93d Cong., 1st Sess. (1973).

196. *Id.* §§ 3(b), 5(c), 10(b), 13(c).

197. [H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.

> . . . .
>
> . . . [T]he statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.
>
> Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has either been directly advanced or tacitly assumed would be tedious and unnecessary.

Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850). Likewise, in Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922), the Court noted that "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress." *See generally* C. WRIGHT, *supra* note 130, § 10; Hart, *The Power of Congress to Limit*

the original jurisdiction of the Supreme Court.[198] Thus if the Ervin Bill should be enacted, it would clearly be ineffective to bar an original suit in the Supreme Court in which a State were a party.[199] For example, should a State, whose application for a convention was rejected as inadequate under the Ervin Bill object to the provisions of that bill as unconstitutional, presumably that State could bring suit in the Supreme Court to have its application declared valid under article V. Since there would be both a federal question and a State as a party involved, such a suit would fall squarely within the original jurisdiction of the Supreme Court.[200] Further, since the Court cannot be made to apply a rule of law which it finds unconstitutional,[201] congressional attempts to exclude judicial review or limit the original jurisdiction of the Supreme Court would be ineffective. This fact is of critical importance, for at various stages in the alternative amendment process, it is probable that the States which have petitioned Congress for a convention will be the parties most likely to challenge any act or lack of action by Congress which such States feel interferes with their prerogatives under article V.

The question of justiciability of the amendment process generally and of the alternative amendment procedure specifically remains unsettled. Likewise the power of Congress to limit judicial review of issues arising under article V is restricted, and in an important class of cases, that power is ineffective. The scope of the judicial power over the amendment process is today so poorly defined that no one, for any purpose, should presume that the federal courts will not play an important role in the future development of article V.

IV. NOSTRUM

In retrospect, perhaps the most striking feature of the above discussion is the sharp disagreement among legal scholars regarding the distribution and scope of the amendment power, particularly with

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the Jurisdiction of Federal Courts: an Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953).

198. *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Wright also points out that the Supreme Court has always understood that the constitutional grant of original jurisdiction is self-executing, and thus Congress cannot take it away. C. WRIGHT, *supra* note 130, § 10.

199. U.S. CONST. art. III, § 2.

200. For a general review of the original jurisdiction of the Supreme Court see C. WRIGHT, *supra* note 130, §§ 109-10.

201. *E.g.*, Yakus v. United States, 321 U.S. 414 (1944); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

respect to the convention procedure. Indeed, on the subject of constitutional conventions, the Constitution is either textually ambiguous or provocatively mum. In truth, then, no one really knows how to amend the Constitution by convention, and among those who claim to know, there are general differences of opinion on even the most fundamental propositions. Accordingly, the debate and discussion concerning article V has resolved nothing, but has instead merely isolated the major points of controversy.

In a word, the alternative amendment procedure is "imperfect"; and as such it is repugnant to the first of the three essential prerequisites for amendment discussed earlier.[202] Our present "imperfect" understanding of the convention procedure could forever cloud the legitimacy of any amendment proposed and ratified under this process. The underlying political environment, if cankered by extreme partisanship on some issue of basic concern, could poison the amendment process; and should any sizable portion of the people become convinced that a constitutional amendment was wrongfully adopted or rejected, respect for the authority of the Constitution generally would be undermined.

Clearly some sort of action is required which will clarify the convention procedure and remove the element of risk which has so long forestalled full participation by the States in the amendment process. Now is a most propitious time to formulate policies for change, for there is at present no major nationwide effort by the States to have a convention called.[203] This situation permits the convention process to be examined on its own merits, and not merely as the means to a particular end. The lack of any serious ongoing movement to call a convention enables reform of article V to proceed without suspicion of the true motives of the reformers.

Recent efforts to reform the alternative amendment procedure have focused upon Congress. The Ervin Bill[204] reflects the confidence of many that Congress can solve most of the troublesome problems legislatively. A recent report of the American Bar Association,[205]

202. *See* text accompanying notes 17-24 *supra*.

203. The busing controversy could, however, provoke such an effort in the near future. *See* note 64 *supra*.

204. S. 1272, 93d Cong., 1st Sess. (1973), discussed in notes 61-63, 96 and accompanying text *supra*.

205. SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974).

while suggesting that certain portions of the Ervin Bill warrant substantial revision,[206] concludes nevertheless that legislation by Congress is the proper vehicle for article V reform.[207] However, the power of Congress is too often overstated, and the general confidence in this power is misplaced. Acts of Congress will prove ultimately inadequate for at least two reasons.

First, the present Congress has no power through legislation to bind and limit the discretion of future Congresses. While legislation presently enacted may prove entirely satisfactory for the time being, such legislation would remain subject to revision or repeal at any time. Legislation today cannot eliminate the possibility that some future Congress, confronted with a strong movement to have a convention called, might suddenly enact new legislation, in effect changing the rules to make the convention more difficult to obtain.

Secondly, it begs the question to assert that Congress can resolve article V problems when the power of Congress to interfere in the convention process is itself a focal point of controversy. Any attempt by Congress to regulate the alternative amendment procedure inevitably will raise the question of the power of Congress to do so, serving only to further complicate the issue.

Greater direction and guidance from the Constitution itself is most obviously lacking, and is consequently most desperately required. Since the alternative amendment procedure in article V is imperfect, attention should focus directly upon article V and not upon Congress. In short, the Constitution should be amended to "perfect" article V.[208] Only when the resolution of problems in the convention procedure carries with it the full force and authority of the Constitution will amendment by convention become the genuine alternative to Congress it was intended to be.[209]

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206. In particular, the ABA report would amend the Ervin Bill to provide clearly for federal court jurisdiction of controversies arising under article V without regard to the amount in controversy. *Id.* at 57.

207. *Id.* at 7-9.

208. The idea of amending article V relative to the convention procedure is certainly not a new one. *See, e.g.*, note 53 and accompanying text *supra*. Past attempts to amend article V, however, have always arisen in the context of some other, more immediate political issue. Amending article V has most often been suggested as a secondary device to achieve a primary political purpose. The time has now come for article V to be considered on its own merits.

209. This point, as does this entire comment, presumes that the alternative amendment procedure should be preserved. This commentator rejects arguments suggesting that the convention procedure is a mere historical relic and should be scrapped entirely, leaving the congressional mode as the sole means of proposing constitutional amend-

Congress should propose and the States should ratify a constitutional amendment expanding and clarifying article V. The following language illustrates what such an amendment might attempt to do.[210]

ARTICLE V.

SECTION I. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.

SECTION 2. Upon the application of the Legislatures of two-thirds of the several States within any_____-year period, Congress shall call a Convention which shall have the power to propose Amendments to this Constitution; *provided that* Congress shall not have power to call a Convention except upon such application, *and*

a. such Applications shall
   i. reasonably reflect a common desire for amendment upon a particular subject, or
   ii. shall reflect a common desire to amend in a general manner the provisions of this Constitution; *and provided further that*

b. in issuing the call for a Convention, Congress shall
   i. provide for the total number of delegates, the manner of their selection, and the apportionment of their number among the several States, and
   ii. specify the date, time and place of the first meeting of the Convention, and
   iii. fix the compensation of the delegates and provide for the expenses of the Convention, to be paid from the Treasury.

A convention called under this Article shall not remain in session beyond the expiration of the Congress which originally called it into session, except whenever two-thirds of both Houses of that Congress shall deem it necessary, and then only for a term not to exceed that of the next-elected Congress.

When, under rules and procedures agreed to by the delegates, the Convention shall have concluded its business, it shall present to the Congress all proposed Amendments agreed to; the Congress shall then submit these proposed Amendments to the States for ratification subject to SECTION 3 of this Article: *provided that* the

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ments. *Cf.* note 49 *supra*. The remainder of the comment is intended to suggest means whereby the convention procedure can be preserved and revitalized.

210. The complete language of present article V appears in text accompanying notes 3-4 *supra*.

Congress shall not be obliged to submit for ratification any proposed amendment which two-thirds of both Houses agree does not reasonably relate to the particular subject manifested in the applications for a Convention under SECTION 2, Clause I(a)(i) of this Article.

SECTION 3. Amendments proposed under this Article shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: *Provided that* no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

SECTION 4. Acts of Congress under this Article are not subject to disapproval by the President under the provisions of Article I, SECTION 7 of this Constitution.

Sections 1 and 3 are intended to preserve the present congressional mode of proposing amendments. Note that the ratification process in section 3 would apply equally to both the congressional and convention procedure. Language in original article V pertaining to the end of the slave trade in 1808 is obsolete and has been eliminated.

Section 2 provides a revised procedure for proposing amendments by constitutional convention and attempts to resolve many of the problems inherent in original article V. Section 2, clause I insures the existence of a national consensus for amendment by requiring that state applications be submitted within a specified number of years in order to be counted toward fulfilling the two-thirds requirement. The precise number of years is left blank and would be subject to thorough consideration by Congress and the States. Clause I, by its use of the plural form "Amendments," is intended to make clear the power of the convention to propose more than one amendment, providing all other conditions are satisfied.

The two provisos to section 2, clause I set out the requirements for a valid application and delineate the powers of Congress over the initial proceedings. In addition, the first clause of the first proviso makes it impossible for Congress to call a convention unless the States apply for one. Congress would not, under this provision, have power to call a convention on its own initiative. A national consensus for amendment, expressed in applications from two-thirds of the States, is thus made a prerequisite to the calling of a convention.

Section 2, clause I, subsection a(i) contemplates an appropriate

national consensus by providing that applications which do not pertain to the same general subject will not be counted toward the two-thirds requirement. Congress, as the body which has responsibility for calling the convention, would make the initial determination of whether a sufficient number of "reasonably-related" applications had been submitted. Any dispute under a(i) whether an application should be counted could be resolved in the courts, and the weight given to Congress' determination that a particular application did not bear sufficient relationship to others would also be for the courts to decide.[211] Subsection a(ii) is cast in disjunctive terms from a(i) and preserves the right of the States to petition for a convention with power to propose general, far-ranging revisions of our constitutional system. Such proposals would, however, be subject to ratification under section 3. Phrasing a(i) and a(ii) in the alternative makes it clear that a general convention may be called only when specifically requested and that applications within the time limit from two-thirds of the States on a variety of different subjects do not warrant or require Congress' calling a general convention.

Section 2, clause I, subsection b(i) gives Congress the power and obligation to determine the number, manner of selection and apportionment of delegates to the convention. The question of whether members of Congress may simultaneously serve as delegates is implicitly left subject to the rulemaking authority of the convention referred to in clause III. Subsection b(ii) permits Congress to fulfill its duty to call the convention by providing for the date, time and place of the *first* meeting of the convention. Once convened, the convention would then be free to determine its own schedule and meeting place. Subsection b(iii) imposes a duty upon Congress to appropriate funds for the expenses of the convention, so that Congress could not by in-

211. This commentator believes that such issues as this, presented in the context of an article V amended as herein suggested, would clearly be within the judicial power of the federal courts under article III. Accordingly, language to this effect in article V is not required. In order to insure the availability of a judicial forum for the ultimate resolution of article V disputes, Congress could enact a special statute extending jurisdiction over such matters to the federal courts, presumably with no jurisdictional amount requirement. *Cf.* SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMERICAN BAR ASSOCIATION, *supra* note 205, § 16(a), at 57. Since time is a key factor in assembling the required number of petitions under this amended article V, some provision for expedited appeals should be included if jurisdiction arises originally in the federal district courts. In cases where a State is a party to the action, serious consideration should be given to expressly including such cases within the original and exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251 (1970), since such a case would present issues of paramount constitutional significance.

direction defeat the purpose of the convention by depriving it of financial support.

Section 2, clause II is designed to allay fears of those who are anxious that the convention would transform itself into a permanent and perpetual "fourth branch of the government." Under this clause, the maximum length of a convention would be just under four years, presuming the original convention to be called immediately after the swearing-in of a newly-elected Congress. The convention could be extended beyond the two-year term of that Congress only by consent of Congress, and then for only one additional two-year term. Since two-thirds of both houses is required to submit for ratification an amendment proposed by Congress, this same supermajority should be required to extend a convention. Note that "extension" of a convention already in session differs from "calling" a convention originally. Under section 2, clause I, Congress is not permitted to call a convention unless it has a sufficient number of valid applications. Section 2, clause II, however, would permit Congress in its discretion to extend a convention which it had originally called, and such extension would not require further applications. Only one extension is permitted, since there is no assurance that the national consensus would continue for a longer period of time. If such a consensus were to persist, it could again be manifested by applications for a new convention.

Section 2, clause III provides the machinery with which the convention actually proposes amendments. Under the "rules and procedures" authority recognized by this clause, the delegates would adopt their own rules of procedure and would have power to determine the size of the majority needed to propose a particular amendment. The clause requires presentation of all proposed amendments to Congress, which in turn has the responsibility of submitting them to the States for ratification under section 3. The proviso to clause III strikes an essential balance between the powers of Congress and those of the convention. If two-thirds of both houses of Congress agree that any or all of the proposed amendments do not pertain to the particular subject matter stated in the applications [section 2, clause Ia(i)], then Congress may refuse to submit such amendments for ratification. Again, this congressional determination should be reviewable in the federal courts.[212] *All* amendments proposed by a general convention

212. *See* note 211 *supra.*

called under section 2, clause Ia(ii) should be submitted for ratification since the proviso in clause III does not apply in this situation.

Section 4 would write into the Constitution the sound wisdom of the Supreme Court in *Hollingsworth v. Virginia*[213] to the effect that the President's veto does not apply to acts of Congress involving constitutional amendments. This section would apply to acts of Congress pursuant to either mode of amendment.

Recent events have focused popular attention upon our Constitution and the fundamental principles of our form of government to a degree unmatched perhaps since the great ratification debates of the eighteenth century. In return, our constitutional system has proved its worth, its strength and ability to withstand extreme challenge and emerge the better for it. Accordingly, the present affords an ideal time to consider the problems inherent in the procedure whereby our Constitution may be changed as contemporary wisdom dictates. In so doing, the role of the States in the constitutional amendment process can be reaffirmed. This can best be achieved by amending the words of the Founding Fathers to reflect more accurately their original expectations. Until this is done, there remains with us the spectre of a fresh constitutional crisis, one involving not merely the petty motives and ambitions of individual persons, but the very right of States to determine to some extent the essential terms of their federalism.

MICHAEL A. ALMOND

213. 3 U.S. (3 Dall.) 378 (1798), discussed in note 143 *supra*.

(Ohio State Law Journal--1970, Vol 31)

THE MANDATORY REFERENDUM ON CALLING A STATE CONSTITUTIONAL CONVENTION: ENFORCING THE PEOPLE'S RIGHT TO REFORM THEIR GOVERNMENT

By ROBERT J. MARTINEAU*

I. INTRODUCTION

Included in the constitutions of thirty seven of the fifty states is the bold and provocative manifesto that the people[1] have the right at all times to alter or reform their government.[2] This statement, which found early expression in the Declaration of Independence,[3] is generally considered to be another way of phrasing the principle that ultimate sovereign power is in the people.[4] The direct exercise of sovereignty by the people of a state is, with one exception, limited to voting on statutory or constitutional measures presented through the initiative, referendum or constitutional revision procedures specified in state constitutions. In all other situations the people have delegated their sovereignty to their state government. Even the three acts of popular soveignty listed find their source in the state constitution and not in the inherent power of the people. There is, however, one aspect of sovereignty that does not depend

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25 (1917). *See also* Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 CASE W. RES. L. REV. 644 (1968).

[1] The definition of "people" is discussed in HOAR, CONSTITUTIONAL CONVENTIONS 16-25 (1917). See also Forkosch, *Who are the "People" in the Preamble to the Constitution*, 19 CASE W. RES. L. REV. 644 (1968).

[2] Alabama, art. I, §2; Arkansas, art. II, §1; California, art. I, §2; Colorado, art. II, §2; Connecticut, art. I, §2; Delaware, Preamble; Georgia, art. I, §2-501; Idaho, art. I, §2; Indiana, art. I, §1; Iowa, art. 1, §2; Kentucky, §4; Maine, art. I, §2; Maryland, Declaration of Rights art. I; Massachusetts, pt. I, art. VII; Minnesota, art. I, §1; Mississippi, art. 3, §6; Missouri, art. I, §3; Montana, art. III, §2; Nevada, art. I, §2; New Hampshire, pt. I, art. X; New Jersey, art. I, §2; North Carolina, art. I, §3, North Dakota, art. I, §2; Ohio, art. I, §2; Oklahoma, art. II, §1; Oregon, art. I, §1; Pennsylvania, art. I, §2; Rhode Island, art. I, §1; South Carolina, art. I, §1; South Dakota, art. VI, §26; Tennessee, art. I, §1; Texas, art. I, §2; Utah, art. I, §2; Vermont, c. I, art. 7; Virginia, art. I, §3; West Virginia, art. 3, §3; Wyoming, art. I, §1. Of the other thirteen states, Alaska, Arizona, Florida, Hawaii, Kansas, Michigan and Washington provide in their constitutions that political power is inherent in the people, Illinois, Wisconsin and Nebraska that government derives its powers from the consent of the governed, Louisiana that government originates from the people, and New Mexico that political power is vested in and derived from the people. In addition, Alaska, Arizona, Florida, Kansas, Louisiana, Michigan, Nebraska, New Mexico, and Washington have constitutional statements that all unenumerated powers are retained by the people. Only New York has no provision that refers to any basic political right existing in the people.

[3] "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute New Government . . ." Declaration of Independence, par. 2.

[4] Luther v. Borden, 48 U.S. (7 How.) 1, 47 (1849); Gatewood v. Matthews, 403 S.W.2d 716, 718 (Ky. 1966); Wheeler v. Board of Trustees, 200 Ga. 323, 331-33, 37 S.E.2d 322, 328-29 (1946); Staples v. Gilmer, 183 Va. 613, 623, 33 S.E.2d 49, 53-54 (1945); Wells v. Bain, 75 Pa. 39, 46 (1873); HOAR, CONSTITUTIONAL CONVENTIONS 11-15 (1917).

upon the state constitution but, rather, is inherent in the people of a state—the power to revise their form of government by means of a constitutional convention. The state constitutional convention has been described as (in the field of constitution writing) the repository of the sovereignty of the people—an all-powerful body, subject to no limitations except those imposed by the people themselves and by the Federal Constitution.[5] It is through the constitutional convention and the subsequent referendum on its proposals that the people are able to exercise directly their right to alter or reform their government. The constitutional convention has been considered so basic that the power to have a convention has been held to exist even though the state constitution makes no mention of it.[6]

The usual procedure for a state to follow in having a constitutional convention involves (1) a decision by the state legislature to submit the question of calling a convention to the people; (2) a favorable vote by the people; (3) the adoption by the legislature of enabling legislation for the convention including providing for the election of delegates to the convention and funding the convention; (4) the election of the delegates. Under this process the holding of a convention is completely dependent upon the legislature. A number of states have, however, attempted to bypass the legislature by including in their constitutions not only the statement as to the right of the people to change their government but also a requirement that the question of calling a constitutional convention be submitted to the people at specified or minimum intervals. These provisions direct that if the people in a mandatory referendum vote for a convention, a convention be held, and they either are self-executing to the extent that no further legislative action is necessary for a convention to be held, or impose a duty upon the legislature to provide the mechanics for holding a convention. At the present time, there are eleven states[7] with

[5] Anderson v. Baker, 23 Md. 531, 616 (1865) quoted with approval in Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 433-34, 229 A.2d 388, 397 (1967); HOAR, CONSTITUTIONAL CONVENTIONS 128-48 (1917); DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 72-117 (1910); Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 1012-16 (1968), Note, *The Constitutional Convention, Its Nature and Powers-And the Amending Procedure*, 1966 UTAH L. REV. 390, 401-09; White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1139-47 (1952); Note, *State Constitutional Conventions: Limitations on Their Powers*, 55 IOWA L. REV. 244, 261-62 (1969). The principal exponent of the contrary view is JAMESON, CONSTITUTIONAL CONVENTIONS 301-28 (4th ed. 1887).

[6] Harvey v. Ridgeway, —— Ark. ——, 450 S.W.2d 281 (1970); Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 229 A.2d 388 (1967); Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966), HOAR, CONSTITUTIONAL CONVENTIONS: ch. IV (1917); DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 44 (1910); White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1134-35 (1952).

[7] Alaska, Connecticut, Hawaii, Iowa, Maryland, Michigan, Missouri, New Hampshire, New York, Ohio and Oklahoma. Arkansas and Illinois will join the group if the new constitutions adopted by the 1969 Arkansas constitutional convention and the 1970 Illinois constitutional convention are ratified by the voters in November and December, 1970, respectively. In the Appendix there is a state by state listing of the mandatory referendum provision of

mandatory referendum provisions and, in view of the recent spate of constitutional conventions[8] and the trend toward the inclusion by these conventions of the mandatory referendum in state constitutions,[9] it is likely that there will be an increasing number of mandatory elections on the issue of calling a constitutional convention. Whenever the convention issue is submitted pursuant to a constitutional directive but the actual holding of a convention is dependent upon legislative action, there is always the risk that the legislature will not comply with its duty to see that a convention is held. This has, in fact, occurred on several occasions in the past.[10] The question presented by this situation is whether the judicial process is available to force the holding of a convention. Up to the present this issue has never been judicially determined, but the general opinion is that a court in these circumstances is powerless.[11] In this article, the history and use of the mandatory referendum on calling a constitutional convention will be reviewed, the advisibility of the different types of mandatory referendum provisions will be assessed, and an analysis made of the legal theories which are available to provide justification for a court to make effective a vote for a constitutional convention and thus enforce the people's right to reform or alter their government.

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the state constitution, the date of each mandatory submission, the vote at each submission, and a statement as to whether the vote resulted in a convention being held. The states are listed in the order in which they adopted the mandatory referendum.

[8] During the period 1950-65, fifteen constitutional conventions were held. Sturm and Craig, *State Constitutional Conventions: 1950-65*, 39 STATE GOVT. 152, 152-53 (1966). In the past three years Arkansas, Hawaii, Illinois, Maryland, New Mexico, New York, Pennsylvania and Rhode Island have had conventions.

[9] Since 1959 Hawaii, Alaska and Connecticut have included the mandatory referendum in their constitutions. In addition within the last three years constitutional conventions in Rhode Island and New Mexico incorporated a mandatory referendum in their constitutional proposals but in both states the new constitutions were rejected by the voters. The 1969 Arkansas constitutional convention has proposed a constitution with a mandatory referendum and the 1970 Illinois constitutional convention has voted to do likewise. In 1968 Florida adopted a legislatively drafted constitution which authorizes a vote on calling a constitutional convention only when the issue has been put on the ballot by an initiative petition. If the vote is in favor of a convention, the procedure for calling a convention is self-executing and not dependent upon legislative action. Fla. Const. art. XI, §4. The National Municipal League's Model State Constitution also provides for a mandatory submission at least once every 15 years. Model State Const. art. 12, sec. 12.03(a) (6th ed. rev. 1968).

[10] *See infra* at notes 15-17.

[11] "[T]he decision to revise the constitution by means of a convention having been made, it is the legal obligation of the legislature to provide for the holding of the convention. Unfortunately, however, the fact that the people have voted for a convention provides little assurance that the legislature will properly discharge its responsibility, as the experience of Iowa well illustrates. Since the legislature cannot be mandamused, there is apparently no effective legal remedy." GRAVES, AMERICAN STATE GOVERNMENT 71-72 (4th ed. 1953); WHEELER, *Changing the Fundamental Law*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 59 (Wheeler ed., 1961); STURM, METHODS OF CONSTITUTIONAL REFORM 88 (1954); HOAR, CONSTITUTIONAL CONVENTIONS 71-76, 117-18 (1917); Note, *State Constitutional Change: The Constitutional Convention*, 54 VA. L. REV. 995, 1008 (1968); Note, *The Constitutional Convention, Its Nature and Powers-And the Amending Procedure*, 1966 UTAH L. REV. 390, 397; Dodd, *Judicially Nonenforcible Provisions of Constitutions*, 80 U. PA. L. REV. 54, 78-80 (1931). The only suggestion to the contrary is found in Note, *State Constitutional Conventions: Limitations on Their Powers*, 55 IOWA L. REV. 244, 252-53 (1969).

II. The Constitutional Provisions

There have been a total of fifteen states which at some time in their history have included in their constitutions a mandatory referendum requirement.[12] Submission of the convention issue pursuant to these provisions has occurred on seventy-two[13] occasions. Twenty-nine times a majority of those voting on the question were in favor of a convention. Of these twenty-nine pro-convention votes, twenty-one have resulted in constitutional conventions being held.[14] In the other eight instances a convention was not called, three times because of an outright refusal on the part of the legislature to pass the necessary legislation,[15] and five times in part because the constitutional provision was read to require a majority voting in favor of a convention greater than a simple majority of those voting on the question.[16] On one other occasion the legislature of New York, after the people had voted for a convention, delayed the holding of a convention for eight years.[17] This could be considered at least a partial non-compliance with the constitional mandate.

Three states adopted their mandatory referendum provisions prior to 1800, three in the period 1801-1850, four from 1851-1900, two more between 1901-1950, and four since 1950.[18] Under the constitutions of the first four of these states, the sole means whereby the constitutions could be revised or amended was by a constitutional convention called pursuant

[12] Alaska, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New York, Ohio, Oklahoma, and Virginia, with Arkansas and Illinois as potential members of this group. For more detailed information as to each state, see the Appendix.

[13] The number of submissions in each state are: Indiana, 2; Iowa, 10; Kentucky, 1 (submissions occurred in 1797 and 1798 but because the issue had to be approved in each year to be effective they are counted as one); Maryland, 4; Massachusetts, 1; Michigan, 7; Missouri, 3; New Hampshire, 30; New York, 5; Ohio, 5; Oklahoma, 3; Virginia, 1. For more detailed information including the dates of the submissions, see the Appendix.

[14] The states in which mandatory referenda have resulted in conventions being held, and the year of each referendum, are: Kentucky, 1797 and 1798; Michigan, 1866, 1961; Missouri, 1921, 1942; New Hampshire, 1850, 1876, 1886, 1900, 1910, 1916, 1928, 1937 1946, 1954, 1962; New York, 1866, 1886, 1936; Ohio, 1871, 1910. For more detailed information as to each referendum, see the Appendix.

[15] New Hampshire, 1861, 1864; Iowa, 1920. For more detailed information, see the Appendix. Graves, *State Constitutional Law: A Twenty-Five Year Summary*, 8 WM. & MARY L. REV. 1, 6 (1966) relates that in California the legislature in 1934 and again in 1946 refused to call a constitutional convention after the voters had adopted initiated proposals for a convention.

[16] Maryland, 1930, 1950; Massachusetts, 1795; Michigan, 1898, 1958. For more detailed information, see the Appendix.

[17] *See* note 25, *infra*.

[18] Massachusetts, 1780; New Hampshire, 1792; Kentucky, 1792; Indiana, 1816; New York, 1846; Michigan, 1850; Maryland, 1851; Ohio, 1851; Iowa, 1857; Virginia, 1870; Oklahoma, 1907; Missouri, 1920; Alaska, 1959; Hawaii, 1959; Connecticut, 1965. New Hampshire had included in its constitution of 1784 a mandate that seven years after the effective date of that constitution delegates were to be elected to a convention to consider revisions in that constitution. The convention which convened in 1791 drafted what became the 1792 constitution. COLBY, MANUAL OF THE CONSTITUTION OF NEW HAMPSHIRE 140-45 (1902).

to a mandatory referendum. The philosophy of these states would appear to have been that the task of changing the constitution was reserved solely to the people and that the legislature was to have no role in it, neither by being able to propose amendments nor by having specific authority on its own initiative to call a convention or to submit the question to the people. New York in its 1846 constitution was the first state to combine a mandatory referendum provision with legislative authority to propose specific amendments.[19] The committee of the 1846 New York convention which proposed the requirement to that convention defended it on the grounds that "it asserted a great principle, and that once in twenty years they might have the matters into their own hands," but "if the people were satisfied with the Constitution, they could endorse it, and the state of things would continue."[20] Similar sentiments were expressed in the 1850-51 Ohio constitutional convention and the New York Constitution was pointed to as an example to follow.[21] The reason expressed for the mandatory referendum in the 1857 Iowa convention—a desire to insure that the people are able to exercise their right to reform their government without interference by the legislature[22]—has become the most often articulated basis for it.[23]

There are two major points upon which mandatory referendum provisions may differ. The first and most important is whether the section is self-executing, i.e. once the voters speak in favor of a convention one will be held without further action by the legislature. Of the eleven states which now have the mandatory referendum, the constitutions of Alaska, Hawaii, Michigan, Missouri, New York, and New Hampshire are self-executing, while Connecticut, Iowa, Maryland, Ohio and Oklahoma (plus Arkansas and Illinois if their new constitutions are ratified) depend upon legislative action to make them effective.[24] There is ample justification for a provision which is self-executing. This is the surest way in which the avowed purpose of the mandatory referendum provision—to permit the people to exercise their right to reform their government without interference by the existing government—can be fulfilled. The self-executing provision also avoids the problems necessarily involved in an effort to obtain a convention through the judicial process. To the extent that conflicts between different branches of government can be avoided, they should be.

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[19] N. Y. CONST. art. XIII (1846).

[20] NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, LEGISLATURE ORGANIZATION AND POWERS 365 (1938).

[21] II DEBATES OF 1850-51 OHIO CONSTITUTIONAL CONVENTION 429-36 (1851).

[22] I DEBATES OF 1857 IOWA CONSTITUTIONAL CONVENTION 604-09 (1857).

[23] *See e.g.*, DEBATES OF 1950 HAWAII CONSTITUTIONAL CONVENTION 748-49 (1961); WHEELER, *Changing the Fundamental Law*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 58-59 (Wheeler ed. 1961).

[24] The relevant constitutional provision of each state is set out in the Appendix.

The other major difference between the states is on the question of the majority required by the constitution to have a convention. Several of the states have in the past required a majority of all those voting at the election rather than a voting-on-the-question majority before a convention would have to be held. Experience has shown, however, that it is almost impossible in a general election to have a majority even vote on a constitutional issue, much less be in favor of a proposition. Now only Maryland would appear to require the voting-at-the-election majority. This trend is advisable because it avoids having the person who votes at the election, but not on the referendum question, counted as a negative vote. Treating his non-vote in this manner is a presumption that has no basis in fact and thus should not be applied to the fundamental issue of revising the state constitution.

III. Judicial Relief for Non-Compliance

In determining the availability of judicial relief to obtain a convention when the legislature refuses to act in accordance with a constitutional directive, it should first be noted that the early mandatory referendum provisions were not self-executing but depended upon the legislature to call the convention and provide for the election of delegates. It was not until the New York convention of 1894 that an attempt was made to bypass the legislature and make the constitution self-executing. This change resulted from the delay by the New York legislature in calling a convention after the mandatory 1886 referendum favored a convention.[25] It appears that New York and the other states which followed its lead included the self-executing provisions because in their absence it was thought that there was no means available to compel the legislature to call a convention after a favorable vote of the people. In those states that do not have a self-executing provision, the philosophy is that the legislature will comply with the vote of the people.[26] As we have seen, however, this assumption is not justified because legislatures in the past have refused or neglected to comply with the constitution.[27] In this situation must a court deny relief on the ground that it cannot force compliance with the constitution? There are several theories which indicate that a court may be able to compel the calling of a convention and thus make effective the people's right to reform their government.

The principle that a court lacks power to do anything in the face of a legislative refusal to do what the constitution commands is based on several different theories: (1) mandamus will not issue to compel the legislature to pass legislation which necessarily involves the exercise of

[25] New York State Constitutional Convention Committee, Legislative Organization and Powers 369-70 (1938).

[26] *See e.g.*, I Debates of 1857 Iowa Constitutional Convention 622-26 (1857).

[27] *See* note 15, *supra*.

discretion;[28] (2) one branch of government cannot interfere with another branch in the performance of duties exclusively committed by the constitution to the latter.[29] Both of these theories are generally encompassed by the concepts of separation of powers, political question and non-justiciability.[30]

One potential justification for judicial involvement in the calling of a constitutional convention lies in the nature of the convention and the role of the legislature in calling a convention. A careful analysis of both of these issues was made by the Maryland Court of Appeals in *Board of Supervisors of Elections v. Attorney General*.[31] The people of Maryland at a special election in 1966 had voted to have a constitutional convention.[32] In considering the enabling legislation for the convention, an argument arose as to whether members of the legislature were able to be delegates to the convention notwithstanding a prohibition in the Maryland constitution against a person holding more than one public office. The legislature caused a declaratory judgment suit to be filed to determine this and other relevant questions, including that of whether the legislature could delay the calling of a convention beyond the deadline included in the 1966 referendum. The court held on the main issue that legislators and other public officials could be delegates to a constitutional convention. It reasoned that the Maryland constitutional prohibition against a person holding more than one office applied only to offices created by or under the constitution, that the office of convention delegate was not an office created by or under the constitution, and thus the prohibition did not apply.[33] In deciding that a convention delegate was not an officer under the constitution, the court held that a convention is not an agency under the constitution but is the direct agent of the people and exists independent of the constitution as the means by which the people exercise their reserved and inherent right to alter or reform their government. As corollaries to this, the court stated that the role of the legislature in the calling of a constitutional convention is independent of its law-making role assigned to it by the constitution, and that in par-

[28] Re State Census, 6 S.D. 540, 542, 62 N.W. 129, 130 (1895); Fergus v. Marks, 321 Ill. 510, 517-18, 152 N.E. 557, 560 (1926). Note, *State Constitutional Change: The Constitutional Convention, Its Nature and Powers-And the Amending Procedure*, 1966 UTAH L. REV. 390, 397; GRAD, THE DRAFTING OF STATE CONSTITUTIONS pt. II, 25-39 (1967).

[29] Dodd, *Judicially Non-enforcible Provisions of Constitutions*, 80 U. PA. L. REV. 54, 56-61, 84-92 (1931).

[30] The relationship between these three concepts is discussed in *Baker v. Carr*, 369 U.S. 186, 208-37 (1962). In this opinion the Court points out that the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 211.

[31] 246 Md. 417, 229 A.2d 388 (1967).

[32] The legislature submitted the question to the people on its own initiative and not pursuant to any specific constitutional authorization. The power of the legislature to do this was one of the issues in Board of Supervisors of Elections v. Attorney General, *id.* The court held that the submission was proper.

[33] *Accord*, Harvey v. Ridgeway, — Ark. —, 405 S. W.2d 281 (1970).

ticipating in calling a convention it is not carrying out its law-making function under the legislative article of the constitution but is merely assisting the people to perform their reserved constitution-making function.[34] It can be concluded from this discussion that the reason the legislature participates in this process is because it is a convenient agency for doing so and not because the tasks ordinarily performed by a legislature in calling a convention are inherently legislative in nature.[35] If this view of the legislative role in the calling of a constitutional convention is accepted, the problem of separation of powers, which arises whenever it is suggested that a court either order a legislative body to act or act in place of the legislature to effectuate the people's call for a convention, does not appear to be relevant. The doctrine of separation of powers is concerned with those governmental powers which are assigned by the constitution—the legislative, executive and judicial powers.[36] If as the Maryland court has stated, participation in the calling of a constitutional convention is not one of those powers, then separation of powers is not applicable to it and it would not be a violation of the principle for the court to play a role in it.

It could be argued that the Maryland case is not on point because it did not involve the 20-year referendum required by the Maryland Constitution but a referendum submitted by the legislature on its own initiative. In the mandatory referendum situation, the duty is specifically imposed by the constitution upon the legislature to call a convention if the people vote in favor of one. Even if the separation of powers doctrine is not applicable when the constitution is silent on whose function it is to call a convention, it does apply if the constitution imposes the obligation to call a convention upon the legislature, then no other branch of government has the power to interfere with the legislature's compliance or non-compliance with its constitutional duty. It is suggested that even though the constitution does assign the duty of calling a convention to the legislature when the people vote in a mandatory referendum to have one, if the legislature refuses to comply with the people's directive, it would not violate the constitution for a court to take whatever steps are necessary to see that a convention is held. As has been pointed out by the Maryland case, the role of the legislature in the calling of a convention arises out of convenience, not because the duties involved are

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[34] Board of Supervisors v. Attorney General, 246 Md. 417, 428-34, 229 A.2d 388, 394-97 (1967). *Accord*, Carpenter v. Cornish, 83 N.J.L. 254, 83 A. 31 (1912); HOAR, CONSTITUTIONAL CONVENTIONS 80-85 (1917).

[35] HOAR, CONSTITUTIONAL CONVENTIONS 75-78 (1917) comes very close to making this point.

[36] People v. Bissel, 19 Ill. 229, 231-32 (1857). *See generally*, VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-40 (1965).

legislative in nature.[37] It would seem strange that a constitutional assignment of a duty based on convenience could be used as a reason to deny another agency of government, the court, the power to insure that the vote of the people and the directive of the constitution are made effective. Convenience would then become the master rather than the slave of the ultimate objective—the right of the people to reform their government.[38] To deny the power of a court to do what is necessary to make a reality of this basic sovereign right when the legislature refuses to carry out its duty on the ground that the people in the constitution have given to the legislature and to no one else the responsibility for assisting them in implementing their right, is putting form over substance. If the legislature refuses to act the people have no direct recourse except to the courts.[39] If the courts refuse to act, they have no recourse at all.[40] The result would be that the basic feature of our system of government, the power of the people over the form of their government, is completely frustrated, and all in the name of a constitutional provision designed to insure that the people are able to exercise this power. It is doubtful that the courts would be held to be powerless in those states in which the responsibility for initiating the machinery for holding a convention is assigned not to the legislature, but to the governor, lieutenant governor or secretary of state.[41] There should be no different result merely because the legislature rather than an official of the executive branch was chosen as the agent to carry out the mandate of the people.

Several cases indicate that the traditional reluctance of courts to order a legislature to act may not apply in the constitutional convention referendum situation. In *Board of Supervisors of Elections v. Attorney General*[42] the Maryland Court of Appeals, in discussing the issue of whether the legislature could delay the convention beyond the period authorized by the voters in the 1966 referendum, agreed with the trial court which

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[37] See discussion *supra* notes 34-35.

[38] The Prohibitory-Amendment Cases, 24 Kan. 700, 710-11 (1881) make the same point in upholding the validity of a constitutional amendment which had been adopted by the people but had not been printed in full in the legislative journals as required by the existing constitution. *Accord*, Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430 (1919).

[39] *Wells v. Bain*, 75 Pa. 39, 47-48 (1873) suggests that the only remedy is for the people to elect new representatives who will call a convention. This, as HOAR, CONSTITUTIONAL CONVENTIONS 76 (1917) points out, is not sufficient. Elections of a majority of the members of a state legislature do not turn on such issues. Stubbs, *Constitution-Making in Georgia*, 6 GA. BAR J. 207, 212 (1944) suggests that if the legislature refuses to provide for the election of delegates to a convention, the governor, pursuant to his duty to uphold the constitution, is obligated to do so.

[40] *Wells v. Bain*, 75 Pa. 39, 47-48 (1873) makes the further suggestion that if the elective process does not work there is always the right of revolution but this is hardly tenable, particularly in view of the responsibilities of the Federal Government under the guarantee clause of article IV of the Constitution.

[41] Alaska, Hawaii, Missouri, and New Hampshire. For the particular provision of each state, see the Appendix.

[42] 246 Md. 417, 229 A.2d 388 (1967).

had held that the "convention was called by the Legislature and confirmed by the people. The General Assembly cannot ignore this mandate." In submitting the issue to the people it "bound itself to the mandate expressed by them. The people have spoken in clear and unmistakable terms, and the legislature is bound to obey. The only thing remaining to be done is to provide for the election of delegates." The Court of Appeals went on to say that "it was mandatory that a convention be called at this time and that the call could not be delayed."[43] The court did not discuss what it would have done had the legislature refused to take the necessary steps to have a convention, but it is unlikely that it would have used the strong language it did, had it not been willing to go beyond merely stating the obligation of the legislature under the circumstances.

The Court of Appeals of Kentucky in *Chenault v. Carter*[44] went even further than the Maryland court when it described the function of the legislature, once the people had voted for a convention, as a "ministerial duty enjoined upon it by the constitution in the execution of a public mandate."[45] The court also stated that the "choice of whether a constitutional convention shall be called rests entirely with the electorate. The discretion of the legislature is at an end when the matter is finally proposed."[46]

Another case in which a court has commented on the nature of the function of the legislature once the people have decided to have a convention is *Carton v. Secretary of State*[47] in which the issue before the Supreme Court of Michigan was whether the constitution adopted by the 1907-08 Michigan constitutional convention was to be submitted to the people at the time directed by the legislature in the convention enabling act or on the date fixed by the constitutional convention. The court held that it was within the discretion of the convention to determine when the constitution should be voted on by the people. In so holding the court made it clear that once the people indicated they wanted a convention the legislature's power over it was limited to providing for the election of delegates to the convention. The court stated that the "power to provide for an election is the sole power conferred" on the

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[43] *Id.* at 445, 229 A.2d at 403.

[44] 332 S.W.2d 623 (Ky. 1960). In this case the court was faced with the question of whether the legislature could submit to the people the issue of whether a convention, limited in the areas of the constitution to which it could propose revisions, should be held. The court held that the convention could be so limited, but that the limiting authority would be the people by their approval of the referendum rather than the legislature by its passage of the act providing for the referendum.

[45] *Id.* at 626.

[46] *Id.*

[47] 151 Mich. 337, 115 N.W. 429 (1908).

legislature and that "the power then conferred [in the constitution] is ministerial rather then legislative."[48]

The use of the words "duty," "ministerial" and "discretion" are significant here because this is the language of the law of mandamus, the general rule being that a court will issue a writ of mandamus only when the duty of the public officer in question is ministerial and involves no discretion on the part of the officer.[49] These three cases, by the use of language that is usually reserved for situations in which mandamus is the appropriate remedy, have established the basis for a court to hold that it has the power to compel the legislature to provide for election of delegates to a convention and that in so doing it is not violating the separation of powers. A court should be able to accept the position that after the people vote for a convention, the legislature's subsequent duty to provide the necessary machinery to have an election of delegates to a convention is merely ministerial and does not call for the exercise of discretion. Having adopted this view, a court could legitimately rule that the legislature is subject to a writ of mandamus to carry out its constitutional duty. In carrying out a non-legislative ministerial duty the legislature, as well as the executive and other public officers, is subject to being ordered by a court to perform its duty.

Apart from enforcing a ministerial duty of the legislature, it can also be maintained that the "right to reform" supposedly guaranteed by the constitution is not merely an indefinite and vague "right of the people" not belonging to anyone in particular but is rather a right that is individual and personal and capable of being enforced by the courts. When a constitution states that it is the "right" of the people to reform their government, what does the use of the word "right" imply? It should be noted that the term is not used extensively in the body of state constitutions even though every constitution has a portion of it designated as a bill or declaration of rights.[50] These bills or declarations generally contain what are commonly thought of as "rights," i.e., affirmative or negative commands to the government for the protection of the individual, but they also include many other statements which are mere expressions of political philosophy.[51] Is the "right" to reform the government a true "right" or just a statement of political philosophy? Up to the present the judicial reliance on the "right" has been to justify some action leading to constitutional reform but not as a basis for affirmative judicial action to compel a legislature to comply with the wishes of the people

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[48] *Id.* at 341, 115 N.W. at 431.

[49] JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 176-92 (1965).

[50] Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 137 (1969).

[51] The various provisions of the Bills of Rights are set forth in the Appendix to *id.* at 164-82.

as expressed in a referendum.[52] It is suggested that by the use of the word "right" in relation to the control the people have over their government, something more is meant than sheer power or authority.[53] If those words or words of similar import were intended, they, rather than the word "right", would have been included in the constitution and it would have been understood by all that the statement was nothing more than a recognition of the obvious, that if the people are successful in forcibly taking power into their own hands notwithstanding the opposition of existing governmental institutions, they can reform their government and cannot be called to account for it. But the word "right" was used, and in a society which is premised upon the recognition by the government of the rights guaranteed by the constitution and upon a judicial process designed to enforce those rights, it must be assumed that the constitutional draftsmen and the people who adopted the constitution did so with full knowledge of its significance.

Under the "right" theory, it can be argued that the legislature should be compelled to provide for a convention on the basis that it is denying an individual's right to reform his government after he and others had been a majority in a referendum on the question of holding a convention. Once the people have attempted to guarantee the right by constitutionally mandating a periodic vote on calling a convention and by commanding that in the event of a favorable vote a convention must be held, the "right" to reform is no longer only a general statement of principle but something to which a person who voted for a convention is entitled as a matter of constitutional guarantee. There would be little point in the constitutional draftsmen adding to the constitution this mandatory machinery designed to result in a convention being held when the people so desire, if the legislature is free to disregard the wishes of the people and the people are left without recourse. The objective of the mandatory provision is to do away with the necessity for reliance on the legislature and thus enable the people to exercise their right to reform their government without interference. This is shown by the debates in the constitutional conventions which adopted the mandatory provisions. In Iowa, for example, in the debate on the periodic mandatory vote, those who favored it stressed the importance of permitting the people to exercise their right to reform their government without having to rely on the existing government.[54] The example of Doar's Rebellion in Rhode Is-

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[52] *See e.g.*, Harvey v. Ridgeway, —— Ark. ——, 450 S.W.2d 281 (1970); Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 229 A.2d 388 (1967); Re Opinion of the Justices 55 R.I. 56, 178 A. 433 (1935); Wheeler v. Board of Trustees, 200 Ga. 323, 37 S.E.2d 322 (1946); Gatewood v. Matthews, 403 S.W.2d 716 (1966); Cummings v. Beeler, 189 Tenn. 151, 223 S.W.2d 913 (1949); Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49 (1945).

[53] Braxton, *Powers of Conventions*, 7 VA. L. REG. 79, 81 (1901).

[54] I DEBATES OF 1857 IOWA CONSTITUTIONAL CONVENTION 604-09 (1857).

land in 1842, as related in the case of *Luther v. Borden*,[55] was cited to show what can happen when the people's inherent right to reform their government is blocked by the government in power.[56] The mandatory referendum is, consequently, intended to be an alternative to armed revolution. But if there is no way to have a convention when the legislature refuses to act, the people are in the same position as had the mandatory referendum not been placed in the constitution, that is with armed revolt as the only recourse open to a people who want to exercise their right to reform their government. Such a result could hardly have been intended by those who included the mandatory referendum in the constitution. It seems reasonable to conclude that what was intended by the adoption of the mandatory referendum was not only that a vote would be taken, but that if the vote were in favor of a convention, a convention would be held. It was certainly not the intention of the draftsmen that the legislature would still have the discretion as to whether a convention would occur.

The case usually cited in support of the proposition that the calling of a constitutional convention is completely subject to the will of the legislature notwithstanding a vote of the people in favor of a convention is *Wells v. Bain*.[57] In that case the narrow issue before the court was whether a convention has the authority to control the procedures at the election at which the constitution drafted by the convention was to be accepted or rejected by the voters. The Pennsylvania Supreme Court held that because the enabling act for the convention provided that the referendum on the constitution was to be conducted in the same manner as other general elections, the convention could not establish a different procedure. In so holding, the court made an extensive analysis of the status and power of a constitutional convention and, in particular, of the convention's relationship to the legislature and to the people. The court's discussion was based on its construction of the section of the Pennsylvania Constitution preserving the right of the people to alter or reform their government. The court stated that there were three ways in which this right could be executed: "(1) The mode provided in the existing constitution. (2) A law as the instrumental process of raising the body for revision and conveying to it the powers of the people. (3) A revolution."[58] The court in its opinion was only concerned with the situation described in the second alternative, that is when the constitution itself does not regulate the manner in which a convention is to be called. The first alternative was inapplicable because the Pennsylvania Constitution did not provide for the calling of a constitutional convention. Thus,

[55] 48 U.S. (7 How.) 1 1849.

[56] I DEBATES OF 1857 IOWA CONSTITUTIONAL CONVENTION 609, 623-24 (1857).

[57] 75 Pa. 39 (1873).

[58] *Id.* at 47-48.

the entire discussion by the court is irrelevant to the situation in which the constitution does specify the duty of the legislature to call a convention. It should also be noted that *Wells v. Bain* is inconsistent with the Maryland case, *Board of Supervisors of Elections v. Attorney General*,[59] and with the thinking of most other courts in its view that, when the people vote for a convention in a referendum proposed by the legislature on its own initiative, the vote merely authorizes the legislature to call a convention but is not a mandate on the legislature to do so.

Several provisions of the United States Constitution are also possible bases for judicial enforcement of the people's call for a convention. The federal claim most likely to be accepted by a court is one based on the equal protection clause of the fourteenth amendment. Adapting the principle of the reapportionment cases to the refusal of a state government to comply with a convention referendum, it appears that this action of the state government is a denial of the effectiveness of an individual's vote in an even more direct way than is a malapportionment of legislative seats.[60] In the reapportionment situation, the impact of the failure to give equal weight to each person's vote is complicated by the vagaries of the legislative process and the other factors which militate against the one man-one vote principle achieving the desired result.[61] It has, in fact, only the advantage of mathematical symmetry. In the situation of a legislature's refusal to abide by a convention referendum, however, the effectiveness of the vote of a person who favors a convention is not merely being reduced, it is being denied completely. The result is the same as if the election officials had torn up all the ballots in favor of a convention or had refused to permit those who favored a convention to cast their vote.

It can also be argued that the right to reform the government is one of those fundamental rights contained in the concept of liberty protected by the due process clauses of the fifth and fourteenth amendments. It has been recognized that the due process clause "protects those liberties that are so rooted in the tradition and conscience of our people as to be ranked as fundamental,"[62] including the right to privacy,[63] the right to travel,[64] and the right to educate one's children.[65] It is suggested that the most fundamental of all rights is the right of the

[59] 246 Md. 417, 229 A.2d 388 (1967).

[60] For another possible application of the equal protection clause to a voting situation see Note, *Supermajority Voting Requirements: Possible Constitutional Objections*, 55 IOWA L. REV. 674 (1970).

[61] Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote,"* 1969 SUP. CT. REV. 219.

[62] Justice Goldberg, concurring in Griswold v. Connecticut, 381 U.S. 479, 487 (1965).

[63] Griswold v. Connecticut, 381 U.S. 479 (1965).

[64] Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[65] Meyer v. Nebraska, 262 U.S. 390 (1923).

people and of the individuals who constitute the people to reform their government. This right was recognized in the Declaration of Independence as a justification for the American Revolution.[66] It is recognized in most state constitutions,[67] and it has been held that the right exists even if not specifically mentioned in the constitution.[68] It is consequently one of the most basic of all fundamental rights and thus is within the liberty protected by the fifth and fourteenth amendments.

Another argument that can be made is that the ninth amendment is a basis for recognizing the existence and enforceability of the right to reform the government. The ninth amendment, which provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," has recently been used to justify the judicial recognition of rights not specifically mentioned in the Constitution.[69] In view of the fundamental nature of the right to reform the government, it seems logical to include it within those unenumerated rights recognized by the ninth amendment.

The guarantee of a republican form of government contained in section 4, article IV of the Constitution[70] can also be used as a foundation for judicial relief. The essential concept of a republican form of government is that the ultimate control over the government resides in the people.[71] If this is the case, and if it is the responsibility of the federal government to guarantee this control, then it seems appropriate that when a state government refuses to follow the command of the people as expressed in a convention referendum, a federal court, as one of the institutions established to insure that the Constitution is observed, or a state court, which has a similar obligation to uphold the federal Constitution, must take appropriate steps to insure that a reluctant state government maintains a republican form of government by complying with the mandate of the people as expressed in a referendum established by the state constitution.[72]

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[66] Note 3, *supra*.

[67] Note 2, *supra*.

[68] See the cases and authorities cited in note 6, *supra*.

[69] Griswold v. Connecticut, 381 U.S. 479 (1965), concurring opinion of Justice Goldberg at 486 (right of privacy).

[70] "The United States shall guarantee to every State in this Union a Republican Form of Government . . ."

[71] Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 558 (1962).

[72] The major difficulty with this thesis is that in *Baker v. Carr*, 369 U.S. 186 (1962), the Court specifically held that a case arising under the guarantee clause was a non-justiciable political question and that a case involving the apportionment of a state legislature was justiciable because it involved the equal protection clause of the fourteenth amendment and not the guarantee clause of article IV. This rationale was criticized by Justice Frankfurter in his dissent in *Baker v. Carr*, 369 U.S. at 297, and by Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245 (1962). In *Kobler v. Tugwell*, 292 F. Supp. 978 (E.D. La. 1968), *aff'd* 393 U.S. 531 (1969), two mem-

There are two major hurdles which a court would have to face in considering a suit seeking relief from a legislative refusal to call a constitutional convention. The first deals with the power of the court to hear the case and the second with the type of relief which the court can grant. A court would initially be confronted with objections to its jurisdiction to hear the case on the grounds that the issue was not justiciable, was a political question or was a violation of the separation of powers, or a combination of all three.[73] Essentially, no matter how it is phrased, the issue involves the propriety of a court considering the matter of the legislative refusal to take action when the constitution says it must do so. If the claim is based upon the alleged violation of a federal constitutional right, *Baker v. Carr*[74] would appear to eliminate any serious question as to the jurisdiction of the court. That case makes it clear that the limitations of justiciability, political question and separation of powers do not apply to a suit alleging that a federal constitutional right has been violated by a refusal by a state legislature to act.[75] This was, of course, the exact situation presented in the apportionment cases.

Similarly, there is no problem in a court taking jurisdiction of a case in which the plaintiff's claim is based on the theory that the duty of the legislature in calling a convention after a referendum in favor of one is merely ministerial and does not call for the exercise of legislative discretion. If a court agrees with that theory it merely applies the usual mandamus principles.[76] Any problem arising from traditional notions of separation of powers can be avoided by a recognition of the fact that a legislature, when it deals with the question of a constitutional convention, is not exercising normal legislative power but a special power assigned to it as a matter of convenience to assist the people in exercising their sovereign right to revise their constitution. A court, by refusing to act in such circumstances, would not be respecting a constitutional limitation on its powers but merely permitting a designated agent of the people not to do what the people have said it must do.[77]

Even if a court does accept jurisdiction of the case and holds that the plaintiff is entitled to relief, is there any relief which the court is able to grant? Again, the reapportionment cases may provide the basis for an

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bers of a three judge panel were of the opinion that under some circumstances the guarantee clause might be judicially enforceable.

[73] See the discussion at notes 28-36, *supra*.

[74] 369 U.S. 186 (1962).

[75] "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government and not the federal judiciary's relationship to the States which give rise to the 'political question'." *Id.* at 210. Cases involving the guarantee clause of article IV are an exception to this statement because the Court has construed that clause to be enforceable by other branches of the Federal Government. *Id.* at 218-25.

[76] See the discussion at notes 42-49, *supra*.

[77] See the discussion at notes 28-36, *supra*.

affirmative answer. In those cases the courts have at first delayed granting relief to permit the state legislatures to have an opportunity to reapportion themselves. The courts then have reviewed the reapportionment measures adopted by the state legislatures, and if they still did not meet the requirements of equal protection, the judges themselves have reapportioned the legislatures.[78] Applying this precedent to the convention problem, a court could direct that unless the legislature enacted by a certain date the legislation appropriate for a convention, the court would enter an order which would include the same provisions as would be in an enabling act.

It is at this point that the most substantial objection to a court assuming a role in the calling of a constitutional convention arises. It is obvious that in calling a constitutional convention there are several details concerning the election and compensation of delegates and operating funds for the convention which may involve the exercise of discretion on matters ordinarily the subject of legislative action. Particularly difficult for a court would be the questions of the number of delegates, the districts from which they would be elected, and whether the election would be partisan or non-partisan.[79] Presumably, to the extent of reasonable applicability, the election would be held in the same manner as other state elections. If the state constitution does not specify the essential provisions for the election of the delegates to the convention, the court is not without any guidance in the matter. It could, for example, merely follow the pattern set by the most recent constitutional convention held in that state or, if for some reason that was not practical, it could use the existing state legislature, or one house thereof, as its model.

The question of providing funds for the convention is just as difficult. State constitutions do not, with one exception,[80] specify that a convention may spend whatever it deems appropriate. To the contrary, in most states public funds may not be expended without a legislative appropriation. Notwithstanding this, it would seem that if the state constitution commands that under certain circumstances a convention be held and the sole purpose of the judicial proceeding is to achieve compliance with the constitution, it would not be inconsistent with the constitution for a court to authorize the expenditure of state funds for a convention. Again it comes down to a question of not permitting the legislature to negate the fundamental right of the people to reform their

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[78] See DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS ch. 12 (1968).

[79] Under some constitutions these matters would not prove a problem because most of these details are specified in the constitutions themselves. *See e.g.*, the HAWAII CONST. art. XV, §1. All the court would have to do is order the state or local officials in charge of election to hold an election on a certain date.

[80] MISSOURI CONST. art. XII, §3(b).

government by a refusal to act when it has a constitutional obligation to act.[81]

The court need not consider any issues beyond the election of the delegates to the convention and making sure that the convention is funded. Other matters such as when the convention begins, how long it sits, what votes are necessary for it to take action, and when the constitution it adopts is to be submitted to the people, are all matters which are properly left to the convention, although most legislatures attempt to control these details by means of the enabling legislation for the convention.[82]

IV. Conclusion

It is clear that notwithstanding the central place in our political system of the right of the people to reform their government, without a mandatory referendum on calling a constitutional convention this right is dependent upon legislative action which often is not forthcoming. Unless the people have voted for a convention, judicial relief from a refusal of the legislature to act is not possible because, among other reasons, there is no way in which a court can determine whether the people actually desire to exercise this right. As a response to this problem, an increasing number of states, including eleven at the present time, have included in their constitutions a provision which requires that the question of calling a constitutional convention be submitted to the people at stated or minimum intervals and, if the requisite majority of voters favors a convention, either imposes upon the legislature the duty to provide the mechanics for the holding of a convention or is self-executing to the extent that a convention will be held without further action of the legislature. The self-executing provision is preferable, because legislatures can and have refused to call a convention on several occasions when the people have voted in favor of having a convention. It has been accepted up to now that in the face of a legislative refusal to comply with a vote of the people for a convention, the courts are powerless to order the legislature to do what the constitution says it must do. Several recent cases have, however, suggested a number of legal bases for a court to take the action necessary for a convention to be held. These bases include the several federal constitutional provisions and an understanding of the role of the legislature in calling a constitutional convention. Whatever basis is used, it is suggested that a court need no longer stay its hand in the face of legislative opposition to the holding of a constitutional convention called for by the people in a constitution-

[81] Hoar, Constitutional Conventions 177-80 (1917) suggests that a convention has the inherent power to incur whatever expenses it deems necessary. *But see* Constitutional Convention v. Evans, — N.M. —, 460 P.2d 250 (1969).

[82] Note, *State Constitutional Conventions: Limitations on Their Powers*, 55 Iowa L. Rev. 244 (1969).

ally mandated referendum. In this way the fundamental right of the people to reform their government can be protected.

APPENDIX

SUMMARY OF DATA ON MANDATORY CONSTITUTIONAL CONVENTION REFERENDA

State	*Const. Provision*	*Date*	*Vote*		*Result when Majority Voted for a Convention*
Massachusetts	Const. 1780[1] part II, § chapter VI, art. X	May 6, 1795	For: Against:	11,386[2] 10,867	no convention called[3]
New Hampshire	Const. 1792[4] part II, §§99 and 100	Mar. 1800	For: Against:	2,478[5] 4,246	
		Mar. 1807	For: Against:	1,722 10,903	
		Mar. 1814	For: Against:	532[6] 16,141	
		Mar. 1821	For: Against:	2,407 13,853	
		Mar. 1833[7]	For: Against:	4,623 11,818	
		Mar. 1834	For: Against:	5,973 12,183	
		Mar. 1838	For: Against:	2,821 16,830	
		Mar. 1844	For: Against:	10,855 20,994	

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State	Const. Provision	Date	Vote		Result when Majority Voted for a Convention
		Mar. 1847	For:	4,583	
			Against:	12,415	
		Mar. 1850	For:	28,877	convention called:
			Against:	14,482	Laws of N.H., 1850, c.959
		Mar. 1858	For:	2,822	
			Against:	18,499	
		Mar. 1861	For:	11,078	no convention called[8]
			Against:	9,753	
		Mar. 1863	For:	1,044	
			Against:	12,428	
		Nov. 1864	For:	18,422	no convention called[9]
			Against:	15,348	
		Nov. 1868	For:	12,219	
			Against:	12,346	
		Mar. 1870	No Record		
		Mar. 1876	For:	28,971	convention called:
			Against:	10,912	Laws of N.H., 1876, c.30
		Nov. 1884	For:	13,036	
			Against:	14,120	
		Mar. 1886	For:	11,466	convention called:
			Against:	10,213	Laws of N.H., 1887, c.107
		Nov. 1894	For:	13,681	
			Against:	16,689	

Nov. 1896	For:	14,099	
	Against:	19,831	
Nov. 1900	For:	10,571	convention called:
	Against:	3,287	Laws of N.H., 1901, c.85
Nov. 1910	For:	23,105	convention called:
	Against:	15,541	Laws of N.H., 1911, c.187
Nov. 1916	For:	21,589	convention called:
	Against:	14,520	Laws of N.H., 1917, c.121
Nov. 1924	For:	22,520	
	Against:	42,616	
Nov. 1928	For:	29,848	convention called:
	Against	21,831	Laws of N.H., 1929, c.190
Mar. 1937	For:	20,559	convention called:
	Against:	20,462	Laws of N.H., 1937, c.187
Nov. 1946	For:	49,230	convention called:
	Against:	29,326	Laws of N.H., 1947, c.77
Nov. 1954	For:	64,813	convention called:
	Against:	37,494	Laws of N.H., 1955, c.42

State	*Const. Provision*	*Date*	*Vote*		*Result when Majority Voted for a Convention*
		Nov. 1962	For: Against:	94,597 49,418	convention called: Laws of N.H., 1963, c.143
Kentucky	Const. 1792[10] article XI	May 1797	For: Against:	5,446[11] 4,367	no convention called[12]
		May 1798	For: Against:	8,804[13] 3,049	convention called:[14] Laws of Ky., 1798, c.140
Indiana	Const. 1816[15] article VIII	Aug. 4, 1828	For: Against:	10,092[16] 18,633	
		Aug. 3, 1840	For: Against:	12,277[17] 61,721	
New York	Const. 1846[18] article XIII, §2	Nov. 6, 1866	For: Against:	352,854[19] 256,364	convention called: Laws of N.Y., 1867, c.194
		Nov. 2, 1886	For: Against:	574,993 30,766	convention called: Laws of N.Y., 1892, c.398 Laws of N.Y., 1893, c.8 Laws of N.Y., 1894, c.228
	Const. 1895[20] article XIV, §2	Nov. 7, 1916	For: Against:	506,563 658,269	

		Nov. 3, 1936	For:	1,413,604	convention called[21]
			Against:	1,190,275	
		Nov. 5, 1957[22]	For:	1,242,568	
			Against:	1,368,063	
Michigan	Const. 1850[23] article XX, §2	Nov. 1866	For:	79,505[24]	convention called: Laws of Mich., 1867, No. 41
			Against:	28,623	
		Nov. 1882	For:	20,937	
			Against:	35,123	
		Nov. 8, 1898	For:	162,123	no convention called[25]
			Against:	127,147	
	Const. 1908[26] article XVII, §4	1926	For:	119,491	
			Against:	285,252	
		1942	For:	408,188	
			Against:	468,506	
		1958	For:	821,282	no convention called[27]
			Against:	608,365	
		1961	For:	596,433	convention called[28]
			Against:	573,012	
	Const. 1963[29] article XII, §3				
Maryland	Const. 1851[30] article XI	No vote taken[31]			

State	*Const. Provision*	*Date*	*Vote*	*Results when Majority Voted for a Convention*
	Const. 1864[32] article XI, §3			
	Const. 1867[33] article XIV, §2	Nov. 8, 1887	For: 72,464[34] Against: 105,735	
		Nov. 5, 1907	For: 32,778 Against: 87,035	
		Nov. 4, 1930	For: 108,351 Against: 93,701	no convention called[35]
		Nov. 7, 1950	For: 200,439 Against: 56,998	no convention called[36]
Ohio	Const. 1851[37] article XVI, §3	Oct. 10, 1871	For: 264,970[38] Against: 104,231	convention called: Laws of Ohio, 1873, pp. 6-8
		Nov. 3, 1891	For: 99,784 Against: 161,722	
		Nov. 8, 1910	For: 693,263 Against: 161,722	convention called: Laws of Ohio, 1911, pp. 298-303
		1932	For: 853,619 Against: 1,056,855	
		1952	For: 1,020,235 Against: 1,977,313	
Iowa	Const. 1857[39] article X, §3	1870	For: 24,846[40] Against: 82,039	

		1880	For:	69,762	
			Against:	83,784	
		1890	For:	27,806	
			Against:	159,394	
		1900	For:	176,337[41]	
			Against:	176,892	
		1910	For:	134,083[42]	
			Against:	166,054	
		1920	For:	279,652[43]	no convention
			Against:	221,763	called[44]
		1930	For:	140,667[45]	
			Against:	195,356	
		1940	For:	199,247[46]	
			Against:	353,142	
		1950	For:	221,189[47]	
			Against:	319,704	
		1960	For:	470,257[48]	
			Against:	534,628	
Virginia	Const. 1870[49] article XII	1888	For:	3,698[50]	
			Against:	63,125	
Oklahoma	Const. 1907[51] article XXIV, §2	Nov. 2, 1926	For:	47,510[52]	
			Against:	241,040	
		Nov. 7, 1950	For:	159,908	
			Against:	347,143	

State	*Const. Provision*	*Date*	*Vote*	*Result when Majority Voted for a Convention*
		Mar. 17, 1970	For: 58,223[53] Against: 187,934	
Missouri	Const. 1875[54] article XV, §4	Aug. 2, 1921	For: 175,355[55] Against: 127,130	convention called[56]
		Nov. 3, 1942	For: 366,018[57] Against: 265,294	convention called[58]
	Const. 1945[59] article XII, §3(a)	Nov. 6, 1962	For: 295,972[60] Against: 519,499	
Alaska	Const. 1959[61] article XIII, §3	[62]		
Hawaii	Const. 1959[63] article XV, §2	[64]		
Connecticut	Const. 1965[65] article XIII, § § 2,3			
Arkansas	Const. 1970[66] article XII, §2			
Illinois	Const. 1970[67] article XIV, §1			

[1] In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution, in order to amendments. And if it shall appear, by the returns made, that two-thirds of the qualified voters

throughout the state, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary's office, to the several towns to elect delegates to meet in convention for the purpose aforesaid.
The said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this constitution to be chosen.

[2] Morison, *The Vote of Massachusetts on Summoning a Constitutional Convention, 1776-1916*, 50 MASS. HIST. SOC. PROC. 241, 247 (1917).

[3] No convention was called because the constitution required a two-thirds majority in favor of a convention before one was to be called.

[4] The New Hampshire Constitution of 1792, part II, section 99 provided:
It shall be the duty of the selectmen and assessors of the several towns and places in this State, in warning the first annual meetings for the choice of senators, after the expiration of seven years from the adoption of this constitution as amended, to insert expressly in the warrant this purpose among others for the meeting, to wit: to take the sense of the qualified voters on the subject of a revision of the constitution; and the meeting being warned accordingly, and not otherwise, the moderator shall take the sense of the qualified voters present as to the necessity of a revision; and a return of the number of votes for and against such necessity shall be made by the clerk, sealed up, and directed to the general court at their then next session; and it if shall appear to the general court, by such return, that the sense of the people of the State has been taken, and that, in the opinion of the majority of the qualified voters in the State, present and voting at the said meetings, there is a necessity for a revision of the constitution, it shall be the duty of the general court to call a convention for that purpose; otherwise the general court shall direct the sense of the people to be taken, and then proceed in the manner before mentioned; the delegates to be chosen in the same manner and proportioned as the representatives to the general court: *Provided*, That no alterations shall be made in this constitution before the same shall be laid before the towns and unincorporated places, and approved by two-thirds of the qualified voters present and voting on the subject.
Section 100 provided:
"And the same method of taking the sense of the people as to the revision of the constitution, and calling a convention for that purpose, shall be observed afterward, at the expiration of every seven years."
Articles 99 and 100 were amended in 1964 to provide, in part:
Amendments to this constitution may be proposed by the general court or by a constitutional convention selected as herein provided.
(a) The senate and house of representatives, voting separately, may propose amendments by a three-fifths vote of the entire membership of each house at any session.
(b) The general court, by an affirmative vote of a majority of all members of both houses voting separately, may at any time submit the question 'Shall there be a convention to amend or revise the constitution?' to the qualified voters of the state. If the question of holding a convention is not submitted to the people at some time during any period of ten years, it shall be submitted by the secretary of state at the general election in the tenth year following the last submission. If a majority of the qualified voters voting on the question of holding a convention approves it, delegates shall be chosen at the next regular general election, or at such earlier time as the legislature may provide, in the same manner and proportion as the representatives to the general court are chosen. The delegates so chosen shall convene at such time as the legislature may direct and may recess from time to time and make such rules for the conduct of their convention as they may determine.

[5] The election results for the years 1800, 1807, 1821, 1833, 1834, 1838, 1844, 1847, 1850, 1858, 1861, 1863, 1864, 1876, 1884, 1886, 1894, 1896 and 1900 are found in COLBY, MANUAL OF THE CONSTITUTIONS OF THE STATE OF NEW HAMPSHIRE 191-239 (1902).

[6] The election results for the years 1814, 1868, 1870, 1910, 1916, 1924, 1928, 1937, 1946, 1954 and 1962 are contained in a letter from Constance T. Rinden, Assistant Law Librarian, New Hampshire State Library, to Author, October 9, 1968.

[7] Letter from Constance T. Rinden to Author, October 28, 1969, indicates that there are no sources available to indicate when mandatory referenda were submitted from 1833 to the present. She indicates that in 1828 the expediency of taking the sense of the voters was referred

to a committee which never reported it out. The question was not raised in the legislature until 1832, when action was taken. For these reasons, the 1833 referendum and subsequent submissions to the people have all been included in this appendix.

[8] Although the vote taken showed a majority, the Senate and House of Representatives at the June session, 1861, failed to agree upon a bill for a convention. Colby, *supra* note 5 at 218.

[9] The legislature, at the June session, 1865, by joint resolution decided to take no action. *Id.*

[10] That the citizens of this State may have an opportunity to amend or change this constitution in a peaceable manner, if to them it shall seem expedient, the persons qualified to vote for representatives shall, at the general election to be held in the year one thousand seven hundred and ninty-seven, vote also, by ballot, for or against a convention, as they shall severally choose to do; and if thereupon it shall appear that a majority of all the citizens in the State voting for representatives have voted for a convention, the general assembly shall direct that a similar ballot shall be taken the next year; and if thereupon it shall also appear that a majority of all the citizens in the State voting for representatives have voted for a convention, the general assembly shall, at their next session, call a convention, to consist of as many members as there shall be in the house of representatives, to be chosen in the same manner, (at the same places and at the same time that representatives are,) by the citizens entitled to vote for representatives, and to meet within three months after the said election for the purpose of readopting, amending, or changing this constitution. If it shall appear upon the ballot of either year that a majority of the citizens voting for representatives is not in favor of a convention being called, it shall not be done until two-thirds of both branches of the legislature shall deem it expedient.

[11] Executive Papers of Governor James Garrard, Section 1, Box 2, Jacket 8.

[12] No convention was called because the constitution required a second submission in 1798.

[13] Executive Papers of Governor James Garrard, Section 1, Box 2, Jacket 9.

[14] 2 LITTELL, THE STATUTE LAW OF KENTUCKY 211-12 (1810).

[15] Every twelfth year, after this Constitution shall have taken effect, at the general election held for Governor there shall be a poll opened in which the qualified electors of the State shall express, by vote, whether they are in favor of calling a convention or not; and if there should be a majority of all the votes given at such election in favor of a convention, the Governor shall inform the next General Assembly thereof, whose duty it shall be to provide, by law, for the election of the members to the convention, the number thereof, and the time and place of their meeting, which law shall not be passed unless agreed to by a majority of all the members elected to both branches of the General Assembly, and which convention, when met, shall have it in their power to raise, amend or change the Constitution. But as the holding any part of the human creation in slavery or involuntary servitude can only originate in usurpation and tyranny, no alteration of this Constitution shall ever take place so as to introduce slavery or involuntary servitude in this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted.

[16] KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA 608-10 (1916).

[17] *Id.* at 610-12.

[18] At the general election to be held in the year eighteen hundred and sixty-six, and in each twentieth year thereafter, and also at such time as the Legislature may by law provide, the question, 'Shall there be a Convention to revise the Constitution, and amend the same?' shall be decided by the electors qualified to vote for members of the Legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a Convention for such purpose, the Legislature at its next session, shall provide by law for the election of delegates to such Convention.

[19] The election results for the years 1866, 1886, 1916, 1936, and 1957 are found in MANUAL FOR THE USE OF THE LEGISLATURE OF THE STATE OF NEW YORK 316, 318, 322, 329, 339, (1967).

[20] At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and also at such times as the Legislature may by law provide, the question, 'Shall there be a convention to revise the Constitu-

tion and amend the same?' shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the State, as then organized, shall elect three delegates at the next ensuing general election at which members of the Assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to members of the Assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the Constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employés and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal and proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.

[21] Because the constitution is self-executing, no legislation was necessary.

[22] The New York Constitution of 1895, article XIV, section 2 was amended on November 8, 1938, and was renumbered article XIX, section 2. This provision states:

At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question Shall there be a convention to revise the constitution and amend the same? shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegates shall receive for his services the same compensation as shall then be annually payable to the members of the assembly and be reimbursed for actual traveling expenses, while the convention is in session, to the extent that a member of the assembly would then be entitled thereto in the case of a session of the legislature. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the ayes and noes being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal, proceedings and other expenses of said convention. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which

shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendment, in the manner provided in the last preceding section, such constitution or constitutional amendment shall go into effect on the first day of January next after such approval.

[23] The Michigan Constitution of 1850, article XX, section 2 provided, in part:

At the general election to be held in the year one thousand eight hundred and sixty-six, and in each sixteenth year thereafter, and also at such other times as the legislature may by law provide, the question of a general revision of the constitution shall be submitted to the electors qualified to vote for members of the legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purpose, the legislature, at the next session, shall provide by law for the election of delegates to such convention.

An 1862 amendment did not change the substance of this section.

[24] The election results for the years 1866, 1882, 1898, 1926, 1942, 1958 and 1961 are contained in a letter from Bernard J. Apol, Director of Elections, to Author, September 5, 1968.

[25] No call for a convention was forthcoming because a majority of all the voters in the election did not vote affirmatively as was necessary to require a convention to be held.

[26] The Michigan Constitution of 1908, article XVII, section 4 provided:

At the general election to be held in the year nineteen hundred twenty-six, in each sixteenth year thereafter and at such other times as may be provided by law, the question of a general revision of the Constitution shall be submitted to the electors qualified to vote for members of the Legislature. In case a majority of such electors voting at such election shall decide in favor of a convention for such purpose, at the next biennial spring election the electors of each senatorial district of the State as then organized shall elect three delegates. The delegates so elected shall convene at the State capitol on the first Tuesday in September next succeeding such election, and shall continue their sessions until the business of the convention shall be completed. A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings and judge of the qualifications, elections and returns of its members. In case of a vacancy by death, resignation or otherwise, of any delegate, such vacancy shall be filled by appointment by the Governor of a qualified resident of the same district. The convention shall have power to appoint such officers, employes and assistants as it may deem necessary and to fix their compensation, and to provide for the printing and distribution of its documents, journals and proceedings. Each delegate shall receive for his services the sum of one thousand dollars and the same mileage as shall then be payable to members of the Legislature, but such compensation may be increased by law. No proposed Constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal. Any proposed Constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner provided by such convention on the first Monday in April following the final adjournment of the convention; but, in case an interval of at least ninety days shall not intervene between such final adjournment and the date of such election, then it shall be submitted at the next general election. Upon the approval of such Constitution or amendments by a majority of the qualified electors voting thereon such Constitution or amendments shall take effect on the first day of January following the approval thereof.

This section was amended by initiative petition and ratified at election on November 8, 1960. This amendment provided:

At the biennial spring election to be held in the year 1961, at each sixteenth year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors qualified ro vote for members of the legislature. In case a majority of the electors voting on the question shall decide in favor of a convention for such purpose, at an election to be held not later than 4 months after the proposal shall have been certified as approved, the electors of each house of representatives district as then organized shall

elect 1 delegate for each state representative to which the district is entitled and the electors of each senatorial district as then organized shall elect 1 delegate for each state senator to which the district is entitled. The delegates so elected shall convene at the capital city on the first Tuesday in October next succeeding such election, and shall continue their sessions until the business of the convention shall be completed. A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings and judge of the qualifications, elections and returns of its members. In case of a vacancy by death, resignation or otherwise, of any delegate, such vacancy shall be filled by appointment by the governor of a qualified resident of the same district. The convention shall have power to appoint such officers, employees and assistants as it may deem necessary and to fix their compensation, and to provide for the printing and distribution of its documents, journals and proceedings. Each delegate shall receive for his services the sum of 1,000 dollars and the same mileage as shall then be payable to members of the legislature, but such compensation may be increased by law. No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner provided by such convention on the first Monday in April following the final adjournment of the convention; but, in case an interval of at least 90 days shall not intervene between such final adjournment and the date of such election, then it shall be submitted at the next general election. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon such constitution or amendments shall take effect on the first day of January following the approval thereof.

[27] No call for a convention was forthcoming because a majority of all the voters in the election did not vote affirmatively. *See* Stoliker v. Waite, 359 Mich. 65, 101 N.W.2d 299 (1960).

[28] Constitutional provision is self-executing so no enabling legislation was necessary.

[29] At the general election to be held in the year 1978, and in the 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.

[30] It shall be the duty of the legislature, at its first session immediately succeeding the returns of every census of the United States, hereafter taken, to pass a law for ascertaining, at the next general election of delegates, the sense of the people of Maryland in regard to the calling of a convention for altering the constitution; and in case the majority of votes cast at said election shall be in favor of calling a convention, the legislature shall provide for assembling such convention, and electing delegates thereto at the earliest convenient day; and the delegates to the said convention shall be elected by the several counties of the State and the city of Baltimore, in proportion to their representation respectively in the senate and house of delegates at the time when said convention may be called.

[31] MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT 49, 444-45 (1967).

[32] At the general election to be held in the year one thousand eight hundred and eighty-two, and in each twentieth year thereafter, the question, 'Shall there be a convention to revise, alter or amend the constitution,' shall be submitted to the electors of the State, and in any case a majority of all the electors voting at such election shall decide in favor of a convention, the general assembly at its next session shall provide by law for the election of delegates and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution agreed upon by any convention assembled in pursuance of this article shall take effect until the same shall have been submitted to the electors of this State, and adopted by a majority of those voting thereon.

[33] The Maryland Constitution of 1867, article XIV, section 2 as originally adopted provided, in part:

> It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year eighteen hundred and eighty-seven, and every twenty years thereafter, the sense of the people in regard to calling a convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto. Each County and Legislative District of the City of Baltimore shall have in such convention a number of Delegates equal to its representation in both Houses at the time at which the convention is called.

The Maryland Constitution of 1867, article XIV, section 2 was amended in 1922 by the addition of article XVII, section 9 which provided:

> The vote to be held under the provisions of section two of article fourteen of the Constitution for the purpose of taking the sense of the people in regard to calling a Constitutional Convention shall be held at the general election in the year nineteen hundred and thirty, and every twenty years thereafter.

Article XVII, section 9 was repealed in 1956 and article XIV, section 2 was amended to provide, in part:

> It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year nineteen hundred and seventy, and every twenty years thereafter, the sense of the People in regard to calling a Convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto. Each County, and Legislative District of the City of Baltimore, shall have in such Convention a number of Delegates equal to its representation in both Houses at the time at which the Convention is called.

[34] The election results for the years 1887, 1907, 1930 and 1950 are found in MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT 65 (1967).

[35] *Id.* at 433-34.

[36] *Id.* at 433-34.

[37] The Ohio Constitution of 1851, article XVI, section 3 provided:

> At the general election, to be held in the year one thousand eight hundred and seventy-one, and in each twentieth year thereafter, the question: 'Shall there be a convention to revise, alter, or amend the constitution?' shall be submitted to the electors of the state; and, in case a majority of all the electors, voting at such election, shall decide in favor of a convention, the General Assembly, at its next session shall provide, by law, for the election of delegates, and the assembling of such convention, as it provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon.

This section was amended on September 3, 1912, to provide:

> At the general election to be held in the year one thousand nine hundred and thirty-two, and in each twentieth year thereafter, the question: 'Shall there be a convention to revise, alter, or amend the constitution' shall be submitted to the electors of the state; and in case a majority of the electors, voting for and against the calling of a convention, shall decide in favor of a convention, the general assembly, at its next session, shall provide, by law, for the election of delegates, and the assembling of such convention, as is provided in the preceding section; but no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon.

[38] The election results for the years 1871, 1891, 1910, 1932 and 1952 are found in Appendix 580, OHIO REV. CODE ANN. (Page 1955).

[39] The Iowa Constitution of 1857, article X, section 3 provides:

> At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, 'Shall there be a Convention to revise the Constitution, and amend the same?' shall be decided by the electors qualified to vote for members

of the General Assembly; and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such Convention.

This section was amended in 1964 to provide, in part:

At the general election to be held in the year one thousand nine hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, 'Shall there be a Convention to revise the Constitution, and propose amendment or amendments to same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified, voting at such election, for and against such proposition, shall decide in favor of a Convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such Convention, and for submitting the results of said Convention to the people, in such manner and at such time as the General Assembly shall provide.

[40] Election results for the years 1870, 1880, and 1890 are found in DOCUMENTARY MATERIAL RELATING TO THE HISTORY OF IOWA, 282-83 (B. F. SHAMBAUGH ed. 1897).

[41] 19 IOWA OFFICIAL REGISTER 363 (1901).

[42] 24 IOWA OFFICIAL REGISTER 457 (1911-1912).

[43] 29 IOWA OFFICIAL REGISTER 483 (1921-1922).

[44] SHAMBAUGH, CONSTITUTIONS OF IOWA 281-83 (1934).

[45] Letter from Robert C. Landes, Deputy Secretary of State, to Author, September 6, 1968.

[46] Des Moines Register, January 1, 1961, at 10, col. 6.

[47] 44 IOWA OFFICIAL REGISTER 318 (1951-1952).

[48] 49 IOWA OFFICIAL REGISTER 369 (1961-1962).

[49] The Virginia Constitution of 1870, article XII provides, in part:

At the general election to be held in year 1888, and in each twentieth year thereafter, and also at such time as the general assembly may by law provide, the question, 'Shall there be a convention to revise the constitution and amend the same?' shall be decided by the electors qualified to vote for members of the general assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the general assembly at its next session shall provide by law for the election of delegates to such convention: Provided, That no amendment or revision shall be made which shall deny or in any way impair the right of suffage, or any civil or political right as conferred by this constitution, except for causes which apply to all persons and classes without distinction.

The 1887 Code of Virginia numbers this provision as section 2; however, The Acts of the General Assembly of the State of Virginia (1870), The Code of Virginia (1873), and 7 THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3897-98 (1909) treat this and the preceding provision as one article without sections.

[50] W. VAN SCHREEVEN, THE CONVENTIONS AND CONSTITUTIONS OF VIRGINIA, 1776-1966, 15 (1967).

[51] No convention shall be called by the legislature to propose alterations, revisions, or amendments to this constitution, or to propose a new constitution, unless the law providing for such convention shall first be approved by the people on a referendum vote at a regular or special election, and any amendments, alterations, revisions, or new constitution, proposed by such convention, shall be submitted to the electors of the State at a general or special election and be approved by a majority of the electors voting thereon, before the same shall become effective: *Provided*, That the question of such proposed convention shall be submitted to the people at least once in every twenty years.

[52] Election results for the years 1926 and 1950 are contained in a letter from Basil R. Wilson, Secretary, State Election Board, to Author, September 18, 1968.

[53] Letter from Basil R. Wilson, Secretary, State Election Board, to Author, May, 1970.

[54] This section was submitted by initiative and adopted November 2, 1920. The provision states:

The question 'Shall there be a convention to revise and amend the Constitution?' shall be submitted to the electors of the state at a special election to be held on the first Tuesday in August, one thousand nine hundred and twenty-one, and at each general

election next ensuing the lapse of twenty successive years since the last previous submission thereof, and in case a majority of the electors voting for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates, and the assembling of such convention, as is provided in the preceding section.

[55] OFFICIAL MANUAL STATE OF MISSOURI 478-79 (1921-22).

[56] The convention was called by the governor, as provided by the Missouri Constitution article XV, section 4.

[57] OFFICIAL MANUAL STATE OF MISSOURI 397-98 (1943-44).

[58] The convention was called by the governor, as provided by the Missouri Constitution article XV, section 4.

[59] This section provides, in part:

At the general election on the first Tuesday following the first Monday in November, 1962, and every twenty years thereafter, the secretary of state shall, and at any general or special election the general assembly by law may, submit to the electors of the state the question 'Shall there be a convention to revise and amend the Constitution?'. The question shall be submitted on a separate ballot without party designation, and if a majority of the votes cast thereon is for the affirmative, the governor shall call an election of delegates to the convention on a day not less than three nor more than six months after the election on the question. At the election the electors of the state shall elect fifteen delegates-at-large and the electors of each state senatorial district shall elect two delegates. Each delegate shall possess the qualifications of a senator; and no person holding any other office of trust or profit (officers of the organized militia, school directors, justices of the peace and notaries public excepted) shall be eligible to be elected a delegate. To secure representation from different political parties in each senatorial district, in the manner prescribed by its senatorial district committee each political party shall nominate but one candidate for delegate from each senatorial district, the certificate of nomination shall be filed in the office of the secretary of state at least thirty days before the election, each candidate shall be voted for on a separate ballot bearing the party designation, each elector shall vote for but one of the candidates, and the two candidates receiving the highest number of votes in each senatorial district shall be elected. Candidates for delegates-at-large shall be nominated by nominating petitions only, which shall be signed by electors of the state equal to five percent of the legal voters in the senatorial district in which the candidate resides until otherwise provided by law, and shall be verified as provided by law for initiative petitions, and filed in the office of the secretary of state at least thirty days before the election. All such candidates shall be voted for on a separate ballot without party designation, and the fifteen receiving the highest number of votes shall be elected. Not less than fifteen days before the election, the secretary of state shall certify to the county clerk of the county the name of each person nominated for the office of delegate from the senatorial district in which the county, or any part of it, is included, and the names of all persons nominated for delegates-at-large.

[60] OFFICIAL MANUAL STATE OF MISSOURI 1179 (1963-64).

[61] If during any ten-year period a constitutional convention has not been held, the secretary of state shall place on the ballot for the next general election the question: 'Shall there be a Constitutional Convention?' If a majority of the votes cast on the question are in the negative, the question need not be placed on the ballot until the end of the next ten-year period. If a majority of the votes cast on the question are in the affirmative, delegates to the convention shall be chosen at the next regular statewide election, unless the legislature provides for the election of the delegates at a special election. The secretary of state shall issue the call for the convention. Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including, but not limited to, number of members, districts, election and certification of delegates, and submission and ratification of revisions and ordinances. The appropriation provisions of the call shall be self-executing and shall constitute a first claim on the state treasury.

[62] Letter from Thelma Cutler, Director of Elections to Author, October 21, 1969:

The question of a constitutional convention will appear on the ballot in the 1970 General Election and the voters will vote on the question at that time.

[63] This section provides, in part:

> The legislature may submit to the electorate at any general or special election the question, 'Shall there be a convention to propose a revision of or amendments to the Constitution?'. If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period. If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election . . . Unless the legislature shall otherwise provide, there shall be the same number of delegates to the convention, who shall be elected from the same areas, and the convention shall be convened in the same manner and have the same powers and privileges, as nearly as practicable, as provided for the convention of 1968.

The only change in this language adopted in 1968 was the reference to the 1968 convention in place of the 1950 convention.

[64] Hawaii held a convention in 1968 pursuant to a 1966 referendum authorized by the legislature. Porteus, *The Constitutional Convention of Hawaii of 1968*, 42 STATE GOV. 97 (1969). Thus another vote is not required in Hawaii until 1976.

[65] The question 'Shall there be a Constitutional Convention to amend or revise the Constitution of the State?' shall be submitted to all the electors of the state at the general election held on the Tuesday after the first Monday in November in the even-numbered year next succeeding the expiration of a period of twenty years from the date of convening of the last convention called to revise or amend the constitution of the state, including the Constitutional Convention of 1965, or next succeeding the expiration of a period of twenty years from the date of submission of such a question to all electors of the state, whichever date shall last occur. If a majority of the electors voting on the question shall signify 'yes', the general assembly shall provide for such convention as provided in Section 3 of this article.

> In providing for the convening of a constitutional convention to amend or revise the constitution of the state the general assembly shall, upon roll call, by a yea vote of at least two-thirds of the total membership of each house, prescribe by law the manner of selection of the membership of such convention, the date of convening of such convention, which shall be not later than one year from the date of the roll call vote under Section 1 of this article or one year from the date of the election under Section 2 of this article, as the case may be, and the date for final adjournment of such convention.

[66] This section is included in the proposed new constitution of Arkansas which will be submitted to the voters at the 1970 general election. The section provides:

> A constitutional convention may be called by law, by initiative or by the voters of the State at a general election upon submission of the question by resolution of the General Assembly. If a constitutional convention has not been held or if the question of calling a convention has not been submitted to the voters of the State for a period of twenty years, then the question shall be submitted at the next general election. The General Assembly shall provide by law for the holding of a convention within one year after a majority of those voting on the question approves the calling of a convention.

[67] This section has tentatively been approved by the 1969-70 Illinois constitutional convention. It is subject to being finally included in the convention's draft constitution and being approved by the Illinois voters in December, 1970. The section provides, in part:

> In the year 1990 and every twenty years thereafter the Secretary of State shall submit to the electors at the general election in that year the question of whether a Constitutional Convention should be called, unless there has been a similar submission during the preceding twenty years.
>
> The vote on calling a Convention shall be on a separate ballot. A Convention shall be called if three-fifths of those voting on the question vote in the affirmative.
>
> The General Assembly shall, at the next session following approval by the electorate, provide for the Convention and for the election on a non-partisan ballot of two delegates from each senatorial district. The General Assembly shall designate the day, hour and place of the Convention's initial meeting, which shall be within three months after the election of delegates. The General Assembly shall fix the pay of delegates and officers, and provide for that pay together with all expenses necessarily incurred by the Convention in the performance of its duties.

(St. Louis Univesity Law Journal--1971)

CONSTITUTIONAL CONVENTIONS: PRECEDENTS, PROBLEMS, AND PROPOSALS

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INTRODUCTION

The evidence suggests that, after nearly one hundred years, there is a possibility of a second constitutional convention. If this be the case, solutions to the problems of a twentieth-century convention will soon become necessary. The problems themselves, perhaps, may be grouped into categories, the most immediate being those centering around the issue of Congressional discretion in calling a convention when the legislatures of two-thirds of the states request it, in view of seemingly mandatory phrasing of article V of the Constitution. If so, inquiry follows regarding the extent to which a convention is to be controlled, its composition (to insure that its members represent the people) and the subject matter of its deliberation (to insure that any constitutional change proposed reflects not a wholesale tampering with the Constitution, but deals with a particular alleged dissatisfaction). Then there may remain the issue of what alternatives are available even beyond those that are constitutionally provided. In the remainder of this article the available precedents, pertinent Congressional history, and the most important scholarly writings will be examined and evaluated and a few conclusions will be made.

Article V of the Constitution requires that:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .

The only remaining precondition is that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." It could be thought, since the convention method of proposing amendments is initiated by the states, that it is the function of Congress to propose amendments from time to time on particular controversies, and that of states to apply through the convention method for general revision of the Constitution. Still, that does not seem to have been the general

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intent of the Framers, whose debates reflect that a convention was only a means of providing the states with an alternative should the national legislature *refuse* to act on some desired constitutional change.[1] However, James Madison felt that the article enabled both the general and state governments "to originate the amendment of errors."[2] A fear of another convention was expressed then,[3] as now, although Hamilton felt that if it were requested by the requisite number of states, Congress had no alternative but to call one.[4] This expression of fear and of limitation may have been precipitated by the precedent of the Convention of 1787 itself. Its delegates had disregarded the instructions from the Continental Congress to simply amend the Articles of Confederation, although in the end the Framers still sought the approval of the Congress of the draft product.[5]

Senator Sam J. Ervin, Jr., the noted authority of Constitutional law in the Senate, most recently involved in the problems of article V, notes that the Founders did not place the new government in the strait-jacket that inhibited the Confederation (the inability to change fundamental law without the consent of every state), but instead compromised between those who would utilize state legislatures as the sole means of initiating amendments, and those who would lodge it in the national legislature.[6] Nevertheless, with the adoption of the Constitution,[7] a new federalism developed with Congress taking the lead as to the amendatory power. While the impetus for inclusion of the Bill of Rights came from the states,[8] it was Congress that initiated the first ten amendments, thereby becoming an active participant in the continuing constitution-making process of 1787. Also, while conceiv-

1. M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 203-04 (1937).

2. *The Federalist* No. 43[42] (J. Madison); that every amendment is a single proposition, *see The Federalist* No. 85 (A. Hamilton).

3. *See* Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921 (1968), citing Charles Pickney of North Carolina in the closing debate of the Philadelphia Convention, September 15, 1787, that "Conventions are serious things and ought not to be repeated."

4. The *Federalist* No. 85 (A. Hamilton).

5. American Enterprise Institute, Special Analysis: *A Convention to Amend the Constitution?* (1967) found in *Hearings on S. 2307 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 128 (1968), citing J. BECK, THE CONSTITUTION OF THE UNITED STATES 173 (1924).

6. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 881 (1968).

7. Rhode Island, it has been noted, did not participate in the Convention of 1787 and did not ratify the Constitution until more than a year after the required ninth state had done so. Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1067 (1967).

8. Brickfield, Staff of the House Committee on the Judiciary, 8th Cong., 1st Sess., *Problems Relating To A Federal Constitutional Convention* 7 (Comm. Print 1957), notes that as early as 1789 New York and Virginia made application for a general convention for inclusion of the Bill of Rights. This was also the concern of the closing debate of the Convention of 1787 with reference to holding another convention for this purpose, *see* note 3 *supra*.

ably those amendments could have been incorporated in the main body of the Constitution, Congress added them as separate articles of amendment and set a pattern for the amendatory power that has been followed ever since.

That Congress has a large measure of control over the process of amendment was further illustrated by *Hollingsworth v. Virginia*.[9] In that case, questions were raised as to the effect and validity of the Eleventh Amendment limiting the judicial power, including the question as to whether the amendment was void for not having been submitted by Congress for Presidential approval. It was questioned whether this failure of submission contravened section 7 of article I of the Constitution, requiring such approval of every Congressional order, resolution or vote.[10] The Court held that the procedure adopted for the amendment was valid even though it had been urged that it was no answer to the question to observe that the two-thirds vote of Congress needed to initiate amendments was the same vote that would override the executive's negative. This did not answer the question, it was argued, because his reasons for disapproval might be so satisfactory as to reduce the vote below the constitutional proportion.[11]

The Court's holding in *Hollingsworth* appears to have been predicated upon the premise that the first ten amendments had not been submitted for Presidential approval, the Court reasoning that the proposition or adoption of amendments was unconnected with the ordinary business of legislation.[12] The case has been taken ever since, with reference to a state's application for a constitutional convention, as also not requiring the submission to a state's governor of the application.[13] And while it has been urged that the exclusion of the executive is more appropriate to a parliamentary system where executive and legislative functions are intertwined,[14] with reference to gubernatorial power, it has been pointed out that in the beginning very few of the original states lodged veto power in that office.[15] And in regard to the Presidency, the Founding Fathers could have included his office expressly as a third participating agency of the Government had it been their desire to do so. It also appears that the participation of the Vice-President in the amendatory process was not contemplated.[16]

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9. 3 U.S. (3 Dall.) 378 (1798).
10. *Id.*
11. *Id.* at 378-79.
12. *Id.* at 380 n.(a).
13. *See e.g.* Ervin, *supra* note 6, at 888-89.
14. McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1014 (1968).
15. Brickfield, *supra* note 8, at 1.
16. Forkosch, *supra* note 7, at 1054 n.10, citing 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 400 (1911); Staff Report to the House Comm. on the Judiciary, 82nd Cong., 2nd Sess., *Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Fed-*

INTERIM PRECEDENT

After these initial clues to the States' amending power, little light was shed on this area in the first one hundred years of constitutional history, for during that century only ten petitions for a constitutional convention were received from the states.[17] There was little to note in this interim period except that the Congressional refusal to permit several states to withdraw their approval of post-Civil War amendments was probably more attributable to the temper of the time than related to the question of whether States may rescind their applications before two-thirds have completed the petitioning process.[18] Finally, however, in 1887, Judge John A. Jameson filled the breach of commentary on the subject with an extensive work wherein he inquired of the typical American constitutional convention generally:

> Is this institution, it might be asked, subject to any law, to any restriction? What claims does it itself put forth, and what do the precedents teach, in relation to its nature and powers? When called into existence, is it the servant, or the master, of the people, by whom it was spoken into being?[19]

In distinguishing the functions and purposes of the revolutionary convention, so often confounded with the constitutional convention,[20] Jameson viewed the latter as being subaltern to and never supplanting the existing organization and never governing.[21] He asserted that sovereignty is not vested in the states but in the Congress that represents all of the people.[22] In view of the shared power to propose amendments, he felt that delegates to a constitutional convention also ought to be elected by the entire electoral body.[23] While conceding that the delegates should be given the liberty to discharge in some measure their essential function of deliberation,[24] Jameson found from precedent generally that a constitutional convention has no inherent rights and exercised delegated power only.[25] Consequently, unless the convention could point to express general authority to propose amendments at will, it could be restricted to a specific mandate.[26] The end product of the convention's deliberations, he concluded, was

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eral Tax Rates, 103 (Comm. Print 1942), citing from Annals 8th Cong., 1st Sess., remarks of Pierce Butler, who had been a member of the Convention of 1787.

17. Brickfield, *supra* note 8, at 7.

18. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 967 n.70 (1968).

19. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS, THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 2 (4th ed. 1887).

20. *Id.* at 6-9.

21. *Id.* at 10.

22. *Id.* at 51-52.

23. *Id.* at 258-69.

24. *Id.* at 364.

25. *Id.* at 408, citing Wells v. Bain, 75 Pa. 39 (1874), where a court enjoined commissioners appointed by a convention from holding an election on the convention's terms when the enabling legislation had provided otherwise.

26. J. JAMESON, *supra* note 19, at 412.

subject to legislative review before submission to the people.[27]

Jameson clearly did not envision a runaway federal convention, although perhaps he realized its possibility since he made so strong an argument for control. The states, in any event, were receptive to his point of view and thereafter forwarded petitions only for specific reforms.[28] The greatest demand was that for the direct election of Senators, and, from 1893 to 1911, a total of seventy-three petitions were received by the Congress from thirty-one legislatures on that subject.[29] This was an impressive request, if not the requisite one, for there is scholarly research that only around two-thirds of the states then existing had so petitioned.[30] The Senate had blocked passage of a House resolution for a constitutional amendment for the popular election of Senators, and, only after such incisive state demand, did it concur in the resolution submitting the Seventeenth Amendment to State legislatures for approval.[31] This, of course, may have been an indication that the Senate, at least, did not believe that it could control the action of a constitutional convention in this area in which it had an obvious vested interest, though it is doubtful this decision was made on strictly constitutional grounds. It has been observed, however, that Congress, by taking the easy way out, hardly refuted Jameson's theory of the ancillary role of a constitutional convention and did not decide this all important, pivotal issue.[32]

Judicial Precedent

As previously noted, the Supreme Court's early determination that submission by Congress of an amendment for Presidential approval is not constitutionally required was probably predicated upon the fact that the Bill of Rights itself had not been so submitted.[33] Thus, regard may have been given to the course of action that Con-

27. *Id.* at 421. Jameson's conclusion as to a reasonable time limit for ratification of amendments was "that an alteration to the Constitution . . . has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress," id. at 634. Jameson also concluded that a State, after once taking action on an amendment, might reconsider and reverse its previous action prior to binding action by the States. *Id.* at 624-33.

28. These ranged from the prohibition of polygamy to world federal government, Brickfield, *supra* note 8 at 74.

29. *Id.* at 7.

30. *Id.* at 74 and House Comm. on the Judiciary, *State Applications Asking Congress to Call a Federal Constitutional Convention*, 86th Cong., 1st Sess. 7 (Comm. Print 1959), also prepared by Brickfield, where he indicates that "on one occasion, at least, more than the necessary two-thirds of the number of States then comprising the Union had submitted applications seeking a convention on the same subject matter", citing to 23 app. Table 2, Item 1, relating to the direct election of Senators.

31. Brickfield, *supra* note 8, at 8.

32. American Enterprise Institute, Special Analysis found this in *Hearings*, *supra* note 5, at 129.

33. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 380 (1798).

gress had pursued, a precedent that gained added impetus subsequently in the Court's dictum that questions pertaining to amendments of constitutions belonged to the political power and not to the judicial.[34] Again, in refusing to enjoin President Andrew Johnson from enforcing Reconstruction legislation, the Court had remarked that neither Congress nor the President can be restrained by the judicial department.[35] In a series of cases from 1920 to 1939, however, the Court did take cognizance of questions pertaining to amendments of the Constitution, although summarily disposing of the objections raised.

In *Hawke v. Smith, No. 1*,[36] the Court held that the action of a State legislature in ratifying the proposed Eighteenth Amendment could not be referred to the electors of the state, for the provisions of its constitution requiring such a referendum were inconsistent with the Constitution of the United States. While this case by analogy may be taken to prohibit the imposition of a popular referendum upon any part of the amendatory process, it does not necessarily mean that a Congressional referendum of an advisory nature is also prohibited, as will be considered later. Nor was this the only question raised by the Eighteenth Amendment, for when it was enacted, it gave rise to a number of questions in the *National Prohibition Cases*.[37] There it was belatedly urged that the power of amendment was limited to the correction of errors in the Constitution's framing and does not contemplate the adoption of additional and supplementary provisions. It was further contended that ordinary legislation could not be embodied in a constitutional amendment, and, also, that amendments could not be proposed that involved the exercise or relinquishment of a State's sovereign powers.[38] In these cases, and in *Leser v. Garnett*,[39] wherein a similar States' rights argument was made against the Nineteenth Amendment (women's suffrage), the Court entertained but rejected the arguments and held the amendments valid. Thus, it would appear that amendments, as indicated by the above examples, may upset the "balance" of the federal system (at least in the eyes of the beholder!).

More important to the subject of discussion here, the Court indicated in *Leser v. Garnett*,[40] as it had in *Hawke v. Smith, No. 1*,[41] that a State legislature in its participation in the amending process is per-

34. Luther v. Borden, 48 U.S. (7 How.) 1, 39 (1849).
35. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1866). This general judgment of the Court has not been followed absolutely. *See* Youngstown Co. v. Sawyer, 343 U.S. 579 (1952) and Powell v. McCormack, 395 U.S. 486 (1969).
36. 253 U.S. 221 (1920).
37. 253 U.S. 350 (1920).
38. E. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 800 (1964).
39. 258 U.S. 130 (1922).
40. *Id.* at 137.
41. 253 U.S. 221, 230 (1920).

forming a federal function, not subject to limitation by the State. It should also be noted that on the same day that *Leser v. Garnett* was decided, the Court held that the general right of a citizen to have the government administered according to law does not entitle him to institute a suit in the federal courts to secure a determination of whether a constitutional amendment about to be adopted will be valid.[42] Thus, with this limitation on the justiciability of attempted attack and its subordination of the States' role in the amendatory process, the Court tended in the post-World War I era to defer to Congress as the main arbiter of questions under article V. In *Dillon v. Gloss*,[43] the Court further held that, since the article implies that amendments submitted thereunder must be ratified within some reasonable time after their proposal, that Congress may fix, as it did for ratification of the Eighteenth Amendment, seven years for ratification. In *Dillon*, the Court, moreover, cited Jameson[44] that constitutional alteration should relate to the "felt needs of today,"[45] thereby giving an indication that Congress, if it desired, could also decide the time limits within which the states must make application for a convention so as to express those needs. This view is reinforced by the Court's finding that "proposal and ratification are not treated [by article V] as unrelated acts but as succeeding steps in a single endeavor."[46]

In *United States v. Sprague*[47] the Court rejected another contention against the Eighteenth Amendment, namely, that it should have been ratified by convention rather than by State legislatures, as Congress pursuant to the choice granted by article V had selected. The argument in support of the contention rejected in *Sprague* was that legislatures are incompetent to surrender personal liberties of the people under the Tenth Amendment. Perhaps now, however, it could be argued in view of the new vitality of the Ninth Amendment,[48] (providing as it does that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people) that use of a national plebiscite in the process of amending the Constitution is not barred by article V. Indeed, the Supreme Court of Rhode Island in *In re Opinion to the Governor*,[49] held that an alternative method of amending the State's constitution was not impliedly prevented by the constitution's listing of but one method of amendment. In that case the statutory alternative advanced and upheld was the convention method of proposing amendments as opposed to the listed constitutional method of legislative proposal. In the course of its opinion, the

42. Fairchild v. Hughes, 258 U.S. 126, 129-30 (1922).
43. 256 U.S. 368 (1921).
44. *Id.* at 375.
45. Text in note 27 *supra*.
46. 256 U.S. 368, 374 (1921).
47. 282 U.S. 716 (1931).
48. Griswold v. Connecticut, 381 U.S. 479 (1965).
49. 55 R.I. 56, 178 A. 433 (1935).

court approved language that the right of amendment is construed from the fact that the people undoubtedly possessed the right in the beginning and have not parted with it by expressly confining amendment to some other method.[50] Nevertheless, it may be that, since federal judicial precedent is that the States at least may not ratify amendments by referendum,[51] Congress would be unwilling in the usual case to resort to the ballot box.

The paramount role of Congress in matters of federal constitutional amendment was perhaps made most apparent by the Supreme Court in *Coleman v. Miller*,[52] though the issues there involved again largely related to the role of the States in the amendatory process. One such issue was that the proposed Child Labor Amendment to the Constitution had suffered a tie vote in the State Senate of Kansas but was broken in favor of the proposal by its Lieutenant Governor. The measure duly passed both houses of the State legislature, and members opposing the amendment unsuccessfully petitioned the Kansas Supreme Court to declare that the measure had not validly passed in view of their allegation that the Lieutenant Governor should not have participated. They also urged that the proposed amendment had been previously rejected by the State and that it had lost vitality since twelve years had elapsed between Congressional submission and the State's most recent action. The United States Supreme Court, while holding that plaintiffs had standing to take an appeal,[53] was equally divided on the participation of the Lieutenant Governor[54] and so let the decision of the state court stand. As to the effect of the previous rejection of the amendment, the Court noted that the state court had cited[55] Jameson to the effect that article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States.[56] Subscribing to this view, the Court did not go behind the State's resolution of ratification.[57] On the third issue, dis-

50. *Id.* at 451, citing HOLCOMBE, STATE GOVERNMENT IN THE UNITED STATES 97 (1926). The court also followed the recognized rule "that if two constructions of a constitutional provision are reasonably possible, one of which would diminish or restrict a fundamental right of the people and the other of which would not do so, the latter must be adopted." 178 A. at 441-42.

51. Hawke v. Smith No. 1, 253 U.S. 221 (1920). ORFIELD, AMENDING THE FEDERAL CONSTITUTION 37 (1942), takes the view that either this case held that article V indicates that its methods of amendment are exclusive or that other methods would be revolutionary. Cf. Brickfield, *supra* note 8, at IX-X, to the effect that the Court has never held that the Constitution may be amended in any other way than in accordance with article V, and Jameson, *supra*, note 19, at 624 that Congress can only act within the special powers received from the people.

52. 307 U.S. 433 (1939).

53. *Id.* at 437-46.

54. *Id.* at 446-47.

55. *Id.* at 447, n.13.

56. J. JAMESON, *supra* note 19, §§ 576-81.

57. 307 U.S. 433, 447-51 (1939).

tinguishing *Dillon v. Gloss*[58] wherein it had held the seven years fixed by Congress for ratification of an amendment to be reasonable, the Court found it did not follow, whenever the Congress had failed to exercise the power of time limitation, that the Court should take upon itself the responsibility of deciding what constitutes a reasonable time.[59] Since the question of a reasonable time as to the ratification of an amendment would involve a great variety of political, social and economic conditions, the Court concluded that it was a political question to be decided by Congress.[60]

Thus, again the Court indicated that questions as to the amendatory power were, in the main, political. Four justices, concurring, would have gone further. They were of the view that:

> The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress . . . . No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.[61]

Professor Orfield, writing in 1942, also complained of the Court's position in that

> [i]f the Supreme Court is not ready to apply the doctrine of political questions to all phases of the amending process, as four members of the court wish, it will apply it to some phases of the amending process and what such phases are remains largely uncertain.[62]

He succinctly listed the difficulties or obstacles to obtaining Court review on any part of the process: whether a justiciable question is presented, whether a case may have been brought in the proper court, whether it is timely, whether brought by a proper party plaintiff, or whether there was an actual controversy.[63] As a result, it would appear that the determination of questions relating to the convention method of amending the Constitution will largely remain with Congress.

Congressional Precedent

In the last two decades, a number of proposals have been studied by Congressional committees in seeking a solution to the problems raised by the possibility of a constitutional convention. One such

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58. 256 U.S. 368 (1921).
59. 307 U.S. 433, 451-53 (1939).
60. *Id.* at 453-54.
61. *Id.* at 456, 458-59.
62. Orfield, *supra* note 51, at 36 (1942).
63. *Id.*

proposal, entitled the "Constitutional Convention Act of 1953",[64] developed as the result of a number of petitions then received for constitutional limitations on federal taxation.[65] It provided that a State could adopt a resolution favoring the calling of a convention to propose an amendment generally revising the Constitution, or to propose one or more amendments of a limited nature, and that the resolution shall be effective for the purposes of the Act without regard to whether it is approved or disapproved by the state's governor.[66] The proposed Act thus attempted to solve several problems in the manner suggested by precedent. It further provided that if during a seven-year period resolutions were received from two-thirds or more of the states, and, if each were of the same general nature as each other, a resolution to call the convention would be in turn introduced by Congressional judiciary committee chairmen that would be non-amendable and subject to limited debate.[67] The President of the Senate was to be the interim chairman, and, each state was to have a number of votes equal to the number of Senators and Representatives to which it was entitled in the Congress. The votes were to be cast as the majority of the State's delegates present decided, and any amendment proposal required the affirmative vote of a group of states having two-thirds or more of the total votes cast on the proposal.[68] It was further provided that no convention called to propose an amendment of a limited nature shall propose any amendment whose general nature differed from that stated in the resolution calling the convention.[69]

This draft legislation, by designating seven years as the limit of vitality of State petitions for Congressional consideration, selected the same time limit that Congress had previously set for ratification of the Eighteenth Amendment.[70] Orfield, who has written the most recent treatise on the subject and who has suggested perhaps a generation as the maximum time, nevertheless had also found a perfect analogy to the time that Congress had previously allowed for ratification.[71] Despite this, and although from 1939 to 1957 petitions had been received from twenty-seven States seeking a limitation on the federal taxing power,[72] the next legislative proposal considered by House Judiciary Committee provided for an effective time for appli-

64. Staff Report to the House Comm. on the Judiciary, 82nd Cong., 2d Sess., *Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates*, App. 21-24 (1952).
65. *Id.* at 24-27.
66. *Id.* at 21, § 2(b).
67. *Id.* at 22, § 3(c).
68. *Id.* at 23-24, §§ 5(c), 6(a).
69. *Id.* at 24, § 6(b).
70. *See* Dillon v. Gloss, *supra* note 43.
71. ORFIELD, *supra* note 51, at 42-43.
72. Brickfield, Staff of the House Comm. on the Judiciary, 85th Cong., 1st Sess., *Problems Relating to a Federal Constitutional Convention* 89 (Comm. Print 1957).

cations of fifteen years.[73] Had this provision been enacted, however, it would have eliminated some of the State petitions on the provocative subject of federal tax limitation. This new proposal, moreover, would have provided that States may rescind their applications at any time except when two-thirds of the States had valid applications pending on the same subject.[74] In other ways it was similar to the previous proposal, except that the Chief Justice was to be the interim chairman of a convention that would be composed of as many delegates from each State as it was entitled to Representatives in Congress.[75] A substantial difference was that each State would have one vote with a majority of the total vote cast being sufficient to propose amendments.[76] Further procedures limiting the convention's session to one year and providing for approval of Congress of the convention's work were based upon the Constitutional Convention of 1787.[77]

Thus, there was evolving in the House Judiciary Committee, at least, greater Congressional direction of the States' amendatory process. Impetus for federal tax limitation also grew. In 1961, a study by the staff of the Joint Economic Committee of the House and Senate revealed that, since the late thirties, thirty-one States had enacted resolutions that would set a twenty-five percent limit on federal income, estate, and gift taxes during peacetime, and that, in two years prior to the study, four States had enacted resolutions for the outright repeal of the Sixteenth Amendment.[78] If those petitions had been taken as all relating to the same subject matter, then again there was a subject ripe for a constitutional convention. Undoubtedly, however, Congress by its inaction felt that the applications were neither sufficiently contemporaneous so as to reflect the state of public opinion at a given time, nor sufficiently relevant to the same subject matter as to have warranted so drastic a step affecting the economy. This was the apparent conclusion of the Joint Committee's study, for it listed Orfield, among others, in support of its conclusion that lack of relevancy and timeliness was "the position most commonly held."[79] Thus, treatises and other legal writings have influenced informal Congressional attention given to conventions, as well as the more formal treatment by the courts of the general amendatory power.[80]

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73. *Id.* at 79, § 5(a).
74. *Id.*, § 5(b).
75. Brickfield, *supra* note 72, at 80, §§ 7(a), 8(a).
76. *Id.*, §§ 9(a), 10(a).
77. Brickfield, *supra* note 72, at 76.
78. *The Proposed 23d Amendment to the Constitution to Repeal the 16th Amendment to the Constitution Which Provides That Congress Shall Have Power to Collect Taxes on Income*, S. Doc. No. 5, 87th Cong., 1st Sess. 7 (1961).
79. *Id.* at 23-24, citing Corwin and Ramsey, *The Constitutional Law of Constitutional Conventions*, 26 NOTRE DAME LAW., 185, 194-96 (1951); ORFIELD, *supra* note 51, at 41-42; and Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 792-794 (1927), in accord for the time element but *contra* as to the subject matter of the petitions, 21 ILL. L. REV. 795.
80. *See* text to notes 55-56 and 44-45 *supra*.

The recent attraction of a constitutional convention arose, of course, with reference to the holdings of the Supreme Court regarding the apportionment of legislative bodies.[81] Even while entering "the political thicket"[82] of reapportionment, however, the Court may have indicated the extent of its participation in the amendatory process. As shown before, the trend of decision has been to leave a large measure of control over the process to Congress, the Court abstaining from the political question it thought Congress better able to handle. But in *Baker v. Carr*,[83] the first of the reapportionment cases, the Court indicated where the political question arose in government by stating:

> . . . it is the relationship between the judiciary and the coordinate branches of the Federal Government and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'[84]

Here may be the solution of the problem that Orfield noted[85] as being unanswered in *Coleman v. Miller*, that is, where and when the Court would deal with questions as to the amendatory procedure. While the Court might hesitate in assuming direction over Congressional action in the process, it might not be as reluctant with reference to the action of the States.

In December, 1962, the Sixteenth Biennial General Assembly of the States in initial reaction to *Baker v. Carr* resolved in favor of a constitutional amendment, *inter alia*, to limit the jurisdiction of the federal judiciary thereby excluding State reapportionment cases, and the petitions of three States, among the many since seeking a convention, immediately dealt with that subject.[86] But it was not so much *Baker v. Carr* as *Lucas v. Forty-Fourth General Assembly*[87] that caused widespread ire, particularly that of the late Senator Dirksen.[88] In the latter case, two amendments had been referred to the people of Colorado, one seeking the reapportionment of both houses of the

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81. *See e.g.* Avery v. Midland County, 390 U.S. 474 (1968); Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

82. Colegrove v. Green, 328 U.S. 549, 556 (1948).

83. Baker v. Carr, 369 U.S. 186 (1962).

84. *Id.* at 210. *But see* Powell v. McCormack, 395 U.S. 486, 518-49 (1969), where the Court, after reviewing the several criteria as to a political question set forth in Baker v. Carr, 369 U.S. at 217, concluded from historical precedent that *Powell* was at least entitled to a declaratory judgment that he was wrongfully excluded from Congress, the Court reiterating from the Baker case at 211, that it was its responsibility to act as the ultimate interpreter of the Constitution.

85. Note 62 *supra* and accompanying text.

86. *Hearings on S. 2307 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 114-17, (1968) [hereinafter referred to as *Hearings*] from American Enterprise Institute, Special Analysis: *A Convention to Amend the Constitution?* (1967).

87. 377 U.S. 713 (1964).

88. Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837, 849-56 (1968).

General Assembly on a strict population basis, which resulted in a substantial defeat, and the other, known as the "Federal plan", that allowed the members of the State senate to be elected on additional relevant factors. The "Federal plan" had substantial success.[89] The Court's requirement in *Lucas*, nevertheless, that both houses of the legislature be apportioned on a population basis, led to Dirksen's labelling of the Court as a "judiocracy."[90] It also led to his unsuccessful attempt to introduce in the Senate an amendment following the Colorado example,[91] and to applications for a convention from a majority of State legislatures along similar lines proposing specific amendments for the convention's action.[92]

Opposition to this campaign to overrule the Court gained support in the United States Senate. Former Senator Paul Douglas declared, "In my opinion, and that of other observers, there is little expectation that the Congress will call a convention even if two-thirds of the State legislatures pass the applications. It cannot, I believe, be forced to do so."[93] Senator Dirksen's later response was to point to the obligation of the oath upon members of Congress to respond and, should they not, that perhaps the Supreme Court could by mandamus order them to do so.[94] It seems doubtful to this author that the Supreme Court would make such an extravagant extension of the *Powell v. McCormack* decision, though admittedly the possibility does exist.

Debate continued in the Senate giving rise to new questions on the reapportionment issue not heretofore raised by precedent. In a floor speech, former Senator Tydings asked, "Should Congress regard as invalid petitions from malapportioned legislatures calling for a constitutional amendment to authorize malapportionment?"[95] His answer was "[E]very first-year law student knows the basic principles of equity that a claimant 'must come into court with clean hands' before the court will hear his claim", and that "no illegally apportioned

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89. *Id.* at 849.
90. *Id.* at 839.
91. *Id.* at 856-59.
92. *Hearings, supra* note 86, at 115-18.
93. *Hearings on Reapportionment of State Legislatures Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 35, 40 (1965) (statement of Senator Paul Douglas).
94. Dirksen, *supra* note 88, at 868-71.
95. 113 Cong. Rec. 10101 (1967). While acknowledging by reference to Ryan v. Tinsley, 316 F.2d 430, 432 (10th Cir. 1963), that to rule invalid all acts of malapportioned legislatures would produce chaos, Senator Tydings cited Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part and remanded*, 279 U.S. 621 (1965), as a holding of a federal court enjoining a general assembly from calling a constitutional convention to revise a state constitution until reapportioned, 113 Cong. Rec. *supra* note 95, at 10102. Analysis of that case, however, reveals that the lower court's order was against submission of a new constitution drafted by the legislature itself, but left no doubt that the malapportioned legislature could call a convention whose delegates were elected on a valid apportionment basis, *Hearings, supra* note 86, at 125 from American Enterprise Institute, Special Analysis.

legislature had 'clean hands' in calling for a constitutional convention to legitimize its own illegality."[96] His second argument was on more familiar ground: the identity of the subject matter of the petitions. Three sought to deprive the federal courts of all reapportionment jurisdiction, he pointed out, whereas the remainder would allow one house of a State legislature to be apportioned on the basis of factors other than population, subject matters that he considered to be fundamentally different.[97]

The late Senator Robert Kennedy also presented new and old grounds for rejecting the petitions. He again urged that twenty-six of the thirty-two resolutions then received were invalidly enacted, since many legislatures were malapportioned when they passed them, and that "[t]heir hastily enacted and ill-considered applications are thus nothing more than attempts of malapportioned bodies to preserve their lost power."[98] He also urged that Congress could not join the three petitions seeking to strip the judiciary of all jurisdiction in reapportionment cases with those petitions sanctioning malapportionment in only one house of a bicameral legislature.[99] Senator Kennedy's third argument was that the resolutions, by stipulating in favor of the texts of the amendments and in favor of ratification by State legislatures, were invalid for making the convention merely a ratifying rather than deliberative agency in the amendatory process, and in disregard of the power of Congress under article V to decide the method of ratification.[100] Finally, he felt that, because the great majority of the States submitting petitions were malapportioned at the time of submission and had subsequently changed their composition and outlook, Congress would be justified in setting a two or three year time limit in order to represent "a valid reflection of the will of the people at any one time."[101]

Senator Javits was another who felt that there was a commanding case for rescission of petitions in view of his fear of a constitutional convention on the issue.[102] Senator Dirksen, on the other hand, saw no basis for this fear and pointed out that, although some of the applications dated back to 1963, *Dillon v. Gloss* had upheld a seven year period set by Congress with reference to amendatory procedures.[103]

Floor debate was apparently abandoned on the subject, but Senator Ervin introduced a bill seeking a solution to the problems of a con-

96. 113 Cong. Rec. *supra* note 95, at 10102, citing Petuskey v. Rampton, 243 F. Supp. 365, 374 (D. Utah 1965).
97. 113 Cong. Rec. *supra* note 95, at 10103.
98. *Id.* at 10105.
99. *Id.*
100. *Id.*
101. 113 Cong. Rec. *supra* note 95, at 10105-06.
102. *Id.* at 10108-09.
103. *Id.* at 10110-11, 10113.

stitutional convention. In hearings on the bill, Senator Proxmire continued the debate by noting the lack of publicity given to the matter as it was rushed through State legislatures and difficulties encountered in some efforts since made at rescission.[104] Theodore Sorensen saw serious flaws in the Ervin bill itself. His principal objections to it were: (1) it permitted delegates to be appointed instead of requiring that they be elected, (2) it gave to each state delegation a unit vote and (3) it let the conventions propose amendments by a majority rather than by a two-thirds vote of its members.[105] His opposition to the latter provision was as much directed against the convention method itself, for he pointed out that after thirty-four states that might represent as little as thirty percent of the population had called the convention, twenty-six states representing one-sixth of the population could propose new amendments, before thirty-eight states that could represent less than forty percent of the population ratified them.[106] Sorensen also urged a reduction of the six year period provided by the bill during which the states might petition amendment, and for a cooling-off period of at least a year between receipt by Congress of the requisite number of applications and its authorization of "so potentially drastic a convention."[107] Thus, while he may have feared it, his testimony was not directed so much against the possibility of a runaway convention as it was to the possibility that the convention method of amendment could be the expression of a minority will.

Congressional Solution

As a result of the hearing on the bill, it was amended to provide a four year period for the submission of amendments but without the "cooling-off period" suggested by Sorensen.[108] The bill, however, was superseded in the Ninety-First Congress, and the new bill provided for the traditional seven-year period.[109] In this respect, the bill hardly differed from a less formal predecessor in the House, except that the Vice-President was to be the interim presiding officer.[110] The differences between it and legislation previously proposed were that a convention was to be composed of as many delegates from each State as it was entitled to Senators and Representatives in Congress, two delegates to be elected at large and one from each congressional district,[111] and that the vote on amendments was to be by a majority of the total

104. *Hearings*, *supra* note 86, at 8-9, 11.
105. *Id.* at 36-37.
106. *Id.* at 37.
107. *Id.*
108. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 897 § 5(a) (1968).
109. S. 623, 91st Cong., 1st Sess., § 5a (Comm. Print 1969).
110. *Id.* § 8(a), the earlier proposal being note 64 *supra* and text accompanying notes 66 to 69.
111. S. 623, *supra* note 109, § 7(a).

number of delegates.[112] The bill also followed other thoughts Sorensen had about the convention amendatory process:[113] exclusion of a state's governor from participation, deletion of a specific expense provision as premature and flexibility in the method of ratification.[114]

Apparently, after eliminating the State unit vote, it was thought unnecessary to require a two-thirds vote by convention delegates to propose amendments. The bill, however, would require a State legislature to state the nature of an amendment or amendments that it proposed and have Congress determine if there were in effect valid applications made by two-thirds of the States with respect to the same subject.[115] This determination, together with a provision that Congress disapprove of a proposed amendment by the convention if it related to or included a subject differing from, or that was not included in, the convention's call,[116] would afford a large measure of control by Congress in furtherance of its representation of the people. It is not unlikely, moreover, that the bill will be amended in passage to require of a convention the same vote that Congress itself must have to propose constitutional amendments. At least previous consideration was given to this by a House Judiciary Committee when a constitutional limitation regarding federal tax rates was under consideration.[117]

Nor is the foregoing proposal the only course of action that Congress may take. It could simply take no action at all. There is again precedent in the more probable interpretation of its earlier determination that proposals for limiting or repealing of the federal income tax provisions had insufficient concurrence of the States either as to subject matter or timeliness.[118] Even after receiving applications from two-thirds of the States, Congress could follow the precedent it took as to the popular election of Senators by initiating the amendment itself[119] and thereby avoiding the questions of the convention alternative. More probably, however, Congress will enact an agreed on version of the proposed legislation. Even then, under a prominent feature of the current proposal and on grounds of previous debate,[120] a majority of either House may reasonably decide that there are not enough valid applications in effect.

Finally, Congress could, under section 18 of article I of the Constitution, refer to the electorate the question as to whether malappor-

112. *Id.*, § 10(a).
113. *Hearings, supra* note 86, at 38.
114. S. 623, *supra* note 109, §§ 3(a), 12(b); 8(b) and 12(b) and (c).
115. S. 623, *supra* note 109, §§ 2 and 6(a).
116. *Id.*, § 11(b)(1); or it could be because procedures specified were not followed, i.e. each delegate to have one vote and the convention should terminate within a year unless the period were extended by Congress, id., § 9.
117. Note 64 *supra* and text to note 68.
118. Text accompanying notes 78 and 79 *supra*.
119. *Supra* note 30.
120. S. 623, *supra* note 109, § 6(a) and text to notes 95-100.

tioned legislative bodies may still be tolerated. It might let this nation of nomads decide. Even if that would not be a binding decision, it would at least enable Congress to determine whether the States' petitions reflect the will of the people. This latter course of action would seem entirely within the power of Congress under the "necessary and proper" clause contained in that section. A better indication of a real desire for change would seem to be indicated on this question. In the last analysis it is difficult to conceive of the States as entities apart from the people.

Conclusion

There is ample precedent showing a certain evolution toward the solution of the problems of a constitutional convention. An alternative method of solution may be indicated, however, as to the reapportionment issue. Short of amendment of article V itself, containing as it does a process of amendment that may not reflect the national will, an impending constitutional crisis may be averted by some direct reference to that will. For the proposed amendment on apportionment is a case where a right of all of the people, achieved after extensive litigation of cases and controversies and change of position, is now sought to be curtailed by a relatively unpublicized attempt to amend the Constitution, potentially by a minority. Since the Court has determined the "one-man-one-vote" principle to be a right of the whole electorate, Congress in this instance at least might take special care to ascertain if there is a present desire to surrender to any degree the right to equal representation.

South Dakota Law Review

VOLUME 9 SPRING 1964

CONFEDERATION vs. UNION

By GEORGE MCGOVERN*

"One Country, One Constitution, and One Destiny." Daniel Webster's conclusion and plea, is once again challenged. New anti-Federalists seek to fragment the unitary, national character of our civil rights and duties. They have proposed Constitutional change intended to permit the several states to go their separate ways on public issues of vital national character.

These men have offered to the state legislatures three amendments to the Federal Constitution. The first permits a minority of states to amend the Constitution without application for a national consensus on the proposal. The second subjects Supreme Court judgments relating to federal-state jurisdiction to review by a superior court made up of the Chief Justices of the 50 states. The third permits entrenched minority rule to circumscribe democratic government in the states. All, to Charles L. Black, Jr., Professor of Jurisprudence at Yale Law School, are "radical in the extreme".[1] As a former professor of American history and as a practicing politician, I agree with Professor Black.

It is curious to see how these "radical" proposals have been propelled into prominence and adoption by nearly twenty state legislatures to the point now that there is a serious possibility they will become the law of the land. Less than a year and a half ago, on July 27, 1962, officials representing twelve Southern states, all delegates to the regional meeting of the Council of State Governments, met in Biloxi, Mississippi. Concerned with the effect of federal Constitutional litigation from *Brown v. Board of Education*[2] to *Baker v. Carr*[3] on the civil rights posture in their states, these officials adopted two resolutions: the first, to forbid federal judicial intervention in state legislative ap-

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1. As quoted in CONG. REC. 8263 (daily Ed. May 15, 1963).
2. 349 U.S. 294 (1955).
3. 369 U.S. 186 (1962).

portionment, and the second, to curb the jurisdiction of the federal courts and strengthen the Tenth Amendment of the Federal Constitution.

As an example of how a minority proposal without grass roots support can be catapulted to endorsement by a widely respected and influential national conference of responsible citizens, the capable reporter, Fred J. Cook, has chronicled the growth of the Biloxi resolutions.[4] The National Legislative Conference meeting in Phoenix, September 21, 1962, passed a resolution, "Strengthening the states in the Federal System," detailing its Federal-State Relations Committee to report to the December meeting of the General Assembly of the States on how the Constitution could be amended effectively by state initiation for the purpose of strengthening state sovereignty. The members of this Federal-State Relations Committee were selected by the Chairman of the National Legislative Conference, a man of like mind to the Biloxi delegates. Understandably, of the nine man committee he selected, eight strongly supported the state sovereignty proposal. Using the Biloxi resolutions as a base, the Federal-State Relations Committee drafted the three amendments discussed below including the suggested method of having them adopted: upon "application of the legislatures of two-thirds of the several states" followed by a national convention and subsequent ratification by three-fourths of the states.[5]

The Council of States Governments, without endorsement but at the Federal-State Relations Committee's request, placed the three amendments before the General Assembly of the States, meeting in Chicago December fifth. The General Assembly, a gathering of state legislators and officials, received copies of the three proposed amendments only on the day they were brought out. There was little debate, no time for the opposition to organize its objections, less for proper reflection on the effect these amendments to our Constitution would have on effective government and Federal-State jurisdiction. Reportedly, the resolutions were brought out, read, debated and passed all in two hours. The votes on these resolutions were as follows:[6]

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4. COOK, THE PROGRESSIVE, (1963). Another history of the proposals may be found in Morgan, *"Seventeen States Vote to Destroy Democracy as We Know It,"* Look, Dec. 3, 1963, p. 76.

5. The efficacy of this method has been attacked by Professor Black in *"The Proposed Amendment to Article V: A Threatended Disaster,"* 72 YALE L. J. 957 (1963).

6. 36 STATE GOVERNMENT 12-15.

AMENDMENT	STATE DELEGATIONS For	Against	Passing
—To simplify state initiation of proposed amendments	37	4	4
—To establish a "Court of the Union" to review Supreme Court decisions relating to the rights reserved to the states.	21	20	5
—To eliminate Federal review of apportionment of State Legislatures	26	10	10

Thus, the small group of state officials meeting in Biloxi, Mississippi had obtained apparent endorsement by the General Assembly of the States, a national body of state officials, in just five and one half months. Now, armed with this "national consensus" many state legislators felt empowered to seek adoption of the resolutions in their own legislatures, resolutions which if finally enacted would increase their own powers and those of their state governments.

Still lacking grass roots support and prior to representative public discussion on the resolutions, by July 1963, seven months later, seventeen states had passed one or more of them. The roll call of the states follows:[7]

State	Resolution Simplify Amendments	Court of the Union	Apportionment
Alabama		X	
Arkansas	X	X	X
Florida	X	X	
Idaho	X		X
Illinois	X		
Kansas	X		X
Missouri	X		X
Montana			X (a)
Nebraska			X
Nevada			X

7. Information supplied by Council of State Government as of July 1963.

New Hampshire	X		
			(b)
New Jersey	X	X	X
Oklahoma	X		X
South Carolina	X	X	X
South Dakota	X		X
Texas	X		X
			(c)
Utah			X
Washington			X
Wyoming	X	X	X

(a) In Nevada the proposal was vetoed by the Governor.
(b) In New Jersey the legislature later rescinded its action.
(c) In Utah the language differs from the standard resolution.

The Amendment to Simplify State Initiation of Proposed Constitutional Amendments

The first of these alleged reforms would alter the Article V procedure for amending the Constitution to the end that the state legislatures could bypass Congress, or any other national forum, such as a constitutional convention, and directly effect changes in the Constitution. Under this proposal, the existing provision in Article V for a convention would be eliminated.

Article————

Section 1. Article V of the Constitution of the United States is hereby amended to read as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states. Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment

as contained in the application shall be deemed to have been proposed, without further action by Congress. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

Section 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several states within seven years from the date of its submission.

The political philosophy behind this proposal mistakenly considers that the United States exists only as fifty and separate political groups and that a national interest, if it does exist, can and ought to find expression only through the separate action of a qualified majority of fifty geographical political units. National questions ought surely at some stage to be deliberated upon in a national forum. Only thus can they receive the consideration of representatives whose responsibility in office is the welfare of the country as a whole. But here is a proposal for state rule only, on the basis of state-by-state count only, and through state institutions only, with national issues submerged.

State legislatures, by the very nature of their purpose and function, have relatively small acquaintance with problems of a national character. They have little or no experience in dealing with problems in such perspective. Even given the best of intent on the part of any state legislature there would be great difficulty in acquainting the members with the attitudes, views, and needs of sections of the country other than their own. The Congress with its nationwide news is best designed to generate the kind of national debate and public scrutiny that is needed to prevent hasty or ill-advised changes in our Constitution. The issue, in short, is whether or not measures of national interest should be subjected to debate, deliberation and publicity at a national level before going out to the several states for their adoption. Do we favor a union of states or a return to the Articles of Confederation?

Using the 1960 census, Professor Black has noted that a muster of thirty-eight least populated states needed to ratify a Constitutional amendment account for 40% of the national population.[8] In these 38 state accounting for 40% of our population

8. *Supra* note 6, at 959.

a minority of the people elect the legislators, on the average about 38%. Thus legislators representing 38% of 40%, or some 15% of the American people, could freely amend the Constitution under this proposal. Such an exact coalition is unlikely, true, but a minority should not possess such power. Our system now places checks on the majority to ensure the rights of the minority, a negative minority power; but what is here proposed is quite the opposite. It would allow the minority to override the majority on questions that concern the very nature of our federal government and federal-state balances. It would be "a change in the distribution of ultimate power".[9]

THE AMENDMENT TO ESTABLISH A "COURT OF THE UNION".

The "Court of the Union" Amendment delegates to a court composed of the fifty state chief justices convened upon motion of five non-contiguous states the power to review decisions involving a substantial question under the Tenth Amendment.

Article————

Section 1. Upon demand of the legislatures of five states, no two of which shall share any common boundary, made within two years after the rendition of any judgment of the Supreme Court relating to the rights reserved to the states or to the people by this Constitution, such judgment shall be reviewed by a Court composed of the chief justices of the highest courts of the several states to be known as the Court of the Union. The sole issue before the Court of the Union shall be whether the power or jurisdiction sought to be exercised on the part of the United States is a power granted to it under this Constitution.

Section 2. Three-fourths of the justices of the Court of the Union shall constitute a quorum, but it shall require concurrence of a majority of the entire Court to reverse a decision of the Supreme Court. In event of incapacity of the chief justice of the highest court of any State to sit upon the Court of the Union, his place shall be filled by another justice of such state

9. *Supra* note 6, at 957.

court selected by affirmative vote of a majority of its membership.

Section 3. On the first Monday of the third calendar month following the ratification of this amendment, the chief justices of the highest courts of the several states shall convene at the national capital, at which time the Court of the Union shall be organized and shall adopt rules governing its procedure.

Section 4. Decisions of the Court of the Union upon matters within its jurisdiction shall be final and shall not thereafter be overruled by any court and may be changed only by an amendment of this Constitution.

Section 5. The Congress shall make provision for the housing of the Court of the Union and the expenses of its operation.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date of its submission.

The fact that this fantistic resolution has passed legislatures in only six states reflects the problems and uncertainties it creates.

Such a court, required to sit with a quorum of 38, would be inefficient. Deliberations would be cumbersome, and compromise to minimize dissenting and separate concurring opinions would be difficult. If it sat frequently and mutual confidence among the justices thrived, it would paralyze the judicial process; if it sat infrequently, its decisions would not be reliably judicious in the field of Constitutional law.

One might presume that this court will hear its first case and render its first decision under Section 1 of the Amendment from a jurisprudential base of Constiutional law already established by the U.S. Supreme Court through the years. Even so, they must be prepared to make the policy decisions required when particular cases call for interpretation of vague and sometimes conflicting provisions of the Constitution. How does this new superior court decide any more judiciously the policy issue

involved in, say, the *Brown*[10] case? They might come to a different conclusion than the Supreme Court did,[11] but the difficult policy decision there appears to have been whether the issue presented was one of civil rights, and therefore clearly within the concern of the 14th Amendment, or public education, an area in the tradition left essentially to state concern. Clearly, both were involved. Both found sources for decision in the Constitution. The choice had to be made. The "Court of the Union" would be no better equipped, likely far less equipped, to make judicial sense out of its resolution of the conflict.

The Congress is empowered to limit the jurisdiction of the Supreme Court to review Congressional enactments.[12] Although I believe that such limitations are inadvisable, I find a transfer of an important part of that jurisdiction to the "Court of the Union" destructive of the entire concept of a national government.

The Court of the Union amendment would deprive the national government of ability to function through its own institutions independent of reliance upon state concurrence, and subvert the principle of national supremacy as designed in the Constiution.[13] Upon its adoption, the United States would cease to remain a sovereign in its own house. There would arise a league of states as weak and as ineffectual as the Confederation which preceded adoption of the present Constitution.

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10. 349 U.S. 294 (1955).

11. Justice Cardozo, reflecting on the intimacy of the making of judicial decision, said "We can never see (things) with any eyes except our own". CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

12. U.S. CONST. art. III, § 1.

13. The intent of the Court of the Union amendment's proponents is manifested in the Statement of Principles of the Committee on Federal-State Relations of the National Legislative Conference: "The basic difficulty is that the Supreme Court's decisions concerning the balance between federal and state power are final and can be changed in practice only if the states can muster sufficient interest in Congress, backed by a three-fourths majority of the states themselves to amend the Constitution. While the founding fathers fully expected and wished the words of the Constitution to have this degree of finality, it is impossible to believe that they envisaged such potency for the pronouncements of nine judges appointed by the President and confirmed by the Senate. The Supreme Court is, after all, an organ of the federal government. It is one of the three branches of the national government, and in conflicts over federal and state power, the Court is necessarily an agency of one of the parties in interest. As such, its decision should not be assigned the same finality as the words of the Constitution itself. There is need for an easier method of setting such decisions straight when they are unsound.

"To amend the Federal Constitution to correct specific decisions of the federal courts on specific points is desirable, but it will not necessarily stop the continuing drift toward more complete federal domination. The present situation has taken a long time to develop and may take a long time to remedy. Accordingly, some more fundamental and far-reaching change in the Federal Constitution is necessary to preserve and protect the states." 36 STATE GOVERNMENT 10 (1963).

THE AMENDMENT TO ELIMINATE FEDERAL JUDICIAL REVIEW OF THE APPORTIONMENT OF STATE LEGISLATURES

The apportionment amendment would overrule the Supreme Court in *Baker v. Carr*[14] and remove from Constitutional text and federal court jurisdiction review of State apportionment of legislatures.

Article———

Section 1. No provision of this Constitution, or any amendment there to, shall restrict or limit any state in the apportionment of representation in its legislature.

Section 2. The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy relating to apportionment of representation in a state legislature.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date of its submission.

The Amendment's proponents fear an undue encroachment by the federal courts and the Congress on the states' power to establish standards for the elections of state legislators. *Baker v. Carr* does not warrant this concern. It represents only a recognition of the Federal Court's power under the 14th Amendment of the Federal Constitution to protect the equality of individuals who are in certain circumstances cast as members of minority groups[15]

This is not a new power. With the Supreme Court decision in *Gomillion v. Lightfoot*,[16] the 15th Amendment has protected such persons from dilution of their political equality caused by gerrymandering of state legislative districts. Congressional districts in the several states long have been subject to federal

14. 369 U.S. 186 (1962).

15. While the provision does not seem to strike at the unconstitutionality of certain situations of gerrymandering, where districts equal in number of voters are so designed to dilute the power of sizeable population groups and render them underrepresented in State Legislatures, it may render the Guaranty Clause, Article IV, Section 4 of the Constitution, forever stillborn.

16. 364 U.S. 339 (1960).

court review on the grounds that in the election of a Congressman no American citizen counts for more than any other American citizen.[17] Justice Douglas, in his concurring opinion in *Baker v. Carr*[18] recites other areas in which Constitutional limits have been placed upon states' powers over voting rights.

It is difficult to believe that there are legislators who support the apportionment amendment to perpetuate privilege for themselves divorced from the very principles of equality which our public institutions are bound to support and which our traditions compel us to champion.

In *Baker v. Carr*, the petitioners claimed among other things that the apportionment of the Tennessee lower house districts, not altered since 1901, had so diluted their votes as to violate the equal protection clause of the 14th Amendment. They were not suing because they were Negroes or Jews or because they lived in cities or on farms, but because they were American citizens and residents of Tennessee. Yet, their individual right to equality in voting for members of the General Assembly of Tennessee had been effectively diluted by the twentieth century shifts in population densities and by a nineteenth century apportionment law.[19]

Let us look at the facts of this Tennessee case. Between 1901 and 1960 the state population increased from 2,020,616 to 3,567,089 and the number of qualified voters from 487,380 to 2,092,891.[20] Today 37% of the voters elect 20 of the 33 Senators and 40% elect 63 of the 99 Assemblymen.[21] Carter County with a population of 23,303 had half the representation of Maury County, population 24,556, and the same representation as Decatur County with a population of only 5,563.[22] As is clear from Table I on page 262 of the Clark opinion, disparity was statewide. Some might be explainable, Justice Clark thought, "but when the entire table is examined—comparing the voting strength of counties of like population as well as contrasting that of the smaller with the larger counties—it leaves but one

17. See United States v. Classic, 313 U.S. 299 (1941).
18. *Id.* at 242-245.
19. Plaintiffs claimed, too, that the 1901 apportionment law, based on the census of 1900, was unconstitutional. *Id.*, at 192.
20. United States v. Classic, *supra* note 17, at 192.
21. *Id.* at 253.
22. *Id.* at 255.

conclusion, namely that Tennessee's apportionment is a crazy quilt without rational basis."[23]

The three judge lower court from which the appeal to the Supreme Court arose found "a clear violation of the state constitution and of the rights of the plaintiffs.[24] The evil was a serious one," the court agreed, "one which should be corrected without further delay.[25] Only, the courts, it thought, were without power to correct the evil.[26] This was a non-justiciable "political question".[27] It should be solved by the political branches of government.

The Supreme Court, in reversing, dispelled the misconception of the role of the judiciary in apportionment cases.[28] It made clear that the Constitution and the nature of the powers vested in the organs of government dictated that certain public issues were not for judicial solving. Such restraint was necessary and fruitful for the effectiveness of the system of checks and balances. When that system, however, was not affected, when federal-state relationships were involved, such Constitution bred considerations and judicial restraint were necessarily replaced "It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' "[29]

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23. *Id.* at 254.
24. *Id.* at 197.
25. *Ibid.*
26. Lack of a procedure for voters' initiative or referendum in Tennessee and failure of the state legislature to effect a reapportionment after several attempts to demonstrate plaintiff's need to invoke the power of th courts. 396 U.S. at 191, 193 n. 14.
27. The concept of the non-justiciable "political question" is demonstrated by such cases as Colegrove v. Green, 328 U.S. 549 (1946). It is distinguished by the Court in Baker v. Carr beginning at page 202. Interestingly, the proposed apportionment amendment would overrule this case, as well.
28. "We hold that this challenge to an apportionment presents no non-justiciable 'political question.' " 369 U.S. at 209. " '[T]he right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.' " 369 U.S. at 210, quoting Snowden v. Hughes, 321 U.S. 1, 11 (1944).
29. United States v. Classic, *supra* note 17, at 210. The Court then stated: "We come, finally to the ultimate inquiry whether our precedents as to what constitutes a non-justiciable 'political question' bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none. The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards

There are, the Court finds, Constitutional mandates protecting the rights of individuals from state as well as federal action. Justice Brennan's majority opinion states:

> the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.[30]

"The question here", he summarizes, "is the consistency of state action with the Federal Constitution."[31]

Charging that Tennessee's apportionment statute worked an "invidious discrimination", this case could have been initiated by other claimants in other states.[32] The following table shows those states where less than 35% of the population can control the respective state lower terms[33]

State	*Population of District*		Percent
	Largest	Smallest	Necessary to Control
Alabama	104,767	6,743	25.7
Arkansas	31,686	4,927	33.3
Colorado	63,760	7,867	32.1
Connecticut	81,089	191	12.0
Delaware	58,228	1,643	18.5
Florida	311,682	2,868	14.7
Idaho	15,576	915	32.7
Indiana	79,538	14,804	34.8
Iowa	133,157	7,910	26.9
Kansas	68,646	2,069	18.5
Kentucky	67,789	11,364	34.1
Louisiana	120,205	6,909	34.1

are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.*, at 226.

30. United States v. Classic, *supra* note 3, at 237.

31. *Ibid.*

32. "At the time of the decision, some twenty-seven states were subject to apportionment laws unchanged in twenty-five years, and in about eight states there had been no change in more than fifty years." 36 STATE GOVERNMENT 13 (1963).

33. N.Y. Times, March 28, 1962, p. 22, col. 1.

Minnesota	99,446	8,343	34.5
Mississippi	59,542	3,576	29.1
Missouri	52,970	3,960	20.3
New Mexico	29,133	1,874	27.0
North Carolina	82,059	4,520	27.1
Ohio	97,064	10,274	30.3
Oklahoma	62,787	4,496	29.5
Tennessee	79,301	3,454	28.7
Utah	32,380	1,164	33.3
Vermont	33,155	38	11.6

This is nearly half of all these state. Further in New York the largest State Assembly district has a population ten times that of the smallest; in Pennsylvania, the largest is more than 27 times larger; in Rhode Island over 37 times; West Virginia, over 50 times. Facts such as these point the conclusion that "invidious discrimination" is widespread in state legislatures throughout the nation.

The threat of federal judicial review of state apportionment statutes has generated a panoply of reactions. The men at Biloxi and their followers at the Chicago meeting of the General Assembly of the States a year ago set out to reverse the decision by proposing a Constitutional amendment to eliminate federal review of state apportionment systems. The League of Women Voters, local Civil Liberties Unions, labor unions, and taxpayers have sought to implement the decision and have brought reapportionment suits before Federal and state courts in 39 states. Twenty state legislatures have proposed and adopted new apportionment plans[34]

It is the state legislatures themselves which should answer the Supreme Court's challenge. They are the prime institution through which our state democracies act. Jefferson said: "The will of the people is the only legitimate foundation of any government and to protect its free expression should be our first object."

Our state legislatures must represent their electorates.

34. N.Y. Times, Nov. 13, 1963, p. 1, col. 5. A brief state-by-state review of the cases and statutory reapportionment plans as of March 22, 1963, is found in 21 CONGRESSIONAL QUARTERLY 424 (1963).

This demands political equality for the voters[35] and majority rule[36] with minority rights protected. Legislators who would create or perpetuate a system not based on per capita equality must establish convincingly the rationality of such a system, the overriding values which compel its use.[37]

Legislators owe a duty of loyalty to their constituents but they also owe a duty of supreme loyalty to the democratic tradition, to that political idea which gives the color of right to the exercise of their office. If they subvert this higher loyalty and advocate a system which secures political power for entrenched minority interests, the aggrieved have little recourse except to the Court. For too long too many state legislatures have overlooked this responsibility. They have now been brought to task.

Experience has shown the need for an objective standard by which democratic representation in states is to be judged. Perhaps that standard requires only that the scheme of representation be a rational one. Circumstances in one state may justify a different scheme from an equally fair one in another state. Although the historical and dual sovereignty rationale for a bicameral legislature on the federal level does not exist at the state level, it may be Constitutionally justifiable to permit two state houses, one giving disproportional weight to the views of an important minority. Perhaps a chamber with such strong minority representation does not cause illegal discrimination if it can merely delay legislative action or can vote only on cer-

35. Although specifically avoiding concern with the Baker v. Carr problem, Justice Douglas in Gray v. Sanders, 372 U.S. 368 (1963) said, "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications....The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing, one person, one vote." *Id.* at 379, 381.

36. Of course the composition of the "majority" may shift from issue to issue; but on the larger issues it will be more or less homogeneous. It may even have an agreed upon political program or platform.

In certain legislative districts the larger issues will be civil rights and job opportunities, in others better housing and welfare services, and in others taxes and improved transportation facilities. But if the majority in a district cannot marshall sufficient voter strength to elect representatives who will present their views in the legislature, the system of representational government is frustrated. If the issues are large enough, if the frustration is complete, the result may be a bypassing of the offending legislature. Recourse may then be to the state governor, Washington or the streets.

37. See Walters v. City of St. Louis, 347 U.S. 231 (1954). "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." *Id.* at 237.

tain kinds of legislation. The Supreme Court has yet to define the scope of the standards[38] beyond outlawing the patent "invidious discrimination" of the Tennessee system.

CONCLUSION

These three proposed Constitutional amendments slipped quietly into prominence. They came from inception to serious contention for adoption in a relatively few months. Yet lawyers and judges soon saw the dangers these proposals were about to impose on our Constitutional system. Many called for public discussion of the proposals rather than hasty adoption by state legislatures.[39] Articles were written about them, and they were debated in the press and on the floor of both houses of Congress. They must be further discussed and argued. Their ramifications must be further explored and clearly understood.

What is clear is that together they would chip away our Constitutionally guaranteed rights, reverse the expansion of our individual civil rights and freedoms, take from us some of the reasons for establishing a free and democratic society and "a more perfect union." They would reincarnate the divided and ineffectual league of states which floundered under the Articles of Confederation.[40] They would institutionalize us as Alabamans, Californians, Virginians and South Dakotans first, Americans second.

But we have, in fact, fought a great Civil War under Abraham Lincoln's leadership to establish the supremacy of our federal union over the sovereignty of any single state. No state in the nation can be permitted to make itself a power free from the claims of the Union and the Constitution. No single state should be empowered to take from any American his God-given, democratically defined and Constitutionally protected civil rights, to deprive him of life, liberty or property without due process of law or deny him the equal protection of the laws

38. Alan L. Clem, Associate Professor of Government at the University of South Dakota has reviewed the problems deciding on the proper methods of carrying out the Supreme Court's prescription in Baker v. Carr. In his helpful article he states: "Perhaps the most serious handicap to the efforts of those advocating more equitable distribution of legislative power is that neither lawyers nor political scientists nor mathematicians have yet been able to agree on a method to define a proper apportionment system." Clem, *Problems of Measuring and Achieving Equality of Representation in State Legislatures*, 42 NEB. L. REV. 622, 623 (1963).

39. By letter, dated October 2, 1963, the American Bar Association reported that its House of Delegates has recorded its opposition to all three proposed amendments.

40. A "confederacy" is defined as a "body formed. . . .by states. . . .united by a league"; and is a "looser union than a federation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY. In the Articles of Confederation of 1777, Article III provided that the "States hereby severally enter into a firm league of friendship with each other, ..." and Article II provided that "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

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PART 3—PAST LEGISLATIVE HISTORY

[From the Congressional Record, Sept. 5, 1979]

STATEMENT ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. Hatch:

S. 1710. A bill to provide procedures for calling Federal constitutional conventions under Article V for the purpose of proposing amendments to the U.S. Constitution; to the Committee on the Judiciary.

CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1979

Mr. HATCH. Mr. President, article V of the U.S. Constitution provides that constitutional amendments may be proposed in either of two ways. The first—the means by which every successful amendment to the Constitution has been proposed—requires the agreement of two-thirds of each House of Congress. The second requires the agreement of a convention called by Congress in response to the petitions of two-thirds of the State legislatures. Ratification of amendments proposed through either method is to be done either by the legislatures, or by conventions, in three-fourths of the States, depending upon the decision of Congress.

Largely as a result of the fact that the convention method of constitutional revision has never been successfully employed, there are substantial questions that relate to it:

What exactly constitutes a valid petition to the Congress?

What procedures must a State follow in submitting a petition?

Must the precise language of the proposed amendment be included within the petition?

How similar must the language be in the petitions of various States in order to allow them to be aggregated?

How long does a petition remain valid? May such petitions be rescinded by the States?

What is the extent of congressional power to review petitions? What is the extent of congressional power to restrict the deliberations of the convention?

What is the extent of State power to restrict the deliberations of the convention?

How is the convention to be organized? How are the States to be represented at the convention?

May Congress refuse to submit the product of a convention to the States for ratification?

How are constitutional convention-proposed amendments to be ratified in the States?

With respect to most of these questions, there is very little constitutional guidance. The relevant language of article V states simply:

"The Congress . . . on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments."

Nor are there useful precedents in view of the fact that there has never been a constitutional convention. Each of the questions involved in this, the "alternative" means of amending the Constitution, is therefore a threshold question.

Article I, section 8, clause 18 of the Constitution invests authority in Congress to—

"Make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States."

The provision clearly authorizes the Congress to pass legislation that would give effect to the convention method of constitutional alteration. This would be a direct function of its article V authority to "call" a convention pursuant to petitions by two-thirds of the States.

OBJECTIVES OF ACT

I am introducing legislation, the "Constitutional Convention Implementation Act," which would fill in the interstices of article V. It is particularly important that this body act on this, or similar legislation, in view of the fact that at least 30 States legislatures have already purported to submit petitions to Congress for the convening of a constitutional convention on the subject of a balanced budget amendment. I would hope that this act, however, could be considered separately from the merits of this specific amendment. The "Constitutional Convention Implementation Act" is designed to establish what are basically neutral procedures to guide the conduct of constitutional conventions generally. While the imminence of a convention of the matter of a balanced budget has clearly created the urgency for this legislation, the act is designed neither to facilitate nor obstruct the eventual achievement of a balanced budget amendment, or any other constitutional amendment.

One must look to the policy underlying the establishment of the convention form of amendment in order to construct a fair procedures bill. Even a cursory analysis of the original constitutional convention (convened under the auspices of the articles of confederation) would suggest that the final provision of article V resulted from a compromise between those delegates who sought to invest proposal authority solely in Congress and those who sought to invest it solely in the State legislatures. The two modes of initiating amendments were viewed as essentially equivalent alternatives, each of which was to serve as a check upon the intransigence of either the National Legislature or the State legislature in the matter of proposing constitutional revision.

In view of this fundamental purpose, I believe that legislation giving effect to the convention method of amendment should be such that resort to its use will not render the Constitution "too mutable" (the Federalist No. 43) while at the same time insuring that it will not be rendered null and void because it is too cumbersome a method. The amendment process should never be one that can be successfully employed with great ease, yet neither should it be a process totally incapable of being used to alter the Constitution. It is this general philosophy that guides congressionally-initiated amendments and would seem most appropriate with respect to convention-initiated amendments as well.

PROVISIONS OF ACT

I would like to briefly discuss the provision of this act and explain their justification. I should add at the outset my debt to the efforts of our former colleague, Senator Sam Ervin. While my bill differs in a number of respects from legislation that Senator Ervin successfully shepherded through the Senate in 1971, its basic structure is closely related to that legislation. This measure has been reintroduced in the present Congress as S. 3 by our distinguished colleague from North Carolina (Senator Helms).

Section 1 of my bill states that its short title is the "Constitutional Convention Implementation Act of 1979."

APPLICATIONS FOR CONVENTION

Section 2 states the manner in which States are to make applications for a constitutional convention. It states simply that the legislature shall state, within its application for a convention, the "General Subject" of the amendment or amendments to be proposed. It is expected that the application is to be sufficiently precise so as to enable Congress to determine whether or not the application ought to be aggregated with the applications of other States. It would not, for example, be enough for a State to say that it desired a convention for the purpose of "improving the functioning of the executive branch of the Federal Government," and have it aggregated with an application specifying its desire for a convention for the purpose of "considering changes in the length of the presidential term of office."

The purpose of the initiating process is to determine that there exists some form of consensus among the States on the matter of a relatively well-defined area of amendment. This consensus cannot fairly be said to be in evidence if aggregation is to be permitted of applications that are, at best, only incidentally related.

On the other hand, it cannot reasonably be expected that identical, or even nearly identical, language be employed in petitions that ought to be aggregated.

Such a requirement is highly unrealistic with respect to fifty diverse State legislative bodies; the imposition of such a rigid rule would effectively render the alternative method of amendment provided in article V useless. Further, to the extent that a petition was required to be precise, either with respect to the specific amendment sought, or the specific language sought, there would be little use for the convention itself. To limit the convention to the consideration of a single, meticulously worded amendment is to make the convention a farce. In order for the convention to be a meaningful part of the article V process, it must have some leeway within which to exercise its legitimate discretion.

LIMITED CONVENTIONS

That this discretion, however, is not without its limits is the subject of section 2(B), and, indeed, is the basic theme of the "Constitutional Convention Implementation Act." This section states that the procedures provided in the act are to be followed in the case of applications for what are commonly referred to as "limited conventions." Such conventions are defined for the purposes of this act as conventions "for the purpose of proposing one or more specific amendments to the Constitution of the United States." Implicit in this section is the recognition that the States may call for the convening of either "limited" or "general" conventions; it is, however, simply with respect to the former that the terms of this act apply.

A "general" convention would be one in which the States petitioned for a convention, not with any specific or limited purposes in mind, but for the purpose of making whatever revisions were deemed necessary or desirable by the convention itself. It is this sort of convention that poses such great concerns to most observers, including myself. I am far from confident that a contemporary "General" convention could do much to improve upon the work of Madison, Hamilton, and Mason. While there is no way that Congress, through passage of a simple statute, could preclude the States from requesting a "general" convention—this is their right under article V—neither is Congress precluded from clarifying that the States are fully within their rights in seeking a "limited" convention.

There is significant academic dispute as to the possibilities of a "limited" constitutional convention. Prof. Charles Black of the Yale Law School, for example, believes that the constitutional convention is a "free agent," sovereign and without limitations. According to this theory, the convention represents the premier assembly of the people, and is therefore supreme to all other Government branches and agencies.

I would disagree with this interpretation. The constitutional convention, while clearly a unique and separate element of the Government—a new branch of the Government, so to speak—is subject to the same limitations and checks and balances as the other, permanent branches of the Government. A constitutional convention, as its name clearly implies, is a constitutional entity; it is appointed under the terms of the Constitution and subject to all of the express and implied limitations imposed by that document. As observed by Professor Jameson in his classic work on constitutional conventions:

"The convention's principal feature is that it is subaltern—it is evoked by the side and at the call of a government pre-existing and intended to survive it, for the purpose of administering to its special needs. It never supplants the existing organization. It never governs. Though called to look into and recommend improvement in the fundamental laws, it enacts neither them nor the statute law; and it performs no act of administration."

The Federal constitutional convention is an instrument of the Government, and acts properly only when it acts in conformity to its authorized powers.

There is nothing in the language of article V to suggest that the convention method of amendment cannot be limited to a single area of amendment, although the article states that the convention is to be convened for the purpose of proposing "amendments," resort to the plural is made also describing the scope of Congress' proposing authority. The symmetry between the competing processes of constitutional amendment is emphasized by Madison in the Federalist No. 43 in discussing the objectives of article V:

"That useful alterations will be suggested by experience, could not be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would

render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the State governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."

It was clearly contemplated that the convention anticipated specific amendment or amendments, rather than general revisions, and that no distinction was to be drawn between the competing methods of amendment in this respect.

To enable Congress to propose specific constitutional amendments while allowing the States only to propose general constitutional revision is to confer markedly unequal powers of amendment upon these governments, an intention contradicted by the unanimous weight of documentary evidence. If the States are to have no ability to control the actions of a convention in the form of their convention applications, then there will be strong disincentives for them to seek such conventions. In the absence of broadbased dissatisfaction with the existing constitutional system, why should they want to create the threat or possibility of a convention acting beyond the scope of the application? Why, in seeking to originate the "amendment of errors" described by Madison, should the States have to risk total revision of the constitutional system?

It is anomalous that in seeking to correct what might be a narrow defect in the system that the States should have to place the entire system in jeopardy? What better means could there be to "perpetuate the discovered faults" of the system? What better means could there be to place the convention system of amendment in an unequivalent position to the congressional system of amendment? What better means could there be to completely discourage any and all resort to the convention means of constitutional amendment?

It is the States, not Congress, that ought to properly have the ability to limit the scope of the convention, through the convention applications. While Congress, under section 6 of the "Constitutional Convention Implementation Act," is empowered to specify in its call for the convention the scope of permissible deliberations, it is performing basically an administrative, nondiscretionary function in doing so; it is simply translating the State applications into a formal convention call.

APPLICATION PROCEDURES

Section 3 of the act specifies that the procedures to be followed in making a convention application are generally to be those established by the States themselves. Section 3(a) states that for the purpose either of adopting a resolution or withdrawing one (pursuant to section 6) the State legislature is to follow the same rules of procedure that govern the enactment of a simple statute, except that the action is to be considered valid without the assent of the Governor of the State.

Thus, the term "legislatures" in article V is treated in the same manner for the purpose of convention applications as it has traditionally been treated for the purpose of amendment ratification. It has generally been thought that, had the Founders intended to require gubernatorial participation in the amendment process, they would have made express reference either to the need for ratification or proposal by the "States," or by the legisltaures with the assent of the "Executive." As the Supreme Court has observed in *Lester* v. *Garnett* 258 U.S. 130, 137 (1922) :

"The function of the State legislature in ratifying a proposed amendment to the Constitution, like the function of Congress in proposing the amendment, is a Federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."

In an analogous decision, the Court in the early case of *Hollingworth* v. *Virginia* 3 Dall. 376 (1798) interpreted the provision of article V to require the exclusion of the national executive from the amendment process.

Section 3(b) provides further that questions concerning the validity of application procedures are to be decided by the State legislatures themselves. While recognizing that, in pursuit of their authority under article V, the States are acting in a quasi-Federal capacity, rather than in a purely State role, it would nevertheless be incongruous for any body to determine whether or not there has been procedural regularity in a State legislative action other than the State legislature itself.

In *Field* v. *Clark* 143 U.S. 649 (1892), it was decided by the Supreme Court that the procedural requirements of the legislative process were presumed to

have been satisfied when legislation was formally certified by the appropriate legislative officers. Rather than intruding Congress or the courts into this area, there is no reason why this traditional rule ought not to continue to apply with respect to convention application actions. There is no compelling reason why article V should require sacrifice by the State legislatures of their right to regulate their own proceedings.

TRANSMISSION OF APPLICATIONS

Section 4 of the act specifies the means by which the States are to transmit their applications for a convention to Congress. Section 4(a) states that, within 30 days of the adoption by a State of an application, the appropriate official is to transmit copies to the President of the Senate and the Speaker of the House of Representatives.

Section 4(b) directs the States to include within these applications: the title of the resolution, the exact text of the resolution, the date of adoption, and an official certification. In addition, States are encouraged, but not compelled, to list in the application other effective State applications which are deemed to concern substantially the same subject. While such a listing is not expected to be conclusive with respect to Congress, it is nevertheless considered that such a listing will be useful to Congress in carrying out its responsibilities in aggregating similar applications.

Section 4(c) requires each house to establish a public record of each State application, and to notify each State legislature of the fact of each application. Through internal procedures to be determined by each House of Congress, Congress would be charged with making its decisions on whether or not to aggregate applications within the 10-day period following each new application. The criteria would be whether or not the applications referenced the "same general subject or subjects."

As observed earlier, it is the objective of this language to ensure the existence of some real consensus among the States with respect to the need for constitutional revision in some relatively circumscribed area. At the same time, in order not to interfere with the legitimate freedom of action of a convention, there ought not to be the requirement of extreme precision, either in the text or in the subject-matter. The language contained in the bill is designed to draw some rough balance between these requirements.

In order to ensure that the consensus for a constitutional amendment remains a relatively "contemporaneous" one (see *Dillon* v. *Gloss* 256 U.S. 368 (1921)), section 5(a) states that an application shall be effective for no longer than a 7-year period, with shorter effective periods contained within the body of an application to be respected. The court in Dillon stated that,

"Proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavour, the natural inference being that they are not to be widely separated in time . . . must reflect the will of the people in all sections at relatively the same period which of course ratification scattered through a long series of years would not do . . . We do not find anything in article V which suggests that an amendment once proposed is to be open for ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective."

Similarly, State convention applications and the "calling" of a constitutional convention are not unrelated acts, but necessary, succeeding steps in a single endeavor. There should be a "reasonable" relationship in time (see *Coleman* v. *Miller*, 307 U.S. 433 (1938)) between these actions. There is the same need to avoid staleness of applications to Congress as there is to avoid staleness of amendment proposals to the States.

In view of the fact that every amendment proposed by Congress, except one, since the 18th amendment has contained a 7-year time limitation either in the body or in the enacting clause, it was decided to use the same period for determining effectiveness of applications.

Section 5(b) authorizes States to withdraw their applications at any time prior to the time that there are a sufficient number of valid applications before Congress to enable it to call a convention. There would seem to be no valid policy reason for denying them this right. Indeed, in order to insure that the amendment process reflects the notion of "contemporaneous consensus," it is vital that the States have the right to reconsider and reverse their application decisions.

States should not be dragooned unwillingly into artificial consensuses because of an inability to rethink earlier application decisions.

CALLING OF THE CONVENTION

Section 6 of the "Constitutional Convention Implementation Act" relates to the actual calling by Congress of the convention. It provides that upon receipt in each House of that application putting two-thirds of the States in agreement on the need for some amendment, it is the duty of that House to call for the convening of a Federal constitutional convention on that general subject. Congress is to designate the time and place of the meeting of the convention, and set forth the general subject of the amendment or amendments for consideration. The convention is to be convened not later than 6 months following the adoption by Congress of its resolution.

Despite some popular misconceptions on this point, it is obligatory that Congress call a convention upon the receipt of valid applications by two-thirds of the States. Alexander Hamilton observed in the Federalist No. 85 that—

"The national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* "on the application of the legislatures of two thirds of the states to call a convention for proposing amendments" . . . the words of this article are premptory. The Congress "shall call a convention". Nothing in this particular is left to the discretion of that body."

James Madison, in a 1789 letter, remarked further—

"It is to be observed however that the question concerning a general convention will not belong to the Federal legislature. If two-thirds of the States apply for one, Congress cannot refuse to call it."

CONVENTION DELEGATES

Section 7 relates to the selection of delegates to the constitutional convention. The language is taken nearly verbatim from article II, section 1, paragraph 2 of the Constitution concerning the selection of Presidential electors. The "Great Compromise" between the larger and the smaller States is carried over into the selection of convention delegates with each State being entitled to that number of delegates equal to the combined number of its Senators and Representatives in Congress. The States are given a free hand in selecting their delegates in whatever (otherwise constitutional) manner they think appropriate. If the experience of the electoral college is at all relevant, and I believe that it is, each of the States will undoubtedly introduce some means of popular election for the delegate positions.

While there are those who would prefer to see a delegate selection system more precisely based upon population, I see no reason not to extend smaller States that slight disproportionate influence in the proposal of amendments through the convention system that they currently enjoy in the proposal of amendments through the congressional system. This is the method of delegate selection that most closely conforms to the basis for congressional representation, and which would most closely aline the alternative systems of proposing amendments.

Section 7 also excludes Members of Congress, the very embodiment of the national influence, from serving as convention delegates, directs the States to coordinate its delegate lists with the House and Senate, and confers the same immunity from arrest upon convention delegates, for the duration of the convention, that article I, section 6 of the Constitution confers upon Members of Congress.

CONVENING OF CONVENTION

Section 8 directs each delegate to the convention to subscribe to an oath by which he commits himself, during the conduct of the convention to "comply with the Constitution of the United States and the provisions of this act." As I discussed earlier, I do not believe that the concept of a "limited" convention is precluded in any manner by article V. The purpose of this purposely broad oath is simply to give effect to any limitations that may have been placed upon a convention by Congress acting on behalf of the States. Since the provisions of the "Constitutional Convention Implementation Act purport to represent congressional interpretation of the provisions of article V, it is perhaps unnecessary to specify compliance with these as part of the delegate oath. I felt, however, that

specificity was desirable in order to clarify that Congress is acting wholly within its appropriate authority in filling in the gaps of article V, and that the delegates to the convention themselves are not empowered to alter this interpretation.

Administering the oath of office to the delegates would be that chief justice serving on a State supreme court with the greatest seniority in that position. Rather than having the Vice President, or the Chief Justice of the United States fill this function, it is my belief that what is basically a State convention should remain that and not run any unnecessary risks, however remote, of being influenced by national officials. I stress the basic purpose for including the convention method of amendment in article V—the need for the States to be able to amend the Constitution in the face of an intransigent national Government.

CONVENTION PROCEDURES

Section 8 also states clearly that the convention itself is to have responsibility for drawing up its own rules of procedures, rather than Congress. No Federal funds whatsoever may be appropriated specifically for the purposes of payment of the expenses of the convention, except that the Administrator of the General Services Administration is authorized to provide facilities for the convention. At the request of the convention, the Federal Government is also permitted to provide sundry information and assistance to the convention.

Section 9 creates a single exception to the convention's prerogatives to determine its own rules by specifying that each delegate is to be entitled to a single vote on all questions before the convention.

The section also provides that the convention is to maintain a daily verbatim record of proceedings, analogous to the Congressional Record. All records of official proceedings are to be transmitted by the convention to the National Archives within 30 days following termination of the proceedings of the convention.

Section 10 again underscores the premise of this act that a "limited" convention to amend the Constitution may properly be called. It restates what is already implicit in the act that a convention called under its terms may not propose amendments of a "general subject" different from that stated in the convention's charter—the resolution approved by Congress. The convention exercises no legitimate governmental authority beyond that granted by the States through Congress. The convention is morally obliged to limit its considerations to the subjects set forth in the State applications; I believe further that it is appropriate for Congress to establish a legal obligation to this same effect.

SUBMISSION OF AMENDMENTS TO STATES

Section 11 concerns the procedures through which the convention product is submitted to the States for ratification. Within 30 days after the completion of the convention, its Presiding Officer is to transmit the exact text of any proposed amendments to Congress. The officers of each House, within 30 more days of continuous session, are to transmit the amendments to the General Services Administrator who, in turn, is to submit the amendments to the States. The amendments are to be accompanied by a congressional resolution specifying, pursuant to article V, the mode of ratification—whether it is to be ratified by the State legislatures or by special ratifying conventions within each of the States.

Congress may refuse to transmit an amendment and resolution to the States, through the GSA, only if it makes the determination that the amendment "relates to or includes" a general subject which differs from or was not included as one of the general subjects within the scope of the convention's authority. The objective is to provide some remedy to a failure by the convention to honor the limitations on its authority to propose amendments to the Constitution. Congress has no power whatsoever to refuse to submit an amendment because of disagreement with its substantive merits. Nor is it empowered to refuse to submit an amendment because of what it perceives as procedural irregularities in the proceedings of the convention. Convention procedure is not within the ambit of congressional concern; checks upon procedural abuse must come from the States themselves in the form of the ratification process. Because this check also exists with respect to conventions acting in an ultra vires manner, it is hoped that Congress will resolve any doubts as to whether or not the convention acted within the scope of its authority in favor of an affirmative finding.

RATIFICATION OF AMENDMENTS

Section 12 of the act, borrowing language directly from article V, states simply that amendments proposed by "limited" constitutional conventions are to become part of the Constitution when ratified in accordance with the terms of article V—by three-fourths of the States in a timely and proper manner. Certified copies of the ratification document are to be forwarded by the States to the General Services Administration, although the ratification itself becomes effective once action is completed within the State legislation, *Dillon* v. *Gloss* 256 U.S. 368 376 (1921).

Section 13 expressly holds that the States are free to reconsider and reverse their ratification decisions, at least until that point that an amendment has been ratified by three-fourths of the States. Thus, any State may ratify a proposed amendment after having previously rejected it, or may rescind an earlier ratification of a proposed amendment. It is again my view that the most reliable determination of the existence (or lack thereof) of a "contemporaneous consensus" can be made if the States are free to reconsider and rethink their ratification decisions until that point that three-fourths of the States are in agreement in support of amendment, or until that point that a "reasonable" period of time has passed for ratification. My views on the matter of rescission of ratifications are discussed at far greater length in the Congressional Record of October 4, 1978, at pages S17043–S17045.

Section 14 imposes upon the General Services Administrator the duty to proclaim the final ratification of an amendment once it is in receipt of certifications of ratification from three-fourths of the States. As section 16 clarifies, however, this is an administrative duty of a symbolic nature, not one with an impact upon the actual effectiveness of an amendment. Under article V (and section 16), the amendment becomes part of the Constitution at the moment the final State has ratified, or on any date specified in the body of the amendment itself.

JUDICIAL REVIEW

Finally, section 15 discusses the role of the judicial branch in the constitutional convention process. It establishes two express situations in which an aggrieved State may bring a direct action in the Supreme Court, pursuant to article III, section 2 of the Constitution. The first involves cases in which a State disputes any determination or finding by Congress, or the failure of Congress to make a determination or finding, with respect to its section 6 responsibilities. Section 6 requires Congress to "call" a convention upon determining the existence of valid applications for such a convention from two-thirds of the States.

The second situation involves cases in which Congress' actions with respect to its section 11 responsibilities are questioned. Section 11 requires Congress to submit amendments proposed by the convention to the States unless it determines that the convention acted on subject matter outside the purview of its authority.

Section 15(c) expressly states that these two actions may not be inclusive concerning the right to a Supreme Court hearing, and that nothing in the act is intended to preclude such review "as is otherwise provided by the Constitution or any other law of the United States." Section 15 further requires suit to be brought within 60 days of a claim, either against the Secretary of the Senate and the Clerk of the House, the General Services Administrator, or "such other parties as may be necessary to afford the relief sought."

Thus, I would reject that version of the so-called "political questions" doctrine that suggests that all interpretative matters deriving from article V are to be resolved by Congress solely at its discretion. I find it ironic that so many individuals who have been so sympathetic to the advance of judicial activism in recent years are also those who would deny the Federal courts, particularly the Supreme Court, their constitutional obligation to interpret the plain language of that document. My views on the "political questions" doctrine are explained more thoroughly in the Congressional Record of October 4, 1978, at pages S17044–5.

CONCLUSION

Mr. President, the convention method of constitutional amendment has been defended and described as an essential component of our Constitution by such men as James Madison, Alexander Hamilton, George Washington, Benjamin

Franklin, and Abraham Lincoln. While no amendment has ever been ratified that has been proposed through this method, it has nevertheless exerted its influence in indirect ways. The 17th amendment to the Constitution, for example—providing for the direct election of U.S. Senators—was proposed by Congress in 1912 in response to an effort in the States to call a convention on this subject. Other convention efforts on such matters as Federal tax limitations and State legislative apportionment have also evoked a significant congressional response. It is clear, too, that the present "balanced budget" movement is having an impact upon national public policy.

It is necessary, however, in order to insure some measure of symmetry in the alternative amendment processes under article V to establish some clear-cut procedures for resort to the convention method. While the absence of legislation such as the "Constitutional Convention Implementation Act" will not preclude the States from exercising their right to call a convention, it will insure that the amendment process will become bogged down in constant litigation, partisan political decisions, and uncertainty. The primary effect of this can only be to undermine the integrity of our constitutional system. In the process, also, we will be eroding one of the basic elements for preserving some semblance of balance between the national and the State governments, as observed by Alexander Hamilton:

"The most powerful obstacle to the Members of Congress betraying the interest of their constituents is the State legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of Federal encroachments and armed with every power to check the first essays at treachery."

While there is no one who respects more than I do the achievement of the Founding Fathers, nor anyone who would place a greater burden of proof upon those who propose to alter the Constitution, I would nevertheless agree with Malcolm Eiselen who stated (in 1937):

"To assume, as many apparently do, that a second convention could alter the Constitution only for the worse . . . is an unwarrantable libel upon the creative statesmanship and political sagacity of the American people."

A more contemporary observer has noted:

"To those who fear a 'runaway convention', it need only be observed that the only group threatening to run away with it so far is Congress itself."

The purpose of the "Constitutional Convention Implementation Act" is to prevent both Congress and the Constitutional Convention from acting outside the scope of each of their proper authority. It is designed to insure that the States, in the event that Congress remains intransigent with respect to some deeply felt public problem, are able to circumvent Congress and act on their own to remedy such a situation. It is designed also to insure that the States—and Congress—are not forced to surrender totally their sovereignty to the Convention. It is designed to insure that the same matrice of constitutional checks and balances are applicable to the Constitutional Convention as to the other more permanent institutions within our governmental system. There can be no "runaway" Convention unless, ultimately, the dissatisfactions of the people are so broad and pervasive that it is a "runaway" Convention that they expressly request. The best way that Congress can work to insure that this never becomes the case is to allow the people and the States to work their will under established procedures when their grievances are more narrow, rather than allowing them to fester as a result of contrived "procedural irregularities." It is occasionally sobering to some of my colleagues, yet it is true, that ultimately it is the citizenry, not Congress, that is the responsible party in our political system.

Mr. President, I ask unanimous consent that the text of the bill be printed in the Record.

There being no objection, the bill was ordered to be printed in the Record, as follows:

S. 1710

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. (a) The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing

one or more specific amendments to the Constitution of the United States and stating the general subject of the amendment or amendments to be proposed.

(b) The procedures provided by this Act are required to be used whenever application is made to the Congress, under article V of the Constitution of the United States, for the calling of any convention for the purposes of proposing one or more specific amendments to the Constitution of the United States each applying State stating in the terms of its application the general subject of the amendment or amendments to be proposed.

APPLICATION PROCEDURE

SEC. 3. (a) For the purpose of adopting or withdrawing a resolution pursuant to section 2 and section 5 of this Act, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, except that the action shall be valid without the assent of the Governor of the State.

(b) Questions concerning the State legislative procedure and the validity of the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or, if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution, the exact text of the resolution signed by the presiding officer of each house of the State legislature, the date on which the legislature adopted the resolution, and a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution; and

(2) to the extent practicable, a list of all State applications in effect on the date of adoption whose subject or subjects are substantially the same as the subject or subjects set forth in the application.

(c) Within ten day after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is presenting officer, identifying the State making application, the general subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States.

EFFECTIVE PERIOD OF APPLICATION

SEC. 5. (a) An application submitted to the Congress by a State, unless sooner withdrawn by the State legislature, shall remain effective for the lesser of the period specified in such application by the State legislature or for a period of seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same general subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 6 of this Act, calling for a constitutional convention.

(b) A State may withdraw its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of withdrawal in conformity with the procedures specified in sections 3 and 4 of this Act, except that no such withdrawal shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-third or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same general subjects.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each general subject. Whenever applications made by two-thirds or more of the States with respect to the same general subject have been received, the Secretary and the Clerk shall so report within five days, in writing to the officer to whom those applications were transmitted, and such officer within five days thereupon shall announce on the floor of the House of which he is an officer the substance of such report. It shall then be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same general subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same general subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that general subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention, and (2) set forth the general subject of the amendment or amendments for the consideration of which the convention is called. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than six months after adoption of the resolution.

DELEGATES

SEC. 7. (a) Each State shall appoint, in such manner as the legislature thereof may direct, a number of delegates, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed as delegate. Any vacancy occurring in a State delegation shall be filled by appointment of the legislature of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the President of the Senate and the Speaker of the House of Representatives the name of each delegate elected or appointed by the legislature of the State pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

CONVENING THE CONVENTION

SEC. 8. (a) Of those persons serving as chief justices of the State supreme courts, the person who is senior in years of service as such a chief justice shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to comply with the Constitution of the United States and the provisions of this Act. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) No Federal funds may be appropriated specifically for the purposes of payment of the expenses of the convention.

(c) The Administrator of the General Services shall provide such facilities, and the Congress and each executive department, agency, or authority of the United States, including the legislative branch and the judicial branch, except that no declaratory judgment may be required, shall provide such information and assistance as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. No convention called under this Act may propose any amendment or amendments of a general subject different from that stated in the concurrent resolution calling the convention.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b)(1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of thirty days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (A) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the mode of ratification in which such amendment shall be ratified or (B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment relates to or includes a general subject which differs from or was not included as one of the general subjects named or described in the concurrent resolution of the Congress by which the convention was called. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligation imposed upon them by the first sentence of this paragraph.

(2) For purposes of paragraph (1) of this subsection, (A) the continuity of a session of the Congress shall be broken only by an adjournment of the Congress sine die, and (B) the days on which either House is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of the period of thirty days.

(c) Upon rectipt of any such proposed amendment to the Constitution, the Administrator shall transmit forthwith to each of the several States a duly certified copy thereof, a copy of any concurrent resolution agreed too by both Houses of the Congress which prescribes the mode in which such amendment shall be ratified, and a copy of this Act. Such concurrent resolution may also prescribe the time within which such amendment shall be ratified in the event that the amendment itself contains no such provision. In no case shall such a resolution prescribe a period of ratification of less than four years.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified consistent with the provisions of article V of the Constitution of the United States.

(b) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy

of the State action ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

JUDICIAL REVIEW

SEC. 15. (a) Any State aggrieved by any determination or finding, or by any failure of Congress to make a determination or finding within the periods provided, under section 6 or section 11 of this Act may bring an action in the Supreme Court of the United States against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. Such an action shall be given priority on the Court's docket.

(b) Every claim arising under this Act shall be barred unless suit is filed thereon within 60 days after such claim first arises.

(c) The right to review by the Supreme Court provided under subsection (a) does not limit or restrict the right to judicial review of any other determination or decision made under this Act of such review as is otherwise provided by the Constitution or any other law of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 16. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

Excerpt
Senate Hearings, Committee on the Judiciary
TAXES ON INCOMES, INHERITANCES, AND GIFTS
April 27, 1954

CHAPTER VI

CONSTITUTIONAL AMENDMENT BY CONVENTION [1]

The Constitution of the United States, Article V, providing an amending process reads as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Of the four possible ways of amending the Constitution, only two have been used. All amendments except the twenty-first were initiated by two-thirds vote of both Houses of Congress and ratified by the legislatures of three-fourths of the States. The twenty-first amendment was initiated in the same manner as the others but was ratified by conventions in three-fourths of the States. So far the Congress has never called a convention to propose amendments.

Consideration of the provision for initiation of amendments by a convention called by Congress at the petition of two-thirds of the State legislatures raises a number of questions. How did the provision come to be included in the Constitution? How frequently, and on what subjects, have State legislatures petitioned Congress for a convention? To what extent does it lie within the discretion of Congress to determine when a convention shall be called? How close together in time and in subject matter must petitions be to count toward the requisite two-thirds? What is the effect of a resolution rescinding a petition? If Congress should decide to call a convention, how would it be organized? Could its powers be limited?

It is hoped that the discussion which follows will throw some light on the above and related questions, although it does not purport to answer them definitively. An attempt has been made to summarize the more significant historical information, to outline the major constitutional issues, and to analyze the various possible lines of argument with respect to each of these issues.

ARTICLE V IN THE CONSTITUTIONAL CONVENTION OF 1787

On May 29, 1787, shortly after the Constitutional Convention had met and organized, Edmund Randolph of Virginia and Charles Pinckney of South Carolina presented general plans for a new Constitution. In both plans the States were given a voice in the initiation of con-

[1] Prepared by Legislative Reference Service, Library of Congress.

stitutional amendments. Article 13 of the so-called Virginia plan, presented by Randolph, stated simply—

that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto. [2]

Article 16 of the Pinckney plan, which closely resembled the amending procedure finally adopted, read as follows:

If two-thirds of the legislatures of the States apply for the same, the legislature of the United States shall call a convention for the purpose of amending the Constitution—or should Congress with the consent of two-thirds of each House propose to the States amendments to the same—the agreement of two-thirds of the legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.

The ratifications of the conventions of — States shall be sufficient for organizing this Constitution.[3]

When article 13 of the Randolph plan was discussed in Committee of the Whole House on June 11, Madison reported that—

Several Members did not see the necessity of the resolution at all, nor the propriety of making the consent of the National Legislature unnecessary.

Colonel Mason and Randolph supported the resolution, Colonel Mason arguing that—

It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

The Convention (in committee) then voted to postpone consideration of the words "without requiring the consent of the National Legislature," and passed the other provision in the clause. This vote was ratified by the Convention on July 23.[4]

When the Committee on detail reported on August 6, the amending provision (article XIX) was worded as follows:

On the application of the legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a convention for that purpose.[5]

On August 30, article XIX was agreed to, with no opposition, although Gouverneur Morris suggested that the National Legislature should be left at liberty to call a convention whenever it pleased.[6]

Then, on September 10, only a week before the Convention adjourned, Elbridge Gerry moved to reconsider article XIX. "This Constitution" he said "is to be paramount to the State constitutions. It follows, hence, from this article that two-thirds of the States may obtain a convention, a majority of which can bind the Union to innovations that may subvert the State constitutions altogether." Hamilton seconded the motion, but on the grounds that "the State legislatures will not apply for alterations, but with a view to increase their own powers"; he wanted the National Legislature to be given power to call a convention, on the vote of two-thirds of each branch. Madison made an interesting observation on the vagueness of the

[2] Max Farrand (ed.), The Records of the Federal Convention (New Haven, 1937), vol. I, p. 22. The account of the convention proceedings contained in this section is taken from Farrand's four-volume work. For a detailed discussion of the history of article V in the convention, see Paul J. Scheips, The Significance and Adoption of Article V of the Constitution, Notre Dame Lawyer, vol. 26, pp. 46–67 (Fall, 1950).
[3] Farrand, III, p. 601.
[4] Farrand, I, pp. 202–3; II, p. 84.
[5] Farrand, II, p. 188.
[6] Ibid., pp. 467–8.

wording of article XIX: "How was a convention to be formed? By what rule decide? What the force of its acts"? Following this discussion the Convention voted to reconsider, nine States to one, New Hampshire being divided.[7]

Sherman then moved to add the words: "or the legislature may propose amendments to the several States for their approbation; but no amendments shall be binding until consented to by the several States."[8] After this motion had been amended by inserting "three-fourths of" before "the several States" (in the proviso), Madison moved to postpone consideration of the amended proposition to take up the following:

> The Legislature of the United States whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States.[9]

With the slavery proviso added, Madison's proposition passed, nine States to one, with New Hampshire's vote again divided.

When the committee of style reported on September 12 the amending article was worded as follows:

> The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, that no amendment which may be made prior to the year 1808 shall in any manner affect the — and — sections of article —.[10]

This article was not taken up until September 15, when the Constitution was ordered to be engrossed. Sherman wanted more protection of the rights of the States. Mason thought the proposed amendment procedures "exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."[11]

Morris and Gerry moved to amend, to require a convention on application of two-thirds of the States.

Madison "did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States, as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided."[12]

The motion of Morris and Gerry was then unanimously agreed to.

On this same day, after being further amended to safeguard the equal representation of the States in the Senate, article V, along with the other provisions of the Constitution, was ordered to be engrossed.[13]

[7] Ibid., pp. 557–8.
[8] Ibid., p. 558.
[9] Ibid., p. 559.
[10] Ibid., p. 602.
[11] Ibid., p. 629.
[12] Ibid., pp. 629–30.
[13] Ibid., pp. 630, 633.

The history of article V is an erratic one, and the recorded debate concerning its provisions is scanty. It is interesting to note, however, that the participation of the States in the process of initiating amendments appears to have been taken for granted. There were differences of opinion as to the desirability of having any provision for amendment, and, if there was to be one, of excluding the National Legislature from having a voice in it. With regard to State participation in the proposal of amendments, however, the only real point at issue was what form it should take.

PREVIOUS USAGE OF THE STATE PETITION PROCEDURE [14]

The contrast between the apparent expectation of the framers as to the importance of State initiation of amendments and the actual use made of the procedure is startling. General petitions were presented to Congress in 1789 by New York and Virginia.
The next petition, also general in nature, was by Georgia in 1833. Later in the same year Alabama petitioned with respect to an amendment against the protective tariff. Shortly before the Civil War six State legislatures petitioned for the calling of a drafting convention.[15] These 10 petitions appear to have constituted the entire output for over 100 years.

In the past 50 years petitions have been much more numerous. The largest number of petitions so far recorded on a single subject called for a convention to initiate an amendment providing for the popular election of Senators. A total of 55 petitions were adopted, representing 29 State legislatures. This movement took place chiefly between 1901 and 1911. In second place comes the current income-tax limitation proposal, on which 24 States have petitioned. Beginning with New York in 1906, 18 States petitioned for a convention on the subject of prohibiting polygamy. These are the only three subjects on which a substantial number of petitions have been recorded. One to half a dozen petitions have been adopted on a wide range of subjects, including antitrust control, repeal of the eighteenth amendment, taxation of tax-exempt securities, regulation of hours of labor and minimum wages by Congress, method of apportionment and presidential tenure. In addition, several legislatures have adopted petitions calling for a convention without specifying any object. Altogether there appear to have been over 100 petitions in the last half century, but many of these represent second and third petitions from several of the State legislatures on the subject of popular election of Senators.

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[14] Information in this section concerning petitions adopted up to 1930 is based chiefly on Federal Constitutional Convention, Senate Document No. 78, 71st Cong., 2d sess. (1930) and Wayne B. Wheeler, "Is A Constitutional Convention Impending?", Illinois Law Review, Vol. 21, pp. 782 ff. (Apr. 1927). Petitions on the income tax proposal are listed in Appendix A of this report. The following list of additional petitions is not intended to be complete: Taxation of securities, previously tax-exempt, by federal government: Idaho 1928, C. R. 69:455; California, 1935, C. R. 79:10814. General constitutional convention: Wisconsin, 1929, C. R. 71:2590, 3369. Repeal of Eighteenth Amendment: Massachusetts, 1931, C. R. 74:45; New York, 1931, C. R. 75:48; Wisconsin, 1931, C. R. 75:57; Rhode Island, 1931, C. R. 75:495–6; New Jersey, 1932, C. R. 75:3299. Regulation of wages and hours by Congress in intrastate commerce: California, 1935, C. R. 79:10814. Change of method of apportionment of congressmen: Iowa, 1941, C. R. 87:2494. Limitation of presidential tenure (either action by Congress or by convention requested): Iowa, 1943, C. R. 89:2516, 2728; Illinois, 1943, C. R. 89:2516–7. Distribution of Federal revenues (see ch. II, this report): Nebraska, 1949, C. R. 95:7893–4; Iowa, 1951, C. R. (daily), Apr. 17, pp. 4045–6; Maine, 1951, C. R. (daily), June 4, pp. 6186–7; New Hampshire, 1951, C. R. (daily), Aug. 28, pp. 10920–31; New Mexico, 1952, C. R. (daily), Feb. 11, 1962. In view of the difficulties in tabulating petitions—one of which is that petitions are not always presented to Congress—most of the figures in this section must be regarded as approximate.

[15] Herman V. Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History (Washington, U. S. Government Printing Office, 1897), p. 283. (H. Doc. No. 353, pt. 2, 54th Cong.)

Only in the case of the provision for popular election of Senators has the petition procedure proved influential in amending the Constitution. The seventeenth amendment was, of course, initiated by Congress, but between 1894 and 1902 the Senate four times blocked passage of resolutions adopted by the House.[16] Following the flood of State petitions for the calling of a convention the Senate finally concurred in the resolution initiating the amendment.

The history of the State petition procedure suggests that from a political standpoint it is nearly always simpler for the advocates of an amendment to concentrate their efforts on persuading Congress to initiate it by a two-thirds vote of both Houses than to secure the adoption of petitions by the legislatures of two-thirds of the States. The exception in the case of the seventeenth amendment is easily explained by the Senate's direct involvement in the proposal. At the same time, the sharp rise in the number of petitions in the past 50 years—some 10 times the number in the first 100 years—makes one hesitate to predict that it will continue to be a vehicle for lost causes.

WHEN IS A CONVENTION TO BE CALLED?

In providing that—

> The Congress * * * on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments * * *.

Article V leaves unanswered many important questions. How closely must petitions be related in time to be counted toward the necessary two-thirds? In subject matter? Should a petition be counted if it is later rescinded by the legislature? If it is vetoed by the governor? Is the role of Congress simply the ministerial one of issuing a call for a convention when two-thirds of the States have applied, or can it determine for itself the desirability of calling a convention? To what extent will the courts review the action of Congress in calling or in failing to call a convention?

1. The nature and extent of Congress' responsibilities

In the light of the history of the amending article in the Constitutional Convention, it is reasonably clear that when two-thirds of the States have made application Congress is to call a convention, not consider whether one should be called. Our constitutional history makes it equally clear that the duty to call a convention is one to be enforced by the Congress itself. It is unlikely that the courts would attempt to compel the Congress to perform a positive act in furtherance of a constitutional obligation. Failure to call a convention would be comparable to the failure after the census of 1920 to make a reapportionment of seats in the House of Representatives, contrary to the requirement of article I, section 2.

When it comes to judicial review of action taken by Congress in calling a convention, the answer is not so clear. Specific rulings of the courts are referred to below, in connection with particular problems of interpretation. In general, it may be said that the Supreme Court has been increasingly inclined to leave to the political branches of the Government the decision of questions arising out of the amending process. In *Coleman* v. *Miller*, which presented several issues concerning the ratification of the twenty-first amendment, Mr. Justice

[16] Wheeler, op. cit., p. 786.

Black in a concurring opinion, speaking for himself and Justices Roberts, Frankfurter, and Douglas, said that article V—

> grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point. [17]

The above four members of the Court, in an opinion written by Mr. Justice Frankfurter, contended that the courts had no jurisdiction over the issues there in question. The decision in the case did not go so far. The Court took jurisdiction, but held that two of the questions involved (see below) were "political" and not "justiciable." On a third question it was evenly divided on this point.

Whether decision-making authority is ultimately held to vest in the Congress or in the courts, it is to be presumed that it will not be exercised on the basis of sheer whim. It will be useful, therefore, in discussing the various questions enumerated at the beginning of this section, to review whatever precedents may appear relevant and to indicate alternative solutions which have been or might be advanced.

2. The time element

An extremely rigid and no doubt unreasonable interpretation would be that Congress is required to call a convention only if the legislatures of two-thirds of the States petition during the life of that Congress. At the other extreme is the view that the time of making application for a convention is irrelevant. The position most commonly held, however, is that petitions ought to be "reasonably contemporaneous," so that they reflect the state of public opinion at a given time.[18] A comparable issue has arisen in connection with the ratification of amendments. In *Dillon* v. *Gloss* the Supreme Court not only upheld the 7-year time limit provided by Congress for the ratification of the eighteenth amendment, but stated that even in the absence of such express limitation:

> there is a fair implication that it [i. e., ratification] must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period.[19]

In *Coleman* v. *Miller* one of the points at issue was whether the proposal by Congress of the Child Labor Amendment had lost its validity through lapse of time. In that case nearly 13 years had elapsed between the proposal and the Kansas ratification, which was in question. The Court refused, however, in the absence of a limitation set by Congress, to take upon itself the responsibility of setting a limit. The Court's view was that:

> * * * the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress

[17] *Coleman* v. *Miller*, (307 U. S. 433, 459 (1938)).
[18] Wheeler, op. cit., pp. 792–794; Lester Bernhardt Orfield, The Amending of the Federal Constitution (Ann Arbor, 1942), pp. 41–42; and Edward S. Corwin and Mary Louise Ramsey, The Constitutional Law of Constitutional Amendment, Notre Dame Lawyer, vol. 26, pp. 194–196 (Winter, 1951).
[19] *Dillon* v. *Gloss* (256 U. S. 368, 375 (1921)).

with the full knowledge and appreciation ascribed to the national legislature of the political, social, and economic conditions which have prevailed during the period since the submission of the amendment.[20]

On the basis of this decision it would appear that Congress, while it need not require that petitions be "reasonably contemporaneous," would have ample authority and justification to so require.

3. Subject matter of petitions

Does article V mean that Congress is to call a convention whenever two-thirds of the States apply, regardless of the subject matter of the petitions? Some writers have contended that it does. Wheeler comments as follows:

* * * Even where 32 State legislatures made application for a convention, each requesting a different amendment it might be considered sufficient to call a convention on the ground that they conclusively showed a widespread demand for changes in Government, provided, of course, the resolutions of the State legislatures were sufficiently concurrent in point of time.

The nature of the right conferred upon the State legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition. The statements of the purposes and objects underlying the petition would have no legal effect except as they indicated to any convention assembled the wishes of the people in regard to proposed changes. It would therefore appear that under article V, whenever two-thirds of the State legislatures apply to Congress, it becomes the duty of Congress to call a convention if the petitions were passed within a reasonable time.[21]

Corwin and Ramsey express a contrary view:

* * * To be obligatory upon Congress, the applications of the States should be reasonably contemporaneous with one another, for only then would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and *by the same token, they ought also to be expressive of similar views respecting the nature of the amendments to be sought.*[22]

This question would seem to be eminently political in nature, as much or more so than the question of relation in time. Congress would appear to have ample justification for requiring general similarity of purpose, should it so desire, but whatever decision it might make would in all probability be sustained.

4. The effect of rescinding action

A number of the State legislatures which petitioned for a convention on the tax-limitation proposal later rescinded their petitions.[23] Do these States count toward the required two-thirds?

In *Coleman* v. *Miller* the Supreme Court dealt at some length with the effect both of previous rejection and of attempted withdrawal of ratifications by State legislatures. The Court found that in practice the political departments of the Government had "determined that both were ineffectual in the presence of an actual ratification."[24] The Court's actual holding in this case, however, was that—

the question of the efficacy of ratifications by State legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."[25]

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[20] *Coleman* v. *Miller* (307 U. S. 433, 453–4 (1938)).

[21] Wheeler, *op., cit.* p. 795. In 1929 Wisconsin presented a resolution to Congress, asking that Congress, having received petitions for a convention from 35 different States, proceed with the call for a convention. The petitions referred to covered a variety of subjects and a period of approximately 100 years.

[22] Corwin *and* Ramsey, *op. cit.*, pp. 195–196. [Italics added.]

[23] See appendix A.

[24] *Coleman* v. *Miller* (307 U. S. 433, 449 (1938)).

[25] Ibid., 450.

Corwin and Ramsey find the legislative precedent less certain than the above opinion indicates.[26] Apart from this, it may be questioned whether the attempted withdrawal of a ratification is strictly comparable to the withdrawal of a petition requesting Congress to call a convention. Ratification of a proposed constitutional amendment might be considered a more formal and irrevocable action than the adoption of a petition.

5. Procedure in petitioning

In two instances petitions relating to the proposed tax limitation were vetoed by the Governor of the State. This raises the question, What is meant by the term "legislature" as used in article V?

It has been held by the Supreme Court that the term "legislature" means the representative body which makes the laws, and that the holding of a popular referendum on ratification of an amendment is inconsistent with article V.[27] Approval of the governor has been regarded as unnecessary,[28] although there has been no clear-cut decision to that effect. Many other procedural issues, such as applicability of State constitutional provisions relative to a quorum, and the right of the lieutenant governor to cast a vote in case of a tie, remain unsettled, even as regards ratification. In *Coleman* v. *Miller* the Supreme Court was equally divided as to whether or not the latter question was "political." The effect in this instance was to uphold the decision of the lower court, which had sustained the lieutenant governor's participation in the vote.[29]

ORGANIZATION AND POWERS OF CONVENTION

Neither the wording of article V nor the debates in the Constitutional Convention shed any light on the numerous problems that would arise should Congress decide to call a convention. It seems to be the view that Congress would possess the implied power to regulate all matters concerning the composition of the Convention, should it choose to do so. This would include the determination as to whether the delegates should represent the States, or the Nation at large.[30] It has been suggested that Congress would probably prefer to address the call to the States and leave to them the method of selecting delegates.[31] This, of course, was the method followed in calling the Convention of 1787, in which voting was by States.

Doubt has been expressed that either the petitioning States or the Congress could restrict the powers of a constitutional convention. Orfield's view is as follows:

> * * * Where the States apply for a convention for general purposes, it would seem that the convention would be free to draft a new document. But even though the application were for a limited purpose, it would seem that the State legislatures would have no authority to limit an instrumentality set up under the Federal Constitution. In reality, the right of legislatures is confined to applying for a convention, and any statement of purposes in their petitions would be irrevelant as to the scope of powers of the convention. Inasmuch as Congress issued the call simply on the basis of the application of the State legis-

[26] Corwin and Ramsey, op. cit., pp. 202 ff.
[27] *Hawke* v. *Smith* (253 U. S. 221 (1920)).
[28] Corwin and Ramsey, op. cit., p. 207.
[29] *Coleman* v. *Miller* (307 U. S. 433, 446-447).
[30] Orfield, op. cit., pp. 43-44, and Wheeler, op. cit., p. 798.
[31] Wheeler, op. cit., pp. 798-799.

latures, there would seem to be no warrant for an attempt by Congress to limit the changes proposed. The primary and in fact the sole business of the convention would be to propose changes in the Constitution. In this sphere the only limitation on it would seem to be article V.[32]

[32] Orfield, op. cit., pp. 44–55. Wheeler is of the same opinion: op. cit., p. 795 ff., especially pp. 96.
See, however, this report, ch. II, for a provision in the proposed amendment controlling the distribution of tax moneys which attempts to limit the power of the convention to the purpose specified. In justification of this limitation, the proposed amendment uses the following language:
"That since this method of proposing amendments to the Constitution has never been completed to the point of calling a convention and no interpretation of the power of the States in the exercise of this right has ever been made by any court or any qualified tribunal, if there be such, and since the exercise of the power is a matter of basic sovereign rights and the interpretation thereof is primarily in the sovereign government making such exercise and since the power to use such right in full also carries the power to use such right in part the legislature of the State of Nebraska interprets article V to mean that if two-thirds of the States make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would have power only to propose the specified amendment and would be limited to such proposal and would not have power to vary the text thereof nor would it have power to propose other amendments on the same or different propositions" (Congressional Record, June 20, 1949, vol. 95, pp. 7893–7894).

APPENDIXES

APPENDIX A

ITEM 1.—*State legislative action on the proposed 25-percent limitation amendment*

Year of adoption	States	Status of resolution		
		Rescinded	Vetoed by Governor	In effect
1939	Wyoming			Wyoming.
1940	Mississippi			Mississippi.
	Rhode Island	Rhode Island (1949).		
1941	Iowa	Iowa (1945)		
	Maine			Maine.
	Massachusetts			Massachusetts.
	Michigan			Michigan.
1943	Alabama	Alabama (1945)		
	Arkansas	Arkansas (1945)		
	Delaware			Delaware.
	Illinois	Illinois (1945)		
	Indiana			Indiana.
	New Hampshire			New Hampshire.
	Pennsylvania		Pennsylvania (1943).	
	Wisconsin	Wisconsin (1945)		
1944	Kentucky	Kentucky (1946)		
	New Jersey			New Jersey.
1950	Louisiana			Louisiana.
1951	Florida			Florida.
	Kansas			Kansas.
	Montana		Montana (1951)	
	Nevada			Nevada.
	Utah			Utah.
1952	Georgia			Georgia.
Total	24	7	2	15.

Source: Legislative Reference Service, Library of Congress, Feb. 21, 1952.

ITEM 2.—*Status of State actions to place a 25 percent maximum rate on incomes, estates, and gifts* [1]

States	Endorsing	Rescinding	Congressional Record	
			Endorsing	Rescinding
Alabama	July 8, 1943 (H. J. Res. 66).	June 13, 1945 (H. J. Res. 10).	Vol. 89, pp. 7523-7524.	None.
Arkansas	April 1943 (H. J. Res. 10).	Jan. 18, 1945 (H. Con. Res. 4).	Daily, Feb. 4, 1952, p. 752.	Vol. 91, p. 11209.
Delaware	Apr. 22, 1943 (S. Con. Res. 6).		Vol. 89, p. 4017	
Florida	May 5, 1951 (S. Con. Res. 206).		Daily, May 10, 1951, p. 5273.	
Georgia	Feb. 6, 1952		Daily, Feb. 18, 1952, p. 1076.	
Illinois	May 26, 1943 (H. J. Res. 32).	1945 (H. J. Res. 7)	Daily, Feb. 4, 1952, p. 752.	Daily, Feb. 4, 1952, p. 752.
Indiana	Mar. 2, 1943 (H. Con. Res. 10).		Daily, Feb. 18, 1952, p. 1075.	
Iowa	Feb. 14, 1941 (H. Con. Res. 15).	Mar. 14, 1945 (H. Con. Res. 9).	Vol. 87, p. 3172	None.
Kansas	Mar. 21, 1951 (S. Con. Res. 4).		Daily, Mar. 28, 1951, p. 3026.	
Kentucky	Mar. 20, 1944 (H. R. 79).	Apr. 12, 1946 (S. Res. 43).	Vol. 90, p. 4040	Daily, Sept. 6, 1951, p. 11195.
Louisiana	June 12, 1950 (H. Con. Res. 24).		None	
Maine	Apr. 17, 1941		Vol. 87, pp. 3370-3371.	
Massachusetts	Apr. 29, 1941 (S. 658).		Vol. 87, pp. 3812-3813.	
Michigan	May 16, 1941 (S. Con. Res. 20).		Vol. 87, p. 8904	
Mississippi	Apr. 29, 1940 (S. Con. Res. 14).		Vol. 86, p. 6025	
Montana	Feb. 1951 (H. J. Res. 4).		Daily, Mar. 16, 1951 p. 2613 vetoed).	
Nevada	Mar. 1951 (S. J. Res. 5).		None	
New Hampshire	Apr. 24, 1943		Vol. 89, p. 3761	
New Jersey	Feb. 25, 1944 (S. J. Res. 3).		Vol. 90, p. 6141	
Pennsylvania	June 7, 1943 (H. R. 50).		Vol. 89, p. 8220 (vetoed).	
Rhode Island	Mar. 15, 1940 (S. 80).	May 3, 1949 (H. 548).	Vol. 86, p. 3407	None.
Utah	1951 (H. J. Res. 3)		Daily, Feb. 11, 1952, p. 962.	
Wisconsin	Apr. 1943 (J. Res. 75).	Jan. 1945 (J. Res. 114).	Vol. 89, p. 7525	None.
Wyoming	Feb. 23, 1939 (H. J. Memorial 6).		Vol. 84, p. 2509	

[1] As of Feb. 21, 1952.

APPENDIX B

FORMS OF RESOLUTIONS ACTED ON BY VARIOUS STATES

Petition adopted by *Arkansas*, 1943; Delaware, 1943; Indiana, 1943; *Iowa*, 1941; Mississippi, 1940; New Hampshire, 1943; Pennsylvania, 1943;[1] and Wyoming, 1939. [States italicized have rescinded their petitions.]

SECTION 1. The sixteenth amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration; provided that in no case shall the maximum rate of tax exceed 25 percent.

SECTION 3. The maximum rate of any tax, duty, or excise which Congress may lay and collect with respect to the devolution or transfer of property, or any

[1] Vetoed by the governor.

interest therein; upon or in contemplation of death, or by way of gift, shall in no case exceed 25 percent.

SECTION 4. Sections 1 and 2 shall take effect at midnight on the 31st day of December, following the ratification of this article. Nothing contained in this article shall affect the power of the United States to collect any tax on any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect.

Petition Adopted by *Alabama*, 1943; Florida, 1951; Georgia, 1952; *Illinois*, 1943; Kansas, 1951, Kentucky, 1944; Louisiana, 1950; Maine, 1941; Massachusetts, 1941; Michigan, 1941; *Rhode Island*, 1940; Utah, 1951; and, Wisconsin, 1943. [States italicized have rescinded their petitions.]

SECTION 1. The sixteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration: *Provided*, that in no case shall the maximum rate of tax exceed 25 percent.

SECTION 3. The maximum rate of any tax, duty, or excise which Congress may lay and collect with respect to the devolution or transfer of property, or any interest therein, upon or in contemplation of or intended to take effect in possession or enjoyment at or after death, or by way of gift, shall in no case exceed 25 percent.

SECTION 4. The limitations upon the rates of said taxes contained in sections 2 and 3 shall, however, be subject to the qualification that in the event of a war in which the United States is engaged creating a grave national emergency requiring such action to avoid national disaster, the Congress by a vote of three-fourths of each House may for a period not exceeding 1 year increase beyond the limits above prescribed the maximum rate of any such tax upon income subsequently accruing or received or with respect to subsequent devolutions or transfers of property, with like power, while the United States is actively engaged in such way, to repeat such action as often as such emergency may require.

SECTION 5. Sections 1 and 2 shall take effect at midnight on the 31st day of December following the ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax on incomes for any period ending on or prior to said 31st day of December laid in accordance with the terms of any law then in effect.

SECTION 6. Section 3 shall take effect at midnight on the last day of the sixth month following the ratification of this article. Nothing contained in this article shall affect the power of the United States to collect any tax on any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect.

Petition adopted by Montana,[1] 1951; Nevada,[2] 1951; and New Jersey, 1944.

SECTION 1. The sixteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. The maximum aggregate rate of all taxes, duties, and excises which the Congress may lay or collect on, with respect to, or measured by, income, however, shall not exceed 25 percent. In the event that the United States shall be engaged in a war which creates a national emergency so grave as to necessitate such action to avoid national disaster, the Congress by a vote of three-fourths of each House, may while the United States is so engaged, suspend, for periods not exceeding one year each, such limitation with respect to income subsequently accruing or received.

SECTION 3. The maximum aggregate rate of all taxes, duties, and excises which the Congress may lay or collect with respect to the devolution or transfer of property, or any interest therein, upon or in contemplation of or intended to take effect in possession or enjoyment at or after death, or by way of gift, shall not exceed 25 percent.

[1] Vetoed by the Governor.

[2] Nevada's petition asks that the Congress submit the amendment to the States for ratification. Also, the petition contains only the first three sections.

SECTION 4. Sections 1 and 2 shall take effect at midnight on the 31st day of December following the ratification of the article. Nothing contained in the article shall affect the power of the United States after said date to collect any tax on, with respect to, or measured by, income for any period ending on or prior to said 31st day of December laid in accordance with the terms of any law then in effect.

SECTION 5. Section 3 shall take effect at midnight on the last day of the sixth month following the ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax with respect to any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect.

APPENDIX C

FORMS OF RESOLUTIONS USED IN RESCINDING PREVIOUS ACTION

KENTUCKY

(S. R. 43)

A JOINT RESOLUTION repudiating, retracting, and withdrawing House Resolution No. 79 of the Regular Session of the 1944 General Assembly

Whereas, by House Resolution No. 79 of the Regular Session of the 1944 General Assembly, application was made to the Congress of the United States to call a convention for the purpose of proposing an amendment to the Constitution of the United States relating to taxes on income, inheritance, and gifts; and

Whereas, such resolution was adopted by the General Assembly under a misapprehension as to its true meaning, intent, and purpose, and without a full consideration of the results that might obtain from such action, and

Whereas, the amendment proposed in such resolution establishes a policy with regard to taxation that is contrary to the established public policy of Kentucky, and will impose the burden of taxation upon those least able to bear it: Now, therefore, be it

Resolved by the General Assembly of the Commonwealth of Kentucky, That House Resolution No. 79 of the Regular Session of the 1944 General Assembly of Kentucky is hereby repudiated and retracted, and the General Assembly hereby withdraws the same.

The Secretary of State is directed to send a duly certified copy of this resolution to the Senate of the United States and to the House of Representatives in Congress of the United States.

Passed and enrolled March 21, 1946.

ILLINOIS

OPPOSITION OF MAXIMUM INCOME TAX RATE

(H. J. Res. No. 7)

Whereas the Sixty-third General Assembly adopted House Joint Resolution No. 32 thereby making application to the Congress of the United States to call a convention for the purpose of proposing a suggested amendment to the Federal constitution, the effect of which would be to fix the maximum income tax rate at 25 percent; and

Whereas the Sixty-fourth General Assembly considers the proposal made by such resolution inadvisable and is opposed thereto: Therefore be it

Resolved by the House of Representatives of the Sixty-fourth General Assembly of the State of Illinois, the Senate concurring herein, That it express its opposition to the application and intent of the resolution set forth in the preamble hereof; and, be it further

Resolved, That the Secretary of State be directed to forward a copy of this resolution to the Senate and House of Representatives of the Congress of the United States.

Adopted by the House, March 13, 1945.

Concurred in by the Senate, March 28, 1945.

APPENDIX D

LIMITATION RESOLUTION AS INTRODUCED IN CONGRESS

82D CONGRESS
1ST SESSION

H. J. RES. 323

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 13, 1951

Mr. REED of Illinois introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States relative to taxes on incomes, inheritances, and gifts

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

"ARTICLE—

"SECTION 1. The sixteenth article of amendment to the Constitution of the United States is hereby repealed.

"SEC. 2. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. The maximum top rate (including the aggregate of all top rates) of all taxes, duties, and excises which the Congress may lay or collect on, with respect to, or measured by, income shall not exceed 25 per centum: *Provided, however*, That Congress by a vote of three-fourths of all the Members of each House may fix a rate in excess of 25 per centum, but not in excess of 40 per centum, for periods, either successive or otherwise, not exceeding one year each. In the event that the United States shall be engaged in a war which creates a national emergency so grave as to necessitate such action to avoid national disaster, the Congress by a vote of three-fourths of all the Members of each House may, while the United States is so engaged, suspend, for periods, either successive or otherwise, not exceeding one year each, such limitation with respect to income subsequently accruing or received.

"SEC. 3. The Congress shall have no power to lay or collect any tax, duty, or excise with respect to the devolution or transfer of property, or any interest therein, upon or in contemplation of or intended to take effect in possession or enjoyment at or after death, or by way of gift.

"SEC. 4. Sections 1 and 2 shall take effect at midnight on the 31st day of December following the ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax on, with respect to, or measured by, income for any period ending on or prior to said 31st day of December laid in accordance with the terms of any law then in effect.

"SEC. 5. Section 3 shall take effect at midnight of the day of ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax with respect to any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect."

APPENDIX E

EXCERPT FROM TESTIMONY, PANEL HEARINGS, JOINT COMMITTEE ON THE ECONOMIC REPORT: JANUARY 31, 1952 [1]

Representative PATMAN. I understand, Mr. Chairman, that the Colin Clark proposition, which has been mentioned by Mr. Heller, is not the same thing as the proposal that has been adopted by many State legislatures, commencing prior

[1] Hearings, January 1952, Economic Report of the President, Joint Committee on the Economic Report, pp. 344-347. Participants at the panel were the following: Arthur Smithies, Harvard; H. van Buren Cleveland, Committee for Economic Development; Walter W. Heller, University of Minnesota; Carl S. Shoup, Graduate School of Business, Columbia University, John P. Miller, Yale; Richard Musgrave, University of Michigan; Alfred G. Buehler, University of Pennsylvania; and Milton Friedman, University of Chicago.

to 1940, calling for a limitation of personal and corporate income taxes to not more than 25 percent in any one year. The Clark contention is that in the aggregate not more than 25 percent of the national income may safely be taken in taxes; is that right?

Mr. HELLER. That is correct, sir.

Representative PATMAN. I want to ask about this proposal that has been sponsored by different organizations, one in particular, before various legislatures. Now that proposal, of course, appeals to a lot of people. I have personal knowledge of a meeting in a certain city in the Southwest. They got people at this meeting who were in the high income brackets, and asked them to take a card and determine for themselves how much money they would save if there were a constitutional limitation against the collection of more than 25 percent in taxes.

Naturally, they found that they would save a lot of money if such a limitation were in effect. The person holding the meeting didn't have any trouble getting a lot of money for his fund to campaign for this limitation before the legislatures. You can see why. That is a selfish reason. We expect people to be selfish up to a point but it shouldn't interfere with the public interest.

There are other reasons, I think, why they are pushing that, but that is not so important as what effect it would have on the country. Personally, I am in favor of a balanced budget. I have always advocated that.

I would be in favor of joining with the majority of the Members of the House in staying in session and we will not adjourn this Congress until the budget is balanced. But we cannot always get done what we want done, because legislation in a democracy is a matter of give and take; compromise and adjustment.

But it occurs to me that it would be a very bad thing fof the sovereign power to have a restriction like that of 25 percent. All the States, counties and cities, the political subdivisions, are restricted by State constitutions. In the event of serious trouble, the only government that heretofore has been able to bail us out and do what is necessary would, if the limitation were adopted, be restricted in its operations. For that reason I think it would be very bad. What do you think about that, Mr. Heller?

Mr. HELLER. As you spoke, I did not find myself disagreeing with anything you said. In fact, I would go beyond it. If we actually were to cut back to 25 percent today on our existing corporate and individual income and estate taxes, we would lose—according to a rough calculation I made a year ago—around $15 billion of revenue. It would certainly be more today. Needless to say, this has to be made up somewhere.

If we follow the tax path, it leads pretty straight to a broad-based consumption tax of some kind, presumably a sales tax. This may very well be exactly what some of the backers of the 25-percent limitation amendment would have in mind. From that standpoint it runs counter to our whole tradition of progressivity in taxation and to the whole democratic structure of income distribution. Moreover, in peacetime such heavy reliance on consumption taxes would make serious inroads on the mass-consumer markets which provide the ultimate base for a full-employment economy.

Representative PATMAN. It is true that these amendments vary somewhat in form. I have read every one of them. In most of them there is a provision that in the event of war a three-fourths majority of Congress may suspend the limitation.

The CHAIRMAN. That is, that the Congress could.

Representative PATMAN. That is setting a bad example. That is endorsing minority control. In a democracy I think the majority should rule. Why should we set up any standards whereby a minority would have absolute control of the House or Senate?

For instance, we are now at war with Korea. That war, I think, was accepted by unanimous consent. I don't think a single Member of the House or Senate said a word of opposition to it until later on; when it became a little unpopular in some quarters, some began to criticize.

But now I don't know but what we would have trouble making the appropriations to carry on operations if it required three-fourths of the Members of the House and Senate.

I think that it is equally as bad in a democracy to have minority control as to have the limitation.

Mr. HELLER. As I recall, it is three-fourths of both Houses of Congress.

Representative PATMAN. That is right.

Mr. HELLER. It is not only of those present but of all Members.

Representative PATMAN. That makes it doubly bad, because it is so seldom we have all Members present in either House. Under that proposal, it has to be a constitutional three-fourths of the Members elected to that body, which wouldn't require many to obstruct absolutely.

The CHAIRMAN. And also unless the amendment established a new cloture rule for the Senate, you would never get it through.

Mr. HELLER. Mr. Patman, may I make one comment about the illusions under which I think some States are operating that have supported this amendment. I understand, by the way, the actual number whose memorials to Congress are firm and solid is only about 15 instead of the 26 claimed by the groups pushing for this amendment.

Representative PATMAN. But even those 15—I wonder if they realize this would be driving the Federal Government into the very areas of taxation that they now occupy. It really would not open up the income tax to them because they can't impose high rates of income taxation.

As I understand, some additional ones may rescind. At one time there were more States approving. I took it upon myself, just as a poor humble Member of the House, to make a few speeches and send those speeches to the 7,500 members of the legislatures of the 48 States, and some of these States that had passed this amendment actually passed an amendment stating they were opposed to it; in other words, to cancel it or wipe it off the books. They didn't want to be certified as being in favor of that type of amendment. I think it was seven States that did that.

Investigation will disclose that not a single one of those amendments has passed the legislature of a State after full, free, and fair discussion. Every one of them has passed right at the end of a session, when the opportunity for public consideration was limited.

In one legislature they were ready to pass it; maybe they were foolish in inviting me, but I went over to that legislature and answered questions. One plea I made was, like you did just now, about the taxing power. That legislature, although they were ready to pass it, decided not to pass it. If a Member as ineffective as I am can persuade them against it, I know that when the legislatures and people get the truth and logic and reason against it, very few States will pass or insist upon it. But unanswered, it has an awful appeal. It wouldn't surprise me, if the Congress submitted that amendment to the States, they would probably adopt it right off without sufficient consideration and debate on the theory that the big bureaucracy in Washington ought to be stopped, and if we stop them from taxing, we can tax in our State. It has a tremendous appeal, but when you analyze it like you have, I think the good arguments are all against it, but it is an issue that has to be met in a forthright manner right away, right now.

This committee, realizing that, has been making a study, which I hope will be available very soon, and that we can begin to circulate this information and place it where it is needed.

The CHAIRMAN. Now let me say for the record that that pamphlet is wholly objective in its purpose. It does not attempt to take sides on this issue, but does attempt to gather together in one compendium, so to speak, all of the facts which seem to have been developed so far.

Representative PATMAN. Since Senator Flanders is interested in this as well as other Members, I would like to ask if any of the other members of the panel would like to express an opinion on this proposal.

Mr. BUEHLER. Could I say a word?

The CHAIRMAN. Mr. Buehler.

Mr. BUEHLER. Pennsylvania is one of the States that passed the resolution, and Senator Martin, who was then Governor, vetoed the resolution.

Representative PATMAN. That is right.

Mr. BUEHLER. I think our Attorney General has given out the opinion unofficially that the veto would have no legal effect.

Representative PATMAN. That would be up to Congress to decide.

Mr. BUEHLER. I presume so. I thought that was a curious twist. But I think that underneath the agitation for a constitutional tax limit is not only a resistance to the higher taxes on incomes, but also a resistance to the growing Federal budget. I have had the proposed amendment explained to me as a way by which Congress would be forced into reducing the budget, keeping expenditures down. You would have available only the revenues that could be raised under

the 25 percent limitation, and therefore you would have to cut the budget. Actually, the total taxes which would be available might support a much larger budget than we now have.

The CHAIRMAN. May I interrupt to say I think from what I have seen that there is a very widespread misapprehension among at least some of those who are supporting this movement, that when the requisite number of States have passed a resolution, it will be mandatory that Congress submit such an amendment for ratification; whereas, that isn't the fact at all.

Congress would be required only to call a Constitutional Convention, and that Convention could at the same time consider and perhaps report and recommend the amendment which was suggested here this morning, that the Federal Government be given the power to tax real property within the boundaries of the several States.

Representative PATMAN. That is under article V of the Constitution, and you are exactly right about it.

Senator FLANDERS. Mr. Chairman.

The CHAIRMAN. Senator Flanders.

Senator FLANDERS. I think this thing might be resolved by a show of hands on the part of the economists. All those in favor of this constitutional amendment, you might ask them to raise their right hands, and those opposed afterwards. I can guess very clearly just how the vote would come out.

Representative PATMAN. Suppose you do that.

The CHAIRMAN. At the suggestion of the distinguished and able Senator from Vermont, the chairman invites those who are in favor of the constitutional amendment to limit to 25 percent for every individual the tax burden which may be levied in a single year upon an individual to raise their hands.

There are no hands showing.

Those who are opposed please raise their hands.

The voting is unanimously against.

APPENDIX F

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FEDERAL CONSTITUTIONAL CONVENTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETIETH CONGRESS

FIRST SESSION

ON

S. 2307

A BILL TO PROVIDE PROCEDURES FOR CALLING CONSTITUTIONAL CONVENTIONS FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, ON APPLICATION OF THE LEGISLATURES OF TWO-THIRDS OF THE STATES, PURSUANT TO ARTICLE V OF THE CONSTITUTION

OCTOBER 30 AND 31, 1967

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
88-138 WASHINGTON : 1968

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price 60 cents

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CONTENTS

PROCEDURES FOR CALLING CONSTITUTIONAL CONVENTIONS UPON APPLICATION BY STATES

MONDAY, OCTOBER 30, 1967

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, New Senate Office Building, Senator Everett McKinley Dirksen presiding.

Present: Senators Dirksen, Hruska, and Tydings.

Also present: Paul L. Woodard, chief counsel, Lawrence J. Brady, minority counsel; Prof. Philip B. Kurland, chief consultant, Prof. Robert G. McCloskey, consultant, and Prof. Alexander M. Bickel, consultant.

Senator DIRKSEN. The committee will come to order.

I will ask that there be included at this point in the hearings record the text of article V of the Constitution of the United States.

(Article V follows:)

CONSTITUTION OF THE UNITED STATES

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Senator DIRKSEN. Senator Ervin is unable to be present at today's session. I think it would be appropriate to insert into the record the statement which he made on August 17, 1967, when he introduced Senate bill 2307.

I will also ask that a copy of the bill be made a part of the record.

(The statement of Senator Ervin, and S. 2307 follow:)

REMARKS OF SENATOR SAM J. ERVIN, JR., DEMOCRAT OF NORTH CAROLINA

Mr. President, I introduce, for appropriate reference, a bill to establish procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States upon application of the legislatures of two-thirds of the States, pursuant to Article V of the Constitution.

In recent weeks there has been much information, misinformation and ignorance displayed on the subject of amending the Constitution by a convention called by the State legislatures. With the sudden realization that thirty-two State legislatures already have called for a new federal constitutional convention, many persons have concluded that the Nation is on the verge of the worst internal crisis since the Civil War. They have warned that if any such convention is called the result will surely be a constitutional nightmare. They foresee a runaway convention proposing wholesale amendments abolishing the Bill of Rights, repealing the income tax, providing for the election of the Supreme Court, and the like. Even those persons who favor a constitutional convention and view it as the highest forum for the expression of the will of the people, are quick to agree that the Congress, in seeking to implement the provision in Article V for the convening of a convention upon application of two-thirds of the States, would be virtually without precedent to guide it in answering the myriad sensitive questions involved.

Amendment of the Constitution is too important a subject to remain thus enshrouded in darkness. And I hope by introduction of this bill to evoke some light—through committee hearings—and to reduce to orderly processes the chaos, and, indeed, the anarchy, that threatens in the absence of such legislation.

At the outset I should say that the problem dealt with in this bill transcends the issue that brought it to light. It would be grossly unfortunate if the partisanship over State legislative reapportionment—and I speak as a partisan on that issue—should distort an attempt at clarification of this process for amendment of the Constitution. For certainly we must recognize that the amendment process in the long-run must command a higher obligation and duty than any single issue that might be the subject of that process.

[S. 2307, 90th Cong., 1st sess.]

A BILL To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Constitutional Convention Act."

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. The legislature of a State, in making application for a constitutional convention under article V of the Constitution of the United States, shall, after adopting a resolution pursuant to this Act, petition the Congress stating, in substance, that the legislative requests the calling of a convention for the purpose of proposing one or more amendments of a particular nature to the Constitution of the United States and stating the specific nature of the amendment or amendments to be proposed.

APPLICATION PROCEDURES

SEC. 3. (a) For the purpose of adopting or rescinding a resolution pursuant to section 2, the State legislature shall adopt its own rules of procedure.

(b) Questions concerning the State legislative procedure and the validity of the adoption of a State resolution cognizable under this Act shall be determinable by the State legislature and its decisions thereon shall be binding on all others, including State and Federal courts, and the Congress of the United States.

(c) A State resolution adopted pursuant to this Act shall be effective without approval by the Governor of the State.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within sixty days after a resolution to apply for the calling of a constitutional convention is adopted by the legislature of a State, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution,

(2) the exact text of the resolution, signed by the presiding officer of each house of the State legislature, and

(3) the date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

(c) Upon receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall cause copies to be made thereof and shall forthwith send a copy thereof to the presiding officer of each House of the legislature of every other State.

EFFECTIVE PERIOD OF APPLICATIONS

SEC. 5. (a) An application submitted to the Congress by a State pursuant to this Act, unless sooner rescinded by the State legislature, shall remain effective for six calendar years after the date it is received by the Congress, except that whenever the Congress determines that within a period of six calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 8, calling for a constitutional convention.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission in conformity with the procedure specified in sections 3 and 4, except that no such rescission shall be effective as to any application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have applications pending before the Congress seeking amendments on the same subject.

(c) The Congress of the United States shall have the sole power of determining whether a State's action to rescind its application has been timely taken.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate to maintain a record of all applications received by the President of the Senate, and it shall be the duty of the Clerk of the House of Representatives to maintain a tabulation of all applications received by the Speaker of the House of Representatives from the States for the calling of a constitutional convention upon each subject. Whenever the Secretary or the Clerk has reason to believe that such applications made by two-thirds or more of the States with respect to the same subject are in effect, he shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce upon the floor of the House of which he an officer the substance of such report. Pursuant to such rules as such House may adopt, it shall be the duty of such House to determine whether the recitation contained in any such report is correct. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention; (2) set forth the particular nature of the amendment or amendments for the consideration of which the convention was called; (3) prescribe the time within which any amendment or amendments proposed by such convention must be ratified by the legislatures of three-fourths of the States or be deemed inoperative; and (4) specify the manner in which such amendment or amendments shall be ratified in accordance with article V of the Constitution. A copy of each such resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than one year after the adoption of the resolution.

DELEGATES

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Representatives in Congress. Each delegate shall be elected or appointed in the manner provided by State law. Alternate delegates, in the number established by State law, shall be elected or appointed at the same time and in the same manner. Any vacancy occurring

in the State delegation shall be filled by appointment of one of the alternate delegates in the manner provided at the time of his election or appointment as an alternate delegate. No alternate delegate shall take part in the proceedings of the convention unless he is appointed a delegate..

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate and alternate delegate appointed or elected pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate and each alternate delegate shall receive compensation at the rate of $50 per day for each day of service and shall be compensated for traveling and related expenses in accordance with the provisions of sections 5701–5702 and 5704–5708, inclusive, of title 5 of the United States Code. The convention shall fix the compensation of employees of the convention.

CONVENING OF CONVENTION

SEC. 8. (a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe an oath not to attempt to change or alter any section, clause or article of the Constitution or propose additions thereto which have not been specified in the resolution calling the convention. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President, the President of the Senate, and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) The Congress shall appropriate moneys for the payment of all expenses of the convention.

(c) Under such regulations as the President shall prescribe, the Administrator of General Services shall provide such facilities, and each executive department and agency shall provide such information, as the convention may require upon written request made by the elected presiding officer of the convention.

PROCEEDINGS OF CONVENTIONS

SEC. 9. (a) In voting on any question before the convention each State shall have one vote which shall be cast as the majority of the delegates from the State, present at the time, shall agree. If the delegates from any State present are evenly divided on any question before the convention, the vote of that State shall not be cast on the question.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The votes of the States on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a majority of the total votes cast on the question.

(b) No convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the convention. No controversy arising under this subsection shall be justiciable but shall be determined solely by the Congress of the United States.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit the exact text of any amendment or amendments agreed upon by the convention to the Congress for approval and transmittal to the several States for their ratification.

(b) Upon the expiration of the first period of three months of continuous session of the Congress following the receipt of any proposed amendment by the Congress, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such proposed amendments to the Administrator of General Services for submission to the States, but only if prior to the expiration of such period the Congress has not adopted a concurrent resolution disapproving the submission of the proposed amendment to the States on the ground that its general nature is different from that stated in the concurrent resolution calling the convention.

(c) Upon receipt of any such amendment or amendments, the Administrator of General Services shall transmit exact copies of the same, together with his certification thereof, to the legislatures of the several States.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by the legislatures of three-fourths of the States in the manner and within the time specified in the concurrent resolution calling for the convening of the convention.

PROCEDURE FOR RATIFICATION

SEC. 13. (a) For the purpose of ratifying proposed amendments transmitted by the States pursuant to this Act the State legislatures shall adopt their own rules of procedure except that the acts of ratification shall be by convention or by State legislative action as the Congress may direct. All questions concerning the validity of State legislative procedure shall be determined by the legislatures and their decisions shall be binding on all others.

(b) Any State resolution ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

TRANSMITTAL OF RATIFICATIONS

SEC. 14. The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State resolution ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 15. (a) Any State may rescind its ratification of a proposed amendment except that no State may rescind when there are existing valid ratifications of such amendment by the legislatures of three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) The Congress of the United States shall have the sole power of determining all questions relating to the ratification, rescission, or rejection of amendments proposed to the Constitution of the United States.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 16. The Administrator of General Services, when three-fourths of the legislatures of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation proclaiming the amendment to be a part of the Constitution of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 17. An amendment proposed to the Constitution of the United States shall be effective from the date on which the legislature of the last State necessary to constitute three-fourths of the legislatures of the United States, as provided for in article V, has ratified the same.

Senator DIRKSEN. Before calling the first witness, the Chair would like to say that he has a statement on the matter to be heard this morning which, rather than deliver, I will insert in the record, if there is no objection.

(Statement follows:)

STATEMENT BY HON. EVERETT MCKINLEY DIRKSEN

We are deeply indebted to the distinguished Senator from North Carolina, Mr. Ervin, for the initiative he has taken in introducing S. 2307 and thereby attempting to answer some of the questions surrounding the calling of a convention as a method of proposing amendments to the Constitution. Senator Ervin, who in my estimation is one of the great scholars of Constitutional law, is performing an invaluable service to the nation by exposing to public scrutiny legislation designed to implement the provision in Article V of the Constitution which directs the Congress to call a convention whenever two-thirds of the state legislatures have applied to the Congress. This is a most complex area, for in seeking to implement Article V, the Congress is virtually without precedent to guide it. Since the Constitution's adoption, there have been over 200 applications calling for conventions to amend the Constitution and they covered a wide variety of subjects. Despite this number, however, we have never received applications from two-thirds of the state legislatures on any one subject. Therefore, the convention method of proposing amendments has never been employed. But today the matter of Constitutional conventions is of serious concern because of the fact that 32 state legislatures have applied to the Congress for a convention on the subject matter of reapportionment of state legislatures. The mood of these legislatures leads me to believe that the Congress will be confronted with the requisite number of applications so as to compel the calling of a convention. The applications may be on a subject other than reapportionment, but I expect them.

Article V is silent on questions as to when conventions are to be convened; how the conventions are to be formed; or what rules are to govern their acts. And too, questions exist as to the authority of the Congress, of the states, and of the people themselves, when this method of proposing amendments is employed.

Article V does, however, provide us with the foundation on which we must proceed in developing implementing legislation.

The language of Article V reads, "The Congress . . . on the application of the Legislatures of two-thirds of the several states *shall* call a Convention for proposing amendments, which . . . shall be valid to all intents and Purposes, as part of this Constitution, when ratified. . . ." I can find nothing in that language of Article V that is not as clear and unambiguous as the English language can be made. We, as members of Congress are bound by Oath as provided by Article VI to support not only that part of Article V that I have quoted, but all of the Constitution.

Let me discuss the reasons as I understand them for the inclusion in Article V of this language that has been described by Alexander Hamilton as "peremptory." There was general acceptance among the delegates to Philadelphia of the necessity of providing a means whereby this new Constitution that was being developed could, when necessary, be amended. Their own experience with the Articles of Confederation attested to this need. But how was this to be accomplished? Two types of proposals were advanced, and without going into any of the details of either of them, I think that it is sufficient to say that neither really met the need that the delegates felt existed. From my reading of history it seems to me that there was a clear recognition of the necessity of providing an unqualified method whereby the people who were surrendering certain authority to a Federal Republic could change that authority at any future time when they felt it necessary to do so and that nothing should be left to stand in the way of the exercise of that right. No Congress could deny it, no court nor executive; this was to be an unqualified right to be retained by the people and exercised by them through their elected representatives in the state legislatures.

I am repeatedly surprised as I read the history of our Constitution at how often I find illustrations of the foresight that these delegates at Philadelphia possessed. Consider that part of the debate that had to do with the adoption of this very language. Fear was expressed that under the other amending proposals some future Congress, assuming greater and greater authority, might become unresponsive to the desires of the people and fail to heed their request for a change in this

basic document that was to safeguard their liberties. It was reasoned that the people might want to reduce the power of Congress and it was considered unlikely that a strong Congress would be responsive to such a proposal. The solution was to provide a means whereby the Congress, upon application of the Legislatures of two-thirds of the States would be mandated to call a Constitutional Convention for the purposes of proposing amendments to the Constitution.

I believe it is with this background in mind that we should proceed to the consideration of S. 2307. Although I have problems with a few parts of the bill, which I have set down in a much longer memorandum I prepared for the Subcommittee's use, I think that legislation along the lines of that embodied in S. 2307 is of the highest urgency and it is my belief that the function being performed by exposing this problem to debate and scrutiny in these hearings is of great importance to the country.

Senator DIRKSEN. Senator Hruska, do you have a statement?

Senator HRUSKA. Yes; I do, Mr. Chairman, and I would like to read it, if there is no objection.

STATEMENT BY HON. ROMAN L. HRUSKA, U.S. SENATOR FROM NEBRASKA

Senator HRUSKA. Mr. Chairman, for the first time since the adoption of the Constitution on September 17, 1787, this Nation may be on the verge of convening another Constitutional Convention. It is well for us, in this light, to examine and study the constitutional procedure for convening a future Convention.

Article V of the Constitution provides two methods for amending the Constitution. It includes a procedure "on Application of the Legislatures of two-thirds of the several States, (the Congress) shall call a Convention for proposing Amendments, * * *." The delegates to the Constitutional Convention in Philadelphia inserted this provision for one very obvious reason. This reason was the great fear of the delegates of a balky future Congress, a Congress that might prove unresponsive to the wishes of the States, and more importantly, to the wishes of the citizens in those States.

There have been many hobgoblins raised as a result of the recent pressure by the States to call a Constitutional Convention. Many of these objections are based, in my opinion, upon a fear of some individuals that the people are not able to make their own decisions.

To determine the proper role that Congress must play in the convention method of amending the Constitution, two principles must be kept in mind. One is that whatever the Congress does, it can only do as a result of authority delegated to it in the Constitution. Secondly, Congress in proposing amendments or calling a constitutional convention is not exercising a legislative function.

Since Congress is without authority of its own to call a convention, it is possessed at most with authority only over routine housekeeping functions. Functions, such as providing for the place, date, presumably the duration, financing, voting, and other similar matters of a convention, are within this authority.

It should not be overlooked that there are two basic safeguards against a "wide open" convention, as many may fear. The first is the good faith, judgment, and responsibility of its delegates. The second is the requirement that any proposal of the convention must be ratified by three-fourths of the States—38 of them—before becoming effective.

Mr. Chairman, it is appropriate that Senator Ervin has introduced S. 2307 and that these hearings are being held in order that the many unfounded fears of a constitutional convention will be laid to rest and that the true constitutional participation of Congress in such a convention will be highlighted.

Senator DIRKSEN. Now, my understanding is that Senator Proxmire is the first witness. Senator, please come up to the witness table.

My friend, you may proceed in your own way.

STATEMENT OF HON. WILLIAM PROXMIRE, U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Thank you very much.

Mr. Chairman, I am delighted to have an opportunity to present to your subcommittee my comments on S. 2307, the bill to provide procedures for calling Federal constitutional conventions to propose amendments to the Constitution. First, I want to commend Senator Ervin for introducing legislation on the subject so that we can begin to come to grips with a very delicate problem—one which has been thrust into the spotlight of public interest by efforts to call a constitutional convention on reapportionment. It is very, very helpful to have before the Congress legislation that can serve as a welcome basis for a discussion of the problem, although I feel the proposal could be improved, as my testimony will indicate.

In my estimation, one of the prime benefits of an orderly procedure for the calling of a Constitutional Convention should be the notice such a process will provide that State petitions for a Constitutional Convention on a particular subject are mounting and that a Convention is a definite possibility. Thus we would avoid the type of situation that erupted this spring when the New York Times observed, with justification, regarding the reapportionment issue that—

> most of official Washington has been caught by surprise because the state legislative actions have been taken with little fanfare. Most Congressional leaders seemed to be unaware that the effort to convene a constitutional convention was so near its goal.

This attempt to quickly and quietly gather petitions for a Convention in such a way that the States themselves do not realize the significance of their action was highlighted by a statement in the same Times article that—

> Senator Dirksen had hoped to keep the progress of the campaign quiet until the end of next week in the hope that two more states would have passed resolutions by then. He then planned to make a dramatic announcement that the requirements for convening a constitutional convention had been met.

Mr. Chairman, I believe the fact that not a single State has acted since that March 17 date to petition the Congress on the subject of reapportionment is eloquent testimony to the importance of complete disclosure in this area.

Such disclosure should also prevent the kind of summary treatment petitions for a constitutional convention have received by State legislatures in the past. Certainly the people of Illinois would have urged the Illinois Legislature to give more consideration to a reapportionment petition that passed the Illinois House after a suspension of the rules and without hearings had the people known that 26 States already

had petitioned the Congress on the same subject. As an editorial in the March 16 Chicago's American stated:

> We only wish (the people) had been given a chance to decide, or even to ask questions, while the legislature was suspending the rules and shutting off debate to hustle this resolution thru.

I doubt that the Indiana State Senate would have passed a similar resolution, in the words of the Indianapolis Star, because Senators "did not have enough votes to pass their own 'Kizer plan' on congressional redistricting, and wanted badly to send it to the House to make a record" had those State legislators known of the stakes involved. Finally, I believe it would be much more difficult for State legislators to urge adoption of a convention-call resolution on the grounds that "the convention would never be held, but that Congress would get some idea of unrest by the people," as a legislator in my State, a very prominent and well-informed legislator, said. He wouldn't have said that if disclosure provisions similar to those contained in the Ervin bill were to become law.

However, I think S. 2307 should be amended to require resolutions calling for a constitutional convention to be transmitted to the U.S. Congress within 10 days after such a resolution is adopted by a State legislature rather than the 60 days provided by the bill. I also believe such resolutions should be numbered before they are transmitted to "the presiding officer of each house of the legislature of every other State" by the President of the Senate and the Speaker of the House so that States considering similar resolutions can be made aware of the number which have already been passed. I would hope that copies could also be made available to Members of both Houses of the U.S. Congress so that they could be made aware of developments in this area. Finally, I support a clarifying amendment to S. 2307 which would require transmission of copies of these resolutions to the States and the U.S. Congress within 10 days after their receipt.

All of these proposed amendments should work no great hardship on the officials involved. On the other hand, they will insure prompt notice to both State and National Legislatures of the progress of efforts to call constitutional conventions.

The bill provides that applications for a constitutional convention shall remain effective for 6 calendar years. In my estimation, this is too long a period of time in today's quickly changing world. Theodore Sorenson, in a speech made earlier this year, suggested that 34 petitions should be received in the same Congress since congressional initiation of a constitutional amendment has to take place in the same Congress. While I feel this requirement is a bit stringent in view of the fact that some State legislatures meet only every other year, a 4-year requirement makes great sense to me. Each and every one of the amendments to our Constitution have been ratified by the States in less than 4 years. In my estimation, the States should be given no more time than this for calling a constitutional convention.

Once again, I feel that a reference to the reapportionment experience is in order. Most of the States that petitioned Congress on the subject were malapportioned at the time the petitions were passed. Those States are, by and large, now apportioned fairly. It is quite likely that most of those State legislatures would not now support a reapportionment resolution. Thus the petitions are badly outdated.

I think it is very important to make it clear, Mr. Chairman, as the Ervin legislation does, that the constitutional conventions will be called upon specific subjects and on the basis of State legislative requests "stating the specific nature of the amendment or amendments to be proposed." I hope that it will be possible for this subcommittee to give careful consideration to the precise meaning of this language and, perhaps, go into the matter in a committee report should S. 2307 or a similar proposal be reported from the Judiciary Committee. As I read this language, for example, it would rule out three of the 32 reapportionment petitions—those three that would limit the jurisdiction of the courts over reapportionment actions. Clearly there is a substantial difference between a constitutional amendment limiting the jurisdiction of the Federal courts and an amendment reserving to the States the right to apportion one house of their legislature on a basis other than population.

S. 2307 provides that each State shall have one vote in a constitutional convention, although the number of delegates representing a State at the convention would be equivalent to the number of Representatives the State has in the U.S. Congress. Each vote shall be cast as the majority of delegates from each State decides. This proposal is in sharp contrast to draft legislation proposed in a House Judiciary Committee staff report back in 1952 which would have given each State a number of votes equal to the number of Senators and Representatives to which the State is entitled in Congress with all votes of a particular State delegation being cast as the majority of the delegation decides.

In my estimation, both of these proposals have serious drawbacks. If each State had one vote in a convention, 26 States representing one-sixth of the population could propose new amendments after 34 States representing 30 percent of the population had called a convention. This hardly would correspond with the injunction that the proponents of a constitutional convention on reapportionment have used in their campaign that we should "let the people decide." In fact, a very small minority of the people of the United States would be deciding to submit a constitutional amendment to the States. This contrasts sharply with the process that has been followed to date in amending the Constitution—a process in which two-thirds of the House of Representatives, apportioned on a population basis, has to approve any amendment.

On the other hand, the type of bloc-voting approach advocated in the House staff report raises all of the many objections that have been discussed in connection with our electoral college system for electing Presidents. A State such as New York, which would be entitled to 43 votes at a constitutional convention, could cast all 43 votes for an amendment although 21 members of the delegation opposed the amendment. Of course, a similar objection could also be raised to the approach taken in S. 2307 although only one vote would be at issue.

As an equitable alternative, I propose that each State be permitted a number of delegates at any constitutional convention equivalent to the number of Representatives and Senators the State has in the Congress. However, each delegate, not each State, should have one convention vote. In this way, we would be taking a giant stride toward truly letting the people decide while at the same time recognizing factors other than population by allotting each State a minimum of three

votes since each State has at least two Senators and one Representative in the Congress. I also think that it should be made clear that these delegates should be elected by the people of the 50 States, not appointed as S. 2307 would permit.

Finally, Mr. Chairman, in my estimation, amendments to the Constitution should be proposed by two-thirds rather than a majority of the votes cast, just as two-thirds of both Houses of Congress must approve amendments before they can be submitted to the States.

These, then, are my suggestions for change in S. 2307. They are an attempt to pinpoint some of the problems that go to the heart of the amendatory process. However, they are in no sense meant to be an exhaustive critique of the bill. I am sure that many substantial questions will be raised by other witnesses testifying on this legislation.

Thank you, Mr. Chairman.

Senator DIRKSEN. I notice you make considerable point of making certain that people and States be fully aware of what is going on if a resolution is passed by a legislature.

In view of the fact that the Council of State Governments was created some years ago and has become immensely active all along the line, are you of the opinion that States and State legislatures are not aware of what is going on? I am referring particularly to your allusion to that New York Times article as if there was some stealth about these efforts of working with the legislatures.

Doesn't it completely ignore the years of work that were done behind the resolution that was introduced in the Congress and on which we voted and for which we got a very substantial vote in excess of a majority? Do you think there was something secretive or hidden about that?

Senator PROXMIRE. Well, of course, what I was talking about was not the fact that it is well known throughout the country, and I am sure it is well known in the State legislatures everywhere that there was a very hot and highly controversial debate going on in the Congress of the United States over the one-man, one-vote issue.

But the point I was making, and I think the New York Times was substantially right on, is that State legislatures were not aware that this change—this proposed Constitutional Convention, rather—was so well on its way and seemed to be very close to being called. I think that this is because, after all, the 50 States are not in the center of national interest, and they don't get national attention, and when a State takes this action, while it might be big news in the State or might not be, it is not very big news in any other State.

Senator DIRKSEN. Isn't the fact that no legislature rescinded its action rather indicative that it knew quite well what was going on, notwithstanding the efforts that were made to have legislatures rescind?

Senator PROXMIRE. Well, as the Senator from Illinois is well aware, it is difficult to rescind and it is sometimes felt in some of these States that it was perhaps unnecessary to go to the difficulty of rescinding even though many of us were deeply concerned. Many State legislators shared that concern. In at least one State I know of where there was an attempt to rescind, it was very clear, in my view, that there was a big majority, and I am referring to Maryland, for rescinding the action.

But there were technical reasons and time reasons why it was impossible to consummate that rescinding action.

Senator DIRKSEN. You raised some question about the validity of the State action taken inasmuch as it was taken in malapportioned legislatures. If that be true, if this could be challenged on that ground, what happens to the host of legislation of all kinds that was enacted by the very same malapportioned legislatures? Does it fall?

Senator PROXMIRE. No, indeed; no, indeed, and I would agree wholeheartedly that this is a critical point that has to be met.

My point, however, is that this is a peculiarly sensitive issue. This is the issue on which a malapportioned legislature might very clearly take a position that would be different from the position of a legislature apportioned on a one-man, one-vote basis. For this reason it seems to me that this can be treated distinctively and specifically without considering action that would, of course, result in chaos, in which you would have to abolish all of the work of legislatures for years before, because many have been malapportioned throughout the country for many, many years.

Senator DIRKSEN. Of course, I want to make abundantly clear that the whole issue involved in the effort which was put forth over a period of time was clearly misrepresented to the country and in many cases to the legislatures. The emphasis was constantly put on one man, one vote when, in truth and in fact, the question was: Is this matter in the State domain and does the legislature take action or does the Supreme Court take action? That was the issue, really.

Now, if a legislature wants to employ one man, one vote for its State, I wouldn't quarrel with it for a moment. But it is a legislative job and it falls within the domain of the State, if we are going to have a proper regard for our federal-state system.

Senator PROXMIRE. Here is where you and I would sharply disagree. I would agree wholeheartedly that it is perfectly proper and legitimate to consider the States rights aspects of this, but there is also no question in my mind that it was proper for the Supreme Court to decide as it did, and under these circumstances for the Congress to take the position that one man, one vote is a legitimate principle to insist that State legislatures follow.

Senator DIRKSEN. Well, I don't quarrel with the principle as such. I just quarrel with the source of power that gives its approval, and that was the position taken by Justice Frankfurter who said this was a legislative thicket where the Supreme Court has no business, and I emphatically agree with the viewpoint that he expressed. But, of course, it is your right to disagree.

Senator PROXMIRE. Of course, my view is the view of the majority of the Supreme Court that, if you are going to have equal rights under the Constitution, this is where the equality must be meaningful.

Senator DIRKSEN. Well much could be said on that subject also. Senator Hruska?

Senator HRUSKA. Senator Proxmire, I don't know that it is particularly determinative of any of the issues here, but many people have been amused by the statement that "in the last 4 years there has been a quiet campaign to rewrite the Constitution." It has been suggested to me that the members of the fourth estate were probably not as alert as they could have been, and because they had been so busy with many

other things, they lost count of the number of States whose legislatures had petitioned the Congress for a constitutional convention. Maybe as a defensive measure they might have thought, "Well, we are going to attribute to some Senator the idea that this campaign to get 34 States to petition for a convention was conducted in a secret and quiet manner." I don't know that I would subscribe to that, but it is an interesting concept to contemplate.

The question I would like to ask is, How can it be said that there would be a quiet campaign? I had never known that State legislatures were exactly quiet places of doing business. My experience is that the press is around each of those legislative sessions in great abundance. Here in the Senate in 1965 and 1966, when the Senate Judiciary Committee held hearings on the subject of State legislative reapportionment, repeatedly this Senator, as well as other Senators, including the Senator from Illinois, interrogated witnesses to the effect that "There are now x States that have petitioned for national conventions on the Constitution. Which would you prefer, the submission to the State legislatures of an amendment on legislative reapportionment proposed by Congress or a constitutional convention?" And I recall at that juncture as many as two dozen States had petitioned for a national convention.

Now, when that question is asked repeatedly of witnesses, and they respond that they would prefer, if they could choose, the consideration by the State legislatures of a proposed amendment passed by Congress as an alternative to a constitutional convention, do you think, in view of all these things, that the words "quiet campaign to rewrite the Constitution" are particularly applicable?

Senator PROXMIRE. Well, of course, it depends entirely on your viewpoint. I think you could say it was proper, a proper interpretation of the situation, because, as the Senator from Nebraska is undoubtedly very sensitive about, as I am too, a great deal that comes out of committee, and properly so, is not deemed by the press as newsworthy. A lot of the questions that go back and forth in the enormous record of hearings we compile have to be more or less overlooked if they don't seem to be timely on the big issue that is before the committee or the Congress at that point.

It did seem, I think, and I am sure the Senator is right in reference to his records, that this question was repeatedly asked. Apparently there was a feeling on the part of the press that this wasn't the central issue that was being discussed at that particular time. And I think, as I said to Senator Dirksen, that the fact that the States are not subject to national reporting means that much that goes on within a State government is not given attention even within the State. It is understandable, then, that this thing can proceed quietly, quietly in a sense that it wasn't called to the attention of many of us in the Senate or in the House, although I am sure that the people such as the Senator from Nebraska and the Senator from Illinois and the Senator from Maryland, who were members of the Judiciary Committee and deeply interested in this, were aware of it.

Senator HRUSKA. Your statement indicates and implies that in some instances in the State legislatures there was hasty or hurried action and the real essence and the real significance of the signing and approving of a petition calling for a constitutional convention really

wasn't realized. That would indicate, wouldn't it, that you would be interested in a more deliberate procedure, a more studious contemplation of the issues involved? Is that a fair statement?

Senator PROXMIRE. Yes, indeed.

Senator HRUSKA. It appears to this Senator that that kind of an idea would be at variance with some of the amendments you propose to the pending bill. For example, numbering of the resolutions is called for so that all of the States would know how many had petitioned for a convention. When a petition is accepted and numbered does that constitute approval? Would that be a judgment by the man—by the official who numbers the petition that it is to all intents and purposes a valid one and will be counted toward the number required for proposing a constitutional convention?

Senator PROXMIRE. The main purpose of that, as the Senator from Nebraska, I think, is aware, is that it would inform other States and would inform the Nation and inform the Congress as to just exactly what progress this campaign for a constitutional convention had achieved, whether it was the 19th State or the 23d State or the 25th State, whatever it was. You would then be in a position to assess the urgency of the situation or would be in position to assess the desirability of being very careful when you come to the States which are close to the two-thirds, the special wisdom of being careful about it.

Senator HRUSKA. Well, I agree it would be good to put everyone on notice and I think that they should be on notice. However, each of the resolutions that was passed by the legislatures in the last 3 or 4 years have been filed in the Congress and they have been here. It is true that no number has been attached to them, but most people can count up to 34 without too much difficulty.

Senator PROXMIRE. Well, at the same time I think the Senator from Nebraska is aware of the fact there is considerable debate as to how many acceptable petitions have been filed. There is some concern as to whether three of these legislatures actually did file petitions that were valid and proper. I think if we had a system of numbering the petitions that were deemed valid then at the point where they are numbered there can perhaps be a challenge if there were those who felt that a petition was not in proper order, and they would also be in position to be aware that you were progressing to a certain point in the campaign.

Senator HRUSKA. The bill does provide for the filing with the Senate and the House of the applications by the legislatures. Of course, that is very important. It is very important so that everyone knows what is going on and so that any action they are requested to take should be on the basis of that information.

One of the other proposed amendments made by the Senator from Wisconsin, however, calls for haste rather than deliberation. That is while it might be too short a period of time to require that State legislative petitions be filed in the same Congress, the period of time should not be much longer than that.

Now, considering that a Constitutional Convention is a unique and potent instrument to be used with extreme rarity, would it not be wise to say "Now, here is a proposition that is rather unusual, it should receive study and maybe before acting upon it there should be more than one term of the legislature at which it should be considered so that as the representative members of that legislature go back to their

constituents they can bring the reflected desires and wishes of their constituents back to the legislature and then act upon it, having had due deliberation and study."

Senator PROXMIRE. I made two points on that. Point No. 1 is that as the Senator knows most of our State legislators go home at least once a week and sometimes more than once a week.

Senator HRUSKA. In the sandhills in Nebraska they are, very often, lucky to see our legislators twice in the session.

Senator PROXMIRE. At any rate, they do get home and get some reflections of views, and I think during the full session there would be an opportunity to secure public reaction to this. However, as the Senator will recall, I said that while I thought you could make a strong case and I thought Mr. Sorenson did make a strong case for requiring the petitions all to be filed in 2 years, nevertheless I thought that it might be all right to permit the petitions to be filed over a period of 4 years instead of 2 years and, therefore, I thought I was taking a moderate middle point rather than the 6 years which the bill provides.

Senator HRUSKA. Twenty-four months has been described by some as being a totally unrealistic period of time in which to make such filing on behalf of 34 States. Do you agree with that?

Senator PROXMIRE. I wouldn't say totally unrealistic; no. I think you can make a strong case for 24 months, but I would be willing to compromise at 48 months instead of 24.

Senator HRUSKA. Is it really 24 months or is it rather a much shorter time period inasmuch as many legislatures have a 60-day or a 90-day time limit and meet only in January of the uneven numbered year. Is 60 days or 90 days a sufficient period of time in which to exercise and call into being a unique and potent instrument which is to be used with extreme rarity?

Senator PROXMIRE. I would say in answer to that, Senator Hruska, that in all the years of this Republic, the oldest Republic in the world, with all the amendments we have adopted, every single one of them has been adopted within a 4-year period on the basis of the testimony I have given this morning.

Senator HRUSKA. That is for adoption after they have been proposed. We are now talking about proposing.

Senator PROXMIRE. I understand there is a difference, but many of these constitutional amendments have been immensely important and should require very substantial deliberation on the part of the States, and yet as I say, year after year, decade after decade, throughout the many years of the Republic, we have been able to adopt our amendments by this way, and within a 4-year period. So I think the 4 years are a modest and moderate compromise.

Senator HRUSKA. Thank you on that point.

You make a further point in your statement that each member of the Constitutional Convention should have one vote as opposed to having the States vote on a unit plan. Unfortunately, article V is pretty much on the basis of State action; isn't it?

Senator PROXMIRE. Yes, sir.

Senator HRUSKA. Rather than individual action. That is the essence of the method of proposal of amendments by States. Whenever on the application of legislatures of two-thirds of the States, then there shall

be a Constitutional Convention called. One of the leading reasons for providing for a Constitutional Convention to be called as a result of States taking action was the belief by those who wrote the Constitution that a future Congress might prove to be obdurate, and that such a Congress might take steps to inhibit and to prevent the States from doing certain things which the States would like to see done. Therefore, an avenue was left open in the amendment process on the basis of State initiative. That is what article V is clearly based upon. What is your reasoning into thinking that we should have a one-man, one-vote rule when article V is clearly based upon the concept of State action?

Senator PROXMIRE. Mine is based on the recognition that the electoral college system that was approved in 1789, that the Constitutional Convention approved then, has gradually evolved into a different kind of system. The growing feeling in the Congress on the part of Senators, representing all kinds of States, that we should provide a proportional opportunity for the minority group in the State to have their position count. If you have the States vote on a unit basis then you would give disproportionate influence to a relatively small group within the State who can make a majority.

Senator HRUSKA. What is the remedy for achieving some satisfaction to the feeling of unrest and unhappiness with the present electoral system in the presidential election process? What is the remedy?

Senator PROXMIRE. The remedy, of course, is a constitutional amendment.

Senator HRUSKA. Wouldn't that be a pretty good way to change article V before we tried to distort it by a legislative process trying to make article V say and provide and mean something different from what it clearly does say? I just wonder if we should emulate another independent branch of the Government in that respect, one that is criticized quite a bit for changing and legislating the Constitution without resorting to the regular amendment processes. I don't believe Congress should get into that.

Senator PROXMIRE. Well, I am not sure I would accept the reasoning in your argument. It would seem to me perfectly proper to permit the interpretation of this article of the Constitution to provide a divided vote in the State.

Senator HRUSKA. Well, it is interesting to get that point of view. It is the hope of this Senator that we will go by the Constitution as it is written and particularly so in article V.

Article V also stipulates that in the process of ratification it is again action by States, either in conventions or in State legislatures. Again it is the State as a unit that will take action. Your proposal wouldn't go to the point of having a popular vote in a State like some people are proposing for the presidential election, without first amending article V; would you?

Senator PROXMIRE. Yes.

Of course, what I am getting at and I think where the difference here is, the whole thrust of our position is, this is something that should be decided by the people, by the people, and it cannot be decided by the people if you rely on a system in which you have one vote per State or if you have alternatively a system in which you have a greater representation for the larger States than the smaller States and then provide that the entire State will go the way a very narrow majority

goes. I am trying to break through to the position that it seems to me more logical and more democratic and more in accordance with the recent Supreme Court opinions and more in accordance, it seems to me, with the view that many of us feel so strongly, that everybody should have an equal opportunity to representation in these great decisions made by our Government.

Senator HRUSKA. Is that what article V says? Article V says that any proposal for amendment of the Constitution shall be ratified by the State. It says ratification shall be by three-fourths of the States, three-fourths thereof.

Senator PROXMIRE. It does indeed say that, and that is why, with your very narrow and very stringent and strict interpretation, we get away from any opportunity to interpret this particular article to permit more equitable representation. At least, for this purpose, the constitutional convention should provide an opportunity for the people to have a chance to determine by majority vote what they want.

As I say, 26 percent or 30 percent, anyway, a small minority of the people, will be able to prevail on the basis of the strict interpretation the Senator from Nebraska is giving this article. I would like to give it an interpretation that would provide by a decision of the people, by a majority of the people, not by a minority.

Senator HRUSKA. The Constitution was written so that the people of this Republic could understand it. We are not supposed to be engaged in using in the Constitution words that have a highly technical or skilled or a word-of-art meaning attached to them. The Supreme Court has said that many times and article V doesn't say ratification by the people of a State. It says ratification by the State, and the States speak either through conventions or through legislatures. That is what article V says.

Would the Senator from Wisconsin want to say "Well, let's disregard that and let's put it on a popular-vote basis? It is true if we do that in the presidential election process we have to have a constitutional amendment, but in this case let us disregard article V. Let us disregard the two alternatives that article V provides for ratification and let's have a popular election." Is that the position of the Senator from Wisconsin?

Senator PROXMIRE. The Senator from Nebraska keeps saying that I say "Let's disregard." I don't say "Let's disregard." I say "Let's interpret it."

Senator HRUSKA. You said "Let the people decide by popular vote"; didn't you?

Senator PROXMIRE. Yes; let the people decide.

Senator HRUSKA. By popular vote; isn't that what you said?

Senator PROXMIRE. What I am trying to do is provide an interpretation of article V which will come as close as possible to permitting a majority decision for these constitutional conventions rather than a decision by a relatively small minority, and the Senator from Nebraska keeps saying you cannot do this unless you amend the Constitution, because to do it does violence to his interpretation of the meaning of the word "State" and we simply disagree on that point.

Senator HRUSKA. A State acting in one of two ways, article V says, either through a State legislature or a convention, whichever method is prescribed by Congress. But the Senator from Wisconsin, the way

I understand it, says "Let's introduce a third factor in it. Let's have a popular vote within a State and then let us add those votes some way with some other votes and arrive at the decision rather than having a vote by a State which is what is clearly contemplated by article V as presently written." Am I mistaken in that construction of the testimony from the Senator?

Senator PROXMIRE. I think the Senator's position is prefectly understandable and perfectly consistent, and I can understand, because it is consistent, why he disagrees with my position. What I am saying is, I believe you can interpret article V to provide the kind of proportionate representation for each State in the constitutional convention that I am talking about if you wanted to elect that particular option.

Senator HRUSKA. Well, Mr. Chairman, I want to thank the witness for his very fine and frank testimony. It will be of very great value I am sure. It certainly would be my hope that we will go by what article V says and give full credit and intent to action by respective States rather than some interpretation of that requirement which would do great violence to its spirit.

Senator PROXMIRE. May I simply say to the Senator from Nebraska that I think his line of questions have been very effective and very forceful. I think he makes a very strong point but I think it emphasizes the great difficulty of relying on a constitutional convention under that interpretation because it does permit a minority, and a small minority, of the country to change our Constitution and it does so under circumstances where I think all of us feel that an amendment to the Constitution is something that should only be arrived at on the basis of more than a majority vote and certainly not by a minority vote.

Senator HRUSKA. Well, is there any difference between that situation and the situation in the Senate of the United States where a minority insofar as representation of population within States sometimes is able to either prevail one way or another? Is there any difference between those two problems?

Senator PROXMIRE. Yes, indeed, there is great difference because the Senate cannot be effective in terms of any of the substantial legislation affecting our country without concurrence by the House of Representatives which is on a population basis.

Senator HRUSKA. Nor can a constitutional convention be effective without concurrence by three-fourths of the States, can it?

Senator PROXMIRE. Well, that is correct. But in the constitutional convention I wanted to give some consideration to the representation of population, representation of people.

Senator HRUSKA. Well, it is this Senator's suggestion that you prepare a petition for the legislative bodies of the States, saying article V should be amended to read thus and so and when you get 34 of those petitions on file here let's call a convention on the Constitution and see if we can convince them that Senator Proxmire is right. I have the idea if he has the privilege of addressing such a convention he might sweep it off its feet and induce it to act as he suggests.

Senator PROXMIRE. Well, I doubt that. [Laughter.]

Senator HRUSKA. Thank you, Mr. Chairman.

Senator DIRKSEN. I think emphasis has got to be placed on this question of ratification. You mentioned a moment ago that you cannot

permit a minority to rewrite or amend the Constitution. Well, it is an impossibility in the nature of things. It wouldn't make any difference what a constitutional convention does. It always under article V must go back to the States for ratification, and that means three-fourths of the States. Now, they have an opportunity either through the legislature or through the convention to ratify or not ratify. Can you conceive of a minority, as you call it, getting by that provision in order to amend the Constitution?

Senator PROXMIRE. Well, I certainly can. I think it is very easy to put that together. All you have to do is get a bare majority in each of three-quarters of the States. The Senator from Illinois is well aware, on the basis of the debates we have had and on the basis of his own experience, that at least some of us feel that State legislatures can very often act under the basis of pressure and excitment to take action without the kind of deliberation, without the kind of consideration, they should. But just from the standpoint of simple logic, if you take the 38 smallest States and take a bare majority in each of the 38 smaller States you certainly have far less than half the country represented by that position. I would say you probably would have, and this would permit amendment of the Constitution, you probably would have close to—well, you have maybe 35 percent of the people represented, or less, much less.

Senator DIRKSEN. I have an idea that if you got an amendment before the people you would have a resounding response from the people, and it would be vastly greater than what you referred to as a minority. Now, this gives point to that spate of articles and speeches that have been made from time to time that they are tampering with the Constitution, they are going to rewrite the Constitution, and you can almost see hands of horror in the air as other profane hands are about to be laid upon our organic act. Well, it is just a lot of nonsense. Maybe it may be the byline or headline writers, I don't know, but I just want to express my emphatic exception to it, because there isn't an iota of fact or truth in it. A convention cannot rewrite the Constitution no matter what mood it might be in. I can only propose amendments to the Constitution and they must be resubmitted to the States for ratification and that is quite a different thing.

Senator PROXMIRE. Yes, indeed, but if a constitutional convention has met and changed the Constitution, and done so rather drastically, and done so in a summary way, it seems to me that we are taking a long step down a very dangerous path. It means instead of relying on a two-thirds vote of each House of Congress on the basis of all the tradition and experience we have had with every amendment to the Constitution adopted this way, instead we are going with a convention and no experience with it and an opportunity as I pointed out, as the Senator from Nebraska pointed out better than I did this morning, for a small minority of the people to propose amendments to the Constitution that then have only one hurdle to overcome and that is three-quarters of the States. And while that hurdle may seem rather great to the Senator from Illinois, it seems to me, with the momentum going and with the kind of organized pressure you can get behind these amendments, I think there is a real threat to our Constitution.

I am surprised that the distinguished Senator from Illinois, who is a man for whom I have the greatest respect and who has served this country so well and so brilliantly, and the Senator from Nebraska has, too, should not be much more concerned with the damage that could be done to our Constitution by a constitutional convention that could act to provide repeal of so many parts of our Constitution that are so precious and so sacred to many of us, and I am sure they are to the Senator from Illinois.

Senator DIRKSEN. I give you three answers: The first one is that the Constitution in this country belongs to the people, because the preamble says "We, the people of the United States, do ordain and establish this Constitution." That is No. 1.

No. 2 is that there are a redoubtable 38 States that you have got to negotiate before you can amend the Constitution by means of the ratification clause.

And the third answer is, and I think the distinguished Senator from Nebraska shares this view, we still have a consummate faith in the people even in a sophisticated and cynical age.

Senator PROXMIRE. Well, may I say to my good friend from Illinois that every single one of those points, it seems to me, falls on the basis of the argument we have just had this morning. Point 1 and point 3 are that you have faith in the people. You rely on the people, and it ought to be up to the people and it is exactly what we say. But you are not relying on the people if you permit a minority to call a Convention, a minority to be represented in the Convention, a minority to submit the amendments, and then as I say a bare majority of 38 States, which would be a minority, to ratify amendments to the Constitution. Even with a number of States that you say represents the obstacle to minority determination of constitutional changes, this could not be an adequate barrier in view of the fact you can get 38 of the smaller States with a bare majority in each of them to take this kind of action.

Senator DIRKSEN. Then I think you have a clear duty and that is to introduce a resolution to modify article V according to your own desires, and if you do and you get it in pretty good form I am not so sure but what I may give you a little assistance.

Senator PROXMIRE. Fine. I tried to do that this morning on a legislative basis. You are suggesting a constitutional amendment basis?

Senator DIRKSEN. The committee has a guest this morning. I see the distinguished Senator from Maryland, Senator Tydings. Have you questions?

Senator TYDINGS. I have some questions, Mr. Chairman.

To begin with, Mr. Proxmire, the bill proposes to restrict what a Constitutional Convention could do by legislation. Now, under the constitutional history of this country, including the records of the debate in the Constitutional Convention itself, I think there is some question as to whether or not any constitutional enactment can restrict what a Constitutional Convention can do, and I want to refresh your recollection as to the procedures adopted at the Constitutional Convention both before and during the Convention of 1787.

To begin with, the request for the Convention were petitions by State legislators sent to the original Congress under the Articles of Confederation, and those petitions requested that Congress call a Con-

stitutional Convention for the purpose of proposing amendments to the Articles of Confederation and then returning those amendments to the State legislatures to pass on. And the Constitutional Convention called by the Congress under the Articles of Confederation was for those purposes.

Actually, once the Congress met, and I am speaking now of the Constitutional Convention of 1787 in Philadelphia, they neither limited their considerations nor deliberations or their charter to pure amendments of the existing Articles of Confederation, nor did they resubmit their proposed charter to the Congress under the Articles of Confederation nor did they submit it to the State legislatures for ratification. In fact they set up proceedings for ratification themselves by calling for individual State conventions. Is that a fair statement?

Senator PROXMIRE. I am sure it is. The Senator from Maryland is far more historically informed than I am in this particular area, and I am impressed. I must say I am delighted he is challenging the assumptions here and that he is making such good history, such pertinent history.

Senator TYDINGS. But even more important, in the actual Convention itself when the debates on article V took place, there is substantial evidence based on the notes of Colonel Mason, of Virginia, who opposed the original Madison proposition which would have limited what material a Convention called under article V by State petitions to consider, Madison would have limited it to specific proposals given by the Congress. But this original proposal was not accepted, and we have article V as stated and expressed by the Constitution today, and we have the notes and reasons of Colonel Mason, of Virginia, particularly his criticism of the original Madison proposal, and I might say that this legislation is drafted on the Madison proposal basis; namely, that the Congress could restrict with a Constitutional Convention could do and Madison commented in his notes as appear at Farrand 629, volume 2 of Farrand's Citation 629 and this is a criticism of this type of procedure. He said:

> By this Article Congress only would have the power proposing amendments at any future time in this convention and should it ever prove so oppressive the whole people of America can't make or even propose alterations to it, and a doctrine utterly subversive to the fundamental principles of the rights and liberties of the people—

And that original Madison proposal was not adopted and the present proposal was.

I say under that history, Isn't there substantial reasoning, both desirable and historical, to the fact that if a constitutional convention is called, neither the Congress nor anyone else can restrict it as to what areas or what matters it can cover?

Senator PROXMIRE. Certainly it sounds that way. The Senator from Maryland is making the argument that this bill cannot have effect with regard at least to limiting the Constitutional Convention.

Senator TYDINGS. Now, the second point I would like to take up with you, Senator Proxmire, is the matter of the election of delegates.

Under the proposal before us, it proposes that each delegate shall be elected or appointed in a manner provided by State law. Now, wouldn't that provide or give the opportunity for an irresponsible

legislature to actually have the appointment or designation of delegates to perhaps the most important convocation of representatives in the Nation's history by just an appointment of the Governor, with no recourse to the electorate, no recourse to the people whatsoever under the proposal before us? Wouldn't it be possible to have all of your delegates to the constitutional convention just appointed by Governors?

Senator PROXMIRE. That is exactly right, and that is one of the reasons why I objected to it and made that particular point that you could have appointment of convention delegates. I object very much to appointment. This would take it out of the proper hands. Of course, the appointment wouldn't necessarily have to be by the Governor. It could be by a committee and a small committee of the legislature for that matter. It just says by State law, it is up to the State to decide it.

Senator TYDINGS. Actually, if you had a very powerful speaker of the house of delegates——

Senator PROXMIRE. He might do it.

Senator TYDINGS (continuing). Of the State legislature he might do it himself. So in effect you might have, or even the majority leader.

Senator PROXMIRE. It could be someone who is not at all responsive to all the people of the State.

Senator TYDINGS. So under this proposal before us, the selection of delegates to the constitutional convention could completely bypass the people.

Senator PROXMIRE. No question about it.

Senator TYDINGS. Next, it provides in this proposal that each State shall have one vote and cast as a majority of the delegates from that State decide.

Under this, actually it would be possible for States representing only 16.3 percent of the population of the United States to propose an amendment, and if the Constitution should adopt rules which would provide that a majority vote were sufficient to act, if only one more than half the delegates of each of the States voted for such an amendment under section 9(a), the State's votes would have to be cast for the amendment and thus, assuming that all delegates were elected on a one-man, one-vote basis, you could have 8 percent or delegates representing 8 percent of the population of the United States adopting amendments or proposals at this Constitutional Convention.

Senator PROXMIRE. Well, I haven't had a chance to check the Senator's arithmetic, but that doesn't sound too far out to me. It seems to me it is a small minority which can propose these amendments to the Constitution to the States.

Senator HRUSKA. Would the Senator yield?

Senator TYDINGS. I think I will go ahead through with my questions and then I will be happy to yield later.

Even if the convention should adopt rules which require that a two-thirds vote of delegates would be necessary to obtain an amendment, it would still be possible under a one-State, one-vote rule for 31 percent of the population to control all of the votes in the constitutional convention. Do you think that is a proper way to have the Constitution of the United States amended.

Senator PROXMIRE. It would be hard to conceive of a way that more clearly violates the principle of one man, one vote to which we sub-

scribe or the principle of leaving it to the people, let the people decide. What people? It is obviously a minority of the people that can decide and propose these amendments to the Constitution to the States to have them ratified.

Senator TYDINGS. Now, in addition, section 5(a) provides that the convention calling the State legislatures shall be, conclusively be, presumed to be valid for 6 years after it was received by the Congress, and you and Senator Hruska had some dialog, but actually for a matter so important as the convention of a constitutional convention, a matter which could only be the most urgent and pressing matter to bypass the normal constitutional procedures which we have used for the past 150 years, wouldn't a reasonable period of time be that period from the time the first petition was received and publicity noted on it across the Nation until every other legislature in the Nation had had a full session or an opportunity to consider it, in other words, a 2½-year period so that every legislature in the Nation would have had one full session in which to consider the gravity, the import, the urgency of such a proposal?

Senator PROXMIRE. Yes.

I think you make a strong case for that, as Mr. Sorenson did in my quotation from him. I indicated that I would be willing to accept a 4-year limit; but certainly not a 6-year limit, especially in view of the experience we have had that our amendments have been adopted within a 4-year period—ample time for the legislatures to act. The only objection I might have to the point made by the Senator from Maryland is that these State legislatures do in many cases meet only once every 2 years and their meeting can be brief; it might be desirable to give them a second chance.

Senator TYDINGS. All right.

Now, section 3(b) of this proposal provides that the validity of any State legislative action adopting one of these petitions shall be determinable only by that State legislature and its decision shall be binding on all others, including the State courts of the very State, not to mention the Federal courts and the Congress. So, thus, you could have a runaway legislature that violates its own rules, its own State constitution in adopting a petition, and it couldn't even be reviewed by the State courts in its own State. Do you think that is a wise procedure?

Senator PROXMIRE. That procedure certainly calls for amendment; it calls for change.

Senator TYDINGS. I mean this would give complete and absolute dictatorial power without recourse to the people or anyone else.

Senator PROXMIRE. Especially since, as the Senator from Maryland makes the point so well, you don't have reliance, No. 1, on rules and, No. 2, on the courts to interpret the rules. You have a situation in which there is sheer raw power incapable of interpretation.

Senator TYDINGS. Now, section 6(a) of this bill provides that the Congress shall call a constitutional convention by a concurrent resolution without the need for Presidential approval, by majority vote, in other words, without the need for Presidential approval.

Now, as I gather, it is based on the analogy that Congress acts alone without Presidential participation in proposing amendments, but it does not follow, and I ask you, does it follow that the Congress can

act alone in calling constitutional conventions when article I, section 17 of the Constitution says that "every order, resolution vote, to which the concurrence of the Senate and House of Representatives may be necessary, except on the question of adjournment, shall be presented to the President," and I ask you whether if this legislation is going to permit the passage of such a concurrent resolution, not by the two-thirds vote that historically we have always required in any constitutional amendment, but by a majority vote, that they shall be able to bypass the approval of the authority of the President?

Senator PROXMIRE. Absolutely not. The calling of a constitutional convention is such a solemn, such a powerful instrument, it can do so much for good and evil, that certainly the President of the United States, the only man who represents all the people of the country, ought to have a voice in it. I would agree wholeheartedly with the point made by the Senator from Maryland.

Senator TYDINGS. Now Section 3(c) of this proposal provides that the State petition, this petition, mind you which has no review by anyone, which is not subject to the people, to the courts, anyone, shall be effective without the approval of the Governor of the State regardless of what the constitution of that State says, what the laws of the State say, what the rules of the legislature say, we are going to say the State can call or can pass such a petition without any approval by the Governor of that State. Now, would you have any comment on that?

Senator PROXMIRE. Once again, I think it is exactly the same point. This is a very solemn, important, powerful instrument, and the Governor is the only man in most States who represents the entire State, is their leading official. He should have a voice. If you rule out both the Governor of the State and the President of the United States, it means no official who represents all of the people, either in the country or of the particular State, would have a voice in this very powerful convention.

Senator TYDINGS. Let me address your attention or direct your attention to a series of questions by Senator Dirksen in which he asked you in reference to pending proposals of calling for a constitutional convention (which were made by) some malapportioned legislatures. He asked you how could you argue that those proposals petitioning the Congress to hold a convention permit malapportionment in one house of the legislature. He asked you whether, if you are going to say that these proposals are illegal or unlawful, every action of the legislature while they were malapportioned would not also have been illegal?

I ask you, hasn't this point been specifically passed on by two Federal courts, one in Georgia in the *Toombs* case, one in Utah in the *Petuskey* case, in which it is said that although the actions of the malapportioned legislature which deals with routine affairs of the State, of course, couldn't be set aside, the courts would not permit the legislature to act on matters involving their own malapportionment. Specifically in Georgia case in Toombs against Fortson, a three-judge Federal court enjoined the Georgia General Assembly from calling a constitutional convention to revise the State constitution until the general assembly is reapportioned in accordance with constitutional standards, and in its order dated June 24, 1964, the three-judge Federal court specifically stated:

We do not feel it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is

as is the case here, proposed under conditions of doubtful legality by a malapportioned State legislature.

As this order was being appealed to the Supreme Court of the United States a new election was held in Georgia, and it was not necessary to enforce the injunction.

However, in the *Petuskey* case, the court held there that a malapportioned legislature may be competent pending its reapportionment to pass legislation generally but such a legislature has no competence to initiate amendments to the Constitution to make legal its own illegality. In *Petuskey* v. *Rampton*, 243 Fed. Supp. 365, decided in 1965, the Court states:

A well-known general principle of equity requires that the malapportioned legislature not consider or vote upon any proposal to amend the Constitution of the United States on the subject of legislative reapportionment.

Senator PROXMIRE. I am very grateful to the Senator from Maryland. That provides excellent legal support for the general opinion I gave that there should be a distinction between a reapportioned legislature acting an its own malapportionment and providing the general housekeeping legislation and the other legislation which you are talking about.

Senator TYDINGS. Let me refresh your recollection on one more point, and that is on the point that there is grave doubt, constitutional doubt, whether any act of Congress should bind a future constitutional convention. In the debate on the floor of the Senate last April 1967, you quoted a distinguished constitutional authority, former Republican U.S. Senator from the State of Idaho. His language was this, and I use it to refresh your recollection.

Senator DIRKSEN. What was his name?

Senator TYDINGS. His name was U.S. Senator Hayburn, and on the floor of the Senate, February 17, 1911, Senator Hayburn stated:

When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution. They can repeal the provision that limits the right of amendment: they can repeal every section of it because they are the peers of the people who made it.

Does that refresh your recollection?

Senator PROXMIRE. It does indeed, and it goes right back to the very first point made by the Senator from Maryland that there is this very serious question as to whether or not Congress could take action as this legislation does here to limit whatever action a constitutional convention might want to take. I think that is a most important point.

Senator TYDINGS. I thank the Senator from Wisconsin. I would be happy to yield to the distinguished Senator from Nebraska for whom I have the greatest esteem and affection.

Senator HRUSKA. The Senator from Nebraska is interested in the arithmetic of the Senator from Maryland when he says it is conceivable that States containing only 16.3 percent of the population could cause a constitutional convention to be convened and, presumably, therefore, only 8 percent inasmuch as a majority vote is necessary—States representing 8 percent of the population, can control the convention.

It would be my idea that in order for those 8 percent to do that, only the delegates from the States containing the 16.3-percent population would be present at the session, and no more and no less, and it is

only by that curious reasoning that 8 percent would then be called upon to exercise and control the destiny of the convention.

The question I would have is this: Is it reasonable to suppose that 49 percent of the delegates or the delegates representing 83.7 percent of the population would not be present at that convention, they would go home in a huff and say "A pox on your house. Go ahead and run your convention. We want no part of it," and thereby 8 percent of the population's delegates could control the convention?

Senator PROXMIRE. I say to the Senator from Nebraska, without accepting the arithmetic necessarily of the Senator from Maryland, I think his point is right for this reason, that if 16 percent of the population represents half the States, and if just half the people in each one of those States takes a position under the unit rule, the entire State vote will go that way, and you get a majority of the States voting that way.

In other words, 8.1 percent would control 16 percent, and, therefore, you get in effect 8.1 percent having their will prevail.

Senator TYDINGS. I would be happy to give the facts, Senator, if you are really interested.

You take the 26 smallest State of the Union, and their population is 16.3 percent of the total population of the United States.

Now, each of these States has a delegation, and if you have a difference of one vote in a majority and a minority position, and under the proposed rules the majority would control the vote of the State delegation, and that means 8 percent or a little bit more than 8 percent, would be controlling.

Senator HRUSKA. Under the unit rule.

Senator TYDINGS. Yes.

Senator HRUSKA. That clears up the muddled-thinking processes of the Senator from Nebraska. I can see the suppositious case that you put in that situation.

Senator TYDINGS. I thank my colleague.

Senator HRUSKA. It is not infrequently that the Senator from Maryland changes the mind of the Senator from Nebraska.

Senator TYDINGS. I would say more often not.

Senator HRUSKA. Maybe he can help me with this. Section 6(a) says that no Presidential signature is necessary, and later in the bill there are provisions that no Governor's signature is necessary on the petition for a National Convention. It has been held ever since the Republic started and continuing without deviation to the present that the President's signature is not necessary for an amendment to be constitutionally adopted. A question was raised to this effect in 1798 with regard to the 11th amendment. In the case *Hollingsworth* v. *Virginia*, Justice Chase said:

> There can surely be no necessity to answer that argument. The negative of the President applies only to ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the Constitution.

That has been the undeviating rule since. The matter of proposing amendments to the Constitution is a Federal function delegated to the Congress, not to the Congress and the President but to the Congress, and likewise the ratification by the legislatures or the proposal of a National Constitutional Convention for amending the Constitution does not require the signature of the Governor because article 5 says

that when two-thirds of the legislatures of the States propose, and the Governor is not a member of the legislature and, therefore, has no part. It is not a legislative function, it is a function given and granted to the State legislatures, not the legislature and Governor. So maybe the Senator can enlighten me on that.

Senator TYDINGS. I would be delighted to have the opportunity, Senator.

To refer you back to the decision, the rather cursory decision, in 1798, is it not a fact that Justice Chase was commenting on a necessity of a Presidential signature on the proposal, by two-thirds vote of the Congress of a constitutional amendment?

Obviously, his opinion was based on the ground that since you needed a two-thirds vote of both Houses for a constitutional amendment, a Presidential veto could have been overridden by the two-thirds majority and hence there was no need for the Presidential signature; whereas inthis bill you abandon the two-thirds requirement and you move to just the simple majority.

Senator HRUSKA. For a limited purpose—of calling the Constitutional Convention which is a mandated, ministerial act after two-thirds of the legislatures of the several States shall have proceeded.

Senator TYDINGS. But you do see the difference between the proposal before Justice Chase and the proposal we have before us. I might also point out as recently as 1943 in at least one State, Pennsylvania, the Governor vetoed a petition to Congress by the State legislature for a Constitutional Convention and, as I read article V, it is the States which call it, and they should follow the normal procedure if the States the State of Pennsylvania, the State of Nebraska, or the State of Maryland has in its constitution that the Governor shall have the right of veto and shall require a two-thirds vote rather than a majority. I do not think that the Congress of the United States should be telling the States how they are going to file their petition, particularly when you do not even give the State courts the right to review the action of the legislature.

Senator HRUSKA. The Senator cannot ride two horses at one time, I am sure, dexterous as he is. He refers to normal processes of the State legislature requiring signature by the Governor. This is not a normal function of the legislature, in fact it is one of great rarity, and a very solemn and sacred moment. He himself has so testified.

This is not a normal legislative function, it is a function prescribed by article V, and when it says on the application of legislatures up to two-thirds of the several States. Article V knew what legislatures were, and if they thought that it would be necessary to have a Governor's signature they would have said, assuming that they were writing this Constitution for the people of the Republic to read and understand, on the application of the legislatures plus the signature of a Governor.

They did not say that. The legislature is an independent, coordinate branch of the Government, and that is what article V says, and the same thing in reference to the ratification—ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths of the several States.

If it is done by convention will the Governor have to sign it?

Where is there any reference to the Governor in article V?

Senator TYDINGS. I do not know whether the Governor will ever see the matter again because the constitutional convention might determine that the ratification shall be chosen or appointed assemblages, and that is one of my great fears in this whole matter, that the ratification would be completely taken out of the existing bodies of the State legislature and the State constitutional authorities.

Senator HRUSKA. In an effort to remove some of the concern and fears from the soul of the Senator from Maryland, I am wondering if he would refer to section 7(a) on page 6 of the bill which starts out by reading "Each delegate shall be elected or appointed in the manner provided by State law." Now he is a proponent and advocate of the people ruling, that the Senator from Maryland has said so many times, and I believe it. Would his heart be made happy if there were stricken from the bill the two words "or appointed" so that that sentence would read, "Each delegate shall be elected in the manner provided by State law"?

Senator TYDINGS. I think that would be a step forward, but that would be the first step of the hike around the world.

Senator HRUSKA. And you would rather have the Congress approve the election of delegates in the several States?

What method would you provide as an alternative?

Senator TYDINGS. In that whole section, first of all, I think delegates to the convention should be elected on a one-man, one-vote basis by the people of the State according to State law and according to the State constitution, and I do not think their election should be determined by the legislature without any reference to State law or State constitutional procedure.

Senator HRUSKA. The sentence does refer, it says, "Provided by State law," and I presume there is——

Senator TYDINGS. But there is also——

Senator HRUSKA (continuing). A presumption of constitutionality of any State law, any act of the State legislature, and I would not imagine they would pass something that is unconstitutional. If we are going to proceed on that assumption and have fears on that score, is that any place in the legislative field that is going to give the Senator from Maryland any feeling of assurance or certainty? I cannot quite see this business of expecting the people to do the wrong thing.

The essential basis of our whole Republic is that men of good faith will act in a responsible and good way and the presumption should be given to that.

If we are going to indulge in all kinds of nightmares about the things, then we will never do anything, because the people might make a mistake, they might be pressured, they might even be brainwashed, you cannot tell in these modern days what might happen.

Senator PROXMIRE. May I say to the Senator from Nebraska my point is that the people do not have a chance.

Senator HRUSKA. By electing delegates.

Senator PROXMIRE. But our statement is, you should not let a minority, 8 percent of the people, decide on this. We want an opportunity for a majority to decide on several ways. No. 1, to permit as close to a majority as you can possibly get by whatever interpretation you want to put on article V; No. 2, by permitting a man elected by the people, all the people of the Nation, to have a voice in this, the President of

the United States; No. 3, by permitting the man, the only man, elected to be head of the State by all the people of the States, to have a voice in this.

On all these grounds and all these steps the Senator from Nebraska takes a contrary position in supporting the bill. He says that under the circumstances so well described and agreed to, stipulated to, by the Senator from Nebraska, so well described by the Senator from Maryland, neither the people, the Governor, nor the President should have a voice.

Senator HRUSKA. The Senator does not say that. It is the Constitution that says it. The Constitution does not say a majority of the popular vote.

Senator PROXMIRE. Perhaps it does not, Senator Hruska, but you are saying go back to the people. You say let the people decide.

Senator HRUSKA. Let the people decide.

Senator TYDINGS. That is what we want, the majority of the people.

Senator HRUSKA. If that is the case we should say every time the Supreme Court acts on a case, let the people decide, refer their decision to the people. There is no warrant for that in the Constitution nor is there any warrant in the Constitution for letting the people decide by a popular vote under article V. Until we change it, article V should mean and be applied for what it says. The people are making the decision because they elect the delegates to the legislature, they elect the delegates to the convention, and under article V the States speak either by the legislature or by the convention.

Now, if we are going to say by legislation, "Well, the people should decide and, therefore, we will disregard article V and we will say by popular vote this shall be done," then we are doing great violence to our pledge and our oath to protect and defend the Constitution and apply it as it plainly reads.

Senator PROXMIRE. Yes. What you are doing is that the people should decide on the basis of your definition of the people.

Senator HRUSKA. No; on the basis of the language.

Senator PROXMIRE. You are not saying the majority of the people shall decide or that the Court shall have a voice or that the President or that the Governor shall have a voice. That is the difficulty with the Constitution——

Senator HRUSKA. It may be narrow, but it is article V that is narrow, and I am going to respect article V as it is written and not put some meaning in it that is not there such as inserting the President's and the Governor's signature and popular vote when they are not even mentioned and when the history of article V plainly shows what was meant.

I second the suggestion by the Senator from Illinois that if article V is not satisfactory to any Senator, let him get up on the Senate floor and propose a resolution which will amend article V.

Senator TYDINGS. I am impressed by the distinguished Senator from Nebraska's argument and his eloquence. But I think he overlooks the complete history surrounding the adoption of article V and, particularly, the arguments of Colonel Mason of Virginia who successfully opposed the first draft, the Madison draft, and got the second draft with the specific purpose that it should give the people an opportunity to bypass the Congress.

Now, if we, in a sense, structure article V in the Congress of the United States rather than let the people have a voice, by giving control of a constitutional convention to 8 percent of the population of the United States and give them the right to amend our charter, I think we do great violence to the right of the people of the United States, and I think it shows a lack of confidence in the majority of the people.

Senator HRUSKA. The Senator again, by his deliberate statement, tries to tell the people of this Nation that this 8 percent, these delegates representing 8 percent, are going to amend the Constitution. They cannot do that any more than the Senator from Maryland or myself can do it. All they can do, even if his computation is correct, all they can do, is propose an amendment.

Senator PROXMIRE. But it is a long, dangerous step.

Senator HRUSKA. They could not change the Constitution.

Senator TYDINGS. Let us concede every point made by the Senator from Nebraska, that all those representatives of 8 percent of the people can do is propose it.

Senator HRUSKA. That is right.

Senator TYDINGS. Don't you think that it violates the basic structure of our democracy to have amendments to the Constitution of the United States proposed by representatives of 8 percent of the people? You think that 8 percent of the people are so superior to the rest of us that they should be able to propose an amendment to the Constitution of the United States?

Senator HRUSKA. No; I do not think it does, because in the first place, we are not a democracy, we are a federated Republic, and, in the second place, we have a Constitution to go by.

So I say again, if some people are unhappy with article V let them propose an amendment to article V to say, "When two-thirds of the legislatures, joined in by the Governor, shall petition for a constitutional convention." It could also say when the Congress passes a concurrent resolution it shall be signed by the President. However, that is not the law today. The law is plain today.

Now, that is separate and apart from its wisdom. But, at the same time, there it is, and I am not going to put myself on public record as saying I will favor a legislative proposal to disregard and to violate the clear meaning of article V as it stands today and as it has been interpreted all these decades.

Senator TYDINGS. Mr. Chairman, I ask unanimous consent that I put the following statistics into the record at this point. In the 1960 census the 26 smallest States had a population of 29,312,000; the 34 smallest States had a population, as of 1960, of 54,567,000; the total population of the United States for the 1960 decenniel census, 179,323,000. The 26-State proportional figure is 16.3 percent of the total population, the 34-State figure is 31 percent of the total population.

Senator DIRKSEN. Without objection.

I have only one comment to make on this question of reposing in Congress any restrictive powers with respect to this. Alexander Hamilton was fully aware of that in that very clear treatise in "The Federalist." He wrote, simply stated, that you could conceivably have a Congress which, by the simple device of inaction, refused to take any action on the applications filed by the States either for amendment of the Constitution or in this case for a convention—simple inaction

and nothing more. So the Congress could thwart the will of the States and of the people.

In the campaign for ratification of the Constitution Hamilton and Madison had to go to New York and elsewhere and make it abundantly clear that if they did not like the Constitution there was article V, and in Hamilton's own language he says no discretion remains in the Congress. It is preemptory.

I will be pretty careful about reposing any restrictive powers in the Congress because it would appear to me, as a matter of course, that when you got up to 32 States petitioning the Congress that instead of trying to get legislatures to rescind their action there ought to be people in the Senate going out encouraging the legislatures to act so that we come to grips with it, and so that we have a constitutional convention, because the safeguards are there.

I do not entertain for a moment the strange fears that motivate these interesting titles to speeches and articles that "they are tampering with the Constitution," as if there is no commonsense left in this country.

Senator HRUSKA. I ask unanimous consent, Mr. Chairman, that an excerpt from Alexander Hamilton's Federalist Paper No. 85 bearing on this particular point be printed in the record here in full text.

Senator DIRKSEN. Without objection.

(The document referred to follows:)

By the fifth article of the plan the congress will be *obliged*, "on the application of the legislatures of two-thirds of the states (which at present amounts to nine), to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in air. Nor however difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.

Senator DIRKSEN. Professor Kurland, have you any questions?

Professor KURLAND. No questions, Senator.

Senator DIRKSEN. And Professor Bickel, what about you?

Professor BICKEL. Well, I hate to keep the committee, because it is getting late in the morning, but if there is a moment, I would just like to suggest to Senator Hruska that article V, while it addresses itself quite literally to the issue of ratification, does not, it seems to me, address itself at all to the question of whether States are to vote by the unit rule in the convention. It speaks of legislatures, Congress, conventions, ratification. It says nothing that I can see about whether in a convention that is called by the States the States must vote by the unit rule. That seems to me an open question.

Senator HRUSKA. Would the gentleman agree that there are two methods by which States can act, as clearly set out in article V in the ratification process?

Professor BICKEL. In the ratification process.

Senator HRUSKA. That is by either the legislatures of three-fourths of the States or by conventions in three-fourths thereof.

Would the gentleman agree?

Professor BICKEL. Quite so, in the ratification process.

Senator HRUSKA. I fail to see any indefiniteness about it. Can I get some explanation?

Professor BICKEL. Quite so. But, as I understood the colloquy between yourself and Senator Proxmire, the issue was whether in the convention called by the States, in the constitutional convention, it was necessary under article V that the States vote by the unit rule, one vote per State, and that I do not see.

Senator HRUSKA. I say the entire thrust of article V in the calling of the convention and the ratification of any proposal for amendment to the Constitution, however derived, is toward a State basis.

Professor BICKEL. I quite agree.

Senator HRUSKA. A State basis; and it is upon that premise that the bill builds the idea that there should be the unit rule in the constitutional convention as well, so that there will be a continuity in that regard and a harmony in that regard.

Professor BICKEL. If I may just continue this for 1 second, I quite agree with the Senator that the thrust of article V is the States call the convention, the States ratify the convention's product.

What article V does not say is that in the convention the States vote by the unit rule as States; this the bill inserts as a choice, as a matter of a policy choice made by Congress, and I understood Senator Proxmire to oppose that choice on the ground that, as Senator Tydings' arithmetic demonstrates, the result would be that in the convention States representing a quite small minority of the population might succeed in proposing amendments.

That may be a good or a bad thing—I think a bad—but it is not compelled by article V, and that is the point I am trying to make.

Senator HRUSKA. Of course, wouldn't that circumscribe very greatly the practical success of any constitutional amendment that is proposed?

Professor BICKEL. I should hope so.

Senator HRUSKA. Because unless there is some certainty inasmuch as ratification must be on the basis of States, unless there is some sympathy for the proposal on the part of the majority, in fact, of three-fourths of the States, there will never be an amendment to the Constitution.

Professor BICKEL. I should hope so. But I should hope also that the convention's work might be more fruitful and might give more hope of ultimate success if, in pursuing its work, in voting in the convention, the vote was per capita, as it is in Congress and all State legislatures. I should hope that would be a better method for insuring the success of the convention.

Senator HRUSKA. Even that would never succeed as a proposed amendment because under article V when you come to ratification I doubt very much that three-fourths of the States are going to say, "All right, we will put ourselves on the chopping block. We will let eight States in the Nation govern the Constitution." I imagine eight States would have as much as a majority of the population in this Nation. It might be 10.

Professor BICKEL. Well, Senator, we are discussing a provision in the Ervin bill that the States shall vote by the unit rule in the convention, and your support of it, as I understand it, is based on the propo-

sition that it is not going to come to anything, it does not matter, the convention will vote essentially by majority vote anyway, because they would never propose for ratification an amendment that had behind it only 8½ percent of the population.

But that is a rather negative way to support an affirmative policy decision by Congress that the States should vote by the unit rule in the convention. I see no reason why that should not be provided.

Senator HRUSKA. You see, we might have a runaway constitutional convention. I suppose a legislature is a runaway legislature, and a constitutional convention is a runaway constitutional convention if it does something that one considers undesirable. But we could have a runaway constitutional convention controlled by eight States, I will have to get the figures and add up enough States to make a majority of the Nation, and that would form an oligopoly of the federation of States.

That is not what the Constitution provides for. This is a Constitution of federated States with equal representation in the U.S. Senate for each and every State, and for other purposes the State is considered as a unit of government.

If we want to rub that out, then let us resort to the regular amendatory process to achieve it. Let us not try to do it legislatively.

Professor BICKEL. What I was pointing out, Senator, is that on this point, we do not need the amending process because article V leaves us entirely free. On the ratification and the calling we are bound. On how the convention votes, we are under article V entirely free, and the choice is a stark one, whether to let the convention act by possibly a minority vote on a population basis, or whether to require it to act as all our legislative bodies act, by a majority vote of persons present, presumably representing a majority of the population.

Senator HRUSKA. Is that true in the Senate of the United States?

Professor BICKEL. That is not necessarily true in the Senate of the United States.

Senator HRUSKA. Would you have it apply in the Senate of the United States?

Professor BICKEL. I am bound on that, Senator.

Senator HRUSKA. How are you bound?

Professor BICKEL. By the Constitution.

Senator DIRKSEN. Professor McCloskey, any questions?

Professor MCCLOSKEY. No questions.

Senator DIRKSEN. Thank you for your fine testimony, Senator Proxmire.

Senator PROXMIRE. Thank you.

Senator DIRKSEN. Our next witness is Theodore Sorensen.

I might say about Mr. Sorensen that he was born in Lincoln, Nebr. I hope my distinguished colleague——

Senator HRUSKA. I have taken note of that fact for many, many years, as the witness will testify.

Senator DIRKSEN. He received a B.S. degree and an LL. B. from the University of Nebraska in 1949 and 1951, and was admitted to the Nebraska bar in 1951. From 1951 to 1952 he was a staff attorney for the Federal Security Agency, and in 1952 served on the Senate staff of the Joint Committee on Revision of the Railroad Retirement System. In 1953 he became administrative assistant to Senator John

Fitzgerald Kennedy, and served in that capacity until the late Senator was elected President. Mr. Sorensen then became special counsel to President Kennedy and he now practices law in New York City.

He is the author of a book, entitled "Decisionmaking in the White House" and a book on his association with President Kennedy entitled "Kennedy," published in 1965.

Mr. Sorensen, we will be glad to hear you.

Senator HRUSKA. Mr. Chairman, I would like to add my welcome to the gracious welcome and introduction which the chairman just made.

We have had occasion to engage in colloquy and in discussion before, and unstrangely enough, Mr. Sorensen and this Senator have not always agreed on philosophical questions, but we have always been congenial and good friends, and for that I am grateful.

Senator TYDINGS. I, too, Mr. Chairman, would like to take this opportunity to welcome your distinguished witness. I have had personal friendship with him for many years, and I am delighted that he has reached the same eminence in the private practice of law as he did in the Government while he was here, both the executive and legislative branches.

STATEMENT OF THEODORE C. SORENSEN, ATTORNEY AT LAW

Mr. SORENSEN. Thank you, Mr. Chairman and gentlemen.

I am here in response to Chairman Ervin's invitation, for which I am grateful, and appear not in any representative capacity but simply as a concerned private citizen.

I am concerned about the choice between constitutional crisis and constitutional chaos which would almost surely confront this country if the effort to call a new National Constitutional Convention ever received the endorsement of 34 State legislatures. We are perilously close to that point today, 32 States at last count having enacted and transmitted such resolutions in varying forms. In the absence of any congressional standards or procedures, in the absence of any precedent other than the Convention of 1787, the country might well experience either a bitter and confused dispute—possibly spilling into the courts—over whether the Congress should or must call such a Convention and under what conditions, or, on the other hand, a runaway convention, under pressure if not domination from all kinds of special interests, tinkering in unlimited fashion with the greatest charter of government ever known to man.

No matter how many and how sincere are the assurances from the backers of a new Convention that their sole concern is reapportionment, no one can safely assume that the delegates to such a Convention, once seated and in action, would wish to go home without trying their hand at improving many parts of this delicately balanced document. All of us know of the pressures that will then build up to amend the Bill of Rights, to halt supposed pampering of the criminally accused, to stop so-called abuses of the fifth amendment, to limit free speech for the disloyal, to reopen the wars between church and state, to limit the Supreme Court's jurisdiction or the President's veto power or the congressional warmaking authority.

The kinds of amendments likely to be considered are reflected in those introduced in the Congress this year, including those that would abolish the income tax, require a balanced budget, permit prayers in public schools, elect the Supreme Court, regulate pornography, limit social security taxes, restore to the States certain rights taken away by the Court, require the advice and consent of the House to treaty-making, allow each State to enact its own legislation on questions of decency and morality, preserve our Nation's spiritual heritage, and establish the paramount right of society and the individual to be protected from crime.

Other proposals contained in various State applications for a constitutional convention over the years have included world federal government, State control of education, revision of article V, provision for a higher court above the Supreme Court, abolition of Federal enterprises, the allocation of oil and mineral rights, and changes in the electoral college. The current church-state debate in New York over its proposed new State constitution illustrates the bitterness as well as the strength of both those who feel that the first amendment "wall" is not high enough and those who might be inclined to lower it.

Whatever one's party or philosophy, whatever his position on a particular amendment or his faith in our State legislative bodies, the prospect of wide-open dabbling with the classic work of 180 years ago can only fill the constitutionalist with alarm. Unlike 1787, there is today no nationwide need or demand for such a Convention. There are no flaws in our system requiring so radical a step. There is no difficulty—as is true of some State constitutions—in invoking the usual amendment route.

I realize that such a convention could do no more than the Congress can already do; namely, propose amendments for ratification by at least 38 States. But Congress does not merely propose amendments. It first approves them on the basis of its own insight into Federal constitutional problems. Neither the members of a new Convention, nor the State legislatures—or State conventions—which ratified their proposals, could possibly have the same knowledge of Federal problems as the Congress or the same degree of responsibility for meeting them. The Convention route has the effect, in the absence of Federal legislation, of practically bypassing the body who will bear the burden of implementing any amendments, and whose members by definition better reflect the national interest and long-range perspective than either the State legislatures or a temporary convention whose delegates need not run for reelection. I note, for example, that seven State legislatures have petitioned for a convention to propose the so-called "Liberty Amendment"—which would repeal all Federal income, gift, and estate taxes, liquidate most Federal programs, and necessitate a national sales tax. But I doubt if very many of the Congressmen and Senators from those same seven States would ever vote for such an irresponsible proposal.

It was for these reasons that I proposed last spring that the Congress involve itself in this wholly unused amendment route—the convention route—by enacting legislation for the implementation of that portion of article V; and it is for these reasons that I commend Chairman Ervin for his initiative in introducing the pending bill.

In my opinion, the basic legal premise of S. 2307 is valid. The constitutional authority of the Congress to establish rules and procedures regularizing the use or application of principles set forth in the Constitution has been too frequently exercised to be doubted today. Moreover, because State legislatures in proposing amendments via the convention route are performing a Federal function derived from the Federal Constitution, they could not be heard in court to complain about the imposition of reasonable standards and procedures by the Federal Congress, so long as their fundamental right to amend the Constitution is not thereby impaired. Article V, it should be noted, gives to the Congress both the responsibility for calling such conventions and the separate responsibility—which could logically be exercised at the convention's close—of determining the mode of ratification for any amendments proposed. It also contains certain restrictions on the subject matter of proposed amendments. The original Constitution itself was submitted to the Congress for that body to submit to the States in accordance with the original call of the Convention; and Federalist Papers 43 and 85 seem to assume that future amendments would be considered piecemeal, not wholesale.

Thus it would appear that the authors of the Constitution clearly contemplated the enactment of legislation such as S. 2307 giving Congress a role prescribing the convention-amendment process; and the courts, by ruling that other congressional actions of this kind—with respect, for example, to ratification—are "political" questions, have made clear that they will not question the right of Congress to enact such legislation. In short, I fully concur with Chairman Ervin that Congress has both the power and the duty to implement article V, to prevent the crisis and chaos that would otherwise result and to restrict any such convention to those topics that are specified in the applications of State legislatures. These limitations, the clarification of the rescission and ratification processes and the assertion of congressional review all represent commendable steps forward.

Much to my regret, however, other portions of S. 2307 as presently drafted contain serious flaws which, if enacted, would make the threat of a national constitutional convention more dire than ever. Indeed, I regard these flaws as dangerously destructive to our basic constitutional principles.

Under section 7(a) the delegates to such a convention could be appointed instead of elected. I know of no modern precedent or acceptable reason for permitting the very State legislatures who call such a convention to avoid by State statute the popular election of their delegates. A Constitutional Convention is the embodiment of the ultimate power of the people; surely its membership must be directly chosen by the people it purports to represent if we are not to turn the clock back to the days before the direct election of Senators.

Under section 9(a) each State delegation to such convention is to have one vote, regardless of size. That proposal is so flagrantly in violation of the one-man, one-vote doctrine—and so obviously contrary to the very notion of a representative body—that even a constitutional convention founded on such a premise could not withstand judicial injunction. I am assuming, I might add, that "Representatives in Congress" in section 7(a) as a basis for convention apportionment means "representatives to the U.S. House of Representatives"

as it does elsewhere in the Constitution. Any other meaning would be an unnecessary distortion of the convention's representatives. History and the Constitution make special provision for equal suffrage in one of the two Houses of Congress; and considerations of diplomacy and sovereignty have necessitated it in the U.N. General Assembly; but neither of those bodies is a proper precedent for a constitutional convention convoked in the name of the people with power to submit far-reaching amendments. In addition, the proposed unit rule for each State delegation would, even if each State's vote were properly weighted, place a curb on dissent and diversity which should not be imposed by the Congress but at best adopted or not adopted voluntarily by each State, as is now the case at our political conventions.

Finally, under section 10(a) such conventions would propose amendments by a majority of the total votes cast. The Congress, on the other hand, can propose amendments under article V only by a two-thirds vote in both Houses. A convention, for the reasons previously indicated, will not be entitled to the same confidence in its deliberations, in my opinion, as the Congress; and it would be most unwise to make even easier its submission of amendments.

The combination of section 9(a) and 10(a) is particularly disturbing. Any amendment submitteed by the Congress has first been approved by not only two-thirds of the Senate—which means at least 34 States and possibly all of them—but also two-thirds of the House, which means at least 290 Members who, even if they came from the smallest constituencies, would still represent roughly two-thirds of the population. But under section 9(a) and 10(a), after 34 States which might represent as little as 30 percent of the population had called the convention, 26 States representing one-sixth of the population could propose new amendments, before 38 States which could represent less than 40 percent of the population ratified them. Such a possibility drastically upsets the very checks and balances on which the Union was founded. And if under section 7(a), the delegates in those 26 States were appointed and not elected, the travesty on democracy contained in this process would be even more shocking. Therefore, I strongly urge the amendment of S. 2307 to provide that all delegates shall be elected and represent a substantially equal portion of their State's population, that each deleagte shall have one vote to be individually cast, and that a two-thirds vote of the convention shall be required to submit amendments for ratification. In the absence of such changes, this bill will do more damage than it prevents.

I would also respectfully urge:

(1) Reduction of the 6-year period provided in section 5(a) during which two-thirds of the States may propose the same amendments via the convention route, in view of the 2-year period in which a two-thirds vote of each House must be obtained to propose amendments via the congressional route;

(2) A cooling-off period in section 6 of at least 1 year between receipt by the Congress of the necessary two-thirds applications and specific authorization by the Congress of so potentially drastic a convention;

(3) A requirement in section 3 that such applications be the product of the same legislative processes at the State level as such State requires for the enactment of a State law, as distinguished from memorials to

the Congress—but not including approval by its Governor which, I must inform my friend from Maryland, I now agree could not be constitutionally required;

(4) A requirement in section 6 that the Secretary of the Senate and the Clerk of the House report annually to their respective bodies on the applications on file, to prevent the kind of surprise which came upon the Congress this year;

(5) The deletion as premature of those provisions attempting to specify now the method and time period of ratification in section 6(a) (3) and (4) and the compensation of delegates in section 7(d); and

(6) I am submitting a list of seven very minor and largely technical or clarifying amendments as an appendix to this statement.

I appreciate, Mr. Chairman, the spirit with which Senator Ervin has put forward this draft bill without committing himself to all of its provisions; and I know that this committee's deliberations will be guided by that same devotion to our Constitution and admiration for its authors that guide every practitioner of the law.

(The appendix referred to follows:)

APPENDIX

TECHNICAL OR CLARIFYING AMENDMENTS TO S. 2307

Page 4, line 5—substitute the words "Section 6" for the words "Section 8"
Page 4, line 13—insert the word "effective" before the word "applications"
Page 4, line 23—substitute the word "record" for the word "tabulation"
Page 6, line 1—delete the words "the legislatures of"
Page 10, line 22—delete the words "the legislatures of"
Page 7, line 24—substitute for the words "have not been" the words "changes or additions are different in general nature from those"
Page 8, line 14—delete remainder of sentence after word "require"

Senator DIRKSEN. Thank you, Mr. Sorensen.

Do you have any questions, Senator Hruska?

Senator HRUSKA. I just have one question, Mr. Sorensen. It is a splendid statement and I commend you for it. It is restrained and it is factual in many, many ways. I would respectfully differ with some of the suggestions that you make by way of amendment.

Can an analogy really be drawn between the necessity to act on a resolution in Congress by a two-thirds vote within a period of 2 years in order to get a proposal for an amendment properly submitted to the State legislatures, and the other situation of having the legislatures limited to a 2-year period in which to petition Congress for a convention?

I cannot quite follow you when you suggest that, since Congress must act within 2 years, therefore everything else by way of proposing a constitutional convention must be done within 2 years.

Mr. SORENSEN. I am frank to say, Senator, that I think the calling of a national constitutional convention is such a serious step that it should not be made easy, it should be made difficult.

Senator HRUSKA. And it should not be made hastily. Some legislatures meet only 60 days, some 90 days, and since it is an event of great rarity, don't you think that they ought to discuss it at one session, come back a couple of years later and say, "Where do we stand now?" That would give them an opportunity to act studiously and properly?

Mr. SORENSEN. Each legislature meets at least every 2 years, and some of them do meet every year, so that the 2-year period would certainly give every legislature a chance. Perhaps as Senator Proxmire suggested, a 4-year period would be an acceptable compromise.

I do not, however, underestimate the difficulty of getting a two-thirds vote of the Congress even in a single 2-year period, so that I think that the process of amending the Constitution is difficult under either route.

Senator HRUSKA. Of course, 2 years is a misleading term not intentionally, but in fact, because of some of the legislatures being allowed to meet only 60 or 90 days. Now that is not 2 years, but rather 60 or 90 days and between the time of proposing a resolution and its adoption, it has to go through two Houses, and so on. If we put it in terms of legislative sessions perhaps that would be a little easier to understand, would it not?

Mr. SORENSEN. Yes.

Senator HRUSKA. It is one possibility.

On another score on page 9 of your statement you suggest the requirement that such applications—excuse me, I withdraw my question. I had hastily read that and understood that there was a proposal to include the signature of the Governor.

Mr. SORENSEN. No.

Senator HRUSKA. It is the State legislature by itself that takes that action, is it not?

Mr. SORENSEN. Yes.

Senator HRUSKA. And, of course, there is that reference to Federalist Paper No. 85 of Mr. Hamilton which pretty much goes into that situation.

Mr. SORENSEN. Yes, Senator.

Senator HRUSKA. Those are all the questions I have.

Mr. SORENSEN. I am sorry that my friend from Maryland is not here because, while I admire the effort which he has made on this matter, I do have admiration for Nebraska lawyers, and I must agree with you that the Governor and the President are not a part of the article V process.

Senator HRUSKA. Thanks very much. Those are all the questions I have.

Senator DIRKSEN. Mr. Sorensen, where Congress fails to act in amending the Constitution, and you only have this one remaining route; namely, the applications of the States, have you any comment upon the inclusion in those applications of limitations on the subject matter that you would like to see handled in a convention?

Mr. SORENSEN. I believe that the provisions in S. 2307 which would require the State legislatures to set forth in their applications the specific matters on which they believe a convention should be held, and then the subsequent requirement that the convention limit itself to that subject matter, are valid.

Senator DIRKSEN. Are you of the opinion that under the present language of article V that is an entirely open question?

Mr. SORENSEN. Yes.

Senator DIRKSEN. And that the Congress could not put restrictions or inhibitions on a convention?

Mr. SORENSEN. I would be very much afraid of that.

Senator HRUSKA. Would the Senator yield?

Would Congress be limiting or restricting the States or would Congress in Senate bill 2307 simply be assuring, making assurances, to all the States and the people of the Republic that only the text of the resolution and the petition of each State will not be exceeded in the convention?

Mr. SORENSEN. In the convention.

Senator HRUSKA. In other words, any limitation of scope will not be imposed by Congress, it will be imposed by the text of the State legislature's resolutions, and all we undertake to do in S. 2307 would be to say whatever that text is, that is what will be considered and nothing more; isn't that the thrust of 2307?

Mr. SORENSEN. That is correct; yes, sir.

Senator HRUSKA. Now, then, could you conceive of the legislatures of two-thirds of the States saying, "We petition the Congress for a constitutional convention which will consider a general revision of the U.S. Constitution"?

Is that a possibility?

Mr. SORENSEN. I would have to——

Senator HRUSKA. And if so is there any way that the Congress can say, "You cannot do that"?

Mr. SORENSEN. S. 2307, Senator, refers to a State's request for the calling of a convention "for the purpose of proposing one or more amendments of a particular nature to the Constitution, and stating the specific nature of the amendment or amendments to be proposed." I think that is a desirable safeguard which would prevent the kind of wholesale application by the State legislatures that you describe.

Senator HRUSKA. Is it a constitutional limitation? Where do we have language which will enable us to negate the express wishes of two-thirds of the State legislatures saying what they want?

Mr. SORENSEN. Once S. 2307 has been passed it stands as an act of Congress implementing and interpreting article V, which, similar to other acts of Congress on many parts of the Constitution would, I believe, stand. Yes.

Senator HRUSKA. Well, we can get into that question in greater detail later. But it seems to me that one of the points that we ought to canvass, Mr. Chairman, when we get into executive session and of witnesses as they appear here, is to determine whether we want to foreclose by statute the right of two-thirds of these State legislatures to say the time has come that we want a general revision of our Federal Constitution. If two-thirds of the State legislatures say, "We want that considered," I would have misgivings, that we by statute, can deny them that right—we, meaning the Congress of the United States.

Mr. SORENSEN. Perhaps it is a question of semantics, Senator, since presumably a State could list practically every article in the Constitution in its request.

Senator HRUSKA. Yes; they can do it the hard way.

Senator DIRKSEN. Professor Kurland, have you any questions?

Professor KURLAND. No questions.

Senator DIRKSEN. Professor Bickel.

Professor BICKEL. One brief question, if I may.

Mr. Sorensen, I take it the reason you thing the Governor is excluded from the proposing process in the States is that article V refers to the legislatures of the States—it says "on application of the legislatures of the States."

Mr. SORENSEN. Yes.

Article V refers to the legislatures, both with respect to the proposing of amendments via the convention route and the ratification of amendments. I believe the courts have held that in the ratification process the Governor's participation is not required, and I would assume, too, it would not be——

Professor BICKEL. That is the point I was coming to. The courts have not held it was required or forbidden. In other words, the courts have, as I understand it, held that the phrase "legislatures of the States" means that the framers of the Constitution wanted to be sure to insert the legislatures, but they did not necessarily intend action by the legislatures exclusively outside the normal legislative processes of the State. As I understand it, what the States have been told, in effect, is, "If you want to insert your Governor into it you may; if not, no."

Well, all right, if it is an open question under article V, then I do not see why Congress cannot, as it could in providing for the ratification of an amendment, say, "This time we choose that you should insert the Governor."

Mr. SORENSEN. I did not read the decisions that way. I thought it was left up to the individual States as to whether they wished to insert the Governor in the process, which is a different question from whether the Congress can insert the Governor in the process.

Professor BICKEL. Well, all I mean is that this process of application and ratification is essentially a Federal process as to which, when Congress has said nothing, the States may do as they wish, but it is essentially a Federal process. Hence, when Congress chooses to do something it is free to do so, and certainly under article V it is free to do so.

Professor MCCLOSKEY. I wonder if I might ask Mr. Sorensen for some brief clarifications of congressional powers of ratification under article V.

I understand from his suggestions they do imply that he believes Congress does have rather broad powers to prescribe the procedures by which the conventions shall be chosen and the route the convention shall proceed. So procedurally you think the Congress can prescribe; that is correct, is it not?

Mr. SORENSEN. Yes.

Professor MCCLOSKEY. Are you also entirely sure one way or another that Congress has no power over the substance of the proposals that are submitted? Are you clear that Congress is in no position to disapprove of the substance? Article V simply says Congress shall call a convention. Are you assuming that becomes purely ministerial, a ministerial obligation, with no congressional discretion once the question of procedures is dealt with?

Mr. SORENSEN. I would not want to say that I was absolutely sure about anything in article V, Doctor. It is certainly a confused area of constitutional law. It is my view, though, that the combination of

language in article V and the language in the "Federalist Paper" which Senator Dirksen previously quoted, would certainly limit very severely the role of Congress in reviewing the subject matter which could be submitted, once the States had specifically indicated what subject they wanted taken up in constitutional convention.

Senator DIRKSEN. If there are no more questions, the hearing stands adjourned until 10 a.m. tomorrow.

(Whereupon, at 12:15 o'clock, the committee adjourned, to reconvene at 10 a.m., on Tuesday, October 31, 1967.)

TUESDAY, OCTOBER 31, 1967

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin and Tydings.

Also present: Paul L. Woodard, chief counsel; Lawrence J. Brady, minority counsel; Prof. Philip B. Kurland, chief consultant; Prof. Robert G. McCloskey, consultant; and Prof. Alexander M. Bickel, consultant.

Senator ERVIN. The subcommittee will come to order.

The first witness today is Dr. Wallace Mendelson, from the Department of Government, University of Texas.

Dr. Mendelson is professor of political science at the University of Texas, Austin, Tex. He was born in Dubuque, Iowa, on September 25, 1911. He received an A.B. degree from the University of Wisconsin in 1936, an LL.B. from Harvard in 1936, and a Ph. D. from the University of Wisconsin in 1950.

In addition to teaching at the University of Texas, Dr. Mendelson has taught at the universities of Missouri, Illinois, and Tennessee.

Dr. Mendelson is the author of "Justices Black and Frankfurter: Conflict in the Court," and "Capitalism, Democracy and the Supreme Court."

We are delighted to have you with us today, Dr. Mendelson.

You may proceed.

STATEMENT OF WALLACE MENDELSON, PROFESSOR, DEPARTMENT OF GOVERNMENT, UNIVERSITY OF TEXAS, AUSTIN, TEX.

Professor MENDELSON. Mr. Chairman and members of the subcommittee, in relation to the pending legislation, may I state that there is an effort to make the amending process more flexible, and there is a great fear on the part of some that this will lead to a runaway modification of the Constitution. Certainly, these two claims can be reconciled by a procedure enacted by the Congress that would permit change and yet guard against any amendment that does not reflect a genuine national consensus. To that end I would suggest that we are not without experience in the amending process.

We have 50 State constitutions, each one of them presumably including an amending process. And so it seems to me that the people of America have spoken very clearly as to what they require in the way of amending procedures.

I would suggest the subcommittee might want to make an analysis of those 50 constitutions. Meanwhile, I can give a general impression, namely, that the American people are not satisfied to have even the initiation of an amendment based simply on a simple majority vote of one session of a legislative body. Thirty States, for example, require an extraordinary majority in at least one of the two houses. Ten States require that a legislature may propose an amendment, but that proposal is not effective until the intervention of a popular election and adoption of the proposal by a second legislative session.

Senator TYDINGS. How many States is that?

Professor MENDELSON. Ten.

And then there are a great number of other qualifications. For example, Tennessee has a provision that a convention may not be called more than once every 6 years; and there are a number of limitations by way of publicity. I would suggest that, on the basis of that quite clear expression of opinion by the American people, this legislation might well require a two-thirds vote in both houses of a State legislature as a prerequisite for a petition for amendment, or it might simply adopt for initiating a Federal amendment the various procedures for initiating State constitutional amendments.

I would hate to see this legislation outlaw a review by the Congress of the validity of a State petition, if the Congress sees fit to impose what I am suggesting, certain limitations with respect to such petitions.

Then, to move to the next step, the convention itself.

I think it must be plain that there is a great deal of dissatisfaction in the United States about the fact that Nigeria or Albania have exactly the same vote in the United Nations General Assembly that the United States has. On that same basis, it is very difficult for me to see why, in the convention, Alaska should have exactly the same vote as North Carolina or Nebraska or Texas. In other words, I would strongly urge that population be the basis of representation and voting in a Constitutional Convention.

Madison in Federalist No. 49, and in many other places, states that the people are the only legitimate fountain of power, and, of course, this would seem to be an endorsement of the one-man, one-vote principle.

It seems to me that the delegates to a national convention ought to be elected by the people, not appointed as the present bill permits.

It seems also that since in the other amending procedure Congress cannot propose an amendment without a two-thirds vote in both Houses, certainly the convention ought to operate on the same two-thirds vote basis.

Now, as to the ratification stage, the Constitution leaves the matter, of course, to the choice of Congress, and I would strongly urge that the ratification be by State convention, a convention chosen by the people by popular election. Of course, that is how the 1787 Constitution was ratified.

What I have suggested is really a three-way filter system, to guarantee against amendments that would not represent a genuine national

consensus. At the petition stage there would be action by the State legislatures operating on a one-State, one-vote basis. Then at the proposal stage, there would be popular participation, all people being equally represented.

Finally, at the ratification stage, there is, again, the one-State, one-vote approach, but this time as reflected by popular vote in the State convention.

Certainly, that ought to give major protection against ill-considered proposals.

As to the question of participation by the President in the proposing process, the Constitution seems to me to speak very clearly. We had some discussion yesterday about the necessity of following the literal language of the Constitution. I cannot see how literalists can escape the literal language of the Constitution, article I, section 7, which requires Presidential approval or disapproval of any vote of the Congress. Now, I must confess that tradition and custom has modified that somewhat, but if we are going to be literalists, the Constitution speaks very plainly.

Can a constitutional convention be limited? I think it should. The convention of 1787 was. It sent its proposal to the Congress not merely for transmittal to the States but for approval by the Congress and then transmittal to the States. Such a "request" for approval by the Congress would seem to imply that Congress was free to disapprove.

I cannot read the proceedings of the convention or the Federalist papers without coming away with a very clear impression that no general constitutional revision was contemplated by the convention system. The reason for including the convention system in article V seems to have been perfectly clear to provide a means for correcting errors: that is, specific, concrete errors or abuses by the National Government. Moreover, the language of article V speaks specifically of "amendments."

Hamilton in the 85th Federalist says that every amendment would be a "single proposition." Similarly, Madison in the 43d Federalist speaks of the "amendment of errors." Neither gentleman seems to have contemplated a general constitutional convention. Both seem to have contemplated State petitions for specific amendments to correct specific national "abuses," for example, a particular Supreme Court decision. Surely it was not thought that by petitioning for an innocuous amendment, for example, on daylight saving time, the States would open up the way for a constitutional convention that would be free to revise the entire taxing authority of the United States or abolish the House of Representatives.

I cannot accept that as a sensible approach, but I would suggest that, apart from questions of legality, there is an important political consideration. I lived for some years in Tennessee. In the early fifties, I think it is fair to say that Tennessee was a quite conservative State; that its constitution was out of date, that here was a general recognition that the constitution needed revising, and yet a deadly fear of a general constitutional convention. Indeed, the fear was so great that, as a political matter, it was not possible in Tennessee to call a general constitutional convention. The matter was solved, however, by what, in Tennessee, is called a "limited constitutional convention," a convention limited

to the consideration of specific items, with the expectation, of course, that either the legislature or the courts, or both, could enforce the stated limitations upon the convention.

So, I would agree very heartily with section 10(b) of this bill.

I have a bit of difficulty with the language, which requires merely that petitions be "on the same subject." It seems to me that is not enough. You can take very different views on the same subject. For example, 20 States may propose an amendment to permit prayers in public schools; another 20 States may propose amendments to the opposite effect. In my view, S. 2307 should require that at least two-thirds of the States take substantially the same view on the same subject as a precondition of the calling of a convention. Otherwise, you could get together a whole conglomeration of different proposed amendments and use this as a basis for calling a constitutional convention.

So, I would strongly urge that Congress in this legislation tighten the language to permit only limited constitutional conventions and to retain in Congress the power to review what the convention has done for the purpose of enforcing the limitations.

Thank you.

Senator ERVIN. As I construe your statement, if I construe it rightly, you take the position that, under section 7 of article I of the Constitution, the President would have to approve the action of the Congress in calling for a convention?

Professor MENDELSON. I do not quite say that. I say that there is authority in the language of the Constitution for such a provision in this bill.

Senator ERVIN. I misunderstood you, then. You do recognize that in practice it has always been the procedure to exclude the President from participation when Congress submitted a constitutional amendment.

Professor MENDELSON. I think the reason, perhaps, that this has been done when Congress proposes an amendment is that such an amendment can be proposed only by a two-thirds vote in each house, which is kind of anticipatory overriding of the Presidential veto.

Senator ERVIN. I am sorry; I did not understand you correctly, then. Section 7 of article I provides that every resolution or vote to which the concurrence of the Senate and the House of Representatives may be necessary, except on the question of adjournment, shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or upon being disapproved by him, shall have been repassed by two-thirds vote of the Senate and the House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Now, article V requires a two-thirds vote on the part of both houses of Congress before Congress can propose an amendment. Therefore, Congress cannot present an amendment to the President unless it has already passed by a two-thirds vote. If the President vetoed it, then it would presumably pass a second time by a two-thirds vote. So, it seems to me that, since the general rule of the law is that you shall not require unnecessary things, the President has no voice in the submission of a constitutional amendment.

Professor MENDELSON. I think you and I are in agreement. We are talking about the so-called "regular" method of proposing amendments by Congress.

Senator ERVIN. Yes.

Professor MENDELSON. Two-thirds approval is not required at the convention. I am suggesting that it should be.

Senator ERVIN. Of course, article V tells us that two-thirds vote of both Houses of Congress is required where Congress itself proposes the amendment to the States. But is not the second alternative method one which should be initiated on the application of two-thirds of the States without any action on the part of the Congress?

Professor MENDELSON. Right.

Senator ERVIN. I am not sure the Congress would have the power to add additional qualifications, such as that the States could not petition for a convention without approval by two separate terms or two-thirds vote. Would not the Congress thereby be limiting and restricting the power of the States, the power vested in the States? In other words, would it not be implied in the Constitution that wherever action is required to be taken by legislative bodies that a majority is sufficient to take such action?

Professor MENDELSON. I am not clear on that at all. It seems to me that the State constitutions reflect the feelings of the people of the States about how these things ought to be done. It should be done by something more than a simple majority vote, it seems to me. The language of the Constitution reads in such fashion as to leave it completely open, and this is a matter of judgment by the Congress. What I am saying is that if the Founding Fathers saw fit to require a two-thirds vote in both Houses of Congress, the situation where you have one House checking upon the other, it seems incredible that the Congress could not, in interpreting this article V, require also something more than a simple majority vote for the initiating of amendments by the States.

Senator ERVIN. Well, of course, it is certainly manifest in the purpose that there should be great deliberation when it comes to amending the Constitution. The Founding Fathers expressed that concern by requiring a two-thirds vote of both Houses of Congress to submit an amendment. But they also showed that concern, it seems to me, in the alternative method, because they required that it should be upon the application of two-thirds of the several States. You would seem to me to be adding something to the Constitution that was not there.

You would be amending the Constitution to say, or for Congress to undertake to say, not only that two-thirds of the States must apply, but that two-thirds of the members of each State's legislature must agree to its application. It is an interesting question. I am inclined to think that you cannot put that additional limitation on the States; that Congress would thereby be depriving the States of a power that the Constitution itself vests in the States to exercise, each State presumably acting by majority vote of its legislative body.

Professor MENDELSON. On the other hand, most of the States' constitutions have a limitation of that type with respect to amendment of State constitutions.

Senator ERVIN. Of course, and I think any such provision would be clearly binding on the State, because a State has the power to say how its constitution shall be amended. But, likewise, the Federal Government, the Federal Constitution, undertakes to say how the Con-

stitution shall be amended. And I think that a literal reading indicates that where Congress initiates the amendment procedure there must be a two-thirds vote of both Houses of Congress; but where the States initiate the alternative amendment procedure, two-thirds of the States must act, and, in general, the principle must be followed that wherever a body is authorized to act, in the absence of specific provisions to the contrary, a majority of that body has the power to act.

Professor MENDELSON. Of course, one difficulty in that position, it would seem to me, would be that it would permit less than a majority of the people, in effect, to petition for amendments.

Senator ERVIN. I agree with you that that would be the result, but article V is concerned with the States rather than the people of the States or the people of the country.

Professor MENDELSON. I have difficulty seeing anything in the concept of a State other than people. Ours is a government of the people and not of the States.

Senator ERVIN. Well, of course, certainly, there is the concept of one-man, one-vote, which interestingly did not come into effect, apparently, until the 14th amendment was ratified in 1868, and, thereafter, was not discovered for many years after that.

Senator TYDINGS. Is that a fact?

Professor MENDELSON. The 14th amendment?

Senator TYDINGS. No, no. Is it a fact that the one-man, one-vote business did not come into effect until the 14th amendment?

Professor MENDELSON. I do no think so, no.

Senator TYDINGS. What was the first legislature to move on the one-man, one-vote proposition? Was it not the State of Virginia when Thomas Jefferson resigned as a delegate in the Continental Congress and ran for the House of Burgesses and gave the people representation the western people of Virginia, as well as the tidelands area?

Professor KURLAND. I would suggest that it was a good deal less than one-man, one-vote in the State of Virginia. History would reveal there was a problem of universal suffrage at the time of Mr. Jefferson's action.

Senator TYDINGS. And there still is.

Professor KURLAND. Mr. Justice Chase had some trouble over the proposal to grant universal male suffrage. That was in 1802 or 1803.

Senator TYDINGS. He got himself into trouble on a lot of things, Mr. Chase did.

Senator ERVIN. I believe that Justice Harlan pointed out in one of the reapportionment cases that you got yourself in trouble when you applied the one-man, one-vote proposition. He said that the one-man, one-vote proposition applied to the Congress originally, because they were to be elected by the people; but that the only people that could vote for Members of Congress were those who elected representatives to the State legislature, and a lot of people could not vote in those elections.

Senator TYDINGS. That was one that he prevailed on.

Professor MENDELSON. It seems to me, apart from history, what the real problem here is that we would not want an amendment that did not reflect a genuine national consensus. And if you control the amendment process by the one-State, one-vote procedure you might well get an amendment that does not reflect the wishes of the American

people. It would seem to me that this legislation ought to move in the direction of preventing minority amendments, and, certainly, one way to do that is by the popularly elected convention voting on a per capita basis.

Senator ERVIN. If you did it on that basis, would you not have to negative a part of article V, because it says that two-thirds of the States could take this action, and, in effect, would you not have to write into that, that two-thirds of the States may take action but only if they contain a majority of the people?

Professor MENDELSON. No, I am satisfied that, just as in Congress the States have a participating role, so in the amending process the States should have a participating role; but, also, just as in Congress, the people ought to have a participating role. The States operating on a one-State, one-vote basis are effective at the petition stage and at the ratification stage. There is nothing, I think, in the Constitution that forecloses popular representation in the middle stage, in the convention stage.

Senator ERVIN. I am inclined to agree with you, that just with respect to membership and voting power in the convention, the States should be weighted, roughly according to their representation in Congress.

Professor MENDELSON. That is right.

Senator ERVIN. But I have difficulty in accepting the view that Congress would have the power to require the States to petition by a two-thirds majority of their legislatures rather than a simple majority. Now, on another question, do you think that Congress has any discretion about the question of calling the convention when two-thirds of the States have adopted resolutions asking for the calling of the convention?

Professor MENDELSON. Yes, I do. I think that if Congress prescribes any kind of limitations on the States, for example, a two-thirds vote on petitions, that certainly Congress ought to be the judge as to whether those limitations have been met. I think when the States petition for a daylight savings time amendment, moreover, that the Congress ought to be able to confine the Constitutional Convention to a daylight savings amendment, and to make that effective Congress should be in a position to review what the Convention does.

Senator ERVIN. It may be that ought to be so, but what words of the fifth article make that so? I think that this method of allowing amendments to be made as the result of the application of legislatures of two-thirds of the States was provided to take care of a situation where the people want a constitutional amendment submitted and the Congress refuses to submit it?

Professor MENDELSON. All right, exactly. The whole thrust of the background of the amendment and the whole thrust of the Federalist Papers seem to be that the States should be able to petition the Congress for the correction of some specific evil. And so it would be the States who are confining the constitutional convention. Congress is just speaking the will of the States. They say they want an amendment on daylight saving. Congress is simply reflecting the desire of the States, confining the Convention to the daylight savings amendment.

Senator ERVIN. But, assuming that you are correct in that position, that two-thirds of the States have to concur in a specific proposal,

when two-thirds of the States do concur in the proposal that they have daylight savings, is it not mandatory on the Congress to call the Convention?

Professor MENDELSON. Assuming that the Congress is satisfied that the States' petitions are bona fide legal petitions; yes, sir. The Congress should have the authority to review the validity of the petitions, however.

Senator ERVIN. Well, now, what would that involve in the way of action on the part of the Congress?

Professor MENDELSON. Well, suppose that a State legislature does vote for a petition. The Congress certainly can look to the validity of that petition. The Congress does not have to accept as valid any paper labeled "petition" that comes to it.

Senator ERVIN. Would they not have to accept it as valid, that is, a petition submitted by a majority vote of a State legislature, when those members of the State legislature have been elected to office and were openly exercising their office?

Professor MENDELSON. The Congress, it seems to me, must, if a required majority does this in proper fashion.

Senator ERVIN. I agree with you on that.

Professor MENDELSON. That is all I am saying.

Senator ERVIN. The point I am getting at is that there has been some intimation on the Washington scene that the Congress would have the right to go into the question of whether the legislature which submitted the application was malaportioned under the one-man, one-vote decision.

Professor MENDELSON. Well, does not that become somewhat academic?

After all, virtually all of the State legislatures have now been reapportioned.

Senator ERVIN. I think so, but I just wondered. There is such a thing as a de facto legislature. I am suggesting that where an officer is elected to office and the exercises the function of that office, his acts are binding on the public and all individuals so long as the law under which he was elected has not been judged unconstitutional.

Professor MENDELSON. It would certainly be opening a hornets' nest if the Congress were to be permitted to go behind the formalities.

Senator TYDINGS. You say "go behind the formality." When you say that, suppose that the newspapers published in a particular area stated that the majority leader and three members had been bribed and that there was a grand jury convened to investigate the situation. Is it your position that the Congress could not go behind the strict formality of that situation?

Professor MENDELSON. This is a problem, much the same as the valid election of a member of the Senate or of the House.

Senator TYDINGS. We have the right here to go into that. We are the judge of the credentials of a Member of the Congress. We have committees that go right out and look into the ballot boxes and take testimony. That is not what you are saying in regard to this.

Professor MENDELSON. No.

Senator TYDINGS. Do you feel that we should have the same right, vis-a-vis the examination of the legality or the validity of the petitions that we would have as to the legality of an election?

Professor MENDELSON. It seems to me it never resolves the problem when the Congress goes back to checking the validity when the States submit them. There must be something——

Senator TYDINGS. Do you or do you not feel that the Congress would be able to check the validity of the petitions?

Professor MENDELSON. It should be able to check, but I have some question as to whether it can go behind what I call the formalities.

Senator TYDINGS. I think that the specific point that Senator Ervin raises and which has been raised by myself and other Members of the Senate, relates to a petition by a malapportioned legislature to call a constitutional convention for the purpose of making legal its own illegal apportionment.

Professor MENDELSON. In other words, the State legislature judging its own case?

Senator TYDINGS. Right.

Professor MENDELSON. I suppose that you could conceive making a special case of this kind of a problem, where it is judging its own case.

Senator ERVIN. The Congress could not very well undertake to inquire into what motivated the votes of the members of the State legislatures when they made the request for the calling of the convention. The remedy for the situation that the Senator from Maryland has suggested would be to prosecute the guilty man for taking a bribe. In other words, nobody would have a right to contest the validity of an act of the Congress on the theory that some of the Congressmen voted for the act had been bribed to vote for the act, that they were motivated by pecuniary gain, rather than a love for country, or something like that. And, similarly, you would penalize State government, if you tried to make the acts of State legislatures, passed by a majority vote, dependent upon a question to be determined later by somebody else, whether a Member of the Congress had been bribed.

Professor MENDELSON. The 14th amendment itself might be the subject of a very serious question on that score.

Senator ERVIN. It certainly is. It was certainly coerced. Now, assuming that two-thirds of the States requested specific legislation and Congress called the convention; then, after the convention undertook the subject matter, the convention acted, the Congress would not have the power to go into the wisdom or the unwisdom of whether or not the convention should have done what it did do, as far as this specific thing was concerned? That would be beyond its powers, would it not?

Professor MENDELSON. As I envision the petitions, they ought to take a specific stand on a specific subject. It is not enough to say: "We want something done about daylight savings." They must petition for an amendment to have daylight savings. And then the Congress should be in a position not to accept an amendment, a proposed amendment on income taxes.

Professor KURLAND. You have been talking about, as an example, a daylight savings amendment. Does it not satisfy your standard if the requisite number of States say that they thought it appropriate for a national, uniform rule? Or would you require that each of the States

propose daylight savings? And if each application were to call for it to go into effect at different times, would that preclude adding the applications together?

Professor MENDELSON. Hamilton, I think, dealt with the problem in the Federalist No. 85, and he put it, I think, similarly to the way that I put it. He treats the convention almost as a mechanical device which would simply vote "Yes" or "No."

Professor KURLAND. You are suggesting that they go through the process of proposing, as well as asking for, a convention, and that they go through the steps twice, once by way of the original procedure, and then——

Professor MENDELSON. No. What I am saying is that the petitioning process is part of the proposing process. This is, I think, the way Hamilton looked at it.

Professor KURLAND. Then, you do not feel that regardless of minor inconsistencies in the applications, the convention could be called?

Professor MENDELSON. Yes, I do.

Professor KURLAND. Thank you.

Senator ERVIN. That was a point that troubled me. Take, for example, the *Miranda* case, which has the effect of excluding voluntary confessions unless the arresting officer gives certain legal advice to the suspect. Suppose that two-thirds of the States say that the *Miranda* case ought to be corrected in some way, by some amendment to the Constitution; but they could not agree exactly as to what the amendment should be, how it should be worded, but only that it should be amended. Would you require them to go further than to request a convention to consider an amendment changing the ruling in that case, without having a specific proposed amendment to do so?

Professor MENDELSON. I understand the problem. I have no objection either way, provided the scope of the convention is confined within reasonably narrow limits.

Senator ERVIN. In other words, it is your theory that, provided the proposition to be considered was defined clearly, that the convention could, nevertheless, be called, and that they could deliberate on the best way to deal with the question submitted to them?

Professor MENDELSON. What I am trying strongly to guard against is the very innocuous petition by a State that leads to an opening up of everything in the Constitution.

Senator TYDINGS. Suppose that the question at issue was not the *Miranda* case. Suppose that during the deliberations of the convention, the delegates looked at the case and felt, perhaps, they should look at one or two prior decisions on which the case rested. What is your position? Would they have the power, in addition to proposing an amendment relating specifically to the *Miranda* case, could they propose an amendment relating to the *Miranda* case or to some prior case on which the *Miranda* case rested?

Senator ERVIN. Pardon me for saying that *Escobedo* did not rest on prior cases, it was a new invention.

Senator TYDINGS. What is your thought on that?

Professor MENDELSON. As I say, my only problem is that of the innocuous amendment petition. I think that this legislation ought to speak very clearly on just exactly how this petition problem should

be handled. It should be done in such a way as not to justify the fears of those people who are afraid of a wide-open convention.

Senator ERVIN. I think that is a very real threat, the situation that you described in Tennessee. I know that, as it exists in my State, the State legislature has been thoroughly liberal in submitting specific amendments to the people, but it has refused on many occasions to call a general constitutional convention. It is a very real threat. This bill does attempt to impose limitations. Of course, this bill has to be constitutional under article V to be valid. This bill also provides for some review by the Congress after the convention has met and has submitted its proposals. I just wonder whether article V should be interpreted to permit this. Under the language of article V on this alternative method, would not the convention itself have the constitutional power to submit its proposals directly to the States, subject, of course, to the power of the Congress to say whether ratification shall be by convention or by the legislature?

Professor MENDELSON. I have a great deal of difficulty with that. My position is that the Constitutional Convention of 1787 brought forth the Constitution, and it did not go to the States until the Congress had approved it.

Senator ERVIN. Of course, they were called to amend the Articles of Confederation; but they rewrote the entire Constitution.

Professor MENDELSON. In other words, both the convention and the Congress violated a specific limitation.

Senator ERVIN. They really assumed authority that they did not have. It was sanctioned by the people later by ratification, of course.

Professor MENDELSON. But implicit in the approval of the Congress was the power to disapprove in that case.

Senator ERVIN. I am just wondering, taking article V literally, suppose two-thirds of the State legislatures ask the Congress to call a convention for proposing specific amendments, and Congress calls for the convention and the convention meets and proposes amendments in conformity with the designated purpose; then, does Congress have any other power than the power to say whether or not those amendments should be voted on by the States through the agency of conventions or through the agency of the State legislatures?

Professor MENDELSON. According to my position, it does; it has the power to judge whether the convention acted within the scope of its authority.

Senator ERVIN. You conceive that being a political question for the Congress rather than a judicial question for the courts?

Professor MENDELSON. I think that the Congress has treated it in that way in this bill.

Senator ERVIN. The bill does that. I am wondering whether those provisions are within the power of Congress. Thank you very much. You have suggested some very intriguing aspects of this question.

Senator TYDINGS. I have some questions.

Do you feel that there is a need for legislation of this type?

Professor MENDELSON. I suppose that the absence of legislation of this type works against the convention method, the convention type of amendment. I suppose that in fairness, we ought to have legislation to facilitate the calling of conventions but not to open the doors of Pandora's box to constitutional revision.

Senator TYDINGS. Now, one area which you and Senator Ervin covered was the area of proposing an amendment of a particular nature. How far would you go in the legislation itself in trying to limit specific proposals that could be acted upon? We got into the question of daylight savings time as an example. Suppose you had 30 petitions regarding daylight savings time on file and you had four in favor of going on eastern standard time for the whole Nation. Would that be sufficient?

Professor MENDELSON. I would have no difficulty with that. To me, the whole sense of the petition approach is that States want a remedy against a specific grievance. I would be inclined to limit the States' petitions in view of that. Thus, the States' petitions should not be counted unless they take a particular view on a particular subject.

Senator TYDINGS. Could you suggest at a later time language, that is, specific language for the bill?

Professor MENDELSON. Yes. I would be willing to do that.

Senator TYDINGS. We dealt before with the problem of a petition from a malapportioned State convention to make legal their illegal apportionment, and the issue was whether or not the Congress should be able to determine whether or not such a petition was proper and valid. I wonder if you would comment on that. Also, suppose a given legislature were under a court order to reapportion at the time that they passed this petition to the Congress to bring about a constitutional amendment?

Professor MENDELSON. The way out of the dilemma, I suppose, would be this: You must accept the petition, if it meets all of the formalities. One of the formalities would be: Is there a court order which, in any way, specifically limits what this legislature can do in its present unapportioned status? Certainly, a court order limiting what it can do ought to be taken into account.

Senator TYDINGS. The court order requiring a legislature to fairly apportion, would that be enough?

Professor MENDELSON. I suppose that alone would not be enough.

Those court orders, I think, very frequently have in them additional limitations; for example, the unapportioned legislature may not call a State constitutional convention, may not propose that.

Senator TYDINGS. We have had a couple of decisions on that.

Professor MENDELSON. Yes.

Senator TYDINGS. If you will turn to page 2 of the proposed bill, section 3(a):

> **For the purpose of adopting or rescinding a resolution pursuant to section 2, the State legislature shall adopt its own rules of procedure.**

And it continues:

> **(b) Questions concerning the State legislative procedure and the validity of the adoption of a State resolution cognizable under this act shall be determinable by the State legislature and its decisions thereon shall be binding on all others, including State and Federal courts, and the Congress of the United States.**

What is your feeling about that?

Professor MENDELSON. I have a great deal of trouble with that. I find it unacceptable. Certainly, the State courts ought to have something to say about the propriety of such a petition, and I would think that the Congress ought to have something to say.

Senator TYDINGS. What is that?

Professor MENDELSON. I think that both the State courts and the Congress at the very minimum ought to have something to say about it.

Senator TYDINGS. Turn to page 3, section 5(a) which has to do with applications. I wonder whether you would comment on what you feel would be a fair period of validity for the application?

Professor MENDELSON. Well, the Congress, of course, has taken the position on several occasions that 7 years is a proper period of time. This is a debatable thing, obviously. The bill states a 6-year period of time. Yesterday, a 4-year period of time was urged. I, certainly, would not want to go beyond 7 years. I see no great objection to the 6 years, although my own inclination would be to cut it down somewhat.

Senator TYDINGS. Now, as to procedure for calling the Constitutional convention which is covered in another section, do you feel that the procedure of a simple concurrent resolution of the Congress by majority vote would be all right, or do you feel that it should be a two-thirds vote with Presidential approval?

Professor MENDELSON. Well, as to Presidential approval, I am simply saying that this is a choice that could be made by the Congress. It seems to me that the literal terms of the Constitution would permit Congress to bring the President into this, by virtue of this bill, but I think that tradition has, perhaps, modified the literal language of the Constitution. It seems to me to be a fair choice for the Congress to do it either way, with justification.

Senator TYDINGS. Do you think that it should be a two-thirds or majority vote of both Houses?

Professor MENDELSON. Well, I would say that it ought to depend, in part, upon what the vote in the Convention is going to be.

If you were going to require a two-thirds vote per capita in the Convention, I would be satisfied to let the Congress act by a simple majority vote in each House.

On the other hand, if it is going to be a simple majority vote in the Convention, and, certainly, if it is going to be on the State basis, I would very much want to have the two-thirds vote in both Houses of the Congress.

Senator TYDINGS. As the bill is drafted, in section 6(a), it provides for an almost automatic adoption of the resolution unless, as I read it, the House in which the petition is received determines that the recitation contained in the report is not really the same subject as the petition itself.

Have you examined that language in section 6(a)?

Professor MENDELSON. I did not get the question.

Senator TYDINGS. Have you examined that language in section 6(a)?

Professor MENDELSON. Yes, I have looked at it.

Senator TYDINGS. How do you interpret the procedure to be followed by the Houses of Congress receiving the petition? Just what happens under this proposed language?

Professor MENDELSON. Just relying on my memory without reading it again, it seems to me that the bill puts each House somewhat at the mercy of its secretary or clerk.

It seems to me that, if my memory is correct on this, each House ought to act on its own responsibility, not simply in terms of taking

the recitation or taking the view of the Secretary or Clerk. I think it does not give the Congress itself great enough responsibility.

Senator TYDINGS. How would you suggest that it be amended?

Professor MENDELSON. I might like to take a little time on that.

Senator TYDINGS. All right. I will be interested in getting your views on that.

Now, turning to section 7(a). I think it is clear from your testimony that you feel that the representation within the convention itself should be representative of the people rather than representative of the States.

Turning to page 8, section 9, dealing with the convention, subsection (c), it states:

The convention shall terminate its proceedings within one year after the date of its first meeting, unless the period is extended by the Congress by concurrent resolution.

How do you interpret that, so far as congressional control of the convention is concerned?

If the Congress decided not to extend the convention time, would the convention automatically die—would the Congress be obligated to extend the time of the convention, or what?

Professor MENDELSON. I notice on the margin of my copy of the bill my notation that this might improperly constitute a veto by the Congress. This, perhaps, would give the Congress a veto, in a sense.

Senator TYDINGS. Over the proceedings of the convention.

Professor MENDELSON. Yes.

Senator TYDINGS. Now, turning to section 10(a), on page 9, it provides that the amendment may be proposed by a majority of the total votes cast on the question.

What is your feeling on that?

Professor MENDELSON. My difficulty is this: In the first place, there is nothing said about a quorum. I think there certainly ought to be. And for me, personally, it would be simply unacceptable for 26 States to be able to propose an amendment. Itis for that reason that I would urge that this be done on a per capita population basis, and since a two-thirds vote is required for a proposal by the Congress, I would be inclined toward that in this analogous situation.

Senator TYDINGS. Two-thirds of the delegates?

Professor MENDELSON. Yes.

Senator TYDINGS. Now, to get back to the original problem. In subsection (b), it states:

No convention called under this act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the convention.

Do you think that that language should be tighter?

Professor MENDELSON. I do.

Senator TYDINGS. And you are going to suggest something?

Professor MENDELSON. I will try.

Senator TYDINGS. Now, as to section 11(e), on page 10, it says:

. . . submit such proposed amendments to the Administrator of General Services for submission to the states, but only if prior to the expiration of such period the Congress has not adopted a concurrent resolution disapproving the submission of the proposed amendment to the states on the ground that its general nature is different from that stated in the concurrent resolution calling the convention.

What is your comment there?

Professor MENDELSON. I do not like that. I do not like the 3 months' limitation. I think that the language ought to be turned around. In my view, the bill should allow a much longer period of time, and then, turning the rest of the language around, should require affirmative action by the Congress to send a proposal to the States.

Senator TYDINGS. What sort of a vote do you think we ought to take, a majority vote of the Congress or a two-thirds vote?

Professor MENDELSON. Well, again, that would depend on what the requirements for the vote were in the convention.

Senator TYDINGS. Assuming the requirement for the convention was two-thirds vote based on population.

Professor MENDELSON. Then, I would be satisfied with a majority vote here.

Senator TYDINGS. Section 12, on page 10 provides, as to the concurrent resolution of the Congress, that the Congress shall provide the manner for the ratification or proposed amendments. Do you feel that the Congress can provide in that manner the ratification, or should each State ratify as it had done in the past, according to their own procedure, in their own constitution?

Professor MENDELSON. I would prefer to have section 12 once and for all send all of these amendments to the properly elected State convention.

Senator TYDINGS. Rather than the State legislature?

Professor MENDELSON. Right.

Senator TYDINGS. That is actually the way the specification is.

Professor MENDELSON. No, sir.

Senator TYDINGS. If you did that, that would alleviate the necessity of section 13 which goes to whether or not a Governor would try to veto it, et cetera.

Now, if you did not support the proposal for the ratification to be by the properly elected State convention, and you gave the ratification function to the State legislature, do you think that the Governor would have any right to veto it?

Professor MENDELSON. I have some difficulty with that. I think that a State, perhaps, could by law bring the Governor into the process. It is not clear to me, that the Congress could bring the Governor into the process.

Senator TYDINGS. It would be up to the State?

Professor MENDELSON. Without examining it further, that would be my impression.

Senator TYDINGS. That is all. Thank you.

Senator ERVIN. I am having a little trouble with this.

As I understand it, the courts have held that the President has no proper role in the constitutional amendment process. If the Congress undertook to give the President this role, we would add something that is not in the Constitution. I do not think that the Congress can add anything to the Constitution or subtract anything from the Constitution. That is my own opinion. I think that the President is deliberately left out, because he might be the one man out of the entire Nation that could arbitrarily throw a monkey wrench into the whole amendatory process.

Professor MENDELSON. Well, I would grant that, but I think that the Constitution literally does bring the President into this, not in article V but in article I, section 7, that every order, resolution or vote to which the concurrence of the Senate and the House may be necessary shall be presented to the President of the United States. I do not see how you can escape that language, though tradition has modified this, I agree. But there was some discussion yesterday about being very literal about what the Constitution says. I cannot easily escape the literal meaning of article I, section 7.

Senator ERVIN. Under your interpretation, the Congress has to have a two-thirds majority to submit a constitutional amendment, and if the President is permitted to disapprove it, that interpretation would be ignoring the fact that the constitutional amendment itself has to be submitted by a vote sufficient to take care of overriding the President's veto.

Moreover, article V merely requires an action that is not really part of the legislative process. It says Congress shall "call" a convention. Article I, on the other hand, deals with the legislative powers of Congress. It does not deal at all with constitutional amendments. It deals with the legislative power of the Congress.

Professor MENDELSON. On the other hand, the language is quite plain. It says every "order"—not necessarily legislation—every "resolution"—not necessarily legislation—every "vote," which is not necessarily legislation.

Senator ERVIN. If you take that interpretation, you would have to modify article V to permit a majority of each House to take action, as article I provides, although there is not a single thing in article I that deals with the power of Congress to amend the Constitution. Under article I, a majority can do business. Under article V it cannot. Two-thirds concurrence is required. So I think that you will get into inconsistencies if you try to apply section 7 of article I to article V. I think that the two deal with two entirely different subjects. But it is an interesting and intriguing question for discussion.

Professor KURLAND. It seems to me that under article V there is one point which is quite clear, and that is the proposition that the Congress should specify the mode of ratification of the amendments proposed by the convention. The method of ratification is to be specified as one of these two choices and the States must abide by the legislative proposition. And so far as that is provided for in this bill, you cannot take exception to it. Is that not right?

Earlier in your testimony you suggested that the mode of ratification that you would prefer would be by State convention rather than by State legislative action. It has been suggested to me that a problem has been revealed when a State refuses to convene a convention for purposes of passing on a ratification issue. Do you think it would be necessary to make a provision to take care of that problem in the event that Congress should specify the convention process for ratification?

Professor MENDELSON. Well, you might have the same problem if the Congress sent it to the legislature. They may refuse to consider the issue.

Professor KURLAND. But I take it that if the legislature refused to act that is in effect a negative vote, whereas the failure to call a con-

vention would preclude the possibility of either an affirmative or a negative vote.

The argument has been made that a Presidential veto is not relevant to a proposition by the Congress for amending the Constitution because there is a requirement for a two-thirds vote in both Houses in any event. But this is to suggest, I take it, that a Presidential veto could not, in any way, effect a change in a vote of the legislature. I think that we have agreed that that is not a practical approach.

Professor MENDELSON. Yes, I think so.

Professor KURLAND. So that, dispensing with the Presidential veto with regard to the congressional action does suggest a precedent for eliminating the Presidential veto with regard to the convention.

Professor MENDELSON. Yes.

Professor KURLAND. Let me turn to a fairly broad question now.

Suppose that the requisite number of States suggested a general constitutional convention. None of us sitting in this room apparently cares for the prospect of a general overhaul of the Constitution of the United States. And I agree with you that the history of article V suggests what the convention was expected to do, that it was to clear up specific defects in the existing Constitution. I will put a hypothetical question to you. Suppose that two-thirds of the State legislatures were dissatisfied with the Constitution as a whole. Could they, by a broad resolution asking for a general constitutional convention, satisfy the requirements of article V?

Professor MENDELSON. I suppose that they could, really. And it is exactly for that reason that I would want to emphasize the manner in which the national convention would operate, by two-thirds vote on a per capita, that is, population basis and by popularly elected State conventions. This would certainly be the ultimate guard against that kind of thing.

Professor KURLAND. Let me turn to something then that we were talking about before. The proportion of the vote required. It has been suggested that instead of a concurrent resolution we require two-thirds vote of the Congress to call the convention or to approve the action of the convention. Does not this, in effect, limit the method of amendment to the first process contained in article V—that is, amendments proposed by Congress?

Professor MENDELSON. It certainly is approaching that.

Professor KURLAND. Is not this the legislative history of article V in broad delineation? It started with the Virginia plan, that Congress should have no role whatsoever in the amending process. The second stage was a suggestion that the Congress should have the only role in the amending process. And the typical 1787 answer to the problem was that parallel roles be created so that the Congress could propose corrections of those evils that the States were involved in, and the States could suggest corrections where they thought that the National Government was unduly using its powers. Am I correct in that?

Professor MENDELSON. Yes, that is my understanding.

Professor KURLAND. So that what we have in terms of the 1787 convention is what, maybe, we do not like; but in terms of what article V seems to contain, the suggestion is that there were to be two roads to constitutional amendments, each one parallel with the other. Does it not suggest that?

Professor MENDELSON. Well, going back to your response to me, you said that if the President does have a veto that will automatically make a difference in how the Congress votes. Now, I am suggesting that if the States do propose an amendment, that in itself would affect the congressional attitude. The 16th and 17th amendments, as I understand it, in fact, both were instigated in Congress as the result of State petitions. The Congress used the other vehicle for amendment, but it acted, in large part, in response to the State petitions.

Professor KURLAND. But you do not suggest that this is the only way?

Professor MENDELSON. No, no.

Professor KURLAND. I have no more questions, Mr. Chairman.

Senator ERVIN. Thank you very much, Professor Mendelson.

Professor MENDELSON. I thank you.

Senator ERVIN. You have made a very interesting presentation. I think that your statements have been very valuable to all of us.

Our next witness is Prof. Alexander M. Bickel.

Professor Bickel is Chancellor Kent professor of law and legal history at Yale University. He received his B.S. degree from the City College of New York in 1947, and his LL.B. degree from Harvard University in 1949.

He served as law clerk to both Mr. Justice Frankfurter, U.S. Supreme Court, in 1952–53, and to Chief Judge Calvert Magruder, U.S. Court of Appeals for the First Circuit, 1949–50.

Prior to going to Yale in 1956, he was special assistant to the director of the policy planning staff of the Department of State, and served that Department as a law officer in Frankfurt, Germany. He also was a member of the European Defense Community observer delegation to Paris in 1952–53.

He is the author of "The Unpublished Opinions of Mr. Justice "Brandeis—the Supreme Court at Work" (1957); "The Least Dangerous Branch—the Supreme Court at the Bar of Politics" (1962); and "Politics and the Warren Court" (1965).

Professor Bickel has just recently consented to become a consultant to the Subcommittee on Separation of Powers, and will give as much time to the subcommittee's studies as his busy schedule will permit. We feel that we are most fortunate to have Professor Bickel as a consultant and to have him here to testify today.

STATEMENT OF ALEXANDER M. BICKEL, CHANCELLOR KENT PROFESSOR OF LAW AND LEGAL HISTORY, YALE UNIVERSITY

Professor BICKEL. Thank you, Senator.

I think, in all candor, it is necessary to concede that in some measure one's attitude toward ease or difficulty of constitutional amendment is decisive at many points in the consideration of S. 2307. A lot of the provisions make sense if one wishes the amendment process to be easy, but seem undesirable if one's inclination is toward a more difficult process. And I ought to make it clear that on the whole, within permissible limits established by article V, my inclination is toward a difficult amending process.

I ran across a statement the other day which I will quote for you, if I may, which I think is as sound an expression of a fundamental and timeless constitutional conservatism as I know of, and I quote:

> Occasionally, there is agitation for amending the Constitution * * *. The Constitution is not cast in a small mold where matters are treated in a particular way. On the contrary, it is couched in a general language * * *. The idea that the Constitution must be amended and treated as if it were a rubber ball so that each succeeding child may play with it according to varying inclinations is not admissible from any angle. What we need is to have the Constitution better understood * * *.

I agree with that statement.

It was made by the late Mr. Justice Van Devanter shortly after he retired from the Court, addressing, I think it was, the Colorado Bar Association in September 1937, and I agree with the sentiment expressed in it.

The amendments that were being proposed in his day were, if I may be permitted the loose usage, generally of a liberal cast. I think I would have favored most of them on the merits, and still not have favored initiating the amending process. Most of the amendments now being proposed are generally seen, in the same loose usage, as having a more conservative coloration. It so happens that on the merits I think I would favor one or two of them, particularly one or two of the proposal on the reapportionment issue, and yet I would rather take my chances in arriving at a more satisfactory result through the judicial process—which has not heard the last of that issue; there is a census every 10 years, and we remain a nation of nomads, so that apportionment is a problem that recurs every decade—I would rather take my chances through judicial processes than open a Pandora's box of constitutional amendments.

I fear that with constitutions, as has happened in many of our States, familiarity of amendment will breed a species of contempt.

Having unveiled for the subcommittee my general attitude, the presuppositions with which I started, let me now come to some more concrete issues.

I have absolutely no doubt that Congress has authority to legislate on the process of amendment by convention and to settle every point not actually settled by article V of the Constitution itself. Obviously, the 50 State legislatures cannot do it. The constitutional convention cannot do it; it must first be brought into being. All that is left, therefore, is the Congress. And, in any event, with respect to all issues not specifically settled or relegated for decision elsewhere by the Constitution, Congress has the residual power to legislate.

I do not think that article V envisions only a convention charged with writing a wholly new Constitution.

On the other hand, I think that article V should be taken to mean that while the legislatures of two-thirds of the States may impose upon Congress the obligation to call a convention which shall consider amendments, they have no authority to require the Congress to call such a convention for the purpose of considering a particular amendment only. In this respect, I agree essentially with the view of my colleague Charles L. Black, Jr., as expressed in his article, "The Proposed Amendment of Article V: A Threatened Disaster," in volume 72 of the Yale Law Journal, 1963. Somewhere between the

general constitutional convention, on the one hand, which many justly fear, and, on the other hand, the convention restricted to the consideration of one amendment only—somewhere in between these two extremes is a middle ground which I think a wise bill should seek to occupy.

Now, for a moment, may I review some of the considerations that argue against the single-amendment, restricted convention?

Article V authorizes the Congress to propose "amendments," in the plural, and then authorizes two-thirds of the States to call a convention "for proposing amendments," again in the plural. I do not wish to make too much of the language, but it is suggestive. Plainly, Congress, under this language, may, at any time, propose one or seven or 17 amendments. By the same token, a fair reading of the language would seem to indicate that the other body authorized by article V to propose amendments—and that other body is the convention convened by the States, not the States—that other body, the convention, is also free to propose one or seven or 17 amendments.

Nothing, as I read it, in the 85th Federalist is to the contrary. Hamilton, it seems to me, there addresses himself to two objections that were made to the proposed Constitution. One was that it would be impossible to change, because, in order to change it, it would have to be entirely rewritten, by as laborious and difficult a process as the framers had just experienced in Philadelphia. To this Hamilton answered that amendments to the Constitution might be brought forward singly, as plainly they might, by Congress and possibly by a convention. The second objection was that the National Government, that is, Congress, would generally be disinclined to offer amendments. And to this, Hamilton answered that there is another route available; namely, by convention called at the behest of the States. This was not subject to that objection. I do not read him as arguing that conventions are to be restricted to proposing single amendments. I only read him as saying, with his customary eminently sound political sense, that single amendments will be more easy to bring forward.

That is so, surely, and that brings me to a point of substance which it seems to me ought to guide us through the uncertainties of language and of history.

On principle, it appears to me that the point is that no constitutional changes should go forward to ratification without having first undergone examination and debate in a national forum, whether it be Congress or a convention. The nature and scope of the debate and examination, in such a national forum, must not be predetermined by the separate decisions of the States. Quite clearly, therefore, the States should have no authority to require Congress to submit a given text of a proposed constitutional amendment to a convention to be voted up or down.

Equally clearly, the States may not require Congress to submit a single narrow subject, demanding action one way or the other on it alone. For it is surely a basic fact of politics in all its forms, that consideration and debate of a political subject can be full and real only if there is opportunity for compromise and give and take. Such opportunity requires that the decisionmaking body have authority to consider more than a single, closely defined subject, so that concessions

from one side on one matter can be matched by concessions from another on a perhaps seemingly discrete matter, to the end that a final package acceptable to all may emerge. That was how the original Constitutional Convention itself worked. Any other conditions threaten either breakdown or rigid ideological decisions. He, moreover, who has the power to frame an issue and isolate it for decision will often have the power, in consequence, to predetermine the decision. If, then, the State legislatures could restrict a convention to consideration of a single, narrow subject only, they might be in a position effectively to insure that a given result was reached. The validity of this observation may be verified in States in which the Governor has power to prescribe the only subject or subjects to be considered in special sessions of the legislature called by him. These are sessions that tend to be controlled by the Governor. The consequence, if this were allowed, would be that, in some measure, a constitutional change would go forward to ratification which had not received full or even meaningful consideration and debate in any national forum, but had, in some measure, been predetermined in the separate legislative forums of the States; and that, in turn, it seems to me, would be a situation plainly contrary to the purpose which informs article V.

Coming to the specific provisions of the bill, first, section 3(b): I see no reason for explicitly and absolutely disabling Congress from reviewing any and all possible procedures adopted by State legislatures in calling for constitutional conventions. In general, of course, State legislatures ought to be masters of their own procedures, but no one can now foresee all possible wrinkles of the procedural problem, and I should think it much better to say nothing about the power of Congress to review State legislative procedures in respect to the calling of a constitutional convention. The situation then would be that Congress would presumably retain some power, rarely to be exercised, and indeterminate and unforeseeable in nature.

I would specifically require that resolutions calling for a constitutional convention be submitted to Governors for approval or veto in accordance with procedures followed in other legislative matters in the State concerned. There is nothing that particularly qualifies legislatures as such to call for constitutional conventions. What we are in search of here is the will of the people of the State, and that will ought to be expressed, in this instance above all perhaps, in a way in which, under the constitution of a State, it is normally expressed on matters of importance, since, presumably, it is the judgment of the State that that is how the will of the people is best and most reliably expressed.

When article V refers to legislatures, we know, because there are other references in the text couched in the same terms, that that may mean to include the Governor in the process or it may mean to exclude him. So article V tells us neither one way or the other, and the Congress it seems to me is free to make a choice, and I am urging the choice that the Governor be included. I urge that, because it seems to me that we are in search here ultimately of the will of the people of the States concerned.

Senator ERVIN. I think that my State is the only State in the Union in which the Governor does not have the power to veto.

Professor BICKEL. At all?

Senator ERVIN. At all.

Professor BICKEL. I did not know that. Have you been getting along all right?

Senator ERVIN. Yes, we believe so; we have been getting along pretty well.

Professor BICKEL. I did not know that your Governor has no veto power whatever.

Senator ERVIN. In other words, we have a complete separation of the legislative and executive branches.

Professor BICKEL. That is a theory of separation, all right.

It might be well, it seems to me, to say something at this point in the bill on a question that is much mooted; namely, whether a legislature that has been held to be malapportioned, or that is under a decree requiring it to reapportion and, perhaps, qualifying its powers in some measure before reapportionment, can validly pass a resolution for a constitutional convention. I should think, in general, it could, unless an outstanding decree forbids it either specifically or by mentioning some analogous forbidden function, but I should think it would be well to be clear on this point. And I think that Congress has the power to settle the point.

Coming to section 5(a), I think that the 6-year period provided in that section is too long. The Constitution contemplates a concurrent desire on the part of the legislatures of a sufficient number of States, and such a concurrent desire can scarcely be said to exist or to reflect in each State the will of the people if too long a period of time has passed from the date of enactment of the first resolution to the date of enactment of the last. True enough, legislatures are free to change their minds, but the passage of a repealer is a different and more difficult political act than the defeat, starting fresh, of a resolution calling for a constitutional convention. The fact, therefore, that a legislature has not repealed a resolution calling for a convention is an insufficient indication that the State in question, after the passage of as long as 6 years, still favors the calling of a convention. The life of a single Congress may be too short a time limit to impose, but anything over 4 years seems to me too long.

Section 6(a) seems to me too restrictive as it involves Congress. It is a matter of drafting really, but I should suppose that Congress must retain the power to determine not only whether the recitation of the clerk that the requisite number of applications have been made is, in fact, correct, but also the power to determine from time to time, on the basis of considerations that cannot all now be foreseeable, whether all of the applications are valid.

Coming to section 7(a), I should think that the national interest, the welfare of the entire Nation, is too closely affected to permit the States to decide, each for itself, how the delegates to a national constitutional convention shall be elected, or, indeed, appointed. I should think it would be wise to provide that all delegates must be elected by the same constituency that elects the States' representatives in Congress, and to provide further that a certain proportion of the delegates may be elected from districts and that, depending on the size of the State, no fewer than a certain number and no more than a third shall be elected at large. Only thus, it seems to me, can all the interests in a State, the particular and the general, find adequate representation. I say nothing for the moment about the problem of apportion-

ing districts for the election of delegates to the constitutional convention, except to remark that it seems to me that Congress ought to have the power to say, at least in an extreme case, that the districts from which a State elected its delegates were invidiously malapportioned, and that an election of delegates is therefore invalid.

I have made it clear at the beginning that I think that the provision in section 8(a), that each delegate must agree not to change or alter any part of the Constitution which has not been specified in the resolution calling for the convention is quite wrong.

Section 9(a). I see no reason for following the precedent of the original convention, by giving each State one vote. The framers, in adopting such a procedure for themselves, worked against the background of the Congress of the Confederation in which the States voted as equal units, and they feared to break this precedent, because if they had tried to do so, they might have made the very constitutional convention impossible. But perhaps their chief purpose in framing the new Constitution was, for the future, to break away from this stultifying precedent. Why should we now return to it, after nearly 200 years in which we have been accustomed in our national institutions—except on the one occasion when the House elected a President—to a different, and, of course, more democratic method? Besides, whatever the convention does is to be ratified by the States, and, in ratifying, the States do vote as units, Alaska being equal to New York. Is that not sufficient?

One final point, if I may, Mr. Chairman: I see no reason why any and all actions to be taken by Congress pursuant to this bill with respect to constitutional conventions should be anything but subject, in the ordinary way, to Presidential approval under article I, section 7, clause 3, of the Constitution In this respect, I also agree with the view of my colleague Charles L. Black, Jr., expressed in the article cited above. I know there is a precedent to the contrary, but I think it is a restricted precedent, not on all fours, and not a terribly strong one anyway, and not, to me, a persuasive one. I think that the situation we are in on the present issue is a different one, so that the precedent does not bind even those who think it a strong one.

Thank you.

Senator ERVIN. How should the President participate?

Professor BICKEL. Well, I think that he ought to be given his normal veto power which in practice would mean that, instead of standing aloof from the whole process, he would be engaged in it from the beginning. I do not think that one should conceive of a veto power as coming into play merely at the point of the exercise of the veto, when a two-thirds vote is needed to override it. To give the President his veto power is to give him the power to engage in the entire process.

The way our Government is organized now, it represents the Nation through the Executive, and the same Nation, but sliced into different constituencies, through the Congress. That is how we achieve full representation of all interests. I believe that on almost all matters, except housekeeping matters for Congress, the President and the Congress should act together, and should do so from the beginning.

Of course, when the President's veto power is maintained, that follows. For that reason, I would suggest it remain here, and in this

instance, as in normal legislation, the actual exercise of the veto would be the rare exception.

Senator ERVIN. The President, would have no voice in what the convention proposes, the proposals that the convention makes, would he? You would leave entirely to the convention the provisions which the convention would submit as desirable?

Professor BICKEL. I am bound as to that. If I had an article V to write, I would provide that the constitutional convention when convened, would vote on all matters by majority, subject to Presidential veto, which can be overridden by two-thirds vote. But, as it is, article V is binding. It does not bind me when it comes to the authority of the Congress to act, and its relationship with the President.

Senator ERVIN. In other words, your position is that, where the words of the fifth amendment are plain, the Congress can do nothing which is inconsistent with those words. It may only provide the machinery where there are not sufficient words to control the action of the Congress.

Professor BICKEL. Precisely so, although article V, like some of the rest of the Constitution, is couched in majestic language that came from the 18th century and leaves a lot of room for manueuver in the present day.

Senator ERVIN. You undoubtedly heard what Professor Mendelson stated, the suggestion that the bill should require more than a majority vote in the State legislatures. Do you have any observations on that point?

Professor BICKEL. I do not agree with him on that. It seems to me that it is a matter of degree. You are edging away from Congress exercising a necessary authority with regard to these things, to regulate the procedures—edging from that toward an action by Congress that hobbles the legislative action of the States. And, of course, the purpose of this alternate amendment route was to give the States an opportunity.

I would think that for the Congress to state, say, that the State legislatures have to be unanimous, I think we would agree, is unconstitutional. The object would be to prevent the States from ever acting. Edging in that direction, I would have trouble with a two-thirds proviso. I have no such problem with the Congress setting forth the procedures, making choices where no man can say that doing it this way makes it obviously much more difficult than doing it the other way. There is the choice of procedures, and there are other more restrictive things.

Senator ERVIN. With regard to that suggestion of Dr. Mendelson, it is my opinion that the history of article V shows that the Founding Fathers did not intend constitutional amendments to be made lightly. They wanted them to be made very seriously. And so they included the requirement for a two-thirds vote of the Congress, by the one method; but it seems to me that they merely intended that two-thirds of the States must petition for a convention, without attempting to say what vote is required within the State legislatures—they left that to the general principle of law that, in the absence of specific provisions to the contrary, the majority can act.

Professor BICKEL. I agree. That is the essential symmetry of the article.

Senator ERVIN. Undoubtedly, the Constitution makes it possible to amend the Constitution piecemeal or generally where Congress itself takes the initiative. It is not quite so clear with respect to the States. But it is conceivable that the States might get so dissatisfied with the Constitution that they might want to have a general overhaul. And your suggestion, as I understand it, is that there is nothing in the fifth article which prevents the States from calling a convention for a general overhaul of the Constitution?

Professor BICKEL. Indeed, there is nothing to prevent that.

To the contrary, as I was trying to say, it seems to me that there is a hint, at least, in the language, and a much stronger suggestion on principle, tending in the other direction. It seems to me we cannot take a provision that says that the States may convene a convention on proposed amendments, and rewrite it to mean that the States may propose an amendment which a convention will ratify, and then send back to the States to ratify again. If the States can say, we want daylight saving time to start on May 21, and send that to the convention, and the convention has to vote that up or down, then it is the States that are proposing the amendment and the convention that is ratifying it, except that there is yet an additional ratifying process. That is not what article V foresees.

Senator ERVIN. Assuming that two-thirds of the States call for a convention for the purpose of submitting amendments, do you think that it is mandatory or discretionary with Congress whether it would then call the convention?

Professor BICKEL. I am afraid that, despite my horror at the prospect and despite my willingness at every juncture where the possibility is available to make that prospect improbable, to make things difficult, I am afraid that I cannot see how the Congress, faced with 34 valid petitions, can do anything but act.

Senator ERVIN. And it seems to me that the Founding Fathers inserted this alternative method in the Constitution in order to allow the people to amend the Constitution where Congress refused to submit the amendment, and if the Congress has any discretionary power to refuse to call the convention, that interpretation would permit the Congress to circumvent the very provisions of the Constitution that were put in there for use where the Congress refused to act.

Professor BICKEL. That is quite true. That would destroy the symmetry of article V by collapsing its two halves into one. The only possibility of amendment would be the first one.

Senator ERVIN. Do you not believe that if the States petitioned to call a convention to vote on a specific question, for example, the question of reapportionment or daylight saving time, and the Congress refused to call the convention, do you not believe that would have a tendency to tempt the States to demand a general convention?

Professor BICKEL. It might very well tempt some to do so. But the Congress is sworn to support the Constitution. And it is one thing for the Congress to alter the Constitution by refusing to do what is its duty under article V. It is quite another thing for the Congress, when asked to present a single amendment to a convention, to say: "We do not believe that article V intended that; therefore, we will not do that, because it is not constitutional in our view for us to do that." When there is no other guidance and, perhaps, even when there is

other guidance, Congress must make its own judgment on a constitutional question.

Senator ERVIN. The Constitution provides that every Member of Congress shall be bound by oath or affirmation to support the Constitution. And article V provides that, whenever two-thirds of both Houses shall deem it necessary, Congress shall propose amendments to the Constitution or, on the application of the legislatures of two-thirds of the several States, Congress shall call a convention for proposing amendments.

Senator TYDINGS. What you are saying is that, in view of the specific terms of article V, you cannot call a Federal constitutional convention for the purpose of passing on one proposal?

Professor BICKEL. That is right.

Senator TYDINGS. But Congress has only the right to call a constitutional convention for any and all proposals under article V. You say, therefore, on the specific reapportionment petition, for example, that there would be a constitutional argument saying that you could not call a convention and limit it to that?

Professor BICKEL. I entirely agree with that. I have only one qualification, that is, I would hope that there is a middle ground.

Senator TYDINGS. That is the purpose of this bill.

Professor BICKEL. I think there is enough by way of suggestion in the history of article V that would enable the States to call a convention to deal with a fairly general subject, or to call a convention to deal with several subjects. And the Congress, I think, should respond to such a request.

What I object to is so hobbling the convention that it is transformed from a deliberative constitutional convention into a ratifying body that votes up or down something that has been put before it. I object to that on the basis of the language of the amendment, because the amendment speaks of a convention for proposing amendments. It is not the States that are to propose amendments. It is the convention. And I object to it, secondly, on the grounds of principle that I tried to make clear.

Senator ERVIN. The bill tries to find a middle ground on this point. I think that article V clearly contemplates that the convention is to be as deliberative a body as possible, and not a body to count noses in favor of some specific proposition submitted to it by somebody else. I think the convention has the authority to propose amendments, not the States.

Professor BICKEL. On the question that Senator Tydings is raising, if I may say so, you can look to the 32 resolutions that are now before the Congress, and some are couched in quite specific language, some name the subject. The question, even under this bill as it stands, and certainly under this bill as I would loosen the language a little bit on that point, would be whether some of the legislatures proposing specific language knew what they were doing, and the issue before the Congress would be whether those resolutions are invalid and should be returned to those legislatures for them to act again, with a proper understanding of what the Constitution demands of them.

Senator TYDINGS. Some other legislature may have passed them under the assumption that the convention should be limited to that narrow issue.

Professor BICKEL. Exactly. One cannot presume that a legislature that was willing to put to a convention a specific bit of language would also have been willing to convene a convention that would be free to act on other matters as well.

Senator ERVIN. They do call for a convention—all of these resolutions call for a convention. Some of them suggest a specific phraseology for the proposed amendment; but the authority they are acting under is the authority to call the convention, which would then have the authority to propose the amendments.

Professor BICKEL. It seems to me, obviously, that there cannot be anything more important than the constitutive process. I was saying that if a legislature, acting under what turns out was a misapprehension of its constitutional function—acting under such a misapprehension, asked the Congress to call a convention to vote up or down a specific text of an amendment—such a legislature cannot be assumed to have also been willing to convene a convention which was not bound to this specific language or to that single narrow subject. And it seems to me that the least that one could do, having regard for the solemnity of the process, and in order to obtain the kind of deliberation that would be desirable, would be for the Congress to make clear its view of what power lodges in the legislatures under article V, and to return their resolutions for reconsideration to those legislatures which have acted under a misapprehension.

Senator ERVIN. On the other hand, they would have a subsequent opportunity to ratify or reject the action of the convention.

Professor BICKEL. To be sure; yes.

Senator ERVIN. Of course, the original Constitution was written by a body of men which was not called together primarily to write a Constitution—it was authorized merely to make amendments to the Articles of Confederation.

Professor BICKEL. I think it is the common understanding that what went on in Philadelphia in that hot summer was partly a legal proceeding, and partly a small revolution, at least in the minds of men.

Mr. WOODARD. Professor Bickel, in the present situation, a number of States apparently are trying to obtain a convention to propose an amendment on the reapportionment problem. Under your reasoning, how could these legislatures properly petition the Congress to achieve that result? What language would you suggest that they use, to be constitutional and within the meaning of article V?

Professor BICKEL. I would suggest that what we are seeking is a middle ground. Suppose that we wrote into this bill language that says that, as Congress views the Constitution, what the legislatures are permitted to do under article V is either to petition for a general constitutional convention or one on specific general subjects, or some specific general aspects of the Constitution. How would I interpret that? Let us say that the Legislature of Nebraska forwards a resolution asking for a convention to consider the problem of representation in the electoral process of the United States—something as broad as that. Suppose there are other similar resolutions, but couched in different language, in different phrases, from other legislatures. So long as I thought that they were all in the same ball park, I would put the 34 of them together and convene the convention.

It is a more dangerous thing, perhaps, than the single shot convention. I venture to think that it is, also, a more difficult one, that the legislatures would hesitate when required to open up broad subjects—that a lot more public opinion would come into play.

We must face the danger, which also exists, of a general convention. I do not see how we can avoid it. We do have article V.

Mr. WOODARD. But, under your view, the convention could be confined at least to the fairly limited ball park you have described.

Professor BICKEL. I would hope so. It does seem historically that there was an intention to give the States the opportunity to convene a convention which did not have to rewrite the entire Constitution.

Mr. WOODARD. You do not believe, then, that under article V a State legislature can properly petition the Congress to call a constitutional convention to consider the advisability of proposing a constitutional amendment to reserve to the States the power, if they wish to do so, to apportion one house of their legislature on some basis other than population.

Professor BICKEL. I think that would transform the convention for proposing amendments into a convention to ratify amendments. I do not think that is the meaning, or at least I do not think that ought to be the meaning of article V.

Senator ERVIN. I just wonder if your interpretation does not defeat the purpose of article V. Dr. Mendelson said the States ought to be able to submit a specific proposal, or at least a specific subject. On the other hand, you say they may suggest only a general subject. Do you not think that we ought to look at the substance of the State's request, rather than dwelling on the form of the resolution?

In other words, it seems to me that if the States petition the Congress for a constitutional convention to consider the reapportionment question, they are not hobbling the convention. The convention may propose any one of several amendments to accomplish that purpose. The substance of that request is for a constitutional convention free to consider many proposals rather than to say that we do or do not want this specific amendment.

Professor BICKEL. I agree with that. I am not urging a "picky" attitude. As things now stand, I do not think that the Congress would be free to call a convention in response to a lot of these resolutions, because it is quite plain on the face of them that the legislatures that passed them acted under a misapprehension of what their constitutional function was, and that is not a matter of form. We are all searching for a real concurrent desire on the part of the country to have a convention. We have to search for that in earnest, without, on the one hand, being picky about language, but without, on the other hand, taking a resolution as saying one thing when on its face it says another because it was passed under a misapprehension.

Senator ERVIN. I am accused of being a conservative, but I have taken a rather liberal attitude toward this problem. How can we require the State legislatures similarly to construe constitutional provisions when the Supreme Court has not been able to agree on them? In other words, how can we get 34 States of the Union to agree on the meaning of a constitutional provision when the Supreme Court divides 5 to 4 regularly on constitutional construction?

Professor BICKEL. Once Congress settles the issue, the legislatures will know what to do. That is why I am in favor of having a bill now. I think it is time to have a bill on this subject. Things are relatively calm. I think it is a good idea for the Congress to make clear to the States what they can or cannot do under article V.

Senator TYDINGS. On the point of the validity of the petitions, how far would Congress be able to look into the validity or the legality of the petitions from the States, for example, as to the question of reapportionment. You heard my question directed to Professor Mendelson, specifically, where a legislature was under a court order to reapportion—should the Congress take into account that order regarding the validity of a legislature's petition to call the constitutional convention, to legalize the illegal reapportioning?

Professor BICKEL. There are two aspects to that, as I see it. One is the power of the Congress—the function of the Congress, and the other is one's preference about what the policy of the Congress should be. I am clear that the Congress may not say, "We do not like this kind of an amendment—we do not think that this sort of subject ought to be put to a constitutional convention." The Congress cannot vote on the basis of its own view on the merits of what the State wants. That is one thing I am quite clear on.

I am clear, secondly, that if the States act unconstitutionally in some manner, for example, 34 petitions ask the Congress that the Constitution be amended so as to deprive the smaller States of equal representation in the Senate, article V says you cannot do that. So the Congress can say, "That is unconstitutional. We will not do that." It can go into the merits to that extent.

Third, it can go into the merits to the extent necessary to examine any other constitutional issue which is not plain on the face of the Constitution, but where a constitutional judgment is required. That is what I was referring to a moment ago. You need broad resolutions or narrow resolutions, what have you.

Fourth, I think that the Congress is free under article V to inquire, for example, whether the legislature was corrupt. When, for example, Senators were elected by State legislatures, the Congress could inquire whether a legislature that elected a Senator was corrupt. I do not see why Congress cannot inquire into that in this instance. I think it should. The rule that the Court should not do so is based on different considerations, it seems to me, and should not bind the Congress. Congress is free to ask, it seems to me, whether the legislature is properly constituted, whether the legislature is, indeed, malapportioned.

Senator ERVIN. If I may interrupt at that point, I would like to point out that under article I, the Congress has specific constitutional authority to inquire into the qualifications of its Members. It has no such specific authority under article V. Moreover, how do you deal with the principle that a de facto State officer can act routinely with complete validity?

Professor BICKEL. I was coming to that. We are speaking here of a matter of policy. This is in the broad procedural area that is subject to congressional consideration. On the merits, however, it seems to me quite clear that a legislature, malapportioned or not—even a legislature under a decree of reapportionment—is a de facto legislature and is authorized to do everything that a de facto legislature can do; and I see no reason why it does not include this.

Now, if the decree under which that legislature operates specifically forbids it to do this, or forbids it to do something quite analogous to this—as, for example, to call a State constitutional convention—then I think that we are in a difficult area. My inclination would be to say that the Congress ought to abide by the decree in that case. I do not think the Congress is entirely bound by it. Not every provision of an equity decree is in itself a constitutional limitation. The district court, when it says a legislature may not submit a constitutional amendment to the people, is not construing the Federal Constitution. It is acting as an equity court. It is exercising the equity power, which is subject to regulation by the Congress.

Even though there is a decree outstanding saying that a legislature may not call a constitutional convention, nevertheless, the Congress could constitutionally accept the resolution from that legislature. I think, however, that the Congress would be well advised in such an event to abide by the decree of the Court.

Senator ERVIN. As I understand the law of de facto officers, if a person is elected to a public office and assumes to exercise that public office, his acts are binding up to the time that the law under which he was elected is adjudged to be unconstitutional. And I think that the Congress, in the adoption of any contrary theory, would entirely destroy article V, and destroy the right of the States to initiate amendments under article V. I have read some of the malapportionment cases many times and I do not know exactly what they mean yet. I think it would be most improper to apply those vague cases retroactively to invalidate the acts of de facto State legislatures. It would produce utter chaos.

Professor BICKEL. I agree that the Congress would be well advised to accept the actions of de facto State legislatures. But I think also that in general the Congress ought to abide by the decree of the Federal courts.

Senator ERVIN. Under the de facto situation, if there had been a definite adjudication of malapportionment by the Court, the questions then become more difficult to resolve.

Professor BICKEL. Right. But I think it is a matter for the Congress. The Congress is authorized to accept a resolution from a malapportioned legislature, if it wishes to do so, and it is authorized to refuse to accept it.

Senator ERVIN. I am personally very reluctant to allow Congress too much room for judgment in this matter, because I have found that when we go into court, we have certain principles of law that must be allowed to prevail; but individual Congressmen are like Josh Billings says, "They do not kick according to any rule whatsoever, except their own political notions." If given any leeway, some Members might use it to vote against any convention if they did not approve, on the merits, of the constitutional amendment likely to be proposed.

Professor KURLAND. As I understand this discussion, you say that the Congress has the power to specify the purposes for calling a convention, but once Congress has called it, there is no way of restricting it. Is that right?

Professor BICKEL. Well, the Congress is free to make rules for their convenience.

Professor KURLAND. Let us turn, if you will, to the question of the form of the application. I do not think there was any quarrel about the proposition that the application cannot specify the amendments to be adopted. I think that everybody is in agreement on that. Are you suggesting that if you get 34 applications to deal with a reapportionment problem in those general terms, that the convention is free to do something else?

Professor BICKEL. I have great difficulty here. I would hope that by one of those practical compromises that do not stand very well in the eyes of some, that one might find an acceptable interpretation of article V to the effect that the convention can be resricted to dealing with broad, fairly broad, subjects, so that it can have enough room for maneuver and can truly study and consider constitutional amendments, rather than be a body merely ratifying proposals made by the States. And I would hope that one could so phrase it—the reapportionment problem as to pass that kind of test.

What would happen if a convention went wild—if it attached amendments on certain other things? Does Congress then have the constitutional power to submit for ratification only the amendment dealing with the reapportionment problem, and not submit any other amendments the convention has produced? I do not know what I would say to that. I have difficulty in answering whether Congress has the right to restrict.

Professor KURLAND. It has been stated that the application must state the subject, but that the subject matter is not binding on the convention—that the statement of the subject matter is irrelevant.

Professor BICKEL. I am certainly not saying that the application must state the subject matter. The application must call for a convention. If it is going to be a general convention, all 34 applications must call for that. If it is to be a more narrow convention, all 34 applications must call for that. There, the problem is to know what a State legislature has wanted, and whether 34 legislatures are all asking for the same thing.

Professor KURLAND. My problem is this: Suppose that the States do call for a convention to deal with the reapportionment problem, with language broad enough to satisfy you of the possibility of give and take on that subject; is it your proposition that the convention is not limited to that subject?

Professor BICKEL. My position is that I do not know what I would say. If the convention then went wild and did something else, and the thing came back to the Congress, and the Congress is the only body left to make the decision, you would be up against deciding whether it may decline to submit one or more of the amendments that the convention adopted, and I do not know what I would think at that point.

Professor KURLAND. In terms of limiting the convention to the subject matter that was called for by the States?

Professor BICKEL. I think that if I were voting on a bill, I would somehow force myself to vote that way, but I would have some question.

Professor KURLAND. You would not say that the bill, as drawn, necessarily requires the States to specify the language of the amendment they desire?

Professor BICKEL. Well, I would think that this bill, as now drawn, goes much farther—it limits the subject, or at least, it is quite restrictive on the subject matter. It attempts to restrict the convention within the terms of the State resolutions which it is willing to accept quite narrowly drawn. It then purports to put limitations upon the convention to abide by those resolutions. As I tried to explain, the nearer you get to a convention that is narrowly restricted to voting something up or down, the greater are my difficulties. What I am trying to do is to edge away from that. I do not know precisely where my edging leads to—where precisely my difficulty disappears.

Professor KURLAND. The difficulty in drafting legislation is that you have to find that edging point, I assume.

Professor BICKEL. Yes.

Professor KURLAND. If 13 states suggested the need for an amendment with reference to the *Escobedo* matter, and 13 others called for amendment on the separation of state and church, and whatever additional number would be necessary asked for an amendment as to reapportionment, would the Congress be required to call a convention?

Professor BICKEL. Certainly not. These States have not asked for the same thing.

Professor KURLAND. My difficulty with your logic is that the convention could not be limited by subject matter, yet you are saying that conventions cannot be called except in terms of specified subject matter set forth in the State applications.

Professor BICKEL. Oh, no; no. The convention can be called generally. The problem——

Professor KURLAND. The applications must state some subject matter, because they will be added up according to subject matter; is that right?

Professor BICKEL. Or no subject matter at all.

Professor KURLAND. A general convention?

Professor BICKEL. Yes.

Professor KURLAND. But what are the reasons for considering the specification of subject matter in the applications, if the convention is not going to be bound by that in its activities? Does it have to stay within that subject matter?

Professor BICKEL. I tried to explain my difficulty with binding the convention. We are now taking the assumption that at some point you can bind the convention.

For example, take a resolution calling for consideration of the *Miranda* case and the *Escobedo* case. The resolution, we will suppose, says that the problem of Federal control over criminal processes of the States should be reexamined, and we will assume that the language is broad enough, although I am not saying it is; but, let us say it is broad enough. We are now taking the assumption that a convention can be bound that way. If I take that assumption, then the next question, quite a separate one, is what kind of convention have a sufficient number of States called for. If I had 13 States that called for a criminal process convention and 13 States that called for a first amendment convention, and another 13 States, or whatever number, that called for something else again, then I would not have 34 State legislatures that wanted the same kind of convention. Then I have to go back to the

legislatures and find out whether the ones that wanted the *Escobedo* convention also want a first amendment convention, and so forth, and if not, we do not have the 34 States.

Professor KURLAND. Let us get back to the background of the problem initiated in congressional talk on the subject. Some applications deal with reapportionment of State legislatures. Is that a broad enough coverage?

Professor BICKEL. I would think not.

Professor KURLAND. Why not?

Professor BICKEL. Because the legislature that now asks for reconsideration of the reapportionment process is—construing that language realistically—intelligently asking for reconsideration of the reapportionment cases, and that seems to me a very narrow thing which is no different from proposing some language to be voted up or down. It is not enough. A convention has to have a substantial subject within which there is room to maneuver.

Professor KURLAND. That is not the way the amendment process works in terms of congressional initiation.

Professor BICKEL. Congress is a national forum.

Professor KURLAND. We are going to provide a national forum—the convention will provide a national forum for discussion of particular issues, as the bill is drafted. There is no dispute that the language contained in the State applications cannot confine the convention to that language. What we are talking about is the question of whether the convention will be limited to a particular subject matter. If you look at the 11th amendment, the income tax amendment, the right of women to vote, they were discussed in a national forum. And now the parallel that I suggested—the parallel that I think is intended by Article V—is that we do have to provide the States with a means for initiating a forum for dealing with a particular problem.

Professor BICKEL. I am not arguing that a convention may not propose single amendments. I am arguing that the States cannot hobble it to acting on a single proposition only. Never, in the course of action on the amendment you mentioned, was the Congress restricted to doing that, and that alone. It was never restricted in what constitutional amendments it proposed, and it was never restricted in anything else. If you read through the record of the 39th Congress, as I once did, you see the Congress acting as a full-blooded total legislative body. Everything comes in. They deal with the problems of the 14th amendment. Somebody suggests a constitutional amendment. Somebody brings in some other problem. Somebody brings in the problem of citizenship. How did the 14th amendment evolve? It started with the single issue of Negro rights: What are we to do with these Negroes in the South? And then it developed into what we now see, because a full-bodied, full-blooded legislative process was at work. That seems to me to be real consideration in a national forum.

If the Congress had been hobbled by being restricted to dealing with some single aspect of the Negro problem only, Lord knows what we would have got, if anything at all.

Professor KURLAND. We are often in disagreement on constitutional history. In terms of the subject matter for appropriate discussion in the national convention, the authority is not given to the national convention, but to the States. There is nothing restricting the number of

applications or the number of subjects that may be contained in the applications; is that correct?

Professor BICKEL. Article V says that it takes two-thirds of the States to call a constitutional convention for proposing amendments, keeping it clear on the one hand that it is the convention, not the States, that proposes amendments, and keeping it clear, on the other hand, that it is up to Congress to determine whether two-thirds of the States have concurred at a given moment in a desire for a constitutional change. If the resolutions go in every direction, you cannot tell whether they concur in the same idea.

Senator ERVIN. In my opinion, if one-third of the 34 States wanted to amend the first amendment, and one-third of them wanted to amend the fifth amendment, and the other one-third wanted to amend the sixth amendment, and they asked the Congress to call the convention, setting forth no specific amendments, Congress would be obligated to call a convention.

Professor BICKEL. If I get, over a period of 3 or 4 years, 13 resolutions on *Miranda* and another 13 on the latest desegregation case in Georgia, or wherever it is, feeling as I do that this thing ought not to be lightly done, I would say that it is jumping to a conclusion that each of these States would be willing to have that convention, even though they knew that it would deal not only with *Miranda* but with the desegregation problem, and vice versa and also with other problems. And if I were the Congress at that point, I would send the resolutions back to each of these legislatures and ask, "Do you want this? This is the kind of convention you are dealing with. Do you still want it?

And I would venture to say that some legislatures that might have wanted a convention about *Miranda* would say, "If this is going to be a convention on segregation, too, better call it off. We will concede on *Miranda*, if they will concede on desegregation." I read article V to mean that this momentous occasion could only occur after the most careful deliberations and only when everybody knew exactly what they were doing, and I would say that in our hypothetical situation, it could not be said that everybody knew exactly what they were doing. There would be a chance that we could slide into a constitutional convention sort of by happenstance, without everybody being quite aware of what was going on. The thing being as momentous as it was, I think that good policy would be for the Congress to take pause and to ask everybody, "Is this what you mean?"

Senator ERVIN. I think that the States have the option of calling for the convention or not. What amendments will be proposed will be up to the convention. The States can refuse to ratify the proposals, the States have that protection.

Professor BICKEL. I agree. In my judgment, I am making sure that the States really want it, and want it, really, with full knowledge of what it is all about. After that, the convention is theirs.

Professor KURLAND. Let me ask just one more question. If the emphasis is on a consensus of the States, and their desires, putting aside the problem that has been brought out by the Senator, do you have any question at all that the State legislatures, on reapportionment, have no problem with the consensus question? Aren't they all talking about the same problem, but suggesting different solutions?

Professor BICKEL. They are talking about the same problem, which is very narrow. They want a convention to overrule the one-man, one-vote decision.

Professor KURLAND. As I understood the recent colloquy between you and Senator Ervin, you were both in agreement that the States cannot limit the subject matter that is presented at all?

Professor BICKEL. Yes.

Professor KURLAND. If I may quote the Senator, the convention is to be the master of the subject matter, rather than the State legislatures.

Professor BICKEL. Well, yes; but I do not think that Senator Ervin suggested that the convention would only be a runaway general constitutional convention.

Professor KURLAND. That is the difficulty with the logic of your position; it requires a consensus among the State applications as to the appropriate subject matter for calling the convention, but then it recognizes that the convention is not restricted to that subject matter.

Professor BICKEL. You do not allow me a retreat in some measure from the position that only a general convention is permissible. I think that somewhere there is a middle ground; namely, a convention restricted—and hopefully we can make that restriction stick—to some fairly general subject, a subject, for example, of the size of that of the 14th amendment. Once you agree with that, the Senator and I were discussing a very different point; namely, the problem that the Congress would have in determining that a legislature that called for a convention knew what it was calling for, and that all called for the same thing and were aware of what everybody else was calling for.

If you received a resolution which asked for something to be overruled, and 4 years later received another resolution that asked for something else to be overruled, then these two legislatures cannot be assumed to have been addressing themselves to the same kind of a convention. You cannot assume that they both knew that a convention when convened could do both things, and we cannot assume that if they knew that, they would still want a convention.

Professor KURLAND. Let me put this question, which bothers me: Why are you saying, in the terms of the reapportionment matter, that it was too narrow? Because they are talking only of the reapportionment of State legislatures? Are you demanding a general reconsideration of the processes for electing representative officers?

Professor BICKEL. I think that the only way that that problem could be broadened sufficiently, so as to bring it to the point where I would hope that you could restrict the convention to dealing with it only, would be to consider that it was as broad as the problem of the allocation of political power in organs of government, State and Federal, or the entire electoral process.

Short of that, it seems to me that you are too near to the other end of the spectrum; namely, the end where you are putting a one-shot question to a convention and demanding that it answer "Yes," or "No." That is the end of the spectrum that we are obliged to try to avoid. The other end of the spectrum, the general constitutional convention, we are obliged, by policy considerations that I think we all share, to avoid, because it is a horror to contemplate. We are trying to find a middle ground.

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I know that it is getting late. But let me back up a little, because I think that I may have created some confusion. I am talking about two separate problems.

One is the problem, the congressional problem, of making sure that the States have all done together a thing that is within their power and have not acted under a misapprehension of what it is that they can do or what it was that other States want to do. Congress must make sure that there really is a concurrence of two-thirds of the States to call a convention permissible under article V.

That is one problem; really a problem of the relationship between the Congress and the State legislatures.

The other, quite separate problem, which the Congress has to resolve, and we hope that this bill resolves, is what is the constitutional power of the States under article V? What kind of convention can be called? What kind may not be called? We have two ends of a spectrum. At one end is the narrow, one-shot convention, which I think is improper. At the other end is the general constitutional convention which the States may call, but we hope they will not. We hope that we can find some middle ground, which is broad enough to avoid one end of the spectrum, and not so broad as to arouse all of the fears at the other end.

We decide, let us say, with respect to apportionment, that the subject is broad enough; or we decide that any convention that is being asked to deal with three separate issues has enough business there to be able to act like a deliberative political body. Well, having decided that, we than go back and look at the resolutions we have, and we now face the other quite separate problem—what did these legislatures ask for? Did they understand what they were asking for in the resolutions that are now before the Congress, for example? As to those, the answer would be "No" in many cases.

I think that if we have three disparate kinds of requests, the answer to all of these ought to be "No," because we cannot assume that a legislature that is asking for a particular kind of convention knew that the convention would also deal with other things. You just could not assume that.

I think the value of this bill, the value of your initiative, Senator Ervin, is that the Congress has now an opportunity to make clear to the States what it is that their powers are under article V. Then, if a bill is passed, when the States act, we will be able to make much sounder assumptions about their understanding of what it was that they were doing, and anyway, solve this problem of the relationship between the Congress and the State legislatures.

But there are two separate problems. And I think that I caused some confusion earlier this morning by speaking of them as interwoven, without making that distinction.

Senator ERVIN. Thank you very much. It has been an interesting discussion. Very informative. This is an intriguing question, particularly because we have so few precedents by which to chart our course.

I will ask the reporter to insert at this point in the record the reported decision in the case of *Fortson* v. *Toombs*, 379 U.S. 621 (1965). I think the case has been misconstrued by some who have referred to it in these hearings.

(The document above referred to follows:)

(379 U.S. 621)

BEN W. FORTSON, JR., AS SECRETARY OF THE STATE OF GEORGIA, ET AL., APPELLANTS,

v.

HENRY J. TOOMBS ET AL.

No. 300.—Argued Nov. 18, 19, 1964. Decided Jan. 18, 1965.

On Appeal from the United States District Court for the Northern District of Georgia.

E. Freeman Leverett, Atlanta, Ga., for appellants.

Francis Shackelford, Atlanta, Ga., for appellees.

Per curiam

The District Court, having held that the Georgia Legislature was malapportioned (Toombs v. Fortson, 205 F. Supp. 248), enjoined appellants, election officials, "from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefore shall be adopted."* Appellants challenge that provision on the merits. Appellees, while defending it on the merits, suggest alternatively that the issue has become moot.

The situation has changed somewhat since the 1964 election, as both the Senate and the House have new members, and appellees, for whose benefit the challenged provision was added, say it is now highly speculative as to what the 1965 legislature will do and suggest the paragraph in question be vacated as moot.

We vacate this part of the decree and remand to the District Court, to whom we give a wide range in moulding a decree (United States v. Crescent Amusement Co., 323 U.S. 173, 185, 65 S. Ct. 254, 260, 89 L. Ed. 160; International Boxing Club of New York v. United States, 358 U.S. 242, 253, 79 S. Ct. 245, 251, 3 L. Ed. 2d 270), for reconsideration of the desirability and need for the on-going injunction in light of the results of the 1964 election and the representations of appellees. It is so ordered.

Decree vacated in part and case remanded.

Mr. Justice Clark, concurring.

"Although I would prefer to declare this litigation moot and vacate the judgment below, I am joining the opinion and judgment of the Court solely on the basis that it is not reaching the merits regarding the propriety of the order fashioned by the three-judge District Court. In my view, the Court is simply vacating and remanding in order to give the District Court an opportunity to reconsider its order in light of the change in circumstances which has occurred since judgment was entered."

Mr. Justice Harlan, with whom Mr. Justice Stewart joins, concurring in part and dissenting in part.

"This is the first time that the Court, after plenary briefing and argument, has been called on to consider the propriety of interim arrangements prescribed by a district court pending the effectuation of its decision requiring reapportionment of a branch of a state legislature.

"After holding that the House of Representatives of the General Assembly of Georgia was unconstitutionally composed, a decision which is not called into question on this appeal, the three-judge District Court ordered: (1) that the election in 1964 of the legislature to serve in 1965 (the 1965 legislature) might

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*The entire paragraph reads as follows:

"The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitution of the State of Georgia, 1945. (See *Hammond* v. *Clarke*, 136 Ga. 313 [71 S.E. 479, 38 L.R.A.,N.S., 77] for a discussion by the Georgia Supreme Court of what constitutes separate amendments.) Nor shall anything in this order prevent the calling by the General Assembly of a 'convention of the people to revise, amend, or change the constitution' if the representation 'in the convention is based on population as near as practicable' with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945."

proceed under the State's existing methods of apportionment; (2) that until a properly apportioned legislature took office no other legislature could propose to the electorate, except through the calling of a convention of popularly elected delegates, the adoption of a new state constitution; and (3) that (except for reapportionment legislation) the 1965 House should be 'limited,' notwithstanding any provision of state law, 'to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session' provided by Georgia law. After the State's appeal, was filed in this Court this last provision was in effect abrogated by the District Court with the approval of the parties."[1]

This appeal draws in question the validity of items (2) and (3) above, similarly numbered in the District Court's order. It is contended by the appellees, however, that both these issues have now become moot.

I.

The Court's disposition of this case, of course, involves a holding that at least as to item (2) the case is *not* moot. For, contrary to what my Brother GOLDBERG says in his dissenting opinion (*post*, pp. 636–638) and as my Brother CLARK seems to recognize (*ante*), the Court does not remand the case to the District Court for a determination on the issue of mootness, but only to decide whether any injunctive relief is now appropriate in light of what has transpired since such relief was first granted.

While it may be that the Court's implicit holding on mootness does not reach beyond the portion of the District Court's decree that goes to the submission of a proposed new state constitution (par. (2) of the decree). I would also hold not moot the pronouncement of that decree placing limitations on the functioning of the 1965 State Legislature (original par. (3) of the decree).

As to paragraph (2), it is sufficient to say that the injunction has continuing effect, not only with respect to the 1965 legislature, but also as to any successor legislature if it is found to be "malapportioned." Any alleged "speculativeness" as to whether a new state constitution may be proposed to the electorate before a "constitutional" legislature comes into being, goes no to mootness but only to the question whether the District Court (assuming is power in the premises, see below) should have granted any relief on this score.[2] So far as original paragraph (3) of the decree is concerned (limiting the activities of the 1965 legislature) it was not rendered moot by the District Court's modification after the case had been taken for review by this Court. Analytically, the situation is tantamount to a confession of error at this level, at most relieving this Court of the necessity of making a definitive exposition of its views on this subject (compare the suggestion of my Brother GOLDBERG, *post*, pp. 638–639), but not depriving the question of the attribute of justiciability. Cf. *Young* v. *United States*, 315 U.S. 257, 258–259.

The position adopted by the Court is that although the case is not moot, at least as to the "constitution-submission" issue, decision of that question could be avoided if the District Court chose to vacate that part of its injuncion in light of the change in circumstance which has made the need for such relief speculative: the Court therefore remands the case to afford the District Court that opportunity. I do not think that such avoidance as to either question is called for in this case. The Court's reapportionment decisions have pressed district courts onto an uncharted and highly sensitive field of federal-state relations with little more to guide them than the elusive "one-person-one-vote" aphorism. District courts, as courts of first instance, must necessarily fashion remedies for themselves, and the passage of time and the variety of remedies chosen by them may ultimately help this Court to wend its way through this treacherous constitutional terrain. But it is essential that the lower courts at least be launched in the right general direction and not allowed to range so far afield as to ham-string state legislatures and deprive States of effective legislative government. Paragraphs (2) and (3) of the injunction involved in this case do range that far afield. Absent disapproval by this Court, the decision below, rendered by a distinguished panel, cannot fail to furnish a strong practical, if not legal,

[1] The full text of the District Court's order and the amendment of item 3 are printed in the dissenting opinion of MR. JUSTICE GOLDBERG as Appendices A and B, respectively. *Post*, pp. 639, 641.

[2] See *Labor Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271; *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 514–515.

precedent for other district courts. I do not think this should be allowed to happen.

II.

I would hold the decree below improvident in both the aspects before us.

As to the provision forbidding submission to the electorate of a legislatively proposed new state constitution, I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a "malapportioned" legislature—particularly one whose composition was considered, prior to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern? [3]

Similarly as to the provision of the lower court's original decree limiting the functions of the 1965 legislature, it seems scarcely open to serious doubt that so long as the federal courts allow this Georgia Legislature to sit, it must be regarded as the *de facto* legislature of the State, possessing the full panoply of legislative powers accorded by Georgia law.

I think that the State of Georgia is entitled to a clear-cut pronouncement from this Court that nothing in its reapportionment decisions contemplated such unheard-of federal court intrusion into state political affairs as the decree before us evinces. Beyond that, for this Court to temporize with important interstitial matters of this kind, deeply affecting the even course of federal-state relations, can only serve to aggravate the confusion which last June's reapportionment cases have left in their wake.[4]

I would modify the decree below by striking therefrom paragraph (2) and approving the substitute for original paragraph (3) as framed by the District Court.

Mr. JUSTICE GOLDBERG, dissenting.

I dissent from the Court's disposition of this case. By remanding, the Court is, in effect, asking the District Court to decide whether this appeal, which is pending before us and with respect to which we noted probable jurisdiction and heard argument, should be dismissed as moot due to events occurring after the appeal had been perfected in this Court. Mootness, in my view, is a question which, under these circumstances, this Court has the responsibility to decide. The facts relevant to this issue are undisputed. The District Court is in no better position to resolve the issue of mootness than we. No legitimate purpose is served by asking it to determine a question which is properly before us and which a long line of unbroken precedents would have us decide.[1] Moreover, if the case is moot, as I believe, there is no need for a further time-consuming hearing below and a possible future second appeal to this Court. Surely both the District Court and this Court have enough to do without this Court creating unnecessary work for both. I would simply vacate the injunction order and dismiss this appeal as moot.

That this case is in fact moot becomes apparent from a consideration of the history of this litigation.

The appeal calls into question the validity of portions of an injunction issued by a three-judge District Court involving the reapportionment of the Georgia House of Representatives. The District Court entered an order on June 30, 1964, holding that the Georgia House of Representatives was unconstitutionally apportioned under the Federal Constitution and declaring invalid state constitutional and statutory apportionment provisions. The court's order allowed the November 1964 elections for the House of Representatives to take place under

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[3] If, as I believe, a State is not federally restricted in its choice of means for initiating constitutional change, the question of whether, under Georgia law, the proposed new Georgia Constitution should have been initiated by a popularly elected convention instead of by the legislature is not a matter for federal cognizance.

[4] To hold as I think the Court should on these issues would not in any way impair the federal courts' ability to prevent frustration of their reapportionment decrees.

[1] See, *e.g.*, *San Mateo County* v. *Southern Pac. R. Co.*, 116 U.S. 138; *United States* v. *Alaska S. S. Co.*, 253 U.S. 113; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 416; *Oil Workers Unions* v. *Missouri*, 361 U.S. 363, and the numerous cases cited at 368, n. 7 therein.

the then-existing constitutional and statutory provisions, but it required that new elections be held in 1965 in time for a properly apportioned legislature to take office no later than "the second Monday in January, 1966." Paragraph (2) of the court's order further enjoined appellants, state election officials, from placing on the November 1964 election ballot a new state constitution proposed by the then-existing unconstitutionally apportioned legislature, and it also enjoined the submission of a wholly new constitution to the voters by the legislature "at any subsequent election until the [legislature] . . . is reapportioned in accordance with constitutional standards." Paragraph (3) of the District Court's order limited the power of the 1965 legislature to enacting "such legislation as shall properly come before [it] . . . during the regular 1965 45-day session." Appellants' motion for a stay of the District Court's order was denied by MR. JUSTICE BLACK on July 6, 1964.[2]

Appellants appealed to this Court. In their jurisdictional statement they did not contest the basic holding that the House of Representatives was unconstitutionally apportioned. They challenged the validity of portions of paragraphs (2) and (3) of the District Court's order.[3] Appellees moved to affirm on the ground that the order was in all respects valid. We noted probable jurisdiction, 379 U.S. 809, and granted appellants' motion to advance the cause for oral argument.

Shortly prior to argument, appellees moved that this appeal be dismissed because events supervening since the entry of the District Court's order rendered this appeal moot. Appellants opposed this motion. Consideration of appellees' motion to dismiss was postponed until the hearing.

Upon argument of this case it appeared without dispute that, since the entry of the order below, the parties had agreed upon modifications which eliminated appellants' objections to paragraph (3) of the District Court's order and that the District Court, on November 3, 1964, had entered an order embodying the agreed-upon modifications.[4] It likewise was agreed at the argument that the new constitution proposed by the legislature was not submitted to the voters in November 1964 and that under Georgia law it has lapsed and cannot be resubmitted. Thus the only issue remaining in this case is the validity of that portion of the District Court's order which prevents the newly elected or any future unconstitutionally apportioned legislature from proposing and submitting to the voters a wholly new state constitution.

Appellees in their motion to dismiss and at the argument stated that although they originally sought affirmance of the portion of the District Court's order now under consideration, they no longer do so because, due to supervening events, it is now "highly speculative" as to whether the newly elected legislatture[5] or any future unconstitutionally apportioned legislature will ever submit another wholly new constitution to the voters. Appellees state that consequently they no longer need the protection given them by the District Court's prohibition of such a submission, and that "this appeal presents only an abstract, hypothetical controversy in which the 'lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity' is lacking."[6] They suggest that for these reasons controversy over this portion of the order has now become moot and urge that the appeal be dismissed and that this portion of the order be vacated. Appellants resist the motion

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[2] The District Court's order of June 30, 1964, is printed as Appendix A.

[3] Appellants interpreted paragraph (3) of the order to mean that the 1965 legislature could only deal with what was legally considered to be "legislation." They feared that the legislature would be unable to conduct investigations, vote pardons, or perform other similar duties. They also were concerned that under the terms of the District Court's order the 1965 legislature might be unable to meet in special session if such a session proved necessary.

[4] This order is printed here as Appendix B.

[5] Appellees pointed out at the argument that in the new legislatutre which will meet in 1965, 20 of the 54 Senators and 67 of the 205 Representatives will have been newly elected at the November 1964 election.

[6] In their Motion to Dismiss at p. 5, appellees state:

"Before the proposed new constitution can be placed on the ballot for ratification in any future general election, it must again be submitted to the General Assembly and passed by an affirmative two-thirds vote of both houses. This Court has repeatedly admonished that 'constitutional questions are not to be dealt with abstractly.' The mere possibility that a similar constitutional proposal may be passed by the General Assembly at some future time is an insufficient basis for invoking the awesome responsibility of constitutional adjudication by this Court. Without further legislative action, this appeal presents only an abstract, hypothetical controversy in which the 'lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity' is lacking." (Citations omitted.)

to dismiss on grounds of mootness. They contend that this Court should reach the merits and reverse the basic determination of the District Court that under the Federal Constitution a malaportioned legislature is without power to propose a new constitution to the voters.[7] They argue that a decision on the merits is called for because the issuance of the prior opinion of the District Court granting the injunction will have a precedential and deterrent effect, notwithstanding the vacation of the injunction order.

As this history shows, the appeal, in its present posture, is plainly moot under long-established principles and precedents. The question appellants would have us decide is one of grave import involving the power under the Federal Constitution of a malapportioned legislature to submit a state constitution to a popular vote—a question which necessarily involves a consideration of the varying systems used in different States for proposing constitutional amendments. The doctrine of "mootness," like the related doctrine of "ripeness," has been evolved by this Court so that it will not have to pass upon this type of question except upon the urging of one who is harmed or is currently threatened with harm caused by the allegedly unconstitutional action. See *Stearns* v. *Wood*, 236 U.S. 75. While this Court cannot and will not avoid its constitutional responsibility to decide apportionment cases arising when justiciable problems are presented and pressed for decision by litigants claiming an abridgment of their constitutional rights,[8] it should not, in apportionment cases, as in other areas, decide moot issues, volunteer judgments or seek out questions which have ceased to be ripe for adjudication[9] and are no longer presented in the context of an actual pending controversy.[10] I strongly, albeit respectfully, disagree with my Brother HARLAN'S intimation, grounded on his basic view that the Court should never have entered into reapportionment matters at all, that now that it has been decided that such issues are justiciable, this Court should be more willing in this "sensitive" area than in other areas, to give opinions of an advisory nature, so that "the lower courts [will] at least be launched in the right general direction and not allowed to range so far afield." Opinion of MR. JUSTICE HARLAN, *ante*, p. 625. Moreover, it has already been demonstrated, as was easily predictable from the history of other constitutional issues of a "sensitive" nature, that there is in this area ample opportunity to guide the lower courts within the traditional bounds of concrete, live controversies, actively pressed by real adverse parties. See *Fortson* v. *Dorsey*, *ante*, p. 433; *Scranton* v. *Drew*, *ante*, p. 40.

This Court does not pass upon constitutional questions unless it is necessary to do so to preserve the rights of the parties. See *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners*, 113 U.S. 33, 39; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341, 345–348 (concurring opinion of Mr. Justice Brandeis); *Coffman* v. *Breeze Corps.*, 323 U.S. 316, 325. Nor does it decide abstract questions merely because of the effect such judgments might have upon future actions in similar circumstances. *Little* v. *Bowers*, 134 U.S. 547, 558; *California* v. *San Pablo & T. R. Co.*, 149 U.S. 308, 314; *Kimball* v. *Kimball*, 174 U.S. 158. In the present case we are told by the proponents of the injunction that there exists only a remote possibility that the newly elected legislature or some future one will submit a wholly new constitution to the voters. Cf: *Bus Employees* v. *Missouri*, 374 U.S. 74, 78. If the question of the legislature's power to propose such a constitution were being submitted to a court as an initial matter, the speculativeness of the legislature's future conduct would undoubtedly render this issue unripe for adjudication. See *New Jersey* v. *Sargent*, 269 U.S. 328; *Ariona* v. *California*, 283 U.S. 423; *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 443; *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 471; *United States* v. *Harriss*, 347 U.S. 612. The speculativeness, which has arisen in this case since the order was entered, makes the issue in this appeal, in my view, similarly unsuitable for adjudication. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113.

The appellees themselves, in whose favor the judgment below has run, do not assert the need for the protection of the District Court's order against future

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[7] This portion of the District Court's order also rested upon a determination that under Georgia law the legislature could not submit to the voters a wholly new constitution in the form of an amendment to the existing constitution. Questions are raised as to the correctness of this determination and the propriety of the District Court's having made it. See *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25. In light of my resolution of this case, I would not reach these questions.

[8] See *Baker* v. *Carr*, 369 U.S. 186; *Reynolds* v. *Sims*, 377 U.S. 533, and companion cases.

[9] See *United States* v. *Alaska S. S. Co.*, 253 U.S. 113.

[10] See *San Mateo County* v. *Southern Pac. R. Co.*, 116 U.S. 138; *Mills* v. *Green*, 159 U.S. 651; *Jones* v. *Montague*, 194 U.S. 147; *Harris* v. *Battle*, 348 U.S. 803.

submission of a new constitution; they deem the possibility of such a submission too remote. They therefore are agreeable to the vacation of the injunction which they sought and obtained. This obviously will relieve appellants of any burden which the injunction imposes upon them. It also will remove any precedential effect of the opinion of the District Court on this issue. *United States* v. *Munsingwear*, 340 U.S. 36, 39–41; Note, 103 U. Pa. L. Rev. 772, 794. Appellants would have the injunction reversed on the merits as improperly issued rather than vacated as appellees desire. Although there is this difference as to the proper disposition of this case, the net result is that no party wishes the injunction to remain in effect. In the present posture of the case, the conclusion which emerges is that although the parties differ with respect to the abstract legal question of the validity of the order, there is no longer present here that "real, earnest and vital controversy between individuals" which assures us that a cause is in a "real sense adversary."[11] *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339, 345; *United States* v. *Johnson*, 319 U.S. 302, 305. Appellants' argument that the order, though vacated, will have an inhibitory effect upon the legislature's activity is but a way of saying that appellants desire to know for their own purposes, as a guide to future conduct, what this Court would have said on the merits, had the issue remained embedded in a real and substantial controversy. Without such a controversy currently existing between those who appear as adverse parties, this Court should not give an opinion upon questions of law "which a party desires to know for . . . his own purposes."[12] *Cleveland* v. *Chamberlain*, 1 Black 419, 426; see *Woodpaper Co.* v. *Heft*, 8 Wall. 333; *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300.

The situation in this case is a far cry from that presented in *Bus Employees* v. *Missouri*, *supra*, where an "existing unresolved dispute" made the likelihood of repetition of the conduct in question much greater than the mere "speculative" possibility existing here. *Id.*, at 78. Nor do other decisions[13] relied upon by appellants support their position. In none of these cases was there any assertion, as here, by the party for whose benefit the injunction order was issued, that it had become highly problematical that the conduct which underlay the controversy would be repeated. In *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257; *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, relied upon by appellants, the party supporting the validity of the order called into question contended that the order was necessary and its validity should be reviewed. In the instant case whether or not the legislature, while still malapportioned, will submit a wholly new constitution to the voters is highly problematical, and the parties supporting the correctness of the injunction themselves feel that it should be vacated since they see no threat that the legislature will repeat conduct they consider illegal. The base is, therefore, much more closely analogous to *United States* v. *Alaska S. S. Co.*, *supra*, in which this Court refused to review the question of the power of the Interstate Commerce Commission to require carriers to comply with an ICC order perscribing certain bills of lading. A three-judge District Court had found the Commission had no such power and had enjoined the Commission from ever issuing such an order. Before argument in this Court, however, it became clear that provisions in the bills of lading prescribed by the Commission conflicted with provisions contained in new legislation passed by Congress after the Dstrict Court's decision. Since the particular bills of lading prescribed would have to be withdrawn by the Commission in view of this legislation, and because of the uncertainty as to whether the Commission would prescribe new bills of lading or the form they would take, this Court refused to decide the issue of whether the Commission had the power to prescribe any bills of lading. The Court stated, "However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide

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[11] Since their motion to dismiss was reserved until the hearing, appellees have conscientiously argued the merits. However, we cannot ignore the basic fact that they are not pressing for a decision on the merits since they believe they no longer need the protection of the injunction.

[12] That appellants' argument does not show that this Court should reach the merits here is further demonstrated by the fact that any inhibitory effect produced by the District Court's injunction at issue here would also be produced by that part of the injunction prohibiting submission of a new constitution only at the 1964 election. Yet appellants concede, as they must, that this Court would not now review that part of the injunction concerned only with the November 1964 election which has already taken place since the new constitution was not submitted to the voters in November 1964 and under Georgia law it has lapsed and cannot be resubmitted. See *Mills* v. *Green*, *supra*.

[13] *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498; *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257; *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332.

moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" 253 U.S., at 116. The Court reversed the District Court's order and remanded the case to the District Court "with directions to dismiss the petition . . . without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing bills of lading after the enactement of the new legislation." *Id.*, at 116–117. Unless *Alaska S. S. Co.*, is to be overruled or ignored, the Court should act similarly here.

Finally, I find the Court's disposition of this case mystifying, for I cannot understand what the District Court is to do upon remand. Since the District Court's order has been vacated, no injunction will be in effect. Presumably the District Court will have before it two groups of parties, one group urging that no order be entered and the other group claiming that no order is necessary because the likelihood of the legislature's resubmitting a new constitution is too remote. It is inconceivable to me that the District Court would be warranted in reinstating its injunction under the present facts. Of course, if circumstances changed, and there was a real, rather than a tenuous threat of further legislative action of the type originally complained of, the District Court, which has retained jurisdiction of this case, would be empowered to entertain an application for appropriate injunctive relief. However, I cannot understand the logic of the Court's decision in asking the District Court now to make a determination which, under the present circumstances, is rightfully our responsibility.

My Brother HARLAN suggests that, contrary to my view, "the Court does not remand the case to the District Court for a determination on the issue of mootness, but only to decide whether any injunctive relief is now appropriate in light of what has transpired since such relief was first granted." *Ante*, p. 624. But with due respect, I suggest that his interpretation of the Court's opinion is not justified by what the Court says or does. The Court explicitly sets forth appellees' contention that the case is moot because "[t]he situation has changed somewhat since the 1964 election," and "it is now highly speculative as to what the 1965 legislature will do" (ante, p. 622), and then the Court remands the case for reconsideration of the desirability of and need for the injunction in terms of the contentions raised by appellees, *i.e.*, "in light of the results of the 1964 election and the representations of appellees." *Ibid.* This surely must mean that the Court is asking the District Court to consider appellees' contentions that the case is moot. Further, I might better understand my Brother HARLAN's general distinction between determining whether a case is moot and whether an injunction is still appropriate if there were some issue in this case other than the power of the District Court to issue the injunction. But the only issue presented for decision on the merits is whether the District Court validly issued this type of injunction; thus to decide here whether, in light of the changed circumstances and the parties' present desires, continuance of the injunction is still appropriate is to decide the identical question as to whether, in light of these changed circumstances and the present contentions of the parties, the case has become moot. Determining the issue of mootness and deciding "whether any injunctive relief is now appropriate in light of what has transpired since such relief was first granted," both come down to the same thing—the question is whether, at this juncture, as appellees contend, "this appeal presents only an abstract, hypothetical controversy in which the 'lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity' is lacking." The question is one for this Court to decide.

I believe that the proper result in this case would be to sustain the appellees' motion to dismiss for mootness and to enter an order vacating paragraph (2) of the District Court's order of June 30, 1964, prohibiting submission of a wholly new constitution to the voters by the legislature at the 1964 election or "at any subsequent election until [it] . . . is reapportioned in accordance with constitutional standards." Thus this portion of the slate would be wiped clean. *United States* v. *Munsingwear*, *supra*, without any necessity for further proceedings below to try the mootness issue. In view of the parties' stipulations before this Court that they accept the modifications entered by the District Court on November 3, 1964, I believe that the Court is correct in not passing upon the validity of paragraph (3) of the District Court's order of June 30, 1964—that portion of the order which appellants took as limiting the powers of the 1965 legislature. However, because of doubts expressed as to the jurisdiction of the District Court to enter its modified order while appeal is pending in this Court, see *Schenipp* v. *School District*, 184 F. Supp. 381 (D. C. E. D. Pa.), the Court ought also to vacate para-

graph (3) of the June 30, 1964, order on the assumption that the District Court will re-enter its modified order of November 3, 1964, in accordance with the agreement of the parties.

The federal district courts have enough to do in deciding ripe reapportionment cases without our requiring them to decide stale ones.

APPENDIX A TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING

FINAL ORDER OF THE COURT OF JUNE 30, 1964

Revised Order

All parties having consented thereto, the order of the Court dated June 24, 1964, is hereby revised to read as follows:

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code Section 2–1501) of the Constitution of Georgia of 1945, is hereby declared to be null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States.

Section 47–101 of the Code of Georgia, as amended, is hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November of 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitution of the State of Georgia, 1945. (*See Hammond* v. *Clarke*, 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments). Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2–1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966.

APPENDIX B TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING

ORDER OF THE DISTRICT COURT OF NOVEMBER 3, 1964

Both parties agree that the motion for alternative relief should be granted. Therefore, paragraph 3 of the order of June 30, 1964, is hereby stricken and the following paragraph 3 is substituted in lieu thereof:

"(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that, notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2–1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the

House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to a term of one year's duration and provided further that the plaintiffs shall have the right to reapply to this Court for further relief should the General Assembly, which convenes in January, 1965, fail to enact, during the regular 1965 45-day session, as provided in the Georgia Constitution, such legislation as may be necessary for the General Assembly to be reapportioned in accordance with Constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly during the calendar year 1965, which elections are to be held at such time as may be necessary to permit the members of such newly constituted General Assembly to take office no later than the second Monday in January, 1966. To the extent that state statutory and constitutional provisions might otherwise conflict with such legislative reapportionment, they are hereby declared to be void and of no effect."

This 3rd day of November, 1964.

Senator ERVIN. The subcommittee will recess subject to the call of the Chair.

(Whereupon, at 1 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.)

APPENDIX

THE FEDERALIST No. 43 [42] [1]

JAMES MADISON

January 23, 1788

To the People of the State of New York.

THE *fourth* class comprises the following miscellaneous powers.

1. A power "to promote the progress of science and useful arts, by securing for a limited time, to authors and inventors, the exclusive right, to their respective writings and discoveries."

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

2. "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the States, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The indispensible necessity of compleat authority at the seat of Government carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the Government, would be both too great a public pledge to be left in the hands of a single State; and would create so many obstacles to a removal of the Government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the Government which is to exercise authority over them; as a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the Legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

The necessity of a like authority over forts, magazines &c. established by the general Government is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempted from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree depend-

[1] From *The Independent Journal*, January 23, 1788. This essay appeared on January 25 in both *The New-York Packet* and *The Daily Advertiser*. It was numbered 43 in the McLean edition and 42 in the newspapers.

ent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned, in every such establishment.

3. "To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons, have been the great engines, by which violent factions, the natural offspring of free Governments, have usually wrecked their alternate malignity on each other, the Convention have with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

4. "To admit new States into the Union; but no new State, shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress."

In the articles of confederation no provision is found on this important subject. Canada was to be admitted of right on her joining in the measures of the United States; and the other *colonies*, by which were evidently meant, the other British colonies, at the discretion of nine States. The eventual establishment of *new States*, seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety therefore has the new system supplied the defect. The general precaution that no new States shall be formed without the concurrence of the federal authority and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealously of the larger States; as that of the smaller is quieted by a like precaution against a junction of States without their consent.

5. "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with a proviso that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

This is a power of very great importance, and required by considerations similar to those which shew the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolute necessary, by jealousies and questions concerning the Western territory, sufficiently known to the public.

6. "To guarantee to every state in the Union a Republican form of Government; to protect each of them against invasion; and on application of the Legislature; or of the Executive (when the Legislature cannot be convened) against domestic violence."

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a Union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into, should be *substantially* maintained. But a right implies a remedy: and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapated to a federal coalition of any sort, than those of a kindred nature. "As the confederate republic of Germany," says Montesquieu, "consists of free cities and petty states subject to different Princes, experience shews us that it is more imperfect than that of Holland and Switzerland." "Greece was undone" he added, "as soon as the King of Macedon obtained a seat among the Amphyctions." In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alterations in the state governments, without the concurrence of the states themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprizing leaders, or by the intrigues and influences of foreign powers? To the second question it may be answered, that if the general

government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the states may chuse to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which it is presumed will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used, seems to secure each state not only against foreign hostillty, but against ambitious or vindictive enterprise of its more powerful neighbours. The history both of ancient and modern confederacies, proves that the weaker members of the Union ought not to be insensible to the policy of this article.

Protection against domestic violence is added with equal propriety. It has been remarked[2] that even among the Swiss Cantons, which properly speaking are not under one government, provision is made for this object; and the history of that league informs us, that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other Cantons. A recent and well known event among ourselves, has warned us to be prepared for emergencies of a like nature.[3]

At first view it might seem not to square with the republican theory, to suppose either that a majority have not the right, or that a minority will have the force to subvert a government; and consequently that the federal interposition can never be required but when it would be improper. But theoretic reasoning in this, as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations for purposes of violence be formed as well by a majority of a State, especially a small State, as by a majority of a county or a district of the same State; and if the authority of the State ought in the latter case to protect the local magistracy, ought not the federal authority in the former to support the State authority? Besides, there are certain parts of the State Constitutions which are so interwoven with the Federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them, bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the Superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succours from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen in fine that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who during the calm of regular government are sunk below the level of men; but who in the tempestuous scenes of civil violence may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States not heated by the local flame? To the impartiality of Judges they would unite the affection of friends. Happy would it be if such a remedy for its infirmities, could be enjoyed by all

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[2] See Essay 19. (Editor)
[3] The reference is to Shays' Rebellion. (Editor)

free governments; if a project equally effectual could be established for the universal peace of mankind.

Should it be asked what is to be the redress for an insurrection pervading all the States, and comprizing a superiority of the entire force, though not a constitutional right; the answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the Federal Constitution, that it diminishes the risk of a calamity, for which no possible constitution can provide a cure.

Among the advantages of a confederate republic enumerated by Montesquieu, an important one is, "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

7. "To consider all debts contracted and enagements entered into, before the adoption of this Constitution, as being no less valid against the United States under this Constitution, than under the Confederation."

This can only be considered as a declaratory proposition; and may have been inserted, among other reasons, for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine that a change in the political form of civil society, has the magical effect of dissolving its moral obligations.

Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favour of the United States, as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told, what few others need be informed of, that as engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves a validity on the other side; and that as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told that every Constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would DARE, with or even without this Constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned.

8. "To provide for amendments to be ratified by three-fourths of the States, under two exceptions only."

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendments of errors as they may be pointed out by the experience on one side or on the other. The exception in favour of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the Legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

9. "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States ratifying the same."

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the Convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion. 1. On what principle the confederation, which stands in the solemn form of a compact among the States, can be superceded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it.

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of

society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. PERHAPS also an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation, that in many of the States, it had received no higher sanction than a mere legislative ratification.[4] The principle of reciprocality seems to require, that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorizes them, if they please, to pronounce the treaty violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it, the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical, forbids an overcurious discussion of it. It is one of those cases which must be left to provide for itself. In general it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and above all the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to re-union, will, it is hoped, not urge in vain MODERATION on one side, and PRUDENCE on the other.

PUBLIUS.

THE FEDERALIST No. 85[1]

ALEXANDER HAMILTON

MAY 28, 1788.

According to the formal division of the subject of these papers, announced in my first number, there would appear still to remain for discussion, two points, "the analogy of the proposed government to your own state constitution," and "the additional security, which its adoption will afford to republican government, to liberty and to property." But these heads have been so fully anticipated and exhausted in the progress of the work, that it would now scarcely be possible to do any thing more than repeat, in a more dilated form, what has been heretofore said; which the advanced stage of the question, and the time already spent upon it conspire to forbid.

It is remarkable, that the resemblance of the plan of the convention to the act which organizes the government of this state holds, not less with regard to many of the supposed defects, than to the real excellencies of the former. Among the pretended defects, are the re-eligibility of the executive, the want of a council, the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press: These and several others, which have been noted in the course of our inquiries, are as much chargeable on the existing constitution of this state, as on the one proposed for the Union. And a man must have slender pretensions to consistency, who can rail at the latter for imperfections which he finds no difficulty in excusing in the former. Nor indeed can there be a better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention among us, who profess to be the devoted admirers of the government under which they live, than the fury with which they have attacked that plan, for matters in regard to which our own constitution is equally, or perhaps more vulnerable.

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[4] See Essay 22. (Editor).

[1] From J. and A. McLean, *The Federalist*, II, 357–365, where this essay was first published on May 28, 1788, and numbered 85. It was begun on August 13 and concluded on August 16 in *The Independent Journal* where it was numbered 84, and appeared on August 15 in *The New-York Packet* where it was numbered 85.

The additional securities to republican government, to liberty and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the union will impose on local factions and insurrections, and on the ambition of powerful individuals in single states, who might acquire credit and influence enough, from leaders and favorites, to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the states in a disunited situation; in the express guarantee of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the state governments, which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

Thus have I, my fellow citizens, executed the task I had assigned to myself; with what success, your conduct must determine. I trust at least you will admit, that I have not failed in the assurance I gave you respecting the spirit with which my endeavours should be conducted. I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties, and which have been not a little provoked by the language and conduct of the opponents of the constitution. The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant not to incite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual charges which have been rung upon the wealthy, the well-born and the great, have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men. It is not impossible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend: It is certain that I have frequently felt a struggle between sensibility and moderation, and if the former has in some instances prevailed, it must be my excuse that it has been neither often nor much.

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

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

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

every part, is upon the whole a good one, is the best that the present views and circumstances of the country will permit, and is such an one as promises every species of security which a reasonable people can desire.

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

The reasons assigned in an excellent little pamphlet lately published in this city[2] are unanswerable to shew the utter improbability of assembling a new convention, under circumstances in any degree so favourable to a happy issue, as those in which the late convention met, deliberated and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worth the perusal of every friend to his country. There is however one point of light in which the subject of amendments still remains to be considered; and in which it has not yet been exhibited to public view. I cannot resolve to conclude, without first taking a survey of it in this aspect.

It appears to me susceptible of absolute demonstration, that it will be far more easy to obtain subsequent than previous amendments to the constitution. The moment an alteration is made in the present plan, it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each state. To its complete establishment throughout the union, it will therefore require the concurrence of thirteen states. If, on the contrary, the constitution proposed should once be ratified by all the states as it stands, alterations in it may at any time be effected by nine states. Here then the chances are as thirteen to nine[3] in favour of subsequent amendments, rather than of the original adoption of an intire system.

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

But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine[3] or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place. There can therefore be no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete constitution.

In opposition to the probability of subsequent amendments it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The

[2] Intitled "An Address to the people of the state of New-York." (Publius.) Written by John Jay, the pamphlet was published first in April and reprinted in *The American Museum* for June, 1788. (Editor.)

[3] It may rather be said TEN, for though two-thirds may set on foot the measure, three-fourths must ratify. (Publius.)

intrinsic difficulty of governing thirteen States at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rules the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this, that the national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan the congress will be *obliged*, "on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in air. Nor however difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.

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

The zeal for attempts to amend, prior to the establishment of the constitution, must abate in every man, who, is ready to accede to the truth of the following observations of a writer, equally solid and ingenious: "To balance a large state or society (says he) whether monarchial or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work: Experience must guide their labour: Time must bring it to perfection: And the feeling of inconveniences must correct the mistakes which they inevitably fall into, in their first trials and experiments." * These judicious reflections contain a lesson of moderation to all the sincere lovers of the union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the states from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from time and experience. It may be in me a defect of political fortitude, but I acknowledge, that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A nation without a national government is, in my view, an awful spectacle. The establishment of a constitution, in time of profound peace, by the voluntary consent of a whole people, is a prodigy, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen states; and after having passed over so considerable a part of the ground to recommence the course. I dread the more the consequences of new attempts, because I know that powerful individuals, in this and in other states, are enemies to a general national government, in every possible shape.

PUBLIUS.

EXCERPTS FROM FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1937 ED.) AND OTHER SOURCES

(Submitted as Appendix to Memorandum on S. 2307, prepared by Prof. Philip B. Kurland.)

[Ed. Note: Footnotes are from Farrand, 1937 edition, and retain numbering of the source.]

The history of the amendment provision in the Constitutional Convention begins with John Randolph's resolutions (The Virginia Plan Resolution 13, according to Madison, reads as follows:

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* Hume's Essays, vol. I, page 128.—The rise of arts and sciences. (Publius.)

"13. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."

Patterson's record of the Randolph provision was more succinct: "4. Provision that the Articles of national Union should be amended—"

The issue was not quickly resolved. The Journal of the Convention reveals that on 5 June 1787, the question was deferred:

"It was then moved and seconded to postpone the consideration of the 13th resolution submitted by Mr. Randolph and the question to postpone it passed in the affirmative"

Madison's notes fill in some of the details of this postponement:

"(propos: 13.) "that *provision ought to be made for* (hereafter) *amending the system now to be established, without requiring the assent of the Natl. Legislature.*" (being taken up.)

Mr. Pinkey doubted the propriety or necessity of it.

Mr. Gerry favored it. The novelty & difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt. Nothing had yet happened in the States where this provision existed to prove its impropriety.—The Proposition was postponed for further consideration: (the votes being: Mas: Con. N.Y. Pa. Del. Ma. N.C.—ay

"Virga. S.C. Geo: no)[20]

[20] "Madison originally recorded that this provision was "postponed nem. con.," but later substituted this vote from *Journal*. His original record was doubtless correct as there is no apparent reason for ascribing this vote to this question."

On June 11, the Journal again reveals postponement:

"It was agreed to postpone the following clause in the 13th resolution submitted by Mr. Randolph namely

" 'and that the assent of the national legislature ought not to be required thereto' "

And Madison's notes again records the substance of the positions taken at this time; suggesting that the principle of amendment was agreed to, but the exclusion of the National Legislature from the process was at issue:

"(Resolution 13.) for amending the national Constitution hereafter without consent of Natl. Legislature (being) considered, several members did not see the necessity of the (Resolution) at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary.

Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.

Mr. Randolph (enforced) these arguments.

The words, "without requiring the consent of the Natl. Legislature" were postponed. The other provision in the clause passed nem. con.

Yates' notes confirm Madison on the June 11 session:

"13th Resolve—the first part agreed to.

"14th Resolve—taken into consideration."

The Journal records for June 13, Randolph's later resolution on the question:

"Resolved that provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary."

A second set of Randolph's resolutions for the same date was recorded in the Journal thus:

"17. Resolved, that provision ought to be made for the amendment of the articles of Union, whensoever it shall seem necessary."

And Madison's notes confirm these recordings in the Journal:

"17. Resd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary."

Madison, according to Yates, had this comment to make on June 29 about the difficulties of Constitutional amendments:

"The difficulty of getting its defects amended are great and sometimes insurmountable. The Virginia state government was the first which was made, and though its defects are evident to every person, we cannot get it amended. The Dutch have made four several attempts to amend their system without success. The few alterations made in it were by tumult and faction, and for the worse."

King's notes confirm this statement by Madison.

The principle of providing for amendment was again confirmed on 23 July 1787. The Journal records the following:

On the question to agree to the 17th resolution, as reported from the Committee of the whole House, namely

"That provision ought to be made for the amendment of "the articles of union, whensoever it shall seem necessary" it passes unanimously in the affirmative.

Madison records no debate on the question:

"Resoln: 17. that provision ought to be made for future amendments of the articles of Union. Agreed to nem. con."

Thereupon the Committee of Detail's draft of the Randolph Resolution was as follows: "Resolved That Provision ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary."

The Wilson papers include this provision in the outline of the New Jersey Plan, also reported to the Committee of Detail: "23. The assent of the Legislature of States shall be sufficient to invent future additional Powers in U.S. in C. ass. and shall bind the whole Confederacy."

In Federalist No. 43, Madison wrote of the amending provisions:

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

That Madison was not prone to see his handiword referred for popular revision is revealed in Federalist No. 49, where he rejects a Jeffersonian proposal for resort to the people to resolve conflicts among the three branches of government.

The George Mason papers include the following proposal in the handwriting of Edmund Randolph with amendments by John Rutledge indicated here by brackets. Italics indicate changes in Randolph's hand:

4. The ratification of the reform is—After the approbation of congress—to be made by a special convention [in each State] recommended by the assembly to be chosen for the express purpose of considering and approving or rejecting it in toto:

and this recommendation may be used from time to time.

5. (An alteration may be effected in the articles of union, on the application of two thirds *nine* [⅔d] of the state legislatures [by a Convn.] [on appln. of ⅔ds of the State Legislatures to the Natl. Leg. they call a Convn. to revise or alter ye Articles of Union]

3. Qu. whether any Thing should be said as to the *Amendment* by the *States*

Again, among the Wilson papers was found the following:

This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose.

The following provision was also found among the Wilson papers:

This Constitution ought to be amended whenever such amendment shall become necessary; and on the Application of (two thirds) the Legislatures

of two thirds of the States of the Union, the Legislature of the United States shall call a Convention for that Purpose.

Madison's notes for 6 Aug. 1787, include the following provision:

"XIX [XVIII] On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.

Its approval by the Convention in this form on August 30 was recorded by Madison: "On the question to agree to the 19 article as reported it passed in the affirmative."

He also recorded on that date no debate on the question: "Art: XIX taken up."

The proposition for participation by the National Legislature in the amendment process was first recorded in the Journal for 10 September 1787:

"It was moved and seconded to reconsider the 19th article which passed in the affirmative [Ayes—9; noes—1; divided—1.]

It was moved and seconded to amend the 19 article by adding the following clause.

Or the Legislature may propose amendments to the several States, for their approbation, but no amendments shall be binding, until consented to by the several States.

It was moved and seconded to insert the words "two thirds of" before the words "the several States" which passed in the negative [Ayes—5; noes—6.] It was moved and seconded to insert the words "three fourths" which passed in the affirmative. ["unanimous"]

It was moved and seconded to postpone the consideration of the amendment in order to take up the following.

'The Legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States: Provided that no amendments which may be made prior to the year 1808, shall in any manner affect the 4th and 5th Sections of article the 7th"

On the question to postpone it passed in the affirmative

On the question to agree to the last amendment it passed in the affirmative [Ayes—9; noes—1; divided—1.]"

Madison's notes reveal the origin of the change and some of the discussion:

Mr. Gerry moved to reconsider art XIX, viz. "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the U.S. shall call a Convention for that purpose." (see Aug." 6.)

This Constitution he said is to be paramount to the State Constitutions. It follows, hence, from this article that two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether. He asked whether this was a situation proper to be run into—

Mr. Hamilton 2ded. the motion, but he said with a different view from Mr. Gerry—He did not object to the consequences stated by Mr. Gerry—There was no greater evil in subjecting the people of a particular State—It has been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention—There could be no danger in giving this power, as the people would finally decide in the case.

Mr. Madison remarked on the vagueness of the terms, "call a Convention for the purpose," as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?

On the motion of Mr. Gerry to reconsider.

N.H. divd. Mas. ae—Ct. ay, N.J.—, Pa. ay. Del. ay. Md. ay. Va. ay. N—C. ay. S.C. ay. Geo . ay. [Ayes—9; noes—1; divided—1.]

Mr. Sherman moved to add to the article "or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to be the several States"

Mr. Gerry 2ded. the motion.

Mr. Wilson moved to insert "two thirds of" before the words "several States"—on which amendment to the motion of Mr. Sherman.

N.H. ay. Mas. (no) Ct. no. N.J. (no) Pa. ay—Del—ay Md. ay. Va. ay. N.C. no. S.C. no. Geo no [Ayes—5; noes—6] [2]

[2] Madison originally recorded both Massachusetts and New Jersey as voting "ay." This made the total vote on the question affirmative. Later he revised his record to conform to *Journal*.

Mr. Wilson then moved to insert "three fourths of" before "the several Sts" which was agreed to nem: con:

Mr. Madison moved to postpone the consideration of the amended proposition in order to take up the following,

"The Legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two third of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.'

Mr. Hamilton 2ded. the motion.

Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property and prejudiced against it. In order to obvaite this objection, these words were added to the proposition: "provided that no amendments which may be made prior to the year 1808 shall in any manner affect the 4 & 5 sections of the VII article" The postponement being agreed to,

On the question On the proposition of Mr. Madison & Mr. Hamilton as amended.

N.H. div. Mas. ay. Ct. ay. N.J. ay. Pa. ay. Del. no. Md. ay. Va. ay. N.C. ay S.C. ay Geo. ay. [Ayes—9; noes 1; divided—1.]

The Committee of style thereafter brought in the following draft of Article V:

"The Congress, whenever two-thirds of both houses shall deem necessary or on the application of two-thirds [25] of the legislatures of the several states, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of [26] of the legislatures [27] of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year 1808 hall in any manner affect the—and [28]—sections of [29] article—

[25] "of two-thirds" crossed out by Madison, and inserted again after "legislatures."
[26] "three-fourths at least of" crossed out by Madison.
[27] "of three-fourths" inserted by Madison.
[28] "and" crossed out, and "1. & 4 clauses in the 9" inserted by Madison.
[29] "the first" interlined by Madison.

Madison's notes of September 15 offer the discussion on the proposed Article V: "Art—V. 'The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the (1 & 4 clauses in the 9.) section of article 1.'

Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.[8]

[8] In the margins of his copy of the draft of September 12, Mason had written: "Article 5th—By this article Congress only have the power of proposing amendments at any future time to this constitution, and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people."

Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of ⅔ of the Sts

Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.

The motion of Mr. Govr Morris and Mr. Gerry was agreed to nem: con (see: the first part of the article as finally past)

Mr. Sherman moved to strike out of art. V. after "legislatures" the words "of three fourths" and so after the word "Conventions" leaving future Conventions to act in this matter, like the present Conventions according to circumstances.

On this motion

NH divd. Mas—ay—Ct ay. NJ.—ay Pa no. Del—no. Md no. Va. no. N.C. no. SC. no. Geo—no. [Ayes—3; noes—7; divided—1]

Mr. Gerry moved to strike out the words "or by Conventions in three fourths thereof"

On this motion

NH—no. Mas. no—Ct. ay. NJ. no. Pa no—Del no. Md no. Va. no. NC. no. S.C. no—Geo no. [Ayes—1; noes—10.]

M—Sherman moved according to his idea above expressed to annex to the end of the article for a further proviso "that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate,"

Mr. Madison. Begins with these special provisos, and every State will insist on them, for their boundaries; exports &c.

On the motion of Mr. Sherman

N.H—no. Mas. no. Ct. ay. N.J. ay—Pa no. Del—ay. Md. no. Va. no N.C. no. Geo. no. [Ayes—3; noes—8.]

Mr. Sherman then moved to strike out art V altogether.

Mr. Brearley 2ded. the motion, on which

N.H. no. Mas. no. Ct. ay. N.J. ay. Pa. no. Del. divd. Md. no. Va. no. N.C. no. S.C. no. Geo. no [Ayes—2; noes—8; divided—1.]

Mr. Govr. Morris moved to annex a further proviso—"that no State, without its consent shall be deprived of its equal suffrage in the Senate"

This motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no.

Col: Mason expressing his discontent at the power given to Congress by a bare majority to pass navigation acts, which he said would not only enhance the freight, a consequence he did not so much regard—but would enable a few rich merchants in Philada N. York & Boston, to monopolize the Staples of the Southern States & reduce their value perhaps 50 Per Ct—moved a further proviso "that no law in nature of a navigation act be passed before the year 1808, without the consent of ⅔ of each branch of the Legislature.

On this motion

N.H. no. Mas no. Ct. no. NJ. no—Pa no. Del. no. Md. ay. Va. ay. N.C abst S.C. no—Geo ay. [Ayes—3; noes—7; absent—1.]

Charles Pinckney's recorded views on the need for alteration of the Constitution by less than unanimous state action were as follows:

The 16th article proposes to declare, that if it should hereafter appear necessary to the United States to recommend that Grant of any additional

Powers, that the assent of a given number of the States shall be sufficient to invest them and bind the Union as fully as if they had been confirmed by the Legislatures of all the States. The principles of this, and the article which provides for the future alteration of the Constitution by its being first agreed to in Congress, and ratified by a certain proportion of the Legislatures, are precisely the same; they both go to destroy that unanimity which upon these occasions the present System has unfortunately made necessary—the propriety of this alteration has been so frequently suggested, that I shall only observe that it is to this unanimous consent, the depressed situation of the Union is undoubtedly owing. Had the measures recommended by Congress and assented to, some of them by eleven and others by twelve of the States, been carried into execution, how different would have been the complexion of Public Affairs? To this weak, this absurd part of the Government, may all our distresses be fairly attributed.

If the States were equal in size and importance, a majority of the Legislatures might be sufficient for the grant of any new Powers; but disproportioned as they are and must continue for a time; a larger number may now in prudence to required—but I trust no Government will ever again be adopted in this Country, whose Alteration cannot be effected but by the assent of all its Members. The hazardous situation the United Netherlands are frequently placed in on this account, as well as our own mortifying experience, are sufficient to warn us from a danger which has already nearly proved fatal. It is difficult to form a Government so perfect as to render alterations unnecessary; we must expect and provide for them:—But difficult as the forming a perfect Government would be, it is scarcely more so, than to induce Thirteen separate Legislatures, to think and act alike upon one subject—the alterations that nine think necessary, ought not to be impeded by four—a minority so inconsiderable should be obliged to yield. Upon this principle the present articles are formed, and are in my judgment so obviously proper, that I think it unnecessary to remark further upon them.

Edmund Randolph in a letter to the speaker of the Virginia House of Delegates, explaining his refusal to sign the Constitution as submitted for ratification, wrote as follows:

5. I was afraid that if the constitution was to be submitted to the people, to be wholly adopted or wholly rejected by them, they would not only reject it, but bid a lasting farewell to the union. This formidable event I wished to avert, by keeping myself free to propose amendments, and thus, if possible, to remove the obstacles to an effectual government. But it will be asked, whether all these arguments, were not be well weighed in convention. They were, sir, with great candor. Nay, when I called to mind the respectability of those, with whom I was associated, I should cheerfully have yielded to a majority; on this the fate of thousands yet unborn, enjoined me not to yield until I was convinced.

Again, may I be asked, why the mode pointed out in the constitution for its amendment, may not be a sufficient security against its imperfections, without now arresting it in its progress? My answers are—1. That it is better to amend, while we have the constitution in our power, while the passions of designing men are not yet enlisted, and while a bare majority of the States may amend than to wait for the uncertain assent of three fourths of the States. 2. That a bad feature in government, becomes more and more fixed every day. 3. That frequent changes of a constitution, even if practicable, ought not to be wished, but avoided as much as possible. And 4. That in the present case, it may be questionable, whether, after the particular advantages of its operation shall be discerned, three fourths of the States can be induced. . . .

George Mason, according to Jefferson, reported the following history of Article V's origins:

"Anecdote. the constn as agreed at first was that amendments might be proposed either by Congr. or the legislatures a commee was appointed to digest & redraw. Gov. Morris & King were of the commee. one morng. Gov. M. moved an instrn for certain alterns (not ½ of the members yet come in) in a hurry & without understanding it was agreed to. the Commee reported so that Congr. shd have the exclusive. power of proposg. amendments. G. Mason observed it on the report & opposed it. King denied the constrn. Mason demonstrated it, & asked the Commee by what authority they had varied what had been agreed. G. Morris then impudently got up & said by authority

of the convention & produced the blind instruction beforementd. which was unknown by ½ of the house & not till then understood by the other. they then restored it as it stood originally.

From the Annals of Congress, 8th Cong., 1st Sess., comes this remark by Pierce Butler who had been a member of the Convention: "It never was intended by the Constitution that the Vice President should have a vote in altering the Constitution."

In his The Framing of the Constitution of the United States (1913) Farrand recapitulates the history of Article V thusly:

The attempt to obtain amendments to the articles of confederation had taught by bitter experience that the objection of a single state was sufficient to block the will of all the others. It was evidently necessary, then, that provision should be made for amendments to the new constitution with the consent of less than the whole number of states. It was also felt that this same principle ought to be applied in the modifications proposed in the existing instrument, and those who were in favor of a government acting directly upon the people advocated as a first step in this process that the changes to be made in the constitution should be ratified by the people rather than by state legislatures.

The provision for future amendments was adopted, except that the clause rendering unnecessary the assent of the national legislature was dropped. There was a little discussion as to the propriety or desirability of referring the changes to be proposed by the convention to popularly chosen conventions in each state. Madison and Wilson favored it on fundamental grounds, King as a matter of expediency. Sherman and Gerry opposed it, the former considering the state legislatures competent, the latter distrusting the people. Wilson and Pinckney suggested also ratification by less than the whole number of states. The question of popular ratification was once postponed, but the final vote was in favor of it and it was so ordered.

The only important action taken on Monday related to future amendments of the constitution. The provision in the draft reported by the committee of detail—that on the application of the legislatures of two-thirds of the states, congress should call a convention for that purpose—had been unanimously adopted by the convention. Gerry now asked and obtained consent to have this reconsidered, because he thought two-thirds of the states could thus commit the whole union to dangerous innovations. This move was taken advantage of by those who desired an easier method of amendment, to render it possible for congress to inaugurate amendments whenever two-thirds of both houses should think it necessary. Gerry evidently wished to require the consent of all the states to adopt an amendment, but Wilson proposed to require the approval of only two-thirds. When the latter motion was defeated by a majority of one, Wilson immediately suggested three-fourths and the convention adopted it unanimously. The proviso was then added, at the insistance of the extreme southern states, that no amendments should be made prior to 1808 that would interfere with the slave trade.

Gerry next moved to amend another section previously agreed to, so that the approval of congress would be essential to the adoption of the new plan. Though supported by Hamilton and others, the amendment was defeated. Randolph having previously expressed his doubts concerning the new plan now came out flatly against it. He wanted the new constitution to be transmitted through the medium of congress and state legislatures to state conventions. Then another general convention was to be held with full power to adopt or reject such amendments as might be proposed by the various state conventions. His motion embodying these proposals was laid on the table and the convention adjourned after instructing the committee of style to prepare an address to accompany the constitution.

Some slight changes were made in the method of amending the constitution, with an idea of making that process easier, but they have proven to be of no importance, because of the difficulty in overcoming the fundamental requirement of obtaining the ratification of three-fourths of the states. It was also feared that congress might refuse to act and so congress was *required* to call a convention on the application of two-thirds of the states. Some further suggestions were made by Sherman, Gerry, and Brearley regarding amendments which were all voted down. But with the idea of con-

ciliation in mind Gouverneur Morris made a motion which was 'dictated by the circulating murmurs of the small States . . . that no State, without its consent shall be deprived of its equal suffrage in the Senate.'

P.B.K.

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PROCEDURES FOR AMENDING THE UNITED STATES CONSTITUTION

(By Norman J. Small, Legislative Attorney, American Law Division, January 15, 1965)

Article V[1] of the Constitution now provides two methods for effecting alterations and additions to the provisions thereof:

(1) Amendment procedure originating with, or initiated by Congress; (2) Amendment procedure originating with the States. Only the former has been used thus far.

(a) Amendment procedure originating with, or initiated by, Congress

A resolution proposing a constitutional amendment may be introduced in either the House or the Senate (H.J. Res. ——; S.J. Res. ——;) and upon being approved by a vote of two-thirds in each House, a quorum being present, the proposed amendment is submitted to the States for ratification.

(i) *Exclusion of the executive from the amending process*

Neither the President nor the governors of the States are accorded any participation in the amending process. Upon approval by the two Houses of Congress, a resolution proposing an amendment to the Constitution is submitted directly to the States for ratification. Unlike ordinary legislative proposals, such a resolution is not submitted to the President for his signature or veto. Likewise, at the State level, the governor is not accorded the privilege of either signature or veto of a resolution adopted by the State legislature recording its approval or rejection of a proposed amendment submitted by the Congress for ratification (*Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798)). Moreover, when Congress designates State legislatures as the ratifying agency, the legislatures must discharge this responsibility directly and are not at liberty to rest their ultimate decision on the vote of the people recorded via referral of the issue of ratification or rejection to the electorate by way of referendum (*Hawke* v. *Smith*, 253 U.S. 221 (1920)).

(ii) *Two methods available for effecting ratification of a proposed amendment originating with the Congress*

By terms of Article V, Congress is empowered to stipulate that ratifications of a submitted amendment shall be effected either by State legislatures, or by conventions in the States selected for the performance of the sole function of recording a State's approval or rejection of the amendment proposed by the Congress. When three-fourths of the State legislatures, or conventions, are recorded as approving (or 38 out of the present 50 states) the proposed amendment becomes effective as a part of the Constitution. On only one occasion, however, has the Congress specified conventions rather than State legislatures as the ratifying agency, namely, when it submitted the Twenty-First amendment for approval repealing the Eighteenth (Prohibition) Amendment.

(b) Amendment procedure originating with the States

When, by the terms of Article V, the legislatures of two-thirds of the States (or now 34 out of the present 50), petition Congress to call a convention "for proposing Amendments", presumably Congress is obligated to provide by law for such a convention whose recommendations, in the form of proposed constitutional amendments, do not become operative as part of the Constitution until approved by legislatures or conventions in three-fourths of the States, with the right reserved to Congress to designate "one or the other mode of ratification."

Hitherto, none of the petitions for the calling of such a convention have received the requisite vote of approval of two-thirds of the State legislatures; and consequently, Congress has never been confronted with the necessity of enacting legislation providing for the holding of a convention and the submission of its proposals for constitutional amendment. Therefore, a number of

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[1] See the Appendix for the text of Article V.

questions relevant to the composition, functioning and disposition of the conclusions of such a convention have never been authoritatively resolved.

As a prelude to consideration of many of these issues, a distinction should be made between "memorials" and petitions (or "applications") adopted by State legislatures.[2] The former are merely exhortations to the Congress to exercise its power to originate, approve, and submit for ratification a specific proposal as an amendment to the Constitution. As an exhortation, such memorials are deemed to give rise to no more than a moral obligation on the part of Congress to respond affirmatively thereto when tendered by a substantial number, or even by as many as two-thirds, of the States (74 Cong. Rec. 2024, 2026; 17 A.B.A.J. 143 (1931)). Whether, on the other hand, petitions for calling a constitutional convention addressed to Congress by a like number of States are possessed of greater significance or of binding legal effect presents a question which also has never been definitely resolved. At least two subsidiary issues are embraced within the question whether Congress is legally obligated, or is amenable to judicial proceedings to compel it, to adopt legislation calling a constitutional convention into being.

1. *To merit counting, for purposes of determining when the requisite two-thirds of the States have acted, must the petitions tendered by the States be received within a specific time limit?*

2. *To merit counting, for purposes of determining that two-thirds of the States have acted, must the petitions be identical as to content: that is, must they request Congress to call a convention limited solely to the consideration of one, two, or three specific amendments, the draft of which has been set forth in identical language in each of the petitions tendered; or is it sufficient that the petitions, however disparate as to content, reflect merely a widely entertained desire for substantial revision of the Constitution to be effected, in whole or in part, by congressional provision for bringing a convention into being?*

As to the first question, a substantial number of commentators are agreed that Congress is not obligated to act in response to petitions unless they are "reasonably contemporaneous with one another" and are "expressive of similar views respecting the nature of amendments to be sought." Moreover, they are able to cite one instance in which Congress ignored a reminder from one State that more than the requisite two-thirds of the States had submitted applications, albeit disparate as to content, for the convening of a constitutional convention.

"It appears from Madison's Journal that the framers intended this provision for the calling of a convention to be mandatory. Conceding that proposition, there remains a question as to when the condition on the Application of the Legislatures of two thirds of the several States shall be deemed to have been fulfilled. In 1929 the Legislature of Wisconsin reminded Congress that 35 States had filed applications for a constitutional convention and called upon it to 'perform the mandatory duty . . . and forthwith call a convention to propose amendments to the Constitution' [71 Cong. Rec. 3369]. The 35 States listed in this memorial included every State but one which had ever petitioned Congress to call a convention for any purpose—even Virginia, Alabama, and Georgia, which had filed no such applications since 1788, 1832 and 1833, respectively. This resolution was ignored, no doubt on the theory approved in *Dillon* v. *Gloss*, 256 U.S. 368, 374 (1921), that the successive steps in the process of constitutional amendment should not be widely separated in time, (Edward S. Corwin and Louise Ramsey. "The Constitutional Law of Constitutional Amendment," 26 Notre Dame Lawyer 195–196 (1951). In accord is Lester B. Orfield, "The Amending of the Federal Constitution," pp. 41–43 (1942), as well as Wayne B. Wheeler, "Is a Constitutional Convention Impending," 21 Ill. L. Rev. 782, 792–795 (1927)).

In formulating answers to the second question, pertaining to the form that the petitions must take in order to merit counting, the commentators are not in agreement. According to Orfield, "when one legislature desires a convention for one purpose, as to prohibit polygamy, another legislature for another purpose, as to adopt the initiative and referendum, and a third legislature for a general purpose, *there is some doubt whether* the prerequisite for a call has been met." Not entirely in harmony with this underscored conclusion is his own suggestion that "the better view would seem to be that the ground of the applications would be immaterial, and that a demand by two-thirds of the states

[2] Article V reads, in pertinent part: "The Congress, . . . or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments. . . ."

would conclusively show a widespread desire for constitutional changes" (op. cit., p. 42). In an unpublished thesis, entitled *The Application Clause of the Amending Provision*, p. 155 (1951), William R. Pullen, Documents Librarian at the University of North Carolina, also considered it "'logical' that a petition setting forth one amendment should be included for the purposes of calling a convention with those containing diverse proposals."

In a Staff Report submitted to the House Committee on the Judiciary in 1952, the last-mentioned conclusions were rejected as unsound. "To argue that Congress must launch the cumbersome, costly, and confusing proceedings of a national convention whenever [34] . . . States fortuitously submit resolutions requesting a convention for one purpose or another does not seem sound when viewed from a realistic standpoint. In the first place, should there be a widespread demand for substantial revision existing in the several States, there is nothing to prevent the State legislatures from submitting petitions requesting that a general convention be invoked by the Congress. But to transform every petition asking for a specific remedial amendment into a request for a general convention by classifying it with every other application asking for constitutional change would constitute a strained interpretation of Article V wholly at variance with the present needs and desires of the States.

"Perhaps the framers themselves envisioned that nothing but general conventions would be summoned pursuant to Article V. At any rate, the first two calls for a convention, which were contained in applications made in 1788 and 1789 by the States of Virginia and New York . . .. were demands for a convention of a general nature. The paucity of petitions, as well as the contents of succeeding applications, submitted to Congress during the first century of our Government indicates that the application process was originally regarded as a grave and serious procedure, to be employed only for significant and large scale overhaulings of the Constitution.

"But latterly, general satisfaction with our fundamental document has led petitions to contain enumerated grievances for which concrete relief through specific constitutional amendment is sought. Since 1899, there have been comparatively few applications for a general convention, with a preponderant number of petitions requesting a convention to propose only amendments frequently set forth verbatim in the text of the application itself. More and more the application process has been utilized either to prod a reluctant Congress into proposing amendments itself or to relieve abuses through the enactment of remedial legislation.

"In view of the transformation of applications from general requests, which were familiar to the framers in 1787, to those now most frequently submitted asking only for a limited reformation, there would seem to be no logical reason whatever for overlooking the language contained in the petitions of the States and forcing a general convention upon those States requesting nothing more than a single amendment to the Constitution. A contrary determination would oftentimes be at variance with the very wishes of those States submitting applications to the Congress as well as constitute a very narrow and restrictive interpretation of Article V itself. The provision would be reduced almost to the point of absurdity if Congress were forced to call a general convention to revise the entire Constitution upon the application of 10 States seeking a limit on taxes, 12 States a limit on wives, and [12] . . . more States a limit on the number of new States to be admitted to the Union.

"Accordingly, the views of Corwin and Ramsey with respect to the subject matter of petitions seems much preferable to those of the writers cited previously. These authors have suggested a sensible rule-of-thumb guide as follows:

" 'To be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and *by the same token, they ought to be expressive of similar views respecting the nature of the amendments to be sought.*' " (*emphasis supplied*) (26 Notre Dame Lawyer 195–196).

"Conversely, in accordance with the above rule, there appears no valid reason to suppose that the language of the amendments requested in State applications must be identical with one another in wording. It should be enough that the suggested amendments be of the same general subject matter in order to be included in a congressional count of applications for a constitutional convention, bearing in mind, of course, that any or all of the States may at any time request a general convention should strong sentiment for such proceedings prevail" (*Problems relating to state applications for a convention to propose constitutional*

limitations on federal tax rates. House Committee on the Judiciary, 82d Congress, 2d session, House Committee Print, pp. 11–12 (1952)).

By way of concluding the aspect of constitutional revision considered in the preceding paragraph, it may be helpful to note that the following view has been informally advanced at academic meetings. It is contended that the two procedures for amending the Constitution set forth in Article V were intended to subserve different purposes; namely, piecemeal amendment on the initiative of Congress, and substantial revision by recourse to constitutional convention; and that Congress accordingly is relieved of any legal obligation to take affirmative action when in receipt of State applications which uniformly embody the draft of a single proposed amendment or group of amendments. Were Congress to call a convention in response to applications in such form, the result, it is asserted, would be to rob the convention of the deliberative functions normally exercisable by such an agency and reduce it to the status of a messenger boy with but one duty to perform; specifically, to take a single vote approving the draft contained in the applications, coupled, perhaps, with a request that Congress submit the same for ratifications; and thereafter promptly adjourn. That States hitherto have intended to limit a convention called in obedience to their petitions is borne out by the terms of applications previously forwarded to Congress. Thus, in 1903 California included within its application a stipulation to the effect that the convention assembled in response thereto be "limited to the consideration and adoption of such amendments to said Constitution as herein mentioned and no other" (Cal. Stat. 1903, p. 683; Orfield, op. cit., p. 45 n. 18; 21 Ill. L. Rev. 794 n. 20).

Although Constitutional conventions, as used by the States, generally have been reserved for wholesale, as distinguished from piecemeal, constitutional revision, there is nothing in the record of the debates at the Philadelphia Convention which discloses any comparable intention on the part of the framers. On the contrary, the latter refrained from any evaluation or differentiation of the two procedures for amendment incorporated into Article V: and tended to view the convention merely as an alternative safeguard available to the States whenever Congress ceased to be responsive to popular will and persisted in a refusal to originate and submit constitutional amendments for ratification. Thus, the record is devoid of any evidence of an intention to preclude the use of conventions for effecting a specific alteration of the Constitution (Cyril F. Brickfield, *State applications asking Congress to call a Federal constitutional convention,* House Committee on the Judiciary, Committee print, p. 7, 86th Congress, 1st Session, 1959; John A. Jameson, *The Constitutional Convention,* § 540 (1873); Walter K. Tuller, *A convention to amend the Constitution—why needed—how it may be obtained,* 193 No. Amer. Rev. 369, 375–378 (1911)).

3. *If applications are tendered by two-thirds of the States within a reasonable interval of time and Congress fails to act, is judicial relief to correct such inaction available?*

Although it is conceded "that the framers intended this provision for the calling of a convention to be mandatory," most commentators are convinced that the Supreme Court would dismiss as judicially unenforceable a petition for mandamus or mandatory injunction. According to the late Professor Walter F. Dodd, "there is no compulsion upon Congress to call a convention" (*Judicially unenforceable provisions of Constitutions,* 80 U. Pa. L. Rev. 54, 82 (1932)). "Since Congress is one of the three coordinate branches of the government, there would seem to be no valid method of coercing it to make the call" (Orfield, op. cit., p. 41; citing *Coleman* v. *Miller,* 307 U.S. 433, 454–456, 457, 459 (1939)). "Nothing in the debates in the Convention that framed the Constitution throws any light on the views of the members on the details of the operation of the plan to adopt amendments by the convention method . . . The most serious objection offered to . . . article [V] as it was finally adopted was that both methods [of amendment] . . . required the assent of Congress and that at any time Congress, by inaction, might defeat the wishes of the States" (Wheeler, op. cit., pp. 785–792). In accord are Brickfield, op. cit., p. 4; Joint Economic Committee, *The proposed 23d Amendment to the Constitution to repeal the 16th Amendment to the Constitution,* S. Doc. No. 5, 87th Congress, 1st Session, pp. 22–24 (1961); and Westel W. Willoughby, *Constitutional Law of the United States* (2d ed., 1929), Vol. I, p. 597. To the contrary, however, is Tuller, op. cit., pp. 378–383, who believed that the duty imposed upon Congress being "purely ministerial . . . the form of remedy for compelling Congress to act would seem clearly to be a writ of mandamus."

4. *If, in response to applications received from the requisite two thirds of the States, Congress brings a constitutional convention into being, is the latter bound to consider and approve, if at all, only those proposals for constitutional*

change as are embraced in such State applications and reiterated in congressional enactments providing for such an assemblage?

Manifestly, if the convention, of its own volition, chooses to confine its deliberations to a consideration of only those proposals contained in State applications, a controversy scarcely would arise. However, according to the great weight of authority, constitutional conventions once created, become relatively free agents whose final determinations are constitutionally tenable as long as they fall within the scope of the power conferred on such conventions by Article V. Consistently with such a view a convention could not be restricted as to the subjects of its deliberations by instructions emanating either from the States or from Congress.

"On general principles it would seem that it is not within the power of state legislatures to limit the action of a federal constitutional convention . . . The nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition. The statements of the purposes and objects underlying the petition would have no legal effect except as they indicated to any convention assembled the wishes of the people in regard to proposed changes. . . .

"Congress [also] would have no authority to restrict the subjects of the amendments proposed by the convention. Congress is the judge of the nature and text of the amendment submitted in the usual way, by resolution. The state legislatures must either ratify such amendment or ignore it. They cannot change its context. The alternative convention method was intended, apparently, to provide a method of securing amendments in a form or upon subjects which Congress might not approve. The only limitation to such a convention would be those imposed by the Constitution itself, such as the one in article V that no state shall be deprived of equal suffrage in the Senate (Wheeler, op. cit., pp. 793–796; *accord:* Tuller, p. 384; William A. Platz, *Article Five of the Federal Constitution*, 3 Geo. Wash. L. Rev. 17, 45–46 (1934); Orfield, op. cit., pp. 44–45).

"The earliest view seems to have been that a convention was absolute (Walter F. Dodd, *The Revision and Amendment of State Constitutions*, ch. 3 (1910)). The convention was sovereign and subject to no restraint. On the other hand, Jameson, whose views have been most frequently cited in decisions, viewed a convention as a body with strictly limited powers, and subject to the restrictions imposed on it by the legislative call (Jameson, op. cit., §§ 382–389). A third and intermediate view is that urged by [Walter F.] Dodd—that a convention, though not sovereign, is a body independent of the legislature; it is bound by the existing constitution, but not by the acts of the legislature, as to the extent of its constituent power (Dodd, op. cit., pp. 73, 77–80). This view has become increasingly prevalent in the state decisions. Accepting this view, it would seem that no restrictions can be placed on the scope of its constituent activity. * * *" (Orfield, op. cit., pp. 45–46).

Relying largely on the opinion of four Supreme Court Justices in *Coleman* v. *Miller* (supra, p. 459), that all controversies arising out of the amending process are political and nonlitigious, and that "undivided control of that [amending] process has been given by the Article [V] exclusively and completely to Congress," the staff of the House Committee on the Judiciary in the report, previously cited herein, which was prepared in 1952, adopted a contrary conclusion to the effect that "it would appear consonant with the duty imposed upon Congress to call a convention, that it have a hand in determining within what area its deliberations shall be confined.

"* * * To hold Congress strictly to the perfunctory duties of issuing a call for a constitutional convention while at the same time encumbering it with all of the onerous burdens inherent in making final decisions governing the remainder of the amending process is an inconsistent concept of congressional control over the amending process under Article V. * * * It is obvious that if the States request a general convention in their applications, it is incumbent upon Congress under Article V to convene such a gathering. But if the States themselves seek in their petitions only a specific amendment, it would certainly appear anomalous were Congress powerless to limit the scope of proceedings to the general subject matter in the text of the applications received from the legislatures of the several States" (*Problems relating to state applications for a convention to propose constitutional limitations on federal tax rates*, op. cit., pp. 15–16).

Upon appraisal of these two conflicting views of congressional power, it would seem that any restraints which Congress might attempt to impose on a convention with reference to amendments to be considered could be effectuated obliquely rather than directly. Insofar as the Supreme Court remains disposed to view controversies arising from the amending process as presenting nonlitigious, political questions, Congress thereby would be enabled to have its own

views prevail by recourse to the expedient of refusing to submit to the States for ratification any amendment drafted by the convention contrary to its wishes. Thus, if Congress directed a convention to consider only proposals A and B, and the convention concluded its deliberations by recommending additional proposals C, D, and E, Congress merely would refrain from submitting the latter for ratification. Of course, if the convention incorporated all five proposals in a single package or draft, inaction by the Congress manifestly would have the effect of nullifying in its entirety the endeavors of the convention. However, as long as the Court chooses not to entertain controversies originating in the amending process, such inaction could be remedied or corrected only at the ballot box. This conclusion rests on a premise supported by Article V; namely, that a constitutional convention is without the power to submit its recommendations directly to the States for approval or rejection, but is dependent upon the intervention of Congress to effect the latter result (Orfield, op. cit., p. 46).

5. *Questions relating to the selection of delegates to, and the internal organization of, a constitutional convention.*

If Congress issues a call for a convention, "a number of issues would still remain unsettled. When and where could the convention meet? How would the delegates be elected? Would they represent the states or the people as an aggregate? The debates of the Constitutional Convention throw no light on these problems. Logically it would seem that Congress could regulate all these matters . . . It might reasonably be argued that under its power to call a convention it has implied authority to fix the time and place of meetings, the number, manner, and date of the election of delegates, and that it also may determine whether the delegates shall represent the states or the nation at large. If the precedent of the Constitutional Convention were followed, the call would be addressed to the states; and would leave to them the method of selecting delegates, and the convention would vote by states" (Orfield, op. cit., pp. 43–44).

Speculating further on the latter problem, another commentator concluded that "it would be possible for Congress to disregard the states entirely and have the delegates apportioned on the basis of population. The Constitution guarantees to each State equal suffrage in the Senate so that in the adoption of amendments through congressional resolutions submitted to the states the small states have an equal or greater voice in making constitutional changes than the larger and more populous states. If, however, Congress by the convention method could fix the basis of apportionment of delegates for the constitutional convention on the ratio of population, an entirely different situation would result in the initiation of amendments. . . .

"Two factors would operate to prevent Congress from attempting to apportion delegates on the basis of population: the senators from small states would be unlikely to vote for a resolution which would deprive their states of the power they hold under the Constitution, and the influence of precedent. In the Convention of 1787 . . . the delegates were elected by states and voted by states. This precedent would probably be followed in a future constitutional convention if one should be held. As a matter of political expediency, a convention call would probably be addressed to the states and leave to them the method of selecting delegates" (Wheeler, op. cit., pp. 798–799; Tuller, op. cit., p. 386).

As to its internal functioning, the convention presumably would be free of domination either by the Congress or the States in the matter of "selecting its own officers, fixing its own rules of procedure, passing on the qualification and election of its members, and from proposing any alterations it chooses. While it is in existence it is a separate arm of the nation, coordinate with Congress in its sphere" (Orfield, op. cit., p. 47). Being "independent of Congress in all respects," the convention, according to another commentator, would have inherent power to appropriate funds for its own subsistence in the event Congress failed to make available moneys for the performance of its duties (Platz, op. cit., p. 47; Orfield, op. cit., p. 46).

6. *Scope of a convention's power to revise the existing Constitution*

Absent any refusal on the part of Congress to submit for ratification the proposals emanating from a convention or reluctance on the part of legislatures or specially chosen conventions, of three-fourths of the States to approve the same, a convention called into being by Congress potentially is capable of rewriting the existing Constitution or of supplanting it with an entirely new one. If the procedural requirements of Article V for effecting constitutional change are faithfully observed, then any reform which emerges from a convention and is

duly approved becomes a valid part of the Constitution. Since the Constitution is the supreme law of the land (Article VI), any addition thereto or revision thereof, if adopted in conformity with its terms, also partakes of the attributes of supreme law.

To be sure, if, for example, the clause of Article V, stipulating that "no State, without its Consent, shall be deprived of equal Suffrage in the Senate," were to be deleted by a duly approved amendment, a radical alteration of our Federal system will have been effected; but the latter fact, it may fairly be argued, scarcely can detract from the validity of the amendment whereby such deletion was consummated. Can there be such a thing as an unconstitutional constitutional amendment? Would not this be a contradiction in terms? Questions such as these have of course never been resolved.

Moreover, as long as the Supreme Court regards the written Constitution as the supreme law of the land, it is hardly likely that it would deign to hold invalid a duly approved constitutional amendment. The Court did of course pass on the merits of contentions challenging the validity of the Eighteenth and Nineteenth Amendments, but only to the extent of rejecting such contentions summarily (United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922)). These decisions are viewed by Westel W. Willoughby as definitively disposing of the notion "that there are inherent limitations upon the amending power [or] that there are some matters which cannot legally be justified even by a constitutional amendment" (*Fundamental Concepts of Public Law*, pp. 250–251 (1931)). Elsewhere the latter author concluded that "the fundamental error of all those who have sought to place inherent limitations upon the amending power . . . is that they necessarily start with the assumption that the Constitution is in the nature of an agreement or compact between the States, or that it implies an understanding between them, or between them and the National Government, that the allocation of powers as provided for in the original instrument shall not be changed in any of its more important or essential features. It is surprising to this writer that this theory which, since the Civil War, has been so decisively rejected by the American people and by the courts, should again be brought forward to support a constitutional argument" (*The Constitutional Law of the United States*, Vol. I, p. 600 (2d ed., 1929); *accord*, Wheeler, op. cit., p. 801; Platz, op. cit., pp. 25, n. 41, 26).

A model bill establishing the procedure for calling a constitutional convention and regulating the composition thereof is contained in *Problems relating to state applications for a convention to propose constitutional limitations on federal tax rates*, op. cit., pp. 21–24.

Appendix

United States Constitution, Article V

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

[AMERICAN ENTERPRISE INSTITUTE]

Special Analysis

(June 1967)

A CONVENTION TO AMEND THE CONSTITUTION?

(Questions Involved In Calling A Convention Upon Applications By State Legislatures)

INTRODUCTION

Genesis of Article

Shortly before the closing session of the Federal Convention of 1787, George Mason of Virginia addressed himself to a proposal by James Madison to provide

a method for amending the Constitution. This proposal, reported out of the Committee on Style and Revision as Article V, "left proposed amendments entirely in the hands of the National Legislature. . . ." [1] The proposal as it stands, Mason said, is "exceptional and dangerous." If the proposing of amendments depends ultimately upon Congress, he continued, then "no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case." [2]

Gouverneur Morris of Pennsylvania then proposed that the article be amended to require Congress to call a convention to propose amendments upon application of two-thirds of the states. His proposal was seconded by Elbridge Gerry of Massachusetts, and adopted.[3] Thus Article V provides that amendments may be proposed (1) by the Congress, or (2) by a convention upon application of two-thirds (34) of the state legislatures.

Article V provides, in pertinent part, that:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode or Ratification may be proposed by the Congress. . . .

Twenty-five amendments to the Constitution have been proposed by the Congress and ratified by the states since the Convention of 1787. The alternate route of amending the Constitution—proposed amendments hammered out by delegates in convention assembled and submitted to the states for ratification—has never been followed, and there are few signposts to guide those states attempting to travel this path.

Reaction to Report on State Applications

On March 18, 1967, Fred P. Graham, of the *New York Times*, reported that "A campaign for a constitutional convention to modify the Supreme Court's one-man, one-vote rule is nearing success . . ." and that "most of official Washington has been caught by surprise." [4] "The Legislatures of Illinois and Colorado," wrote Graham, "formally asked Congress this week to call a constitutional convention, bringing to 32 the number of states that have taken this step." [5]

Reaction to Graham's story was immediate. "At no time has Congress or the country been willing to open the basic structure of our Government and the character of our liberties to the unpredictable whims of a new convention," editorialized the *Washington Post*. "It is difficult to believe that well-informed legislators will risk such hazards to our constitutional underpinnings if they know what they are doing. This back-door assault on the Constitution should be stopped." [6]

The League of Women Voters charged that "Blitz methods" had been used in securing the petitions, and that "at least 24 of the 32 legislatures were malapportioned at the time they passed the resolutions." [7]

Then, on March 21, 1967, Senator Everett Dirksen (R. Ill.) was interviewed by reporters. "We are working on five" legislatures, Dirksen stated, and predicted the number of petitions "will shortly go up to 33 and then 34." [8] Continuing, he stated that the matter "would have the highest privilege" and would go directly before the Senate. In that event, observed the *Washington Evening Star*, "we will be in for one of the wildest, most emotional and most confusing battles royal of this or any other Congress—with a full-fledged liberal filibuster very possibly tossed in for good measure." [9] Dirksen said a filibuster could be overcome.

Objecting to charges that the movement for a convention had been a "back-door assault," Senator Dirksen said, "Why, this has been an open and above-board matter in every legislature." [10]

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[1] Brickfield, *Problems Relating to a Federal Constitutional Convention*, House Committee on the Judiciary, 85th Cong., 1st Sess., p. 5 (Comm. Print 1957) (hereinafter cited as Brickfield).
[2] Madison, *Journal of the Federal Convention*, p. 737 (Scott ed. 1893).
[3] *Ibid.*
[4] *New York Times*, March 18, 1967, p. 1, col. 6 (city ed.).
[5] *Ibid.*
[6] *The Washington Post*, March 21, 1967, Editorial.
[7] *New York Times*, March 22, 1967, p. 21, col. 2 (city ed.).
[8] *New York Times* March 23, 1967, p. 23, col. 2 (city ed.).
[9] *The Washington Evening Star*, April 2, 1967, Editorial.
[10] *The Washington Post*, March 22, 1967, p. A21.

On March 22, 1967, Senators Joseph D. Tydings (D. Md.) and William Proxmire (D. Wisc.) addressed the Senate in opposition to a constitutional convention. Describing the efforts of proponents of a constitutional convention as closely resembling "an assault by the Marx Brothers on Fort Knox," [1] Tydings stated that:

> . . . despite any impressive totals of the number of State legislatures which have asked Congress for some kind of action regarding State legislature apportionment, the number of States which have at any time asked Congress for a convention to propose a malapportionment amendment is at least four and probably seven States short of the necessary 34. And of the 30 memorials which apparently have been enacted asking for such a convention, 24 are certainly void, because they were enacted by legislatures which were themselves unconstitutionally malapportioned at the time. . . .[2]

Senator Proxmire also questioned the validity of many of the petitions, stating that he had

> . . . received a study from the Library of Congress that indicates all but six of the 32 legislatures calling for a constitutional convention on apportionment were illegally constituted at the time they approved the memorials to Congress calling for such a convention. . . .[3]

Reaction of the press to the prospects of a constitutional convention appear to be about evenly divided. The *Washington Post*, in a second editorial, urged the states "not to put themselves in the posture of trying to tear the Union to pieces," [4] and noted with approval that a bill had been introduced in the Maryland legislature to rescind its petition.[5] Commenting on the speeches of Senators Proxmire and Tydings, the *Post* stated that they "may not be on solid ground in urging Congress to reject the resolution because 26 of the 32 legislatures passing it were improperly apportioned, but that is certainly a good reason for the states themselves to reconsider their rash action." [6]

A brief comment in *National Review* observed that "The sudden prospect of a convention has made flocks of liberal editorialists unhappy—or, perhaps, embarrassed that the thing is going to happen despite their vigorous efforts to ignore it for three years. Really, could 32 state legislatures have acted in secret, or did the press decide that what we didn't know couldn't hurt us?" [7]

David Lawrence summed up what is perhaps the unstated fear of some when he wrote that

> . . . Congress probably would much rather have action on a single amendment involving the reapportionment problem than to have a whole gamut of issues opened up for constitutional amendment . . . there are no limits on the questions that a constitutional convention can consider.
>
> The delegates to the convention from the several states could take action to prevent the federal government from using public funds as a means of interfering in activities which are explicitly reserved to the states by the Constitution. There are, in fact, opportunities for a complete shift of power from the federal government back to the states if the device of a national constitutional convention now is put into operation.[8]

Some of the questions that have arisen—and will continue to arise—in connection with the current movement by the states to invoke the constitutional convention provision of Article V are discussed in the sections that follow.

EFFORTS TO INVOKE THE CONVENTION PROVISION PRIOR TO THE 88TH CONGRESS

As pointed out in a House Judiciary Committee staff report, it is "a far from easy task" to obtain an accurate tabulation of the total number of petitions requesting a constitutional convention.[9] The present practice is for the Speaker of the House and President of the Senate to refer such petitions to a congressional committee.[10] Most petitions appear to be referred to the House and Senate

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[1] 113 *Congressional Record*, S4231, March 22, 1967 (daily ed.).
[2] *Ibid.*
[3] 113 *Congressional Record*, S4209, March 22, 1967 (daily ed.).
[4] *The Washington Post*, March 24, 1967, Editorial.
[5] The bill failed to pass.
[6] *The Washington Post*, March 24, 1967, Editorial.
[7] 19 *National Review* (April 11, 1967), p. 1.
[8] The *Washington Evening Star*, "Constitutional Rebellion Looms," (March 22, 1967).
[9] Staff of House Committee on the Judiciary, 82nd Cong., 2d Sess., *Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates*, p. 5 (Comm. Print 1952).
[10] *Ibid.* But see Proposed Legislation, p. 48, *infra*.

Judiciary Committees, although a few applications seeking a convention to limit federal income taxing powers have been referred to the Committee on Ways and Means of the House, and to the Committee on Finance of the Senate. The Judiciary Committee staff report concluded that locating the text of state applications for constitutional conventions in public records depends "less upon diligence than on chance." If a petition is properly transmitted, its receipt is noted in the *Congressional Record*. But the staff report observed that "the index to the Congressional Record is indeed weak stratum upon which to base a call for a Federal convention. . . ."[1]

More than 200 Applications for Conventions

Fred P. Graham, former Chief Counsel of the Senate Subcommittee on Constitutional Amendments, and currently *New York Times* Washington correspondent, writing in the December, 1963, issue of the *American Bar Association Journal*, lists 206 petitions applying for a constitutional convention.[2] These were filed prior to 1963. These petitions have covered many subjects: direct election of Senators, limitation on federal taxing power, prohibition of polygamy, general revision of the Constitution, world federal government, repeal of the 18th Amendment, Presidential tenure, treaty-making, taxation of federal and state securities, protective tariffs, wages and hours, gasoline tax, tidelands problem, control of trusts, grants-in-aid, popular ratification of amendments, constitutionality of state enactments, revision of Article V, and the Townsend plan.[3]

It is interesting to note that only "10 petitions constituted the entire output for the first hundred years of our Federal Government under the United States Constitution."[4] Between 1893 and 1911, however, 31 state legislatures adopted a total of 73 petitions relating to the election of Senators. This is the largest number of petitions calling for a convention on a particular subject.[5]

Writing in 1957, Brickfield stated that:

> . . . The second largest number concerned the Federal power over the taxation of incomes on which 32 applications have been submitted by 27 States. Beginning with New York in 1906, 27 States have petitioned for a convention on the subject of prohibiting polygamy, and 29 petitions from 22 States have sought a general revision of the Constitution without specifying a particular subject. These are the four subjects on which the greatest number of petitions have been received.
>
> From 1 to 8 petitions have been presented to Congress on a wide variety of subjects including world federal government, limitation of Presidential tenure, repeal of the 18th amendment, taxation of tax-exempt securities, regulation of hours of labor and minimum wages by Congress, treatymaking, and methods of apportionment. In all, there have been over 195 petitions in the last 60 years—as distinguished from 10 in the first 100 years—of our Nation. However, many of the petitions adopted since the turn of this century represent second and third petitions from several of the State legislatures, and some legislatures have rescinded their earlier actions.[6]

Since 1957, however, the number of applications calling for a convention on the subject of state legislature reapportionment has greatly increased, and that subject now ranks well within the top four subjects on which the greatest number of petitions have been received.

It should be pointed out that there is considerable disagreement on what constitutes a valid effective petition and how petitions are to be counted. *If Article V "requires merely that two-thirds of the States submit applications, a convention has long been overdue."*[7]

As Graham has pointed out, analysis of state applications submitted to Congress "reveals that, although most amounted to little more than a political gesture and a waste of time, some of them did contribute directly to the eventual adoption of an amendment,"[8] the most notable example being the 17th Amendment providing for election of senators by the people.

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[1] *Ibid.*
[2] Graham, "The Role of the States in Proposing Constitutional Amendments," 49 *A.B.A.J.*, pp. 1175, 1179–83 (December, 1963b).
[3] See Brickfield, p. 74.
[4] *Ibid.*, p. 7.
[5] *Ibid.*
[6] *Ibid.*, pp. 7–8.
[7] *Ibid.*
[8] Graham, "The Role of the States in Proposing Constitutional Amendments," *op. cit.*, p. 1176.

EFFORTS TO INVOKE THE CONVENTION PROVISION BEGINNING WITH THE 88TH CONGRESS

Background—The Reapportionment Decisions

On March 26, 1962, the United States Supreme Court, in the landmark case of *Baker* v. *Carr*,[1] made the field of state legislative apportionment subject to federal judicial review. Dissenting, Mr. Justice Frankfurter said that the Court reversed "a uniform course of decision" and that the decision was "a massive repudiation of the experience of our whole past."

Prior to *Baker*, the courts held that suits to compel legislative reapportionment were political in nature, and thus nonjusticiable in federal courts.[2] Rejecting this argument when raised in *Baker*, Mr. Justice Brennan, writing for the Court, stated:

> . . . it is the relationship between the judiciary and the coordinate branches of the Federal Government and not the federal judiciary's relationship to the States, which gives rise to the "political question."[3]

Mr. Justice Frankfurter, perhaps anticipating public response to the *Baker* decision, wrote:

> . . . The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained *public confidence* in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[4]

Having held that the federal courts have jurisdiction in apportionment cases, the Court remanded the case to the lower court for further proceedings.

In December, 1962, the 16th Biennial General Assembly of the States[5] endorsed three proposed amendments to the Constitution, and recommended that the states petition Congress for a constitutional convention for the purpose of proposing these amendments. Two of the proposed amendments are outside the scope of this Analysis,[6] the third sought to nullify the holding of *Baker* v. *Carr*, *supra*, by limiting the jurisdiction of the federal judiciary so as to exclude suits involving state legislative apportionment. Response to the General Assembly's proposed amendments was contagious: during the first eight months of the First Session of the Eighty-eighth Congress (1963) the legislatures of eighteen states submitted to Congress thirty-eight applications calling for a constitutional convention to propose amendments to the Constitution of the United States. This was almost four times as many applications as were submitted to Congress in the first century of the Constitution, and by far the largest number to be adopted in any one year. Twelve of these applications for a constitutional convention dealt with apportionment of state legislatures.

After this initial activity on the part of the states, the controversy surrounding apportionment of state legislatures shifted temporarily to the law reviews.[7] The quiet was to be short-lived however, for on June 15, 1964, the Supreme Court handed down a decision which went beyond its assertion of jurisdiction in *Baker* v. *Carr*, *supra*. In the case of *Reynolds* v. *Sims*,[8] the Court held that, "as a basic constitutional standard, the Equal Protection Clause requires that both houses of a bicameral state legislature must be apportioned on a population basis."[9] Explaining the reasoning of the Court, Chief Justice Warren wrote:

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[1] Baker v. Carr, 369 U.S. 186 (1962).

[2] See, *e.g.*, *Colegrove* v. *Green*, 328 U.S. 549 (1964).

[3] Baker v. Carr, *op. cit.*, p. 210.

[4] Baker v. Carr, *op. cit.*, p. 301 (Frankfurter, J., dissenting), emphasis added.

[5] See, *e.g.*, Dixon, "Apportionment Standards and Judicial Power," 38 *Notre Dame Law*, 367 (1963); Hanson, "Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases," 12 *Am U. L. Rev.* 51 (1963); Lucas, "Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr," 61 *Mich. L. Rev.* 645 (1963); McKay, "The Federal Analogy and State Apportionment Standards," 38 *Notre Dame Law.* 387 (1963); and Weaver & Hess, "A Procedure for Non-Partisan Districting: Development of Computer Techniques," 73 *Yale L.J.* 288 (1963).

[6] *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[7] The Council of State Governments, a joint governmental agency of the states, supported by appropriations of the state legislatures, holds a General Assembly of the states biennially.

[8] See Shanahan, "Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations," 49 *A.B.A.J.* 631 (July, 1963) for a general discussion of these proposed amendments. But see Black, "Proposed Constitutional Amendments: They Would Return Us to Confederacy," 49 *A.B.A.J.* 687 (July, 1963) for a different interpretation of how these proposals would affect federal-state relations.

[9] *Ibid.*, p. 568.

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[1]

The Chief Justice also argued:

> . . . The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis. In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.[2]

Dissenting, Justice Harlan wrote:

> The Court's elaboration of its new "constitutional" doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislaures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.[3]

The immediate effect of *Reynolds* v. *Sims* was to nullify apportionment provisions in the constitutions and laws of six states.[4] The long-range effect, however, was the rekindling of a controversy that remains unabated. Efforts to permit the states to consider factors other than population in apportioning their legislatures took two forms: (1) Attempts were made in Congress to curb the effects of the Court's ruling. They were unsuccessful.[5] (2) Meeting in Chicago, in December, 1964, the 17th Biennial General Assembly of the States proposed that the states petition Congress to convene a constitutional convention to propose an amendment to the Constitution for consideration by the states.

Unlike an amendment proposed two years earlier by the 16th General Assembly, the 1964 version did not refer to removal of jurisdiction of apportionment cases from the federal judiciary, but instead followed basically the language of an amendment proposed by Senator Dirksen in the 89th Congress.[6]

SURVEY OF APPLICATIONS FOR A CONSTITUTIONAL CONVENTION TO PROPOSE AN AMENDMENT DEALING WITH APPORTIONMENT

Summary

Since 1963, petitions from at least twenty-eight states have been received by Congress requesting that body to call a constitutional convention to deal—in one fashion or another—with state legislative apportionment.

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[1] *Ibid.*, p. 562.
[2] *Ibid.*, p. 576.
[3] *Ibid.*, p. 615 (Harlan, J., dissenting).
[4] Alabama, Colorado, Delaware, Maryland, New York, and Virginia.
[5] The House of Representatives, on August 19, 1964, passed H.R. 11926, introduced by Rep. William M. Tuck (D., Va.) which would have taken jurisdiction over state apportionment cases away from the federal district courts, and appellate jurisdiction over such cases away from the Supreme Court. The Senate, after a filibuster, passed a "sense of Congress" resolution that the federal courts should give the state legislatures ample time within which to apportion, but this was rejected by the House, and the 88th Congress adjourned.
During the 89th Congress, a majority of the Senate voted to propose a constitutional amendment introduced by Senator Dirksen that would permit a state to apportion one house of a bicameral legislature on factors other than population, but the votes were seven short of the required two-thirds. The votes were: 57 to 39 in 1965 and 55 to 38 in 1966.
[6] See preceding footnote.

It also appears that four other states have adopted such petitions. However, the records of the congressional committees to which they are usually referred indicate that they have not been received. These petitions and the questions raised as to their status are discussed on pages 15 through 17.

The amendments described in the twenty-eight petitions now on file in the House and Senate Judiciary Committees are of three general types, with one minor exception.

First are those petitions seeking consideration of an amendment that would abolish federal judicial review of state legislative apportionment and thus set aside the rule announced in *Baker* v. *Carr*. State petitions falling within this category are Nevada, Washington, and Wyoming. Three states then, have petitions on file seeking an amendment to abolish federal judicial review of state legislative apportionment.[1]

Petitions in the second category seek a convention to propose an amendment to set aside the rule in *Reynolds* v. *Sims* that both houses of a bicameral state legislature must be apportioned on a population basis. These seek consideration of an amendment to allow one house to be apportioned on factors other than population. In addition, the amendment described in these petitions would permit a state to make its own determination of how membership of governing bodies of its cities and other governmental units would be apportioned.

Twenty-two states have filed petitions calling for a convention for the purpose of proposing such an amendment. They are Alabama, Arkansas, Arizona, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Virginia.

The petitions of Illinois and North Dakota comprise the third category. Unlike the other petitions, these do not include the language of the amendment they wish considered. They call for a convention for the purpose of submitting an amendment which:

> . . . will secure to the people the right of some choice in the method of apportionment of one house of the State legislature on a basis other than population alone. . . .

One of the petitions on file, from Nebraska, employs the same language as that found in the first sections of the petitions proposing amendments to abolish federal judicial review over state apportionment schemes, but does not contain the second section that specifically states that "the judicial power of the United States shall not extend . . . to any controversy relating to apportionment . . . in a State legislature."

The four states whose petitions were not accounted for in the Judiciary Committee files are New Hampshire, Colorado, Utah, and Georgia.

Petitions Submitted to the 88th Congress

Congress received petitions calling for a constitutional convention to propose an amendment dealing with apportionment from 11 states during the first session (1963) of the 88th Congress; one during the second session (1964).

In 1963, Arkansas (H.J.R. 4), Idaho (S.J.M. 4), Kansas (S.C.R. 4), Missouri (H.C.R. 4), Montana (S.J.R. 15), Nevada (S.J.R. 2), South Carolina (H.C.R.), South Dakota (S.J.R. 2), Texas (H.C.R. 22), Washington (H.J.M. 1), and Wyoming (E.J.M. 14) submitted applications for a constitutional convention for the purpose of proposing the following amendment, or a slight variation thereof:

> SECTION 1. No provision of this Constitution, or any amendment thereto, shall restrict or limit any State in the apportionment of representation in its legislature.
>
> SEC. 2. The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy relating to apportionment of representation in a State legislature.
>
> SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislature of three-fourths of the several States within 7 years from the date of its submission. . . .

Virginia followed suit in 1964, and submitted H.J.R. 90. These petitions were found in the files in both the House and Senate Judiciary Committees, with the exception of the petition from South Carolina, and Committee records indicate that the South Carolina petition was referred to the Committee on June 11, 1963.

[1] Nine other states have filed applications of this type. However, later they filed applications in a different form.

Petitions Submitted to the 89th Congress

Twenty-two states submitted constitutional convention petitions to Congress during the 89th Congress. Of these 22 petitions, 21 proposed the following amendment, or a slight variation thereof:

> SECTION 1. Nothing in this Constitution shall prohibit any State which shall have a bicameral legislature from apportioning the membership of one house of such legislature on factors other than population, provided that the plan of such apportionment shall have been submitted to and approved by a vote of the electorate of that State.
>
> SEC. 2. Nothing in this Constitution shall restrict or limit a State in its determination of how membership of governing bodies of its subordinate units shall be apportioned.
>
> SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress.

These states were Alabama (S.J.R. 3), Arkansas (H.J.R. 1), Arizona (H.C.M. 1), Florida (H.M. 2433), Idaho (S.J.M. 1), Kansas (S.C.R. 1), Kentucky (S.R. 8), Louisiana (S.C.R. 25), Maryland (S.J.R. 1), Minnesota (R. 5), Mississippi (S.C.R. 101), Missouri (H.C.R. 2), Montana (S.J.R. 5), New Mexico (S.J.R. 2), North Carolina (R. 60), Oklahoma (E.S.C.R 3), South Carolina (C.R.), South Dakota (S.J.R. 1), Tennessee (H.J.R. 34), Texas (S.C.R. 24), and Virginia (H.J.R. 13).

The 22nd state, Nebraska, submitted Legislative Resolution 14, which requested a convention to propose the following amendment:

> SEC. 1. No provision of this Constitution, or any amendment thereto, shall restrict or limit any State in the apportionment of representation in its legislature.
>
> SEC. 2. [Provides that article shall be inoperative unless ratified by legislatures of three-fourths of the States within seven years.]

It should be noted that the language of section one of the Nebraska resolution is identical to the language of the proposed amendment contained in the petitions submitted to the 88th Congress. The second section of the proposed amendment contained in the petitions submitted to the 88th Congress—"the judicial power of the United States shall not extend to any suit in law or equity, or to any controversy relating to apportionment of representation in a State Legislature"—is not included in the Nebraska petition.

Of the 22 states to petition the 89th Congress for a constitutional convention, nine had submitted an earlier call for a convention to the 88th Congress. They were: Arkansas; Idaho, Kansas, Missouri, Montana, South Carolina, South Dakota, Texas and Virginia.

These 22 petitions were found in the files of both the House and Senate Judiciary Committees, with the exception of the petition from Oklahoma, which was not in the files of the Senate Judiciary Committee. Committee records indicate, however, that the petition was referred on January 22, 1965.

Petitions Submitted to the 90th Congress

Four petitions calling for a constitutional convention have been received thus far by the 90th Congress, and have been recorded in both the House and Senate Judiciary Committees.

These petitions are from Illinois (H.J.R. 32), Indiana (H.E.C.R. 58), Nevada (S.J.R. 2), and North Dakota (HCKI–1).

The Illinois and North Dakota petitions call for a constitutional convention for the purpose of proposing an amendment which:

> . . . will secure to the people the right of some choice in the method of apportionment of one house of a state legislature on a basis other than population alone. . . .

The Indiana petition, H.E.C.R. 58, is substantially identical in language to the petitions filed with the 89th Congress, and Nevada's S.J.R. 2 is identical—in fact, is the same petition—that was submitted to the 88th Congress. Correspondence indicates that it was re-submitted in March, 1967.

Status of Four Other Petitions

In addition to the 28 states listed above, four others have adopted such petitions. The states in this group are New Hampshire, Colorado, Utah, and Georgia; and these petitions are discussed below:

New Hampshire. According to the Clerk of the New Hampshire House of Representatives, the legislature of that state approved an application for a convention on apportionment on April 8, 1965 and "the petition was transmitted to the Congress immediately after its adoption."[1] The resolution containing the application directed that copies be "immediately transmitted" to the Clerk of the U.S. House of Representatives, the Secretary of the U.S. Senate, and to each member of Congress from New Hampshire.[2] The office of the Clerk of the U.S. House of Representatives is unable to find any record of receiving this petition and it was not received by the Judiciary Committees, to which such petitions are referred, according to Committee records. However, on June 8, 1965, Rep. Cleveland, of New Hampshire, announced that the petition had been adopted by the legislature of his state and the text of the petition appears in the *Congressional Record* with his remarks on the floor of the House.[3]

The New Hampshire application called for a convention for the purpose of proposing an amendment to permit a state with a bicameral legislature to apportion one house thereof on factors other than population provided the plan is approved by a vote of the electorate of the state. Also, this amendment would cover apportionment of subordinate units of government.

Colorado's application does not appear in the files of the Judiciary Committees presumably because it was transmitted to the individual members of Congress from that state instead of the Speaker (or the Clerk) of the House and the President (or the Secretary) of the Senate.

A copy of the Colorado application, furnished AEI by the office of the Governor, is identical to the applications from Illinois and North Dakota described above.[4]

Utah. The text of the petition from Utah (S.J.R. 3) appears in the *Congressional Record* of March 8, 1965, following a statement by Senator Bennett of Utah on the subject of apportionment.[5] Copies have not been referred to the Committee on the Judiciary of the House or Senate, according to the records of those Committees.

Georgia. According to evidence received from the Lieutenant Governor of Georgia, the legislature of that state adopted its petition (S.R. 14) on April 9, 1965. The Georgia petition is substantially identical to 21 petitions submitted to the 89th Congress. (See p. 13) AEI has been unable to find a record of the Georgia petition in the *Congressional Record* or the files of the Judiciary Committees. In August, 1965, the Legislative Reference Service reported that no record could be found of a petition from Georgia having been communicated to either House of Congress.[6]

HOW MANY PETITIONS CAN BE COUNTED AS "APPLICATIONS" TO "THE CONGRESS"?

Aside from claims that some of the petitions are invalid and unacceptable, some opponents of the proposed convention contend that four of the petitions claimed by Senator Dirksen have not been received by the Congress and, therefore, cannot be counted. They point out that Article V states that a convention shall be called upon "application" to the "Congress" by two-thirds of the state legislatures and they argue that a petition must be transmitted to and received by both houses of the Congress in order to constitute an "application" to the Congress. Presumably, this means that a verified copy of the application must be submitted to the Speaker (or the Clerk) of the House and the President (or the Secretary) of the Senate. It follows, opponents say, that four petitions—from New Hampshire, Colorado, Utah, and the petition adopted by Georgia—cannot be counted as "applications" for a convention.

On the other hand, it can be argued that such a literal reading of Article V would frustrate its purpose and thwart the will of the four legislatures mentioned above on the basis of inadvertence, or at most, a harmless procedural error. Apparently, opponents of a convention do not seriously dispute the claim that

[1] Letter to AEI from Francis W. Tolman, Clerk of the House, New Hampshire General Court, dated May 9, 1967, enclosing a copy of the application.
[2] *Ibid.*
[3] 111 Congressional Record, p. 12397, June 8, 1965 (daily ed.).
[4] AEI was advised by John W. Patterson, Special Assistant to the Governor of Colorado, in a letter dated May 12, 1967, that copies of the Colorado petition (S.J. Memorial No. 5) "were transmitted to the Colorado Congressmen on March 28, 1967."
[5] 111 *Congressional Record*, p. 4210, Mar. 8, 1965.
[6] Yndlosky, *State Petitions and Memorials to Congress on the Subject of Apportionment of State Legislatures* iv, Library of Congress Legislative Reference Service Report JK140C—32/205R.

the legislatures of New Hampshire, Colorado, and Utah have adopted resolutions petitioning Congress to call a constitutional convention. As noted above, copies of the petitions from New Hampshire and Utah have been published in the *Congressional Record* and copies of the Colorado petition were transmitted to the members of Congress from that state, according to the office of the Governor.

Advocates of the proposed convention point out that Congress has not enacted any law for the guidance of state legislatures in communicating applications for a convention to the Congress; that the adoption of such applications is a matter of public record, and that the essential question is not whether copies were submitted to the proper officers of the Congress, but whether they were in fact adopted.

Students of congressional procedure point out that the Congress can take action on the basis of known official state actions although copies of formal certifications of such actions have not been received and recorded by the proper congressional authorities. For example, newly elected members of the House have been permitted to take the oath of office "in cases where the credentials are delayed or lost and there is no doubt of the election, or where the governor of a state has declined to give credentials to a person whose election was undoubted and uncontested."[1]

If the petitions of New Hampshire, Colorado, Utah, and Georgia are recognized as valid "applications," 32 of the required 34 applications can be counted—two short of the required two-thirds.

OTHER QUESTIONS INVOLVED IN CALLING A CONVENTION

What happens if the 34th state calls for a convention? Since Article V provides that "Congress . . . *shall* call a convention. . . ." may the Congress exercise any discretion in the matter? No legislation exists concerning the scope of this section of Article V; no procedures have been devised that may be instituted under it.[2] As early as 1965, the then Senator Paul Douglas (D. Ill.), remarked:

> In my opinion, and that of other observers, there is little real expectation that the Congress will call a convention even if two-thirds of the State legislatures pass the applications. It cannot, I believe, be forced to do so.[3]

David Lawrence has commented on this point as follows:

> Within the last few days certain senators in their speeches have come up with the amazing idea that the Constitution doesn't really mean what it says and that a constitutional convention cannot be called to consider amendments unless Congress first examines those proposals and agrees to permit such a convention to be held.
>
> This would be a defiance of the Constitution itself. The document says plainly that Congress, "on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments." The Constitution doesn't say that Congress "may" call a convention, but declares explicitly that it "shall" call a convention. The provision is mandatory and not discretionary. It doesn't matter if different states give one or more reasons. The simple fact remains that the states merely present their "applications" for a constitutional convention, and Congress is obliged to honor it.
>
> Recent statements by senators, however, assert that Congress need not call a convention if it thinks the kind of amendments proposed are going to be unpalatable. These same senators are contending that Congress may refuse to call such a convention if "for any reason" the resolutions passed by the legislatures "appear to be invalid."[4]

Some of the questions that may soon have to be answered include:

Must the language of amendments proposed in state petitions be identical?

How long does a state petition requesting a constitutional convention remain valid?

Is a petition from a malapportioned state legislature valid?

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[1] *Rules and Manual of the House of Representatives,* House Document 459, 86th Congress, 2d session, p. 80, § 236.

[2] See draft proposals to provide such procedures beginning at page 48.

[3] Douglas, *Statement before the Subcommittee on Constitutional Amendments,* U.S. Senate, Mar. 4, 1965. (Mimeo.)

[4] Lawrence, "Constitution Specific on Convention," *Washington Evening Star* (Apr. 21, 1967).

May a state rescind a petition calling for a convention?

Does Congress have power to restrict the scope of a convention's deliberations?

Do State applications control the subjects considered in a convention?

Does Congress have the power to refuse to call a constitutional convention?

The language of Article V, writes Brickfield, "is silent as to how and when conventions are to be convened and . . . does not state how conventions are to be formed or what rules of procedure are to govern their acts." [1] The debates of the Convention of 1787, while raising many questions concerning a convention, leave them unanswered. "Court decisions furnish little more than signpost assistance . . . [and] have relegated the matter of constitutional amendment to that area of constitutional law known as political questions." [2] The ultimate effect is that the courts will not attempt to resolve "many of the significant questions that will arise in the present attempt to propose amendments to our fundamental law by convention . . ." [3] and, consequently, the decisions of the Congress "will be final and conclusive on the courts." [4]

Legislative Proposals to Implement Article V

A draft bill to provide a permanent procedure for calling constitutional conventions and a resolution to provide for processing state applications are reproduced in this publication beginning at page 54. An analysis of these proposals is reproduced beginning at page 48. These proposals and the analysis thereof were drafted by Dr. Brickfield in 1957 for the use of the House Committee on the Judiciary.

How Congress will ultimately resolve the many questions raised by Article V's constitutional convention provision remains to be seen. Various theories, however, have been advanced over the years, and some of these are discussed below.

MUST THE LANGUAGE OF AMENDMENTS PROPOSED IN STATE PETITIONS BE IDENTICAL?

In the past, when states have submitted applications asking for a constitutional convention, most of them have sought a convention to propose amendments on a particular subject matter. Of the more than 200 petitions on file calling for a convention, less than 40 seek a general revision of the Constitution.

The question has been raised, in the debates over the current apportionment petitions, whether a convention can "be convened on the basis of widely differing application seeking consideration of disparate issues." [5]

As noted above, of the 28 petitions received by the Committees on the Judiciary, 22 propose a specific amendment permitting one house of a bicameral legislature to be apportioned on factors other than population; three seek to abrogate the power of the federal judiciary to deal with apportionment; two, Illinois and North Dakota, do not call for a specific amendment, and the Nebraska petition is hybrid in nature. [6]

"We are told that these . . . groups of resolutions can be linked together," Senator Robert Kennedy (D. N.Y.) recently stated, "but certainly that cannot be." [7] Continuing, he argued:

> . . . One group wants the judiciary stripped of jurisdiction and left without power to deal with malapportionment in either chamber of a State legislature. There is no basis on which Congress can conclude that that group also wants an amendment which leaves power in the courts and sanctions malapportionment in only one house of a bicameral legislature. Those legislatures which may have believed it wrong for the Federal courts to enter the "political thicket" at all may not have wanted to guarantee the right of each State to malapportion one branch of its legislature. A request to shift power from one level to another in the Federal system is not the same as a request for permission to deny majority rule in a State legislature. . . . [8]

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[1] Brickfield, p. 68.
[2] *Ibid.*
[3] Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," 39 *Notre Dame Law.* 659 (1964) (hereinafter cited as Bonfield).
[4] *Ibid.*, pp. 659–660.
[5] 113 *Congressional Record* S5455, Apr. 19, 1967 (daily ed.)
[6] The Nebraska petition sets forth an amendment that is identical, in its first section, to those amendments submitted to the 88th Congress but fails to add the second section that specifically abrogates Federal jurisdiction over apportionment cases.
[7] 113 *Congressional Record* S5455, Apr. 19, 1967 (daily ed.).
[8] *Ibid.*

Lending support to Senator Kennedy's argument is a recent law review article by Professor Charles L. Black,[1] wherein he stated:

> Assuming these "applications" are not within article V, it may still be suggested that a sort of "reformation" might be applied—that Congress, even if not persuaded that the present applications asked for the thing contemplated by article V, ought to call such convention as it thinks it would have been obliged to call if the applications had been of the right sort. This seems clearly wrong, for several reasons. Generally, a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all. Congress is given no power to call a constitutional convention when it wants to, or thinks that on the general equities perhaps it should; if Congress desires an amendment, article V very clearly tells how that desire is to be made known. Congress' power as to conventions is not discretionary but strictly conditional, and if the condition is not met Congress not only need not but may not call a valid convention.
>
> It is, moreover, illegitimate to infer, from a state's having asked for a "convention" to vote a textually-given amendment up or down, that it desires some other sort of convention. It is not for Congress to guess whether a state which asks for the one kind of "convention" wants the other as a second choice. Altogether different political considerations might govern.[2]

Senator Dirksen, on the other hand, disagrees with the above conclusions, stating:

> It has been said that some of the applications are not valid as to form and substance. Mr. President, the Constitution of the United States is completely silent on that point. Since State legislatures must initiate, under article V, that is a matter for them to determine. All that is needed, by a rule of reason, is a clear expression of intent by the legislatures. So what difference does it make in what form the application for a convention is made?[3]

Substantial authority exists to support this point of view. For example, Wheeler, in a University of Illinois law review article,[4] feels that conventions must be general in scope and that a state petition calling for a specific amendment could have no legal or binding effect on a convention, but that such petition *could* be counted in determining whether the requisite number of petitions had been submitted for calling a convention.[5]

And Brickfield writes:

> . . . It would be the duty of Congress to promulgate rules for counting the applications and determining the kind of convention to be convened. Congress would have to determine whether the language of State applications seeking an amendment on a specific subject should be identical in their texts, or whether applications using varying language but appertaining to the same subject matter generally would be acceptable. Clearly the latter method is preferable. . . .[6]

HOW LONG DOES A STATE PETITION REQUESTING A CONSTITUTIONAL CONVENTION REMAIN VALID?

Recent Senate debates on the current movement by the states to seek a constitutional convention through the application process have raised the question of timing. "Is the 90th Congress required to recognize resolutions sent to the 89th Congress?" asked Senator Jacob Javits (R. N.Y.). "Are state resolutions passed more than two years ago . . . still valid?"[7]

Senator Robert Kennedy also questioned whether the petitions were "sufficiently contemporaneous to be treated as a valid reflection of the will of the people at any one time."[8]

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[1] Black, "The Proposed Amendment of Article V: A Threatened Disaster," 72 *Yale L.J.* 957 (1963).
[2] *Ibid.* at 963–64.
[3] 113 *Congressional Record* S8463, Apr. 19, 1967 (daily ed.).
[4] Wheeler, "Is a Constitutional Convention Impending?" 21 *Ill. L. Rev.* 782 (1927).
[5] *Ibid.*, p. 795.
[6] Brickfield, p. 20, citing Corwin and Ramsey, "The Constitutional Law of Constitutional Amendment," 26 *Notre Dame Law.* 185 (1951).
[7] 113 *Congressional Record* S5029, Apr. 13, 1967 (daily ed.).
[8] 113 *Congressional Record* S8455, Apr. 19, 1967 (daily ed.).

The amending article is silent on the subject of what force or effect the lapse of time will have on an application. The Supreme Court dealt with an analogous situation concerning the length of pendency of an amendment proposed by the Congress to the States for ratification in the case of *Dillon* v. *Gloss*[1] and thought that amendments ought not be left open for *all* time:

> We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary.[2]

In the *Dillon* case, Congress proposed to the States for ratification a resolution which resulted in the 18th amendment. In the resolution, Congress fixed a period of 7 years within which three-fourths of the States had to ratify or else the resolution would have been lost. In upholding this action on the part of Congress, the Court announced (1) that Congress could fix a reasonable time within which proposed amendments had to be ratified, and (2) that 7 years was without question a reasonable time. The Court also noted that the proposal of an amendment and its ratification were not unrelated events:

> First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.[3]

In passing on this case the Court enunciated the so-called "contemporaneous" test and it would seem logical to apply this same interpretive technique in dealing with state applications for constitutional conventions. There is nothing in Article V which suggests that an application of a state, once made, is to be valid for *all* time or that the application of one state may be separated from those of other states by many years and still be effective. Using the same reasoning which the Court employed in *Dillon* v. *Gloss*, quoted above, and employing it by way of analogy, it would appear, first, that state applications and the calling of a convention are not unrelated acts but are succeeding steps in a single endeavor, not to be widely separated in time. Secondly, since it is only when legislatures deem amendments to be necessary that applications for a convention are made to the Congress, a reasonable inference is that such a convention is needed to "presently" dispose of the needs of the people. Thirdly, since an application is made in response to popular demand and is effective when made by the legislatures of two-thirds of the states, "there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people, in all sections at relatively the same period" which applications "scattered through a long series of years would not do." From this the conclusion may be drawn that an application should have force for a reasonable time only.

The question then arises, what constitutes a "reasonable time"? One student of the subject believes "the maximum life of a request should not be more than a generation."[4] On the other hand, another suggests that Congress count only those petitions submitted during its life.[5]

Bonfield disagrees with both theories:

> . . . no measure of the precise length of a generation is provided: nor is any satisfactory rationale offered to justify Congress' counting applications together that have been tendered over such an appreciable time period.[6]

Bonfield argues that the suggestion that applications expire at the end of each Congress is equally impracticable because:

> . . . In the first place, ten applications tendered the last day of one Congress, and thirty submitted the first day of the following one would be insufficient even though they may have been submitted only three months apart.

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[1] *Dillon* v. *Gloss*, 256 U.S. 368 (1921).
[2] *Ibid.*, p. 374.
[3] *Ibid.*, pp. 374–75.
[4] Orfield, *Amending the Federal Constitution* 42 (1942).
[5] Sprague, "Shall We Have a Federal Convention, and What Shall It Do?" 3 *Maine L. Rev.* 115, 128 (1910).
[6] Bonfield, op cit., p. 668.

Additionally, it should be recalled that the state legislatures do not address their applications to any specific Congress. . . .[1]

Advocating a middle ground, Bonfield suggests:

. . . In counting applications for an Article V convention, Congress should properly consider only those tendered in that period, prior to the most recent application, during which all of the state legislatures have had an opportunity to consider the question at a full regular session. That is, the maximum time between those applications that can be counted together should not exceed that period during which all state legislatures have met once for a full regular session. In no case could the time period involved exceed about two and a half years.

The advantage of this approach seems evident. The burden should always be on those who invoke this process to demonstrate clearly by sufficient contemporaneity of their applications that there is a present agreement among two-thirds of the states as to the desirability of a constitutional convention. Such a present consensus can only be realistically demonstrated by limiting the count of such applications to those made during the most recent period during which all state legislatures have had a reasonable opportunity to consider the question. Only applications filed during this period would accurately represent the results of the most recent poll that could reasonably be taken on the subject.[2]

The cases of *Coleman* v. *Miller*[3] and *Wise* v. *Chandler*[4] before the state courts of Kansas and Kentucky presented for judicial determination, among other things, the question of what is a reasonable time under Article V. Both cases involved the question of the validity of a state's purported ratification of the proposed child-labor amendment more than 12 years after it was proposed by Congress.[5] The United States Supreme Court, in *Dillon* v. *Gloss*,[6] had earlier held that Congress, in proposing an amendment, could fix a reasonable time for ratification and that the 7 years it had prescribed for the adoption of the 18th amendment was, without question, a reasonable time.[7] The Kansas and Kentucky cases offered an opportunity for a further judicial decision on whether a reasonable time had been exceeded in those instances.

The state courts reached opposite results, the Kansas court holding that despite the lapse of 12 years the proposed amendment still reflected the "felt needs of the day" and was, therefore, still open to ratification;[8] the Kentucky court, on the other hand, holding that a reasonable period during which the state might have acted had expired, and that a resubmission of the proposed amendment by Congress was necessary if further action was to be taken on it.[9]

However, the Supreme Court, in *Coleman* v. *Miller*, decided the question by concluding that it was essentially political and not subject to judicial determination. In so deciding, the Court reasoned that, inasmuch as the Constitution set forth no satisfactory criteria for judicial determination of the question, and since a decision would involve an appraisal of a great variety of political, social, and economic conditions, the question was more appropriately one for congressional than for judicial determination.

The Court distinguished *Dillon* v. *Gloss*[10] on the ground that Congress had set a definite time within which the proposed amendment had to be ratified. It did not follow, as the Court pointed out, that when Congress has not set a time limitation, the courts had to take on the responsibility of deciding what constitutes a reasonable time.

When a proposed amendment is based upon the needs, economic or otherwise, of the Nation, it seems necessary to consider, in determining what is a reasonable time, the conditions then prevailing throughout the country, and whether they had so far changed since the submission of the proposed amendment as to make the proposal no longer responsive to the conception which inspired it. As the Supreme Court stated (p. 453):

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[1] *Ibid.*
[2] Bonfield, *op. cit.*, pp. 668–60.
[3] 146 Kan. 390 (1937), *aff'd.* 307 U.S. 433 (1939).
[4] 270 Ky. 1 (1937), *aff'd.* 271 Ky. 252 (1937), *dis'd* 307 U.S. 474 (1939).
[5] 43 Stat. 670 (1924).
[6] 256 U.S. 368 (1921).
[7] *Ibid.*, 376.
[8] 146 Kan. 390 (1937).
[9] 270 Ky. 1 (1937), *aff'd.* 271 Ky. 252 (1937), *dis'd* 307 U.S. 474 (1939).
[10] 256 U.S. 368 (1921).

> In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the National Legislature of the political, social, and economic conditions which have prevailed during the period since the submission of the amendment.

It must be conceded that what is a reasonable time in one situation will not necessarily be reasonable in another. To illustrate: A comparatively short time could probably be held reasonable in the case of an amendment necessitated by the exigencies of a national emergency such as a war or an economic crisis, whereas a much longer period would conceivably be reasonable in the case of an amendment changing the term of office of the President. The suggested test laid down by Jameson, and cited with approval in *Dillon* v. *Gloss*, which seems to be a workable one is that a proposed amendment—

> . . . has relation to the sentiment and felt needs of today, and that, if not ratified early while the sentiment may fairly be supposed to exist it ought to be regarded as waived. . . .

Such a test sets up no rigid rule which will result in a similar time limitation being applied to every case. It only prescribes that an independent judgment should be used in each particular case in deciding whether sufficient time has elapsed to render the passage of an amendment unnecessary from a practical standpoint and unsupported by general public sentiment.

Relating this test to the reapportionment petitions, Senator Robert Kennedy stated:

> . . . How long the States have collectively to propose or ratify specific constitutional change has always been a matter of congressional judgment. In deciding that question, Congress must determine when the identical acts of various States will cease to be collectively responsive to a continuing public interest. In this particular case, over two-thirds of the enacting legislatures were faced with reapportionment at the time they acted and most of these legislatures have since changed in composition and outlook.[1]

and he concluded:

> . . . Therefore it seems to me that Congress is justified in this case in setting a very short time period—certainly of no more than 2 or 3 years.[2]

In rebuttal, Senator Dirksen stated:

> The point has been made here this morning that these applications are invalid, because they date back, in some instances, to 1963. I think the Supreme Court demolished that argument pretty well in connection with the 17th amendment, in the case of Dillon against Gloss. That is the amendment that provided for the direct election of Senators. It was attacked because of section 3 in the amendment, which allowed 7 years for ratification.
>
> Oh, the great to-do, the hue and cry that was made, that that was out of all reason. But when the Supreme Court got through, they said 7 years was a reasonable time.
>
> If 7 years is reasonable for ratification, is 4 years an unreasonable time in which to initiate, by State application, a convention for the purpose of amending the same Constitution to which they have 7 years to approve an amendment? I submit that the rule of reason applies in every case.[3]

IS A PETITION FROM A MALAPPORTIONED STATE LEGISLATURE VALID?

A recent survey found that of the 32 states[4] calling for a convention on apportionment, 26 states were under federal court order to reapportion at the time the petitions were passed.[5] "For Congress to accept such positions," Senator Proxmire stated, "would be like permitting all Democrats to have two votes in a referendum to determine whether or not Democrats should have two votes."[6]

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[1] 113 *Congressional Record* S5455, Apr. 19, 1967 (daily ed.).
[2] *Ibid.*
[3] *Ibid.*, S5463.
[4] The question of whether these petitions had to be received by Congress to be valid was not discussed in the report.
[5] Killian, *Memorials to Congress on Constitutional Convention*, Library of Congress Legislative Reference Service (Mar. 21, 1967).
[6] 113 *Congressional Record* S4209, Mar. 22, 1967 (daily ed.).

Senator Tydings agreed with Senator Proxmire, and in a lengthy floor speech, urged Congress to disregard—as invalid—petitions from malapportioned legislatures. "Every first year law student," Tydings said, "knows the basic principle of equity that a claimant 'must come into court with clean hands' . . . In my judgment, no *illegally* apportioned legislature has 'clean hands' in calling for a constitutional convention to legitimize its own illegality." [1]

In reply, Senator Dirksen stated, "I defy Senators to find anywhere, in any decision, the word 'illegal.' The court has never said that a malapportioned legislature is an illegal legislature." [2]

Continuing, Dirksen added:

> It has been said that some of the legislatures passed these resolutions when they were malapportioned. If that made this action invalid, then why not apply the same rule to everything that those legislatures did from the time they were malapportioned? Why not strike down the appropriations, strike down the validation of nominations to State courts and to State offices, strike down all the policy legislation and statutes they may have passed?
>
> Besides that, 25 of those States which are alleged to have been malapportioned approved 25 amendments to the Constitution, and we still accept them as valid.

In the case of *Ryan* v. *Tinsley*,[3] the court held that to rule invalid all legislative acts—or even those acts which appeared to favor over-represented interests—passed by malapportioned legislatures "would produce chaos." [4]

Agreeing with the *Ryan* case, Senator Tydings stated:

> In certain circumstances, however, malapportioned legislatures can take action which flagrantly violates the citizens' right to equal representation and which even after reapportionment cannot readily be corrected. The courts have recognized this problem, and have acted to protect the rights of State citizens to equal representation by forbidding such action by malapportioned legislatures.[5]

The Senator relied on the case of *Toombs* v. *Fortson*[6] for illustration saying:

> In Toombs against Fortson, a three-judge Federal court enjoined the Georgia General Assembly from calling a constitutional convention to revise the State constitution "until the general assembly is reapportioned in accordance with constitutional standards." In its order, the court stated:
>
> > We do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body. (Order dated June 24, 1964, Civil Action No. 7883.)
>
> As this order was being appealed to the Supreme Court of the United States, a new election was held in Georgia. The Supreme Court remanded the case for a determination whether, in view of the new elections, the order was still necessary. (379 U.S. 621 (1965).) As Mr. Justice Harlan pointed out in his dissenting opinion, this disposition clearly indicated that the lower court could properly issue the injunction.[7]

On the other hand, legal analysts point out that in this case the lower court did not enjoin the General Assembly from "calling a convention to revise the State constitution" and that the Supreme Court did not rule on whether a malapportioned legislature can call such a convention. In fact, the order of the lower court stated explicitly that it did not prevent the calling of a "convention of the people to revise, amend or change the constitution," the delegates being elected and apportioned "based on population as near as practicable." The court order involved in the *Toombs* case was directed against submission of a new constitution drafted by the legislature *itself*, but it left no doubt that the legislature could call a convention to draft such amendments.

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[1] 133 *Congressional Record* S5451–52, Apr. 19, 1967 (daily ed.).
[2] *Ibid.*, S5643.
[3] *Ryan* v. *Tinsley*, 316 F. 2d 430 (10th Cir. 1963).
[4] *Ibid.*, p. 432.
[5] 113 *Congressional Record* S5451, Apr. 19, 1967 (daily ed.).
[6] 205 F. Supp. 248.
[7] 113 *Congressional Record* S5451, Apr. 19, 1967 (daily ed.).

The Supreme Court sent the case back "for reconsideration of the desirability and need for the on-going injunction." The constitutional amendment drafted by the legislature was not placed on the ballot, a new legislature had been elected, and the Court was told that to assume that the new legislature would revive the proposal was "highly speculative."

Justice Harlan, joined by Justice Stewart, felt that the Supreme Court should have passed on the issue and should have upheld the power of a legislature—"even a malapportioned legislature"—to propose and submit constitutional amendments. The Harlan-Stewart dissent includes the following views:

> . . . I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a "malapportioned" legislature—particularly one whose composition was considered, prior to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern?[1]

MAY A STATE RESCIND A PETITION CALLING FOR A CONVENTION?

In a recent editorial, the *Washington Post* suggested that:

> A second line of defense is to launch rescission movements in states which have given their approval. We are glad to note that such a bill has been introduced in Maryland. It should be passed despite the adjournment rush. Indeed, every state which rushed this resolution through a malapportioned legislature should take a second look at it. Senators Proxmire and Tydings may not be on solid ground in urging Congress to reject the resolution because 26 of the 32 legislatures passing it were improperly apportioned, but that is certainly a good reason for the states themselves to reconsider their rash action.[2]

May a state, once having made application for the call of a constitutional convention, withdraw or rescind its application? Some writers[3] on the subject believe that the legislatures may do so; at least one does not.[4]

The Supreme Court, in *Coleman* v. *Miller*,[5] on the question of whether a state could withdraw or rescind its prior rejection of a proposed amendment to the Constitution, stated that the matter concerned a political question over which Congress had the ultimate power of decision. Congress, with respect to the 14th amendment, did not permit the states of Ohio and New Jersey to rescind their *ratifications* of that amendment. It has taken no position with respect to the withdrawal of state *applications*.

If precedent of the ratification process is followed, then it would seem that legislatures could not withdraw their applications. However, the wisdom of applying such similar reasoning may well be questioned.

The present attitude among legislators seems to be that withdrawal is a permissible procedure. The application process is, of course, distinguishable from the ratifying of proposed amendments. In the one instance, in a state application only an initiating action is sought with no one finally committed to the substantive proposition contained in the application, not even the state which submits it. In the other instance, Congress has completed its work and is committed to the position outlined in the proposed amendment. Since this question is a political one, Congress, notwithstanding its earlier decision on ratifications, can permit the states to withdraw their applications.

DOES CONGRESS HAVE POWER TO RESTRICT THE SCOPE OF A CONVENTION'S DELIBERATIONS?

In November, 1965, Senator Dirksen, addressing the National Grange in Topeka, Kansas, stated:

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[1] *Fortson* v. *Toombs*, 379 U.S. 621, 626 (1965).

[2] The *Washington Post*, Mar. 24, 1967, editorial. As noted previously, p. 3, the Maryland bill failed of passage in the adjournment rush.

[3] Cuvillier, "Shall We Revise the Constitution," 77 *Forum*, pp. 321, 325 (1927); Tuller, "A Convention To Amend the Constitution—Why Needed—How May It Be Obtained," 193, *North American Review*, pp. 383–84 (1911).

[4] See Packard, F. F., "Rescinding Memorialization Resolutions," 30 *Chi-Kent Law Rev.* 339 (1952).

[5] 307 U.S. 433, 448–49 (1939).

There can be and is a genuine fear of a constitutional convention on the part of many thoughtful people who urgently are working toward enactment of a constitutional amendment.

The fear is simple. There has never been a constitutional convention since these United States become a nation. There is strong legal opinion that once the states have mandated a convention, the courts nor the executive can control it, gulde it, or establish the matters with which it would deal.

A constitutional convention, many sincere people believe, would, once unlocked, spread in every direction.[1]

In the recent Senate debates over a constitutional convention, the following colloquy occurred between Senator Dirksen and Senator Proxmire:

Mr. PROXMIRE. I wish to ask the Senator from Illinois if he still feels that sincere and thoughtful people feel that way, or whether he would disagree that sincere and thoughtful people feel that way.

Mr. DIRKSEN. Oh, I never disagree with sincere people, but I call attention to the fact that I set up some premises and then proceeded to knock them down.

Mr. PROXMIRE. Would the Senator concede, as he said 2 years ago, that there is strong legal opinion that once the States have mandated a convention, the courts, as well as the executive, could not guide or control such a convention?

Mr. DIRKSEN. Exactly; and for what reason? If the courts or the executive could guide and control a convention, why have article V? That is what Hamilton was pointing out in his papers when he spoke about a hostile government that would not give ear to the people. So here we have the power of the people, and it is provided for in article V.

Mr. PROXMIRE. So the Senator is not only saying that if this convention is called it can go in any direction, but is he now adding that in his judgment this is the way a constitutional convention of the people should develop?

Mr. DIRKSEN. That is right, and the States upon their applications have indicated an interest in one thing, which is the question of apportionment.

Mr. PROXMIRE. Then, the Senator would entertain only those petitions which would specify they are interested in apportionment; others would be considered invalid?

Mr. DIRKSEN. I do not run the convention.

Mr. PROXMIRE. No, but the Senator from Illinois is one of the most influential Members of this body and the principal proponent of a constitutional convention. He would certainly have a major influence on what the petitions acceptable by the Congress should contain and what Congress should consider in giving force to the applications. The Senator is taking the position that only those petitions which would seek to overturn the one-man, one-vote principle would be entertained.

Mr. DIRKSEN. That is the only thing that the legislatures have asked for.

Mr. PROXMIRE. There are a number of States that have asked for a convention that would restrain the powers of the courts over some legislatures.

Mr. DIRKSEN. The fear is expressed that the legislatures would run hog wild. Apparently the Senator has no confidence in his State legislature.[2]

Assuming the right of the Congress to call a convention into being, has it the further right to impose restrictions upon its actions, to dictate to the convention its organization and modes of procedure; in short to subject it to the restraints of legislative law?

Those who deny that Cougress has the power to bind a convention rely heavily on the so-called doctrine of "conventional sovereignty." According to this theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign power and therefore is supreme to all other government branches or agencies.

For those who hold that such a convention would be a "premier assembly" of the people embodying their sovereign powers and would be unlimited and absolute, the following apt description was made in 1847, in connection with the

[1] Edwards, "Resist Constitutional Convention Plan," *Chicago Tribune* (Mar. 27, 1967).
[2] 113 *Congressional Record* S5462, Apr. 19, 1967 (daily ed.).

Illinois State Constitutional Convention (and it is pertinent to a Federal convention):

> We are here, the sovereignty of the state. We are what the people of the state would be if they were congregated here in one mass meeting. We are what Louis XIV said he was—"We are the State". We can trample the constitution under our feet as waste paper, and, no one can call us to an account save the people. . . .[1]

Sixty years later, a similar view was expressed by Senator Heyburn in the United States Senate:

> When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it.[2]

On the other hand, those who assert the right of the Congress to bind a convention contend that the convention is, in no proper sense of the term, a sovereign. It is, they argue, but an agency employed by the people to institute or revise fundamental law. The argument continues as follows: While there may be a special dignity attaching to a convention by reason of its framing fundamental law, no such dignity or power should attach which would invest it with a primacy over other branches of government having equally responsible functions. A constitutional convention has the general characteristics of a legislature but with the functions and organization only of a committee. Since its assembling is infrequent and dependent, for the most part upon considerations of expediency, it follows that the Congress, whose function it would be to declare and enforce the expediency, would be the proper body to determine the time and conditions for its assembling and to announce the will of the people in relation to the scope of the business committed to the convention.

Before considering the power and scope of a constitutional convention, it is important to distinguish between a revolutionary convention and a constitutional convention. The revolutionary convention, as its name implies, is part of the apparatus of a revolution. Jameson says it consists of those bodies of men who, in times of political crisis, assume or have cast upon them, provisionally, the function of government.[3] They either supplant or supplement the existing governmental organization.[4]

A constitutional convention, on the other hand as its name implies, is constitutional; not simply having for its object the framing or amending of constitutions, but as being within rather than without the pale of fundamental law. It is, says Jameson, "ancillary and subservient and not hostile and paramount to" the government then existing.[5]

A constitutional convention appointed under law and the Constitution, which presumes to overpass the limits imposed upon it by its creators, and seeks to do acts requiring the exercise of revolutionary powers, ceases to be a constitutional convention and becomes in the eye of law an extralegal or revolutionary convention.[6]

It might be well to note at this point that while the constitutional convention of 1787 acted beyond the scope of its authority, the Congress itself ratified and consented to the action of the convention and, in fact, transmitted its proposals to the states for their ratification. At no time did the convention seek to bypass or overrule the Congress; rather it submitted the draft Constitution to the Congress for its consideration and approval.[7]

Many authorities agree that a constitutional convention, once convened, would be limited by Article V. *The real area of disagreement is whether a convention*

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[1] Illinois, Constitutional Convention (1847), debates p. 27.
[2] 46 *Congressional Record* 2769, Feb. 17, 1911.
[3] Jameson, *Constitutional Conventions* (4th ed.; 1887), p. 6; see also 35 *Michigan Law Review*, pp. 284–85.
[4] *Ibid.*, p. 6.
[5] *Ibid.*, p. 10.
[6] Behout and Kass, "How Can New Jersey Get a New Constitution," 6 *University of Newark Law Review* (1941) pp. 7–8; Stephens, *Constitutional Convention Report*, Georgia Bar Association (1931) p. 219.
[7] J. M. Beck, *The Constitution of the United States* (New York: Oxford University Press, 1924), p. 173 et seq.

would be further limited by the conditions set forth in a congressional act calling it together.

For example, Senator Jacob Javits (R. N.Y.) recently stated:

> I doubt very much that the Congress of the United States can limit such a constitutional convention when it passes a measure of implementation concerning what is requested by the States.
>
> * * * * * * *
>
> A constitutional convention, even if elected under a congressional mandate that it could deal with only one subject, could run away. After all, it would be a duly created constitutional convention, and it could propose any amendments which it decided it wished to propose, subject to ratification.[1]

Those who do not think a convention would be limited, point out that a convention ought to be independent of Congress—free, even to alter the powers of Congress itself under the Constitution. They offer the argument that it was fear of this contention which caused the Congress, after much pressure had been brought to bear on it for a constitutional convention, to adopt instead, under the first method, the proposal which resulted in the 17th amendment to the Constitution on the popular election of Senators. Many argue that if Jameson's theory of an ancillary and subservient convention was valid, the Congress would have had no need to fear the then proposed constitutional convention in that Congress could have restricted the convention in its work and, among other things, prohibited it from dealing with the question of senatorial elections (Art. I, Sec. 3). In adopting the first alternative method in the amending process, they argue that the Congress, in fact, conceded it could not control the scope of a convention's proceedings.

This whole matter, of course, can be dismissed as being more argumentative than decisive. The Senate took the easy way out and avoided the issue. Whatever its merits, it can hardly be said that the Congress, in proposing the 17th Amendment to the states, decided this all-important issue.

While this question, then, has never been directly decided by Congress or by the courts, it has been argued that the whole scheme, history, and development of our government, its laws and institutions, require the control of any convention and the most logical place for exercising that control would be in the enabling act convening it, or in some other federal statutory law.

Dodd has no doubt on this question. He points out that a convention does not supersede the existing government; it "is bound by all restrictions either expressly or impliedly placed upon its actions by the Constitution in force at the time."[2] In the case of our federal Constitution, a new Constitution as proposed by a convention certainly could not become effective until promulgated and, in accordance with Article V (which permits Congress to select the mode of notification), ratified by the legislatures of three-fourths of the states. A convention then is an instrument of government and acts properly only when it stays within the orbit of its powers. Since the Congress is the branch of the federal government which has the duty of calling the convention, and since it acts at the requests of the states, and since both, in the final analysis, represent the people, the ultimate source of all power, a federal constitutional convention, to act validly, would necessarily have to stay within the designated limits of the congressional act which called it into being.

Inherent in all questions concerning constitutional law is one relating to the effect various articles of the Constitution have on each other. Article V is no exception and must be read and viewed in the light of all the other provisions of the Constitution.

In connection with congressional power, a provision which affects substantially all provisions is the so-called necessary and proper clause.[3] It reads:

> [The Congress shall have Power] . . . to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

By its terms there is conferred upon Congress:

> (1) the power to make all laws which shall be necessary and proper for carrying into execution all powers which had previously been conferred and, in addition, (2) all other powers vested by the Constitution in the Government of the United States. . . .[4]

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[1] 113 *Congressional Record* 85458, April 19, 1967 (daily ed.).
[2] Dodd, *The Revision and Amendment of State Constitutions*, p. 93 (1910).
[3] U.S. Constitution, Art. I, Sec. 8, cl. 18.
[4] Watson, *The Constitution of the United States*, I, 701 (1910).

In addition, Bonfield would argue that an additional reason exists for not counting the present petitions as "applications" for an Article V convention. He writes:

> Article V clearly specified that Congress "shall call a Convention for *proposing* Amendments." The process of *proposing* amendments contemplates a conscious weighing and evaluation of various alternative solutions to the problems perceived.
>
> If Article V contemplates this kind of a "Convention . . . for proposing Amendments," the resolutions sponsored by the Council of State Governments should be deemed insufficient applications within the meaning of that provision. Instead of requesting a deliberative convention with full power to propose to the states any amendments dealing with the subject in question that it thinks proper, these resolutions demand "a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States." As a result, the resolutions in issue really call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed" elsewhere. In this sense, the proponents of these resolutions seek to make the "Convention" part of the *ratifying* process, rather than part of the deliberative process for "proposing" constitutional amendment. Consequently, the resolutions in question should not empower Congress to call a convention authorized to submit amendments to the states for ratification. They are not "Application[s for a] Convention . . . for *proposing* amendments" as Article V demands; rather, they are applications for a convention empowered solely to approve or disapprove the submission to the states of particular amendments "proposed" elsewhere.
>
> Furthermore, Congress has no authority to treat the resolutions sponsored by the Council of State Governments as applications for the kind of convention Article V does contemplate. It cannot be inferred from these resolutions requesting a convention empowered solely to approve or disapprove particular amendments for submission to the states, that the state legislatures tendering them would be satisfied or willing to have a plenary convention consider the problems at which these amendments were directed, and submit to the states the solutions to those problems that *the convention* deems best.[1]

Dr. Brickfield points out, however, that:

> Under article V, Congress calls the convention after the required number of states have submitted petitions. It has the duty to announce the will of the State legislatures in relation to the scope of the convention's business and, under the necessary and proper clause, it may set up the procedures and conditions so that the convention may not only function, but that it may control the convention's actions to make certain that it conforms to the mandates and directives of the Congress, the State legislatures, and ultimately the people. *This does not mean that the convention may not exercise its free will on the substantive matters before it; it means simply that its will shall be exercised within the framework set by the congressional act calling it into being.*[2]

If Brickfield's contentions be accepted, state applications may be considered as mandates to the Congress, not only to call the convention, but also to specify the scope and limit of a convention's deliberations in accordance with state directives. In 1957, the State of Indiana in five separate applications calling for conventions to consider five different subjects set forth the above theory in the following language in its resolution:

> For the reason that the power of the sovereign States to propose amendments to the Constitution of the United States by convention under article V has never been exercised and no precedent exists for the calling or holding of such convention, the State of Indiana hereby declares the following basic principles with respect thereto: that the power of the sovereign States to amend the Constitution of the United States under article V is absolute; that the power of the sovereign States to propose amendments to the Constitution by convention under article V is absolute; that the power of the sovereign States extends over such convention and the scope and control thereof and that it is within their sovereign power to prescribe whether such

[1] Bonfield, pp. 662–63.
[2] Brickfield, p. 18. (Emphasis added.)

This clause has been declared to be an enlargement of the powers granted to Congress and enables it to select the means necessary [1] to effectuate those powers. Thus since Congress, under Article V must call the convention, it of necessity must have the power to fix the date and place of meeting. Further, since Article V places on Congress the function of selecting the method of state ratification, it must legislate into law a set of federal rules governing the process.[2] There is then a close relationship between the principal congressional power conferred under Article V and the supporting or ancillary powers, conferred under the necessary and proper clause, to carry the principal power into execution. Without the supporting power, the principal power would cease to exist.[3]

These powers apply not only to procedural functions such as convening the convention and adopting the mode of ratification, but they also apply to the vital issue of declaring whether the convention shall consider either a single subject, a limited number of subjects, or a large scale overhauling of the Constitution. As will be discussed below, Congress, acting on the applications and at the request of the state legislatures, may limit the scope of such conventions and as a corollary it follows that Congress may adopt the means necessary to invoke such limitation upon the convention.

DO STATE APPLICATIONS CONTROL THE SUBJECTS CONSIDERED IN A CONVENTION?

Arguments in recent years have sought to shift some of the emphasis on control over federal conventions from the Congress to the state legislatures. In support of this position of state legislative control, the State of Georgia, in an application for a federal constitutional convention which would have taken up the problem of revising the constitution generally, declared in its resolution that the federal convention was to amend the Constitution:

> . . . in the particulars herein enumerated and in such others as the people of the other States many deem needful of amendment.[4]

New York, in 1931, in declaring its right to control the scope of federal conventions, made application for a convention to propose an amendment to repeal the 18th Amendment "and no other article of the Constitution." [5]

In recent years, many States have expressly cited in their petitions the particular subject matter they intended that the convention should consider.

In fact, of the 32 apportionment petitions currently under consideration, 29 include the exact wording of the amendment to be considered and proposed by the convention.

Professor Bonfield argues, however, that:

> *The notion that state applications can limit a convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter as that contained in those applications is not widely accepted.* It has been insisted that "the nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition." *The Convention itself is a Federal instrumentality set up by Congress under powers granted to it by the Constitution.* Since Article V directs *Congress* to call the convention, and is silent as to the details of such a body, *Congress is the only authority entitled to specify those details.* Consequently, if any power can limit such a convention to the proposal of amendments dealing with the same subject matter as that contained in the state applications, it can only be Congress. "State legislatures . . . have no authority to limit an instrumentality set up under the federal Constitution. . . . The right of the legislatures is confined to applying for a convention, and any statement of purposes in their petition would be irrelevant as to the scope of powers of the convention." [6]

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[1] McCulloch v. Maryland, 4 Wheat. 316 (U.S. 1819); U.S. Congress, Senate, 82d Cong., 2d sess., 1952, Senate Doc. 170, *Constitution of the United States of America* (1952), 307.

[2] Rottschaeffer, *Handbook on American Constitutional Law* 887 (1939).

[3] Tucker, *Constitution of the United States* (1899), I. 368, but see Tucker, *Ibid.*, p. 365. The "necessary and proper" clause stated to be unnecessary since Congress, having been granted a principal power, by implication may adopt the means necessary to execute the power.

[4] U.S. Congress, Senate, 71st Cong., 2d Sess., 1930, *Senate Doc.* 78, p. 25.

[5] 75 *Congressional Record* 48.

[6] Bonfield, pp. 677–78.

convention shall be general or shall be limited to the proposal of a specified amendment or of amendments in a specified field; that the exercise by the sovereign States of their power to require the calling of such convention contemplates that the applications of the several States for such convention shall prescribe the scope thereof and the essential provisions for holding the same; that the scope of such convention and the provisions for holding the same are established in and by the applications therefor by the legislatures of the two-thirds majority of the several States required by article V to call the same, and that it is the duty of the Congress to call such convention in conformity therewith; that such convention is without power to transcend, and the delegates to such convention are without power to act except within, the limitations and provisions so prescribed.

Brickfield has summarized his findings in this regard as follows:

> Just how far States may go in imposing their wills on conventions is a matter on which the Founding Fathers failed to define the limits in article V. It is evident, however, that together, the Congress and the State legislatures play the dominant roles. Together they not only initiate but also finally approve the work of any convention. With this ultimate power at their command, they may fence off the boundaries of power within which a convention must operate.
>
> While both have important roles, the greater and final power . . . lies in the Congress of the United States, not so much because of the express provisions of article V which creates the power, but by reason of the article's failure to place sanctions on the Congress and for its failure to provide for review of congressional action.[1]

DOES CONGRESS HAVE THE POWER TO REFUSE TO CALL A CONSTITUTIONAL CONVENTION?

May Congress refuse to call a convention should the requisite number of states comply? The Founding Fathers included the Convention provision in Article V as a remedy for the states to bring about constitutional reform in the event the federal government refused to do so.[2] It was certainly their intention that Congress should have no discretion in the matter of calling a convention once two-thirds of the states applied.[3]

Madison, on the question, stated:

> It is to be observed however that the question concerning a general convention will not belong to the Federal Legislature. If two-thirds of the States apply for one, Congress cannot refuse to call it: if not, the other mode of amendments must be pursued.[4]

James Iredell, before the North Carolina ratifying convention, also stated:

> . . . that it was very evident that it (the proposal of amendments) did not depend on the will of Congress; for that the legislatures of two-thirds of the States were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress *shall* call such convention, so that they will have no option. (Emphasis in original.)[5]

In addition to the above statements made contemporaneously with the adoption of the Constitution as to its true intent, there are the express words of Article V that Congress "shall call a convention." But suppose the Congress refuses? Is there any process or machinery under our constitutional system by which the Congress could be compelled to perform this duty? It is argued by some that the congressional act being ministerial, the courts could compel the legislative branch to act by way of mandamus, otherwise the whole intention of the framers would be nullified.[6]

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[1] Brickfield, pp. 25–26.

[2] I Farrand, *The Records of the Federal Convention of 1787*, 203 (Rev. ed. 1937).

[3] See excerpts from the constitutional debates, W. K. Tuller, "A Convention To Amend the Constitution," quoting from *Elliott's Debates*, 193, *N. Amer. Rev.* 375–78 (1911).

[4] *Documentary History of the Constitution*, V, 141, 143, citing Madison's letter to Mr. Eve, Jan. 2, 1789.

[5] *Elliott's Debates* (2d ed.: 1937), IV, p. 178. But see Walter F. Dodd, "Judicially Non-Enforceable Provisions of Constitution," 80 *University of Pennsylvania Law Review*, p. 82 (1931), "In general, a constitutional provision which states that a legislature 'shall' perform a duty is equivalent to a statement that it 'may' or 'shall have power.'"

[6] Tuller, "A Convention To Amend the Constitution," 193 *North American Review*, pp. 379–81 (1911).; Cuvillier, "Shall We Revise the Constitution?" (1927), 77 *Forum*, pp. 323–25; F. E. Packard, "Legal Facets of the Income Tax Rate Limitation Program," 30 *Chi-Kent Law Rev.* 128 (1952).

Both Dr. Brickfield and Professor Bonfield take issue with this argument. Brickfield states:[1]

> It seems more likely, however, that the courts would refuse to issue such a writ for the same reasons that they have refused to issue writs on the President of the United States, namely the doctrine of separation of powers which proscribes action by one branch of our Government against another.

In Mississippi v. Johnson, the Supreme Court, among other things, pointed out that:

> The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.[2]

Agreeing with Brickfield's statement, Bonfield notes that:

> . . . the courts have never issued an injunction or writ of mandamus directly against the President or Congress because of the doctrine of separation of powers embodied in our National Constitution, and the consequent obligation of respect owed co-equal branches of the National Government by the Federal judiciary. To do so here would reflect a "lack of respect" for the actions of a coordinate branch of the Federal Government in regard to a subject that may even textually be exclusively committed to its judgment by the Constitution. Therefore, aside from the very practical inability of the courts adequately to enforce any decree directing Congress to call such a convention, sound reasons and well-established precedent dictate the correctness of the assumption that it lacks the authority to do so.[3]

Do recent cases, such as *Baker* v. *Carr*, *supra*, and *Westberry* v. *Sanders*,[4] indicate that the Court might be more willing to enter the political thicket? Senator Hruska clearly believes that these cases would support Supreme Court intervention, reasoning:

> The Court has had no difficulty in recent cases involving the legislatures. Granted they are State legislatures, but the principle remains the same. The Court secured compliance with its orders even though the action involved was to a certain extent legislative whereas in our case it clearly is not. These cases involved apportionment, beginning with Baker against Carr and more recently Reynolds against Sims, and related cases. In those instances, where a legislature refused to obey an order to redistrict, the Court developed its own districting plan and directed elections to be held. It is really not arguable that the right of two-thirds of the State legislatures for a Constitutional Convention clearly provided by article V is less a right than that of the people of Tennessee to have reapportionment of their State legislature.
>
> Should the Congress fail to respond affirmatively to the applications of the legislatures of two-thirds of the States for a Constitutional Convention, it would appear that the Supreme Court could enforce this right, and that precedent for it to do so exists. Should the Congress refuse to comply with the writ, the Court, in enforcing this right, could itself order the Convention. Some State legislatures, I would be certain, would pursue this form of remedy should the Congress fail to act.[5]

Bonfield, on the other hand, argues convincingly that these cases are inapposite. He writes:

> Recent cases holding that the courts can force the states to reapportion their legislatures conformably to equal protection, or that the courts can force state legislatures to draw congressional districts so that they are as nearly equal in population as practicable are inapposite here. The reason for this is that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and *not* the federal judiciary's relationship to the States which gives rise to the 'political question.'" That is, "the nonjusticiability of a political question is primarily a function of the separation of powers." Judicial review on the merits of state legislative apportionment or the drawing of congressional districts by the states only involves federal judicial superintendence of *state* action or inaction; but

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[1] Brickfield, p. 27.
[2] Mississippi v. Johnson, 4 Wall. 475, 500 (U.S. 1866).
[3] Bonfield, pp. 672–73.
[4] Westberry v. Sanders, 376 U.S. 1 (1964).
[5] 113 *Congressional Record* S6654–55, May 10, 1967 (daily ed.).

judicial review of Congress' failure to call an Article V convention directly involves the federal courts in an effort to force its co-equal branch of government to perform a duty exclusively entrusted to it by the Constitution.[1]

From a legal standpoint, Brickfield concludes, the same situation exists "as arose from the failure of Congress to reapportion the number of Representatives in the House of Representatives, which article I, section 2, clause 3, requires it to do every 10 years, but which in 1920 Congress failed to do. Thus while Congress has the mandate to perform, its failure or refusal to do so apparently gives rise to no enforcible cause of action. In line with this point, it may be observed that court orders, even if it could be argued that the States had a right to bring legal actions in the courts against an unwilling Congress to call a convention, would have little meaning or effect since the courts lack the necessary tools to enforce their decisions against the Congress."[2]

As a consequence, it would seem, public opinion and, ultimately, the ballot box,[3] are the only realistic means by which Congress can be persuaded to act. A federal statute containing provisions for convening a convention might go a long way in easing the road to congressional action. A proposed statute for this purpose is discussed in this analysis beginning at p. 48.

PROPOSALS TO PROVIDE PROCEDURES FOR CALLING CONSTITUTIONAL CONVENTIONS

Draft proposals have been prepared by Dr. Cyril Brickfield which would set up a framework for giving effect to the application procedure under Article V of the Constitution. The first is a draft bill to decide various questions relating to state petitions for constitutional conventions and the problems involved in convening conventions. The second is a draft resolution to amend the rules of the House of Representatives (minor modifications would be needed to provide for Senate procedure) for processing such petitions. Dr. Brickfield's drafts and his analysis of them are reproduced below.

Analysis of Draft Bill For Calling A Constitutional Convention

Applications for a convention may request either a general convention or a convention to propose specific amendments (sec. 2).

The form of our government warrants a general revision of the Constitution if the people so wish it. In fact, the first two petitions submitted within two years after the Constitution's adoption were petitions calling for a general revision of the Constitution. Specific amendment is also authorized and the history of petitions submitted in the last fifty years clearly indicates a recognition of this form of amendment by a convention.

State legislatures will determine all questions connected with the adoption of State applications (sec. 3(b)).

Parliamentary precedents and court decisions recognize the rule that legislative bodies should have control over their own proceedings.

Approval of governor is not to be required in application process (sec. 3(c)).

Court decisions indicate, and the history of amendments to the Constitution show, that the action of the executive power is not required in the amending process.

Applications must contain certain basic data including the exact text of the State resolution (sec. 4(a)).

In order that amendments may be properly classified and counted, it is proposed that the exact text of the State petitions be submitted so that the subject matter of each petition may be authoritatively established, and also to make certain that applications meet the procedural requirements set out in this draft legislation. It is not the underlying intention of this provision, however, to require that the text of applications be identical to be classified together. If they relate generally to the same subject they are to be classified together, since a convention, if called, would be free to adopt its own language in drafting a proposal on the subject.

An application, once submitted, shall remain valid for 15 years and for such longer time as Congress deems necessary if two-thirds of the States have submitted application on the same subject (sec. 5(a)).

In line with court decisions that proposals should not remain everlastingly alive, but must be "contemporaneous," a 15-year cutoff date was inserted. The

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[1] Bonfield, p. 673.
[2] Brickfield, pp. 27–28.
[3] See Colegrove v. Green, 328 U.S. 549, 556 (1946).

same time limitation has been adopted in recent House resolutions and in some State petitions calling for the revision of article V itself.

State may rescind their applications at any time except when two-thirds of the States have valid applications pending on the same subject (sec. 5(b)).

While Congress has never allowed a State, once having ratified, to withdraw its ratification of an amendment, it is believed that because of the present-day means of speedy communications and the distinguishing features between applications for conventions and ratifications of amendments, withdrawals should be permitted.

Congress, when the requisite number of applications have been received, shall call a constitutional convention (sec. 6(a)), and the Chief Justice of the United States shall preside until the convention is organized (sec. 8).

The first part of this provision repeats the mandate of article V of the Constitution. Further, a high Government official would seem to be the most appropriate person to initiate the tremendously important task of actually calling a convention to order, and it is believed that the office of Chief Justice of the United States, who is to act as a temporary chairman only, is sufficiently removed from active politics to avoid criticism.

Delegates are to be elected in accordance with State law (sec. 7(a)), and each State shall have as many delegates as it has Representatives in Congress (sec. 7(a)).

This provision places election procedures in the States, in line with the practice approved by Congress when it proposed the 20th amendment to the Constitution. In providing that delegates should be chosen on the same geographical basis as Congressmen, it is felt that this method, on a national basis, is the most representative and best proportioned.

Each State is to have one vote to be cast as the majority of its delegates decide (sec. 9(a)).

Section 7 provides for representation on a proportional basis; this section gives each State equal suffrage. This procedure is in line with the 12th amendment and article 2, section 1, clause 3, of the United States Constitution which directs the House of Representatives in cases of tie in the electoral votes for President to vote by States, each having one vote.

The convention will be limited to the consideration of those subjects set out in the congressional resolution calling the convention into being (sec. 8).

The purpose of this provision is to give Congress and the States control over the scope and work of constitutional conventions, and to prevent so-called runaway, extra-legal, or revolutionary conventions.

The convention will be in session not more than one year (sec. 9(c)), and its proposals will be transmitted through Congress to the States for ratification (sec. 11).

To limit the time of the convention and also to provide for congressional control and approval of the convention's work. This procedure was used by the Constitutional Convention of 1787.

The presiding officers in Congress must transmit a convention's proposals to the States within three months of their receipt but only if Congress does not by affirmative action disapprove the proposals (sec. 12(a)).

This procedural provision follows the method adopted by Congress in considering reorganization acts. The burden is placed on the Congress to take action. If it does not the measure is automatically processed by the presiding officers.

Amendments proposed by the convention must be ratified by the States within the time set by Congress for ratification (sec. 13(a)).

Under the provision Congress may set up a reasonable time limitation. It has limited the time for ratifying in the adoption of the 18th, 20th, 21st, and 22d amendments to the Constitution.

Congress may not recall a proposed amendment (sec. 12(b)).

Jameson states that the power to submit proposals to the States does not include the power to recall them; otherwise, in recalling proposals, Congress would also have the power to definitely reject such proposals.

Gubernatorial action is removed from the ratification process (sec. 14(b)), and States may rescind their action at any time prior to the ratification by three-fourths of the States (sec. 16(a)). A State may also ratify an amendment it has previously rejected (sec. 16(b)).

As previously noted, and in line with court decisions and the practice adopted with other amendments, executive action is not requisite in the

amending process. Since the exact status of proposed amendments may now be easily and quickly ascertained, it is no longer necessary to hold States bound to their ratifications unless three-fourths of the States have also ratified the same proposal. Rejection of an amendment presents no real problem since Congress, in the past, has permitted States who have rejected an amendment to later ratify the same.

Congress will determine all questions relating to ratification (sec. 16(c)), and the Administration of General Services, when the requisite number of States have ratified, will officially proclaim the new amendment to be part of the Constitution (sec. 17).

This provision concerns a "political question" and it is generally recognized that Congress has the power to decide all questions relating to ratification. Official proclamation by the Administrator of General Services is a procedural provision and follows the present law relating to amendments.

Analysis of Draft Resolution Amending Rules of the House of Representatives for Processing of State Applications Seeking Constitutional Conventions

The Speaker is to refer all State applications for a constitutional convention to the House Judiciary Committee (sec. 1 (a)).

This provision follows the present practice for referral of State applications to a congressional committee.

Within 60 days after the beginning of each session of Congress, the Judiciary Committee must report to the House the number of petitions, according to subject matter, which have been received during the preceding 15 years (sec. 1 (b)), together with the number of States which have rescinded their applications (sec. 1 (b)).

The 60-day provision is to prevent delay or deferring of action by a committee of Congress. The remainder of the section carries out the provision of sections 4 and 5 of the draft bill.

If, during a 15-year period, two-thirds of the States have submitted applications on a particular subject, a resolution must be introduced in the House calling for a convention within two years for the purpose set forth in the State applications (sec. 2).

An enabling provision to initiate action by a House of Congress once the formal requirements outlined in the draft bill have been met.

The resolution is to be referred to the Judiciary Committee which must report back to the House within 30 days or be automatically discharged (sec. 3 (a)).

To give preference to this legislation over other matters pending in committee and to provide for not only immediate consideration of the measure by the committee, but also to require the committee to take final action without delay. Consideration was given to setting up a joint committee of the House and Senate; also to a separate commission. However, since applications only trickle in over the years there would be very little work to justify the existence of a joint committee or a commission. The judiciary committees of the Congress are ideally set up to handle the work involved in State applications.

The resolution is to be considered immediately by the House (sec. 3 (b)), and may be passed by a simple majority vote (sec. 4).

To give measure highest priority on floor of the House, and at the same time require only a simple majority vote of the members present at time measure is considered.

If, prior to taking action on a House resolution, the Senate passes a similar resolution, the House will nevertheless consider the House resolution, and, if acted upon favorably, shall then constitute the House resolution for the Senate resolution and adopt the same (sec. 5).

This provision is similar to the present Rules of the House of Representatives with regard to separate but similar measures which are considered on the floors of both Houses of Congress at the same time or approximately the same time.

In the absence of a House resolution, a Senate resolution shall be processed in the same manner as though it had been introduced as a House resolution (sec. 6).

Follows present House rules with regard to a measure which has passed the Senate and on which there is similar measure pending in the House.

A Congressman may, at any time, inquire whether a sufficient number of applications have been submitted requiring the calling of a convention (sec. 7).

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To authorize Members of Congress to require an accounting by the Judiciary Committee if there is doubt concerning the present status of applications.[1]

LEGISLATIVE PROPOSAL

A BILL To Provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Constitutional Convention Act."

ACTION OF STATE LEGISLATURES

SEC. 2. The legislature of a State, in making application for a constitutional convention under article V of the Constitution of the United States, shall, after adopting a resolution pursuant to this Act, petition the Congress stating, in substance, that the legislature favors the calling of a constitutional convention for the purpose of—

(a) proposing a general revision of the Constitution of the United States; or

(b) proposing one or more amendments of a particular nature to the Constitution of the United States stating the specific nature of the amendments to be proposed.

SEC. 3. (a) For the purpose of adopting a resolution pursuant to section 2, the State legislature shall adopt its own rules of procedure.

(b) Questions concerning the State legislative procedure and the validity of the adoption of a State resolution cognizable under this Act are determinable by the State legislature and its decisions thereon are binding on all others, including State and Federal courts, and the Congress of the United States.

(c) A State resolution adopted pursuant to this Act is effective without regard to whether it is approved or disapproved by the Governor of the State.

SEC. 4 (a) Within 60 days after a resolution is adopted by the legislature of the State, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House.

(b) Each copy of the application shall contain—

(1) the title of the resolution,

(2) the exact text of the resolution, signed by the presiding officer of each House of the legislature, and

(3) the date on which the legislature adopted the resolution,

and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

SEC. 5. (a) An application submitted to the Congress pursuant to this Act, unless sooner rescinded by the State legislature, shall remain effective for 15 calendar years after the date it is received by the Congress, unless two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same subject, in which event the application shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 8, calling for a constitutional convention.

(b) A State, upon notification to the Congress in accordance with section 4, may rescind its application calling for a Constitutional Convention except that no State may rescind when two-thirds or more of the State legislatures have applications pending before the Congress seeking amendments on the same subject.

(c) The Congress of the United States has the sole power of determining whether a State's action to rescind its application has been timely made.

COMPOSITION AND PROCEEDINGS OF THE CONVENTION

SEC. 6. (a) Congress, under such rules as it may deem necessary, shall adopt concurrent resolutions calling for the convening of a Federal Constitutional

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[1] Cyril Brickfield, *Problems Relating to a Federal Constitutional Convention,* House Committee on the Judiciary, 85th Cong., 1st Sess. (Committee Print, 1957), p. 75.

Convention. It may, in such resolution designate the place and time of meeting and it shall set forth therein the particular subjects which the convention is to consider.

(b) When no place or time is specified in the concurrent resolution calling the convention, the convention shall be held in the District of Columbia not later than two years after the adoption of the resolution.

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Representatives in Congress. Each delegate is to be elected or appointed in the manner provided by State law. Alternate delegates, in the number established by State law, shall be elected or appointed at the same time and in the same manner. Any vacancy occurring in the State delegation shall be filled by appointment of one of the alternate delegates in the manner provided at the time of his election or appointment as an alternate delegate. No alternate delegate shall take part in the proceedings of the convention unless he is appointed a delegate.

(b) The Secretary of State of each State, or, if there be no such officer the person charged by State law to perform such function, shall certify to the Chief Justice of the United States the name of each delegate and alternate delegate appointed or elected pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation at the rate of $50 per day for each day of service and shall be compensated for traveling and related expenses in accordance with the Travel Expense Act of 1949, as amended. The convention shall decide the compensation of alternate delegates and employees of the convention.

(e) The Congress shall appropriate moneys for the payment of all expenses of the convention.

SEC. 8. (a) The Chief Justice of the United States shall convene the constitutional convention. He shall administer the oath of office to the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe an oath not to attempt to change or alter any section, clause or article of the Constitution or propose additions thereto which have not been proposed or fixed by the resolution calling the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as it may adopt.

(b) The performance of the duties required of the Chief Justice of the United States under this Act, shall not be deemed to disqualify him from participating in any case or controversy before the United States Supreme Court.

SEC. 9. (a) Each State shall have one vote. The vote of each State shall be cast on any question before the convention as the majority of the delegates from that State, present at the time, shall agree. If the delegates from any State present are evenly divided on any question before the convention, the vote of that State shall not be cast on the question.

(b) The convention shall keep a daily record of its proceedings and publish the same. The votes of the States on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a majority of the total vote cast on the question.

(b) No convention called under this Act to propose an amendent of a limited nature may propose any amendment or amendments, the general nature of which differs from that stated in the concurrent resolution calling the convention. All controversies arising under this subsection shall not be justiciable but shall be determined by the Congress of the United States.

SEC. 11. The presiding officer of the convention, within 1 month after the termination of its proceedings, shall submit the exact text of the amendments agreed upon at the convention to the Congress for approval and transmission to the several States for their ratification.

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TRANSMITTAL OF PROPOSED AMENDMENTS

SEC. 12. (a) The President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit the proposed amendments to the Constitution to the Administrator of General Services for submission to the States upon the expiration of the first period of 3 months of continuous session of the Congress following the date on which such proposals are received, but only if prior to the expiration of such period Congress has not adopted a resolution disapproving the submission of the proposed amendments to the States.

(b) Whenever the President of the Senate and the Speaker of the House of Representatives have jointly transmitted proposed amendments to the Administrator of General Services, the Administrator shall forthwith transmit, with his certification thereof, exact copies of the proposed amendments to the legislatures of the several States.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 13. (a) Amendments proposed by the convention pursuant to and in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when ratified by the legislatures of three-fourth of the States. Congress, in the resolution adopting the proposal, may set the time within which the proposal shall be inoperative unless ratified by the legislatures of three-fourths of the States.

(b) Congress may not recall a proposed amendment after it has been submitted to the States by the Administrator of the General Services Administration.

SEC. 14. (a) For the purpose of ratifying proposed amendments pursuant to this Act the State legislatures shall adopt their own rules of procedure except that the acts of ratification shall be by convention or by State legislative action as the Congress may direct. All questions concerning the validity of State legislative procedure shall be determined by the legislatures and their decisions shall be binding on all others.

(b) Any State resolution ratifying a proposed amendment to the Constitution shall be valid without regard to whether it has been assented to by the Governor of the State.

SEC. 15. The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State resolution ratifying the proposed amendment or amendments to the Administrator of General Services.

SEC. 16. (a) Any state may rescind its ratification of a proposed amendment except that no state may rescind when there are existing valid ratifications by the legislatures of three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it had previously rejected the same proposal.

(c) The Congress of the United States shall have the sole power of determining all questions relating to the ratification, rescission, or rejection of amendments proposed to the Constitution of the United States.

SEC. 17. The Administrator of General Services when three-fourths of the legislatures of the several States have adopted a proposed amendment to the Constitution of the United States, shall issue a proclamation proclaiming the amendment to be a part of the Constitution of the United States.

SEC. 18. An amendment proposed to the Constitution of the United States shall be effective from the date on which the legislature of the last State necessary to constitute three-fourths of the legislatures of the United States, as provided for in article V, has ratified the same.

LEGISLATIVE PROPOSAL

HOUSE RESOLUTION To provide for the processing of State applications for a Federal Constitutional Convention in the House of Representatives

Be it resolved in the House of Representatives of the United States of America, That—

(a) The Speaker of the House of Representatives shall refer each application submitted, pursuant to the Federal Constitutional Convention Act, to the House Committee on the Judiciary.

(b) Within sixty days after the commencement of each regular session of the Congress of the United States, the House Committee on the Judiciary shall report to the House concerning the applications received pursuant to the Federal Constitutional Convention Act during the preceding fifteen calendar years. The reports shall be printed in the Congressional Record and shall state—

(1) the total number of applications calling for a convention to propose a general revision of the Constitution,

(2) the total number of applications calling for conventions to propose specific amendments of a limited nature to the Constitution, together with the total number received with respect to each such amendment,

(3) the date of receipt of each application,

(4) the particular State applications, if any, on which states have taken rescinding action, and

(5) such other information as the committee considers appropriate.

SEC. 2. If, during a fifteen year period, applications are received from the legislatures of two-thirds of the several States and

(a) each application seeks the calling of a convention to propose an amendment generally revising the Constitution of the United States, or

(b) each application seeks the calling of a convention to propose an amendment of the same general nature as each other application,

the chairman of the Committee on the Judiciary of the House of Representatives shall, and any other Member may, introduce a concurrent resolution calling for a Constitutional Convention within two years for the purpose sought in the applications.

SEC. 3. (a) Concurrent resolutions calling a convention shall be referred to the Committee on the Judiciary. The committee shall report on the resolution within thirty calendar days after its introduction. If it does not report the resolution before the expiration of thirty calendar days after is introduction, the committee shall be automatically discharged from all further consideration of the measure.

(b) When the committee has reported or has been discharged from further consideration of such a concurrent resolution, it shall, at any time thereafter, be in order for a Member to move to proceed for the immediate consideration of such resolution.

SEC. 4. (a) A concurrent resolution calling for a Constitutional Convention may be adopted by the affirmative vote of a majority of those present and voting.

(b) Except as otherwise provided in this resolution, the rules of the House of Representatives shall govern the conduct of the proceedings hereunder.

SEC. 5. If, prior to the passage by it of a concurrent resolution, the House of Representatives receives from the Senate a resolution calling for a Constitutional Convention for proposing the same amendment, it shall proceed to consider its own resolution and, if favorably acted upon, shall substitute and adopt the resolution of the Senate therefor with such amendment as it deems necessary to reflect its own action.

SEC. 6. Where no similar resolution with respect to such amendment as shall be received from the Senate has been introduced or referred to the Committee on the Judiciary, the resolution from the Senate shall be treated in the same manner as concurrent resolutions under section 3.

SEC. 7. Any Member may introduce a resolution to determine—

(a) whether the rescinding action of a State legislature has been timely made or is otherwise entitled to recognition under the provisions of the Federal Constitution Convention Act, and

(b) whether a sufficient number of applications have been submitted as to require the introduction of a resolution calling for a constitutional convention.

[26 Notre Dame Lawyer 185 (1951)]

THE CONSTITUTIONAL LAW OF CONSTITUTIONAL AMENDMENTS*

During the five year period following V–J Day, more than 150 resolutions were introduced in Congress calling for the amendment of the Federal Constitution.

*This is the second article dealing with the amending process under Article V of the Constitution. The previous article, *The Significance and Adoption of Article V of the Constitution* by Paul J. Scheips can be found at p. 46 in the Fall issue of this volume. [Editor's note.]

In 1947, an amendment limiting the tenure of the president was submitted to the states and has now been ratified by 24 of them.[1] A proposal for changing the method of electing the president was adopted by the Senate early in 1950,[2] but was defeated in the House of Representatives.[3] All of this agitation for a change in the fundamental law has stimulated a renewed interest in the interpretation of the amending clause itself.[4] Numerous disputes have arisen, many of which are still unresolved, as to the nature and scope of the amending power, the procedure by which amendments are proposed, and the entire process by which the assent of the states is given.

Prior to 1939 these questions were usually determined by the judiciary. In *Coleman v. Miller*,[5] decided in that year, the Supreme Court indicated that most, if not all, of such controversies will be left to Congress in the future. That decision probably will have little effect on those phases of the process which are the immediate responsibility of Congress—that is to say, the content of amendments and the procedure for proposing them—but it may enhance the importance of technical objections to methods of ratification followed in various states. Such objections will afford an opportunity to reconsider, and an excuse to kill, any change proposed by an earlier Congress.

I.

Content of Amendments

Controversy over the permissible content of amendments began in the Constitutional Convention itself. Madison's *Journal* discloses that during the debate on Article V, "Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States . . . " and moved to add a proviso "that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate." This motion was defeated but immediately thereafter the Convention adopted the second part of it.[6] Persistence of the fears expressed by Sherman prompted Congress, in 1861, to propose, and three states to ratify, an amendment barring any future changes which would "interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[7]

The defeat of Sherman's motion, the adoption of an express restriction on change of representation in the Senate, and general acquiescence in the substantial curtailment of state powers effected by the Civil War amendments, would seem to have established beyond challenge that the amending clause is not to be narrowed by implied limitations.[8] Nevertheless, many years after the Civil War, George Tichnor Curtis found in the Ninth and Tenth Amendments a basis for the argument that the power to amend is confined to changes in the manner of executing the existing powers of the national government and does not "enable three fourths of the states to grasp new power at the expense of any unwilling state."[9]

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[1] 61 STAT. 959 (1947).
[2] 96 Cong. Rec. 1307 (Feb. 1, 1950).
[3] *Id.*, at 10587 (July 17, 1950).
[4] Article V reads: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."
[5] 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).
[6] MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES 573 (Hunt and Scott ed. 1920).
[7] AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 196 (1897).
[8] In Leser v. Garnett, 258 U.S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922) the Supreme Court refused to consider the argument that the Nineteenth Amendment was invalid, because by enlarging the electorate without the consent of the states which did not ratify it, it destroyed their autonomy as political bodies. Noting that this Amendment was similar in character and phraseology in the Fifteenth and that both had been adopted by the same procedure, it dismissed the objection with this observation: "That the 15th is valid, although rejected by six states including Maryland, has been recognized and acted on for half a century." *Id.*, 258 U.S. at 136.
[9] 2 CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 161 (Clayton ed. 1896).

With the adoption of the Eighteenth Amendment, this debate was carried into the courts. Claiming that the Amendment was void because of its substance, its opponents argued that the framers used the term "amend" in the sense attached to it by the common law; that "amendment" embraced only a correction of errors in the existing constitution not an addition or supplement to it. They complained that the Eighteenth Amendment was "legislative" in that it laid down a rule for the conduct of individuals without implementing legislation by Congress or the states; that it regulated vested rights, and infringed "fundamental and unamendable" principles protective of the powers of the states in the field of local government and individual rights. Whence they concluded that this Amendment was contrary to the spirit and intent and implied limitations of the amending power. The Supreme Court was not impressed by this labored reasoning. Without refuting the arguments in detail, it simply announced that the subject matter of the Eighteenth Amendment was within the power to amend reserved by Article V of the Constitution.[10]

Far-fetched as much of the argumentation obviously was, underlying it was a fundamental question of constitutional theory regarding the nature of the power with which Article V deals. This question may be put as follows: Is it the purpose and result of Article V to delegate a certain power of constitutional amendment to the agencies designated by it, or is it merely to provide a method for the more convenient future use of an already existing power of the people? In a sense, the direct prohibition in Article V of any amendment to deprive a state of its equal representation in the Senate contradicts both the theory that the power to amend springs from the same source as the Constitution itself, and the contention that it is subject to implied limitations. If the amending power is the same power which ordained and established the original Charter, any limitation on it must be considered as having only such force and validity as the amending power itself may at any time choose to accord it—it has the moral force of a promise given more than one hundred sixty years ago. On the other hand, the very presence of this specifically stated limitation may be taken as an indication that no other restrictions of the same nature were intended. It is not, however, inconsistent with a concept of the term "amendment" which would restrict it to a modification of the existing instrument rather than an addition to it.

In the First Congress, Sherman suggested that there was a difference between the authority upon which the Constitution rested and that upon which amendments would rest, the former being the "act of the people"; the latter, "the act of the State Governments."[11] The theory stated by the Supreme Court shortly before the Civil War in the case of *Dodge v. Woolsey*[12] seems to be much the same. The view set forth in Justice Wayne's opinion is that since the power to amend the Constitution is one to be exercised by agents, it must be treated as a delegated power and so a constitutionally limited power. But is this the theory of the Court today? On the strength of much that it has said in the cases arising out of the Eighteenth Amendment, the question must be answered in the negative. In *Dillon v. Gloss* we find Justice Van Devanter speaking for a unanimous Court as follows:[13]

> Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

Nothing apparently could be plainer; the authority by which amendments to the Constitution are made is that by which the Constitution itself was ordained—it is the supreme authority of the people of the United States. To be sure, it can be exercised in accordance with the Constitution only through

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[10] National Prohibition Cases (Rhode Island v. Palmer) 253 U.S. 350, 40 S. Ct. 486, 64 L. Ed. 946 (1920).
[11] 1 ANNALS OF CONG. 708 (1789).
[12] 18 How. 331, 15 L. Ed. 401 (U.S. 1856).
[13] 256 U.S. 368, 374, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

certain "delegated agents"; but the essential question is what authority it is that such delegates are at any time exercising. The answer of the Court seems to be that the power thus exerted in amending the Constitution is the ultimate right of the people in the choice of their political institutions.

Nor can the people of any state, by any provision in their state constitution, disable themselves or their representatives from exercising this right. The constitution adopted by Missouri in 1875 declared that "the Legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment of change of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this State." On the strength of this provision, the right of the Missouri Legislature to ratify the Nineteenth Amendment was assailed in *Leser* v. *Garnett*,[14] The limitation was held to be ineffective and the ratification valid, the Court saying that[15]

> . . . the function of a state legislature in ratifying a proposed Amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function, derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.

II.

Submission of Amendments

The first question to arise respecting amendments to the Constitution was as to the form they should take. On June 8, 1789, James Madison, in fulfillment of the informal understanding upon which the Constitution had been ratified in some of the states, laid before the House of Representatives certain proposals of amendment which he planned to have inserted in the text of the Constitution at appropriate places.[16] When, however, the House went into Committee of the Whole on the proposed additions, Roger Sherman at once entered a protest against the idea of interweaving amendments with the original Constitution, urging that the latter sprang from a higher authority than the amending power.[17] He thereupon moved that the suggested amendments be proposed as supplementary to the Constitution. Other members supported the motion, one offering the singular argument that to connive in any alteration of the text of the Constitution would be a violation of the oath of members to support it;[18] while a third contended that if amendments were incorporated in the body of the Constitution "it will appear, unless we refer to the archives of Congress, that George Washington and the other worthy characters who composed the Convention, signed an instrument which they never had in contemplation."[19] Although rejected at the outset.[20] Sherman's proposal eventually prevailed and the precedent thus created has been followed ever since; even the Twelfth Amendment, which definitely supersedes a part of the text of Article II, appears as a supplement to the original document.

On the same occasion the suggestion was offered that before either House could properly deliberate upon specific amendments, both Houses must pass resolutions by the required two-thirds vote affirming the necessity for amendment.[21] No attention was paid to the suggestion, and in the *National Prohibition Cases*[22] the Court ruled, very sensibly, that the Houses, by proposing an amendment, indicate that they deem it necessary. From another angle, nevertheless, the phrase has significance. It discredits entirely the argument offered in support of the Eighteenth Amendment while it was pending in Congress, that the question of the desirability of a proposed amendment was one for the state ratifying bodies rather than for the proposing body.[23] There is, to be sure, a certain ambiguity in the word "necessary." It may be surmised that when two-thirds of the Senate voted to submit the Seventeenth Amendment to the States, they were prompted by the belief that submission of the Amendment was unavoidable, not that the proposed change in the Constitution was desirable.

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[14] 258 U.S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922).
[15] *Id.*, 258 U.S. at 137.
[16] 1 ANNALS OF CONG. 433–6 (1789).
[17] *Id.* at 707.
[18] *Id.* at 709.
[19] *Id.* at 710.
[20] *Id.* at 717.
[21] *Id.* at 430.
[22] 253 U.S. 350, 386, 40 S. Ct. 486, 64 L. Ed. 946 (1920).
[23] 56 CONG. REC. 438 (1917).

By the precedent set in 1789 and followed ever since, the requirement that "two-thirds of both Houses" vote to submit a proposed amendment applies only to the final vote of proposal in each House; all preliminary votes may be by a simple majority.[24] What, however, is the meaning of the word "Houses" in this context? Does it mean the total membership thereof, or simply the members present, there being a quorum of these? For all legislative purposes, it means the latter, and in 1789 it was assumed that the same word is used in the same sense in Article V.[25] This view was confirmed by the Supreme Court in the *National Prohibition Cases*.

An interesting question has been raised concerning the submission of the pending amendment to limit the tenure of the president. The original resolution adopted by the House of Representatives was amended by the Senate. As thus modified, the proposed amendment was approved in the lower House by a vote of 81 to 29.[26] Since the membership of that House is 435, 218 members constitute a quorum. Hence it has been argued that at least 146 votes, being two-thirds of 218, were necessary for adoption of the resolution in its final form.[27] Support for this contention is found in the *Prohibition Cases*, where, in rejecting the argument that two-thirds of the entire membership must concur in proposing an amendment, Justice Van Devanter said: "The two-thirds vote in each House which is required in proposing an amendment is a vote of two-thirds of the members present,—assuming the presence of a quorum,—and not a vote of two-thirds of the entire membership, present and absent."[28] Similar expressions are to be found in other judicial utterances and in legislative rulings, which, however, were addressed to situations where the affirmative votes equalled the required majority of a quorum.[29]

The final vote for submission of the amendment was sufficient under Rule XV of the House of Representatives. As interpreted by that rule, the requirement of a quorum applies only to the number of members who must be present in order for the House to have authority to transact business; it does not require that any minimum number of members vote upon a particular proposition. In 1898 a dispute arose over the vote necessary for the adoption of a resolution proposing an amendment for the popular election of Senators. Speaker Reed made the following ruling:[30]

> The provision of the Constitution says "two-thirds of both Houses." What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House . . . is a proposed amendment to the Constitution; and the practice is uniform . . . that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object.

The *Congressional Record* discloses that after the vote on the motion to concur in the Senate amendments had been taken, a member made and then withdrew the point of order that a quorum was not present.[31] Accordingly, it is to be presumed that a quorum was present at that time.[32]

A further question arises whether a proposed amendment has to be laid before the president for his approval. In view of the sweeping language of Article I, Section 7, it would seem so, especially as the "Houses" therein mentioned are the same "Houses" which function under Article V. But the First Congress transmitted the proposed Bill of Rights to the states, via the president

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[24] 1 ANNALS OF CONG. 717 (1789).

[25] The resolution proposing the amendments submitted to the states in 1789 was adopted in the House with "two-thirds of the members present concurring," JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1st and 2nd Congress 85, 86 (1789–93); similarly, the Senate Resolution approving (with some exceptions) the amendments proposed by the House, contains the phrase "two-thirds of the Senators present concurring." JOURNAL OF THE SENATE, 1st and 2nd Congress 77 (1789–93).

[26] 93 CONG. REC. 2392 (1947).

[27] N.Y. Times, April 3, 1947, p. 24, col. 6.

[28] 253 U.S. 350, 386, 40 S. Ct. 486, 64 L. Ed. 946 (1920).

[29] Missouri P. Ry. v. Kansas, 248 U.S. 276, 284, 39 S. Ct. 93, 63 L. Ed. 239 (1919); United States v. Ballin, Joseph & Co., 144 U.S. 1, 6, 12 S. Ct. 507, 36 L. Ed. 321 (1892); 8 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3503 (1936); 5 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 7028 (1907).

[30] 5 HINDS, *op. cit. supra* note 29, § 7027.

[31] 93 CONG. REC. 2392 (1947).

[32] 6 CANNON, *op. cit. supra note 29*, §§ 565, 565a, 624.

without asking or suggesting that he approve it.[33] Here again, what was done in 1789 has determined subsequent practice, having, indeed, been approved by the Supreme Court as early as 1798.[34]

An alternative method of proposing amendments is by a convention which Congress "shall" call upon the application of the legislatures of two-thirds of the states. The first petitions for a convention were filed in 1788 and 1789 by Virginia and New York, respectively. The next occurred in 1832 and 1833 and came from Georgia and Alabama. In the sessions of Congress just prior to the Civil War petitions were received from the legislatures of six states, praying that a drafting convention be summoned. On several occasions during that era various members of Congress also offered resolutions for that purpose.[35] The greatest sustained effort to set in motion this machinery for proposing a change in the Constitution was made between 1895 and 1913, during which period 33 states filed applications, the great majority of which were in furtherance of an amendment providing for the popular election of Senators, others of which had an anti-polygamy amendment as their objective, and only a few of which suggested a convention of indefinite powers.[36] Within the past decade a number of state legislatures have formally petitioned Congress to call a convention for the purpose of proposing an amendment to limit the rate of federal income taxation.[37]

It appears from Madison's *Journal* that the framers intended this provision for the calling of a convention to be mandatory.[38] Conceding that proposition, there remains a question as to when the condition "on the application of the legislatures of two-thirds of the several states" shall be deemed to have been fulfilled. In 1929 the Legislature of Wisconsin reminded Congress that 35 states had filed applications for a constitutional convention and called upon it to "perform the mandatory duty . . . and forthwith call a convention to propose amendments to the constitution of the United States."[39] The 35 states listed in this memorial included every state but one which had ever petitioned Congress to call a convention for any purpose—even Virginia, Alabama and Georgia, which had filed no such applications since 1788, 1832 and 1833, respectively. This resolution was ignored, no doubt on the theory subsequently approved in *Dillon v. Gloss* that the successive steps in the process of constitutional amendment should not be widely separated in time.[40] To be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought also to be expressive of similar views respecting the nature of the amendments to be sought.

Although no convention has ever been held, the provision has not been entirely ineffective. The petitions just mentioned, asking for a convention to propose an amendment for the popular election of Senators, undoubtedly were instrumental in bringing about the submission by Congress itself of the Seventeenth Amendment, a reform which the Senate had long resisted.

But is it essential that two-thirds of the state legislatures, or any number thereof, should make application to Congress, for a convention in order to enable Congress to call one; why may not Congress summon a convention on its own initiative? No such call has ever been made, but if we assume that the machinery which is perscribed by Article V for amending the Constitution is a particular organization of the inherent power of the people of the United States to determine their political institutions, then it would seem that Congress's obligation to call a convention upon the application of the legislatures of two-thirds of the States was not thought to exhaust its power in this respect, but was intended merely to specify a contingency in which it would be under the moral necessity of exercising it. If, however, the powers of Congress under Article V represent something less than this plenary power of the people, then its obligation to call a convention in the contingency of a demand upon it to do so by the legislatures of two-thirds of the States may very well comprise its full power in the premises.

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[33] 1 ANNALS OF CONG. 913–4 (1789).
[34] Hollingsworth v. Virginia, 3 Dall. 378, 1 L. Ed. 644 (U.S. 1798).
[35] AMES, *op. cit. supra* note 7, at 282, 311, 345, 356–64.
[36] *Federal Constitutional Convention*, SEN. DOC. No. 78, 71st Cong., 2d Sess. 2 (1930).
[37] 90 CONG. REC. A3969 (1944).
[38] MADISON, *op. cit. supra* note 6, at 574.
[39] 71 CONG. REC. 3369 (1929).
[40] 256 U.S. 368, 374, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

However an amendment is proposed, Congress must decide whether it shall be ratified by state legislatures or by conventions in the states. In *United States v. Sprague*[41] it was argued that by the Tenth Amendment "the people reserved to themselves powers over their own personal liberty, and that the legislatures are not competent to enlarge the powers of the federal government in that behalf . . . the people never delegated to the Congress the unrestricted power of choosing the mode of ratification of a proposed amendment;"[42] that the Eighteenth Amendment was of the latter character; and hence, having been ratified only by the state legislatures, was invalid. The district court, ignoring this argument, substituted one of its own which led to the same practical result. Judge Clark was willing to concede that Congress originally had possessed the right to choose between the two types of referendum, but concluded that the subsequent progress of political science had established the constitutional convention as the appropriate instrumentality for effecting constitutional changes of major importance.[43] The Supreme Court rejected both arguments. It found the language of Article V to be too entirely free from ambiguity to admit of reading into it the teachings of political science or other outside considerations. Furthermore, it pointed out, Congress had never resorted to conventions up to that time, notwithstanding the fact that the Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth Amendments "touch rights of the citizens" at vital points.[44]

What did the framers have in mind when they referred to conventions in the states? No doubt much the same type of bodies as those to which they themselves referred the original Constitution, namely, bodies which would be created *ad hoc* for the sole purpose of passing upon certain amendments referred to them, and which, once they had done so, would be *functus officio*. How, then, are such bodies to be summoned into existence? The conventions which ratified the original Constitution assembled upon the "recommendation" of the several state legislatures. But the whole process by which the Constitution was established was so exceptional that it contributes little to the solution of the present problem. The power seems clearly to belong to Congress in its legislative capacity, as auxiliary to the power delegated to it by Article V in the submission of amendments. Serious practical difficulties would, of course, be encountered if Congress decided to proceed without the co-operation of state legislatures. In addition to determining the make-up of the convention and who might vote for delegates thereto, the federal lawmakers would have to set up the machinery for conducting the election and provide funds both for the election and for the functioning of the conventions.

When the Twenty-first Amendment was under consideration, A. Mitchell Palmer, who had been Attorney General during Wilson's administration, brought forward a plan designed to by-pass the state legislatures.[45] It would have authorized the governor of each state to call an election for delegates to a convention. The election was to be state-wide for a panel of delegates representing each side of the question and was to be held in accordance with the election laws of such state. The voters were to be electors qualified under the respective state laws. The expenses of the election were to be met by a national appropriation. In the end Congress decided to leave the matter to the state legislatures, and the expediency of this course was vindicated by the fact that ratification was consummated in less than a year. Only five states failed to take steps for the holding of a convention. Forty-three enacted the necessary enabling legislation. In North Carolina the electorate voted against holding a convention after the legislature had made provision for calling one.[46]

Having submitted an amendment to the states, may Congress thereafter withdraw it? Some commentators have expressed the opinion that this cannot be done.[47] However, much that Chief Justice Hughes said in *Coleman v. Miller*

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[41] 282 U.S. 716, 51 S. Ct. 220, 75 L. Ed. 640 (1931).
[42] *Id.*, 282 U.S. at 733.
[43] 44 F (2d) 967, 981 (D. N.J. 1930).
[44] 282 U.S. 716, 734, 51 S. Ct. 220, 75 L. Ed. 640 (1931).
[45] 76 CONG. REC. 130 (1932).
[46] Myers, *The Process of Constitutional Amendment*, SEN. Doc. No. 314, 76th Cong., 3d Sess. 23 n. 62 (1940). In three States the scheduled conventions did not assemble because ratification was completed before the date appointed for their meeting. *Ibid.* For a valuable article on the whole story see Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005 (1935).
[47] CONG. GLOBE, 41st Cong., 2d Sess. 1477, 1479 (1870) (argument of Roscoe Conkling); JAMESON, CONSTITUTIONAL CONVENTIONS § 585 (4th ed. 1887).

concerning the factors which would have to be considered in determining what was a reasonable time for ratification could also be urged in support of an affirmative answer to this question. He wrote: [48]

> When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. . . . [These questions] can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

If, as the concurring Justices argued in this case, all questions concerning the submission of amendments are for Congress alone to decide, the right of formal withdrawal is of little moment; the lawmakers almost certainly could find some pretext to inter an amendment believed to be no longer desirable.

III

Ratification of Amendments

After an amendment which is within the power reserved by Article V has been lawfully proposed, further questions arise concerning the action of the states in giving or withholding their assent to it. These problems fall into two categories—those relating to the right of the state legislature to act upon the proposition at the time it undertakes to do so, and those dealing with the procedure whereby it shall express its will.

When May a State Act?

The debate as to when a state is at liberty to ratify or reject a proposed amendment has been directed to three subsidiary inquiries: How long after its submission does an amendment remain open for ratification? When is action by a state legislature foreclosed by its own prior acceptance or rejection of the proposal? May postponement of consideration be required by a state constitution or statute?

Four amendments submitted prior to the Civil War—two of the twelve proposed in 1789, one proposed in 1810 and one in 1861—have never been ratified. The same is true of the Child Labor Amendment proposed in 1924. Are these amendments still to be regarded as pending? As a matter of fact, the Ohio Legislature adopted a resolution in 1873 purporting to ratify one of the 1789 proposals.[49] Perhaps it was with this circumstance in mind that Congress added a third "section" to the Eighteenth Amendment which provided that ratification must take place in seven years. This was an obviously futile proceeding. As part of an unratified amendment, the provision was inoperative, and if ratification had taken place after the prescribed date it would still have been inoperative unless the ratification was valid in spite of it! In *Dillon v. Gloss* the Supreme Court properly treated the so-called "section" as a part, not of the amendment itself, but of the resolution of proposal, and sustained it on the ground that it gave effect to the implications of Article V that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period. . . ." [50]

In this same case Justice Van Devanter intimated that the four proposals which antedate 1900 were no longer open to ratification.[51] But when asked to hold that the Child Labor Amendment could not be ratified thirteen years after its submission, the Court refused to decide the issue, saying that this was a political ques-

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[48] 307 U.S. 433, 453, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

[49] *Dillon* v. *Gloss*, 256 U.S. 368, 372, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

[50] *Id.*, 256 U.S. at 375. In 1930 Fiorella La Guardia, then a member of the House of Representatives, made an ingenious argument that the effect of Section three was to limit the duration of the Eighteenth Amendment to a period of seven years after ratification unless it was reratified by three-fourths of the states within that period. His reasoning was that the section could not have applied to the original ratification because it was not then a part of the Constitution; therefore it must be interpreted to operate prospectively after the original ratification of the amendment made it a part of the Constitution. 72 CONG. REC. 1898 (1930).

[51] 256 U.S. 368, 375, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

tion which should be left for the determination of Congress in the event three-fourths of the state ever gave their assent to the proposal.[52]

Does a state legislature exhaust its power to act on an amendment by the adoption of a resolution accepting or rejecting it? In *Coleman v. Miller*, Chief Justice Hughes reviewed the events leading up to the proclamation that the Fourteenth Amendment had been ratified and concluded that "the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification." [53] This proposition rests upon a concurrent resolution adopted by Congress in 1868, declaring the Fourteenth Amendment operative as a part of the Constitution. That resolution included in the list of states which had ratified the Amendment the names of three—Louisiana, North Carolina and South Carolina—which first rejected and later ratified the proposal, and of two—New Jersey and Ohio—which had attempted to withdraw their earlier ratifications.[54]

Upon closer examination this legislative precedent is found to be less conclusive than the opinion of the Chief Justice indicated. There was another, quite distinct, issue involved in the dispute as to whether the Fourteenth Amendment had been duly ratified; namely, whether the seceding states should be counted in ascertaining the number of states necessary for ratification. On January 11, 1868, before any state had attempted to change its mind, either by ratifying after rejection, or by retracting its previous consent, Senator Sumner of Massachusetts introduced a joint resolution which recited that twenty-two states had ratified the Fourteenth Amendment and declared that it was to all intents and purposes a part of the Constitution.[55] A similar resolution was offered in the House of Representatives by Representative Bingham on January 13th.[56] Two days later, the Ohio Legislature voted to revoke its assent which previously had been certified to the Secretary of State. On January 31st, Sumner expressed the opinion that the attempted withdrawal of Ohio's ratification was ineffective. After stating that the "assent of the State once given is final," he went on to say that the action of Ohio was a nullity because the Amendment was already a part of the Constitution. He declared: [57]

> This amendment was originally proposed by a vote of two-thirds of Congress, composed of the representatives of the loyal States. It has now been ratified by the Legislatures of three fourths of the loyal States, being the same States which originally proposed it, through their representatives in Congress. The States that are competent to propose a constitutional amendment are competent to adopt it. Both things have been done. The required majority in Congress have proposed it: the required majority of States have adopted it. Therefore I say this resolution of the Legislature of Ohio is *brutum fulmen*—impotent as words without force.

In a brief exchange with Sumner, Reverdy Johnson of Maryland voiced the tentative impression that assent could be withdrawn at any time before ratification was complete. Said he: [58]

> . . . supposing the amendment not to have been adopted . . . my impression is that they can withdraw; . . . I look upon what the States do preliminary to a decision of a majority which, when made, makes the amendment proposed a part of the Constitution as a mere promise or undertaking that each will assent when the others are ready to assent, but that the day after the assent is given, or at any period subsequent to the giving of the assent, if the State assenting thinks that it has made a mistake, and that the Constitution should not be amended in the way proposed, it may withdraw its assent.

In the Senate, the Ohio resolutions were referred to the Committee on the Judiciary, which also had Sumner's original motion under consideration.[59] No further action was taken by that House until July 9th, when it called upon the

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[52] *Coleman v. Miller*, 307 U.S. 433, 454, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).
[53] *Id.*, 307 U.S. at 449.
[54] 15 STAT. 709 (1868).
[55] CONG. GLOBE, 40th Cong., 2d Sess. 453 (1868).
[56] *Id.* at 475.
[57] *Id.* at 877.
[58] *Id.* at 878.
[59] *Id.* at 453, 878.

Secretary of State for a list of the states which had ratified the amendment.[60] By that time the New Jersey Legislature also had voted to revoke its ratification and six additional states, including Louisiana, North Carolina and South Carolina, had ratified. On July 18th, Sherman introduced a new resolution declaring the amendment effective; this also was referred to the Committee on the Judiciary,[61] which was discharged from consideration thereof on July 20th.[62] The following day, after being changed to a concurrent resolution, it was approved in the Senate without debate and without a record vote. It was rushed to the House of Representatives which promptly concurred, also without debate, but by a yea-and-nay vote.[63] In this resolution, the 29 states named as having given their assent, including the five which had changed their minds, were referred to as "being three fourths *and more* of the several States of the Union."[64]

Inasmuch as Congress did not take this action until additional ratifications had been certified, it is plausible to infer that a majority did not support the view of Sumner and Bingham that the Amendment had become effective before the further ratifications or attempted withdrawals were made. The resolution adopted was not, however, inconsistent with their thesis. It also can be supported by Johnson's tentative opinion that a state's assent could be revoked at any time before ratification was complete. In the absence of committee reports or recorded debate, it is impossible to find in this legislative history an endorsement of either of the two theories advanced for declaring the amendment adopted.

In any event, the inclusion in this list of Louisiana, North Carolina and South Carolina is not decisive as to the effect of a rejection by a legislature which is admittedly competent to act on a constitutional amendment. At the time they expressed their dissent, these states were treated by Congress as being still in a state of rebellion; they were required to adopt new constitutions and to ratify the pending amendment before they could obtain readmission to the Union.[65]

That the resolution declaring the adoption of the Fourteenth Amendment was not regarded as a determination of the effect either of rejection or withdrawal was demonstrated by events attending the adoption of the Fifteenth Amendment. Again, Ohio reversed itself, this time by approving the Amendment after first voting against it,[66] while New York repudiated its earlier assent.[67] In discussing these developments on the floor of the Senate, Roscoe Conkling of New York took the position that a ratification was irrevocable but that a rejection had no legal effect whatsoever.[68] Davis of Kentucky argued that a vote by a state legislature either to reject or to ratify was final and conclusive.[69] Significantly, neither mentioned the adoption of the Fourteenth Amendment or the resolution of Congress declaring it to be in effect.

Not until two additional states had ratified, thus making it unimportant whether New York and Ohio were counted, did the Secretary of State proclaim the adoption of the amendment. His proclamation listed these two states among those which had ratified, but it also recited without comment that the New York Legislature had passed resolutions "claiming to withdraw" its ratification. Ohio's previous rejection was not mentioned.[70] Prior to the issuance of this proclamation, a resolution similar to that adopted with reference to the Fourteenth Amendment had been introduced in the Senate to confirm the Fifteenth, but it never came to a vote.[71] Without qualification, it named New York and Ohio as having ratified the latter Amendment.

The persistence of sharp disagreement as to the correct interpretation of Article V is reflected in the unsuccessful effort made at this time to pass a bill declaring that any attempted revocation of a State's consent to an amendment

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[60] *Id.* at 3857.
[61] *Id.* at 4197.
[62] *Id.* at 4230.
[63] *Id.* at 4296.
[64] *Id.* at 4266. Emphasis supplied.
[65] 15 STAT. 2 (1867); 15 STAT. 73 (1868).
[66] CONG. GLOBE, 41st Cong., 2d Sess. 110 (1869); *Id.* at 918 (1870).
[67] CONG. GLOBE, 41st Cong., 2d Sess. 377 (1870).
[68] *Id.* at 1477.
[69] *Id.* at 1479. Both Conkling and Davis argued from the premise that ratification by a state legislature had the same effect as would ratification by a convention in case that method were chosen by Congress. Both assumed that ratification by a convention would be final. Davis made the further assumption that rejection by a convention would exhaust the power of a state to act on an amendment. Conkling did not meet this issue squarely.
[70] CONG. GLOBE, 41st Cong., 2d Sess. 2290 (1870).
[71] *Id.* at 1444, 2738, 3142.

should be treated as null and void. The House approved such a measure,[72] which, however, died on the Senate Calendar after being reported adversely by the Judiciary Committee.[73] Earlier in the session the upper House had voted to postpone indefinitely a joint resolution of similar tenor.[74]

Looking to the merits of the issue, there appears to be nothing in the language or policy of Article V to preclude ratification at any time, irrespective of prior disapproval. The Constitution speaks only of ratification by the states: there is no reason why an unfavorable vote by one legislature should bar contrary action by its successors. The teaching of *Dillon v. Gloss* that ratification should "reflect the will of the people in all sections at relatively the same period . . ." lends support to the view that later retraction should also be taken into account. Likewise, if change of public sentiment is relevant, the formal action of a state withdrawing its prior consent is pertinent. What weight should be given this relevant fact would, however, be for Congress to determine.

A long-mooted question concerning the right of a state to require that action on a proposed amendment be delayed until a new legislature has been elected was answered in *Leser v. Garnett.*[75] The fact that the Constitution of Tennessee required such postponement was cited in support of the argument that the purported ratification of the Nineteenth Amendment by the Legislature of that State was a nullity. Instead, the Supreme Court held that this constitutional provision was of no effect, since the power to act on a proposed amendment to the Federal Constitution is derived from the latter document.

Procedure for Ratification

When a constitutional amendment is before a state for consideration, who constitutes the "legislature" by which its will is to be expressed, and what rules govern the proceedings? It was decided in *Hawke v. Smith*[76] that the term "legislatures" as used in Article V still means, as it did in 1789, "the representative bod[ies] which . . . [make] the laws of the people."[77] It therefore does not include the electorate in states where the popular referendum has become a part of the legislative process, and approval by the people on a referendum vote cannot be made a condition of ratification. Similarly, it has been established by practice, with the implied approval of the Supreme Court, that legislative resolutions ratifying proposed amendments to the Federal Constitution are not subject to gubernatorial veto. In *Lesser v. Garnet,* it appeared that the Governor of Tennessee had not certified the ratification of the Nineteenth Amendment to the Secretary of State. The Supreme Court held, nevertheless, that the Amendment had been validly ratified, saying "As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him. . . ."[78]

The Constitution is silent concerning the procedures to be followed by state legislatures in acting on proposed constitutional amendments, and Congress has never undertaken to supply the omission. In 1869, to be sure, joint resolutions for this purpose were presented in both Houses of Congress but did not pass in either.[79] The resolution introduced into the House of Representatives would have required each branch of a state legislature to proceed to a consideration of a

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[72] *Id.* at 5356.

[73] CONG. GLOBE, 41st Cong., 3d Sess. 1381 (1871).

[74] CONG. GLOBE, 41st Cong., 2d Sess. (1869); *id.* at 3971 (1870).

[75] 258 U.S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505 (1922). Massachusetts passed a law in 1920 which declared it "to be the policy of the commonwealth that the general court, when called upon to act upon a proposed amendment to the federal constitution, should defer action until the opinion of the voters of the commonwealth has been taken . . ." It provided further that if an amendment is not ratified by the session of the general court to which it is first submitted, it shall be submitted to the people at the following state election. MASS. ANN. LAWS c. 53, § 18 (1946).

[76] 253 U.S. 221, 40 S. Ct. 495, 64 L. Ed. 871 (1920).

[77] *Id.*, 253 U.S. at 227.

[78] 258 U.S. 130, 137, 42 S. St. 217, 66 L. Ed. 505 (1922). The effect of a gubernatorial veto was called into question in connection with the adoption of the Twelfth Amendment. The Governor of New Hampshire vetoed the resolution of that State's Legislature to ratify the proposal. If effective, ratification by New Hampshire would have brought the total of consenting states to the necessary three-fourths. The amendment was not proclaimed, however, until another state had ratified, and the proclamation did not include New Hampshire as one of the ratifying states. Myers, *op. cit. supra* note 46, at 34.

[79] CONG. GLOBE, 41st Cong., 1st Sess. 75, 102, 334 (1869). The House resolution bore a strong resemblance to the act passed in 1866 (14 STAT. 243) requiring state legislatures to meet at an appointed day and to proceed as therein directed to elect a United States Senator.

pending amendment on the sixth day of any regular or special session, and to continue to meet until final action was taken on the amendment. A proposed change was to be deemed ratified if it received the vote of a majority of the members elected to each house. Whether such a measure is within the power of Congress incident to the submission of amendments is doubtful.

A still unsettled question which has arisen from time to time is whether provisions of state constitutions defining a quorum, prescribing the majority necessary for the enactment of legislation, or regulating the conduct of legislative business are applicable to ratification of amendments to the Federal Constitution. In 1871, the Indiana Senate voted to rescind that State's "pretended ratification" of the Fifteenth Amendment, on the ground, among others that this action had been taken by less than a quorum of each house of the state legislature as defined by the state constitution.[80] More recently, the purported ratification of the Child Labor Amendment by at least two states was clouded by uncertainty as to the effect of state constitutional provisions governing the passage of a local law. The Governor of Illinois certified to the Secretary of State that this Amendment had been ratified by the Illinois Legislature, although the resolution to that effect had been adopted in the Senate by less than a majority of all members elected thereto, as required for the enactment of legislation.[81] On the other hand, the ratification of this proposal by Kansas was valid only if the provision of the state constitution authorizing the Lieutenant Governor to cast a deciding vote applied to the ratification of an amendment.[82]

Since proposed amendments are submitted to the state legislatures and not to the people it would seem, on principle, that restrictions imposed by the people, in the state constitution, on the adoption of legislation, should not be binding with respect to the performance of this federal function if the legislature chooses to adopt other rules. But in the absence of special rules sanctioning a different procedure, by what authority can it be said that proceedings which do not conform to the requirements for ordinary legislation constitute the action of the state legislature within the sense of Article V?

As long as the Supreme Court adhered to the position taken in *Leser v. Garnett* that official notice to the Secretary of State that a State had ratified an amendment "was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts," [83] questions as to the regularity of state action were of little more than academic interest. But in *Coleman v. Miller* and *Chandler v. Wise* [84] the Court, in effect, closed the door to judicial determination of these issues. In the former it held that the legal consequences of a previous rejection of an amendment by a state legislature, and of the lapse of time since the submission of the proposal, were political questions which should be resolved by Congress rather than by the courts. Being equally divided on the point, it did not decide whether the right of a Lieutenant Governor to cast a deciding vote was a justiciable issue. Although this case left open the possibility that some questions might still be found to be justiciable at some stage, the opinion in *Chandler v. Wise* indicates that even those questions might cease to be cognizable by a court before it had an opportunity to pass upon them. There citizens and taxpayers sued to restrain the Governor of Kentucky from certifying an allegedly void resolution of the state legislature purporting to ratify the Child Labor Amendment. Before being served with summons in this suit, the Governor forwarded a certified copy of the resolution to the Secretary of State by mail. The Supreme Court dismissed a writ of certiorari on the ground that while the state court had jurisdiction *in limine*, after the Governor had transmitted the notice of ratification. "there was no longer a controversy susceptible of judicial determination." [85]

In a concurring opinion in the Coleman case, four justices expressed the view that the process of amendment "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." [86] Even without this invitation, the uncertainty as to what, if any, questions the courts would entertain in the future would constitute a strong inducement to Congress to occupy the whole

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[80] CONG. GLOBE, 41st Cong., 3d Sess. 1250 (1871).
[81] JOURNAL OF THE ILLINOIS STATE SENATE, 58th General Assembly 1751 (1933).
[82] *Coleman* v. *Miller*, 307 U.S. 433, 446, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).
[83] *Leser* v. *Garnett*, 258 U.S. 130, 137, 42 S. Ct. 217, L. Ed. 505 (1922).
[84] 307 U.S. 474, 59 S. Ct. 992, 83 L. Ed. 1407 (1939).
[85] *Id.*, 307 U.S. at 478.
[86] *Coleman* v. *Miller*, 307 U.S. 433, 459, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

field. And once it has done so, it is extremely improbable that the Supreme Court would undertake to eject it.

Nor is it likely that Congress would exhibit the same reluctance to examine the regularity of state action as has the Court. Moreover, there appears to be no reason why all decisions concerning the ratification of an amendment could not be taken by a simple majority vote. Since such votes would, on the surface at least, relate merely to questions of fact and of law raised by objections to the validity of purported ratification, rather than to the wisdom of the amendment, it would be straining a point to say that they were governed by he phrase "whenever two thirds of both houses shall deem necessary." No other provision of the Constitution would require more than a simple majority in this situation. The only legislative precedent is the resolution adopted in 1868 declaring the Fourteenth Amendment to be a part of the Constitution. In the House of Representatives, 127 members voted in the affirmative, 33 in the negative, with 55 not voting.[87] The yeas and nays were not taken in the Senate. The *Congressional Globe* simply recites: "The resolution was adopted."[88]

IV.

Conclusion

No amendment to the Constitution has been adopted since *Coleman v. Miller* was decided. Any estimate of its practical results lies, therefore, entirely in the realm of speculation. Where an amendment is sharply controversial, there is a strong possibility that the issue will be fought out all over again in the Halls of Congress after three-fourths of the states have given their assent. To this extent the process of changing the Constitution may become still more difficult than it has been in the past. In view of the decision in *Dillon* v. *Gloss* that an amendment takes effect on the date of the final ratification required for its adoption, rather than on the date when it is proclaimed,[89] there is a further possibility of a period of serious confusion and uncertainty while the validity of ratification is being determined.

To leave the way open for Congress to bury a proposed amendment even after three-fourths of the states have approved it seems to be consonant with the purpose of the framers to permit changes in the fundamental law only when there is a strong preponderance of contemporaneous opinion in favor of it. If a majority of both Houses of Congress felt compelled for any reason to declare that a proposed amendment had not been duly ratified, that action would raise grave doubts as to whether the amendment had the requisite support in public opinion at that time. But if the lawmakers are to exercise this function some way must be found to minimize the confusion until the issue is decided. The ruling that an amendment becomes effective the moment the thirty-second state ratifies it should be repudiated. And provision should be made for determining when Congress has said its final word on the subject. Although it has been suggested that in proclaiming an amendment, the Secretary of State speaks with the authority of Congress, no one can say whether such a proclamation would preclude subsequent inquiry into the validity of ratification, or if not, whether there is any time limit on the power of Congress to reopen the matter. In 1930, eleven years after the Eighteenth Amendment was ratified, Representative La Guardia of New York offered a joint resolution to declare that amendment inoperative on the ground that ratification of the original resolution was ineffective to make the amendment a permanent part of the Constitution.[90] But as this resolution was never acted upon the question remains unanswered.

One method of handling the problem might be for Congress to repeal the present statute authorizing the Secretary of State to proclaim the adoption of an amendment immediately upon receipts of official notice of the requisite ratifications. Instead, he might be directed to transmit such evidence to Congress when three-fourths of the states have purported to ratify. To avoid a stalemate, it might be desirable to provide that unless Congress directs otherwise with a designated period, the Secretary should issue, at the end of such period, a

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[87] CONG. GLOBE, 40th Cong., 2d Sess. 4206 (1868).
[88] *Id.* at 4266.
[89] 256 U.S. 368, 376, 41 S. Ct. 510, 65 L. Ed. 994 (1921).
[90] 72 CONG. REC. 1761 (1930). This resolution was referred to the Committee on the Judiciary and was never reported. For a statement of the author's reasoning, see note 50 *supra*.

proclamation, which should be deemed conclusive, declaring that the amendment had been adopted. In any event, having been given virtually complete responsibility in the premises, it is up to Congress to provide some procedure for a prompt definitive decision as to the validity of the ratification of any amendments it proposes.

Edward S. Corwin
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[72 Yale Law Journal 957 (1963)]

The Proposed Amendment of Article V: A Threatened Disaster

(By Charles L. Black, Jr.†)

Three proposals for amending the Constitution have recently come from the Council of State Governments, and are being propelled down the never before used alternative route of article V—the route *via* state applications to Congress for the calling of a convention.[1] Of the three, one (which would establish a Court of the Union, composed of the state Chief Justices in all their multitude, to meet on extraordinary occasions to review judgments of the Supreme Court)[2] is so patently absurd that it will probably sink without trace. Another, eradicating[3] *Baker* v. *Carr*[4] concerns a special subject, and hence does not generally affect the federal power or the whole shape of the Union. The third is of supreme interest to students of constitutional law. Its adoption would effect a constitutional change of a higher order of importance than any since 1787—if one excepts (and that only doubtfully) the *de facto* change implicit in the result of the Civil War.

It is wonderful that this proposal—which has already commended itself to a number of state legislatures[5]—has been so little noticed. This is doubtless because the proposed change is in procedure. But a change in the procedure of constitutional amendment—unless it is purely formal, and this one is not—is a change in the distribution of ultimate power. The proposed article V, if adopted, would make it easily possible for a proportion of the American people no greater than that which supported Landon in 1936 to impose on the rest of the country any alteration whatever in the Constitution. The people who could do this would be, by and large, those inhabitants of the less populous states who reside in the districts that are over-represented in their own state legislatures. "Unto him that hath it shall be given." This component of the population—to which we are all accustomed to conceding a veto power on constitutional amendment, as on many other matters—would under the proposed plan have something very different from a veto power. It would have the affirmative power of forcing its will on the majority, as to anything which may be the subject of constitutional amendment—that is to say, as to everything. Such a proposal ought to be scrutinized with the very greatest care, and the same careful scrutiny should be given to the method by which its proponents hope to coerce its submission to the state legislatures for ratification as an amendment.

THE PROPOSED NEW ARTICLE V

If this proposal were to win its way through, article V would read as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states. ***Whenever applications from the Legislatures of***

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[1] All are set out in full, with an account of their espousal by the Council, in *Amending the Constitution to Strengthen the States in the Federal System*, 36 State Gov't 10 (1963).

[2] *Id.* at 13–14.

[3] By abolishing all substantive federal guarantees against malapportionment, thus making action by Congress as well as by Court impossible, and by withdrawing the subject entirely from federal judicial power. 36 State Gov't at 12.

[4] 369 U.S. 186 (1962) (fourteenth amendment claim against state legislative malapportionment held within federal judicial jurisdiction).

[5] According to information informally received, the legislatures of Arkansas, Florida, Missouri, Oklahoma, Kansas, and Wyoming have already passed the Resolution set out in text accompanying note 13 *infra*. In about an equal number of states, one house has passed it.

two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress. No State, without its consent, shall be deprived of its equal suffrage in the Senate."[6]

It may be convenient to the reader to have set out the text of the present article V:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[7]

The proposed plan, it will be seen, abolishes the (never used) "convention" way of amendment, and put in its place a method wholly under the control, as to substance and procedure, of the state legislatures. It does this by making it mandatory that Congress submit for ratification any amendment called for by the legislatures of two-thirds of the states, and by simultaneously taking away Congress' power to elect the state convention mode of ratification.

At present an amendment may be passed (and all have actually passed in this way) if two-thirds of each national house wants it, and if it is ratified by three-fourths of the states in the manner chosen by Congress. One might also pass if (on proper application of two-thirds of the states) a convention, summoned by Congress and having such structure as Congress thought wise to give it, proposed the amendment, and if it were then ratified in the manner chosen by Congress.

Along the new route opened by the proposed article V, Congress would control neither substance nor procedure. Three-fourths of the state legislatures, without the consent of any other body, could change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment, make Catholics ineligible for public office, and move the national capital to Topeka. These are (in part at least) cartoon illustrations. But the cartoon accurately renders the *de jure* picture, and seems exaggerated only because we now conceive that at least some of these actions have no appeal to anybody. Some amendments—*e.g.*, something like the Bricker Amendment—would be very likely of early passage. At present the main dangers would be to civil and political rights, to national conduct of foreign relations, and to the federal taxing power. But (particularly since the proposed change would be absolutely irreversible, thirteen states being enough to block it reversal) the cartoon does not exaggerate the possibilities of the long future. A country in which the large majority would have to dread and sometimes submit to constitutional innovations appealing only to a minority could not call itself, even poetically, a democracy, and the possible tensions between consensus and Constitution would be dangerous in the extreme.

At present when an amendment passes the House and the Senate by two-thirds there is fair ground for the inference that there is national consensus upon it; at least the means of ascertaining that crucial fact, though rough, are fairly well adapted to the end. If the national convention method, under the present article V, were ever to be used, Congress, in setting up the convention, could ensure that it be so representative as to be likely to express a national consensus. Congress even retains control over the ratification process; if the state legislatures were in its view to come to be dangerously unrepresentative, Congress could provide for ratification by state conventions so chosen as accuratedly to reflect the views of each state's people. Properly used, the present article V can ensure that no constitutional change be effected which is disliked, deplored, or detested by a distinct majority of the American people.

What is the situation under the proposed new article V? Here one must talk numbers—even statistics of a rough kind. Let us note first that the thirty-eight least populous states, whose legislatures could under the proposed article V repeal

[6] 36 STATE GOV'T 11-12 (1963); see text accompanying note 13 *infra*.
[7] U.S. CONST. art. V.

the full faith and credit clause, contain about 40 percent of the country's population.[8] That really ought to be enough. That these particular people should, in the name of federalism, have a veto power, is acceptable; at least it is accepted beyond change. What rational ground could there be for giving them, in addition, the power affirmatively to govern the rest of the people?

But of course one cannot stop there. The power given by the new article V is not in the states but in their legislatures. It cannot be too strongly stressed that one need not approve of *Baker* v. *Carr*[9] in order to accept the fact, as a fact, that the state legislatures do not accurately represent the people of their states—that a majority in each house of most state legislatures can be made up of votes representing a distinct minority of the state's people. This situation may have a certain romantic appeal;[10] even if one does not appreciate its beauty, one may not think the remedying of it a fit job for the federal courts. But neither of these judgments supports the conclusion that the uncontrolled power of federal constitutional amendment should be turned over to bodies so constituted.

So back to numbers: In the best table accessible,[11] relevant data are given for thirty-four of the thirty-eight least populous states of the Union. On the average it takes 38 per cent of the people in one of these states to form the constituencies of enough state senators or representatives to pass a measure through the *more* accurately representative house of the state legislature. Taking this figure as good enough for present purposes, if the proposed article V were in force, the income tax could be abolished, by repeal of the sixteenth amendment, if about 15 per cent of the American People were represented by legislators who desired that result.[12]

Now of course it can be replied that such a coalition cannot be formed without the implication that a good many other people are like-minded with it. Granted, But the margin is enormous. If the right 30 per cent of the people favored some amendment, its chance of passage would be very great indeed, whatever the other 70 per cent might think. And it is very important that the distortion is not random but systematic—it is a distortion operating steadily in favor of rural districts and small towns. It is not too much to say that the proposed article V would enable the inhabitants of such districts to effect any change they persistently wanted in the Constitution of the United States. They may be better and wiser than the rest of us; perceptive fiction and the exacter sociology are not clear on this, but let us assume it is so. Does that justify turning the Constitution over to them, affirmatively and negatively, to keep or to change as they will.

Reference was made above to the result of the Civil War. The proposed article V rests on the theory, at least in part, that that result ought to be revised. The several states now have a crucial part in the process of constitutional amendment; the new proposal would (as far as one alternative method is concerned) give it entirely into their hands, setting at nothing the concept of national consensus among the American people considered as a whole people. It is a proposal for state rule only, on the basis of state-by-state count only and through state institution only, with the popular and national principles altogether submerged. If history has any lessons, our history teaches that such a location of ultimate power would put us in mortal danger.

It should only be added that this proposal, as a corollary to its discard of the concept of national consensus as a prerequistite to amendment, does away with national consideration and debate as a part of the amendment process. Under the present article V, any amendment must be examined and considered in a fully national forum—whether Congress or Convention—before it goes out to the several states. Such debate focusses national attention on something which is above all of national concern. Under the proposal, the only public debate would be in fifty separate state legislatures; the rest of the process would be ministerial only. This short-circuiting of national deliberation is actually one of the most offensive features of the plan.

The mode of proposal

The plan of the proponents of this amendment is to see it introduced into each of the state legislatures, in the form of a resolution in the following terms:

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[8] Calculated from the 1960 Census, 1963 WORLD ALMANAC 255. The author is ill at reckoning, but the figures given here are not far off.

[9] 359 U.S. 185 (1952).

[10] See Perrin, *In Defense of Country Votes*, 52 YALE REV. 16 (1962), especially at 24.

[11] Compiled by The National Municipal League, N.Y. Times, Mar. 28, 1962, p. 22, col. 3.

[12] This figure is arrived at by taking 38% (the percentage of people in the relevant states necessary, on the average, to control the legislature) of 40% (the percentage of the American people residing in the thirty-eight least populous states).

"A (JOINT) RESOLUTION*

*[This resolution should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto.[13]]

Memorializing Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States relating to Article V thereof.

"Resolved by the House of Representatives, the Senate concurring, that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States.

"'ARTICLE ——

"'Section 1. Article V of the Constitution of the United States is hereby amended to read as follows:

"'"The Congress, whenever two-thirds of both Houses shall deem it necessary or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states. Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress. No State, without its consent, shall be deprived of its equal suffrage in the Senate."

"'Section 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several states within seven years from the date of its submission.'

"BE IT FURTHER RESOLVED that if Congress shall have proposed an amendment to the Constitution identical with that contained in this resolution prior to January 1, 1965, this application for a convention shall no longer be of any force or effect.

"BE IT FURTHER RESOLVED that a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States and to each member of the Congress from this State."

The hope is that, if two-thirds of the legislatures submit a petition, Congress will consider itself bound, under the present article V, to call the "convention" requested.

Questions presented

A number of questions arise; some of these will be considered here—not as judicial questions, but as questions sure to come into the mind of any Congressman or Senator conscientiously seeking to do his duty.

Is the Document Quoted Above an "Application" Within the Meaning of Article V?

Article V lays down that Congress shall "call a Convention for proposing Amendments," on "Application" of the legislatures of two-thirds of the states. The "Application" which can raise a conscientious obligation on Congress' part must be one that asks it to "call a Convention *for proposing Amendment*." (Emphasis added). A good case can be made for the proposition that the quoted document is not such an "Application," but an application for something quite different—for a "Convention" to consider whether an amendment already proposed shall be voted up or down.[14]

The process of "proposal" by Congress, contained in the *first* alternative of article V, obviously includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives, as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the *second* alternative, ought to be taken to

[13] 36 STATE GOV'T 11–12 (1963).

[14] Even this much is more than the Resolution literally allows; it asks for a convention "for the purpose of proposing" the amendment set out. Is it possible that the sponsors think the convention's role can be made ministerial?

denote a mechanical take-it-or-leave-it process. Under the procedure followed by the draftsmen and proponents of the present "application," the "convention" would be in true function a part of the process of *ratification.*

This doubt is reinforced by the fact that the delegates who approved this language at Philadelphia were just completing the work of a "convention" of their own. It is not likely that to them the phrase "convention for proposing amendments" meant a convention with a mandate somewhat like the one under which they had worked—a mandate to consider a set of problems and seek solutions?

The difference here is not merely formal, but sounds the deeps of political wisdom. The issue is whether it is contemplated that measures dominantly of national interest should be malleable under debate and deliberation at a national level, before going out to the several states. Such a conception of the "convention" contemplated by article V makes the second route to amendment symmetrical with the first, in the vital respect that, under both, the national problem must be considered as a *problem,* with a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power. The Congressman or Senator persuaded by this distinction would be justified in concluding that the present "applications," even if two-thirds of the states joined, was not of the sort that obligated Congress to call a convention.[15]

Assuming these "applications" are not within article V, it may still be suggested that a sort of "reformation" might be applied—that Congress, even if not persuaded that the present applications asked for the thing contemplated by article V, ought to call such convention as it thinks it would have been obliged to call if the applications had been of the right sort. This seems clearly wrong, for several reasons. Generally, a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all. Congress is given no power to call a constitutional convention when it wants to, or thinks that on the general equities perhaps it should; if Congress desires an amendment, article V very clearly tells how that desire is to be made know. Congress' power as to conventions is not discretionary but strictly conditional, and if the condition is not met Congress not only need not but may not call a valid convention.

It is, moreover, illegitimate to infer, from a state's having asked for a "convention" to vote a textually-given amendment up or down, that it desires some other sort of convention. It is not for Congress to guess whether a state which asks for the one kind of "convention" wants the other as a second choice. Altogether different political considerations might govern.

On the whole, then, no member of Congress could be held to have disregarded a conscientious obligation if he took the view that the "application" quoted above, even if sponsored by two-thirds of the state legislatures, did not make obligatory a convention call. Indeed, he might conclude that Congress would be exceeding its powers in calling such a "convention," the condition to such a call, on a fair construction of article V, not having been met.

If Congress Is Obligated To Call a Convention, What Sort Must It Call?

The short fact here is that neither text nor history give any real help. When and if the article V condition is met, Congress "shall call a Convention . . ."; that is all we know. Fortunately, that is all we need to know, for the "necessary and proper" clause[16] and the common sense of *McCulloch v. Maryland,*[17] give all the constitutional guidance required. Since Congress is to call the convention and since no specifications are given, and since no convention can be called

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[15] It should be noted that another and quite independent defect might be thought to vitiate these "applications." They demand the calling of a convention "for the purpose of proposing" an amendment which is, by its own text, to be ratified *by the state legislatures;* Congress can be under a duty to comply with these applications, then, only if such applications in sufficient number can place it under a duty to abdicate its own discretionary function, as clear as anything in the Constitution, of choosing between the modes of ratification, whatever may have been the mode of proposal. It is certain, on the fact of Article V, that no applications from any number of state legislatures can put Congress under a moral or legal obligation to do that. This quite patent error ought to lead to some suspicion of the whole theory on which these applications are drawn—the theory that Congress and the desired "convention" can be very narrowly confined in function, and that their work can be done for them in advance by the state legislatures.

[16] U.S. Const. art. I, § 8.

[17] 17 U.S. (4 Wheat.) 316 (1819).

without specifications of constituency, mode of election, mandate, majority necessary to "propose," and so on, then Congress obviously may and must specify on these and other necessary matters as its wisdom guides it. (It may be noted that continuing control by Congress of the amendment process must have been contemplated, for Congress is given, under article V, the option between modes of ratification, no matter what the method of proposal.)

If this is accepted, then no Senator or Representative is bound to vote for a convention call which in its form fails to safeguard what he believes to be vital national interests. Specifically, insistence would be thoroughly justified on the allocation of voting power by population rather than by states, on the election at large of a state's delegation or its choice in fairly apportioned districts, and on federal conduct of the election of delegates, to prevent racial and other discrimination. Provision for a "two-thirds" rule might well be thought wise, in order to ensure the same kind of consensus on this branch of article V as on the other. Since the adoption of this proposed amendement would make easily possible the future amendment of the Constitution without anything like popular consent, it is thoroughly reasonable for Congress to insist that this surrender be fully voluntary for at least this generation, unless (as is not true) some positive constitutional command to the contrary prevents.

It will probably be argued that the voting in any convention must be by states, since the voting in the original Constitutional Convention was by states. On this point, the anology is not persuasive. The states then were in a position of at least nominal sovereignty, and were considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of the new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluable union; there is a whole American people. The question in an amending convention now would be whether innovations, binding on dissenters, were to be offered for ratification. The propriety of a vote by states in the one convention surely cannot settle its rightness in the other.

Has the President a Part in the Convention Call Process?

Article I, section 7, clause 3 is as plain as language can be:

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

Clearly, this language literally applies to actions of Congress taken under article V.

In *Hollingsworth* v. *Virginia*,[18] it was contended that the eleventh amendment had not been validly proposed, since the resolution proposing it had not been sent to the President. Against this and other arguments, the Court, in a brief opinion not touching substance, upheld the amendment. In the course of argument, Justice Chase remarked: "The negative of the president applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution." [19]

Since that time, the practice has been not to send amendment proposals to the President. These precedents apply, of course, only to the first method prescribed by article V, since that is the only method that has been used. *Hollingsworth v. Virginia* is inherently weak, as the unreasoned decision must be. It introduces an exception by fiat into the entirely clear language of article I, section 7. But it need not be unfrocked in its own parish, since it is possible that the Court may have had in mind a ground for taking the first alternative of article V out of the veto process; since the congressional proposal must be by two-thirds in each house, it may have been thought that the requirement for overriding the veto was already met. This is not perhaps a very good ground, but the point about it here is that it would not exist at all if Congress, by simple majorities, called a "convention" under article V. Unless some other ground (better than Justice Chase's mere assertion) be stated for holding the contrary, it would seem that such a congressional action would fall as clearly as may be under the terms of article I, section 7, clause 3.

[18] *Id.* at 380 n.a.
[19] 3 U.S. (3 Dall.) 378 (1798).

If this is right, then the grounds upon which the President might exercise his veto need be no less than those proper in the case of a Congressman voting on a convention call. If the President believed the structure and mandate of the "convention" significantly wrong, and dangerous to the national well-being, he would surely be justified in vetoing the Resolution.

Summary

This proposal for amending article V is dangerous. It is to be hoped that it will be defeated in the state legislatures, but they are, after all, voting for or against increasing their own powers. If "Applications" in the form quoted above, reach Congress in sufficient number to force the issue, there is still authentic constitutional ground on which to stand. It may be that these "applications" call for something not contemplated by the second alternative in article V, and hence need be treated, at most, only as memorials to Congress to propose this amendment, a plea addressed entirely to discretion. It is as certain as any such matter can be that no Congressman or Senator is bound to vote for a convention call, even on impeccably proper application, wherein prudent conditions as to mandate, structure, constituency, voting, proper selection of delegates, and all the rest, are not met. There is no real reason why Presidential veto, on the same grounds, is not proper in this matter.

If all this terrain is fought over, then the American people will surrender this ultimate power into the hands of a minority only if they want to, and if they want to nobody can stop them.

[39 Notre Dame Lawyer 659 (1964)]

PROPOSING CONSTITUTIONAL AMENDMENTS BY CONVENTION: SOME PROBLEMS

(By Arthur Earl Bonfield*)

All of the existing amendments to the United States Constitution were proposed to the states by a two-thirds vote of both Houses of Congress. Proponents of the three provisions under discussion here seek to avoid this procedure. They are attempting to invoke an alternative means of submitting to the states amendments to our fundamental law. In addition to the direct Congressional initiation of the amending process, Article V[1] provides that "on the Application of the Legislatures of two-thirds of the several states [Congress] shall call a Convention for proposing amendments." The present paper will consider some of the difficult questions raised by the current effort to utilize this particular mode of "proposing" amendments to our Constitution.

At the outset, it should be noted that many of the significant questions that will arise in the present attempt to propose amendments to our fundamental law by convention will not be resolvable in the courts.[2] Strong dicta even go so far as to insist that all questions arising in the amending process are nonjusticiable.[3] But there is evidence of a substantial nature to the contrary. It would indicate that some of the questions which may arise in this process can

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[1] U.S. Const. art. V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of the Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

[2] See Coleman v. Miller, 307 U.S. 433, 457 (1939) (concurring opinion). Dowling, *Clarifying The Amending Process*, 1 WASH. & LEE L. REV. 215 (1945). In Coleman v. Miller, the Court held that the effectiveness of a state's ratification of a proposed amendment which it had previously rejected, and the period of time within which a state could validly ratify a proposed amendment, were nonjustifiable political questions within the exclusive and irrevocable determination of Congress.

[3] See *id.* at 457–59 (concurring opinion).

Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation. . . . Undivided control of [the amending] process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety . . . and is not subject to judicial guidance, control or interference at any point.

See also text accompanying note 22 *infra*, and Dowling, note 2 *supra*.

be settled on the merits by the judiciary.[4] However, those that are beyond the capacity of the courts to decide because they are nonjusticiable political questions will be resolvable solely by Congress. Its decision in such cases will be final and conclusive of the courts.[5] Nevertheless, in the exercise of that power Congress . . . is [still] governed by the Constitution."[6]

The first question raised by the current effort to propose amendments to our National Constitution via a convention concerns the sufficiency of the resolutions sponsored by the Council of State Governments for this purpose.[7] Are they proper applications for a "Convention" within the meaning of Article V? If they are not, their adoption by the legislatures of two-thirds of the states would neither authorize nor compel Congress to summon a convention empowered to propose amendments to the Constitution. The reasons for this are several.

In the first place, the United States is a government of delegated powers. Consequently, it possesses no authority save that conferred upon it by the Constitution. Article V, the only provsion in the Constitution dealing with its amendment, must therefore be deemed exhaustive and not merely illustrative of the Federal Government's powers in this regard. That provision explicitly provides two modes for proposing constitutional amendments. Only one of these contemplates the convening of a convention empowered to propose amendments. Such a "Convention" is authorized by Article V only when two-thirds of the state legislatures have made "Applications" for one. As a result, applications within the meaning of Article V from two-thirds of the state legislatures must fairly be deemed absolute prerequisites to the summoning of such a body.[8]

There is a second reason why valid Article V applications from the requisite number of state legislatures must be deemed prior conditions to the summoning of any convention empowered to propose amendments. If these applications are not prerequisites to such a convention call, on its own say-so, a majority of Congress could validly summon such a body.[9] By the same simple majority, Congress could determine the convention's makeup and mode of operation. It could therefore provide that the convention could propose amendments to the states by a mere majority of its delegates.

But Article V insists that a two-thirds vote be required by both Houses of Congress, or that two-thirds of the state legislatures make "Application" for a "Convention," before an amendment to the Constitution may be proposed to the states. This reflects the conviction of the founding fathers that the seriousness of this kind of action demands a national consensus of the sort required to achieve such two-thirds votes. Permitting a majority of Congress, on its own say-so, to call a convention empowered to propose constitutional amendments approved by a single majority of the latter's delegates would, therefore, frustrate the well-reasoned intentions of the founding fathers in this respect; for the kind of consensus required to secure a two-thirds vote of Congress or applications for a "Convention" from two-thirds of the state legislatures would no longer be required to trigger the amending process.

There is a further reason why Congress may not call a convention empowered to propose amendments to the Constitution until it has received the kinds of applications contemplated by Article V from the requisite number of state legislatures. "A high degree of adherence to exact form . . . is desirable in this ultimate legitimating process."[10] Because of the uniquely fundamental nature

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[4] See Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, No. 1, 253 U.S. 221 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

This article will *not* attempt to fully explore the extent to which the Courts can or should take it upon themselves in suits properly before them to independently resolve the various questions that may arise in the amending process. On the justiciability of questions arising in the amending process see ORFIELD, AMENDING THE FEDERAL CONSTITUTION 7–36 (1942); Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621 (1953); Note, 70 HARV. L. REV. 1067 (1957).

[5] Coleman v. Miller, 307 U.S. 433 (1939); *cf.* United States v. Sprague, 282 U.S. 716 (1931).

[6] Coleman v. Miller, *supra*, note 5, at 457 (1939).

[7] *Amending the Constitution to Strengthen the States in the Federal System, 19 State Government 10 (Winter No. 1, 1963).*

[8] See ORFIELD, AMENDING THE FEDERAL CONSTITUTION 40 (1942); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW, 185, 196 (1951); Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962–64 (1963).

[9] The terms of Article V in no way suggest that Congress may not convene such a body by the usual vote required for Congressional action. Consequently, no more than a majority vote would seem to be required to "call a Convention."

[10] Black, *supra* note 8, at 963.

of a constitutional amendment, attempts to alter our Constitution should not be filled with highly questionable procedures which could reasonably cast doubt on the ultimate validity of the provision produced. The procedure followed in any effort to amend the Constitution should be so perfect that it renders unequivocal to all reasonable men the binding nature of the product. Consequently, Article V must insist upon a firm and unyielding adherence to the precise procedures it provides. This unusual need for certainty in the process of amending our fundamental law also lends additional force to the assumption that the precise procedures provided in Article V must be deemed exclusive.

Prior discussion demonstrates that in the process of "proposing Amendments" to the Constitution by "Convention," Congress resembles those state legislatures that are empowered to create such a body only after a demand for such action by the people at the polls.[11] That is, Congress may not call a convention empowered to "propose" amendments to the Constitution unless it receives from two-thirds of the state legislatures the kinds of applications for such action that are contemplated by Article V. As a consequence, the resolutions sponsored by the Council of State Governments and adopted by the legislatures of several states must be carefully scrutinized in order to determine their adequacy in this respect. If these resolutions are not applications for a convention within the meaning of Article V in no case would Congress be authorized or obligated to call a "Convention" pursuant thereto.

The resolutions sponsored by the Council of State Governments provide as follows:

"Resolved by the House of Representatives, the Senate concurring that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States." [The text of one of the three desired constitutional amendments is then inserted.[12]]

It can be argued with substantial persuasiveness that these resolutions are not applications for an Article V "Convention."

Article V clearly specifies that Congress "shall call a Convention for *proposing* Amendments." The process of *proposing* amendments contemplates a conscious weighing and evaluation of various alternative solutions to the problems perceived. As Professor Charles Black has noted:

"The process of 'proposal' by Congress contained in the *first* alternative of Article V, obviously [and necessarily] includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives as to substance and wording. It is 'proposal' in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the second alternative, ought to be taken to denote a mechanical take-it or leave-it process."[13]

Common sense alone suggests that Article V contemplates a deliberative convention that would itself undertake fully to evaluate a problem, and propose those particular solutions that it deems desirable. The reason for this is that amendments to our National Constitution are chiefly matters of national concern. Consequently, all the alternatives should be carefully explored and debated on a national level, and the details of any proposed amendments fully worked out on a national level, before they are sent to the states for their more locally oriented action or ratification.

With this in mind, it can reasonably be assumed that the two modes provided for "proposing" amendments found in Article V were to be symmetrical. Whether "proposed" by Congress or a "Convention," the problem at which any amendment is directed is to be "considered as a *problem*, with [an evaluation] of a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power."[14] Consequently, the "Convention," contemplated by Article V was to be a fully deliberative body—with power to propose to the states as amendments any solutions to the problem submitted to the "Convention" that it deemed best.

If Article V contemplates this kind of a "Convention . . . for proposing Amendments," the resolutions sponsored by the Council of State Governments should be

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[11] See Iowa Const. art. X, § 3; Nev. Const. art. XVI, § 2; N.Y. Const. art. XIX, § 1; S.D. Const. art. XXIII, § 2; Tenn. Const. art XI, § 3.

[12] *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11–14 (Winter No. 1 1963).

[13] Black, *supra* note 8, at 962.

[14] *Id.*, at 963 (emphasis added).

deemed insufficient applications within the meaning of that provision. Instead of requesting a deliberative convention with full power to propose to the states any amendments dealing with the subject in question that it thinks proper, these resolutions demand "a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States." [15] As a result, the resolutions in issue really call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed" elsewhere. In this sense, the proponents of these resolutions seek to make the "Convention" part of the *ratifying* process, rather than part of the deliberative process for "proposing" constitutional amendment.[16] Consequently, the resolutions in question should not empower Congress to call a convention authorized to submit amendments to the states for ratification. They are not "Application[s for a] Convention . . . for *proposing* amendments" as Article V demands; rather, they are applications for a convention empowered solely to approve or disapprove the submission to the states of particular amendments "proposed" elsewhere.

Furthermore, Congress has no authority to treat the resolutions sponsored by the Council of State Governments as applications for the kind of convention Article V does contemplate. It cannot be inferred from these resolutions requesting a convention empowered solely to approve or disapprove particular amendments for submission to the states, that the state legislatures tendering them would be satisfied or willing to have a plenary convention consider the problems at which these amendments were directed, and submit to the states the solutions to those problems that *the convention* deems best. "It is not for Congress to guess whether a state which asks for one kind of a 'convention' wants the other as a second choice. Altogether different political considerations might govern." [17]

A further defect in the resolutions may preclude their characterization as valid Article V applications. The text of each of the amendments contained in the propositions sponsored by the Council of State Governments specifies that it is to be ratified by "the state legislatures." [18] Article V clearly indicates that regardless of the mode of an amendment's proposal, *Congress* is to decide whether it shall be ratified by three-fourths of the state legislatures or three-fourths of special ratifying conventions held in each state.[19] As a result, the resolutions in question may also be deemed insufficient as Article V applications because they are attempting to achieve an illegitimate end. They seek to deny Congress the discretion to choose the mode whereby the states might ratify any product of the convention they seek.

Prior discussion should demonstrate that Congress could not legitimately treat the resolutions in questions as valid applications for an Article V convention. Consequently, it should have no authority to call such a "Convention for proposing Amendments" to the Constitution pursuant thereto. Since precedent does exist for the proposition that courts will review the validity of a constitutional amendment on the merits in light of *some* procedural defects that may have vitiated its proper proposal or adoption,[20] there is a possibility that amendments proposed by any convention called pursuant to *these* resolutions would be held invalid in an appropriate judicial proceeding. Indeed, at the behest of a proper litigant a court might even enjoin the election of delegates to any convention called on the basis of such inadequate Article V applications.

However, it can be argued with great force that the sufficiency for Article V purposes of the resolutions sponsored by the Council of State Governments is a nonjusticiable political question,[21] whose resolution is committed exclusively and finally to Congress. While these is no case directly on point, the dicta of four Justices of the United States Supreme Court in the case of *Coleman v.*

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[15] See text accompanying note 12, *supra*.

[16] Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A.J. 631, 633 (1963). He specifically notes that the purpose of including the actual text amendments was to insure that the "applicants" for a convention retained control over the amendments ultimately proposed.

[17] Black, *supra* note 8, at 964.

[18] *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11–14 (Winter No. 1 1963).

[19] United States v. Sprague, 282 U.S. 716 (1931).

[20] The courts will adjudicate on the merits the validity of a constitutional amendment in light of any alleged procedural defects that may have vitiated its proper proposal or adoption. See Dillon v. Gloss, 256 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, No. 1, 253 U.S. 221 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

[21] See Wheeler, *Is a Constitutional Convention Impending?* 21 Ill. L. Rev. 782, 791–92 (1927); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 Harv. L. Rev. 1067, 1071 (1957).

Miller [23] should be recalled. "Undivided control of [the amending] process has been given by . . . Article [V] exclusively and completely to Congress. The process itself is 'political' in its entirety from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." [24]

Furthermore, there may be a "textually demonstrable constitutional commitment of the [particular] issue to a coordinate political department." [25] That is, since Congress is to call the Article V convention on receipt of applications from the proper number of states requesting such a body, Congress alone may be empowered to decide whether those applications tendered are sufficient. By the same token it can be argued that the validity of these resolutions as applications for an Article V convention is nonjusticiable because of "the impossibility of a court's undertaking independent resolution [of the question] without expressing lack of respect due coordinate branches of government." [26] If this is true, and the validity of these resolutions are applications for an Article V convention is "not meet for judicial determination," the decision of Congress on this question, whatever it is, will be conclusive on the courts for all purposes.

II

The next question presented by the current effort to propose amendments to the Constitution by convention concerns the role of state governors in the application process. Must applications for an Article V convention be approved by the legislatures and the governors of two-thirds of the states to be effective? Or, is legislative approval of these applications by the required number of states alone sufficient to empower Congress to call a convention for proposing amendments?

It should be noted that the Council of State Governments specifies that the resolution it sponsors "should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto." [28] The correctness of the approach taken by the Council of State Governments in this respect depends on whether the term "legislature" in the application provision of Article V means the whole legislative process of the state—as defined in the state constitution—or only its representative lawmaking body. As we will see, close analogies suggest that this is a justiciable question.

The 1920 case of *Hawke* v. *Smith, No. 1* [27] interpreted "legislatures" in the ratification clauses of Article V to mean the representative lawmaking body only, since "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word." [28] If the term "legislature" is interpreted to mean only the state's representative lawmaking body in the ratification clauses of Article V, it should bear the same meaning in the application clauses of that provision. There would seem to be no valid reason for according a different meaning to the one term in these two different clauses of the same constitutional provision.

Further support for the view that the governor of a state need not sign its application for an Article V convention can be gleaned from the case of *Hollingsworth* v. *Virginia*. [29] In that suit counsel argued that the Eleventh Amendment was invalid because after it had been approved for proposal to the states by a two-thirds vote of Congress, it had not been tendered to the President for his signature. On this basis it was asserted that the Amendment had never been properly submitted to the states for their ratification. Mr.

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[23] Coleman v. Miller, 307 U.S. 433 (1939).
[24] *Id.* at 459 (1939) (concurring opinion).
[25] Baker v. Carr, 369 U.S. 186, 217 (1962).
[26] *Id.* at 217.
[27] *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11 (Winter No. 1 1963).
[27] 253 U.S. 221 (1920). That case held that a state could not restrict the ratifying power of its legislature by providing for a binding popular referendum on the question.
[28] *Id.* at 229. As a result, the Court held that a state constitutional provision that provided for a referendum on the action of the General Assembly in ratifying any proposed amendment to the United States Constitution was in conflict with Article V. *Contra*, State *ex rel. Mullen* v. *Howell*, 107 Wash. 167, 181 Pac. 920 (1919). An approach similar to that of *Hawke* v. *Smith, No. 1* has been taken by state courts with regard to state constitutional amendments. See *Mitchell* v. *Hopper*, 153 Ark. 515, 241 S.W. 10 (1922); *Larkin* v. *Gronna*, 69 N.D. 234, 285 N.W. 59 (1939).
[29] 3 U.S. (3 Dall.) 378 (1798).

Justice Chase answered this contention by asserting that "the negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition, or adoption, of amendments to the Constitution." [80]

It is easy to apply this reasoning to the powers of state governors and conclude similarly that the executive of the state has no function to perform in the application process under Article V. The governor's approval of such an application for a convention is unnecessary; and an executive veto may be disregarded. Consequently effective applications for an Article V convention need only be approved by a state's legislature [81]—and in this respect, the theory upon which the resolutions sponsored by the Council of State Governments is predicated is correct.

III

The current effort to seek a constitutional convention through the application process also raises a question of timing. That is, in order to be effective, within what period must the resolutions be adopted by two-thirds of the state legislatures? There would seem little doubt that Congress would neither be empowered nor under a duty to call an Article V convention unless it receives "relatively contemporaneously," proper applications from the required number of state legislature.[82] The reason for this is that each step in the amending process is meant to demonstrate significant agreement among the people of this country—*at one time*—that changes in some particular part or the whole of our fundamental law are desirable. Nothing less would seem acceptable in a process of such significance and lasting impact.

The case of *Dillon v. Gloss* [83] lends support to the assumption that a convention can properly be called pursuant to applications for an Article V convention only if they are made relatively contemporaneously by the legislatures of two-thirds of the states. In that suit the United States Supreme Court sustained the power of Congress to fix the time period during which ratification of a pending amendment could be effective. After noting that Article V was silent on this question, the Court commented as follows:

"What then is the reasonable inference or implication? It is that ratification may be had at any time as within a few years, a century or even a longer period; or what it must be had within some reasonable period which Congress is left free to define?" [84]

After admitting that neither the debates in the Federal Convention nor those in the state conventions ratifying the Constitution shed any light on this question, the Court concluded that "the fair inference or implication from Article V is

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[80] *Id.* at 381. "The most reasonable view would seem to be that the signature of the chief executive of a state is no more essential to complete the action of the legislature upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment." Ames, *The Proposed Amendments to the Constitution of the U.S. During the First Century of Its History*, H.R. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., 298 (1897).

[81] See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES 7–8 (Comm. Print 1952); Note, 70 HARV. L. REV. 1075 (1957).

[82] Additionally, Congress may not properly call an Article V Convention unless a sufficient number of timely applications also agree on the problem of *general subject matter* that such a body should consider. But they need not be otherwise identical. That is, it is sufficient if the specific constitutional changes suggested by each application concern the same general subject matter; it is not necessary that each application propose the same changes in that subject matter. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG. 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW, 185, 195–96 (1951); Note, 70 HARV. L. REV. 1067 (1957). *But see* OBFIELD, *op. cit. supra* note 8, at 42; Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 795 (1927).

The prior position seems correct for many of the same reasons that such applications must be reasonably contemporaneous to be effective. Sufficient national agreement to warrant the calling of an Article V Convention is evidenced only if the legislatures of two-thirds of the states agree that a convention is needed to deal with the *same* general problem or subject matter. Consequently, applications for a convention dealing with divergent subjects such as some dealing with the treaty power, some dealing with the taxing power, and some desiring a general constitutional revision, should not be counted together. The problem of whether heterogeneous applications should be considered together does not really arise in the present case since the Council of State Governments proposes that two-thirds of the states adopt identical resolutions. Twelve states have already adopted one of these resolutions. Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175, 1182–83 (1963).

[83] 256 U.S. 368 (1921).

[84] *Id.* at 371.

that the ratification must be within some reasonable time after proposal, which Congress is free to fix." [35] The Court's rationale was:

"As ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period which of course ratification scattered through a long series of years would not do." [36]

This logic would seem equally compelling in regard to the process of proposing amendments to the Constitution. Article V is silent as to how long applications for a convention are to retain their vitality. But to exhibit any significant or meaningful agreement as to the desirability of such a convention, applications from two-thirds of the states must be "sufficiently contemporaneous . . . to reflect the will of the people in . . . [different] sections at relatively the same period." That is, "to be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then, would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought also to be expressive of similar views respecting the . . . [subject matter] of the amendment sought." [37]

While *Dillon* v. *Gloss* [38] seems to establish the authority of Congress to fix reasonable time limitations for the application as well as the amending process, it does not solve the problem as to what would be considered sufficient contemporaneity in absence of such a stipulation. The case of *Coleman* v. *Miller* [39] is relevant to this inquiry, since it held that the period of time within which the states could validly ratify a proposed amendment was a nonjusticiable political question. That is, in the absence of any edification from Congress as to what constitutes a reasonable time in the ratification process, the Court refused to make such a determination. Its rationale was that—

". . . the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." [40]

While the previous discussion only directly considers the role of the judiciary in defining time limits in the ratification process, it probably also means that the courts will not independently determine whether applications from two-thirds of the states for an Article V convention have been tendered to Congress with sufficient contemporaniety. *Coleman* v. *Miller* would seem to indicate that this question is solely for Congress and its decision on the matter will be binding on the judiciary for all purposes.

How, then, should Congress determine whether tendered applications are sufficiently contemporaneous to be counted together? It has been suggested that the current Congress might only consider those applications submitted during its tenure.[41] That is, in order to ascertain whether it is empowered or under an obligation to call an Article V convention, each Congress need only look to those applications tendered during its life. The 88th Congress need not consider any applications tendered during the 87th Congress, since the life of an application is only as long as the particular Congress to which it is tendered.

This standard of contemporaneity seems unacceptable for a variety of reasons. In the first place, ten applications tendered the last day of one Congress, and

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[35] *Id.* at 375.

[36] *Id.* at 375. The Court quotes JAMESON, CONSTITUTIONAL CONVENTIONS § 585 (4th ed. 1887) at this point to the effect that: "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon unless a second time proposed by Congress."

[37] Corwin & Ramsey, *The Constitutional Law of a Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 195–98 (1951).

[38] 256 U.S. 368 (1921).

[39] 307 U.S. 433 (1939).

[40] Coleman v. Miller, 307 U.S. 433, 453–54 (1939).

[41] Sprague, *Shall We Have a Federal Constitutional Convention, and What Shall It Do?*, 3 MAINE L. REV. 115, 123 (1910). The author admits that as a practical matter, such a requirement of contemporaneity would render the application process incapable of fulfillment.

thirty submitted the first day of the following one would be insufficient even though they may have been submitted only three months apart. Additionally, it should be recalled that the state legislatures do not address their applications to any specific Congress.

It has also been suggested that at maximum only those applications tendered within the last generation be counted with each other; that is, that the effective life of an application not exceed a generation.[42] However, no measure of the precise length of a generation is provided; nor is any satisfactory rationale offered to justify Congress' counting applications together that have been tendered over such an appreciable time period.

Congress might determine the effective life of an application, and therefore whether it can properly be counted with later applications on the same subject, by engaging in a full analysis of the application itself and all surrounding circumstances. This was at least suggested in *Coleman* v. *Miller*.[43] Among the factors that could be considered in determining the continuing vitality of an application might be the political tenor of the times, then and now; intervening or changing circumstances relevant to the subject matter of the application since its filing; the transitory or long-term nature of the problem to which the application for a convention addresses itself; whether the problem is still considered grave by most Americans; and so on. The difficulty with this approach is that it requires Congress to make a determination with regard to many variables that are unusually difficult if not impossible for even that politically oriented body properly to evaluate or handle.

A more persuasive and perhaps more sensible approach to the question of reasonable contemporaneity can be devised than any of the prior possibilities. In counting applications for an Article V convention, Congress should properly consider only those tendered in that period, prior to the most recent application, during which all of the legislatures have had an opportunity to consider the question at a full regular session. That is, the maximum time between those applications that can be counted together should not exceed that period during which all state legislatures have met once for a full regular session. In no case could the time period involved exceed about two and a half years.[44]

The advantage of this approach seems evident. The burden should always be on those who invoke this process to demonstrate clearly by sufficient contemporaneity of their applications that there is a present agreement among two-thirds of the states as to the desirability of a constitutional convention. Such a present consensus can only be realistically demonstrated by limiting the count of such applications to those made during the most recent period during which all state legislatures have had a reasonable opportunity to consider the question. Only applications filed during this period would accurately represent the results of the most recent poll that could reasonably be taken on the subject.

There are other advantages to limiting the life of an application to that period during which all other state legislatures have had a subsequent opportunity to consider similar action during a full regular session. Once applications for a convention are filed, attempts to withdraw them are not likely to be strenuously pressed. This is true even though the legislature may have changed its mind—or would no longer make such an application as a de novo proposition.[45] The requirement suggested here would cure this by forcing a reasonably frequent reconsideration of the desirability of such a convention in each state that had previously applied for one. Some assurance is thereby provided that such an extraordinary body will be convened only if applications from two-thirds of the states clearly demonstrate by the most recent, hence most reliable poll practicable, a present agreement on the subject.

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[42] ORFIELD, *op. cit. supra* note 8, at 42.

[43] 307 U.S. 433 (1939).

[44] If legislature A made such an application at the very start of its session, say in February 1962, its application would retain its validity until the end of the next full regular session of all the state legislatures. Since many states meet only every other year, and one of those might make such an application at the end of its session, for example, as late as June or July 1964, a period of two and a half years may elapse between the first and last applications that may be counted together.

[45] But note that in a good number of cases, states have attempted to rescind applications for an Article V Convention that they had previously tendered. 49 A.B.A.J. 1181–82 (1963).

The suggested requirement is neither unduly onerous, nor necessarily destructive of the "Application" process. States generally will not act alone in such matters. Indeed, the founding fathers probably contemplated some concert of action in such attempts to obtain a convention. The present effort is an excellent example. Furthermore, once a state legislature tenders such an application it can continually renew that application in its subsequent sessions. If there really is substantial agreement on the desirability of such a convention, debate on subsequent renewals of such applications should be relatively perfunctory, and the renewals easy to obtain.

The precise formulation that is offered for measuring the required contemporaneity of the applications may be fruitfully tested against the treatment of the same problem in the ratification process. The two situations seem closely analogous and probably would be treated similarly by Congress.[46]

In four of the last seven amendments that Congress proposed to the states it specified that the latter were to have up to seven years to effectively ratify them.[47] Congress has also deemed all of the twenty-four amendments to the Constitution properly ratified within a time period sufficiently short to demonstrate a contemporaneous agreement among the people in three-fourths of the states, despite the fact that one took as long as four years from the date of its submission and another three and a half years.[48]

So far, Congress has therefore rejected any test of contemporaneity as stringent as that suggested here. However, on the basis of its express action in four of the last seven amendments it submitted to the states, Congress may be inclined to consider seven years the absolute maximum period allowable to demonstrate a "current" agreement among the people in all sections of the country in respect to any question dealing with amendments to the Constitution. If this is so, proponents of the three "states' rights" amendments will have to secure the endorsement of their resolutions by the legislatures of two-thirds of the states within that period of time.

Congress could, of course, greatly reduce this period and quite reasonably choose to ignore any applications submitted prior to that most recent period during which all state legislatures had an opportunity to consider the question during a full regular session. But it seems rather unlikely that Congress would adopt a standard of contemporaneity in the "Application" process so much stricter than that which it has recently used in the ratification process.

IV

The next major issue likely to arise in the current effort to convene a constitutional convention is the right of states tendering such applications to withdraw them. *Coleman v. Miller*[49] held that "the efficacy of ratifications by state legislatures, in light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in Congress."[50] It is likely that the courts would treat the closely analogous question of the effect of a state's "withdrawal" of its application for an Article V convention in a similar way. If this is true, the judiciary will refuse independently to resolve the question, feeling itself conclusively bound by Congress' decision in the matter.

How should Congress handle this problem? It has been argued that under Article V only forward steps can be taken and therefore a state cannot effectively withdraw an application for a convention.[51] This view seems entirely erroneous and untenable. It would base the presence of a sufficient number of applications solely upon a mechanical process of addition and ignore the extent to which each application reflects the existence of the required contemporaneous

[46] It might be contended that applications for a convention need not be made contemporaneously to be effective because the calling of a convention empowered only to *propose* amendments is far less significant than ratification. But this notion should be rejected. All parts of the amending process are too important to demand anything less than the kind of contemporaneous agreement suggested here.

[47] U.S. CONST. amend. XXII; U.S. CONST. amend. XXI; U.S. CONST. amend. XX; U.S. CONST. amend. XVIII; see also Dillon v. Gloss, 256 U.S. 368 (1921).

[48] The Constitution of the United States of America 47–48, 54 (Corwin ed. 1952). The 16th Amendment was proposed July 12, 1909, and ratification was completed on February 3, 1913, while the 22d Amendment was proposed on March 24, 1947, and ratification was completed on February 27, 1951.

[49] 307 U.S. 433 (1939).

[50] *Id.* at 450 (1939).

[51] See Note, *Rescinding Memorialization Resolutions*, 30 CHI.-KENT. L. REV. 339 (1952).

agreement that an Article V convention is desired. Consequently, in determining whether two-thirds of the states have applied for a convention, applications which have been rescinded should be disregarded;[52] for they no longer evidence any present agreement that a convention should be called.

Any precedent that may exist for denying states the right to rescind their ratifications of interstate compacts[53] or constitutional amendments[54] is not apposite here. Ratification is the "final act by which sovereign bodies confirm a legal or political agreement arrived at by their agents."[55] Applications for a constitutional convention, however, are merely "formal requests" by state legislatures to Congress, requesting the latter to "call a Convention for proposing Amendments" because there is a present consensus that such action is desirable. Consequently, they do not share the same dignity or finality as ratifications which might justify the latter's irrevocable nature.[56]

V

Assuming that the resolutions in question are deemed to be valid Article V applications and are tendered to Congress by two-thirds of the states within a "reasonable" time of each other, is Congress under a duty to call a constitutional convention? Or, does it have discretion to use its judgment as to whether such a convention is really desirable or necessary? The former conclusion seems most plausible.

Article V states: "On the Application of the Legislatures of two-thirds of the several States [Congress] *shall* call a Convention for proposing Amendments." From this language alone it would seem clear that Congress was to be under a firm and nondiscretionary obligation to call a Convention when sufficient applications from two-thirds of the states are tendered. The word "shall" as used in Article V is clearly mandatory.

More, however, is available than the bare language itself to support this conclusion. The debates of the Constitutional Convention indicate that in providing for the proposal of amendments by convention the founding fathers intended to furnish a method by which the Constitution could be altered even though Congress was opposed.[57] Further support for the mandatory and nondiscretionary nature of Congress' duty to call a convention when the prerequisites are met can be found in the *Federalist Papers*. In paper No. 85 Hamilton insisted:

"By the fifth article of the plan, the Congress will be obligated 'on application of the legislatures of two thirds of the states . . . to call a Convention for proposing amendments . . .' The words of this article are preemptory. The Congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body."[58] It therefore seems clear that if Congress receives applications for an

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[52] Fensterwald, *Constitutional Law: The States and the Amending Process—a Reply*, 46 A.B.A.J. 717, 719 (1960); Grinnel, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?* 45 A.B.A.J. 1165 (1959); Note, *Proposing Amendments to the United States Constitution by Amendment*, 70 HARV. L. REV. 1067, 1071 (1957). *Contra*, Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161 (1959).

[53] See *West Virginia* v. *Sims*, 341 U.S. 22 (1950).

[54] There is precedent for Congressional refusal to permit a state to withdraw its ratification. Congress did so during Reconstruction when several states attempted to withdraw their ratification of the post-Civil War amendments. The decision of Congress in that case seems clearly wrong. Its action may be attributed to the unusual temper of the times. See Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 624–26 (1953); Grinnel, *supra* note 52, at 1165.

[55] Fensterwald, *supra* note 52, at 719.

[56] The common sense of Article V, however, would seem to be that ratification can also be effectively rescinded anytime before three-fourths of the states lend their assent to the proposed amendment. *But see* note 54 *supra*.

[57] When final debate on Article V began in the Constitutional Convention the draft being considered provided that "the Congress, whenever two-thirds of both Houses shall deem necessary, or on the applications of two-thirds of the Legislatures of the several States shall propose amendments to this Constitution . . ." 2 FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTION 629 (1911).

"Col. Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendment is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the national government should become oppressive . . ." 2 FARRAND, *op. cit. supra*, at 629. As a result, Mr. Gouverneur Morris and Mr. Gerry moved to amend the article to require a convention or application of two-thirds of the states. 2 FARRAND, *op. cit. supra*, at 629. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a call (sic) a convention on the like application." 2 FARRAND, *op. cit. supra*, at 629–30.

[58] THE FEDERALIST No. 85, at 546 (Wright ed 1961) (Hamilton).

Articles V convention, from two-thirds of the state legislatures within a "reasonable time period," it is absolutely bound to convene such a body.[59]

However, it should be relatively clear that the courts would never attempt to force Congress to call such a convention [60] since the latter's decision as to whether many of the prerequisites to such a call have been met will probably be conclusively binding on the former. For example, prior discussion demonstrates that the intrinsic adequacy as applications for an Article V convention of any resolutions tendered to Congress, their timeliness, and their continuing validity in light of attempts to withdraw them, are all likely to be considered by the judiciary as nonjusticable political questions. If this is so, Congress' decision on these matters will conclusively bind the courts, and necessarily disable the latter from playing any positive role in forcing a convention call.

It should also be noted that the courts have never issued an injunction or writ of mandamus directly against the President or Congress because of the doctrine of separation of powers embodied in our National Constitution, and the consequent obligation of respect owed co-equal branches of the National Government by the federal judiciary.[61] To do so here would reflect a "lack of respect" for the actions of a coordinate branch of the Federal Government in regard to a subject that may even textually be exclusively committed to its judgment by the Constitution.[62] Therefore, aside from the very practical inability of the courts adequately to enforce any decree directing Congress to call such a convention, [63] sound reasons and well-established precedent dictate the correctness of the assumption that it lacks the authority to do so.

Recent cases holding that the courts can force the states to reapportion their legislatures conformably to equal protection,[64] or that the courts can force state legislatures to draw congressional districts so that they are as nearly equal in population as practicable [65] are inapposite here. The reason for this is that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and *not* the federal judiciary's relationship to the States which gives rise to the 'political question.'" [66] That is, "the nonjusticability of a political question is primarily a function of the separation of powers." [67] Judicial review on the merits of state legislative apportionment or the drawing of congressional districts by the states only involves federal judicial superintendence of *state* action or inaction; but judicial review of Congress' failure to call an Article V convention directly involves the federal courts in an effort to force its co-equal branch of government to perform a duty exclusively entrusted to it by the Constitution.

VI

What is the President's role in the calling of an Article V convention? Does the call for a convention, like any ordinary piece of legislation, require his signature or a two-thirds vote of Congress for it to be valid?

The previously discussed case of *Hollingsworth* v. *Virginia* [68] would seem to indicate that the need for Presidential concurrence in any convention call is justifiable, but that his signature is never required for the valid issuance of such a call. Consequently, the President's failure to join in the Congressional summons of such a convention would in no way impair the validity of any amendment

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[59] See 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 331 (2d ed. 1929); Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI.-KENT L. REV. 128, 133-34 (1952); Note, 70 HARV. L. REV. 1067 (1957). *Contra*, Platz, *Article V of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 44 (1934).

[60] See 1 WILLOUGHBY, *op. cit. supra* note 59, § 331; Fensterwald, *supra* note 52, at 720. *Contra*, Packard, *supra* note 52, at 196.

[61] In *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1866), the Supreme Court unanimously held that the President himself is not accountable to any court save that of impeachment either for the nonperformance of his constitutional duties or for the exceeding of his constitutional powers.

"The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi* v. *Johnson*, *supra* at 500.

[62] *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

[63] How could the courts force Congress to call a convention when all the details of such a body seem to be left to thhe unreviewable discretion of Congress? Would a court call one itself if Congress failed to follow a court decree directing it to do so?

[64] *Baker* v. *Carr*, 369 U.S. 186 (1962).

[65] *Westberry* v. *Sanders*, 84 S. Ct. 526 (1964).

[66] *Baker* v. *Carr*, *supra* note 64, at 210. (Emphasis added.)

[67] *Id.* at 210.

[68] 3 U.S. (3 Dall.) 378 (1798).

the latter body proposed. The language of Article V directly supports this conclusion since it asserts that "*the Congress*" is to call a "Convention for proposing Amendments" on the Application of the legislatures of two-thirds of the several states."

However, a contrary argument of substantial weight has been made.[69] Article I, Section 7 of the Constitution provides that—" . . . *every* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a Bill."

Hollingsworth v. *Virginia* carved an exception to this rule as far as Congress' proposal of Constitutional Amendments was concerned. But it can be argued that this mode of proposing constitutional amendments was taken out of the veto process by the Supreme Court in that case solely because "the congressional proposal must be by two-thirds in each house [and] it (therefore) may have been thought that the requirement for overriding the veto was already met."[70] This ground would not exist if Congress called a constitutional convention to propose amendments by a simple majority vote.

As a result, it can be argued that the commands of Article I, Section 7, apply to the convention call since it is an "Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives [are] . . . necessary." If this is true, the President must sign any call by Congress for a constitutional convention and if he vetoes it, Congress can override him only by a two-thirds vote of both Houses.

Further support for this point of view can be gleaned from the fact—to be shortly noted—that Congress can specify how the convention is to be chosen, its organization, rules, etc. This being so, Congress must necessarily make more than a mere call for a convention. Such a call would be meaningless without the inclusion of the specific terms upon which such a body is to be constituted, organized, and conducted. These terms to be spelled out by Congress would appear similar to the general kinds of legislation with which Congress normally deals. Consequently, no reason or logic dictates its different treatment in respect to the need for Presidential approval.

This conclusion is bolstered by the desirability of such a requirement. The President is the only official who is elected by and responsible to the American people as a whole. His concurrence in the summoning of such a convention that would intimately affect the concerns of all individual Americans, and our Nation as a whole, therefore seems most logical and desirable.

The President's duty in such a case would be the same as that of Congress; to participate in such a call only if, in good conscience, he deems the requisites for such a convention to have been properly met. If Article V demands Presidential concurrence in such a call, the refusal of the chief executive to act, like that of Congress, would probably be conclusive on the courts[71] subject however to the right of Congress to override his judgment by a two-thirds vote. However, it should be reiterated that the need for Presidential concurrence in any congressional convention call might well be decided otherwise on the basis of Article V's specific language directing "*The Congress*" to call a convention, and the analogous case of *Hollingsworth* v. *Virginia*.[72]

VII

If Congress does call an Article V convention pursuant to the resolutions in question here, on what terms may it do so? How would such a convention be constituted, how would it operate, and what would be the scope of its authority? The terms of Article V give us little help. Indeed, Madison worried about these questions at the Convention of 1789. "He saw no objection . . . against providing for a convention for the purpose of proposing amendments, except only that difficulties might arise as to the form, the quorum, etc."[73]

Since Article V empowers "*Congress*" to call the "Convention" when the requisites for the summoning of such a body are met, and Article V does not indicate

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[69] See Black, *supra* note 8, at 965.
[70] *Id.* at 965.
[71] See note 61 *supra* and the text accompanying that note.
[72] 3 U.S. (3 Dall.) 378 (1798).
[73] 2 FARRAND, *supra* note 57, at 630.

the terms upon which such a convention is to be constituted, organized, or operated. Congress must be authorized to decide such questions. Under its power to call a convention, Congress therefore has implied authority to fix the time and place of meeting, the number of delegates, the manner and date of their election, whether representation shall be by states or by population, whether voting shall be by number of delegates or by states, and the vote in convention required to validly propose an amendment to the states.[74]

If the broad dictum of *Coleman v. Miller*[75] is any guide to present judicial conviction Congress' determination in the above matters may be conclusive on the courts for all purposes. Such a refusal by the courts to review on the merits the propriety of the organizational ground rules imposed by Congress on an Article V convention might be defensible on the assumption that in Article V there is a "textually demonstrable constitutional commitment of th[is] issue to a coordinate political department."[76] Even if the courts are conclusively bound for all purposes by the congressional specifications regarding the terms upon which such a convention must be constituted, organized and operated, Congress will still be bound in its action on these questions by the Constituntion and its judgment of the popular will. However, here as in most places in the amending process, the only available remedy for Congressional abuse may be political—resting with the electorate at the polls.

In calling an Article V convention Congress would not be justified in following by analogy the Constitutional Convention of 1787 where representation and voting were by states.[77] Nothing in the terms of Article V requires representation or voting in such a body to be on that basis. Furthermore, at the time of the 1787 Constitutional Convention the states—

". . . were in a position of at least nominal sovereignty, and were considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of a new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluble union; there is a whole American people. The question is an amending convention now would [only] be whether innovations, binding on dissenters, were to be offered for ratification."[78]

As a result, the propriety of a vote or representation by states in the 1787 Convention cannot settle the propriety of similar action in a convention today.

More appropriate than representation or voting by states in any Article V convention would be an apportionment of the delegates and voting power in such a body on the basis of population alone. Such an approach makes good sense not only because it would conduce to the most accurate expression of the national will, but also because regional interests are more than adequately weighted at the ratification stage where each state is given an equal voice. Congress should therefore, provide that delegates to any Article V convention be elected from districts of equal population, and that each delegate have one vote.

Congress should also provide that an affirmative vote of two-thirds of the delegates would be required to propose any given amendment to the states. In this way it would assure a symmetry of concurrence in the bodies empowered to propose constitutional amendments—whether the body was Congress or a convention. Such symmetry is desirable because it would assure the same kind of overwhelming consensus in one route to proposal as the other, thereby avoiding possible forum shopping. A two-thirds requirement in such a convention would also guarantee that no amendment, regardless of its means of proposal, is ever submitted to the states before an overwhelming consensus as to its desirability is evidenced in a nationally oriented body.

From all of the above, it would seem clear that "no Senator or Representative [or the President if his concurrence is required]is bound to vote for a convention call which in its form fails to safeguard what he believes to be vital national

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[74] See ORFIELD, *op. cit. supra* note 8, at 43–44; Black, *supra* note 8, at 959; Note, 70 HARV. L. REV. 1067, 1075–76 (1957). This continuing hand of Congress in the convention process need not appear unduly strange since Article V explicitly gives it the power to decide between modes of ratification regardless of the mode of proposing the amendment to the states.

[75] 307 U.S. 433 (1939).

[76] *Baker v. Carr*, 369 U.S. 186, 217 (1962). However, a good argument can be made to the contrary.

[77] FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 57 (1962).

[78] Black, *supra* note 8, at 964–65.

interests." [79] And as noted previously, their decision in this regard would seem to be unreviewable in the courts. That is, the sole remedy available to check an abuse of Congress' judgment in this matter may be at the polls.

A further question is raised by the current effort to propose amendments to the Constitution by convention. Can either the states or Congress limit the scope of such a convention's authority in any way? It should be recalled that the resolutions sponsored by the Council of State Governments avowedly attempt to restrict the convention to the approval or rejection of the precise amendments contained in those resolutions. Prior discussion has already demonstrated that an Article V convention is to be a fully deliberative body empowered to propose those solutions to a problem that it deems best. Consequently, such a convention cannot be limited by the state applications upon which it is predicated to the approval or rejection of the text of any particular amendments contained therein. By the same token, Congress may not limit such a convention to the approval or rejection of any particular amendments.[80]

While neither the states nor Congress may limit an Article V convention to the consideration of the terms of any particular provision, they should be able to restrict such a body to the proposal of amendments dealing with the same general subject matter as that contained in the applications upon which the convention is predicated. Indeed, of their own force, the state applications should limit any convention called by Congress to the proposal of amendments dealing with the same general subject matter as that requested in those applications. The reason for this is as follows:

An agreement is required among two-thirds of the state legislatures that a Convention ought to be held before Congress is empowered to convene such a body. No Article V convention may be called in absence of such a consensus. If the agreement is that a convention is desired only to deal with a certain subject matter, as opposed to constitutional revision generally, then the convention must logically be limited to that subject matter. To permit such a body to propose amendments on any other subject would be to recognize the convention's right to go beyond that consensus which is an absolute prerequisite for its creation and legitimate action.

If the prior conclusion is correct, and the state applications of their own force can bind any convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter requested in those applications, then Congress should disregard any amendment proposed by such a body which is outside of that subject matter. Here, as elsewhere, the courts will be bound by Congress' decision on the question if the issue is nonjusticiable. This, regardless of whether Congress deems a proposed amendment ineffective because it is beyond the scope of the convention's authority, or effective because it is within the scope of the convention's authority. On the other hand, if this question is justiciable, the courts may independently determine whether an amendment proposed by such a convention is beyond the general subject matter requested by the state applications. If such an amendment is outside that subject matter the courts might enjoin its ratification, or set the amendment aside afterwards because it was never properly proposed.

The notion that state applications can limit a convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter as that contained in those applications is not widely accepted. It has been insisted that "the nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition.[81] The Convention itself is a Federal instrumentality set up by Congress under powers granted to it by the Constitution. Since Article V directs *Congress* to call the convention, and is silent as to the details of such a body, Congress is the only authority entitled to specify those details. Consequently, if any power can limit such a convention to the proposal of amendments dealing with the same subject matter as that contained in the

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[79] *Id.* at 964.

[80] There is another reason why *Congress* cannot properly limit a convention to the approval or rejection of the text of any particular amendment. The framers of the Constitution probably intended the convention method of proposing amendments to be as free as possible from Congressional interference so that the "Convention" could propose any amendments it deemed desirable in spite of any Congressional objections to the provision. See note 57 *supra*.

[81] Wheeler, *supra* note 21, at 795.

state applications, it can only be Congress.[82] "State legislatures . . . have no authority to limit an instrumentality set up under the federal Constitution. . . . The right of the legislatures is confined to applying for a convention, and any statement of purposes in their petition would be irrelevant as to the scope of powers of the convention." [83]

If this is true, and the state applications cannot themselves bind a convention to a consideration of only the same subject matter requested in those applications, then Congress should be able to do so pursuant to its implied power to fix the terms upon which such a body shall operate.[84] A convention called pursuant to the resolutions in question here, for example, should not be permitted to propose amendments concerning the treaty power.[85] The reason for this is that the applications specifically request a convention for another purpose. A constitutional change should never be proposed by a convention unless two-thirds of the states have previously agreed that an amendment dealing with the particular subject matter involved is desirable, or that a convention was needed to consider a general constitutional revision. For this reason, it would seem anomalous were Congress powerless to limit the scope of a convention's authority to the general subject matter requested in the text of the applications upon which it is predicated. Certainly it would be under a duty to call a general convention if two-thirds of the state legislatures properly ask for one. Equally obvious should be its right and obligation to limit the scope of a convention to the same subject matter requested by the state applications.

Some authority for Congressional power in this respect can be gleaned from those state cases insisting that state constitutional conventions are subject to the restrictions contained in the call for the convention. The theory is that the legislatures call is a law and the delegates are elected under the terms of that law.[86] Consequently, they can exercise no powers beyond that conferred by such a statute or the Constitution itself.

Prior discussion should demonstrate that at least Congress can limit the scope of any Article V convention to the "subject matter" or "problem" at which the state applications were directed. Clearly, Congress is at least morally bound to do so. And in any subsequent litigation, the courts should respect such a limitation imposed by Congress and disregard any provisions proposed by a convention that were beyond the latter's authority as so limited. Of course, the notion that the state applications can themselves limit the scope of a convention's authority solely to a consideration of the same subject matter as that contained in those applications should not be ignored. However, if that theory is rejected, the people of the United States will have to rely on Congress to expressly limit any Article V convention it calls to the proposal of amendments dealing with the same subject matter as that contained in the state applications.

VIII

If the amendments sponsored by the Council of State Governments were proposed by a validly convened and constituted convention, the states would still need to ratify them. As previously noted, the terms of the three "states rights" amendments specify that they are to be ratified by the *legislatures* of three-fourths of the states. Even if these precise amendments could be validly proposed by a convention called pursuant to the resolutions in question here, Congress would not be bound in this respect. Article V clearly empowers *Congress* to determine in its sole discretion which of the two modes of ratifica-

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[82] STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2d Sess., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952).

[83] ORFIELD, *op. cit. supra* note 8, at 45.

[84] *Contra*, 46 Cong. Rec. 2769 (1911) (remarks of Senator Heyburn), ORFIELD, *op. cit. supra* note 8, at 45; Wheeler, *supra* note 21, at 796; Note, 70 HARV. L. REV. 1067, 1076 (1957).

[85] See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2d Sess., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952)); JAMESON, A TREATISE OF CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS AND MODES OF PROCEEDING 10, 11, 493 (4th ed. 1887).

[86] See *Wells* v. *Bain*, 75 Pa. 39, 51 (1874). But see *Goodrich* v. *Moore*, 2 Minn. 49, 53 (1858) (dictum). For debate on both sides of this question, see 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1872–73, 52–61 (1873).

tion specified in that provision shall be utilized:[57] this regardless of the method of the particular amendment's proposal. Consequently, that decision would still rest with Congress in the case at hand, and the courts would be bound in all respects by its choice in the matter. Congress could, therefore, choose to have any amendment proposed by such a convention "ratified by the Legislatures of three-fourths of the several states, or by Conventions in three-fourths thereof. . . ."

HOLLINGSWORTH *v.* VIRGINIA.

[3 U.S. (3 Dall.) 378 (1798)]

Suits against a state.—Constitutional law.

The 11th amendment to the constitution having deprived the supreme court of jurisdiction over suits against a state, by a citizen of another state, pending actions could be no further prosecuted.

An amendment to the constitution need not be presented to the president for his approval.

The decision of the court, in the case of *Chisholm* v. *Georgia* (2 Dall 419), produced a proposition in congress, for amending the constitution of the United States, according to the following terms:

"The judicial power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

The proposition being now adopted by the constitutional number of states, *Lee*, Attorney-General, submitted this question to the court—whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another state?

W. Tilghman and *Rawle* argued in the negative, contending, that the jurisdiction of the court was unimpaired, in relation to all suits instituted, previously to the adoption of the amendment. They premised, that it would be a great hardship, that persons legally suing, should be deprived of a right of action, or be condemned to the payment of costs,[1] by an amendment of the constitution, *ex post facto;* 4 Bac. Abr. 636–7, pl. 5. And that the jurisdiction being before regularly established, the amendment, notwithstanding the words "shall not be construed," &c., must be considered, in fact, as introductory of a new system of judicial authority. There are, however, two objections to be discussed.

*The amendment has not been proposed in the form prescribed by the constitution, and therefore, it is void. Upon an inspection of the [*379 original roll, it appears, that the amendment was never submitted to the president for his approbation. The constitution declare, that "every order, resolution or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, &c." Art. I. § 7. Now, the constitution likewise declares, that the concurrence of both houses shall be necessary to a proposition for amendments. Art. V. And it is no answer to the objection, to observe, that as two-thirds of both houses are required to originate the proposition, it would be nugatory to return it president for his approbation. The constitution declares, that " every order, with the president's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proportion. The concurrence of the president is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both houses of congress.

2d. The second objection arises from the terms of the amendment itself. The words, "commenced or prosecuted," are properly in the past time; but it is clear, that they ought not to be so grammatically restricted; for then a citizen

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[57] *U.S. v. Sprague*, 282 U.S. 716 (1931).

[1] See *Walker* v. *Smith*, 1 W.C.C. 202.

need only discontinue his present suit, and commence another, in order to give the court cognisance of the cause. To avoid this evident absurdity, the words must be construed to apply only to suits to be "commenced and prosecuted." The spirit of the constitution is opposed to everything in the nature of an *ex post facto* law, or retrospective regulation. No *ex post facto* law can be passed by congress. Const. Art. I. § 9. No *ex post facto* law can be passed by the legislature of any individual state. Ibid. § 10. It is true, that an amendment to the constitution cannot be controlled by those provisions; and if the words were explicit and positive, to produce the retrospective effect contended for, they must prevail. But the words are doubtful; and therefore, they ought to be so con-
*380] strued as to conform to the general principle of the constitution. (*a*) In *4 Bac. Abr. 650, pl. 64, it is stated, that "a statute shall never have an equitable construction, in order to overthrow an estate;" but if the opposite doctrine prevails, it is obvious, that many vested rights will be affected, many estates will be overthrown. For instance, Georgia has made and unmade grants of land, and to compel a resort to her courts, is, in effect, overthrowing the estate of the grantees. So, in the same book (p. 652, pl. 91, 92), it is said, that "a statute ought to be so construed, that no man, who is innocent, be punished or endamaged;" and "no statute shall be construed in such manner, as to be inconvenient or against reason:" whereas, the proposed construction of the amendment would be highly injurious to innocent persons; and driving them from the jurisdiction of this court, saddled with costs, is against every principle of justice, reason and convenience. Presuming, then, that there will be a disposition to support any rational exposition, which avoids such mischievous consequences, it is to be observed, that the words "commenced and prosecuted" are synonymous. There was no necessity for using the word "commenced," as it is implied and included in the word "prosecuted;" and admitting this glossary, the amendment will only affect the future jurisdiction of the court. It may be said, however, that the word "commenced" is used in relation to future suits, and that the word "prosecuted" is applied to suits previously instituted. But it will be sufficient to answer in favor of the benign construction for which the plaintiffs contend, that the word "commenced" may, on this ground, be confined to actions originally instituted here, and the word "prosecuted" to suits brought hither by writ of error or appeal. For it is to be shown, that a state may be sued originally, and yet not in the supreme court, though the supreme court will have an appellate jurisdiction; as, where laws of the state authorize such suits in her own courts, and there is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity. (1 U.S. Stat. 80, § 13; Id 85, § 25.) Upon the whole, the words of the amendment are ambiguous and obscure; but as they are susceptible of an interpretation, which will prevent the mischief of an *ex post facto* construction (worse than an *ex post facto* law, inasmuch as it is not so easily rescinded or repealed), that interpretation ought to be preferred.

(*a*) CHASE, Justice.—The words "commenced and prosecuted," standing alone, would embrace cases both past and future.

W. Tilghman.—But if the court can construe them, so as to confine their operation to future cases, they will do it, in order to avoid the effect of an *ex post facto law*, which is evidently contrary to the spirit of the constitution.

Lee. Attorney-General.—The case before the court is that of a suit against a state, in which the defendant has never entered an appearance; but the amendment is equally operative in all the cases against states, where there has been an appearance, or even where there have been a trial and judgment.

An amendment *of the constitution, and the repeal of a law, are not, [*381
manifestly, on the same footing; nor can explanatory law be expounded by foreign matter. The amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found or exercised elsewhere. The policy and rules which, in relation to ordinary acts of legislation, declare that no *ex post facto* law shall be passed, do not apply to the formation or amendment of a constitution. The people limit and restrain the power of the legislature, acting under a delegated authority; but they impose no restrain on themselves. They could have said, by an amendment to the constitution, that no judicial authority should be exercised, in any case, under the United States; and if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting

the amendment? On general grounds, then, it was in the power of the people, to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States? Two objections are made: 1st. That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments that have been adopted?*(a)* And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the president with a qualified negative on the acts and resolutions of congress. 2d. That the amendment itself only applies to future suits. But whatever force there may be in the rules for construing statutes, they cannot be applied to the present case. It was the policy of the people, to cut off that branch of the judicial power, which had been supposed to authorize suits by individuals against states; and the words being so extended as to support that policy, will equally apply to the past and to the future. A law, however, cannot be denominated retrospective, or *ex post facto*, which merely changes the remedy, but does not affect the right; in all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments. The amendment is paramount to all the laws of the Union; and if any part of the judicial act is in opposition to it, that part must be ex-
*382] punged. There can be no amendment of the constitution, indeed, which may not, in some respect, be called *ex post facto;* but the moment it is adopted the power that it gives, or takes away, begins to operate, or ceases to exist.

THE COURT, on the day succeeding the argument, delivered a unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state.

(a) CHASE, Justice.—There can, surely be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the propostion or adoption of amendments to the constitution.

HAWKE v. SMITH, SECRETARY OF STATE OF OHIO. (No. 1.)

[253 U.S. 221 (1920)]

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

No. 582. Argued April 23, 1920—Decided June 1, 1920

Under the Constitution, Art. V, a proposed amendment can be ratified by two methods only—by the legislatures of three-fourths of the States or by conventions in three-fourths of the States, the choice of method being left to Congress. P. 226.

The term "legislatures" as used here and elsewhere in the Constitution, means the deliberative, representative bodies that make the laws for the people of the respective States; the Constitution makes no provision for action upon such proposals by the people directly. P. 227.

The function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing such amendments, is a federal function, derived not from the people of that State but from the Constitution, P. 230.

The ratification of a proposed amendment to the Federal Constitution by the legislature of a State is not an act of legislation, in the proper sense of the word; it is but the expression of the assent of the State to the proposed amendment. P. 229. *Davis* v. *Hildebrant*, 241 U.S. 565, distinguished.

The action of the General Assembly of Ohio ratifying the proposed Eighteenth Amendment cannot be referred to the electors of the State, the provisions of the state constitution requiring such a referendum being inconsistent with the Constitution of the United States. P. 231.

100 Ohio St. 385, reversed.

The case is stated in the opinion.

Mr. J. Frank Hanly, with whom *Mr. George S. Hawke, Mr. Arthur Hellen, Mr. Charles B. Smith, Mr. James Bingham* and *Mr. Remster A. Bingham* were on the brief, for plaintiff in error.

Mr. Lawrence Maxwell, with whom *Mr. John G. Price*, Attorney General of the State of Ohio, *Mr. Judson Harmon* and *Mr. B. W. Gearhcart* were on the brief, for defendant in error:

The Constitution of the United States does not require that the States shall have any particular form of legislature. The people of the States have the power to abolish their general assemblies and to take into their own hands all matters of legislation. They have the power to provide that no legislation shall be enacted by the general assembly without being first submitted to the people for approval. And they have the power to do, as they have in fact done, in all referendum States, namely, to provide that all, or any particular class, of legislative acts shall stand suspended for a specified time after adjournment of the general assembly, and if, during that time a referendum is duly ordered, that the legislation shall remain suspended and inoperative until the next general election and take effect or not according to the result of the popular vote thereon. They may also provide, as has been done in two of the States, that no legislature or convention shall act upon any proposed amendment to the Constitution of the United States, except a legislature or convention elected after such amendment is submitted. Constitution, Tennessee, 1870, Art II, § 32; Florida, 1885, Art. XVI, § 19.

The Federal Constitution confers no power upon the state legislature. It gets all of its power from the people of the State. Such authority as the legislatures have to ratify amendments to the Federal Constitution is not mandatory but permissive. Congress merely proposes amendments and it is provided that if they shall be ratified by the "legislatures" of a sufficient number of the States, they become part of the Federal Constitution. Such amendments are submitted to the legislative or lawmaking power of each State whatever its form or constitution, as distinguished from its executive or judicial power. If a State should abolish its general assembly and resort to direct legislation in all instances, it would thereby, according to the opposing argument, deprive itself of the power to act upon proposed constitutional amendments. If more than one-fourth of the States should adopt that policy there would not then remain three-fourths of the several States capable of ratifying a federal amendment.

But if we assume, for the sake of discussion, that the general assembly of the State must have the final word in ratifying amendments to the Federal Constitution in cases where the State ratifies, it must be admitted that it speaks, not for itself, but for the people of the State, and it follows that the people, in their state constitutions, may provide that the action of the general assembly shall be conditional upon popular rejection or approval at the polls.

In such a case the action of the general assembly, if approved by referendum, is a ratification by the "legislature." If rejected, there is no ratification by the legislature of that State. No expressed prohibition of such a form of state government is found in the Federal Constitution and none should be inferred. Citing: *Davis* v. *Hildebrant*, 94 Ohio St. 154; aff'd 241 U.S. 565; *Hawke* v. *Smith*, 100 Ohio St. 385; *State* v. *Howell*, 107 Washington, 167.

Mr. Wayne B. Wheeler and *Mr. James A. White*, by leave of court, filed a brief as *amici curiae*.

MR. JUSTICE DAY delivered the opinion of the court.

Plaintiff in error (plaintiff below) filed a petition for an injunction in the Court of Common Pleas of Franklin County, Ohio, seeking to enjoin the Secretary of State of Ohio from spending the public money in preparing and printing forms of ballot for submission of a referendum to the electors of that State on the question of the ratification which the General Asssembly had made of the proposed Eighteenth Amendment to the Federal Constitution. A demurer to the petition was sustained in the Court of Common Pleas. Its judgment was affirmed by the Court of Appeals of Franklin County, which judgment was affirmed by the Supreme Court of Ohio, and the case was brought here.

A joint resolution proposing to the States this Amendment to the Constitution of the United States was adopted on the third day of December, 1917. The Amendment prohibits the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes. The several States were given concurrent power to enforce the Amendment by appropriate legislation. The resolution provided that the Amendment should be inoperative unless ratified as an Amendment of the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States. The Senate and House of Representatives of the State of Ohio adopted a resolution ratifying the pro-

posed Amendment by the General Assembly of the State of Ohio, and ordered that certified copies of the joint resolution of ratification be forwarded by the Governor to the Secretary of State at Washington and to the presiding officer of each house of Congress. This resolution was adopted on January 7, 1919; on January 27, 1919, the Governor of Ohio complied with the resolution. On January 29, 1919, the Secretary of State of the United States proclaimed the ratification of the Amendment, naming thirty-six States as having ratified the same, among them the State of Ohio.

The question for our consideration is: Whether the provision of the Ohio constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the General Assembly of proposed amendments to the Federal Constitution is in conflict with Article V of the Constitution of the United States. The Amendment of 1918 provides: "The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States." Article V of the Federal Constitution provides: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall proposed amendments to this Constitution or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 402. The States surrendered to the general government the powers specifically conferred upon the Nation, and the Constitution and the laws of the United States are the supreme law of the land.

The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.

This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge* v. *Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? That was not a term of uncertain meaning when incorporated into the Constitution. What is meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article I, § 2, prescribes the qualifications of electors of Congressmen as those "requisite for electors of the most numerous branch of the state legislature." Article I, § 3, provided that senators shall be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment

which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every State against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By Article I, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be. Article IV, § 3, provides that no new States shall be carved out of old States without the consent of the legislatures of the States concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article I, § 2.

The constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a General Assembly consisting of a Senate and House of Representatives. Article II, § 1, provides:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people shall reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollingsworth* v. *Virginia*, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with Article I, § 7, of the Constitution. The Attorney General answered that the case of the amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the Attorney General, Justice Chase said: "There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution." The court by a unanimous judgment held that the amendment was constitutionally adopted.

It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

This view of the provision for amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 *et seq.* Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States.

But it is said this view runs counter to the decision of this court in *Davis* v. *Hildebrant*, 241 U.S. 565. But that case is inapposite. It dealt with Article I, § 4, of the Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each State shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

It follows that the court erred in holding that the State had authority to require the submission of the ratification to a referendum under the state constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

LESER ET AL *v.* GARNETT ET AL

[258 U.S. 130 (1922)]

ERROR AND CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

No. 553. Argued January 23, 24, 1922.—Decided February 27, 1922

1. A suit by qualified voters of Maryland to require the Maryland Board of Registry to strike the names of women from the register of voters upon the grounds that the state constitution limits the suffrage to men and that the Nineteenth Amendment to the Federal Constitution was not validly adopted, is maintainable under the Maryland law and raises the question whether the Nineteenth Amendment has become a part of the Constitution. P. 136.
2. The objection that a great addition to the electorate, made without a State's consent, destroys its political autonomy and therefore exceeds the amending power, applies no more to the Nineteenth Amendment than to the Fifteenth Amendment, which is valid beyond question. P. 136.
3. The Fifteenth Amendment does not owe its validity to adoption as a war measure and acquiescence. P. 136.
4. The function of a state legislature in passing on a proposed amendment to the Federal Constitution, is federal, and not subject to limitation by the people of the State. P. 137. *Hawke* v. *Smith*, 253 U.S. 221, 231.
5. Official notice from a state legislature to the Secretary of State, duly authenticated, of its adoption of a proposed amendment to the Federal Constitution, is conclusive upon him, and, when certified to by his proclamation, is conclusive upon the courts. P. 137. *Field* v. *Clark*, 143 U.S. 649, 672, 673.

139 Md. 46, affirmed.

CERTIORARI to a decree of the court below affirming a decision of the state trial court dismissing a petition by which the plaintiffs in error sought to require the members of the Maryland Board of Registry to strike the names of specified woman voters from the registration list.

Mr. Thomas F. Cadwalader and *Mr. William L. Marbury*, with whom *Mr. George Arnold Frick* was on the briefs, for plaintiffs in error and petitioners.

The only power to amend the Constitution is contained in Article V, and is a delegated power. *Hawke* v. *Smith*, 253 U.S. 221, 227; *Dodge* v. *Woolsey*, 18 How. 348. It is a power to "amend," granted in general terms.

In a series of decisions rendered soon after the Civil War, this court established the doctrine propounded by Mr. Lincoln in his first inaugural address, that the Union was intended to be a perpetual Union,—"an indestructible Union of indestructible States,"—and that no power was conferred upon any of the agencies of government provided for in the instrument to defeat that intention,—that "great and leading intent" of the people, *Ex parte Yerger*, 8 Wall.

85, 101,—by destroying any of the States, by taking away in whole or in part any one of the "functions essential to their separate and independent existence" as States. *Lane County* v. *Oregon*, 7 Wall. 71; *Texas* v. *White*, 7 Wall. 700, 724–725. Obviously Article V must be so construed as not to defeat the main purpose of the Constitution itself.

A "State" within the meaning of the Constitution is not merely a piece of territory, or a mere collection of people. It is, as this court has said, "a political community." Who constitute the State in that sense? Clearly the people who exercise the political power. That is to say, the electorate and those whom the electors of a State choose to clothe with the governmental power of the State. When an amendment is adopted, therefore, which changes the electorate, the original State is destroyed and a new State created.

Questions of power do not depend upon degree. *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Keller* v. *United States*, 213 U.S. 138, 148.

The power to amend is granted in no broader language than that in which the taxing power is granted in § 8, Art. I. Yet this court held, in *Collector* v. *Day*, 11 Wall. 113, that it would not construe that language, broad as it was, as sufficient to authorize Congress to levy a tax upon the salary of a state judge, for the same reason we urge here. If the power to maintain a judiciary whose salaries shall be exempt from taxation by Congress be one of the "functions essential to the existence" of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It is argued that there is no provision in the Constitution forbidding the submission or the ratification of such an amendment. But even so, as said in *Collector* v. *Day*, exemption from such an amendment "rests upon necessary implication, and is upheld by the great law of self-preservation."

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that that power was intended to be unlimited in other respects. It might be a sufficient answer to that contention to say that the maxim *expressio unius exclusio alterius*, while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the courts would certainly look to the consequences which might follow such an interpretation. *Slaughter-House Cases*, 16 Wall. 36, 78. But perhaps a more conclusive answer will be found in the fact that the same argument was rejected as applied to the taxing clause. *Collector* v. *Day*, *supra*; *Evans* v. *Gore*, 253 U.S. 245.

The decision of this court in the *National Prohibition Cases*, 253 U.S. 350, constitutes no precedent for holding valid the Nineteenth Amendment. The Eighteenth Amendment did not attack or interfere with the government of the State—"the structure of the state government"—or deprive it of any function "essential to its separate and independent existence."

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it may be deprived of its equal suffrage in the Senate; and, second, that it may not by any amendment be deprived of its power to give or refuse its consent.

It is easy to see that, if any inteference with the electorate of a State be permitted, its power to refuse its consent to any amendment which may hereafter be proposed, including an amendment reducing the number of its Senators, may be taken away.

The consent of the State cannot be given or refused except by the will expressed either directly or indirectly of the State's own voters. Therefore it follows necessarily that the right of the State's own electorate to vote is a right reserved and withheld from the scope and operation of the amending power altogether. Hamilton, The Federalist, No. 59, pp. 238, 239.

The various cases decided by this court since the Civil War, including *Myers* v. *Anderson*, 238 U.S. 368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the States—has been, in fact, consented to, however reluctantly, by each and all of them,—is valid, and must be accepted by this court as being valid when the question of its validity was arised for the

first time, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

While it may be true that no formal treaty of peace was entered into by the Government of the United States and the Confederate States, or any of them, the substance of a treaty was enacted in the Thirteenth, Fourteenth and Fifteenth Amendments. *Slaughter-House Cases*, 16 Wall. 36, 67, 71.

It may be true that this involves the contention that the effect of war and the necessity of taking measures to prevent the recurrence of war expands the amending power, but it is submitted that there is nothing unreasonable in that contention. The same effect would undoubtedly be produced by the same causes upon the treaty-making power.

If, after the expiration of a period of forty-five years, the validity of a treaty, by which this country made the best terms it could to end a disastrous war, were called in question as the validity of the Fifteenth Amendment was called in question for the first time in *Myers* v. *Anderson*, would not this court deal with the objections to its validity in the same way in which it dealt with the objections urged against the validity of the Fifteenth Amendment in that case, viz: ignore them altogether and decide all other questions raised with the tacit assumption that the treaty was valid?

After the Fifteenth Amendment had been proclaimed, the States which had refused ratification, and their people, evidenced their consent and acquiescence in the clearest possible way, by not only refraining from challenging its validity for forty-five years, but in passing laws either for the enforcement of the amendment or in recognition of its validity.

The Nineteenth Amendment has never been legally ratified by the requisite number of States. Tennessee and West Virginia, both of which must be counted to make the requisite three-fourths, in fact refused to ratify the Amendment. The votes upon which the certifications were based were illegal under the local law. The proceedings are subject to judicial injury under that law, and by this court.

The legislatures of five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, were, by the provisions of their respective state constitutions, expressly forbidden to adopt amendments of the character of the Nineteenth, and were therefore incompetent to ratify that amendment.

Mr. Alexander Armstrong, Attorney General of the State of Maryland, with whom *Mr. Lindsay C. Spencer* was on the briefs, for defendants in error and respondents.

Mr. George M. Brady, with whom *Mr. Roger Howell* and *Mr. Jacob M. Moses* were on the brief, for Caroline Roberts et al., defendants in error and respondents.

Mr. Solicitor General Beck, by leave of court, filed a brief as *amicus curiae* on behalf of the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On October 12, 1920, Cecilia Streett Waters and Mary D. Randolph, citizens of Maryland, applied for and were granted registration as qualified voters in Baltimore City. To have their names stricken from the list Oscar Leser and others brought this suit in the court of Common Pleas. The only ground of disqualification alleged was that the applicants for registration were women, whereas the constitution of Maryland limits the suffrage to men. Ratification of the proposed Amendment to the Federal Constitution, now known as the Nineteenth, 41 Stat. 362, had been proclaimed on August 26, 1920, 41 Stat. 1823, pursuant to Rev. Stats. § 205. The Legislature of Maryland had refused to ratify it. The petitioners contended, on several grounds, that the Amendment had not become part of the Federal Constitution. The trial court overruled the contentions and dismissed the petition. Its judgment was affirmed by the Court of Appeals of the State, 139 Md. 46; and the case comes here on writ of error. That writ must be dismissed; but the petition for a writ of certiorari, also duly filed, is granted. The laws of Maryland authorized such a suit by a qualified voter against the Board of Registry. Whether the Nineteenth Amendment has become part of the Federal Constitution is the question presented for decision.

The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extend to this Amendment, because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys is autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be

valid and the other invalid. That the Fifteenth is valid, although rejected by six States including Maryland, has been recognized and acted on for half a century. See *United States* v. *Reese*, 92 U.S. 214; *Neal* v. *Delaware*, 103 U.S. 370; *Guinn* v. *United States*, 238 U.S. 347; *Myers* v. *Anderson*, 238 U.S. 368. The suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained.

The second contention is that in the constitutions of several of the thirty-six States named in the proclamation of the Secretary of State there are provisions which render inoperative the alleged ratifications by their legislatures. The argument is that by reason of these specific provisions the legislatures were without power to ratify. But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State. *Hawke* v. *Smith, No. 1*, 253 U.S. 221; *Hawke* v. *Smith, No. 2*, 253 U.S. 231; *National Prohibition Cases*, 253 U.S. 350, 386.

The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective States. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other States—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field* v. *Clark*, 143 U.S. 649, 669–673, is applicable here. See also *Harwood* v. *Wentworth*, 162 U.S. 547, 562.

Affirmed.

DILLON *v.* GLOSS, DEPUTY COLLECTOR OF UNITED STATES INTERNAL REVENUE

[256 U.S. 368 (1921)]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 251. Argued March 22, 1921.—Decided May 16, 1921.

1. Article V of the Constitution implies that amendments submitted thereunder must be ratified, if at all, within some reasonable time after their proposal. Pp. 371, 374.
2. Under this Article, Congress, in proposing an amendment, may fix a reasonable time for ratification. P. 375.
3. The period of seven years, fixed by Congress in the resolution proposing the Eighteenth Amendment, was reasonable. P. 376.
4. The Eighteenth Amendment became a part of the Constitution on January 16, 1919, when, as the court notices judicially, its ratification in the state legislatures was consummated; not on January 29, 1919, when the ratification was proclaimed by the Secretary of State. P. 376.
5. As this Amendment, by its own terms, was to go into effect one year after being ratified, §§ 3 and 26, Title II, of the National Prohibition Act, which by § 21, Title III, were to be in force from and after the effective date of the Amendment, were in force on January 16, 1920. P. 376.

262 Fed. Rep. 563, affirmed.

THE case is stated in the opinion.

Mr. Levi Cooke, with whom *Mr. Theodore A. Bell* and *Mr. George R. Beneman* were on the brief, for appellant:

The Eighteenth Amendment is invalid because of the extra-constitutional provision of the third section. Congress has no power to limit the time of delibera-

tion or otherwise control what the legislatures of the States shall do in their deliberation. Any attempt to limit voids the proposal.

The legislative history of the Amendment shows that without § 3 the proposal would not have passed the Senate. Cong. Rec., 65th Cong., 1st sess., pp. 5648–5666; Cong. Rec., 65th Cong., 2d sess., p. 477.

The same taint attended the passage of the amendment in the House, because there what is now § 3 was considered and the limitation changed from six to seven years, and it is impossible to say now that without the attempted time limitation upon the States two-thirds of the House would have assented to the proposal of the amendment.

The fact that thirty-six States thus ratified within the time emphasizes the evil that was accomplished by the limitation, and can in no way be invoked to suggest that the third section became surplusage in view of this result attained so well within the seven-year limitation attempted to be set by Congress. On the contrary, the fact of there being a time limitation tended to destroy any deliberation by the States and to enable the faction which was pressing for ratification of the amendment to urge immediate indeliberate action in order to avoid the possibility of the time limitation expiring without thirty-six States having made ratification.

The history of the times discloses, if the court may take judicial notice thereof, that legislators elected prior to the submission by Congress were urged to act forthwith, without awaiting the election of legislators by an electorate aware of the pendency of the congressional proposal, and that in some legislatures ratification was secured without debate in the precipitate action urged by the faction advocating the amendment. The speed with which the amendment was disposed of by the state legislatures tends to establish the absence of deliberation; and in any view the fact stands that the States were acting in the presence of a limitation fixed by Congress, violative of Art. V, in terms unheard of in the history of the country, and contrary to any procedure sanctioned by the organic law, with the very nature and structure of which both the Congress and the state legislatures were dealing. See 2 Story, Const., 3d ed., § 1830.

The National Prohibition Act should be found to have become effective, if at all, January 29, 1920, a year after ratification of the amendment was proclaimed and made known to the public. The proclamation of the Secretary of State must be treated as the publication of the fact of ratification; under Rev. Stats., § 205, of which all persons may be considered to be charged with knowledge.

Mrs. Annette Abbott Adams, Assistant Attorney General, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an appeal from an order denying a petition for a writ of *habeas corpus*. 262 Fed. Rep. 563. The petitioner was in custody under § 26 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, on a charge of transporting intoxicating liquor in violation of § 3 of that title, and by his petition sought to be discharged on several grounds, all but two of which were abandoned after the decision in *National Prohibition Cases*, 253 U.S. 350. The remaining grounds are, first, that the Eighteenth Amendment to the Constitution, to enforce which Title II of the act was adopted, is invalid because the congressional resolution, 40 Stat. 1050, proposing the Amendment, declared that it should be inoperative unless ratified within seven years; and, secondly, that, in any event, the provisions of the act which the petitioner was charged with violating, and under which he was arrested, had not gone into effect at the time of the asserted violation nor at the time of the arrest.

The power to amend the Constitution and the mode of exerting it are dealt with in Article V, which reads:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What then is the reasonable inference or implication? Is it that

ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

The proposal for the Eighteenth Amendment is the first in which a definite period for ratification was fixed.[1] Theretofore twenty-one amendments had been proposed by Congress and seventeen of these had been ratified by the legislatures of three-fourths of the States—some within a single year after their proposal and all within four years. Each of the remaining four had been ratified in some of the States, but not in a sufficient number.[2] Eighty years after the partial ratification of one an effort was made to complete its ratification and the legislature of Ohio passed a joint resolution to that end,[3] after which the effort was abandoned. Two, after ratification in one less than the required number of States, had lain dormant for a century.[4] The other, proposed March 2, 1861, declared: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[5] Its principal purpose was to protect slavery and at the time of its proposal and partial ratification it was a subject of absorbing interest, but after the adoption of the Thirteenth Amendment it was generally forgotten. Whether an amendment proposed without fixing any time for ratification, and which after favorable action in less than the required number of States had lain dormant for many years, could be resurrected and its ratification completed had been mooted on several occasions, but was still an open question.

These were the circumstances in the light of which Congress in proposing the Eighteenth Amendment fixed seven years as the period for ratification. Whether this could be done was questioned at the time and debated at length, but the prevailing view in both houses was that some limitation was intended and that seven years was a reasonable period.[6]

That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed.[7] An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired,[8] it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any State, without its consent, of its equal suffrage in the Senate.[9] A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two-thirds of the States Congress shall call a convention for the purpose. When proposed in either mode amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the States, "as the one or the other mode of ratification may be proposed by the Congress." Thus the people of the United States, by whom the

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[1] Some consideration had been given to the subject before, but without any definite action. Cong. Globe, 39th Cong., 1st sess., 2771; 40th Cong., 3d sess., 912, 1040, 1309–1314.

[2] Watson on the Constitution, vol. 2, pp. 1676–1679; House Doc., 54th Cong., 2d sess., No. 353, pt. 2, p. 300.

[3] House Doc., 54th Cong., 2d sess., No. 353, pt. 2, p. 317 (No. 243); Ohio Senate Journal, 1873, pp. 590, 666–667, 678; Ohio House Journal, 1873, pp. 848, 849. A committee charged with the preliminary consideration of the joint resolution reported that they were divided in opinion on the question of the validity of a ratification after so great a lapse of time.

[4] House Doc., 54th Cong., 2d sess., No. 353, pt. 2, pp. 300, 320 (No. 295), 329 (No. 399).

[5] 12 Stat. 251; House Doc., 54th Cong., 2d sess., No. 353, pt. 2, pp. 195–197, 363 (No. 931), 369 (No. 1025).

[6] Cong. Rec., 65th Cong., 1st sess., pp. 5648–5651, 5652–5653, 5658–5661; 2d sess., pp. 423–425, 428, 436, 443, 444, 445–446, 463, 469, 477–478.

[7] *United States* v. *Babbit*, 1 Black, 55, 61; *Ex parte Yarbrough*, 110 U.S. 651, 658; *McHenry* v. *Alford*, 168 U.S. 651, 672; *South Carolina* v. *United States*, 199 U.S. 437, 451; *Luria* v. *United States*, 231 U.S. 9, 24; *The Pesaro*, 255 U.S. 216.

[8] Article V, as before shown, contained a provision that "No amendment which shall be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article." One of the clauses named covered the migration and importation of slaves and the other deals with direct taxes.

[9] When the federal convention adopted Article V a motion to include another restriction forbidding any amendment whereby a State, without its consent, would "be affected in its internal police" was decisively voted down. The vote was: yeas 3—Connecticut, New Jersey, Delaware; nays 8—New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia. Elliot's Debates, vol. 5, pp. 551, 552.

Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.[1]

We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson[2] "that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.

Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require;[3] and Article V is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified.

The provisions of the act which the petitioner was charged with violating and under which he was arrested (Title II, §§ 3, 26) were by the terms of the act (Title III, § 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter by its own terms was to go into effect one year after being ratified. Its ratification, of which we take judicial notice, was consummated January 16, 1919.[4] That the Secretary of State did not proclaim its ratification until January 29, 1919,[5] is not material, for the date of its consummation, and not that on which it is proclaimed, controls. It follows that the provisions of the act with which the petitioner is concerned went into effect

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[1] See *Martin* v. *Hunter's Lessee*, 1 Wheat, 304, 324–325; *McCulloch* v. *Maryland*, 4 Wheat, 316, 402–404; *Cohens* v. *Virginia*, 6 Wheat. 264, 413–414; *Dodge* v. *Woolsey*, 18 How. 331, 347–348; *Hawke* v. *Smith*, 253 U.S. 221; Story on the Constitution, 5th ed., §§ 362–363, 463–465.

[2] Jameson on Constitutional Conventions, 4th ed., § 585.

[3] *Martin* v. *Hunter's Lessee*, 1 Wheat, 304, 326; *McCulloch* v. *Maryland*, 4 Wheat, 316, 407.

[4] Sen. Doc. No. 169, 66th Cong., 2d sess.; Ark. Gen. Acts, 1919 p. 512; Ark. House Journal 1919 p. 10; Ark. Sen. Journal 1919, p. 16; Wyo. Sen. Journal, 1919, pp. 26–27; Wyo. House Journal 1919, pp. 27–28; Mo. Sen. Journal, 1919, pp. 17–18; Mo. House Journal, 1919, p. 40.

[5] 40 Stat. 1941.

January 16, 1920. His alleged offense and his arrest were on the following day; so his claim that those provisions had not gone into effect at the time is not well grounded.

Final order affirmed.

COLEMAN ET AL. v. MILLER, SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL

[307 U.S. 433 (1939)]

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 7. Argued October 10, 1938. Reargued April 17, 18, 1939.—Decided June 5, 1939.

1. Upon submission of a resolution for ratification of a proposed amendment to the Federal Constitution, known as the Child Labor Amendment, twenty of the forty senators of the State of Kansas voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution, and later it was adopted by the other house of the legislature on a vote of a majority of its members. The twenty senators who had voted against ratification, challenging the right of the Lieutenant Governor to cast the deciding vote in the Senate, and alleging that the proposed amendment had lost its vitality because of previous rejection by Kansas and other States and failure of ratification within a reasonable time, sought a writ of mandamus to compel the Secretary of the Senate to erase an endorsement on the resolution, to the effect that it had been adopted by the Senate, and to endorse thereon the words "was not passed," and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The State entered its appearance and the State Supreme Court entertained the action, sustained the right of the plaintiffs to maintain it, but overruled their contentions, upheld the ratification, and denied the writ. *Held:*

(1) The questions decided were federal questions, arising under Article V of the Constitution. P. 437.

(2) The complaining senators, whose votes against ratification have been overridden and virtually held for naught, although if they are right in their contentions their votes would have been sufficient to defeat ratification, have a plain, direct and adequate interest in maintaining the effectiveness of their votes. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. P. 438.

(3) This Court has jurisdiction to review the decision of the state court by certiorari, under Jud. Code § 237(b). P. 438.

2. The Court being equally divided in opinion as to whether the question presents a justiciable controversy, or is a political question, expresses no opinion upon a contention that the Lieutenant Governor of Kansas was not a part of the "legislature," and under Article V of the Federal Constitution could not be permitted a deciding vote on the ratification of the proposed amendment. P. 446.

3. In accordance with the precedent of the Fourteenth Amendment, the efficacy of ratification of a proposed amendment to the Federal Constitution by a state legislature which had previously rejected the proposal, is *held* a question for the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment. P. 447.

4. The legislature of Kansas having actually ratified the proposed Child Labor Amendment, this Court should not restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. There is found no basis in either Constitution or statute for such judicial action. P. 450.

5. R.S. § 205; 5 U.S.C. 160, presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. No warrant is seen for judicial interference with the performance of that duty. P. 450.

6. The Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality before being adopted by the requisite number of legislatures. P. 451.

7. In determining whether a question falls within the category of political, non-justiciable questions, the appropriateness under our system of government of attributing finality to the action of the political departments, and also the lack of satisfactory criteria for a judicial determination, are dominant considerations. P. 454. 146 Kan. 390; 71 P. 2d 518, reversed.

CERTIORARI, 303 U.S. 632, to review a judgment of the Supreme Court of Kansas denying a writ of mandamus, applied for in that court by senators of the State and members of its House of Representatives for the purpose of compelling the Secretary of the Senate to erase an endorsement purporting to show that a resolution for the ratification of a proposal to amend the Federal Constitution had passed the Senate, and to restrain the officers of the Senate and the other house of the legislature from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor.

Messrs. Robert Stone and *Rolla W. Coleman*, on the reargument and on the original argument, for petitioners.

Mr. Clarence V. Beck on the reargument, and with *Mr. E. R. Sloan* on the original argument, for respondents.

By special leave of court, *Solicitor General Jackson*, with whom *Mr. Paul A. Freund* was on the brief, argued the case on behalf of the United States, as *amicus curiae*, urging affirmance.

By leave of Court, *Messrs. Orland S. Loomis*, Attorney General of Wisconsin, *Mortimer Levitan* and *Newell S. Boardman*, Assistant Attorneys General, filed a brief on behalf of that State, as *amicus curiae*, urging affirmance.

Opinion of the Court by MR. CHIEF JUSTICE HUGHES, announced by MR. JUSTICE STONE.

In June, 1924, the Congress proposed an amendment to the Constitution, known as the Child Labor Amendment.[1] In January, 1925, the Legislature of Kansas adopted a resolution rejecting the proposed amendment and a certified copy of the resolution was sent to the Secretary of State of the United States. In January, 1937, a resolution known as "Senate Concurrent Resolution No. 3" was introduced in the Senate of Kansas ratifying the proposed amendment. There were forty senators. When the resolution came up for consideration, twenty senators voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution. The resolution was later adopted by the House of Representatives on the vote of a majority of its members.

This original proceeding in mandamus was then brought in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the House of Representatives, to compel the Secretary of the Senate to erase an endorsement on the resolution to the effect that it had been adopted by the Senate and to endorse thereon the words "was not passed," and to restrain the officers of the Senate and House of Representatives from signing the resolution and the Secretary of State of Kansas from authenticating it and delivering it to the Governor. The petition challenged the right of the Lieutenant Governor to cast the deciding vote in the Senate. The petition also set forth the prior rejection of the proposed amendment and alleged that in the period from June, 1924, to March, 1927, the amendment had been rejected by both houses of the legislatures of twenty-six States, and had been ratified in only five States, and that by reason of that rejection and the failure of ratification within a reasonable time the proposed amendment had lost its vitality.

An alternative writ was issued. Later the Senate passed a resolution directing the Attorney General to enter the appearance of the State and to represent the State as its interests might appear. Answers were filed on behalf of the defendants other than the State and plaintiffs made their reply.

The Supreme Court found no dispute as to the facts. The court entertained the action and held that the Lieutenant Governor was authorized to cast the deciding vote, that the proposed amendment retained its original vitality, and that the resolution "having duly passed the house of representatives and the senate, the act of ratification of the proposed amendment by the legislature of Kansas was

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[1] The text of the proposed amendment is as follows (43 Stat. 670):

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Sec. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

final and complete." The writ of mandamus was accordingly denied. 146 Kan. 390; 71 P. 2d 518. This Court granted certiorari. 303 U.S. 632.

First. The jurisdiction of this Court.—Our authority to issue the writ of certiorari is challenged upon the ground that petitioners have no standing to seek to have the judgment of the state court reviewed, and hence it is urged that the writ of certiorari should be dismissed. We are unable to accept that view.

The state court held that it had jurisdiction; that "the right of the parties to maintain the action is beyond question."[1] The state court thus determined in substance that members of the legislature had standing to seek, and the court had jurisdiction to grant, mandamus to compel a proper record of legislative action. Had the questions been solely state questions, the matter would have ended there. But the questions raised in the instant case arose under the Federal Constitution and these questions were entertained and decided by the state court. They arose under Article V of the Constitution which alone conferred the power to amend and determined the manner in which that power could be exercised. *Hawke* v. *Smith (No. 1)*, 253 U.S. 221, 227; *Leser* v. *Garnett*, 258 U.S. 130, 137. Whether any or all of the questions thus raised and decided are deemed to be justiciable or political, they are exclusively federal questions and not state questions.

We find the cases cited in support of the contention, that petitioners lack an adequate interest to invoke our jurisdiction to review, to be inapplicable.[2] Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege. As the validity of a state statute was not assailed, the remedy by appeal was not available (Jud. Code, § 237 (a); 28 U.S.C. 344 (a)) and the appropriate remedy was by writ of certiorari which we granted. Jud. Code, § 237 (b); 28 U.S.C. 344 (b).

The contention to the contrary is answered by our decisions in *Hawke* v. *Smith*, *supra*, and *Leser* v. *Garnett*, *supra*. In *Hawke* v. *Smith*, the plaintiff in error, suing as a "citizen and elector of the State of Ohio, and as a taxpayer and elector of the County of Hamilton," on behalf of himself and others similarly situated, filed a petition for an injunction in the state court to restrain the Secretary of State from spending the public money in preparing and printing ballots for submission of a referendum to the electors on the question of the ratification of the Eighteenth Amendment to the Federal Constitution. A demurrer to the petition was sustained in the lower court and its judgment was affirmed by the intermediate appellate court and the Supreme Court of the State. This Court entertained jurisdiction and, holding that the state court had erred in deciding that the State had authority to require the submission of the ratification to a referendum, reversed the judgment.

In *Leser* v. *Garnett*, qualified voters in the State of Maryland brought suit in the state court to have the names of certain women stricken from the list of qualified voters on the ground that the constitution of Maryland limited suffrage to men and that the Nineteenth Amendment to the Federal Constitution has not been validly ratified. The state court took jurisdiction and the Court of Appeals of the State affirmed the judgment dismissing the petition. We granted certiorari. On the question of our jurisdiction we said:

"The petitioners contended, on several grounds, that the Amendment had not become part of the Federal Constitution. The trial court overruled the conten-

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[1] The state court said on this point:

"At the threshold we are confronted with the question raised by the defendants as to the right of the plaintiffs to maintain this action. It appears that on March 30, 1937, the state senate adopted a resolution directing the attorney general to appear for the state of Kansas in this action. It further appears that on April 8, 1937, on application of the attorney general, an order was entered making the state of Kansas a party defendant. The state being a party to the proceedings, we think the right of the parties to maintain the action is beyond question. (G.S. 1935 75–702; *State, ex rel.* v. *Public Service Comn.*, 135 Kan. 491, 11 P. 2d 999.)"

[2] See *Caffrey* v. *Oklahoma Territory*, 177 U.S. 346; *Smith* v. *Indiana*, 191 U.S. 138; *Braxton County Court* v. *West Virginia*, 208 U.S. 192; *Marshall* v. *Dye*, 231 U.S. 250; *Stewart* v. *Kansas City*, 239 U.S. 14; *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U.S. 96.

tions and dismissed the petition. Its judgment was affirmed by the Court of Appeals of the State, 139 Md. 46; and the case comes here on writ of error. That writ must be dismissed; but the petition for a writ of certiorari, also duly filed, is granted. The laws of Maryland authorized such a suit by a qualified voter against the Board of Registry. Whether the Nineteenth Amendment has become part of the Federal Constitution is the question presented for decision."

And holding that the official notice to the Secretary of State, duly authenticated, of the action of the legislatures of the States, whose alleged ratifications were assailed, was conclusive upon the Secretary of State and that his proclamation accordingly of ratification was conclusive upon the courts, we affirmed the judgment of the state court.

That the question of our jurisdiction in *Leser* v. *Garnett* was decided upon deliberate consideration is sufficiently shown by the fact that there was a motion to dismiss the writ of error for the want of jurisdiction and opposition to the grant of certiorari. The decision is the more striking because on the same day, in an opinion immediately preceding which was prepared for the Court by the same Justice,[4] jurisdiction had been denied to a federal court (the Supreme Court of the District of Columbia) of a suit by citizens of the United States, taxpayers and members of a voluntary association organized to support the Constitution, in which it was sought to have the Nineteenth Amendment declared unconstitutional and to enjoin the Secretary of State from proclaiming its ratification and the Attorney General from taking steps to enforce it. *Fairchild* v. *Hughes*, 258 U.S. 126. The Court held that the plaintiffs' alleged interest in the question submitted was not such as to afford a basis for the proceeding; that the plaintiffs had only the right possessed by every citizen "to require that the Government be administered according to law and that the public moneys be not wasted" and that this general right did not entitle a private citizen to bring such a suit as the one in question in the federal courts.[5] It would be difficult to imagine a situation in which the adequacy of the petitioners' interest to invoke our appellate jurisdiction in *Leser* v. *Garnett* could have been more sharply presented.

The effort to distinguish that case on the ground that the plaintiffs were qualified voters in Maryland, and hence could complain of the admission to the registry of those alleged not to be qualified, is futile. The interest of the plaintiffs in *Leser* v. *Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case. This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution, and the twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being a part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution.

We are of the opinion that *Hawke* v. *Smith* and *Leser* v. *Garnett* are controlling authorities, but in view of the wide range the discussion has taken we may refer to some other instances in which the question of what constitutes a sufficient interest to enable one to invoke our appellate jurisdiction has been involved. The principle that the applicant must show a legal interest in the controversy has been maintained. It has been applied repeatedly in cases where municipal corporations have challenged state legislation affecting their alleged rights and obligations. Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.[6] But there has been recognition of the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties. Under the Urgent Deficiencies Act,[7] the Interstate Commerce Commission, and commissions representing interested States which have intervened, are entitled as "aggrieved parties" to an appeal to this Court from a decree setting aside an order of the Interstate Commerce Commission, though the United States refuses to join in the appeal. *Interstate Commerce Comm'n* v. *Oregon-*

[4] Mr. Justice Brandeis.
[5] *Id.*, pp. 129, 130. See, also, *Frothingham* v. *Mellon*, 262 U.S. 447, 480, 486, 487.
[6] *Pawhuska* v. *Pawhuska Oil Co.* 250 U.S. 394; *Trenton* v. *New Jersey*, 262 U.S. 182; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U.S. 378; *Williams* v. *Mayor*, 289 U.S. 36.
[7] Act of October 22, 1913, 38 Stat. 219; 28 U.S.C. 47, 47a, 345.

Washington R. & N. Co., 288 U.S. 14. So, this Court may grant certiorari, on the application of the Federal Trade Commission, to review decisions setting aside its orders.[8] *Federal Trade Comm'n* v. *Curtis Publishing Co.*, 260 U.S. 568. Analogous provisions authorize certiorari to review decisions against the National Labor Relations Board.[9] *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1. Under § 266 of the Judicial Code (28 U.S.C. 380), where an injunction is sought to restrain the enforcement of a statute of a State or an order of its administrative board or commission, upon the ground of invalidity under the Federal Constitution, the right of direct appeal to this Court from the decree of the required three judges is accorded whether the injunction be granted or denied. Hence, in case the injunction is granted, the state board is entitled to appeal. See, for example, *South Carolina Highway Dept.* v. *Barnwell Brothers*, 303 U.S. 177.

The question of our authority to grant certiorari, on the application of state officers, to review decisions of state courts declaring state statutes, which these officers seek to enforce, to be repugnant to the Federal Constitution, has been carefully considered and our jurisdiction in that class of cases has been sustained. The original Judiciary Act of 1789 provided in § 25[10] for the review by this Court of a judgment of a state court "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity"; that is, where the claim of federal right had been *denied*. By the Act of December 23, 1914,[11] it was provided that this Court may review on certiorari decisions of state courts *sustaining* a federal right. The present statute governing our jurisdiction on certiorari contains the corresponding provision that this Court may exercise that jurisdiction "as well where the federal claim is sustained as where it is denied." Jud. Code, § 237(b); 28 U.S.C. 344(b). The plain purpose was to provide an opportunity, deemed to be important and appropriate, for the review of the decisions of state courts on constitutional questions however the state court might decide them. Accordingly where the claim of a complainant that a state officer be restrained from enforcing a state statute because of constitutional invalidity is sustained by the state court, the statute enables the state officer to seek a reversal by this Court of that decision.

In *Blodgett* v. *Silberman*, 277 U.S. 1, 7, the Court granted certiorari on the application of the State Tax Commissioner of Connecticut who sought review of the decision of the Supreme Court of Errors of the State so far as it denied the right created by its statute to tax the transfer of certain securities, which had been placed for safekeeping in New York, on the ground that they were not within the taxing jurisdiction of Connecticut. Entertaining jurisdiction, this Court reversed the judgment in that respect. *Id.*, p. 18.

The question received most careful consideration in the case of *Boynton* v. *Hutchinson Gas Co.*, 291, U.S. 656, where the Supreme Court of Kansas had held a state statute to be repugnant to the Federal Constitution, and the Attorney General of the State applied for certiorari. His application was opposed upon the ground that he had merely an official interest in the controversy and the decisions were invoked upon which the Government relies in challenging our jurisdiction in the instant case.[12] Because of its importance, and contrary to our usual practice, the Court directed oral argument on the question whether certiorari should be granted, and after that argument, upon mature deliberation, granted the writ. The writ was subsequently dismissed but only because of a failure of the record to show service of summons and severance upon the appellees in the state court who were not parties to the proceedings here. 292 U.S. 601. This decision with respect to the scope of our jurisdiction has been followed in later cases. In *Morehead* v. *New York ex. rel. Tipaldo*, 298 U.S. 587, we granted certiorari on an application by the warden of a city prison to review the decision of the Court of Appeals of the State on *habeas corpus*, ruling that the minimum wage law of the State violated the Federal Constitution. This Court decided the case on the merits. In *Kelly* v. *Washington ex*

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[8] 15 U.S.C. 45; 28 U.S.C. 848.
[9] 29 U.S.C. 160(e). See, also, as to orders of Federal Communications Commission, 47 U.S.C. 402(e).
[10] 1 Stat. 73, 85, 86.
[11] 38 Stat. 790; see, also Act of September 6, 1916, 39 Stat. 726.
[12] See cases cited in Note 8.

rel. Foss Co., 302 U.S. 1, we granted certiorari, on the application of the state authorities charged with the enforcement of the state law relating to the inspection and regulation of vessels, to review the decision of the state court holding the statute invalid in its application to navigable waters. We concluded that the state act had a permissible field of operation and the decision of the state court in holding the statute completely unenforceable in deference to federal law was reversed.

This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the State officers invoking our jurisdiction were sustaining any "private damage."

While one who asserts the mere right of a citizen and taxpayer of the United States to complain of the alleged invalid outlay of public moneys has no standing to invoke the jurisdiction of the federal courts (*Frothingham* v. *Mellon*, 262 U.S. 447, 480, 486, 487), the Court has sustained the more immediate and substantial right of a resident taxpayer to invoke the interposition of a court of equity to enjoin an illegal use of moneys by a municipal corporation. *Crampton* v. *Zabriskie*, 101 U.S. 601, 609; *Frothingham* v. *Mellon*, *supra*. In *Heim* v. *McCall*, 239 U.S. 175, we took jurisdiction on a writ of error sued out by a property owner and taxpayer, who had been given standing in the state court, for the purpose of reviewing its decision sustaining the validity under the Federal Constitution, of a state statute as applied to contracts for the construction of public works in the City of New York, the enforcement of which was alleged to involve irreparable loss to the city and hence to be inimical to the interests of the taxpayer.

In *Smiley* v. *Holm*, 285 U.S. 355, we granted certiorari on the application of one who was an "elector," as well as a "citizen" and "taxpayer," and who assailed under the Federal Constitution a state statute establishing congressional districts. Passing upon the merits we held that the function of a state legislature in prescribing the time, place and manner of holding elections for representatives in Congress under Article I, § 4, was a law-making function in which the veto power of the state governor participates, if under the state constitution the governor has that power in the course of the making of state laws, and accordingly reversed the judgment of the state court. We took jurisdiction on certiorari in a similar case from New York where the petitioners were "citizens and voters of the State" who had sought a mandamus to compel the Secretary of State of New York to certify that representatives in Congress were to be elected in the congressional districts as defined by a concurrent resolution of the Senate and Assembly of the legislature. There the state court, construing the provision of the Federal Constitution as contemplating the exercise of the law-making power, had sustained the defense that the concurrent resolution was ineffective as it had not been submitted to the Governor for approval, and refused the writ of mandamus. We affirmed the judgment. *Koenig* v. *Flynn*, 285 U.S. 375.

In the light of this course of decisions, we find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.

Second. The participation of the Lieutenant Governor.—Petitioners contend that, in the light of the powers and duties of the Lieutenant Governor and his relation to the Senate under the state constitution, as construed by the supreme court of the state, the Lieutenant Governor was not a part of the "legislature" so that under Article V of the Federal Constitution, he could be permitted to have a deciding vote on the ratification of the proposed amendment, when the senate was equally divided.

Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point.

Third. The effect of the previous rejection of the amendment and of the lapse of time since its submission.

1. The state court adopted the view expressed by textwriters that a state legislature which has rejected an amendment proposed by the Congress may later

ratify.[13] The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and, as a ratifying power, persists despite a previous rejection. The opposing view proceeds on an assumption that if ratification by "Conventions" were prescribed by the Congress, a convention could not reject and, having adjourned *sine die*, be reassembled and ratify. It is also premised, in accordance with views expressed by text-writers,[14] that ratification if once given cannot afterwards be rescinded and the amendment rejected, and it is urged that the same effect in the exhaustion of the State's power to act should be ascribed to rejection; that a State can act "but once, either by convention or through its legislature."

Historic instances are cited. In 1865, the Thirteenth Amendment was rejected by the legislature of New Jersey which subsequently ratified it, but the question did not become important as ratification by the requisite number of States had already been proclaimed.[15] The question did arise in connection with the adoption of the Fourteenth Amendment. The legislatures of Georgia, North Carolina and South Carolina had rejected the amendment in November and December, 1866.[16] New governments were erected in those States (and in others) under the direction of Congress.[17] The new legislatures ratified the amendment, that of North Carolina on July 4, 1868, that of South Carolina on July 9, 1868, and that of Georgia on July 21, 1868.[18] Ohio and New Jersey first ratified and then passed resolutions withdrawing their consent.[19] As there were then thirty-seven States, twenty-eight were needed to constitute the requisite three-fourths. On July 9, 1868, the Congress adopted a resolution requesting the Secretary of State to communicate "a list of the States of the Union whose legislatures have ratified the fourteenth article of amendment,"[20] and in Secretary Seward's report attention was called to the action of Ohio and New Jersey.[21] On July 20th Secretary Seward issued a proclamation reciting the ratification by twenty-eight States, including North Carolina, South Carolina, Ohio and New Jersey, and stating that it appeared that Ohio and New Jersey had since passed resolutions withdrawing their consent and that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual." The Secretary certified that if the ratifying resolutions of Ohio and New Jersey were still in full force and effect, notwithstanding the attempted withdrawal, the amendment had become a part of the Constitution.[22] On the following day the Congress adopted a concurrent resolution which, reciting that three-fourths of the States having ratified (the list including North Carolina, South Carolina, Ohio and New Jersey),[23] declared the Fourteenth Amendment to be a part of the Constitution and that it should be duly promulgated as such by the Secretary of State. Accordingly, Secretary Seward, on July 28th, issued his proclamation embracing the States mentioned in the congressional resolution and adding Georgia.[24]

Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.[25] While there were special circumstances, because of the action of the Congress in relation to the governments of the rejecting States (North Carolina, South Carolina and Georgia), these circumstances were not recited in proclaiming ratification and the previous rejections by the respective legislatures. This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

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[13] Jameson on Constitutional Conventions §§ 576–581; Willoughby on the Constitution § 329a.

[14] Jameson, *op. cit.*, §§ 582–584; Willoughby, *op. cit.*, § 329a; Ames, "Proposed Amendments to the Constitution," House Doc. No. 353, Pt. 2, 54th Cong., 2d Sess., pp. 299, 300.

[15] 13 Stat. 774, 775; Jameson, *op. cit.*, § 576; Ames, *op. cit.*, p. 300.

[16] 15 Stat. 710.

[17] Act of March 2, 1867, 14 Stat., p. 428. See *White* v. *Hart*, 13 Wall. 646, 652.

[18] 15 Stat. 710.

[19] 15 Stat. 707.

[20] Cong. Globe, 40th Cong., 2d Sess., p. 3857.

[21] Cong. Globe, 40th Cong., 2d Sess., p. 4070.

[22] 15 Stat. 706, 707.

[23] 15 Stat. 709, 710.

[24] 15 Stat. 710, 711; Ames, *op. cit.*, App. No. 1140, p. 377.

[25] The legislature of New York which had ratified the Fifteenth Amendment in 1869 attempted, in January, 1870, to withdraw its ratification, and while this fact was stated in the proclamation by Secretary Fish of the ratification of the amendment, and New York was not needed to make up the required three-fourths, that State was included in the list of ratifying States. 16 Stat. 1131; Ames, *op. cit.*, App. No. 1284, p. 388.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection.[26] Nor has the Congress enacted a statute relating to rejections. The statutory provision with respect to constitutional amendments is as follows:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with this certificate specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." [27]

The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty. See *Leser* v. *Garnett*, *supra*, p. 137.

2. The more serious question is whether the proposal by the Congress of the amendment had lost its vitality through lapse of time and hence it could not be ratified by the Kansas legislature in 1937. The argument of petitioners stresses the fact that nearly thirteen years elapsed between the proposal in 1924 and the ratification in question. It is said that when the amendment was proposed there was a definitely adverse popular sentiment and that at the end of 1925 there had been rejection by both houses of the legislatures of sixteen States and ratification by only four States, and that it was not until about 1933 that an aggressive campaign was started in favor of the amendment. In reply, it is urged that Congress did not fix a limit of time for ratification and that an unreasonably long time had not elapsed since the submission; that the conditions which gave rise to the amendment had not been eliminated; that the prevalence of child labor, the diversity of state laws and the disparity in their administration, with the resulting competitive inequalities continued to exist. Reference is also made to the fact that a number of the States have treated the amendment as still pending and that in the proceedings of the national government there have been indications of the same view.[28] It is said that there were fourteen ratifications in 1933, four in 1935, one in 1936, and three in 1937.

We have held that the Congress in proposing an amendment may fix a reasonable time for ratification. *Dillon* v. *Gloss*, 256 U.S. 368. There we sustained the action of the Congress in providing in the propsed Eighteenth Amendment that it should be inoperative unless ratified within seven years.[29] No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission. But petitioners contend that, in the absence of a limitation by the Congress, the Court can and should decide what is a reasonable period within which ratification may be had. We are unable to agree with that contention.

It is true that in *Dillon* v. *Gloss* the Court said that nothing was found in Article V which suggested that an amendment once proposed was to be open to ratification for all time, or that ratification in some States might be separated from that in others by many years and yet be effective; that there was a strong suggestion to the contrary in that proposal and ratification were but succeeding steps in a single endeavor; that as amendments were deemed to be prompted

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[26] Compare Article VII.

[27] 5 U.S.C. 160. From Act of April 20, 1818, § 2; 3 Stat. 439; R. S. § 205.

[28] Sen. Rep. 726, 75th Cong., 1st Sess.; Sen. Rep. 788, 75th Cong., 1st Sess.; Letter of the President on January 8, 1937, to the Governors of nineteen non-ratifying States whose legislatures were to meet in that year, urging them to press for ratification. New York Times, January 9, 1937, p. 5.

[29] 40 Stat. 1050. A similar provision was inserted in the Twenty-first Amendment. *United States* v. *Chambers*, 291 U.S. 217, 222.

by necessity, they should be considered and disposed of presently; and that there is a fair implication that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period; and hence that ratification must be within some reasonable time after the proposal. These considerations were cogent reasons for the decision in *Dillon* v. *Gloss* that the Congress had the power to fix a reasonable time for ratification. But it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratification. That question was not involved in *Dillon* v. *Gloss* and, in accordance with familar principle, what was there said must be read in the light of the point decided.

Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. In their endeavor to answer this question petitioners' counsel have suggested that at least two years should be allowed; that six years would not seem to be unreasonably long; that seven years had been used by the Congress as a reasonable period; that one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that three years, six months and twenty-five days has been the longest time used in ratifying. To this list of variables, counsel add that "the nature and extent of publicity and the activity of the public and of the legislatures of the several States in relation to any particular proposal should be taken into consideration." That statement is pertinent, but there are additional matters to be examined and weighed. When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elasped since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.

It would unduly lengthen this opinion to attempt to review our decisions as to the class of questions deemed to be political and not justiciable. In determining whether a question falls within that category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.[80] There are many illustrations in the field of our conduct of foreign relations, where there are "considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice." *Ware* v. *Hylton*, 3 Dall. 199, 260.[81]

[80] See Willoughby, *op. cit.*, pp. 1326, *et seq.*; Oliver P. Field, "The Doctrine of Political Questions in the Federal Courts," 8 Minnesota Law Review, 485; Melville Fuller Weston, "Political Questions," 38 Harvard Law Review, 296.

[81] See, also, *United States* v. *Palmer*, 3 Wheat. 610, 634; *Foster* v. *Neilson*, 2 Pet. 253, 309; *Doe* v. *Braden*, 16 How. 635, 657; *Terlinden* v. *Ames*, 184 U.S. 270, 288.

Questions involving similar considerations are found in the government of our internal affairs. Thus, under Article IV, § 4, of the Constitution, providing that the United States "shall guarantee to every State in this Union a Republican Form of Government," we have held that it rests with the Congress to decide what government is the established one in a State and whether or not it is republican in form. *Luther* v. *Borden*, 7 How. 1, 42. In that case Chief Justice Taney observed that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." So, it was held in the same case that under the provision of the same Article for the protection of each of the States "against domestic violence" it rested with the Congress "to determine upon the means proper to be adopted to fulfil this guarantee." *Id.*, p. 43. So, in *Pacific Telephone Co.* v. *Oregon*, 223 U.S. 118, we considered that questions arising under the guaranty of a republican form of government had long since been "definitely determined to be political and governmental" and hence that the question whether the government of Oregon had ceased to be republican in form because of a constitutional amendment by which the people reserved to themselves power to propose and enact laws independently of the legislative assembly and also to approve or reject any act of that body, was a question for the determination of the Congress. It would be finally settled when the Congress admitted the senators and representatives of the State.

For the reasons we have stated, which we think to be as compelling as those which underlay the cited decisions, we think that the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications. The state officials should not be restrained from certifying to the Secretary of State the adoption by the legislature of Kansas of the resolution of ratification.

As we find no reason for disturbing the decision of the Supreme Court of Kansas in denying the mandamus sought by petitioners, its judgment is affirmed but upon the grounds stated in this opinion.

Affirmed.

Concurring opinion by MR. JUSTICE BLACK, in which MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join.

Although, for reasons to be stated by MR. JUSTICE FRANKFURTER, we believe this cause should be dismissed, the ruling of the Court just announced removes from the case the question of petitioners' standing to sue. Under the compulsion of that ruling,[1] MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and I have participated in the discussion of other questions considered by the Court and we concur in the result reached, but for somewhat different reasons.

The Constitution grants Congress exclusive power to control submission of constitutional amendments. Final determination by Congress that ratification by three-fourths of the States has taken place "is conclusive upon the courts."[2] In the exercise of that power, Congress, of course, is governed by the Constitution. However, whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, calls for decisions by a "political department" of questions of a type which this Court has frequently designated "political." And decision of a "political question" by the "political department" to which the Constitution has committed it "conclusively binds the judges, as well as all other officers, citizens and subjects of . . . government."[3]

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[1] Cf., *Helvering* v. *Davis*, 301 U.S. 19, 639–40.

[2] *Leser* v. *Garnett*, 258 U.S. 130, 137.

[3] *Jones* v. *United States*, 137 U.S. 202, 212; *Foster* v. *Neilson*, 2 Pet. 253, 309, 314; *Luther* v. *Borden*, 7 How. 1, 42; *In re Cooper*, 143 U.S. 472, 503; *Pacific States Telephone Co.* v. *Oregon*, 223 U.S. 118; *Davis* v. *Ohio*, 241 U.S. 565, 569. "And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive ["political department"] be right or wrong. It is enough to know that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union. . . . this court have laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive." *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420.

Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation.[4] To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree.

The state court below assumed jurisdiction to determine whether the proper procedure is being followed between submission and final adoption. However, it is apparent that judicial review of or pronouncements upon a supposed limitation of a "reasonable time" within which Congress may accept ratification: as to whether duly authorized state officials have proceeded properly in ratifying or voting for ratification; or whether a State may reverse its action once taken upon a proposed amendment; and kindred questions, are all consistent only with an ultimate control over the amending process in the courts. And this must inevitably embarrass the course of amendment by subjecting to judicial interference matters that we believe were intrusted by the Constitution solely to the political branch of government.

The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. There is no disapproval of the conclusion arrived at in *Dillon v. Gloss*,[5] that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a "reasonable time." Nor does the Court now disapprove its prior assumption of power to make such a pronouncement. And it is not made clear that only Congress has constitutional power to determine if there is any such implication in Article V of the Constitution. On the other hand, the Court's opinion declares that Congress has the exclusive power to decide the "political questions" of whether a State whose legislature has once acted upon a proposed amendment may subsequently reverse its position, and whether, in the circumstances of such a case as this, an amendment is dead because an "unreasonable" time has elapsed. No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.

Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as *Dillon* v. *Gloss* attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. If Congressional determination that an amendment has been completed and become a part of the Constitution is final and removed from examination by the courts, as the Court's present opinion recognizes, surely the steps leading to that condition must be subject to the scrutiny, control and appraisal of none save the Congress, the body having exclusive power to make that final determination.

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.

Opinion of MR. JUSTICE FRANKFURTER.

It is the view of MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and myself that the petitioners have no standing in this Court.

In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which

[4] *Field* v. *Clark*, 143 U.S. 649, 672.
[5] 256 U.S. 368; 375.

judicial action was to move—however far-reaching the consequences of action within that area—by extending "judicial Power" only to "Cases" and "Controversies." Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies." It was not for courts to meddle with matters that required no subtlety to be identified as political issues.[1] And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law. Compare *Muskrat* v. *United States*, 219 U.S. 346; *Tutun* v. *United States*, 270 U.S. 568; *Willing* v. *Chicago Auditorium Assn.*, 277 U.S. 274; *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249.

As abstractions, these generalities represent common ground among judges. Since, however, considerations governing the exercise of judicial power are not mechanical criteria but derive from conceptions regarding the distribution of governmental powers in their manifold, changing guises, differences in the application of canons of jurisdiction have arisen from the beginning of the Court's history.[2] Conscious or unconscious leanings toward the serviceability of the judicial process in the adjustment of public controversies clothed in the form of private litigation inevitably affect decisions. For they influence awareness in recognizing the relevance of conceded doctrines of judicial self-limitation and rigor in enforcing them.

Of all this, the present controversy furnishes abundant illustration. Twenty-one members of the Kansas Senate and three members of its House of Representatives brought an original mandamus proceeding in the Supreme Court of that State to compel the Secretary of its Senate to erase an endorsement on Kansas "Senate Concurrent Resolution No. 3" of January 1937, to the effect that it had been passed by the Senate, and instead to endorse thereon the words "not passed." They also sought to restrain the officers of both Senate and House from authenticating and delivering it to the Governor of the State for transmission to the Secretary of State of the United States. These Kansas legislators resorted to their Supreme Court claiming that there was no longer an amendment open for ratification by Kansas and that, in any event, it had not been ratified by the "legislature" of Kansas, the constitutional organ for such ratification. See Article V of the Constitution of the United States. The Kansas Supreme Court held that the Kansas legislators had a right to its judgment on these claims, but on the merits decided against them and denied a writ of mandamus. Urging that such denial was in derogation of their rights under the Federal Constitution, the legislators, having been granted *certiorari* to review the Kansas judgment, 303 U.S. 632, ask this Court to reverse it.

Our power to do so is explicitly challenged by the United States as *amicus curiae*, but would in any event have to be faced. See *Mansfield, C. & L. M. Ry. Co.* v. *Swan*, 111 U.S. 379, 382. To whom and for what causes the courts of Kansas are open are matters for Kansas to determine.[3] But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court. It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances. Are these members of the Kansas legislature, therefore, entitled to ask us to adjudicate the grievances of which they complain?

It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency. See the correspondence between Secretary of State Jefferson and Chief Justice Jay, 3 Johnson, Correspondence and Public Papers of John Jay, 486–89. Unlike the role allowed to judges in a few state courts and

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[1] For an early instance of the abstention of the King's Justices from matters political, see the Duke of York's Claim to the Crown, House of Lords, 1460, 5 Rot. Parl. 375, reprinted in Wambaugh, Cases on Constitutional Law, 1.

[2] See *e. g.* the opinion of Mr. Justice Iredell in *Chisholm* v. *Georgia*, 2 Dall. 419, 429; concurring opinion of Mr. Justice Johnson in *Fletcher* v. *Peck*, 6 Cranch 87, 143; and the cases collected in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341.

[3] This is subject to some narrow exceptions not here relevant. See, e. g., *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230.

to the Supreme Court of Canada, our exclusive business is litigation.[4] The requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined.[5] No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all. *Stearns* v. *Wood*, 236 U.S. 75; *Fairchild* v. *Hughes*, 258 U.S. 126.

In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizens? The answer requires analysis of the grievances which they urge.

They say that it was beyond the power of the Kansas legislature, no matter who voted or how, to ratify the Child Labor Amendment because for Kansas there was no Child Labor Amendment to ratify. Assuming that an amendment proposed by the Congress dies of inanition after what is to be deemed a "reasonable" time, they claim that, having been submitted in 1924, the proposed Child Labor Amendment was no longer alive in 1937. Or, if alive, it was no longer so for Kansas because, by a prior resolution of rejection in 1925, Kansas had exhausted her power. In no respect, however, do these objections relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty of Kansas. The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to this issue. On this aspect of the case the problem would be exactly the same if all but one legislator had voted for ratification.

Indeed the claim that the Amendment was dead or that it was no longer open to Kansas to ratify, is not only not an interest which belongs uniquely to these Kansas legislators; it is not even an interest special to Kansas. For it is the common concern of every citizen of the United States whether the Amendment is still alive, or whether Kansas could be included among the necessary "three-fourths of the several States."

These legislators have no more standing on these claims of unconstitutionality to attack "Senate Concurrent Resolution No. 3" than they would have standing here to attack some Kansas statute claimed by them to offend the Commerce Clause. By as much right could a member of the Congress who had voted against the passage of a bill because moved by constitutional scruples urge before this Court our duty to consider his arguments of unconstitutionality.

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[4] As to advisory opinions in use in a few of the state courts, see J. B. Thayer, Advisory Opinions, reprinted in Legal Essays by J. B. Thayer, at 42 *et seq.*; article on "Advisory Opinions," 1 Enc. Soc. Sci. 475. As to advisory opinions in Canada, see *Attorney-General for Ontario* v. *Attorney-General for Canada* [1912] A. C. 571. Speaking of the Canadian system, Lord Chancellor Haldane, in *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] A. C. 153, 162, said: "It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies." For further animadversions on advisory pronouncements by judges, see Lord Chancellor Sankey in *In re The Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, 66: "We sympathise with the view expressed at length by Newcombe, J., which was concurred in by the Chief Justice, [of Canada] as to the difficulty which the Court must experience in endeavoring to answer questions put to it in this way."

Australia followed our Constitutional practice in restricting her courts to litigious business. The experience of English history which lay behind it was thus put in the Australian Constitutional Convention by Mr. (later Mr. Justice) Higgins: "I feel strongly that it is most inexpedient to break in on the established practice of the English law, and secure decisions on facts which have not arisen yet. Of course, it is a matter that lawyers have experience of every day, that a judge does not give the same attention, he can not give that same attention, to a suppositious case as when he feels the pressure of the consequences to a litigant before him. . . . But here is an attempt to allow this High Court, before cases have arisen, to make a pronouncement upon the law that will be binding. I think the imagination of judges, like that of other persons, is limited, and they are not able to put before their minds all the complex circumstances which may arise and which they ought to have in their minds when giving a decision. If there is one thing more than another which is recognized in British jurisprudence it is that a judge never gives a decision until the facts necessary for that decision have arisen." Rep. Nat. Austral. Conv. Deb. (1897) 966–67.

[5] See the series of cases beginning with *Hayburn's Case*, 2 Dall. 409, through *United States* v. *West Virginia*, 295 U.S. 463.

Clearly a Kansan legislator would have no standing had he brought suit in a federal court. Can the Kansas Supreme Court transmute the general interest in these constitutional claims into the individualized legal interest indispensable here? No doubt the bounds of such legal interest have a penumbra which gives some freedom in judging fulfilment of our jurisdictional requirements. The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainments of legal interest brought here for review. For the creation of a vast domain of legal interests is in the keeping of the states, and from time to time state courts and legislators give legal protection to new individual interests. Thus, while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts. *Coyle* v. *Smith*, 221 U.S. 559; *Heim* v. *McCall*, 239 U.S. 175.

But it by no means follows that a state court ruling on the adequacy of legal interest is binding here. Thus, in *Tyler* v. *Judges*, 179 U.S. 405, the notion was rejected that merely because the Supreme Judicial Court of Massachusetts found an interest of sufficient legal significance for assailing a statute, this Court must consider such claim. Again, this Court has consistently held that the interest of a state official in vindicating the Constitution of the United States gives him no legal standing here to attack the constitutionality of a state statute in order to avoid compliance with it. *Smith* v. *Indiana*, 191 U.S. 138; *Braxon County Court* v. *West Virginia*, 208 U.S. 192; *Marshall* v. *Dye*, 231 U.S. 250; *Stewart* v. *Kansas City*, 239 U.S. 14. Nor can recognition by a state court of such an undifferentiated, general interest confer jurisdiction on us. *Columbus & Greenville Ry Co.* v. *Miller*, 283 U.S. 96, reversing *Miller* v. *Columbus & Greenville Ry.*, 154 Miss. 317; 122 So. 366. Contrariwise, of course, an official has a legally recognized duty to enforce a statute which he is charged with enforcing. And so, an official who is obstructed in the performance of his duty under a state statute because his state court found a violation of the United States Constitution may, since the Act of December 23, 1914, 38 Stat. 790, ask this Court to remove the fetters against enforcement of his duty imposed by the state court because of an asserted misconception of the Constitution. Such a situation is represented by *Blodgett* v. *Silberman*, 277 U.S. 1, and satisfied the requirement of legal interest in *Boynton* v. *Hutcheson*, 291 U.S. 656, *certiorari* dismissed on another ground in 292 U.S. 601.[*]

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[*] A quick summary of the jurisdiction of this Court over state court decisions leaves no room for doubt that the fact that the present case is here on *certiorari* is wholly irrelevant to our assumption of jurisdiction. Section 25 of the First Judiciary Act gave reviewing power to this Court only over state court decisions *denying* a claim of federal right. This restriction was, of course, born of fear of disobedience by the state judiciaries of national authority. The Act of September 6, 1916, 39 Stat. 726, withdrew from this obligatory jurisdiction cases where the state decision was against a "title, right, privilege, or immunity" claimed to exist under the Constitution, laws, treaties or authorities of the United States. This change, which was inspired mainly by a desire to eliminate from review as of right cases arising under the Federal Employers' Liability Act, left such review only in cases where the validity of a treaty, statute or authority of the United States was drawn into question and the decision was against the validity, and in cases where the validity of a statute of a state or a state authority was drawn into question on the grounds of conflict with federal law and the decision was in favor of its validity. The Act of February 13, 1925, 43 Stat. 936, 937, extended this process of restricting our obligatory jurisdiction by transferring to review by *certiorari* cases in which the state court had held invalid an "authority," claimed to be exercised under the laws of the United States or in which it had upheld, against claims of invalidity on federal grounds, an "authority" exercised under the laws of the states. Neither the terms of these two restrictions nor the controlling comments in committee reports or by members of this Court who had a special share in promoting the Acts of 1916 and 1925, give any support for believing that by contracting the range of obligatory jurisdiction over state adjudications Congress enlarged the jurisdiction of the Court by removing the established requirement of legal interest as a threshold condition to being here.

Nor does the Act of December 23, 1914, 38 Stat. 790, touch the present problem. By that Act, Congress for the first time gave this Court power to review state court decisions *sustaining* a federal right. For this purpose it made *certiorari* available. The Committee reports and the debates on this Act prove that its purpose was merely to remove the unilateral quality of Supreme Court review of state court decisions on constitutional questions as to which this Court has the ultimate say. The Act did not create a new legal interest as a basis of review here; it built on the settled doctrine that an official has a legally recognizable duty to carry out a statute which he is supposed to enforce.

Thus, prior to the Act of 1914, the Kentucky case, *post*, p. 474, could not have come here at all, and prior to 1916, the Kansas case would have come here, if at all, by writ of error. By allowing cases from state courts which previously could not have come here at all to come here on *certiorari* the Act of 1914 merely lifted the previous bar—that a federal claim had been sustained—but left every other requisite of jurisdiction unchanged. Similarly, no change in these requisites was affected by the Acts of 1916 and 1925 in confining certain categories of litigation from the state courts to our discretionary instead of obligatory reviewing power.

We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake on it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names. Therefore, none of the petitioners can here raise questions concerning the power of the Kansas legislature to ratify the Amendment.

This disposes of the standing of the three members of the lower house who seek to invoke the jurisdiction of this Court. They have no standing here. Equally without litigious standing is the member of the Kansas Senate who voted for "Senate Concurrent Resolution No. 3." He cannot claim that his vote was denied any parliamentary efficacy to which it was entitled. There remains for consideration only the claim of the twenty nay-voting senators that the Lieutenant-Governor of Kansas, the presiding officer of its Senate, had, under the Kansas Constitution, no power to break the tie in the senatorial vote on the Amendment, thereby depriving their votes of the effect of creating such a tie. Whether this is the tribunal before which such a question can be raised by these senators must be determined even before considering whether the issue which they pose is justiciable. For the latter involves questions affecting the distribution of constitutional power which should be postponed to preliminary questions of legal standing to sue.

The right of the Kansas senators to be here is rested on recognition by *Leser* v. *Garnett*, 258 U.S. 130, of a voter's right to protect his franchise. The historic source of this doctrine and the reasons for it were explained in *Nixon* v. *Herndon*, 273 U.S. 536, 540. That was an action for $5,000 damages against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. In disposing of the objection that the plaintiff had no cause of action because the subject matter of the suit was political, Mr. Justice Holmes thus spoke for the Court: "Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court." "Private damage" is the clue to the famous ruling in *Ashby* v. *White*, *supra*, and determines its scope as well as that of cases in this Court of which it is the justification. The judgment of Lord Holt is permeated with the conception that a voter's franchise is a personal right, assessable in money damages, of which the exact amount "is peculiarly appropriate for the determination of a jury," see *Wiley* v. *Sinkler*, 179 U.S. 58, 65, and for which there is no remedy outside the law courts. "Although this matter relates to the parliament," said Lord Holt, "yet it is an injury precedaneous to the parliament, as my Lord Hale said in the case of *Bernardiston* v. *Soame*, 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense." 2 Ld. Raym. 938, 958.

The reasoning of *Ashby* v. *White* and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action but are of the very essence of political action, if "political" has any connotation at all. *Field* v. *Clark*, 143 U.S. 649, 670, *et seq.*; *Leser* v. *Garnett*, 258 U.S. 130, 137. In no sense are they matters of "private damage." They pertain to legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies. If the doctrine of *Ashby* v. *White* vindicating the private rights of a voting citizen has not been doubted for over two hundred years, it is equally significant that for over two hundred years *Ashby* v. *White* has not been sought to be put to purposes like the present. In seeking redress here these Kansas senators have wholly misconceived the functions of this Court. The writ of *ceriorari* to the Kansas Suprme Court should therefore be dismissed.

MR. JUSTICE BUTLER, dissenting.

The Child Labor Amendment was proposed in 1924; more than 13 years elapsed before the Kansas legislature voted, as the decision just announced holds, to ratify it. Petitioners insist that more than a reasonable time had elapsed and that, therefore, the action of the state legislature is without force. But this Court now holds that the question is not justiciable, relegates it to the "consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States the time arrives for the promulgation of the adoption of the amendment" and declares that the decision by Congress would not be subject to review by the courts.

In *Dillon* v. *Gloss*, 256 U. S. 368, one imprisoned for transportation of intoxicating liquor in violation of § 3 of the National Prohibition Act, instituted habeas corpus proceedings to obtain the release on the ground that the Eighteenth Amendment was invalid because the resolution proposing it declared that it should not be operative unless ratified within seven years. The Amendment was ratified in less than a year and a half. We definitely held that Article V impliedly requires amendments submitted to be ratified within a reasonable time after proposal; that Congress may fix a reasonable time for ratification, and that the period of seven years fixed by the Congress was reasonable.

We said:

"It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What, then, is the reasonable inference or implication? Is it that ratification may be had at any time as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?

"We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefore that amendments are to be proposed, the reasonable implication being that when proposed, they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson [in his Constitutional Conventions, 4th ed. § 585] that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for according to it, four amendments proposed long ago—two in 1789, one in 1810, and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. . . . Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

Upon the reasoning of our opinion in that case, I would hold that more than a reasonable time had elapsed* and that the judgment of the Kansas supreme court should be reversed.

The point that the question—whether more than a reasonable time had elapsed—is not justifiable but one for Congress after attempted ratification by the requisite number of States, was not raised by the parties or by the United States appearing as *amicus curiae;* it was not suggested by us when ordering reargument. As the Court, in the *Dillon* case, did directly decide upon the reasonableness of the seven years fixed by the Congress, it ought not now, without hearing argument upon the point, hold itself to lack power to decide whether more than 13 years between proposal by Congress and attempted ratification by Kansas is reasonable.

MR. JUSTICE MCREYNOLDS joins in this opinion.

[From the Congressional Record, April 19, 1967]

VALIDITY OF CONSTITUTIONAL CONVENTION PETITIONS REGARDING REAPPORTIONMENT

Mr. TYDINGS. Mr. President, several weeks ago the distinguished Senator from Wisconsin [Mr. PROXMIRE] and I called attention, on the floor of the Senate, to the clear possibility that we are approaching another chapter in the battle against malapportioned State legislatures. We noted that 32 State legislatures had, at that time, apparently petitioned Congress to call a convention to propose specific amendments to the Constitution dealing with legislative apportionment.

If two more State legislatures petition Congress for a convention dealing with any aspect of legislative apportionment, I expect that the same forces which were defeated twice during the 89th Congress in their attempts to authorize legislative malapportionment will rush back to the floor of the Senate demanding that Congress immediately call a constitutional convention. Their arguments, no doubt, will be deceptively simple. They will cite article V of the Constitution:

"The Congress . . . on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments."

They will contend that 34 valid petitions had been received, and that Congress must immediately call a convention.

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*CHRONOLOGY OF CHILD LABOR AMENDMENT

[A State is said to have "rejected" when both Houses of its legislature passed resolutions of rejection, and to have "refused to ratify" when both Houses defeated resolution for ratification.]

June 2, 1924, Joint Resolution deposited in State Department. In that year, Arkansas ratified; North Carolina rejected. *Ratification, 1; rejection, 1.*

1925, Arizona, California and Wisconsin ratified; Florida, Georgia, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Vermont rejected; Connecticut, Delaware and South Dakota refused to ratify. *Ratification, 4; rejections, 16; refusals to ratify, 3.*

1926, Kentucky and Virginia rejected. *Ratifications, 4; rejections, 18; refusals to ratify, 3.*

1927, Montana, ratified; Maryland rejected. *Ratifications, 6; rejections, 19; refusals to ratify, 3.*

1931, Colorado ratified. *Ratifications, 6; rejections, 19; refusals to ratify, 3.*

1933, Illinois, Iowa, Michigan, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Washington and West Virginia ratified as did also Maine, Minnesota, New Hampshire, and Pennsylvania, which had rejected in 1925. *Ratifications, 20; rejections, (eliminating States subsequently ratifying) 15; refusals to ratify, 3.*

1935, Idaho and Wyoming ratified, as did Utah and Indiana, which had rejected in 1925. As in 1925, Connecticut refused to ratify. *Ratifications, 24; rejections, 13; refusals to ratify, 3.*

1936, Kentucky, which had rejected in 1926, ratified. *Ratifications, 25; rejections, 12; refusals to ratify, 3.*

1937, Nevada and New Mexico ratified, as did Kansas, which had rejected in 1925. Massachusetts, which had rejected in 1925, refused to ratify. *Ratifications, 28; rejections, 11; refusals to ratify, 3.*

Six States are not included in this list: Alabama, Louisiana, Mississippi, Nebraska, New York and Rhode Island. It appears that there has never been a vote in Alabama or Rhode Island. Louisiana house of representatives has three times (1924, 1934 and 1936) defeated resolutions for ratification. In Mississippi, the Senate adopted resolution for ratification in 1934, but in 1936 another Senate resolution for ratification was adversely reported. In Nebraska, the House defeated ratification resolutions in 1927 and 1935, but the Senate passed such a resolution in 1929. In New York, ratification was defeated in the House in 1935 and 1937, and in the latter year, the Senate passed such a resolution.

Mr. President, we in Congress must be prepared for this new assault on the principle of one-man, one-vote. These latest tactics present gravely disturbing questions which have potential impact far beyond the apportionment issue itself. I should like to explore these questions today—before any resolution is before us in Congress—so that we might calmly examine the merits of the possible demands for a convention before the proponents attempt to stampede us into convening an ill-considered constitutional convention.

I wish to discuss two questions today. These are not the only questions regarding the validity or meaning of the petitions now before Congress, but I believe these questions have particular importance. The first question I wish to discuss today is, Should Congress regard as invalid petitions from malapportioned legislatures calling for a constitutional amendment to authorize malapportionment? In my judgment, the answer is "Yes." Both the distinguished Senator from Wisconsin and I took this position on the Senate floor several weeks ago. Today I shall spell out in somewhat greater detail my justification for this position.

I begin with the premise that a malapportioned State legislature abridges the fundamental rights of citizens living in more populous, under-represented districts. As the Supreme Court stated, in *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964):

"To the extent that a citizen's right to vote is debased, he is that much less a citizen."

Malapportioned legislatures brought a vast number of political injustices to citizens in under-represented districts, both through legislation favoring over-represented interests and through failing to enact legislation on behalf of under-represented interests. But these injustices cannot, as a practical matter be erased by a stroke of the pen—either in the courts, or in Congress. As a Federal court of appeals has stated, to rule invalid all legislative acts—or even those acts which appeared to favor over-represented interests—passed by malapportioned legislatures "would produce chaos." *Ryan* v. *Tinsley*, 316 F. 2d 430, 432 (11th Cir. 1963). Moreover, it is not necessary to resort to this extreme step. The many injustices of malapportionment can, I believe, in most cases be substantially corrected simply by election of new State legislatures under constitutionally sanctioned apportionment.

In certain circumstances, however, malapportioned legislatures can take action which flagrantly violates the citizens' right to equal representation and which even after reapportionment cannot readily be corrected. The courts have recognized this problem, and have acted to protect the rights of State citizens to equal representation by forbidding such action by malapportioned legislatures.

A Georgia case illustrates this. In Toombs against Fortson, a three-judge Federal court enjoined the Georgia General Assembly from calling a constitutional convention to revise the State constitution "until the general assembly is reapportioned in accordance with constitutional standards." In its order, the court stated:

"We do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body. (Order dated June 24, 1964, Civil Action No. 7883.)"

As this order was being appealed to the Supreme Court of the United States, a new election was held in Georgia. The Supreme Court remanded the case for a determination whether, in view of the new elections, the order was still necessary. (379 U.S. 621 (1965).) As Mr. Justice Harlan pointed out in his dissenting opinion, this disposition clearly indicated that the lower court could properly issue the injunction.

Action by a malapportioned legislature to undermine the constitutional principle of one-man, one-vote is, of course, the most direct and flagrant abridgement of this constitutional right. Every first year law student knows the basic principle of equity that a claimant "must come into court with clean hands" before the court will hear his claim. In my judgment, no illegally apportioned legislature has "clean hands" in calling for a constitutional convention to legitimize its own illegality. A malapportioned legislature may be competent, pending its reapportionment, to pass legislation generally. But such a legislature has no competence to initiate amendments to the Constitution to make legal its own illegality. A three-judge Federal court in Utah has clearly recognized this principle. In *Petuskey* v. *Rampton*, 234 F. Supp. 365, 373 (1965), the Court stated:

"Well-known general principles of equity require that the [malapportioned] legislature not consider or vote upon any proposal to amend the Constitution of the United States on the subject of legislative reapportionment."

Accordingly, Congress should refuse to accept from a malapportioned legislature "any proposal to amend the Constitution of the United States on the subject of legislative reapportionment."

The Petuskey case reveals the strategy followed by proponents of a constitutional convention for adoption of a malapportionment amendment and provides an additional argument for holding convention petitions invalid. In 1964, the court observed the following, regarding the State legislature:

"We note here the somewhat widespread public statements of some persons who are, or may be, charged with the responsibility of law-making that reapportionment is a subject upon which they are 'willing to drag their feet' or to 'await potential changes in the federal law or Constitution.'"

A year later, when the State legislature remained malapportioned, the court stated:

"For a very long period of time all efforts to obtain a constitutionally apportioned legislature in this State have been frustrated."

The court then observed, in a footnote:

"It is interesting to note the speed by which the last State legislature memorialized Congress to call a constitutional convention to provide for reapportionment 'on factors other than population' . . . compared to the Legislature's hesitancy to properly reapportion under the mandate of this court."

This pattern of hostility to court orders for reapportionment, attempts to delay implementation of those orders, and feverish activity to force a constitutional amendment legitimizing malapportionment was repeated in other State legislatures across the country, including my own. Of the 29 State legislatures which have petitioned for a convention to propose a constitutional amendment to authorize apportionment on "factors other than population," 23 were unconstitutionally apportioned at the time the petition was approved; 13 of those 23 legislatures were under court orders to reapportion, and litigation was pending in the other 10. Moreover, 24 of these 29 petitions were passed in the same year, 1965, in legislative sessions immediately following the Supreme Court's decision in Reynolds against Sims which elucidated the one-man, one-vote principle. These petitions were passed in haste, without the measured deliberativeness which should accompany the weighty responsibility of proposing an amendment to the Constitution of the United States.

We must not forget that, although the reapportionment decisions were welcomed by the great majority of citizens in this country, those decisions were most unpopular among the defeated litigants—the malapportioned State legislatures themselves. These defeated litigants had many reasons to resent and to oppose the reapportionment orders. For many rural legislators, the orders meant that they would lose their jobs. For many who might expect to be reelected in a constitutionally apportioned legislature, reapportionment nevertheless meant the disappearance of the old coalitions of overrepresented interests which give them effective power. In addition, many court orders required special sessions of State legislatures to adopt reapportionment plans. As we in this Chamber know, special sessions are not particularly popular among legislatures. Petitions to legitimize malapportionment which were approved under these circumstances were, in truth, little more than sullen gestures of annoyance, and defiance. These petitions were passed without the calm, unhurried exploration of merits and demerits which should properly accompany the proposal of a convention to amend the Constitution of the United States.

Because of the circumstances in which most of these petitions were approved, I believe that the Congress should disregard them. Because most of these petitions were approved by unconstitutionally apportioned legislatures, in flagrant disregard of the rights of all citizens within the States for equal representation, I believe that the Congress must disregard them.

There is an additional, compelling reason that Congress should disregard petitions submitted by malapportioned legislatures. In judging the validity of petitions for constitutional convention, submitted by State legislatures under article V, Congress clearly has the authority to rule out petitions on the ground that circumstances which led to their submission have materially changed. This authority is precisely analogous to Congress power, upheld by the Supreme Court, to disregard the ratification by the Kansas Legislature of a constitutional amendment—dealing with child labor laws—after circumstances which had led to the proposal of the amendment had materially changed. Chief Justice Charles Evans Hughes, speaking for the Court in *Coleman* v. *Miller* (307 U.S. 433, 453 (1939)) stated:

"When a proposed amendment springs from a conception of economic needs, it would be necessary to consider the economic conditions prevailing in the country, [and] whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it . . . This question can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

I submit Mr. President, that the reapportionment of State legislatures which had submitted petitions to avoid such reapportionment is a political and social condition which has "so far changed since the submission—of the petitions—as to make the proposal no longer responsive to the conception which inspired it." These petitions must be disregarded because the State legislatures which approved them no longer exist. Of the 23 malapportioned legislatures which approved "factors other than population" petitions, 19 are now constitutionally apportioned and elections under the new apportionment have been held. In two other States, elections are soon to be held. If a convention to change the present constitutional principles of apportionment is to be proposed by any of these states, the reapportioned legislatures shall consider the question.

The decision of the Supreme Court in *Dillon* v. *Gloss*, 256 U.S. 368 (1921) is also directly in point. In that case, which upheld Congress' power to place a specific limit on the time permitted for State legislatures to ratify the 18th amendment, the Court stated at p. 375—

"An alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and . . . , if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

In that case, the time limit was 7 years. Here most State legislatures have petitioned Congress within the past 2 or 3 years. But the principle still applies to invalidate these petitions. It is not the lapse of time, but rather the lapse of the malapportioned legislatures themselves which clearly indicated that the same "sentiment" in the newly apportioned legislatures may not "fairly be supposed to exist." These petitions, therefore, "ought to be regarded as waived, and not again to be voted upon, unless a second time proposed" by a constitutionally apportioned State legislature.

Based on the considerations I have discussed, which in my view demonstrate the manifest invalidity of petitions dealing with reapportionment submitted by malapportioned legislatures, at the present time the Congress has before it only six valid petitions from State legislatures for a convention to propose an amendment authorizing apportionment on factors other than population and no valid petitions whatsoever for a convention to propose an amendment depriving Federal courts of jurisdiction regarding legislative apportionment. Thirty-four valid petitions—two-thirds of the several States—are, of course, required before Congress must consider calling a convention. At the present time, we are a long way from that number.

Mr. President, the second question I want to discuss today is—even assuming the validity of all 32 of the pending petitions dealing with legislative apportionment, must the Congress call a constitutional convention if two more States submit petitions on this subject? In my judgment, the answer to this question is "No." It appears that if two more legislatures act, 34 of the State legislatures at some time will have called for conventions dealing in some manner with legislative apportionment. But the convention calls now before the Congress differ in crucial respects. Twenty-nine of those petitions call for a convention to propose a specific amendment—detailed in the petitions—to permit one house of a State legislature to be apportioned on the basis of "factors other than population." Three of those petitions call for another fundamentally different amendment, one which would deprive the Federal courts of any jurisdiction regarding apportionment of State legislatures. I do not think the Congress would be justified in considering these two different types of petitions as calling for the same constitutional convention.

It is not correct to assert that all 32 State legislatures which have thus far submitted petitions want a constitutional convention dealing generally with the subject of legislative apportionment. The State legislatures have not said this. Some have called for a convention to propose one specific amendment; others want a convention to propose another specific amendment. I do not think we can assume that a legislature which called for an amendment to keep the courts out

of apportionment cases would be just as happy to have an amendment which keeps the courts in those cases, but alters the apportionment standards applied by the courts.

Even more importantly, the question whether Congress could place any limitation on the powers of a constitutional convention would be dangerously complicated if Congress were to lump together two different kinds of calls for conventions. The most troublesome unanswered question in article V of the Constitution is whether Congress can limit the powers of a convention called to propose amendments. I believe that the Congress, if it calls a constitutional convention in response to the present petitions, must narrowly and clearly circumscribe the powers of that convention to insure that the whole fabric of our framework of government is not brought into issue. Unless the Congress can call a convention with powers strictly limited to those specifically requested by two-thirds of the State legislatures, then I believe the convention could too easily view its power as unlimited, and could too easily justify ignoring Congress express limitations.

There is little precedent to guide us on the question whether Congress can limit the power of article V constitutional conventions since none has been called since the first convention which drafted the Constitution itself. Every other amendment to our Constitution, including the cherished Bill of Rights, has been first deliberated and approved in the Congress before being proposed to the States for ratification. The proponents of the malapportionment amendments have resorted to attempting a constitutional convention because the Congress deliberated on the proposed amendments, saw the clear dangers in them, and rejected them.

The Congress, in deliberating on those amendments, also saw quite clearly certain forces which, behind the scenes, were among the most ardent advocates for malapportionment—the far right-wing, anti-civil rights, and special interest big business groups which have for years controlled the rotten borough legislatures for their own profits and the public's loss. There is danger, I think, that those groups would attempt to dominate a constitutional convention called to consider malapportionment amendments. And I shudder at the prospect that a constitutional convention, thus dominated, would be free to reopen every sentence and paragraph of the U.S. Constitution.

The reasons for the uncertainty in article V regarding whether Congress can limit the powers of a constitutional convention arise from the history which preceded the calling of the first Constitutional Convention, and the debates at the Convention itself regarding article V. After 1780, the weaknesses of the Articles of Confederation as an instrument of government quickly became apparent—in particular, the lack of authority in the central government to raise revenue, to regulate interstate commerce, or to exercise general coercive powers to enforce its laws. Moreover, the veto power which the Articles placed in any single State made amendment impossible. By the end of 1786, all States but Rhode Island had petitioned the Congress to call a convention to re-examine generally the structure of Government established by the Articles. The Congress in February 1787, refused to issue such a general convention call, but called a convention for the "sole and express purpose of revising the Articles of Confederation" and reporting back to the Congress—Pritchett, "The American Constitution," page 14. 1959. The Constitutional Convention which met in May 1787, ignored this limitation and considered itself, as the Preamble to the Constitution indicates to speak for "we the people of the United States."

In the convention debates on article V, there is some evidence that constitutional conventions provided for by that article, could also ignore the limitations placed on it by Congress and instead purport to speak for "the people." The first draft of the constitutional provision dealing with the amending power stated that, when two-thirds of the State legislatures applied for an amendment, the Congress "shall call a convention for that purpose." Madison's notes of the Convention record that he was disturbed by this provision. "How," he asked, "was a convention to be formed? by what rule decide? What the force of its acts?"—2 Farrand, "The Records of the Federal Convention of 1787," at 558. Madison moved successfully for reconsideration of the provision.

The second draft gave the Congress exclusive power to propose constitutional amendments, with no provision for conventions. Colonel Mason, of Virginia, opposed vesting exclusive power to propose amendments in the Congress. Mason's marginal notes on his copy of the draft of the Constitution provide his reasoning:

"By this article, Congress only [would] have the power of proposing amendments at any future time to this constitution and should it ever prove so oppres-

sive, the whole people of America can't make or even propose alterations to it: a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people. (2 Farrand, *op. cit.*, at 629 n. 8)"

Mason stated these objections, and Madison reiterated his concerns about the form of such conventions and his preference for clearly leaving the function of proposing amendments with the Congress. Madison was, however, willing to have Congress "bound to propose amendments applied for by two-thirds of the States" —2 Farrand, op. cit. at 629–30. From this debate, the draft of article V was changed to its present form so that either the Congress or a convention called by Congress, on application of the States, could propose constitutional amendments.

Article V thus appears to be a compromise between Mason's view, that a convention must be free to speak for "the whole people of America" and bypass the Congress altogether in the amending process, and Madison's view that the Congress should retain a clear role in proposing amendments. On the basis of this constitutional history, however, the question whether Congress could validly restrict the powers of a constitutional convention is not free from doubt. I might note that the distinguished minority leader, Senator DIRKSEN, has expressed similar views. The Chicago Tribune of Monday, March 27, 1965, reported that in an address 2 years ago to the National Grange, Senator DIRKSEN made the following remarks:

"There can be and is a genuine fear of a constitutional convention on the part of many thoughtful people who urgently are working toward enactment of a constitutional amendment. The fear is simple. There has never been a constitutional convention since these United States became a nation. There is strong legal opinion that once the states have mandated a convention, the courts nor the executive can control it, guide it, or establish the matters with which it would deal. A constitutional convention, many sincere people believe, would, once unlocked, spread in every direction."

I think all of us in the Congress would readily agree—no matter what our views on the apportionment issue—that the Constitution as a whole, and our framework of government under it, should not be freely tampered with by a constitutional convention called by this Congress. As I have stated, there are grave doubts that Congress could validly limit a convention called under article V. But if there is ever a remote possibility that a convention could be limited, Congress would justify imposing a limitation only if it counts together, for purposes of aggregating the necessary two-thirds, petitions from State legislatures which request conventions for exactly—to the letter—the same purposes. At the present time, Congress has received no more than 29 petitions calling for a convention dealing with the same specific aspect of the reapportionment issue. We must therefore conclude that, even assuming the validity of these 29 petitions, at least five more State legislatures must petition the Congress before any issue regarding a convention call is properly before us.

[From the Congressional Record, Apr. 19, 1967]

VALIDITY OF CONSTITUTIONAL CONVENTION PETITIONS REGARDING REAPPORTIONMENT

Mr. DIRKSEN. Mr. President, on June 15, 1964, when the Supreme Court in its decision in the case of Reynolds against Sims handed down what has become quite a celebrated one-man, one-vote decision, I took immediate exception, and in January of 1965. I introduced the first resolution for a constitutional amendment to preserve in the States the right to determine their own destinies, as far as their legislatures were concerned. I was in pretty good company because over a period of time no less a person than Justice Frankfurter took the position that that was a legal thicket, or a political thicket, into which the Court should not venture.

Mr. President, once more I wish to reemphasize what the primary issue is. It is not one-man, one-vote, as such. It is the right of a State legislature to determine the complexion of at least one of its branches on a basis other than population. That basis can be geography; it can be economic interest; it can be one of a dozen things; but it does preserve in the States the right to make that self-determination.

I am afraid those fearsome persons in this body, who so freely express their fears, evidently have no trust in the people. That is another issue. I trust the

people. We trust the people who send us here. I know of no good reason why we should not trust them to exercise a very clearly defined constitutional power, which is lodged in them by virtue of article V of the Constitution.

I call attention to the fact that when we were under the Articles of Confederation, there was a provision in article 13 to the effect that those Articles of Confederation could not be amended unless every State—every State, Mr. President—approvingly ratified the amendment. The result was a stalemate in our Government. Rhode Island blocked a very important amendment all by its little lonesome self. Others have blocked amendments that were deemed to be quite necessary for the functioning of those articles.

The framers of the Constitution saw that difficulty when the first call went out. Interestingly enough, Mr. President, the call did not go out to gather in Annapolis or Philadelphia for the purpose of framing a constitution. The call indicated that they were going to revise the Articles of Confederation.

There were timid souls then, who said, "Oh, don't touch this holy document." Why, there had been people in those days who said, "Don't get into difficulty with King George and his Ministers. Let things stand as they are."

Of course, the law of life is either to change or decay, and change is eternal. That is one thing in this universe you can bet on, and bet everything you have, because change is eternal.

Now, they finally fabricated the Constitution, but that Constitution had to be sold to the people. The three great salesmen were John Jay, James Madison, and Alexander Hamilton. Of all the papers that were written to sell that document to the people, those written by Alexander Hamilton were by far the most prolific.

There are 85 papers or articles in the Federalist Papers, and Hamilton wrote 51 of the 85. In No. 85 he dealt with the question of amending the Constitution of the United States. He did it in a very forthright fashion. Hamilton was aware that things are not static, and that there come times when the people may want to have their Constitution amended, for after all, this is a government of the people.

The Constitution, in the Preamble, recites:

"We the people of the United States, * * * do ordain and establish this Constitution for the United States of America."

Today timid voices are raised, "Oh, don't touch the Constitution." We have heard that before and it has been amended more than a score of times to indicate that it cannot remain static when the need arises.

When I introduced that joint resolution for a constitutional proposal to take care of this decision by the Supreme Court and leave the complexion of at least one branch of the legislature in the hands of the people of the State, we foresaw at that time the difficulties that were going to arise. I mentioned it in this Chamber at the time when I warned the Senate: Watch out, because this is dynamite. It is proving now to be dynamite. Much of the argument that has been made is quite irrelevant to the issue. I pointed out at that time that every elective body might be subject to the one-man, one-vote principle.

Yesterday that question arose in the Supreme Court, because I have here an article entitled "High Court Ponders One-Vote Issue." What is involved? There is involved a city council, a park district, a county board, and particularly, the Houston County Board of Revenue and Control in Alabama.

In the course of the argument before the Court, one of the attorneys gave his opinion that about 20,000 of the Nation's 90,000 local bodies would be affected.

Let me just recite the last paragraph and then I shall insert the entire article in the Record.

"But Truman Hobbs, lawyer for the Houston County board, insisted that most of the board's work was administering 1000 miles of rural roads. He said the city 'couldn't care less' about county roads and rural residents would suffer if the city dominated the county board."

That could apply, they say, to some 20,000 communities. It is no surprise that the Honorable Thurgood Marshall, the Solicitor for the Department of Justice, went before that court in March and filed his memorandum his notice that the Department of Justice intended to intervene.

It is beginning. Here is the clarion call. Let us wait and see what is going to happen because we have taken away from the States the right to make that determination and, in so doing, I think that we have violated that first sacred clause of the Preamble which states, "In order to form a more perfect Union."

Mr. HRUSKA. Mr. President, will the Senator from Illinois yield?

Mr. DIRKSEN. I yield.

Mr. HRUSKA. The Senator properly points out that with respect to the one-man, one-vote rule the effort is being made to apply it not only to State legislatures but also to the local political subdivisions which, in every case, are the creatures of the legislature.

Is it not true that there are also advocates of the proposition that the one-man, one-vote rule should apply to the very body which is housed in this Chamber so that there will not be two Senators to each State but representation by population of the States in this body?

Mr. DIRKSEN. Indeed so. When this matter was before the Legislature of the State of Illinois, there were a number of persons who went before that legislature to testify. I quote from an article published in the Chicago Tribune of March 9, 1967:

"One of the chief lobbyists for organized labor today may have aided the movement toward a national convention. He is John Alesia, legislative spokesman for years for the United Steel Workers and brother-in-law of Josephy Germano, midwest regional director of the USW.

"WILLING TO CHANGE SENATE

"Sen. Everett E. Laughlin [R., Freeport] asked Alesia, a witness before the senate sitting as a committee of the whole, whether his AFL-CIO organization would pursue its 'one man, one vote' theories to the point that each state would not be entitled to two United States senators.

" 'We'll accept the United States Senate on a population basis,' Alesia replied."

Mr. President, well, how many Senators for New York? How many for Rhode Island? How many for Wisconsin? How many for California? How many for Ilinois? How many for Arizona?

Well, Mr. President, you figure out the mathematics of the thing. But here is a spokesman for labor who said, "We will accept the U.S. Senate on a population basis."

What a body this will be.

Blow out the walls and enlarge this place because we will never be able to hold them now. It will take a lot more than that to people this hall, if this ever comes to pass. But there, he states it before a legislative body that "We will accept the U.S. Senate on a population basis."

Mr. President, I ask unanimous consent to have this article printed in the RECORD at the conclusion of my remarks, as well as "High Court Ponders One-Vote Issue," previously referred to.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. HRUSKA. Mr. President, will the Senator from Illinois yield further?

Mr. DIRKSEN. Gladly.

Mr. HRUSKA. In answer to the contention that an effort is being made to put this body on a one-man, one-vote basis, often resort is had to that part of article V of the Constitution which states:

"That no State without its consent, shall be deprived of its equal Suffrage in the Senate."

That particular article was adopted as part of the Constitution proper in 1789.

It was the 14th amendment, was it not, which was the basis of the Supreme Court's, one-man, one-vote decision. The 14th amendment was adopted in 1867.

The fond hope of men such as those who testified before the Legislature of the State of Illinois is that the Supreme Court, following this reasoning, ultimately will conclude that since the 14th amendment followed in time, it supersedes article V in the body of the Constitution.

Mr. DIRKSON. Precisely so.

Mr. President, the distinguished Senator from Maryland says, "I am afraid." Afraid of what? The people?

The distinguished Senator from New York says, "I am afraid."

Afraid of what? The people?

Well, Alexander Hamilton was quite aware of these things when he wrote Federalist Paper No. 85. The people were a little afraid at that time about this Constitution and what should they do if they had an abdurate Congress with which they could not deal. They would want an amendment to that Constitution as first proposed—and there were quite a number of proposals by Charles Pinckney and others on amendments—but they finally adopted article V so that the

Congress could initiate a constitutional amendment and send it to the States for ratification. Then, they provided that the people, through their legislatures, could initiate a constitutional connection to propose amendments if Congress refused or failed to do so.

Fancy a hostile Congress that would not do anything about a resolution which came down here.

Well, they had to sell the people on that idea. So, let me read to the Senate what Mr. Hamilton had to say:

"By the fifth article of the plan, the Congress will be obliged, on the application of the legislatures of two-thirds of the States which at present amounts to nine, to call a convention for proposing amendments which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof."

Hamilton continued:

"The words of this article are peremptory."

Well, what does peremptory mean?

Peremptory is absolute. There is no escaping it. That is what Hamilton said, in order to mollify the fears of the people.

Then he went on:

"Nothing in this particular is left to the discretion of that body—"

Meaning Congress.

I read that glorious sentence again:

"Nothing in this particular is left to the discretion of that body."

Yes; Mr. President, they were wise men, those framers. They had all this in mind.

Hamilton continued:

"And of consequence, all the declamation about the disinclination to a change vanishes in the air."

That is Alexander Hamilton speaking, addressed to the people of the 13 States, to be able to say to them, "Fear not. We have put a power in your hands. The Congress cannot thwart you because it is peremptory. We have left no discretion in congressional hands."

Now there is one thing about it, although they have been declaiming on this subject, they have forgotten one thing about a constitutional convention. They have forgotten that a constitutional convention cannot amend the Constitution.

What it can do is to propose an amendment, and nothing more.

That proposal must then go to the country, and the country will then determine whether to ratify or not. It takes three-fourths of the States to ratify. Thus, a constitutional convention itself could consider a host of things. Not a comma or a period could be inserted in the Constitution until three-fourths of the States had solemnly ratified everything that was proposed.

I have no fear of the people. I do not understand these apprehensions and these ghosts under the bed that are seen by those who are now trying to scale down and undo, if they could, what has been built up in securing the applications of 32 States.

Mr. President, the distinguished Senator from Maryland had your State of Alaska on the phone a good many times—so did I—talking to the leaders of both houses of Alaska. The proposal went through one house in Alaska. It failed in the other house by three votes. I am inclined to feel that it was because there was a little political intrusion in it that it failed; but that is a personal opinion of mine.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. DIRKSEN. I yield.

Mr. HRUSKA. Does not article V further provide that ratification can be had by the legislatures of three-fourths of the States or by conventions in three-fourths of the States?

Mr. DIRKSEN. Indeed, it does.

Mr. HRUSKA. Is it not the intention of the Senator from Illinois, and would it be his thinking, that there would be submitted an act to implement the calling of a constitutional convention. It would provide for the selection of conventions within the States for the purpose of considering ratification of any proposal by the convention to amend the Constitution?

Mr. DIRKSEN. Absolutely so.

Mr. HRUSKA. We find evidence in the statements of those who oppose the submission of an amendment of a complete lack of trust and confidence in the com-

petence of the people to govern themselves. It is a rejection of our republican form of government and our democratic form of government.

Mr. DIRKSEN. Let us make up our minds whether this is a government of the people and by the people or not. Abraham Lincoln, standing at that holy spot in Gettysburg, uttered the prayer, as it were, that government of the people and by the people shall not perish from the earth. That has been the great philosophy of our party, and I adhere to it as firmly now as the Great Emancipator did when he uttered those deathless words.

Mr. PROXMIRE. Mr. President, will the Senator yield?

Mr. DIRKSEN. I yield.

Mr. PROXMIRE. May I ask the Senator from Illinois if he still takes the position which he took 2 years ago, and I would like to quote very briefly from what he said——

Mr. DIRKSEN. The Senator does not have to quote me. It has already been quoted.

Mr. PROXMIRE. I understand, but, to frame the question appropriately, I would like to quote what he said.

Mr. DIRKSEN. I would like to ask the Senator, Where is the whole speech?

Mr. PROXMIRE. The Senator is here. He can supply the context. This is what he said 2 years ago in that speech:

"There can be and is a genuine fear of a constitutional convention on the part of many thoughtful people who urgently are working toward enactment of a constitutional amendment. The fear is simple. There has never been a constitutional convention since these United States became a nation. There is strong legal opinion that once the states have mandated a convention, the courts nor the executive can control it, guide it, or establish the matters with which it would deal. A constitutional convention, many sincere people believe, would, once unlocked, spread in every direction."

I wish to ask the Senator from Illinois if he still feels that sincere and thoughtful people feel that way, or whether he would disagree that sincere and thoughtful people feel that way.

Mr. DIRKSEN. Oh, I never disagree with sincere people, but I call attention to the fact that I set up some premises and then proceeded to knock them down.

Mr. PROXMIRE. Would the Senator concede, as he said 2 years ago, that there is strong legal opinion that once the States have mandated a convention, the courts, as well as the executive, could not guide or control such a convention?

Mr. DIRKSEN. Exactly; and for what reason? If the courts or the executive could guide and control a convention, why have article V? That is what Hamilton was pointing out in his papers when he spoke about a hostile government that would not give ear to the people. So here we have the power of the people, and it is provided for in article V.

Mr. PROXMIRE. So the Senator is not only saying that if this convention is called it can go in any direction, but is he now adding that in his judgment that is the way a constitutional convention of the people should develop?

Mr. DIRKSEN. That is right, and the States upon their applications have indicated an interest in one thing, which is the question of apportionment.

Mr. PROXMIRE. Then, the Senator would entertain only those petitions which would specify they are interested in apportionment; others would be considered invalid?

Mr. DIRKSEN. I do not run the convention.

Mr. PROXMIRE. No, but the Senator from Illinois is one of the most influential Members of this body and the principal proponent of a constitutional convention. He would certainly have a major influence on what the petitions acceptable by the Congress should contain and what Congress should consider in giving force to the applications. The Senator is taking the position that only those petitions which would seek to overturn the one-man, one-vote principle would be entertained.

Mr. DIRKSEN. That is the only thing that the legislatures have asked for.

Mr. PROXMIRE. There are a number of States that have asked for a convention that would restrain the powers of the courts over some legislatures.

Mr. DIRKSEN. The fear is expressed that the legislatures would run hog wild. Apparently the Senator has no confidence in his State legislature.

Mr. PROXMIRE. Maybe a little less confidence in a Republican controlled one than I would have in a Democratic one.

Mr. DIRKSEN. Before the control went into Republican hands, the Senator from Wisconsin uttered the same fear, because this goes back to 1964.

Mr. PROXMIRE. I may mention to the Senator from Illinois that the Wisconsin legislature is now considering this matter. The majority leader of the State senate has specified that no convention would be called, but that this would bring to the attention of the people that a State should have a right to apportion the membership of one house on a basis other than population. He says this Wisconsin petition is not going to result in a convention, contrary to what the Senator from Illinois said 2 years ago.

Mr. DIRKSEN. If the Senator is quoting, perhaps the rest of the quotation can be supplied. The expectation is that a convention would be called. If a correspondent was quoting the gentleman, I do not think it is correct, because he was referring to a convention to consider this question.

Mr. PROXMIRE. I am quoting the reporter who gave the position of Senator Robert Knowles as being that it was his belief that a convention would not be called. He said Congress would get some indication of the unrest of the people. He said that is the object of the petition. His view is that a convention is not going to be held. He is the majority leader of the State senate, and the prime proponent of the petition. His view that the petition would simply bring to the attention of the Congress of the United States the unrest brought about by the failure of the Senator from Illinois to write an amendment and to get congressional approval for it.

Mr. DIRKSEN. He is giving his belief that Congress should act.

Mr. PROXMIRE. He said it would not act, that there would not be a constitutional convention. He does not want it, apparently.

Mr. DIRKSEN. He must have been misquoted, because in that resolution there is a statement of intention if Congress did not submit an amendment before the 30th of June, the convention is to be called. If Congress acted, a convention would become moot.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. DIRKSEN. I yield.

Mr. HRUSKA. Is that not exactly what happened when the 17th amendment was proposed?

Mr. DIRKSEN. Exactly.

Mr. HRUSKA. The same condition was expressed—that if it was not done by the Congress it should be done through a Constitutional Convention—and the Congress saw the handwriting on the wall and proposed the 17th amendment, and it was ratified.

Mr. PROXMIRE. I think this debate is very helpful. The Senator is saying that the purpose of this procedure in the State legislatures all over the country is to put Congress in such a mood as to act on the Dirksen amendment of last year; it is not to call a Constitutional Convention, which the distinguished Senator from Nebraska as well as the great and distinguished Senator from Illinois, who are conservatives in the best sense, must know could radically and tragically change our Constitution.

Mr. HRUSKA. Why does not this Congress amend in every conceivable manner the Constitution of the United States? It can propose amendments all over the place if it wants to. Why does not this Congress run away in its effort to amend the Constitution? Common-sense and good faith restrains it. For the same reason I would be very confident and extend every good faith to the representatives in a national convention. As the Senator from Wisconsin will surely concede, all wisdom does not abide in the 100 Members of this body. Surely those selected to the high honor and heavy responsibility of representing the people in a national convention can be given the confidence of possessing good faith and good judgment.

They cannot run away, because it would take 38 State legislatures or constitutional conventions to adopt and ratify their amendments. And, Mr. President, if that is accomplished, who shall deny them the right to exercise the constitutional prerogatives contained in article V? Who is to say? These people representing temporarily the States of the Union?

The significant point in this whole matter is the effort to permit the people to speak. If the amendment is ultimately adopted, it would be a plan which would be approved by the legislatures of the States, calling for representation on a basis other than population in one of the bodies of the legislature, subject to one thing, Mr. President, and that is a popular vote of the people on that issue. Not only once, but every 10 years.

If it is not a proposition of being afraid to trust the people, and of lack of confidence in their ability, to oppose that kind of a proposition, then I do not recognize the breed of the animal.

Mr. PROXMIRE. Mr. President, once more, here is the box we are putting ourselves into: the State legislatures are deeper concerned because under the Court's ruling, they must apportion both Houses on the basis of population. They feel very strongly on this particular issue. They have petitioned for a constitutional convention to act on the issue.

Nevertheless, article V is very clear; and it seems to me, if I understand anything the Senator from Illinois has said this morning, that his view is that a constitutional convention could not be bound, and he says it should not be bound. They do not have to confine themselves simply to apportionment. They can repeal the first ten amendments of the Constitution, if they wish to do so.

The PRESIDING OFFICER. The time of the Senator from Illinois has expired.

Mr. DIRKSEN. Mr. President, I ask unanimous consent to proceed for an additional 30 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PROXMIRE. And what is the answer of Senators DIRKSEN and HRUSKA to this "Pandora's box" nightmare? The Senator from Nebraska supplied it when he asked what is wrong with relying, number one, on a vote of the people who were elected by all the people to take part in this constitutional convention. with the double check that it would have to go through three-quarters of the legislatures or three-quarters of the States having conventions in order to be ratified.

The answer to the Senator is that those of us who have had experience with State legislatures know that a proposal as extreme as abolishing the Federal income tax—the primary basis for supporting our Government has passed a shocking large number of our State legislatures.

State legislatures have far less knowledge of Federal problems and little or no responsibility for them.

Frankly if the Congress should call a constitution convention, I would expect a number of extreme amendments to be offered and adopted by three-quarters of our State legislatures.

Mr. HRUSKA. The same article would allow them to reconsider, would it not?

Mr. PROXMIRE. What I am trying to get at is that we have had, for the 180 years of our Republic's history, amendments acted, with Congress originating them, never calling a constitutional convention. Members of Congress responsible for Federal law and experience in Federal law making have had and should have the principle voice in acting on constitutional amendments. I think those 180 years represent some accumulated wisdom. We should recognize that once you call a convention of this kind, of people who is most cases have not had experience in Federal office, as Members of Congress have had, of people who have not had the kind of seasoning in working with legislation that Members of Congress have had, almost anything could happen.

Mr. HRUSKA. Exactly.

Mr. PROXMIRE. And three-quarters of the legislatures could act under those circumstances.

Mr. HRUSKA. That is what the Constitution provides.

Mr. PROXMIRE. It is not a matter of not trusting the people. None of us would be here is we did not trust the people. It is a matter of recognizing we have established a good practice, in the past, in accordance with the first provision of article V, and that it could be most unfortunate if we now turn to an untried method which could result in many radical changes in our form of government.

Mr. HRUSKA. The Senator is using words of tact, and they are quite blandishing, but the substance of what he is saying is this: "I do not think the people are competent to govern themselves and make this decision for themselves." That is the plain import of the Senator's statement.

Mr. DIRKSEN. Mr. President, I must remind my friend from Wisconsin all over again that a constitutional convention could propose an amendment to adopt the metric system in the United States; but he forgets that it has got to go back and receive the approval of three-fourths of the States before it ever gets within the four corners of the Constitution of the United States.

The point has been made here this morning that these applications are invalid, because they date back, in some instances, to 1963. I think the Supreme Court demolished that argument pretty well in connection with the 17th amendment,

in the case of Dillon against Glass. That is the amendment that provided for the direct election of Senators. It was attacked because of Section 3 in the amendment, which allowed 7 years for ratification.

Oh, the great to-do, the hue and cry that was made, that that was out of all reason. But when the Supreme Court got through, they said 7 years was a reasonable time.

If 7 years is reasonable for ratification, is 4 years an unreasonable time in which to initiate, by State application, a convention for the purpose of amending the same Constitution to which they have 7 years to approve an amendment? I submit that the rule of reason applies in every case.

It has been said that some of the applications are not valid as to form and substance. Mr. President, the Constitution of the United States is completely silent on that point. Since State legislaures must initiate, under article V, that is a matter for them to determine. All that is needed, by a rule of reason, is a clear expression of intent by the legislatures. So what differences does it make in what form the application for a convention is made?

It has been said that some of the legislatures passed these resolutions when they were malapportioned. If that made this action invalid, then why not apply the same rule to everything that those legislatures did from the time they were malapportioned? Why not strike down the appropriation, strike down the validation of nominations to State courts and to State offices, strike down all the policy legislation and statutes they may have passed?

Besides that, 25 of those States which are alleged to have been malapportioned approved 25 amendments to the Constitution, and we still accept them as valid.

I defy Senators to find anywhere, in any decision, the word "illegal." The court has never said that a malapportioned legislature is an illegal legislature. They have been accepted in due course.

Can Congress limit or control the convention? One of the reasons Alexander Hamilton wrote that article 85 in the Federalist was to make clear to people that no hostile Congress could thwart the will of the people, if they wanted to amend their own organic law. That makes good sense.

Now comes the great expression of fear that people are going to run hogwild, that a convention will run hogwild. Well, you would have to have either the legislatures or the conventions in three-quarters of the States also run hogwild before you could add one word or one syllable to the Constitution.

Mr. HOLLAND. Mr. President, will the Senator yield?

Mr. DIRKSEN. I yield.

Mr. HOLLAND. Mr. President, I am so glad that the distinguished Senator is making this speech, and particularly that he refers to the fact that 25 amendments to the Constitution have been adopted by legislatures which under the present law would have been held to be malapportioned.

I recall many Supreme Court decisions in which these amendments have been followed, approved, and interpreted. As late as the time of the Virginia poll tax decision, the Court found occasion to approve and to comment upon the 24th amendment, which was ratified prior to the amendment most recently adopted.

I wonder with the adoption of the 25th amendment, if on any occasion when it is exercised—and I hope there will not be any occasion—somebody will raise the question that the Vice President who happens to come into office or the President, as the result of the functioning of the 25th amendment is not really the President because a malapportioned legislature, or several of them, happened to be among the 38 States that adopted that amendment.

The whole argument seems to me to be completely fallacious. I am glad that the Senator is exposing it.

I hope that the Senator is successful in his effort to have the legislatures, speaking for the people of the State more clearly than any other groups can speak, demand action in this field.

We have recently had a horrible example in my State of Florida of what happens when the court reapportions. I think our people are sick of it. For instance, we have the coupling of Broward County, the county of Port Lauderdale, in a circuitous route with Monroe County, which is almost an independent principality for the selection of senators, so that all three State senators allowed in that widely extended district have now been named by Broward County. That is a situation in which a citizen from Key West has to come 109 miles to Miami, plus the 28 or 30 miles to Fort Lauderdale, before he can find a State senator to discuss special or local legislation which vitally affects him and his county. There is no State senator who knows what happens in his particular county of Monroe.

I hope the Senator from Illinois will continue to pursue this course of action with the perseverence which has marked his activity in the past. I hope that he will be successful in his course of action. So far as the senior Senator from Florida is concerned, he proposes to cooperate with him to the fullest possible extent in any way in which he can cooperate.

Mr. DIRKSEN. Mr. President, I remind the distinguished Senator from Florida of the Supreme Court case in which argument was finished yesterday. It involved local districts, like towns and cities. In the case of Houston County, Ala., the board of revenue and control administers 1,000 miles of highway dominated by the city. As the attorney said before the Court, the city could not care less about country roads.

This is already simmering down. It was estimated yesterday before the Court that as many as 20,000 local political subdivisions might be affected. They would consist of school boards, park boards, drainage districts, cities, and counties. You name it, and it will come within the purview. However, the Court is trying to find out where to draw the line, now that the damage has been done.

Mr. HOLLAND. Mr. President, will the Senator yield further?

Mr. DIRKSEN. I yield.

Mr. HOLLAND. Mr. President, if I may revert again to the case I just mentioned, which is only one of the horrible situations resulting in my State from a court reapportionment, I can say from some knowledge that many of the questions that will come up on a local basis in Monroe County—the county of Key West—have to do with marine or maritime matters—for instance, the stone crab, which the distinguished Senator knows of and loves so well as a table delicacy. Shrimp are found there in great profusion, as well as sea turtles and other sea creatures which are harvested from the gulf or the Atlantic at or near Key West.

Is it not rather ridiculous to have a local legislator address himself to the handling of problems such as these which are decided in the Florida Senate by three State senators from Broward County, on the mainland of the Atlantic coast, where none of these problems exists? They have to handle matters concerning which they have no knowledge, matters like the Key West crawfish, which are of vital importance to the people in that far-off area which happens to belong to the suzerainty of three Senators who live up in the Fort Lauderdale area. There could not be any more ridiculous situation than to expect those three State senators to know, understand, and be able to deal with the local problems affecting Key West, or Monroe County.

I cite that as an illustration of where we can go when we try to operate on an arbitrary one-man, one-vote basis, particularly when we place jurisdiction and authority in the courts, and have cases decided by men who have life tenure, who do not care whether the people like it or not, who do not care whether it suits the desires of the people or not but simply decide questions on a mathematical basis by a circuitous route, taking a course such as was adopted in that case, by which they linked Key West, through the little west coast county of Collier, with the great county of Broward, so that Broward, with its 10-to-1 voting strength over both those counties—can dominate the entire delegation.

It is not right. It is not democratic. It is not sound. It ought to be corrected, and I hope the Senator from Illinois will presevere in his effort to have such situations corrected.

Mr. DIRKSEN. Mr. President, I say to my distinguished friend, the senior Senator from Florida, that we have persevered, and we shall continue to do so.

The votes of only seven other Senators were necessary to adopt the resolution that I offered in January 1965, to provide the constitutional two-thirds. Only seven other votes were needed. The vote was 57 to 39, and we fell just a few votes short.

The Senate should have passed that resolution, and the House should pass it. Then, let it go to the people and see what they have to say. However, here we have the expression: "I am afraid of the people."

All I can say, as was written on the ancient parchment long ago: "O, ye of little faith."

I think that is a good place to stop, and we will join in combat at some time later. So, I leave it at that for the moment.

I shall fervently hope that, in a number of States where this resolution is under consideration, they will see fit to approve it.

When we get the necessary 34—and we require only two additional States—I shall march in here, because this is a matter of the highest privilege, with a

concurrent resolution and ask that it go to the calendar so that it can be considered in due course.

Mr. President, I believe that will be the end of the discussion for the moment. There is much that I could add, but I shall do that on a subsequent occasion.

Mr. President, I yield the floor.

EXHIBIT 1

[From the Chicago Tribune, Mar. 9, 1967]

STATE SET TO JOIN ONE-MAN, ONE-VOTE FIGHT—SENATE EXPECTED TO APPROVE DIRKSEN PLAN

(By George Tagge)

SPRINGFIELD, ILL., March 8—Joining a revolt against the "one-man, one vote" dictation by the United States Supreme court, the Illinois legislature today prepared to join the legislatures of 27 other states in demanding a national convention to revise the federal Constitution.

The Illinois Senate gave every sign that next week it will adopt a resolution to put Illinois on record in the march toward action by 34 states to achieve the national constitutional convention.

SUGGESTED BY DIRKSEN

Last week the Illinois House adopted the resolution and sent it to the Senate, as suggested by United States Senate Minority Leader Dirksen [R., Ill.]. Dirksen for years has been seeking means of restoring the right of states to follow the federal system in setting up legislatures if their voters want it.

Until the Supreme court several years ago upset the traditional rights of states in this field, most of them followed the system of having one legislative body based on population, and the other chamber based also on other factors.

WOULD ELECT JUSTICES

Illinois voters in 1954 overwhelmingly adopted the federal system but they were overruled by the supreme court headed by Chief Justice Earl Warren, former governor of California.

The anti-supreme court trend was sparked here yesterday by introduction of a Senate resolution aiming at election of justices of the United States Supreme court. This would also be the subject of a national convention obtained by the same method as the one on legislative apportionment.

The move toward abolishing Presidential appointment of Supreme court members was proposed by a freshman Republican, Sen. Joseph J. Krasowski of Chicago's southwest side.

An ultra-liberal Democrat, Sen. Paul Simon of Troy, sought to get a promise of delay beyond next week from Sen. Hudson Sours [R., Peoria], chief sponsor of the Dirksen plan resolution.

CITES 14TH AMENDMENT SPEED

Sours replied that the 14th amendment to the United States Constitution, on which the Supreme court based its 'one man, one vote' rulings, was created in less time than is being taken in Springfield to try to modify just one effect.

Sen. Robert McCarthy [D., Decatur] objected that the League of Women Voters favors the pronouncements of the Supreme court and has not had a chance to go into action since the revolt started here last week.

One of the chief lobbyists for organized labor today may have aided the movement toward a national convention. He is John Alesia, legislative spokesman for years for the United Steel Workers and brother-in-law of Joseph Germano, mid-west regional director of the USW.

WILLING TO CHANGE SENATE

Sen. Everett E. Laughlin [R., Freeport] asked Alesia, a witness before the senate sitting as a committee of the whole, whether his AFL–CIO organization would pursue its "one man, one vote" theories to the point that each state would not be entitled to two United States senators.

"We'll accept the United States Senate on a population basis," Alesia replied.

Surprised by the union lobbyist's answer, other senators asked him similar questions and obtained similar replies.

"We would support reapportionment of the United States Senate on a population basis," was Alesia's final version.

STATES CAN FORCE ACTION

Article 5 of the Constitution provides that a convention to revise this basic law may be had if two-thirds of the state agrees on this goal.

Simple majorities are sufficient to adopt the national constitutional resolution.

In contrast, two-thirds majorities in the Senate and House here are needed to adopt a pending resolution for a state convention to revise the Illinois constitution of 1870.

[From the Washington Post]

HIGH COURT PONDERS ONE-VOTE ISSUE

(By John P. MacKenzie)

The Supreme Court searched yesterday for a place to draw the line on the "one person, one vote" principle for local government.

The Justices completed two days of oral argument in four local reapportionment cases. They heard warnings of a "political thicket" more dangerous than State legislative reapportionment, and complaints of a continuing 'rural stranglehold' on cities at the level of county government.

They were assured by lawyers for city dwellers that the problem was manageable despite the number and variety of county and city governing units. One lawyer said that about 20,000 of the Nation's 90,000 local bodies would be affected.

ONLY 20,000?

"Only 20,000?" asked Justice Byron R. White. "That's a lot more than 50," Justice William J. Brennan Jr. added, referring to the number of state legislatures governed by the 1964 equal-population decision.

Justice Abe Fortas said the problem was: "What is local government?" He demanded in each case to know the specific governmental powers the State had delegated to local political units. In no case could opposing counsel agree.

Justice Department Attorney Francis X Beytagh, supporting extension of the equal-population rule, said Fortas's functional approach would bog the Court down in details not involved in the four cases. He said the rule should apply whenever the State provides for elections by districts to a body with any governmental powers.

At issue are the election processes for these political units:

The school board of Kent County, Mich. Grand Rapids has more than half the County's population, but its school district is only one of 21 in the County, each district having a vote in the annual selection of school board members.

The Board of Revenue and Control of Houston County, Ala. The City of Dothan, which has more than half the County's voters, is outnumbered by four rural districts.

The Board of Supervisors of Suffolk County, Long Island. The County is composed of 10 towns ranging in population from 1300 to 172,000 but each town is entitled to one Board member.

The City Council of Virginia Beach, Va. All its 11 members are elected at large, but seven must reside in each of seven boroughs that vary in population from 733 to 20,000.

MOST DIFFICULT CASE

Beytagh conceded that the Michigan case was "the most difficult" of the four because the school board is not elected directly by the people. But he said most school boards are popularly elected and should be covered by any equal population ruling.

School board attorney Paul O. Strawbecker insisted that in Michigan, "education has never been a part of local self-government." He insisted that fairly apportioned state legislatures were "more competent than any court" to distribute political power below the state level.

Washington attorney Charles S. Rhyne, who argued in the breakthrough 1962 case of Baker vs. Carr, urged the Justices to extend the rule because "it's a principle that you just can't carve up."

But Truman Hobbs, lawyer for the Houston County board, insisted that most of the board's work was administering 1000 miles of rural roads. He said the city "couldn't care less" about county roads and rural residents would suffer if the city dominated the county board.

[From the Congressional Record, May 10, 1967]

THE REAPPORTIONMENT CRISIS

Mr. HRUSKA. Mr. President, I want to address myself this afternoon to an analysis of the constitutional question posed to Congress by the petitions for a Constitutional Convention by the States—the most important Constitutional question to confront the country since the convening of the original Constitutional Convention in Philadelphia on May 14, 1787.

The men who assembled in Constitutional Convention at Philadelphia May 14, 1787, in order to form a more perfect Union, probably are unmatched by any single group in history for their reasoned grasp of the tenets essential to a government of the people and for their unquenchable thirst for freedom.

The Constitution which they wrought with brilliance and fervent devotion to freedom under law, I believe, stands high above the achievement of the Magna Carta, obtained as Hamilton described it "by the barons, sword in hand, from King John." It stands high above such landmark documents, too, as the Petition of Right assented to by Charles I, or the Declaration of Right presented to the Prince of Orange and afterwards formed into an act by Parliament called the Bill of Rights.

The Constitution of the United States proposed by that inspired body meeting in Convention Hall in Philadelphia was the product of free men—forging freedom by choice. It was not the grudging gift of some despot brought to terms by force of arms or that of some benevolent monarch.

"We the People of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

"To secure the blessings of liberty to ourselves and our posterity . . ."

We, today, are that posterity. Does the light of liberty burn within us as an all-consuming, living, breathing precept as it did with those who so magnificently forged our Constitution? Does the rule of reason, the passion for government by law, stir our souls to the degree required to protect our precious constitutional heritage? I believe so.

I would not so believe, however, if I thought we might heed the dismaying clamor pealing from the confines of mind of a few willful men intent on tailoring the fabric of our Constitution for purposes other than it was devised.

A CONVENTION GUIDELINE

For the first time since the adoption of the Constitution on September 17, 1787, this Nation may be on the verge of convening another constitutional convention. It behooves us in this light to examine the cause and to study the purpose of that first Convention when it created the constitutional procedure for convening a future convention.

In this way, I believe, we can better bring logic to our discussion and develop a guideline to the constitutional ground on which we tread.

While the points which I wish to raise are designed to clarify the procedures inherent in a constitutional convention, I would point out that the Congress, in view of the nature of the petitions from the States for a convention before it, may resolve the issue itself by proposing the requested amendment to the Constitution to the States for ratification. It has an alternative.

I would prefer to see this alternative course pursued.

I have no fear of the will of the people of these United States however if the Congress, in its wisdom or obstinacy, prefers the convening of a Convention. To vote otherwise, in my mind, would be to violate my oath of office to uphold the Constitution by which this Nation is governed.

Much in the manner of Chicken Little skittering to and fro telling all who would listen the sky is falling, much alarm has been expressed at what a Constitutional Convention might do. "The Bill of Rights will be repealed," "the Supreme Court will be abolished," are just two of the more irrational alarms being trumpeted from the rooftops by some who have felt compelled to exclaim rather than reason.

Fears of this kind have no foundation in reason, logic, or experience. They should be dismissed.

WHAT A CONSTITUTIONAL CONVENTION CAN DO

I think it is more important to recognize a Constitutional Convention for what it is and what it can do. First, it is a perfectly valid method of proposing amendments to the Constitution. It is a right reserved to the States and guaranteed by article V of the Constitution. The fact that we have never had one does no diminish the right of the people to have one if they wish.

As to what a Constitutional Convention might do to existing rights or to governmental structure, it could do nothing more than what the Congress has authority to do—it can propose amendments to the Constitution. Alone, it can make no change in the Constitution; it can change no rights. In the final analysis, three-fourths of the States, a total of 38, either by legislative action or by State convention, must ratify any amendment the Convention might propose before it becomes a part of the Constitution. Precisely the same procedure that applies to amendments proposed by the Congress must be observed so far as ratification is concerned.

In our examination of the facts it is reasonable, I believe, to read article V, to see what it says, look at the background, refresh our memory on why it was made a part of the Constitution, and analyze the legal aspects surrounding it:

ARTICLE V

"*The Congress*, whenever two-thirds of both Houses shall deem is necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments*, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . ."

THE GENESIS OF ARTICLE V

Let us look for a moment at the genesis of article V. Why did the delegates to the Constitutional Convention in Philadelphia insert this provision for a future Constitutional Convention into their handiwork? The answer is not difficult to determine. One of the great fears of the delegates was a balky future Congress, a Congress that might prove unresponsive to the wishes of the States, and more importantly, to the wishes of the people in those States.

A great weakness in the Articles of Confederation with which the delegates to the Philadelphia Convention were wrestling was the difficulty of amending the articles. Amendments to become binding required ratification by the legislatures of all of the States. It is for this reason without question that the delegates to Philadelphia early realized the impracticability of merely amending the Articles of Confederation even though every delegate, with the possible exception of those from New Jersey, who were operating under somewhat broader authority than their confreres, was under instruction to do no more than propose amendments to the Articles of Confederation.

Shortly after it became apparent that more than the mere amendment of articles would take place and that a new Constitution would be submitted, the problem of providing for subsequent amendments to the proposed Constitution was considered. Four separate proposals were submitted. Mr. President, I ask unanimous consent that an exhibit which contains the text of proposals by Pinckney, Randolph, and Mason, and documentary references and commentary upon them, be printed in the Record at the conclusion of my remarks. The Hamilton proposal I shall speak of later.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

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FEAR OF AN UNRESPONSIVE CONGRESS

Mr. HRUSKA. It seems clear from the debates that what was foremost in the minds of the delegates in regard to amending the Constitution was the fear that, among other things, there would be at some future date a Congress unresponsive to the wishes of the State. Initially the sentiment of the delegates, as shown by the journals and diaries, seemed to be that of denying to the Congress any voice in the process of amending the Constitution. The debates convinced a sufficient number of delegates that Congress should at least have an opportunity to propose amendments with the final approval left to the States. As a result, Congress was only given authority to propose amendments. The States, through their legislatures, retained the authority to initiate a Convention. The safeguard of a Convention was specifically provided so that Congress could not thwart the wishes of two-thirds of the States by refusing to submit amendments desired by the States.

Mr. President, it seems to me that we ought to put this in proper context. Those men at that convention had just finished a long war against King George III of England, and a situation existed of refusal on the part of the Government to permit people to have their wishes. They wanted to guard against such refusals. They did it in many ways. One was the safeguard that was put into the Constitution in article V, which allowed for the States and for the people of the States an opportunity to combat tyranny—the tyranny of either the executive, of the Congress, or of the central national government—by having a convention to consider amendments to the Constitution.

This safeguard for the calling of a Convention upon application of the legislatures of two-thirds of the States seem to be perfectly clear in intent. In fact, it would appear that the Congress by refusing to call a Convention upon application, would, in such instance, be setting itself up as being above the Constitution. For instance, the States might decide that a Convention was necessary in order to limit the power of Congress—could Congress refuse to call a Convention in such instance? A situation very nearly like this occurred when the 17th amendment—direct election of Senators—was proposed—it can hardly be argued that this amendment was "necessary"; rather, it is apparent that Congress acted in order to avoid a Convention.

The Federalist Papers give clear insight as to what the framers of the Constitution had in mind with the adoption of article V. Alexander Hamilton, in Federalist Paper No. 85, made the point that the people were a little afraid at that time about the proposed Constitution and what they should do if they had a balky Congress with which they could not deal. Pointing out they would want to amend the Constitution and to insure this right article V was approved.

HAMILTON

Hamilton said:

"By the fifth article of the plan, the Congress will be obligated, 'on the application of the legislature of two-thirds of the States' which at present amounts to nine, to call a Convention for proposing amendments which shall be valid to all intents and purposes as a part of the Constitution when ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof. The words of this article are peremptory "The Congress shall call a Convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declaration about their disinclination to a change, vanishes in the air. Nor however difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a Union on points which are merely relative to the general liberty or security of the people. We may safety rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."

THE SITUATION TODAY

In can be seen then that the situation confronting this Congress is precisely that visualized by the delegates to the Constitutional Convention in Philadelphia in 1787 when they made provision that a Constitutional Convention must be called upon application of two-thirds of the States. At this time in our history, two-thirds of the States of the Union number 34. As of this moment, 32 States have petitioned this Congress to call a Constitutional Convention for the purpose

of proposing an amendment to the States for ratification which would permit the States a degree of flexibility in the apportionment of one House of their State legislatures. It should come as no surprise to the Members of Congress that the States have so petitioned.

In 1963, as the first implications of Baker v. Carr—March 26, 1962, 369 U.S. 186—became evident, several States petitioned Congress to call a convention or to take action.

In 1964, Congress again failed to take action and additional States added their petitions to the roll before us.

In 1965, the process was repeated.

Again in 1966, the number of States petitioning for action increased.

So far this year 1967, four additional States have petitioned, bringing the total number of petitions before us, as I have said, to 32. I predict that the number will reach 34, and quite possibly more. The reason is that Congress has refused to act in keeping with the expressed, deeply felt wishes of the States in connection with this vital constitutional question. Therefore, as Hamilton foresaw in making provision for a call of a Constitutional Convention in the face of an obdurate Congress, the States are following the petition route.

It is important, moreover it is essential, it seems to me, in view of this demand by the States for a Convention that certain facts be clearly enunciated.

1. ARE THE PETITIONS FROM THE STATES INVALID HAVING BEEN ADOPTED OVER A PERIOD TO DATE, OF FOUR YEARS?

Article V is silent as to the period of time in which applications must be received in order to be valid and as to the period of time in which ratification must occur in order for a proposed amendment to become valid as a part of the Constitution.

A time limit in which ratification must take place was imposed by the Congress in the submission of the 18th amendment. This marked the first instance of such a time limitation. In the third section of that amendment the 7-year period for ratification was expressed. The validity of this amendment was challenged because of the alleged "extra-constitutional provision of the third section" in Dillon v. Glass, Deputy Collector of the United States Internal Revenue, 256 U.S. at 368.

The court ruled that the fair inference from article V is that ratification must be within some reasonable time after proposal of the amendment and that 7 years, as determined by Congress, was reasonable. The opinion pointed out that the Constitution's lack of express provision on the subject is not in itself controlling, because with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. The following cases were cited: United States v. Babbit, 1 Black, 55, 61; Ex parte Yarbrough, 110 U.S. 651, 658; McHenry v. Alford, 168 U.S. 651, 672; South Carolina v. United States 199 U.S. 437, 451; Luria v. United States, 231 U.S. 9, 24; The Pesaro, 255 U.S. 216.

An examination of article V, the court said, discloses that it is intended to invest Congress with a wide range of power in proposing amendments. The opinion also reads:

"We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggest the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefore that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.

"We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal.

"Of the power of Congress, keeping within reasonable limits to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution

speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require [1]; and Article V is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

Applying the reasoning of the court in Dillon against Glass to the problem at hand it is clear that applications for a Convention would certainly be valid if received within a 7-year or possibly a longer period, since this period was established by the Congress and approved by the courts, and action pursuant thereto constituted valid ratification. The argument that applications, to be valid must be received in the life of one Congress is about as illogical as saying that ratification must take place in the life of one Congress or that failure of a proposed amendment in one Congress would forever foreclose subsequent Congresses from attempting to propose similar amendments.

2. ARE THE APPLICATIONS VALID AS TO FORM AND SUBJECT MATTER?

In determining whether the applications are in proper form, it should be recalled in the first place that article V makes no reference to form. Congress might, although this is a doubtful power, prescribe a form to be used for this purpose but it has not done so. It seems strange, then, for Congress now to contend that the applications are in improper form. More logical, it would seem would be the view that since the State legislatures, and they alone, have the authority to initiate a Convention, their decision as to form should be binding, and the form used by one legislature would not preclude the use of a different style form by another legislature in making application to the Congress for a Convention. What really seems to be important or controlling is the substance, purpose, and intent of the applications.

Each of the 32 applications presently before us specifically requests that a Constitutional Convention be called. They assign various reasons for their request by using one or more "whereas" clauses, all of which, however, relate to apportionment. These clauses are not a part of the resolving clause and in no way limit its effect. Some legislatures have proposed in their applications actual language for an amendment but in so doing they have not destroyed the effectiveness of their applications for a Constitutinal Convention. Such language could only be regarded at most as surplusage intended to convey to the Congress an idea as to the wording of the amendment that either the Congress or a Convention could propose for ratification. The applications, as previously noted, do give to Congress the alternative to calling a Constitutinal Convention; that alternative being the submission of amendment by the Congress.

Some of the States have in their applications, attempted to establish the method of ratification. No reason is given for this action, but it can be presumed that it was done so as to foreclose any possibility that the Congress might refuse to provide a method of ratification. In any event the inclusion of this extraneous material could not conceivably invalidate the application for a Constitutional Convention.

In fact, the situation existing now is almost precisely that envisioned by the delegates at Philadelphia. The alternative that the delegates provided, the calling of a Constitutional Convention, was designed to meet the very situation where Congress would not act.

3. DOES THE FACT THAT SOME OF THE LEGISLATURES WERE MALAPPORTIONED AT THE TIME THE APPLICATIONS WERE ADOPTED AFFECT THE VALIDITY OF THE APPLICATIONS?

During the period of time covered by these applications—1963–67—application for a Convention has been made by legislatures apportioned on the basis of population alone. Other legislatures that were under court order to reapportion also made application for a Convention, and, finally, State legislatures that were malapportioned to some extent according to the principle of Reynolds against Sims, but had not been found to be malapportioned by any court, also approved

[1] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch* v. *Maryland*, 4 Wheat. 316, 407.

applications for a Constitutional Convention. The question has been raised as to whether these two latter groups could make a valid application for a Convention so as to permit apportionment of one House on the basis of factors other than population alone.

Part of the argument being made in support of the premise that a malapportioned legislature could not make a valid application for such a Convention is based on the premise that such action was self-serving and would tend to make that legislature "pure." This line of argument falls of its own weight. In the first place, no such application could stay court action requiring apportionment based on the principle of Reynolds against Sims; namely, population alone. So that those legislatures under court order had no alternative but to reapportion, and they did. Obviously, any such application could not have been self-serving so far as preserving the apportionment of that legislature was concerned. Those legislatures that were in fact malapportioned, but under no court order could hardly expect to maintain their status quo by the act of approving an application for a Convention. Only an amendment to the Constitution could help them, and the undisputed fact is that there was not sufficient time to propose a constitutional amendment and obtain ratification so as to help this group.

As to the patently absurd argument that these applications cannot be counted because they were approved by a malapportioned legislature, it can be disposed of with the observation that if such argument is true, then every act of that legislature and preceding ones are invalid and with them quite likely most every act of the Congress because every State having more than one Representative in Congress would have had its congressional districts determined by an invalid legislature. Also, the validity of all amendments to the Federal Constitution subsequent to the 14th will be brought into question because with only one exception, the 21st article of amendment, they have been ratified by malapportioned legislatures. What a paradox it would be to hold valid the ratification of an amendment by a legislature as provided in article V and to hold invalid the petition for a Constitutional Convention by the same legislature as also provided in article V.

Fortunately, we have some guidance from the Supreme Court on this problem. The question arose in *Texas* v. *White* (1868) 7 Wall (74 U.S.) 700.

U.S. SUPREME COURT RULING ON THIS POINT

Texas v. *White*—74 U.S. Reports 700 (1868). The Supreme Court in this case was confronted with a situation based on certain acts of the Civil War Legislature of the State of Texas. It held that—

"Considered as transactions under the Constitution, the ordinance of secession, adopted by the Texas convention, and ratified by a majority of the citizens of Texas, and all acts of her legislature intended to give effect to that ordinance were absolutely null. They were utterly without operation in law."

But, the Court stated, the State did not cease to be a State, nor her citizens to be citizens of the Union. The insurgent legislature could not be regarded in the courts of the United States as a lawful legislature, or its acts as lawful acts. Yet that legislature and its government were the only actual government Texas had. It constituted a de facto government "and its acts during the period of its existence as such would be effectual and in almost all respects valid." Such validity, however, did not extend to a contract in aid of the rebellion, which was a treasonable act. On this point the Court held:

"Exact definitions, within which the acts of a State government, organized in hostility to the Constitution and government of the United States, must be treated as valid or invalid, need not be attempted. It may be said, however, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to persons and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens and other acts of like nature, must, in general be regarded as invalid and void."

No one would seriously contend that these State legislatures who have made application for a Constitutional Convention were "illegal governments" by virtue of the fact that they were malapportioned. It certainly cannot be said that an application for a Constitutional Convention constitutes "rebellious" or "treasonable" actions of that legislature.

At the time the petition for a Convention was adopted, the very least that can be said that such legislature was a part of a de facto government and its acts would be effectual in such matters as this. This is clear under the decision in Texas against White.

But the uniform holdings of the courts have been that otherwise valid enactments of legislatures will not be set aside as unconstitutional by reason of their passage by a malapportioned legislature. See *Dawson* v. *Bomar*, 322 Fed. (2d) 445 (1963), Sixth Circuit Court of Appeals (certiorari denied, 376 U.S. 732).

Mr. President, I ask unanimous consent that portions of that opinion be printed at this point in the Record.

There being no objection, portions of the opinion was ordered to be printed in the Record, as follows:

"As indicated by the petitioner's failure to cite authority in support of his contention, the courts have uniformly held that otherwise valid enactments of legislatures will not be set aside as unconstitutional by reason of their passage by a malapportioned legislature. This conclusion is reached upon one or more of three judicially recognized doctrines: (1) the *de jure* doctrine which recognizes that a legislative body created by a state constitution has a *de jure* existence which is not destroyed by an failure to redistrict in accordance with the constitutional mandate; (2) the *de facto* doctrine which recognizes that the legislative offices created by the state constitution were *de jure* and the incumbents, even though elected under an invalid districting act, were at least *de facto* members of the legislature and their acts as valid as the acts of the *de jure* officers; (3) the doctrine of avoidance of chaos and confusion which recognizes the common sense principle that courts, upon balancing the equities between the individual complainant and the public at large, will not declare acts of a malapportioned legislature invalid where to do so would create a state of chaos and confusion.

"For the Court to select any particular category of laws and separate them from other laws for the purpose of applying either the *de facto* doctrine or the doctrine of avoidance of chaos and confusion would in fact circumvent legal principles in order to substitute the Court's opinion as to the wisdom, morality, or appropriateness of such laws."

Mr. HRUSKA. Mr. President, in the case of *Ryan* v. *Tinsley*, 316 Fed. (2d) 430 U.S. Court of Appeals, Tenth Circuit, April 22, 1963, the court held:

"If the petitioner's contentions are to be accepted, a malapportioned legislature could not pass a valid act of reapportionment."

4. CAN THE CONGRESS OR THE STATES LIMIT THE ACTION OF A CONVENTION?

In providing an answer to this question two principles must be kept in mind. First, is that whatever the Congress does, it can only do as a result of authority delegated to it in the Constitution. Second, Congress in proposing amendments or calling a Constitutional Convention is not exercising a legislative function. This latter matter was thoroughly discussed and disposed of by the Court in *Hollingsworth* v. *Virginia* (1798) Dallas 378. In that case the following argument was made:

"The amendment has not been proposed in the form prescribed by the constitution, and therefore, it is void. Upon an inspection of the original roll, it appears, that the amendment was never submitted to the president for his approbation. The constitution declares, that every order, resolution or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives &c. Art. 8 S 7. Now, the constitution likewise declares, that the concurrence of both houses shall be necessary to a proposition for amendments. Art. V. and it is no answer to the objection, to observe, that as two-thirds of both houses are required to originate the proposition, it would be nugatory to return it with the president's negative, to be repassed by the same number; since the reasons assigned for his disapproba-

tion might be so satisfactory as to reduce the majority below the constitutional proportion. The concurrence of the president is required in matters of infinitely less importance; and whether on subjects of ordinary legislation, or of constitutional amendments, the expression is the same, and equally applies to the act of both houses of congress."

In response the Attorney General stated:

"Two objections are made. 1st. That the amendment has not been proposed in due form. But has not the same course been pursued relative to all the other amendments that have been adopted? (a) And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the president with a qualified negative on the acts and resolutions of congress."

The Court on the day succeeding the arguments unanimously held that the amendment was constitutionally adopted, and this decision has been uniformly observed, establishing the fact that the amending process is not a legislative function.

As to the question of a delegation of power to the Congress to limit the action of a Convention, nowhere in the Constitution can such a delegation of authority be found. Such a delegation would negate the very authority reserved to the States. What purpose would be served by allowing the States to initiate a Convention and leave the authority in the Congress to say what the Convention could do? If a Convention can in fact be limited, it would seem that only the States who possess the sole authority to initiate it could control it. In this connection I would point out that all 32 petitions under discussion request action only in respect to reapportionment. In fact, also, further and ultimate control does rest in the States for not until three-fourths of them have ratified, could any amendment proposed by a Convention have effect.

In further considering this point, it is necessary to examine the precise nature of the acts involved in calling a Constitutional Convention. The Congress, as has been discussed does not have the initiating authority in this instance, it can act, only in response to applications from at least two-thirds of the State legislatures, and, upon receipt of the necessary number must call such a Convention. Since the Congress is without authority of its own to call a Convention, it is possessed at most with authority only over routine housekeeping functions. These functions would provide for the place, date, presumably the duration, financing, voting, and other similar functions of the Convention .

Since article V gives to the States sole authority to determine whether or not there shall be a Constitutional Convention and since someone must say where, when, and so forth, Congress obviously has this limited authority. It can be argued that the States could include these items in a uniform manner in their applications, but since they did not do so it would seem that this function is left to the Congress.

Wherein lies any safeguard against a "wide open" Convention? First in the good faith, judgment, and responsibility of its delegates. Second, in the requirement that any proposals of the Convention must be ratified by three-fourths of the States—38 of them—before becoming effective.

5. CAN A STATE LEGISLATURE RESCIND AN APPLICATION FOR A CONSTITUTIONAL CONVENTION?

Attempts to rescind the application for a Constitutional Convention made by an earlier legislature have occurred at least in four State legislatures. An instance where this occurred is in Maryland. The 1965 Legislature of Maryland, found by the Court to be malapportioned, adopted a resolution calling for a Constitutional Convention. The legislature was reapportioned according to population. In its 1967 session, a resolution rescinding the earlier application was introduced but rejected. No legislature has rescinded an application for a Constitutional Convention on reapportionment of State legislatures. The question then is whether or not such an act of recission would have effect.

The Supreme Court has been confronted with cases on ratification that shed some light on this question. The Court has held that the function of a State legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment is a Federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State. *Hawke* v. *Smith*, No. 1, 253 U.S. 221; *Hawke* v. *Smith*, No. 2, 253 U.S. 231; *National Prohibition* cases, 253 U.S. 350, 386.

It also appears that ratification of a proposed amendment, when once acceded to by a State legislature would seem to exhaust its authority to act and preclude a reconsideration. *Coleman* v. *Miller* 307 U.S. 433.

The Court has also held that certification to the Secretary of State—now Administrator GSA—by the legislature of its act of ratification is binding upon him. In *Lester* v. *Garnett* 258 U.S. 130, the Court held:

"The remaining contention is that the ratifying resolutions of Tennessee and of West Virginia are inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective States. The question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other States—Connecticut and Vermont—have adopted resolutions of ratification. But a broader answer should be given to the contention. The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislatures of thirty-six States, and that it 'has become valid to all intents and purposes as a part of the Constitution of the United States.' As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the source. The rule declared in *Field* v. *Clark*, 143 U.S. 649, 669–673, is applicable here. See also *Harwood* v. *Wentworth*, 162 U.S. 547, 562."

Since the act of a State legislature in making an application to Congress for a Constitutional Convention and its act of ratifying a proposed amendment are quite similar and relating the court's holdings in the former to the latter it is apparent that: First, both are Federal functions; second, neither can be rescinded; and, third, each would be binding, the one upon the Congress, the other on the Administrator of GSA and both upon the courts. The rule of reasonableness, such as the Court used in the National Prohibition cases, where it held 7 years to be a reasonable time in which to effect ratification, could be applied so as to prevent the cumulative effect of applications spread over a number of years and on various subjects. Any attempt to rescind during this 7-year period would be a nullity, and after the lapse of 7 years during which time the necessary two-thirds had not been achieved the applications would lose their effect.

Additionally, once applications from two-thirds of the legislatures have been received by the Congress we are confronted with what might be termed an act of finality. Any attempted act of recision of its application by a State legislature would have no more meaning then than would an attempt to rescind a sufficient number of acts of ratification so as to repeal an article of amendment that had previously been ratified by three-fourths of the States.

6. MUST THE CONGRESS CALL A CONVENTION UPON APPLICATION OF TWO-THIRDS OF THE LEGISLATURES OF THE STATES?

The Federalist Papers give clear insight as to what the framers of the Constitution had in mind in article V. I have quoted Alexander Hamilton in Federalist Paper No. 85 in this respect, where Hamilton makes it clear the Congress has no option.

The duty of Congress under article V is quite clear. In the syllabus of *United States* v. *Sprague* et al., 282 U.S. 715, it is noted that:

". . . 2. Article V, in its provision that proposed amendments shall become part of the Constitution when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, 'as the one of the other mode of ratification may be proposed by the Congress,' plainly and without ambiguity places the choice between these two modes in the sole discretion of Congress, and cannot by construction be read as requiring that changes detracting from the liberty of the citizens, distinguished from changes in the character of federal means or machinery, shall be referred to conventions, p. 730.

"3. The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition, p. 731.

"4. The fact that an instrument drawn with such meticulous care, and by men who so well understood how to make language fit their thought does not contain any phrase limiting the exercise of discretion by the Congress in choosing one or the other alternative modes of ratification, is persuasive evidence that no qualification was intended. p. 732."

Applying this interpretation to the instant case it would appear that the Congress is left without authority to determine the wisdom, propriety or desirability of the applications and their purposes. Certainly it would not be a decision for the Congress to make as to whether or not there should be a Constitutional Convention this decision has already been made by the States, assuming 34 applications. Only when an amendment or amendments as had been requested had been proposed by Congress for ratification could the Congress constitutionally ignore the mandate of the State legislatures calling for a Convention. The action of Congress in this instance would seem to be purely and simply ministerial. To reinforce this view, if indeed reinforcement is needed, is the unquestionable fact that the Constitutional Convention of 1787 adopted the Convention clause of article V because of fear, a fear it appears that demonstrates no little foresight, that an oppressive Federal administration might refuse to yield to the demands of the States for a change in the fundamental law.

ENFORCEMENT BY COURT ORDER

Since the action required of Congress in calling a Constitutional Convention is purely ministerial in fact not even legislative, can it be compelled to do so against its wishes, by court order? Recognizing the doctrine of separation of powers and the somewhat battered principle of political question, it appears that a recalcitrant Congress can be compelled to act.

It is a well-established principle of law that the courts will compel the doing of purely ministerial acts. This is normally accomplished by mandamus and is frequently referred to as a writ commanding the performance of a particular duty which results from the official station of the one to whom it is directed.

In one of its very early decisions, *Marbury* v. *Madison* (February 1803) 1 Cranch 137, the Supreme Court clearly established the principle that the Court can command the performance of a purely ministerial act by an official of a coequal branch of Government, the Executive. Some excerpts from that opinion are particularly applicable. On page 103, the Court said:

"The government of the United States has been emphatically termed a government of laws, and not of man. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

On page 166:

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of this country for a remedy."

On page 170:

"What is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of Justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of Congress and the general principles of law?"

And on page 179:

"From these, and many other selections which might be made, it is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of courts as well as of the legislature."

Applying the reasoning of the Court in that landmark case to the problem at hand can it earnestly be contended that the people, through their representatives in the State legislature can be denied by the Congress one of the most fundamental rights they possess, that of altering the basic document under which the whole process of government operates, the Constitution, and that the Court is without authority to enforce this right? If this be true, that the right of two-thirds of the States to secure a Constitutional Convention upon application to Congress is a nonenforceable right, then we have ceased to be a Government of laws. Indeed, for the Court to refuse to enforce this right it would have to cast aside a whole series of decisions, not the least of which would be those affirming the validity and propriety of several articles of amendment. But, more importantly, the people's sovereignty would once and for all have been destroyed.

The Court has had no difficulty in recent cases involving the legislatures. Granted they are State legislatures, but the principle remains the same. The Court secured compliance with its orders even though the action involved was to a certain extent legislative whereas in our case it clearly is not. These cases involved apportionment, beginning with Baker against Carr and more recently

Reynolds against Sims, and related cases. In those instances, where a legislature refused to obey an order to redistrict, the Court developed its own districting plan and directed elections to be held. It is really not arguable that the right of two-thirds of the State legislatures for a Constitutional Convention clearly provided by article V is less a right than that of the people of Tennessee to have reapportionment of their State legislature.

Should the Congress fail to respond affirmatively to the applications of the legislatures of two-thirds of the States for a Constitutional Convention, it would appear that the Supreme Court could enforce this right, and that precedent for it to do so exists. Should the Congress refuse to comply with the writ, the Court, in enforcing this right, could itself order the Convention. Some State legislatures, I would be certain, would pursue this form of remedy should the Congress fail to act.

I trust in this somewhat lengthy presentation a base has been provided for rational discussion of the issue before us. It would have been far simpler to engage in a bit of rhetoric rather than citing the ample precedent, intent and law which prevails. However, it is my observation that this deliberative body, now engaged in a considerable constitutional discussion, prefers fact to fun in reaching its conclusions.

For myself, as I have stated, should this body, through inaction in proposing a reapportionment constitutional amendment, vote the mandatory alternative of a Convention, I have no more fear of the outcome than did the delegates to Philadelphia in 1787, when they provided this course of action for the situation they could foresee which now has arisen.

If there are those among my colleagues who are fearful of a Convention, I suggest they respond now to the call of the States by proposing the necessary amendment to the States for ratification or rejection.

PROPOSED CONSTITUTIONAL AMENDMENT

There are several elements which I believe should be included in the proposed constitutional amendment:

First. The proposal should be entirely permissive in nature. Each State could make its own determination whether or not it wishes to make use of provisions for constituting one house of its legislature on the basis of factors other than population or constituting both houses on the basis of population.

Second. Reapportionment would be mandatory every 10 years.

Third. Any State electing to constitute one house of its legislature on the basis of factors other than population would be required to submit alternate plans to the electorate for approval or rejection—one plan for population only in both houses, the other a little Federal plan.

Fourth. A section should be considered protecting the right of the States to determine the composition of the subdivisions of State government—county boards of supervisors, school districts, city councils, and so on.

Fifth. A section reasserting the right of every State to two U.S. Senators, and providing that States cannot be combined for purposes of membership in the U.S. Senate.

Sixth. A section reasserting the right of every State to proportionate membership in the House of Representatives, with no State having less than one member, and a stipulation that State boundaries cannot be crossed in the composition of congressional districts.

The voice of the people has been made abundantly clear on this issue. Now it is up to us to let the people decide—either through a Convention called for that purpose or a proposed constitutional amendment by this Congress. For the life of me, I can find no rationale for denying the people of this country the right to decide—which they now request. If we, the Congress, cannot trust the people, we have no right to be here. Frankly, no amount of verbal obfuscation can hide the fact that this is the real issue up for decision.

EXHIBIT 1

The four proposals as to methods of future amendments of the Constitution which were submitted in the Constitutional Convention, were as follows. One by Charles Pinckney, on May 29; one by Edmund Randolph on that same day; the third by William Patterson on June 15; and the fourth by Alexander Hamilton on June 18.

PINCKNEY

Mr. Pinckney proposed the following:

"If two-thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a Convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the Legislatures of the States shall be sufficient to make the said *amendments parts of the Constitution.*"

As Pinkney explained it, this article:[1]

". . . proposes to declare, that if it should hereafter appear necessary to the United States to recommend the Grant of any additional Powers, that the assent of a given number of the States shall be sufficient to invest them and bind the Union as fully as if they had been confirmed by the Legislatures of all the States."

Pinckney feared the requirement of unanimous consent to any change, as found in the Articles, because "it is to this unanimous consent the depressed situation of the Union is undoubtedly owing . . ."[2]

RANDOLPH

Randolph proposed the following language:

"Resolved that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto."

MASON

Mason, on June 11, in defending the proposal for providing some means of amendment said that it would:

". . . be better to provide for them in an easy, regular and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for an amendment."

As various details of what is now Article V were discussed and agreed to, a motion was made by Governors Morris and Gerry to amend proposed Article V, so that the Convention clause might be inserted providing that a Convention for proposing amendments would be called on application of two-thirds of the States. Madison, however, "did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a Convention on the like application."[3] He had no objection to providing for a Convention, as he had previously indicated, but did foresee "that difficulties might arise as to the form, the quorum, etc., which in Constitutional regulations ought to be as much as possible avoided."[4] *The motion to amend so as to require a Convention was approved without dissent and was worded in such a fashion as to make it mandatory that Congress call a Convention upon application by two-thirds of the States.*

YALE LAW SCHOOL,
New Haven Conn., October 2, 1967.

Prof. PHILIP B. KURLAND,
Chief Consultant, Subcommittee on Separation of Powers, U.S. Senate, Senate Office Building, Washington, D.C.

DEAR PHIL: This is in reply to your request for comment on Senator Ervin's bill, S. 2307. You may make such use as you wish of this letter, including publishing it in the Subcommittee's record of hearings. I will give you my views more or less seriatim, following the arrangement of the bill, and in rather summary fashion.

I have absolutely no doubt that Congress has the authority to legislate about the process of amendment by convention, and to settle every point not actually

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[1] *The Records of the Federal Convention of 1787* 120 (Farrand ed. 1937). Farrand indicates that Pinckney's explanation of this Article XVI was made on May 28, the day before he presented it to the Convention.

[2] *Ibid.*

[3] Madison, *Journal of the Federal Constitution* (Scott ed. 1908). Note 13 at 737.

[4] (Ed. Omitted in original).

settled by Article V of the Constitution itself. Obviously the fifty state legislatures cannot themselves legislate on this subject. The constitutional convention cannot do so for it must first be brought into being. All that is left, therefore, is Congress, which in any event, in respect of other issues not specifically settled by the Constitution, as well, has the residual power to legislate on matters that require uniform settlement.

I do not think that Article V foresees only a convention charged with writing a wholly new constitution. On the other hand—and this is the important point— I fully agree with the view of my colleague Charles L. Black, Jr. (see "The Proposed Amendment of Article V: A Threatened Disaster," 72 *Yale Law Journal* 878, 962 *et seq.* [1963] that the language of Article V means that while the legislatures of two-thirds of the states may impose upon Congress the obligation to call a convention which shall consider amendments to the constitution, the legislatures have no authority to require Congress to call a convention to consider a particular amendment or even a particular issue, or even just a set of particular amendments. In other words, a convention need not be called to write a new constitution, but nobody can restrict it to the consideration of certain topics only, and forbid it to consider other ones, or forbid it, in other words, to write a new constitution if it chooses. This would seem to be the thrust of the language of Article V, which says that "on the Application of the Legislatures of two-thirds of the several States, [Congress] shall call a Convention for proposing Amendments." A convention for *proposing*, as Mr. Black points out, not for ratifying either a text or an idea submitted by the legislatures, nor even for considering such a text or such an idea, but for *proposing*, which means freedom to canvass matters afresh and to weigh all possibilities and alternatives. And for proposing *Amendments*, which suggests, in the plural, canvassing possibilities for improving the Constitution, not ratifying or considering a single possibility.

On principle, the point is that no constitutional change should go forward to ratification separately by the states without having first undergone examination and debate in a national forum, whether it be Congress or a convention, and that the nature and scope of the debate and examination in such a national forum must not be predetermined by the separate decisions of the states. Quite clearly, therefore, the states have no authority to require Congress to submit a given text of a proposed constitutional amendment to a convention, to be voted up or down. Equally clearly, the states may not require Congress to submit a single subject, demanding action one way or the other on it alone, for it is surely a basic fact of politics in all its forms that consideration and debate of a political subject can be full and real only if there is opportunity for compromise and give-and-take. Such opportunity requires that the decision-making body have authority to consider more than a single, closely-defined subject, so that concessions from one side on one matter can be matched by concession from another on a perhaps seemingly discreet matter, to the end that a final package acceptable to all may emerge. That was how the original constitutional convention itself worked. Any other conditions threaten either breakdown, or rigid ideological decisions. He, moreover, who has the power to frame an issue and isolate it for decision will often have the power, in consequence, to predetermine the decision. If, then, the state legislatures could restrict the convention to consideration of a single, narrow subject only, they might be in a position effectively to ensure that a given result was reached. (The validity of this observation may be verified in states in which the governor has power to prescribe the only subject or subjects to be considered in special sessions of the legislature called by him.) The consequence, if this were allowed, would be that, in some measure, a constitutional change would go forward to ratification which had not received full or even meaningful consideration and debate in any national forum, but had, in some measure, been predetermined in the separate legislative forums of the states. That, in turn, it seems to me, would be a situation plainly contrary to the purpose which informs Article V.

I see no reason for explicitly and absolutely disabling Congress from reviewing any and all possible procedures adopted by state legislatures in calling for constitutional conventions. In general, of course, state legislatures ought to be masters of their own procedure, but no one can now foresee all possible wrinkles of the procedural problem, and I should think it much better to say nothing about the power of Congress to review state legislative procedures in respect of the calling of a constitutional convention. The situation then would be that Congress would presumably retain some power, rarely to be exercised, and indeterminate and unforeseeable in nature.

I would specifically require that resolutions calling for a constitutional convention be submitted to governors for approval or veto in accordance with procedures followed in other legislative matters in the state concerned. There is nothing that particularly qualifies legislatures as such to call for constitutional conventions. What we are in search of here is the will of the people of the state, and that will ought to be expressed, in this instance above all, perhaps, in the way in which, under the constitution of a state, it is normally expressed on matters of importance, since presumably it is the judgment of the state that that is how the will of the people is best and most reliably expressed.

It might be well to say something at this point in the bill on a question that is much mooted, namely whether a legislature that has been held to be malapportioned, or that is under a decree requiring it to reapportion and perhaps qualify its powers in some measure before reapportionment, can validly pass a resolution for a constitutional convention. I should think in general it could, unless an outstanding decree forbids, either specifically or by mentioning some analogous forbidden function, but I should think it would be well to be clear on this point.

I should think the six-year—and quite possibly longer—period provided for in Section 5(a) of the bill is too long. The Constitution contemplates a concurrent desire on the part of the legislatures of a sufficient number of states, and such a concurrent desire can scarcely be said to exist, or to reflect in each state the will of the people, if too long a period of time has passed from the date of enactment of the first resolution to the date of enactment of the last. True enough, legislatures are free to change their minds, but the passage of a repealer is a different and more difficult political act than the defeat, starting fresh, of a resolution calling for a constitutional convention. The fact, therefore, that a legislature has not repealed a resolution calling for a convention is an insufficient indication that the state in question, after the passage of as long as six years, still favors the calling of a convention. The life of a single Congress may be too short a time limit to impose, but anything over four years seems to me too long.

Section 6(a) seems to me too restrictive of the power of Congress. It is a matter of drafting, really, but I should suppose that Congress must retain the power to determine not only whether the recitation of the Clerk that the requisite number of applications have been made and are in effect is correct, but also a power to determine from time to time, on the basis of questions that cannot all now be foreseeable, whether all the applications are valid. Again, I see no reason to decide now that all amendments proposed by a convention shall be ratified by legislatures rather than by conventions in the several states. On the contrary, I should think there would be good reason to provide for ratification by conventions, since the legislatures have already—as is not true when Congress proposes an amendment—been involved in the amending process. At any rate, it should be left open to future Congresses to decide from time to time whether they want ratification by legislatures or by conventions in the states.

I should think the national interest, the welfare of the entire nation, is too closely affected to permit the states to decide, each for itself, how the delegates to a national constitutional convention shall be elected or, indeed, appointed. I should think it would be wise to provide that all delegates must be elected by the same constituency that elects the states' representatives in Congress, and to provide further that a certain proportion of the delegates may be elected from districts, and that, depending on the size of the state, no fewer than a certain number and no more than a third should be elected at large. Only thus, it seems to me, can all the interests in a state, the particular ones and the general ones, find adequate representation. I say nothing for the moment about the problem of apportioning districts for the election of delegates to the constitutional convention, except to remark that it seems to me Congress ought to have the power to say, at least in an extreme case, that the districts from which a state elected delegates were invidiously malapportioned, and that an election of delegates is therefore invalid.

I have made it clear at the beginning that I think the provision in Section 8(a) that each delegate must agree not to change or alter any part of the Constitution which has not been specified in the resolution calling the convention is quite wrong.

I see no reason for following the precedent of the original convention by giving each state one vote. The framers, in adopting such a procedure for themselves, worked against the background of the Congress of the confederation, in which

the states voted as equal units, and they feared to break this precedent, because if they had tried to do so, they might have made the very constitutional convention impossible. But perhaps their chief purpose in framing the new constitution was, for the future, to break away from this stultifying precedent. Why should we now return to it, after nearly two hundred years in which we have been accustomed in our national institutions—except on the one occasion when the House elected a President—to a different and of course more democratic method? Besides, whatever the convention does is to be ratified by the states, and in ratifying the states do vote as units, Alaska being equal to New York. It that not sufficient?

Again, I have indicated at the beginning my disagreement with Section 10(b) of the bill. The point again arises in the last few lines of Section 11(b).

I see by Section 13(a) that Congress is meant to retain the option of submitting amendments to ratification by conventions in the states rather than by legislatures. So the provision, on which I commented earlier, in Section 6(a), on page 5, line 24, and page 6, line 1, which seems to indicate that Congress may submit for ratification only by legislatures must be a mistake of drafting.

One final point. I see no reason why any and all actions to be taken by Congress pursuant to this bill with respect to constitutional conventions should be anything but subject, in the ordinary way, to Presidential approval under Article I, Section 7, Clause 3 of the Constitution. In this respect also I agree with the views of my colleague Charles L. Black, Jr., expressed in the article cited above (see 72 *Yale L.J.* at 965). *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798), is to the contrary so far as the function of Congress in proposing amendments is concerned. but, as Mr. Black says, this precedent "is inherently weak." (C. F. Smiley v. Holm, 285 U.S. 355 [1932]).

Sincerely,

Alexander M. Bickel,

[*Consultant, Subcommittee on Separation of Powers, U.S. Senate*].

[MEMORANDUM]

Re: S. 2307

To: Senator Sam J. Ervin, Jr., Chairman, Subcommittee on Separation of Powers.

From: Philip B. Kurland, Chief Consultant Subcommittee on Separation of Powers.

At the outset it should be noted that this bill can be drawn so as to place as many hurdles as possible in the way of effective use of the process of Constitutional amendment in response to a call by state legislatures for a convention to propose amendments. Or it can be drawn in a manner that will make such process a possible, however improbable, method of effecting constitutional change. I have assumed that it is the Committee's desire to take the second road. The first objective might better be served by the absence of law specifying appropriate procedures.

1. Perhaps the primary and most difficult issue raised by the bill is the question of the propriety of limiting the scope and authority of a convention called in response to the appropriate applications from the States. You have already received Professor Alexander Bickel's opinion that the subject matter of the convention action is not subject to limitation. I am in agreement with his statement that "the states have no authority to require Congress to submit a given text of a proposed constitutional amendment, to be voted up or down." I disagree, however, that "the states may not require Congress to submit a single subject, demanding action . . . on it alone." It is the latter for which this bill provides and, I am confident, that this is in keeping with the intent and function of Article V.

Let me concede at the outset that a literal reading of the words of Article V, removed from the context of their promulgation and their history, would provide a base for Professor Bickel's position and that of the authority he cites, Professor Charles Black. I do not believe, however, that their reading is either necessary or appropriate to the document under consideration.

The history of Article V at the Convention is set out for your study in the appendix hereto.* The appendix consists of materials derived from Farrand's

*The material referred to appears at p. 96.

The Records of the Federal Convention (1937 ed.). I have also appended Professor Farrand's own reading of these materials as revealed in his *The Framing of the Constitution of the United States* (1913).

My own reading of these materials is this. First, the founders were concerned lest they place the new government in the same strait-jacket that inhibited the Confederation, unable to change fundamental law without the consent of every state. The amendment process, rather a novelty for the time, was therefore included in the Constitution itself. Second, the forces at the convention that sought to limit the power of originating amendments to the States were at first dominant. The forces that would limit the power of the origination of amendments to the national legislature then became prevalent. The argument on each side was persuasive, *i.e.*, that the improprieties or excesses of power in the national government would not likely be corrected except by State initiative, while improprieties by the State governments or deficiencies in national power would not likely be corrected except by national initiative. In the spirit that typified the 1787 convention, the result was to make provision for recognizing both claims. Neither method was expected to be superior to or easier of accomplishment than the other. It certainly was not intended that the national legislature promote individual amendments while the state legislatures were to be concerned with more extensive revisions.

It seems to me, that what the members of the convention were concerned with, in both cases, was the power to make specific amendments. They did not appear to anticipate a need for a general revision of the Constitution. And certainly this was understandable, in light of the difficulties that they had in finding the compromises to satisfy the divergent interests needed for ratification of their efforts. Provision for two exceptions to the amendment power underlines the notion that the convention anticipated specific amendment or amendments rather than general revision. For it is doubtful that the exceptions in Article V could have been expected to control a later general revision.

My construction of Article V, with reference to the initiation of the amendment procedure by the State legislatures, is certainly not inconsistent with the literal language of the Article. As I see it, Article V anticipated that the role of the States in filing their applications would be to identify the problem or problems that they believed to call for constitutional resolution by way of Amendment. The role of the convention that would be called by reason of such action by the States would then be to decide whether the problem called for correction by constitutional amendment and, if so, to propose, *i.e.*, to frame, the amendment itself, for ratification as provided in Article V. To my mind, the language of the bill under consideration fully accords with the mandate of Article V.

I would suggest, moreover, that the reading given by Professor Bickel is neither a practicable nor a desirable one. If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the States to call for a convention in the absence of a general discontent with the existing construction of the Constitution. This construction limits the States to call for conventions where there is a need for a general revision rather than specific revision. Alternatively, under the Bickel construction, applications for a convention deriving in some States from a dissatisfaction with the *School Desegregation Cases*, in others because of the *School Prayer Cases*, and in still others by reason of objection to the *Miranda* rule, could all be combined to make up the requisite two-thirds of the States needed to meet the requirements of Article V. I find it hard to believe that this is the type of consensus that was thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date should be added up—and there are a large number of them—to see whether, in what is considered an appropriate span of time, two-thirds of the States have made demands for a constitutional convention to propose amendments, no matter the cause for applications or the specifications therein.

The intention of Article V was clearly to place the power of initiation of amendments in the State legislatures. The function of the convention was to provide a mechanism for effectuating this initiative. The bill carries out this intention in keeping not only with the letter but also with the spirit of Article V.

2. On the question whether Presidential approval is required by Article I, § 7, for Congressional provision for a convention it is clear that the literal interpretation given by Professor Bickel, in reliance on Professor Black, has long since been rejected by American history. Professor Corwin pointed out in his annotation to Article I, § 7:

The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" becomes Statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action (e.g., the concurrent resolutions by which during the fight over Reconstruction the Southern States were excluded from representation in the House and Senate, the Joint Committee on Reconstruction containing members from both Houses were created, etc.), or to directing the expenditure of money appropriated to the use of the two Houses.[17] Within recent years the concurrent resolution has been put to a new use—the termination of powers delegated to the Chief Executive, or the disapproval of particular exercises of power by him. Most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.[18] Similarly, measures authorizing the President to reorganize executive agencies have provided that a Reorganization Plan promulgated by him should be reported to Congress and should not become effective if one [19] or both [20] Houses adopted a resolution disapproving it. Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course.

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[17] 54th Cong., 2d Sess., S. Rept. 1335; 4 Hinds' *Precedents of the House of Representatives*, § 3483 (1907).

[18] *See e.g.*, Lend Lease Act of March 11, 1941 (55 Stat. 31); First War Powers Act of December 18, 1941 (55 Stat. 838); Emergency Price Control Act of January 30, 1942 (56 Stat. 23); Stabilization Act of October 2, 1942 (56 Stat. 765); War Labor Disputes Act of June 25, 1943 (57 Stat. 163).

[19] Reorganization Act of June 20, 1949 (63 Stat. 203).

[20] Reorganization Act of April 3, 1939 (53 Stat. 561).

(*The Constitution of the United States of America: Analysis and Interpretation* 135–36 [S. Doc. No. 39, 88th Cong., 1st Sess., 1964 ed.]).

Moreover, with reference to the specific practice concerning proposals of constitutional amendments, the case is, as Corwin indicated, far stronger than the suggestion of the isolated opinions of *Hollingsworth v. Virginia* (3 Dall. 378 [1798]). No successful proposed amendment, starting with the First, has ever required the signature of the President. And Professor Black to the contrary notwithstanding, the authorities were pretty well agreed—before the suggestion of reapportionment amendments—to the propriety of dispensing with such approval.

Thus, Professor Andrew C. McLaughlin, writing about the amendment to abolish slavery, wrote:

> After the election of Lincoln in the autumn of 1864, and after a summer of success accompanied by horrible slaughter on the battlefronts, the amendment came once more before the House. It was carried by a vote of 119 to 53—an astonishing result on the whole: after nearly four years of civil strife, a shifting of three votes to the negative would have prevented its passage. It was submitted to the President and signed by him; but such signature, it may be noticed, was unnecessary, if not actually improper. Senator Trumbull immediately proposed and the Senate passed a resolution stating that the approval was unnecessary and should not be taken as a precedent.

(*McLaughlin, A Constitutional History of the United States* 635 [1935]).

And Professor Orfield summarized the authorities and reached the same conclusion:

> In spite of the early decision of the point, there seem to have been some doubts as to the necessity of the President's approval. Jameson, Constitutional Conventions, 4th ed. (1887) §§ 556–561. In 1803 a motion in the Senate to submit the Twelfth Amendment to the President was defeated. In 1861 the President signed the Corwin amendment without anyone's protesting. President Lincoln inadvertently signed the Thirteenth Amendment, but immediately notified Congress, and the Senate adopted a motion that his approval was unnecessary and not a precedent. In submitting the Fourteenth Amendment to the states, President Johnson informed Congress that he was acting in a purely ministerial capacity. The President has signed no subsequent amendments. President John Quincy Adams was of the view that the President should not even suggest amendments to Congress. At present resolutions of amendment are printed in the statutes as signed by the Speaker of the House and the President of the Senate, and attested to by the clerk of the House and the Secretary of the Senate.
>
> Some state decisions have distinguished between the proposal and the submission of an amendment, and assert that the governor must approve the latter. Hatch v. Stoneman, (1885) 66 Cal. 632, 6 P. 734. This has not been the practice of Congress, which has always performed both acts in a single resolution. Jameson is of the view that both the submission of a state amendment and the call of a state convention are legislative. Jameson, Constitutional Conventions, 4th ed. (1887) 567. But it seems doubtful that the President's approval would be required if Congress were to call a convention, particularly as the call arises at the application of the state legislatures. The same reasoning would seem to apply to an attempted distinction between the proposal and the selection of the mode of ratification, whether by legislatures or conventions.

(*Orfield, Amending the Federal Constitution* 50 n. 30 [1942]).

The requirement of Presidential approval would mean that, although the States had properly called for a convention to sponsor amendments and although Congress had provided appropriate machinery, the Congressional provision would require a two-thirds majority if the President did not cotton to the idea of the amendments proposed. With such a majority behind a proposed constitutional amendment, there would be no need for State initiative at all.

The Constitution made the amendment process difficult. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to attribute to the founders the concept that amendments originating in the States should have so much harder a time of it than those proposed by Congress. That issue was fought out in the 1789 convention and resolved in favor of two originating sources, not one, as the materials collected in the appendix hereto amply demonstrate.

I respectfully submit that Presidential acquiescence in all but the ministerial role of Congress in providing for a convention is not required by the Constitution. Indeed, a strong case could be made out that the Constitution, construed throughout our history, precludes such participation by the executive in the amendment process.

3. So, too, I am in disagreement with Professor Bickel on the desirability or need for submitting the application of state legislatures to the possibility of gubernatorial veto. We do not have here any question about the exercise of the lawmaking process by a state legislature in combination with whatever executive participation might be called for by state law. We have here rather a question, as Professor Bickel recognizes, of heeding the voice of the people of a State in expressing the possible need for a change in the fundamental document. It seems clear to me that the founders saw the state legislatures in the proper role of the representative of the people. The executive veto, a carryover from the requirement of royal assent, was not regarded as the expression of popular opinion at the time of the 1787 convention. And, to retort to the kind of literalism invoked by others as appropriate for construction of other provisions of Article V, and of Article I, § 7, the language of Article V definitely asserts that the appropriate applications are to come from "the Legislatures."

4. My final point of substantial disagreement with Professor Bickel relates to the appropriate period of time within which the applications of the state legislatures must be filed. I have already pointed out that I do not think that applications for a convention based on disparate subjects should be added together for purposes of determining the existence of a number sufficient to require the call of a convention. The issue then is what is an appropriate time for 50 legislatures, many with biennial session, to give adequate consideration to, and take appropriate action on, a problem that must be resolved, if it is to be resolved at all, by constitutional amendment. For a long time now it has apparently been the view of Congress that a seven-year period is the appropriate time limit within which States must act if they are to ratify a constitutional amendment proposed by Congress. The very factors that are relevant to the ratification process are also relevant to the application process. The period must be short enough so that the actions of the States really represent a concurrent consensus. On the other hand, the period must be long enough to overcome the difficulties of securing the views of fifty legislatures. I do not find any magic in the number seven but any period substantially less than that seems to me to fail to take account of the practical difficulties involved in securing action by state legislatures.

5. Having spent my time to this point in disagreement with Professor Bickel, I would now underline some of the points of agreement between us.

a. I have no doubt about the power and desirability of the Congress to make provision for appropriate processes for effectuating the terms of Article V.

b. I tend to agree, with less certainty, that there should be no provision "disabling Congress from reviewing . . . procedures adopted by state legislatures in calling for constitutional conventions."

c. I wholeheartedly agree that a "malapportioned legislature" can validly make application for a constitutional convention. To open the question of the propriety of legislative composition would be to open a Pandora's box and might raise constitutional doubts about the validity even of the Fourteenth Amendment itself.

d. I would agree that provision should be made for the method of selection of delegates to the convention. Professor Bickel's proposal on this score commends itself to me.

e. Finally, I would agree that the vote at the convention ought to be on a per capita basis rather than by States. As Professor Bickel points out, the ratification process will necessarily be in terms of State votes. It seems appropriate—and in keeping with the spirit of the 1787 convention—to recognize the interests of majority rule in the method for proposing the amendments.

I would end this memorandum where I began it, by pointing out that the essential issues are not to be found in the details for the bill under consideration but rather in the question of whether you want to destroy this means of constitutional amendment or effectuate it.

Memorandum

By Robert G. McCloskey, Consultant, Subcommittee on Separation of Powers

Re S. 2307 Proposed constitutional convention bill.

Herewith some reflections on, and suggestions about, S. 2307. I regret that I was unable to attend the hearings on October 31. It is possible that some of my thoughts overlap those expressed by Professors Bickel and Mendelson on that day.

Leaving aside matters of minor detail, it seems to me that there are three constitutional or policy problems posed by the bill: *One*, the question whether it is desirable to enact such a law at all in advance; *Two*, the question of Congress' constitutional power—and elbow-room—in dealing with this subject; *Three*, the question of what form the legislation, if enacted, should take. Obviously the answer to the third question will depend in part on the answers to the first two.

One. I will not pause long over this question, though I had some doubts about it when I first heard of the proposal. It is not easy to anticipate all the problems that may present themselves in a procedure like this, nor to deal with those problems wisely in the abstract. On consideration, I do think that a bill on the subject should be passed in order to avoid what might well be an unseemly and chaotic imbroglio if the question of procedure were to arise simultaneously with the presentation of a substantive issue by two-thirds of the state legisla-

tures. But while I do believe that a law should be enacted, I also believe that framers of such a law should be extremely careful to close as few doors as possible. This will be what might be called "quasi-organic" legislation. That is, it relates not merely to a current policy question but to the basis on which our whole governmental system rests; in England it would be recognized as a constitutional statute. When dealing with such a measure, it is best to bear in mind Marshall's well-worn aphorism that it is a *constitution* we are expounding, and not get involved in "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must [be] seen dimly, and which can be best provided for as they occur".

Two. I have no doubt that Article V. is, as Hamilton said, "peremptory"; that Congress is honor-bound to call a convention when two-thirds of the states apply for one, if it is satisfied that the applications are in order. However I equally have no doubt that Congress has full authority to prescribe and determine what a valid application shall be; and is further authorized to provide as it chooses for the selection of delegates and the procedures that will govern the convention's operations, As to the first point, Congress is made the agency for calling the convention, and it is hard to see why Congress should have been brought into the matter at all unless it was expected to determine when sufficient appropriate applications had been received. As to the second point, the same argument strikes me as compelling: if Congress was not expected to provide for the selection and procedures of the convention, why were no provisions made for those matters in Article V, itself? It would be perfectly simple for the Article to provide for delegation of those arrangements to the states. When we add to this argument the weight of the "necessary and proper clause" and the authority of *Coleman* v. *Miller* for the proposition that the amending process is in the congressional domain, the conclusion seems inescapable. Congress has plenary power to provide for the selection and procedures of the convention. Nor do I think Congress is trammeled here by the provisions of Article V. relating to ratification. The states as states must give approval to proposed amendments, because that is what Article V. says. But the Article says nothing at all about how the convention shall be chosen or operate; and I think for the reasons given that that omission leaves decision on those matters in Congress' hands.

Three. This brings me to the question of the form the legislation should take. The answer depends in part on constitutional considerations, which I have touched on above. It also depends in part on the policy premises we start with. The general policy issues raised by the proposed legislation are, I think, two, which can be framed as queries: should the law aim to make the amendment process difficult or easy? Should it lean toward majority-controlled or minority-controlled arrangements? Plainly there is some relationship between these issues. I suppose that the smaller the minority that exercises effective control over the proposing process, the greater would the ease of getting that minority's proposals through. On the other hand the same minority would presumably have a veto on majority proposals. So an arrangement that emphasized minority control (e.g. each state having one vote in the convention) would make the amending process easier for the minority and harder for the majority.

My own view, to be as brief as I can about it, is that the amending process should be made as difficult as the language and intent of the Constitution will permit. We have the oldest stable constitutional system in the world; and I think its stability is related to its immutability, or relative immutability. Even the alterations that the Supreme Court has brought about have been, until lately, gradual and "Burkean". I don't think we should loosen up the whole amending process simply because the judicial amending process has been used a bit too cavalierly in recent years.

It is partly because I would prefer to keep the amending process difficult that I would also lean toward the majority principle in shaping convention procedures. As I have suggested, the minority-rule procedures that are built into the bill as it stands would make amendment easier, and I object to them on that ground. But there are other reasons for believing that the procedures should give more weight to majority rule. I am quite aware that the Framers were not simple majoritarians, and I am not one myself. As a matter of taste and political theory, I think there is a lot to be said for giving the minority a voice and some control in the governmental process. But I do not think that my taste and the expectations of the American people necessarily coincide. I believe that, in spite of the constitutional departures from the majority principle in

such institutions as the Electoral College and the Senate, the nation as a whole has come to think of majoritarianism as a normative standard and would be shocked and unsettled by an organic measure that was not enacted by a popular majority. Indeed I would be most apprehensive about the political peace of the nation if, because of the fortuities of the Electoral College, a presidential candidate with substantially fewer popular votes than an opponent won the office. The reaction to the election of 1876 is not reassuring, and I suspect that the popular commitment to majoritarianism has hardened considerably since then.

In short, within the limits imposed by the Constitution, I would seek to make the amending process more rather than less difficult; and would lean toward the majority principle in the arrangements that were prescribed.

Now let me turn to the specific provisions and language of the bill. My conclusions about this are based on the judgments just set forth.

A. p. 2, Sec. 3. (b). I would revise as follows:

Questions concerning the validity of State legislative procedure and of the adoption of a State resolution cognizable under this Act shall be determinable by the Congress of the United States, and its decisions thereon shall be binding on all others, including State and Federal courts.

(I would keep this procedural check in Congress' hands in pursuance of my belief that the amendment process should not be made too easy, and because questions of irregularity and bad faith might, quite conceivably, arise. My trust in the incorruptibility and fairness of state legislatures is not overwhelming. It would be politically unhealthy if it could be plausibly charged that a constitutional amendment had come into being with the help of irregular state procedures.)

B. p. 2, Sec. 3. (c). I would strike this paragraph.

(It is clear that the Governor's approval is not required for legislative ratifications, and I would suppose that it is not required for legislative applications either, i.e. that Article V. uses "legislatures" in the same sense in both instances. But so far as I know the question has never been authoritatively decided, and I see no reason to emphasize the departure from majority control by giving this point up in advance.)

C. pp. 3–4, Sec. 5 (a). In line 3, p. 4 I would insert the words "a valid" after "Submitted", striking "an". In line 13, p. 4 I would insert "valid" after "have".

(This is in line with my conviction that Congress should determine the validity of an application on the basis of its judgment about the regularity of the legislative procedures. However, even in terms of the assumptions of the bill as it stands, the revision in line 13 would seem necessary in order to clarify what "pending" means. That is, I take it that Congress must determine whether all applications do concern the same subject, and that the prohibition against rescissions does not go into effect until that determination has been made with respect to thirty-four applications.)

D. p. 5, Sec. 6 (a). In line 14, p. 5 I would insert "valid" after "effect".

(Same reasons as above.)

E. p. 6, Sec. 7. (a). In line 16, p. 6 I would strike "or appointed". In line 20 I would strike "or appointment".

(The possibility of appointment needlessly qualifies the principle of popular control of these procedures)

F. p. 8, Sec. 9. (a). I would strike this whole paragraph and substitute:

"In voting on any question before the convention each delegate shall have one vote. Any final amendment proposal must receive the approval of two-thirds of the delegates."

(I realize that the Convention of 1787 voted by states and that a majority of state votes decided all interim questions. But the final draft of the proposed Constitution was approved "by the Unanimous Consent of the states present"—i.e. eleven states, Rhode Island being unrepresented and New York lacking a quorum; and an overwhelming majority of the individual delegates—thirty-nine out of forty-two—signed that final draft. It is most unlikely that the Constitution would have been presented to the states, or could have been ratified, if only a bare majority of either the state delegations or the individual delegates had approved it. Add to this the fact that Article V. *requires* a two-thirds vote of Congress to propose amendments, and I think there is little doubt that Congress *may* constitutionally impose a similar requirement on the convention. That it *should* impose such a requirement is suggested to me by my belief that the amending process should not be easy.

As for the rule that delegates vote as individuals, this strikes me as a prudent concession to the principle of popular control, for reasons already discussed. I think it falls well within Congress' plenary power over convention procedures)

G. p. 9, Sec. 10. (a). I would strike this subsection and begin Sec. 10 with present subsection (b).

H. p. 10, Sec. 11 (b). Beginning with the word "not" in line 8, I would strike the rest of that line and the whole of lines 9 through 12. I would substitute:

"adopted a concurrent resolution approving the submission of the proposed amendment to the states."

(Even in terms of the bill as it stands, I see no reason for limiting the possibility of disapproval to the ground that the proposal's general nature is different from that stated in the concurrent resolution. Suppose, for example, the convention had failed to abide by the procedures set up in Sec. 9. Would the Congress be obliged by Sec. 11 (b) to approve the proposals anyway? But my more general reason for suggesting this alteration is that I do not think we can anticipate the possibilities for procedural irregularities and disputes, and I therefore do not think Congress should surrender in advance its last opportunity to take a hand in this amending process. I assume, as I have all along, that Congress could not withhold approval merely because it objected to the policy of a proposal, but the line between policy and procedure can be fuzzy and unpredictable, and I would feel easier if Congress were left to determine it as the issue arises, rather than by a prospective disclaimer of this sort.)

Now for a final observation. The more I think about this bill as it stands, the more it seems to me to facilitate amendment proposals by minority political forces. But I think that those who feel a grievance because minority claims are currently being overridden should reflect that "facilitation" (if there is such a barbarous word) is a two-edged sword. By making it easier to embody minority views in constitutional amendments they also make the amendment process easier for an overweening majority to exploit. The elimination of the Governor from the application process, the provision for decision by a simple majority in the convention, the surrender of all but the narrowest congressional control, the whole imperative, automatic spirit of the bill would set a precedent for a majority to follow in working its will on minorities in the future. The only provision that looks the other way is the present provision for one-state-one-vote in the convention, and that could be wiped out in five minutes. What would remain would be a congressionally-established precedent for relatively easy constitutional amendment. As a believer in minority rights, I would think twice before setting such a precedent.

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Calendar No. 332

92D CONGRESS 1st Session | SENATE | REPORT No. 92-336

FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT

JULY 31, 1971.—Ordered to be printed

Mr. ERVIN, from the Committee on the Judiciary, submitted the following

REPORT

together with

SEPARATE VIEWS

[To accompany S. 215]

The Committee on the Judiciary, to which was referred the bill (S. 215) to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution, reports favorably thereon with one amendment and recommends that the bill as amended do pass.

EXPLANATION OF THE AMENDMENT

The committee has adopted the following amendment to S. 215:

In section 5(a), on line 10, strike "8" and insert "6".

PURPOSE OF THE BILL

The purpose of this bill is to provide the procedural machinery necessary to effectuate that part of article V of the Constitution of the United States which authorizes a convention called by the States to propose specific amendments to the Constitution. The bill does not purport to deal with the situation in which the States have issued a call for a convention to propose a general revision of the Constitution. This limited purpose of the bill derives from two considerations. First, American history since shortly after the adoption of the Constitution reveals no expression of a desire on the part of the American people for any general constitutional revision. It does reveal sporadic expressions by the people of the States of a desire to

provide limited changes in the Constitution. Second, it is the committee's opinion that the machinery appropriate for a convention undertaking a complete rewriting of the Constitution calls for a greatly different procedure from that which would be appropriate for a convention called for the more limited purposes contemplated by this bill. The committee is of the opinion that a call from the States for a general constitutional convention is so remote that there is no need, at this time, for providing the machinery for such a convention. It is the committee's view that a convention call for proposing specific amendments has from time to time, and especially recently, come near enough to fruition to make it appropriate for the provision of the necessary machinery in order to avoid the chaos that would result in the event that the call came and the procedures were not spelled out in advance.

The bill offered here is not intended to effectuate or preclude the proposing for submission to the States of any particular amendment that may, at the moment, be the subject of debate. Although the impetus for this legislation was initially provided by the public concern over accumulating petitions for a convention to consider an amendment regarding reapportionment, the committee has not considered the legislation in the narrow light of any single issue. The committee believes that the responsibility of Congress under the Constitution is to enact legislation which makes article V meaningful. This responsibility dictates that legislation implementing the article should not be formulated with the objective of making the Convention route a dead letter by placing insurmountable procedural obstacles in its way. Nor on the other hand should Congress, in the guise of implementing legislation, create procedures designed to facilitate the adoption of any particular constitutional change.

In recommending S. 215 to give effect to article V, the committee has been deeply conscious that this is "constitutional legislation" which will have to meet the unforeseen circumstances of our country's future. Its concern has been with the long-term needs of America.

The committee urges passage of this bill now in order to avoid what might well be an unseemly and chaotic imbroglio if the question of procedure were to arise simultaneously with the presentation of a substantive issue by two-thirds of the State legislatures. Should article V be invoked in the absence of this legislation, it is not improbable that the country will be faced with a constitutional crisis the dimensions of which have rarely been matched in our history.

LEGISLATIVE HISTORY

This legislation was first introduced by Senator Ervin, Chairman of the Senate Committee on the Judiciary, Subcommittee on Separation of Powers, on August 17, 1967. Hearings on the bill, S. 2307 of the 90th Congress, first session, were held by the subcommittee on October 30 and 31, 1967, and subsequently published. Thereafter the bill was revised and reintroduced in the 91st Congress, first session, as S. 623: the Subcommittee reported S. 623 to the full Committee on the Judiciary on June 19, 1969, where no action was taken on the measure during the 91st Congress. The legislation was reintroduced in the 92d Congress on January 26, 1971, as S. 215. On April 27, 1971, the Subcommittee on Separation of Powers reported the measure to the full Committee on the Judiciary.

Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

BACKGROUND OF ARTICLE V

Because so much confusion has been disseminated about the origins of article V, it is not inappropriate to set forth here, in capsule form, the development in the Convention of 1787 of the provisions of article V. In the words of Philip B. Kurland:

> However natural it may now seem for the Constitution to provide for its own amendment, we should remember Holmes's warning against confusing the familiar with the necessary. There are other, more recent, national constitutions that make no such provision. The nature of the political compromises that resulted from the 1787 Convention was reason enough for those present not to tolerate a ready method of undoing what they had done. Article V, like most of the important provisions of the Constitution, must be attributed more to the prevailing spirit of compromise that dominated the Convention than to dedication to principle.
>
> Although the original Virginia plan provided for a method of amendment, the first essential question resolved by the Convention was whether any method of amendment should be provided. Despite strong opposition from men such as Charles Pinckney of South Carolina, the Convention soon agreed in principle to the desirability of specifying a mode for amendment, with Mason, Randolph, and Madison of Virginia, Gouverneur Morris of Pennsylvania, Elbridge Gerry of Massachusetts, and Hamilton of New York leading the Convention toward accepting the necessity of such a provision.
>
> The Virginia plan not only specified an amendment process but provided also that the National Legislature be excluded from participation in that process. And it was on the question of the proper role of Congress that the second major conflict was fought. When first reported by the Committee of Detail, the provision called for amendment by a convention to be called—apparently as a ministerial action—by the National

> Legislature on application of the legislatures of two-thirds of the States. Although this plan was first approved, the issue was again raised on Gerry's motion for reconsideration, seconded by Hamilton, and supported by Madison. On reconsideration, Sherman of Connecticut sought to have the power given to the National Legislature to propose amendments to the States for their approval. Wilson of Pennsylvania suggested that the approval of two-thirds of the States should be sufficient, and when this proposal was lost he was able to secure consent to a requirement of three-fourths of the States. At this point Madison offered what was in effect a substitute for the Committee of Detail's amended recommendation. It read, as the final draft was to read, in terms of alternative methods. Two-thirds of each House of Congress or two-thirds of the State legislatures could propose amendments. The amendments were to be ratified when approved either by three-fourths of the State legislatures or by conventions in three-fourths of the States. This compromise eventually overcame the second difficulty. By providing for alternative methods of procedure, the Madison proposal also made possible the compromise between those who would, from fear of the reticence of the National Legislature to correct its own abuses, utilize the convention as the means of initiating change, and those who, like Mason, wanted the National Legislature to be the sole sponsor of amendments * * *
>
> Article V, which resulted from these deliberations, must be attributed largely to Madison, with the obvious active participation of Hamilton * * * ("Article V and the Amending Process," by Philip B. Kurland, in 1, *An American Primer* 130–131 edited by Daniel J. Boorstin (1966)).

Although constitutional conventions, as used by the States, generally have been reserved for wholesale, as distinguished from piecemeal constitutional revision, there is nothing in the record of the debates at the Philadelphia Convention which discloses any comparable intention on the part of the Framers. On the contrary, the latter refrained from any evaluation or differentiation of the two procedures for amendment incorporated into article V; they tended to view the convention merely as an alternative safeguard available to the States whenever Congress ceased to be responsive to popular will and persisted in a refusal to originate and submit constitutional amendments for ratification.

The history of the use of the amendments process was also shortly stated by Professor Kurland:

> Although the Constitution has been the subject of 24 * different amendments, resort has never once been made to a national convention to initiate the process. And only once, in the case of the 21st amendment, was the State-convention process utilized for purposes of ratifying an amendment.
>
> For the most part, the amendments have been minor rather than major rearrangements of the constitutional plan. The

* Now 26.

first 10 amendments, the Bill of Rights, came so hard on the heels of the original document that they must be treated, for almost all purposes, as part of it. The only truly basic changes came in the Civil War amendments, the 13th, 14th, and 15th. Although intended primarily for the benefit of the Negroes, who ultimately were the beneficiaries, the amendments have proved to be the essential vehicles for the tranfer to power from the States to the National Government and, within the National Government, to the Supreme Court, which has since exercised a veto power over the actions of the State legislatures, executives, and judiciaries * * * [T]here can be little doubt of the truth of Felix Frankfurter's observation that there has been throughout our history an "absence of any widespread or sustained demand for a general revision of the Constitution."

On the other hand, it should be noted that some of the amendments have been attributable solely to the need to correct a Supreme Court construction of the Constitution. Thus, the 11th amendment was promulgated to overrule the case of *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), in which the Court held that sovereign immunity was not available as a defense to suit by a citizen of one State against another State. The necessity for the Civil War amendments derived in no small measure from the awful case of *Dred Scott* v. *Stanford*, 19 How. 393 (1857). The 16th amendment, authorizing the income tax, was a direct consequence of the Court's highly dubious decisions in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895).

The other major category of amendments includes those relating to the mechanics of the National Government itself. These are due, first, to the need to eliminate ambiguities that became apparent through experience and, second, to the tendency toward extension of the franchise, a movement notable in all democratic countries during the 19th and 20th centuries. In the first group fall the 12th amendment, made necessary by the tied vote for Jefferson and Burr in the 1800 election; the 20th amendment, a response to the increased efficiency of communications and transportation that made it possible to provide for the succession of the newly elected government at a date much closer to the election, as well as to the need to eliminate the ambiguities about filling a presidential vacancy; the 22d amendment, which adopted George Washington's notion that two terms were enough for any man to occupy the Presidency, an unwritten constitutional tradition broken by Franklin Delano Roosevelt's election to the office for four successive terms. In the second category, the amendments that enhance popular sovereignty, fall the 17th, providing for popular election of Senators; the 19th, providing for women's suffrage; the 23d, giving a voice to citizens of the District of Columbia in the election of the President; and the 24th* elim-

*The 25th amendment, providing for the filling of a vacancy in the offices of President or Vice President; and the 26th, providing for the "18-year-old vote", were adopted subsequent to the writing of the work quoted.

inating the poll tax as a requirement for voting in national elections.

The only two other amendments are concrete evidence of the undesirability of promulgating a minority's notions of morality as part of the Nation's fundamental law. The 18th amendment, the prohibition amendment, was a ban on commerce in intoxicating liquors. The horrible results of the "noble experiment" that led an entire nation into a lawlessness from which it has never recovered caused the repeal of the 18th amendment by the 21st amendment.

Perhaps the primary importance of article V may be found in the *in terrorem* effect of an ultimate appeal to the people for the correction of the abuses of their government. But it is not a weapon ready for use and its cumbersome method is both its virtue and its vice. (Kurland, *op. cit. supra*, at 132–134.)

Although the convention route has never been used as a means of proposing amendments, its usefulness has been demonstrated. The campaign for direct elections of Senators was stymied for decades by the understandable reluctance of the Senate to propose an amendment which jeopardized the tenure of many of its Members. Frustrated by the Senate, the reform movement shifted to the States, and a series of petitions seeking to invoke the convention process were submitted to Congress. Rather than risk its fate at the hands of a convention, the Senate then relented and approved the proposed amendment, which was speedily ratified. The history of the 17th amendment illustrates the usefulness of having a viable method by which a recalcitrant Congress can be bypassed when it stands in the way of the desires of the country for constitutional change.

GENERAL CONSIDERATIONS

At the outset it should be noted that this bill could have been drawn to place such hurdles in the path of the process that it could never effectively be used. And there are proponents of such an approach. On the other hand, it could have been drawn in such a manner as to make easy this means of constitutional amendment. There are proponents of this attitude as well. This committee regards both approaches as inconsistent with the purpose and function of article V, which it is the committee's intention to effectuate in this bill. The bill is drawn in such a manner as to make possible, however improbable, the constitutional convention method of amendment, as it was clearly the intent of the drafters of the Constitution to provide. There is no evidence whasoever that the Framers did not regard this means to be as desirable and as viable as that which allows for constitutional amendment at the initiation of Congress. On the other hand, it is equally clear that the Framers did not, with regard to either process, anticipate either frequent or easy use of article V to bring about changes in the Constitution. The effort of the committee, therefore, has been to seek a solution between that which would in fact preclude the States from initiating constitutional amendments and that which would afford a Pandora's box too easily opened.

AUTHORITY OF CONGRESS TO SPECIFY PROCEDURES FOR A CONSTITUTIONAL CONVENTION CALLED BY THE STATES

It is the opinion of the committee that Congress unquestionably has the authority to legislate about the process of amendment by convention, and to settle every point not actually settled by article V of the Constitution itself. This is implicit in article V. Obviously the 50 State legislatures cannot themselves legislate on this subject. The constitutional convention cannot do so for it must first be brought into being. All this is left, therefore, to Congress, which in any event, in respect to other issues not specifically settled by the Constitution, has the residual power to legislate on matters that require uniform settlement.

Congress has full authority to prescribe and determine what a valid application shall be and is further authorized to provide as it chooses for the selection of delegates and the procedures that will govern the convention's operations. As to the first point, Congress is made the agency for calling the convention, and it is hard to see why Congress should have been brought into the matter at all unless it were expected to determine when sufficient appropriate applications had been received. As to the second point, the same argument is compelling; if Congress were not expected to provide for the selection and procedures of the convention, why were no provisions made for those matters in article V itself? It would have been perfectly simple for the article to have provided for delegation of those arrangements to the States. When we add to this argument the weight of the necessary and proper clause and the authority of *Coleman* v. *Miller* for the proposition that the amending process is in the congressional domain, the conclusion is inescapable. Congress has plenary power to provide for the selection and procedures of the convention. Nor is Congress hampered here by the provisions of article V relating to ratification. The States as States must give approval to proposed amendments, because that is what article V says. But the article says nothing at all about how the convention shall be chosen or operate; and, for the reasons given, that omission leaves decision on those matters in the hands of Congress.

As Mr. Theodore Sorenson said in his testimony before the subcommittee:

> The constitutional authority of Congress to establish rules and procedures regularizing the use or application of principles set forth in the Constitution has been too frequently exercised to be doubted today. Moreover, because State legislatures in proposing amendments via the convention route are performing a Federal function derived from the Federal Constitution, they could not be heard in court to complain about the imposition of reasonable standards and procedures by the Federal Congress, so long as their fundamental right to amend the Constitution is not thereby impaired. * * *
>
> In short, I fully concur with Chairman Ervin that Congress has both the power and the duty to implement article V, to prevent the crisis and chaos that would otherwise result and to restrict any such convention to those topics that are specified in the applications of State legislatures. (Hearings,

before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 90th Congress, 1st Session, on S. 2307, p. 36.)

LIMITATION OF SUBJECT MATTER TO BE CONSIDERED BY CONVENTION

Probably the most vexing question presented to the committee was whether Congress could provide for the limitation of the subject matter to be treated by a convention called pursuant to article V. The committee is of the opinion that a failure to provide for such limitation would be inconsistent with the purposes of article V and, indeed, would destroy the possibility of the use of the convention method for proposing amendments.

As may readily be seen from the history of article V, it was intended to afford the States an opportunity for the introduction of specific amendments to the Constitution that was to parallel the opportunity of Congress to put forth such amendments. Thus, Madison, addressing himself to the subject in Federalist No. 43, wrote:

> That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.

And, in further explication of the amendment power and its exercise, Hamilton stated in No. 85:

> Every amendment to the Constitution, if one established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point—no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather 10 States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution.

Apart from being inconsistent with the language and history of article V, the contention that any constitutional convention must be "wide open" is neither practicable nor desirable. If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the States to call for a convention in the absence of a general discontent with the existing constitutional system. This construction would effectively destroy the power of the States to originate the amendment of errors pointed out by experience, as Madison expected them to do. To suggest that the States could not propose

specific amendments without risking a general constitutional convention is, in fact, in the committee's view, to destroy the desire and therefore the power of the States to initiate specific amendments by the convention process. Congress is not required to run such risks in the amendments that it would originate. There is little reason to believe that the States should be expected to do so.

The argument that the convention must have general power is also unsound from another point of view. If the convention were to be general, then it would seem that appropriate applications for a limited convention deriving in some States from a dissatisfaction with the school desegregation cases, in others from the school prayer cases, and in still others by reason of objections to the Miranda rule, or because of a desire for reapportionment, revenue sharing by the States, tax relief, or for other reasons, should all be combined to make up the requisite two-thirds of the States needed to meet the requirements of article V. The committee does not believe that this is the type of consensus among the States that the Founders thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date—and there are a large number of them—should be added up to see whether, in what is considered an appropriate span of time, two-thirds of the States have made demands for a constitutional convention to propose amendments, no matter the cause for applications or the specifications contained in them. Indeed, under this theory a convention is long overdue. Since the committee believes that State applications should not be treated as a call for a convention unless they deal with the same subject—a conclusion supported by two centuries of practice—it is unreasonable to suggest that the convention resulting from 34 applications on a single subject is nonetheless free to roam at will in offering changes to the Constitution.

The attempted analogy sometimes made to the example of the Philadelphia Convention is not persuasive. First, the Articles of Confederation did not contain any effective means of amendment, as does the Constitution. Second, many of the delegates to that assembly were given credentials expressly limiting their authority to proposing individual amendments to the Articles. The Convention's decision to propose an entirely new charter was *ultra vires* and, in effect, "unconstitutional." Third, the Congress and the States retroactively approved the Convention's action of submitting and ratifying the new Constitution according to its own terms. Of course, a convention ostensibly acting under article V could ignore its authority, violate its oath, and propose amendments on subjects other than those specified. But the committee believes that such action would be unconstitutional; neither Congress nor the States would be under any obligation to give consideration to its proposals.

The construction of article V adopted by the committee is consistent with the literal language of the article as well as its history and is more desirable and practicable than the alternative construction. The intent of article V was to place the power to initiate amendments in the Congress and in the State legislatures. The function of the convention was to provide the States with a mechanism for effectuating this initiative. The role of the States in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be

called by reason of such action by the States would then be to decide whether the problem or problems called for correction by constitutional amendment and, if so, to frame the amendment itself, and propose it for ratification as provided in article V. The bill carries out this intention in keeping not only with the letter but also with the spirit of article V.

It is the conclusion of the committee, therefore, that the bill properly limits the scope of the convention to the subject or subjects that caused the States to seek constitutional amendment in the first place. The convention would have no authority to go beyond the subjects specified.

MEASUREMENT OF REQUIRED NUMBER OF STATE APPLICATIONS

As has already been stated, applications of the States for a constitutional convention that relate to disparate subjects are not to be added together to make up the requisite two-thirds. Applications are not to be added together unless they are addressed to the solution of a common problem.

The committee is in agreement with a 1952 Report of the House Judiciary Committee which stated:

> . . . . there appears no valid reason to suppose that the language of the amendment requested in State applications must be identical with one another in wording. It should be enough that the suggested amendments be of the same general subject matter in order to be included in a congressional count of applications for a constitutional convention, bearing in mind, of course, that any or all of the States may at any time request a general convention should strong sentiment for such proceedings prevail. ("Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates," House Committee on the Judiciary, 82d Congress, second session, House committee print, page 12 (1952))

Obviously the question of whether any 34 petitions are sufficient to bring into operation article V is one for resolution by Congress. In making this determination, the 34 States could not be required to submit in their applications identical texts of an amendment. Nor could Congress define the subject so narrowly as to impose a requirement of textual uniformity which as a realistic matter could not be met by the States. It should be sufficient that the States identify a subject or problem, demanding action on it alone. The petitions should disclose a State's concern with respect to a subject and a desire for a convention to deal with the problem.

For example, the petitions could call for a convention to consider the propriety of an amendment to deal with problems raised by a series of Supreme Court decisions, or actions by the Congress or the President, defining those actions in specific terms. The convention then would be confined to a specific subject, but would be free to consider the wisdom of any proposed amendment within that subject and what form it should take. The convention could not be deprived of deliberative freedom and confined to a yes-or-no vote on any specific proposal. To illustrate, States desiring a convention to deal with the issues raised by the Escobedo-Miranda decisions could phrase their petitions with reference to those cases, or in general terms of the problem of Federal

control over State criminal procedure. The convention would be confined to that subject, but would nevertheless have great deliberative freedom to consider all possible solutions and to frame whatever amendment it deemed appropriate to respond to the issues identified by the States.

TIME WITHIN WHICH THE APPLICATIONS FOR CONSTITUTIONAL CONVENTION MUST BE FILED

Article V is silent on the question of how long a proposed amendment should remain available for ratification or rejection by the States. It is likewise silent on the question of how long applications for a convention should remain valid. There is general agreement that, to be meaningful, applications for a constitutional convention to propose an amendment on a single subject should be a contemporaneous recognition by the States of the need for solution of a constitutional problem. There is some difference of opinion about the time period that is an appropriate measure of this contemporaneity. In the recent past, in making provision for the ratification of amendments proposed by Congress, 7 years has been specified as the appropriate time period within which ratification should take place. The bill provides that the same period—7 years—shall be the valid period. A shorter time, for instance 1 or 2 years, would not afford the States adequate time for debate and deliberation on so fundamental a question as a proposed constitutional amendment. On the other hand, a much longer time, say 15 years, would not satisfy the reasoned desire for consensus.

OBLIGATION OF CONGRESS TO CALL A CONVENTION ON APPLICATION OF REQUISITE NUMBER OF STATES

The committee is of the view that, when the requisite number of valid applications have been filed, it is the constitutional duty of Congress to call the convention; for, as Hamilton said in Federalist No. 85:

> In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part, I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing thirteen States at any rate, independent of calculations upon an ordinary degree of public spirit and integrity will, in my opinion, constantly *impose* on the national rules the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt that the observation is futile. It is this: that the national

> rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged*, "on the application of the legislatures of two-thirds of the States [which at present amounts to nine] to call a convention for proposing amendments which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are preemptory. The Congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change vanishes in air. (Emphasis in original.)

Hamilton reflects the record of the Convention itself. As Farrand records:

> It was also feared that Congress might refuse to act so Congress was *required* to call a convention on the application of two-thirds of the states. (Farrand, "Framing of the Constitution of the United States," (1913 ed.), p. 190.) (Emphasis in original.)

Concededly, the Congress cannot be forced by the courts or by the provisions of this bill to convene a convention when the constitutional prerequisites have been satisfied. And since the obligation to call the convention is given to Congress, neither the President nor the Supreme Court could act in its stead. However, every Member of Congress has taken an oath to support the Constitution and it is inconceivable that Congress would refuse to perform its duty. No adequate argument has been brought forth to suggest a different conclusion. In light of the function of the alternative methods of proposing amendments provided in article V—to assure to Congress and the States equal opportunity to do so—for Congress to veto State proposals would be an infringement on State power and a violation of the Constitution.

ROLE OF THE EXECUTIVE IN THE AMENDMENT PROCESS

After much deliberation, the committee concluded that, just as with amendments proposed by Congress, so too with those proposed by the States, neither the National Executive nor the State Executive should have a role in the amendment process. Inasmuch as the function of Congress is simply to operate the machinery to effectuate the actions of the States and the convention, there is no proper place for a Presidential role.

Moreover, article I, section 7, is not authorized for Presidential assent to the concurrent resolution calling for a convention or for the congressional action of transmitting a proposed amendment to the States for ratification. The short but sufficient answer is to be found in Professor Corwin's annotation of article I, section 7:

> The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the

legislative process would have been bogged down hopelessly, not to mention other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills", which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the House concurrently with a view to expressing an opinion or to devising a common program of action (e.g., the concurrent resolutions by which during the fight over Reconstruction the Southern States were excluded from representation in the House and Senate, the Joint Committee on Reconstruction containing members from both Houses was created, etc.), or to directing the expenditure of money appropriated to the use of the two Houses. Within recent years the concurrent resolution has been put to a new use—the termination of powers delegated to the Chief Executive, or the disapproval of particular exercises of power by him. Most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect. Similarly, measures authorizing the President to reorganize executive agencies have provided that a reorganization plan promulgated by him should be reported to Congress and should not become effective if one or both Houses adopted a resolution disapproving it. Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course. (The Constitution of the United States of America: Analysis and Interpretation) 135–36 (S. Doc. No. 39, 88th Cong., first sess., 1964 ed.) Citations omitted.

The Constitution made the amendment process difficult. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to attribute to the Founders the concept that amendments originating in the States should have much more difficulty in passage than those proposed by Congress. That issue was fought out in the 1789 Convention and resolved in favor of two originating sources, not one.

Therefore, the committee has concluded that Presidential participation in the operation of article V is not required by the Constitution. Indeed, a strong case is made out that the Constitution, as construed throughout our history, precludes such participation by the Executive in the amendment process.

Just as the National Executive is excluded from the amendment process, so the State Executives play no role. Article V assigns to the State legislatures the duty to apply for a constitutional convention just as it authorized the legislatures to be ratifying bodies. Supreme Court decisions have interpreted the term "legislatures" in the ratification clause to mean the representative lawmaking body of the State—not including the Governor—since ratification of a constitutional amendment is not an act of legislation, in the proper sense of the word.[1] The term must have the same meaning in the application clause and the ratification clause of article V.

The role of the Governor is not needed for the voice of the people to be heard in the amendment process. It is heard, first, through their legislative representatives in their State governments; second, by the requirement contained in this bill for the democratic election of convention delegates; and third, in the ratification either by State ratifying convention or State legislature. To require that, in addition to an affirmative vote by two-thirds of the legislatures of the States within a period of 7 years, those votes must be by a two-thirds majority of each legislature (or by whatever other majority is needed to overcome a veto) where the Governor disapproves, is indeed "to pile Ossa on Pelion and leaf-crowned Olympus on Ossa" to create an insuperable barrier to any effective use of this method of constitutional change.

RESCISSION OF APPLICATIONS AND RATIFICATIONS

The question of whether a State may rescind an application once made has not been decided by any precedent, nor is there any authority on the question. It is one for Congress to answer. Congress previously has taken the position that having once ratified an amendment, a State may not rescind.

The committee is of the view that the former ratification rule should not control this question and, further, should be changed with respect to ratifications. Since a two-thirds consensus among the States in a given period of time is necessary to call a convention, obviously the fact that a State has changed its mind is pertinent. An application is not a final action. It merely registers the State's views. A State is always free, of course, to reject a proposed amendment. On these grounds, it is best to provide for rescission. Of course, once the constitutional requirement of petitions from two-thirds of the States has been met and the amendment machinery is set in motion, these considerations no longer hold, and rescission is no longer possible. On the basis of the same reasoning, a State should be permitted to retract its ratification, or to ratify a proposed amendment it previously rejected. Of course, once the amendment is a part of the Constitution, this power does not exist.

RESOLUTION OF QUESTIONS ARISING UNDER THIS MEASURE

The Committee takes the position that all questions to be resolved by the Congress under the provisions of this measure shall be submitted preliminarily to the Senate and House Judiciary Committees.

[1] *Hawke v. Smith*, No. 1, 253 U.S. 221, 229 (1920).

SECTIONAL ANALYSIS

Section 1 provides that the title of the act is the "Federal Constitutional Convention Procedures Act."

Section 2 provides that a State desiring to invoke article V to call a constitutional convention for the purpose of proposing an amendment to the Constitution must adopt a resolution pursuant to this act requesting such a convention and stating the nature of the amendment it wishes proposed. Pursuant to the requirements of this section, the measure is prospective and not retroactive in operation.

Section 3 provides that the procedure to be used by the State in adopting or rescinding a resolution is the same as that used for enacting State laws of general application except that the approval of the Governor is not required. Any questions arising as to the adoption or rescission of resolutions are matters for determination solely by the Congress as part of its responsibility to determine whether article V has been activated. Of course, Congress has no authority to examine the action of the legislature, except to assure itself that the State has used the procedure specified in section 3.

Section 4 provides that within 30 days of the adoption of a resolution the secretary of state or the equivalent officer of the State must send two certified copies to the Congress, one addressed to the President of the Senate and the other to the Speaker of the House. Each copy must contain the title of the resolution, the date upon which it was adopted, and the exact text of the resolution signed by the presiding officers of each house of the State legislature. Within 10 days of receipt, the President of the Senate and the Speaker of the House must report to their respective Houses the identity of the State making application, the subject of the application and the number of States which have thus far applied with respect to that subject. If Congress is in recess or is adjourned, the announcement would be made when Congress was again in session, and as soon thereafter as possible. The two officers must cause copies of the application to be sent to the presiding officers of each of the Houses of the other States, and to each Member of Congress.

Section 5 provides that applications for the convening of a convention are effective for 7 years from date of receipt by Congress. Whenever within a 7-year period there are in effect valid applications on the same subject from two-thirds of the States all the applications remain in effect until Congress has called the convention.

States may rescind applications by adopting resolutions of recission in accordance with the procedures of sections 3 and 4. However, attempted recissions would not be effective after applications have been received by Congress from the requisite two-thirds of the States. Questions concerning the recission of applications are determined solely by Congress.

Section 6 provides that the Secretary of the Senate and Clerk of the House shall maintain a record of the applications received upon each subject. Whenever applications upon the same subject have been received from two-thirds of the States, they must report in writing to the presiding officer of their respective Houses, and such officer shall report to that House the substance of the report. Periodic reports

to each House on the nature and number of petitions received would be advisable, as well.

Each House then determines whether the recitation of the report is correct. Upon such determination it is the constitutional duty of each House under article V to agree to a concurrent resolution calling for the convening of a constitutional convention. The resolution shall set forth the nature of the amendment the convention is to consider and designate the time and place for the convention. Copies of the resolution are to be sent to the State Governors and to each House of each State legislature. The convention must be convened within 1 year of the adoption of the resolution.

Section 7 provides that each State shall elect two delegates-at-large and one additional delegate from each congressional district in the State, in accordance with its usual procedures for the election of Senators and Representatives. Vacancies are filled by appointment of the State Governor. The secretary of state of each State or equivalent officer shall certify to the Vice President of the United States the name of each delegate. Delegates will enjoy the same privileges as do members of Congress under article I, section 6. Delegates are to be compensated for service and travel and related expenses as provided for in the convening resolution.

Section 8 provides that the Vice President of the United States is to convene the convention and administer the oath of office. Each delegate is required to take an oath not to propose or vote in favor of any proposed amendment relating to a subject other than that named or described in the concurrent resolution. This is consistent with the position that the convention's authority is limited by the States' conferral of authority.

Names of the officers of the convention are to be transmitted to the Speaker of the House and President of the Senate. The convention may adopt rules of procedure not inconsistent with this act. Congress is authorized to appropriate funds for the expense of the convention; the Administrator of the General Services Administration is directed to provide the required facilities; and Congress, executive departments, and agencies are required to provide information required by the convention, except as otherwise provided by law.

Section 9 provides that each delegate to the convention has one vote. A daily verbatim record of proceedings must be kept, and the vote of each delegate must be recorded. The convention shall terminate within 1 year of the first meeting unless extended by resolution of Congress. Records of the convention's proceedings are to be transmitted to the Archives within 30 days of the termination of the convention.

Section 10 provides that amendments may be proposed by a majority of delegates to the convention. No amendments with respect to a subject different from that stated or described in the resolution calling the convention may be proposed and any questions relating to this point are to be determined solely by Congress.

Section 11 provides that within 30 days of the end of the convention the exact text of any amendments proposed by the Convention must be transmitted to Congress. Upon receipt of a valid proposed amendment, Congress must adopt a concurrent resolution directing

the Speaker of the House and the President of the Senate to send the proposed amendment to the Administrator of the General Services Administration. The resolution shall also prescribe the time and manner of ratification by the States. Congress may adopt a concurrent resolution disapproving the submission of the proposed amendment to the States, but only on the grounds (1) that it relates to or includes a subject different from that stated or described in the resolution calling the convention, or (2) that the procedures used by the convention were not in substantial conformity with the provisions of this act. This conforms to the fact that, under article V, Congress has no power to review or veto any action of the convention because of doubts or disapproval on the grounds of policy. Congress' sole function is ministerial. Of course, Congress is under no obligation to transmit an amendment if the convention has exceeded its authority by proposing amendments on subjects other than those designated, or if there were procedural irregularities at the convention of a substantial nature so as to make the actions of the convention ineffective.

If Congress has not adopted a concurrent resolution either transmitting or disapproving the transmission of the proposed amendment within 90 days of continuous session following its receipt, the President of the Senate and Speaker of the House nonetheless are obligated to transmit the proposed amendment to the Administrator of the General Services Administration. This is to assure that Congress may not impede or block the transmittal to the States for the reasons of disapproval of the wisdom of the proposal. The Administrator of the General Services Administration must submit to the States a certified copy of the proposed amendment and any concurrent resolution adopted by Congress setting forth the time and manner for ratification along with a copy of this act.

Section 12 provides that amendments submitted in accordance with this act are valid as a part of the Constitution when ratified by three-fourths of the States within the time and according to the manner, by State legislature or State convention, as Congress directs by concurrent resolution. If the transmittal is made in the absence of a concurrent resolution, ratification is by State legislature and within 7 years of transmittal. Ratification by a State legislature shall be according to its own rules for such actions, but does not require the approval of the Governor. Certified copies of State ratifications must be sent promptly to the Administrator of the General Services Administration.

Section 13 provides that States may rescind by the same procedure as that used for ratification, but no rescission may be made after valid ratification by three-fourths of the States. States may ratify after a previous rejection. Any questions concerning ratification or rejection are determined solely by Congress.

Section 14 provides that the Administrator of the General Services Administration shall issue a proclamation that the amendment is part of the Constitution when three-fourths of the States have ratified.

Section 15 provides that the effective date of a constitutional amendment shall be that specified in the amendment or, if none, on the date of the ratification by the last State necessary to constitute three-fourths of the States.

SEPARATE VIEWS OF MESSRS. BAYH, BURDICK, HART, KENNEDY, AND TUNNEY

We are basically in accord with the purpose and framework of this bill, and we supported a favorable report to the Senate. We wholeheartedly agree that the groundrules for a constitutional convention should be established before a convention is called to deal with a specific topic, lest views on the substantive issue color decisions about fair procedure. We also agree with the Committee's goal of avoiding both those procedures which make constitutional change too easy and those which stifle needed reform. And we agree that the convention must not be permitted to roam the Constitution at will; it must instead be limited to considering only that constitutional issue which led to its creation.

There are two specific provisions of this bill, however, which hinder rather than further the Committee's intentions:

First, Section 10, which permits the convention to propose amendments by a bare majority vote should be amended to require a two-thirds majority. As presently written, it undermines the traditional safeguard which has protected the integrity of the Constitution since 1789. That safeguard, of course, is Article V's requirement that amendments be proposed by two-thirds of the Congress. All Senators know very well the difference between persuading half and persuading two-thirds of our colleagues of the wisdom of a course of action. Article V's requirement guarantees that a decisive majority of the members of not one but two deliberative bodies agree that the amendment is the wisest means of dealing with a fundamental national problem, and that they come to that agreement before the amendment is submitted to the States. We should require that the convention act through the same decisive majority of its delegates. Only if such a broad consensus is reached at the time the amendment is drafted—a time when viable alternative amendments are still under consideration—can we be confident that there is widespread agreement that the specific language of the amendment proposed best fulfills its purpose. By allowing a bare majority of the convention to propose an amendment, the bill opens the door to the submission of a proliferation of amendments to the States.

It is true that three-quarters of the States must ratify any proposed amendment. But during ratification the States cannot make any changes in the proposal. It is presented to them in final form on a take it or leave it basis. In each State, only a majority of the legislature need be convinced that the particular amendment proposed is better than no amendment at all. Ratification, therefore, is simply not a substitute for the reasoned deliberation and the building of a substantial consensus which ought to precede the proposal of change in the basic framework of our political sys-

tem. It is for this reason, we feel, that the founding fathers wisely required in Article V a two-thirds vote by each House before the Congress could propose an amendment, even though such an amendment, too, must subsequently be ratified by three-quarters of the States. Our own constitutional history demonstrates this principle. Since 1927, 28 constitutional amendments have been voted on by one or both Houses of Congress. Of those debated, only 7 finally won support from enough members of Congress to be proposed to the States. But of those 7, not one was rejected by the States. In fact, since 1789 only 5 proposed amendments—two of them part of the original Bill of Rights—have been rejected by the States.

For these reasons, proposals should be sent to the States for ratification only if approved by two-thirds of the delegates to the convention.

Second, we believe that a State's call for a convention should not remain effective for seven years, as Section 5 of the bill now provides. The call for a convention, as Professor Paul A. Freund has said, should reflect "a contemporaneously felt need." Of course, enough time must be provided to give the State Legislatures an opportunity to consider joining the request. However, in our view, four years would be a sufficient length of time. The vast majority of the legislatures—33 at latest count—now meet annually. Even the 17 legislatures which meet only in alternate years would have two sessions in which to act.

BIRCH BAYH,
QUENTIN N. BURDICK,
PHILIP A. HART,
EDWARD M. KENNEDY,
JOHN V. TUNNEY.

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85th Congress, 1st Session

PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION

BY

CYRIL F. BRICKFIELD

COMMITTEE PRINT

Printed for the Committee on the Judiciary, House of Representatives

July 1, 1957

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FOREWORD

This study on problems relating to a Federal Constitutional Convention was prepared by Mr. Cyril F. Brickfield of the committee staff in partial fulfillment of the requirements of the degree of Doctor of Juridical Science at the George Washington University School of Law. It discusses the legal as well as practical problems presented by a constitutional convention method of amendment and suggests means, in the form of draft bills, to dispose of these problems.

Article V of the United States Constitution provides that Congress, on the application of the legislatures of two-thirds of the States, shall call a constitutional convention for the purpose of amending the Constitution. Since the Constitution's adoption, 168 years ago, there have been over 200 State applications calling for conventions to amend the Constitution on a wide variety of subjects including the direct election of Senators, Federal income taxes, prohibition of polygamy, repeal of the 18th amendment, world federal government, and the general or complete revision of the Constitution itself. Despite this number of applications, the constitutional convention method of amendment has never been employed.

Many of these applications no doubt are no longer valid. Petitions, for example, for the direct election of Senators, and the repeal of the 18th amendment, have been rendered moot by reason of the 17th and 21st amendments respectively to the Constitution. In addition, the lapse of time may well have rendered other applications invalid. In recent years, however, Congress has been in receipt of a number of petitions from various States requesting the call of a convention to amend the Constitution limiting the power of the Federal Government over the taxation of income. In 1952 the staff of this committee prepared a report on the status of State applications directed to that subject.

The problem of constitutional conventions is a matter of serious concern to the House Committee on the Judiciary since rule XXII and Rule XI, clause 12 (c), of the rules of the House of Representatives direct, among other things, that petitions for conventions be referred to this committee for appropriate action. Unfortunately there is no statutory authority to guide this committee or the Congress in classifying applications or in counting them, nor is there any statutory guidance for the calling of a convention.

Mr. Brickfield's dissertation discusses these problems and suggests procedures to be followed in processing applications and for governing the scope of a constitutional convention's deliberations. Of course, the views expressed and the conclusions reached herein are those of the author and do not necessarily represent the views of any of the members of the committee. The material, however, gives in detail the history and problems relating to the convention method of amending the Constitution, and can be of immeasurable aid to the Congress in considering possible statutory clarification of this problem and in taking positive action on a long-neglected but vital problem.

EMANUEL CELLER, *Chairman.*

ACKNOWLEDGMENTS

I wish to express my appreciation to Prof. J. Forrester Davison of the George Washington University Law School who as faculty adviser patiently consulted with me during 3 trying years and gave me the benefit of his good counsel. I desire to thank Dr. Norman J. Small of the Legislative Reference Service of the Library of Congress for his assistance in helping me rework the various tables which form part of the appendix of this dissertation.

As sources of reference in the preparation of this work I relied heavily on the prize essay of Prof. Herman V. Ames, which was published as House Document 353, part 2, 54th Congress, 2d session, entitled "The Proposed Amendments to the Constitution of the United States During the First Century of Its History", the unpublished thesis of William R. Pullen entitled "The Application Clause of the Amending Provision of the Constitution," University of North Carolina, Chapel Hill (1951), and the committee document of the House Judiciary Committee (1952) entitled "Problems Relating to State Applications for a Convention To Propose Constitutional Limitations on Federal Taxes," which was largely prepared by Mr. Jerrold Walden.

Acknowledgment is due the George Washington University in authorizing the use of this material for publication as a committee document.

C. F. BRICKFIELD.

PREFACE

Article V of the United States Constitution provides two methods for amending the Constitution: (1) Congress may propose amendments to the Constitution for ratification by three-fourths of the States, or (2) on application of the legislatures of two-thirds of the several States, Congress shall call a constitutional convention. Twenty-seven amendments have been referred to the States for ratification under the first method,[1] but there never has been, since the adoption of our Constitution, a constitutional convention. Because of the growing number of petitions submitted to Congress by the several States during recent years calling for a convention under the second method, and because of the complex problems involved it is the intention of the writer to direct this dissertation to the problems and issues involved in a Federal constitutional convention.

Article V is silent as to how and when conventions are to be convened and it does not state how the convention is to be formed or what rules of procedure are to guide its acts. In order to present a clear view of the general problem there follows, in outline form, several of the more obvious issues connected with calling a constitutional convention.

Article V, while providing that the States may make application to Congress for the calling of a convention, sets no requirements concerning what provisions each State application must contain or what standards each application must meet in order to be considered as validly made. One application, for instance, while it passed the State legislature, was vetoed by its governor.[2] This raises the question of whether the Constitution contemplates action solely by the houses of a State legislature or whether applications must be processed in accordance with procedures for enacting State laws which usually include action by the State's chief executive.

Another question is: When have two-thirds of the legislatures of the several States made application for the calling of a convention? Some petitions to Congress were made 168 years ago.[3] Do these petitions and others remain permanently alive or do they lapse after a reasonable period of time?

Article V is also silent on the subject matter of applications. A constitutional convention can be construed to mean that subjects on many and varied topics may be considered looking toward a general reformation of the Constitution. Yet, there are legal commentators who support the proposition that all petitions, in order to be counted, should be identical or at least relate to a single specific subject matter; for example, a proposed amendment pertaining solely to the subject of limiting the Federal Government's power over the taxation of income.

A question of importance is the power of a State to rescind its application once it has been submitted to Congress. The view has been expressed that since a State legislature is competent to make

application for a constitutional convention, it is obviously competent to withdraw its application. It may be well to point out, however, that Congress refused to allow the States of Ohio and New Jersey to rescind their ratifications of the 14th amendment.[4] And conversely, Congress permitted North Carolina, South Carolina, Georgia, and Virginia which at first rejected the 14th amendment, to subsequently ratify the same.[5] Whether rescission of an application petitioning for a Federal constitutional convention should be considered in the same light as rejection in the course of ratification is, of course, another matter which adds to the complexity of the problem.

Once convened, a question which presents itself is whether the convention may discuss any and all subjects relative to the Constitution or whether Congress may restrict the scope of its deliberations to a particular subject or at least to a limited number of subjects. Many believe that once convened, a convention could rewrite the entire Constitution if it so desires. Others, however, adopt the view that Congress would have the power to determine the areas of deliberations to which the convention would be confined. This would be especially so if Congress convened the convention for the sole purpose of taking up a particular subject.

The problem is further complicated when one seeks to determine the extent to which the States themselves may control the actions of a convention.

An interesting question is how can the provisions of article V be enforced if the Congress fails or refuses to act in the event there are a sufficient number of State applications submitted?

Another question which looms large throughout the entire problem is whether many of the issues are of a justiciable nature open to determination by the courts, or whether they are political questions beyond the limits of the courts' jurisdiction and therefore subject to determination by the Congress?

It is believed that Congress can resolve and otherwise render academic many of these questions by setting up, through implementing legislation, statutory provisions containing standards and guides to govern the submission of State applications. The subject of amending the Constitution is one which has, over the years, engendered much learned comment. However, in recent years, one of the more significant happenings has been the submission of 32 applications to the Congress from 27 States all relating to the same subject matter, namely, a constitutional convention to consider the problem of limiting the power of the Federal Government in the taxation of incomes, gifts, and inheritances. It may be well at this time to look ahead and seek to provide legislation which will not only contain the answers to the legal problems involved but which will also resolve the practical ones as well.

Scope of dissertation

While this dissertation is concerned with problems relating to constitutional conventions, it may be well to note, briefly, highly publicized controversies in recent years over whether the Constitution may be amended by means other than those provided for in article V. For example, Senator John W. Bricker of Ohio feels that treaties made under authority of the United States can and do result in changing the provisions of the Constitution. Further, it has been argued that the United States Supreme Court, by judicial decisions, has also

substantially changed the meaning and original intent of many of the provisions of our Constitution. This view gathered additional support as the result of the recent school segregation case.[6]

At first impression, these controversies might appear to be proper subjects for discussion here since article V is the amending article, and the underlying purpose of constitutional conventions is amendment and revision. However, amendment by treaties or by judicial decisions cover fields of constitutional law which are so broad that many learned commentaries have been written on them alone.[7] To attempt any discussion of them here may well be inappropriate. Furthermore, it is felt that such subjects are not really pertinent to this undertaking. We are here dealing with amending the Constitution by means of a constitutional convention. Whether it may be amended by constitutional means other than those expressly provided for in article V would not in any way affect amending the Constitution by means of a constitutional convention.

Basically, however, it is felt that article V provides the only methods for the Constitution's amendment. As is discussed in the following chapters, changes in our basic law can only be made in a legal or constitutional manner. Our courts have consistently recognized the principle that, aside from revolution, the only method of effecting changes is pursuant to some procedural provision of the Constitution.[8]

The framers of our Constitution gave serious consideration to the problem of providing a method of amendment. They wished the Constitution to be open to improvement as exigencies in the future should require. It was essential, in drafting a provision regulating the mode of amending the Constitution, that consideration be given to devising a practical but not too easy method of making changes. With this understanding, they adopted article V.[9] In the discussions in the constitutional convention concerning article V, not a single word was uttered to indicate that article V was not to be all embracing on the subject of amendments. Having thus provided a particular method of effecting amendments to the Constitution, the Founding Fathers certainly cannot be assumed to have left the door open to vicarious amendment—treaty or otherwise.

Five or 6 years ago, Senator Bricker started a movement in Congress to curtail the treatymaking powers upon the ground that treaties could cut across the face of, and change, the Constitution. This movement received enthusiastic support from certain segments of the American Bar Association and from leading lawyers.[10] However, the issue has become dormant. Many people who originally supported the movement have changed their positions. Secretary of State John Foster Dulles, for example, supported the movement in 1952 [11] and opposed it is 1953.[12] Originally 64 Senators joined Senator Bricker in sponsoring his legislation. Ordinarily such a manifestation of solidarity would lead one to believe that the legislation would be assured of passage in the Senate. But such was not the case and the measure was lost in the 83d Congress. Apparently, full discussion of the problem in the Senate and in legal periodicals throughout the United States helped erase the fears that treaties can change the Constitution.

Without attempting, for the reasons stated above, to discuss these issues at too great length, it may be noted that the Supreme Court has never held that a treaty or judicial decision can expand or subtract

from the Constitution, nor has it ever held that the Constitution may be amended in any other way than in accordance with the amending power contained in article V.[13]

Be that as it may, there are still those who believe to the contrary. Almost without exception, the proponents of these resolutions cite the opinion of Mr. Justice Holmes in the Migratory Bird case.[14]

In order to evaluate this celebrated case intelligently, it is necessary to recall the factual background. In 1913 Congress enacted a law prohibiting the destruction of migratory birds.[15] Thereafter, in a criminal prosecution brought under regulations promulgated by the Department of Agriculture in pursuance to the act, the court held that migratory birds were not the property of the Government, but of the several States in their sovereign capacity. It concluded that there was no provision in the Constitution authorizing Congress to regulate or protect migratory wild game when in a State.[16]

It should be noted that this is only a lower district court case. No appeal was taken from its decision. It should also be noted that the only contention urged by the Government was that Congress had power to regulate and protect property belonging to the United States.[17] The Government did not contend that the legislation may well have been permissive under the commerce clause.[18]

There was also another district court case which handed down a similar decision and from which no appeal was taken.[19]

Thereafter, President Wilson in 1916 proclaimed a convention for the protection of migratory birds between the United States and Great Britain (on behalf of Canada), and in 1918 Congress enacted the Migratory Bird Treaty Act to implement the convention and which, in effect, was somewhat similar to the earlier enactment of Congress which the lower district courts had held unconstitutional.

A short time later, two residents of Missouri were separately indicted for violation of the Federal statute. They asked for a dismissal of the indictments on the ground that the act was unconstitutional. After the return of the indictment, the State of Missouri filed a bill in equity seeking to restrain the United States game warden, Holland, from enforcing the act in that State. The district court dismissed the bill in equity.[20]

On appeal to the United States Supreme Court, Mr. Justice Holmes delivered the much discussed and sometimes misinterpreted opinion of the Court.[21] The Justice stated that the question involved in the case was "whether the treaty and statute are void as an interference with the rights reserved to the States." He pointed out that although the 10th amendment reserves the powers not delegated to the United States, the power to make treaties was expressly delegated. And if the treaty was valid the statute was also valid under the "necessary and proper" legislative power.

It might be well to state first that the Court upheld the treaty and the statute as valid. The Court, in so doing, decided this—and nothing more: "The treaty in question does not contravene any prohibitory words to be found in the Constitution," nor was it "forbidden by some invisible radiation from the general terms of the 10th amendment."

One of the grounds advanced by those who argue that a treaty need not conform to the Constitution is that in the Migratory Bird case, Holmes is supposed to have held that article VI of the Constitution

requires that statutes be "pursuant" to the Constitution, but treaties need merely be made under the "authority" of the United States. Such a holding, even if it could be interpreted as an express statement by Holmes that treaties need not conform to the Constitution, would not be controlling inasmuch as it had no bearing upon the decision in the case. The controlling rule was that the treaty in question did "not contravene any prohibitory words to be found in the Constitution" and was not forbidden by some invisible radiation from the general terms of the 10th amendment. That is the entire basis of Holmes' opinion and is, of course, contrary to the holding imputed to him.

Nor has the Supreme Court considered Holmes' statement to mean that a treaty could be superior to the Constitution. Four years after the Migratory Bird case the Court cited the Migratory Bird decision as one of its authorities for the proposition that the treatymaking power is not superior to the Constitution.[22]

Another supposed holding of the case is that although Congress had no power under the Constitution to legislate on migratory birds, once a treaty was made on the subject, it could legislate to implement the treaty. Here again the argument falls short for there is no evidence in the opinion that the Supreme Court considered the congressional act unconstitutional except for the treaty. The two cases arising under the statute prior to the treaty did not reach the Supreme Court and consequently there is no holding by that Court, but only by the district courts on that statute. Holmes pointed out that "whether the two cases were decided rightly or not they cannot be accepted as a test of the treaty power." Clearly that statement cannot be construed as a holding that the prior statute was unconstitutional. Even if Holmes had stated—which he did not—that the earlier act was unconstitutional it would not have been authoritative since that statute was not involved in this case.

It may be said, in summary, that the decision did not hold that a treaty does not have to conform to the Constitution; nor that the statute enacted prior to the treaty was unconstitutional; nor that Congress could legislate in a field which prior to the treaty it could not constitutionally legislate; nor, finally, that a treaty may change the Constitution.

Probably the best way of concluding this discussion on whether a treaty may validly conflict, supersede, modify, or otherwise amend the Constitution is to quote the Supreme Court itself in a case handed down over 80 years ago. In litigation involving a treaty with the Cherokee Nation of Indians, the Court aptly stated: [23]

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government.

No doubt as world conditions change, we may experience another cycle of events which will give cause for another reconsideration of this problem. However, as Mr. Dulles noted, the Constitution has served well over the last century and a half and there is no present need to change the amending processes of article V.[24]

CITATIONS

[1] Twenty-two amendments have been certified as part of the United States Constitution. Five amendments have been proposed by the Congress but have not been ratified by a sufficient number of States. They relate to (a) the apportionment of Representatives in the House (submitted in 1789), (b) the compensation of Senators and Representatives (submitted to the states in 1789), (c) acceptance by United States

[1] [illegible] of [illegible] of [illegible] [illegible] (1861); [illegible] [illegible] submitted in 1861, [illegible] U. S., Congress, [illegible] House [illegible] [illegible]

[2] Pennsylvania, Session Laws (1943) p. 222.

[3] See states of New York and Virginia, Table I, Appendix.

[4] U. S., Statutes at Large, vol. 15, 706–710. Secretary Seward, in a communication to Congress, stated that if Ohio and New Jersey's ratifications were still effective notwithstanding their subsequent purported withdrawals, a sufficient number of States had ratified Article XIV (15 Stat. 707). Congress, citing both States in its resolution, declared the amendment adopted as having been ratified by the necessary number of States (15 Stat. 709, 710).

[5] U. S., Congress, House, Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History, 54th Cong., 2d Sess., 1897, House Doc. 353, Pt. 2, pp. 299–300.

[6] Brown v. Board of Education, 347 U. S. 483 (1954).

[7] Zinn, Charles J., "The Exercise of the Treaty-Making Power Cannot Effect the Denial or Abridgement of Any Right Enumerated in the Constitution" (unpublished S. J. D. dissertation, Georgetown University, 1954); Allen, Florence E., The Treaty as an Instrument of Legislation (New York: Macmillan Co., 1952); Tucker, Henry St. George, Limitations on the Treaty-Making Power (Boston: Little Brown & Co., 1915); Bricker, John W., U. N. Blueprint for Tyranny, The Freeman (Jan. 28, 1952); Chafee, Zechariah, Stop Being Terrified of Treaties: Stop Being Scared of the Constitution, 38 Amer. Bar Assoc. Journ. 731 (Sept. 1952); Holman, Frank E., Treaty Law-Making: A Blank Check for Writing a New Constitution, 36 Amer. Bar Assoc. Journ. (Sept. 1950).

[8] Weston, Political Questions, 38 Harvard Law Review, 296, 305 (1925).

[9] Madison, The Federalist, No. 43.

[10] U. S. Congress, Senate, 83d Cong., 1st sess., 1953, S. J. Res. 1; Holman, Treaty Law Making: A Blank Check for Writing a New Constitution, 36 Amer. Bar Assoc. Journ. 707 (1950).

[11] Dulles, Speech at American Bar Association regional meeting, Louisville, Kentucky, April 11, 1952; Cong. Rec., May 15, 1952, Vol. 98, p. 5306 (Daily): "* * * treaty law can override the Constitution."

[12] Dulles, Testimony before Senate Subcommittee on S. J. Res. 1, 83d Cong., April 6, 1953; Department of State Bulletin, April 20, 1953, p. 591: "The Constitution, as it is, has served well in the field of foreign relations. * * * there is no present need for a Constitutional change."

[13] Zinn, Charles J. The Exercise of the Treaty-Making Power Cannot Effect the Denial or Abridgement of Any Right Enumerated in the Constitution, unpublished S. J. D. dissertation, Georgetown Univ. Washington, D. C., 1954.

[14] Missouri v. Holland, 252 U. S. 416 (1920).

[15] Act, March 4, 1913, ch. 154, 37 Stat. 828, 847. "All wild geese, wild swans, * * * and all other migratory game * * * which in their northern and southern migration pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided for."

[16] United States v. Shauver, 214 Fed. 154 (1914).

[17] U. S. Constitution, Art. IV, Sec. 3, cl. 2.

[18] U. S. Constitution, Art. I, Sec. 8, cl. 3. United States v. Shauver, 214 Fed. 154 (1914).

[19] United States v. McCullogh, 221 Fed. 288 (1915).

[20] United States v. Samples; United States v. DeLapp, State of Missouri v. Holland, 258 Fed. 479 (1919).

[21] 252 U. S. 416 (1920).

[22] Asakura v. Seattle, 265 U. S. 332, 341 (1924).

[23] The Cherokee Tobacco, 11 Wall. 616, 620–621 (U. S. 1870).

[24] Testimony before Senate Judiciary Committee on S. J. Res. 1, 83d Cong., April 6, 1953; see also footnote 12 above.

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APPENDIX

TABLE OF CASES

PART I

HISTORY OF AMENDING CLAUSE

CHAPTER 1 *

LAW PRIOR TO CONSTITUTIONAL CONVENTION OF 1787

Uniqueness of amending clause

The Constitution of the United States provides for its own amendment. Article V states:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The idea of an amending clause in the organic instrument of a sovereignty is peculiarly American. Although our States base their organic laws on English and, in some instances, continental conceptions, such is not the case in the fundamental matter of altering or amending their constitutions.[1]

England, of course, never had a written constitution. It has what is known as a cumulative constitution developed over the centuries from accumulated usages, common-law principles, decisions of its courts, compacts, and statutes.[2] Its laws are evolved gradually as the needs of national life require.

However, in America in the years preceding the Revolutionary War, the political life of the colonists was such that they were unable to develop civil institutions which could grow in an environment of normalcy reflecting the developments and customs of the colonists themselves. Instead, their institutions were subjected to, and thus reflected, the almost complete and abusive domination of England. When they did break away from the mother country, there was no time for the slow development of a form of government built on custom and usage; rather the colonies had to adopt a type of government which would give them immediate political stability. They adopted written constitutions. Jameson, in his treatise on Constitutional Conventions, was of the opinion that the most appropriate way for creating a new government, under circumstances in which our forebears found themselves, was by written constitution. He noted that when the political life of a people has been—

> unpropitious for the foundation and growth of civil institutions [written constitutions] however slow, superficial, or deficient * * * give civic dignity and political

*Footnotes are at end of each chapter.

consciousness to a people [and], form, in times of political apathy * * * a passage, a bridge to pass over to better times.[3]

So although the colonists were familiar with English and continental systems, they did not and, because of the exigencies of the times, could not follow them.

Since the people were sovereign, however, it followed that they could not only enact a constitution but, as a necessary corollary, they could also amend and revise it.[4] It is in this latter aspect that American constitutional systems are completely distinguishable from those of other countries. While some European countries had written codes or constitutions, none, at the time of the American Revolution, had organic laws containing express provisions providing for their own amendment or alteration. It was purely an American concept.

Interestingly enough, our Founding Fathers, in making provision for amendments, at the same time restricted the manner and mode by which changes could be made. This was done to prevent rash and impassioned attempts to bring about wholesale changes in our form of government once it had been adopted. Jameson in his treatise aptly describes the purpose: [5]

> The idea of the people thus restricting themselves in making changes in their constitutions is original, and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and, therefore, always under the restraints of law.

Amending clause in early State constitutions and Articles of Confederation

The first State constitutions were the immediate results of the Revolutionary War. Soon after the Declaration of Independence the Continental Congress recommended that the people of the Colonies meet for the purpose of forming independent governments. Of the 13 constitutions which were first framed, 6 made provisions for their future revision and amendment.[6] By the time the Federal Constitutional Convention met in 1787, two additional States had express provisions in their constitutions for their amendment or revision.[7]

In Delaware, Maryland, and South Carolina, use of the amending process was reserved to the legislatures.[8] In Georgia, Massachusetts, New Hampshire, Pennsylvania, and Vermont, amendments were to be made by conventions.[9]

At the Constitutional Convention of 1787 both methods were embodied into one instrument.

Since, at the time of the Revolution, it was felt that a strong union of the States was highly desirable if not imperative, the Continental Congress adopted a plan of confederation on November 15, 1777, and submitted it to the States for ratification.[10] It became effective on March 1, 1787, and was known as the Articles of Confederation. It contained the following provisions providing for its own amendment:

ARTICLE 13

> * * * And the articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every state.[11]

Thus in this first concerted effort on the part of all the States, there was set out an express provision relating to the articles' future amendment and alteration.

Our colonial States experienced growing pains and, as with other provisions of the Articles of Confederation, there were experimentations with the amendment clause. In fact, article XIII, quoted above, because of its restrictive provisions, was instrumental in defeating the purpose of the confederation. Under it, a single State could prevent any change in the confederation. Oliver Ellsworth, speaking before the Connecticut convention, clearly pointed up the difficulty:

> How contrary, then, to republican principles, how humiliating, is our present situation! A single state can rise up, and put a *veto* upon the most important public measures. We have seen this actually take place. A single state has controlled the general voice of the Union; a minority, a very small minority, has governed us. So far is this from being consistent with republican principles, that it is, in effect, the worst species of monarchy.[12]

CITATIONS

[1] Orfield, The Amending of the Federal Constitution (1942), p. 1.

[2] See for discussion of written and unwritten constitutions Jameson, Constitutional Conventions (4th ed., 1887), pp. 80–81; Borgeaud, Adoption and Amendment of Constitutions in Europe and America (1895), pp. xv–xvi.

[3] Jameson, Constitutional Conventions (4th ed., 1887), p. 79, quoting Lieber, Political Ethics, Pt. I, pp. 394–395.

[4] Orfield, The Amending of the Federal Constitution (1942), p. 1.

[5] Jameson, Constitutional Conventions (4th ed., 1887), p. 549.

[6] Delaware, Constitution (1776), Art. 30; Poore, United States Charters and Constitutions (2d ed.: 1878), I, 273–278; Pennsylvania, Constitution (1776), Sec. 47; Poore, ibid., II, 1540–1548; Maryland, Constitution (1776), par. LIX; Poore, ibid., I, 818–828; Georgia, Constitution (1777), Art. LXIII; Poore, ibid., I, 377–383; Vermont, Constitution (1777), Sec. XLIV; Poore, ibid, II, 1857–1865; Massachusetts, Constitution (1780), Art. VI; Poore, ibid., I, 956–972.

[7] New Hampshire, Constitution (1784); Poore, ibid., II, 1280–1293; South Carolina, Constitution (1778), par. XLIV; Poore, ibid., II, 1620–1627.

[8] Poore, ibid., I, 278, 828; Poore, ibid., II, 1627.

[9] Poore, ibid., I, 383, 972; Poore, ibid., II, 1292, 1548, 1865.

[10] Elliott's Debates (1937 facsimile of 1836 ed.), I, 79.

[11] Ibid., p. 84.

[12] Ibid., II, 197. Ellsworth was referring to Rhode Island's action in defeating amendments proposed by the Congress on February 1, 1781, and on April 18, 1783, which would have authorized Congress to levy certain import duties. Both of the amendments had been ratified by the other twelve states.

CHAPTER 2

CONSTITUTIONAL CONVENTION OF 1787 AND CIRCUMSTANCES SURROUNDING ARTICLE V

In the fall of 1786, a committee from five States met at Annapolis, Md., for the purpose of adjusting certain commercial differences.[1] However, because so few States were represented, the committee did not proceed with its business but recommended that a further meeting, made up of all the States, be held in Philadelphia in May of the next year.[2] Thus was initiated the Federal Convention of 1787. On February 21, 1787, Continental Congress adopted a resolution authorizing the Convention to meet—

> for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.[3]

When it met in Philadelphia, the main business of the Federal Convention was first embodied in a plan on the union submitted by Edmund Randolph on behalf of the Virginia delegation.[4] Randolph's 13th resolution provided for amendment whenever it would "seem necessary" and did not require the consent of the National Legislature. As originally introduced it stated:

> provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.[5]

In the Committee of the Whole, several members did not see the wisdom or propriety of making the consent of the National Legislature unnecessary. As a result, the latter part of the provision was lost,[6] and as such, was submitted to the committee on detail.[7] That committee returned what is known as the first draft of the Constitution, and in article XIX thereof provided for amendment by having the National Legislature call a convention whenever two-thirds of the State legislatures petitioned for it. Article XIX read:

> On application of the Legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.[8]

The draft was printed for the delegates and was the basic instrument used in future discussions. It, together with a record of the proceedings, was referred to another committee known as the Committee on Style and Revision.[9] Two days later the committee reported back a second draft and, as it turned out, this draft was the final one on the Constitution. After further discussion and additional revision by the Committee of the Whole, the draft, as revised, was agreed to by the delegates of all the States and was signed by all but three of the delegates.

When article XIX of the first draft was discussed by the delegates, it was agreed to unanimously.[10] However, in the second draft

Mr. Gerry moved its [illegible] on the ground that, as the Federal Constitution was [illegible] State constitutions, any provision which permit[illegible] States to obtain a convention, and thus subvert and [illegible] stitutions, might not be proper.[11] Alexander Hamilton [illegible] motion, but for another reason. Hamilton objected to the present form of the article because he did not believe the proposed manner for introducing amendments was adequate. He thought there should be an additional method. The National Legislature, in his view, would be the first to perceive the necessity of amendments and should, therefore, also be empowered, when two-thirds of each branch of the National Legislature concurred, to call a convention.[12] In addition, he pointed out that it would be essential to provide an expeditious method for amending the new document and not to rely on the State application process alone to remedy defects which Hamilton thought were very soon to become evident in the fabric of the new government. He also thought that if the article was not changed "the State legislatures will not apply for alterations but with a view to increase their own powers."

The Convention proceeded to study several measures (proposed by Roger Sherman, of Connecticut, and James Wilson, of Pennsylvania) which would have injected the National Legislature into the process for proposing amendments, but discussion was postponed in order to take up a proposition moved by Madison. Madison's proposal left proposed amendments entirely in the hands of the National Legislature either (1) upon application of two-thirds of the several States or, (2) when deemed necessary by two-thirds of both Houses of Congress. This proposal read:

> The Legislature of the U— S— whenever two-thirds of both Houses shall deem necessary, or on application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid for all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S.[13]

The Madison proposal, except as modified by provisions added at the end thereof to pacify the protests of slavery interests, was finally accepted.[14]

The Committee on Style and Revision reported back the article as article V. It read:

> The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article.[15]

Considerable discussion was had on the article in this form before final agreement was reached. Objections were made to the provisions which would give the Congress plenary powers over the amending procedure. On the motion of Gouverneur Morris and Elbridge Gerry, the article was amended so as to require that a convention be called upon application of two-thirds of the States.[16] This amendment was adopted over the misgivings of Madison who "did not see why Congress would not be as much bound to propose amendments

PART II

VALIDITY OF STATE APPLICATIONS REQUESTING CONGRESS TO CONVENE A CONSTITUTIONAL CONVENTION

CHAPTER 4

ACTION OF GOVERNOR ON STATE APPLICATIONS

Insistence that the convention clause of Article V is mandatory raises many questions concerning the validity of applications calling for a convention. One involves gubernatorial consent. How, for example, shall Congress classify the petition from the State of Pennsylvania which was vetoed by its Governor.[1] Article V states that Congress shall call a convention on the application of the "Legislatures of two-thirds of the several States" and there is no indication, from the language of the article, whether the term "legislature" means action solely by the legislative houses of the States or whether it includes the established channels for statutory enactments, including the assent of the governors.

In deciding whether gubernatorial action affects the validity of a State application, it is necessary to determine the meaning of the word "legislatures" as set out in article V providing that:

> The Congress * * * on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments * * *,

The word "legislature" is used 13 times in the Constitution as originally adopted and 7 times in its amendments.[2] However, the term "legislature" in different circumstances does not always imply, as noted in Smiley v. Holm,[3] the performance of the same function. Ordinarily, the legislature acts as the lawmaking body in each State government. Under the Federal Constitution, it performs additional duties. It was intended to act, as noted in the Smiley case, as an electoral body, under article I, section 3, in the choice of United States Senators, prior to the adoption of the 17th amendment; as a ratifying body, under article V, with respect to proposed amendments, and as a consenting body, with regard to the acquisition of lands by the United States under article I, section 8, clause 17.[4]

Wherever, therefore, the term "legislature" is used in the Constitution, it is necessary to consider the nature of the particular action in view. Legislatures, in calling upon Congress to convene a convention, would not seem to be acting in the exercise of a lawmaking power but as agencies of the Federal Government, discharging a particular duty in the manner which the Constitution requires.[5] The matter of a Federal constitutional convention pertains exclusively to Federal affairs—not State domestic issues—and State legislatures, in soliciting the Congress, would be acting as representatives of the people of the State under the power granted by article V. The article

therefore imports a function different from that of lawmaker and renders inapplicable the conditions which usually attach to the making of State laws. Furthermore, the Constitution speaks as of the time it was adopted, and in the beginning very few of the original States granted the veto power to their governors.[6]

As further indicia that action by governors was not intended, the Constitution uses the terms "executives" and "legislatures" in its text, and both terms were well-understood expressions. Article I, section 3, clause 2 gave the "executive" of the State authority to fill, temporarily, vacancies in the office of Senator,[6a] and article IV, section 3, clause 1 forbids the formation of new States by the junction of two or more States or parts of States without the consent of the "legislatures" of the States concerned. In fact, the Constitution expressly identifies the members of State legislatures and requires members of the several State legislatures to support the Constitution.[7] Article IV, section 4, guarantees the protection of every State against domestic violence on the application of the "legislature" or of the "executive" when the legislature cannot be convened. If the framers of the Constitution had intended that "legislature" include gubernatorial action, it could have used the word "State" which could include the governor, or some other expression such as "the legislature with the approval of the executive." Both terms are in no way novel, and both are used in other provisions of the Constitution.

The functions of a legislature as contained in article V are at odds with the ordinary duties of a deliberative body in conducting its statutory business. By way of analogy, the Supreme Court, speaking of ratifications of amendments by State legislatures, stated [8] that—

> * * * ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.

By the same reasoning, it would follow that the application process, like ratification, would fall within the same category as a select proceeding under article V.

Another Supreme Court decision which would seem to remove the executive branch of the State government from participation in the application process is Hollingworth v. Virginia.[9] In that case it was argued that the 11th amendment was invalid in that the joint resolution passed by the Congress proposing the measure to the States was never submitted to the President of the United States for his approval. In a footnote to the case, Mr. Justice Chase rejected the contention that the President's approbation was necessary by stating to the Attorney General:

> There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the Constitution.[10]

It therefore would not be incongruous to conclude that since the President has no functions to perform in the submission of amendments to the States for ratification, the actions of State governors, similarly, are unnecessary in the application process under article V. Ames states that: [11]

> The most reasonable view would seem to be that the signature of the chief executive of a State is no more essential to complete the action of the legislature

upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment.

CITATIONS

[1] Pennsylvania Session Laws (1943) p. 922; Montana's Governor vetoed a petition relating to income tax but the petition sought congressional action under the first method of amendment and not a convention. Montana House Journal (1951) pp. 596–597.

[2] U. S., Constitution, Art. I, sec. 2, cl. 1; U. S., Constitution, Art. I, sec. 3, cl. 1. U. S., Constitution, Art. I, sec. 3, cl. 2 (twice). U. S., Constitution, Art. I, sec. 4, cl. 1. U. S., Constitution, Art. I, sec. 8, cl. 17. U. S., Constitution, Art. II, sec. 1, cl. 2. U. S., Constitution, Art. IV, sec. 3, cl. 1. U. S., Constitution, Art. IV, sec. 4, (twice). U. S., Constitution, Art. V, (twice). U. S., Constitution, Art. VI, cl. 3. U. S., Constitution, Art. XVII, cl. 1. U. S., Constitution, Art. XVII, cl. 2 (twice). U. S., Constitution, Art. XIV, sec. 2. U. S., Constitution, Art. XIV, sec. 3. U. S., Constitution, Art. XVIII, sec. 3. U. S., Constitution, Art. XX, sec. 6.

[3] 285 U. S. 355, 365 (1932).

[4] Smiley v. Holm, Secretary of State, 285 U. S. 355, 365–366 (1932), citing Hawke v. Smith No. 1, 253 U. S. 221, 231 (1920); Leser v. Garnett, 258 U. S. 130, 137 (1922).

[5] Cf. Hawke v. Smith No. 1, 253 U. S. 221, 230 (1920).

[6] Only two states had veto powers by the chief executive, Massachusetts and New York—Massachusetts, Constitution (1780), chap. 2, sec. 1, Thorpe, American Charters Constitutions and Organic Laws, III, 1909; Laws of New York (1780), chap. 11.

[6a] Clause 2 was changed by clause 2 of the 17th amendment but the term "executive" was again used.

[7] U. S., Constitution, Art. VI, cl. 3.

[8] Hawke v. Smith No. 1, 253 U. S. 221, 229 (1920).

[9] 3 Dall. 376 (U. S. 1798).

[10] Ibid. p. 380.

[11] U. S., Congress, House, 54th Cong., 2d Sess., 1897, House Doc. 353, pt. 2, p. 298 (1897), Ames, The Proposed Amendments to the Constitution of the United States During the First Century of its History, p. 298.

CHAPTER 5

CONGRESSIONAL POWER TO REGULATE STATE APPLICATION PROCEDURE

Another issue pertaining to State applications is whether Congress may regulate the procedures of State legislatures in proposing constitutional conventions. As noted earlier the amending power conferred by article V of the Constitution is manifestly a Federal function in which the States take part in proposing constitutional conventions and ratifying amendments.[1] At the same time, however, State legislatures are not subject to absolute congressional control. While the act of petitioning or ratifying is a Federal function, the legislature performing the act is nonetheless the State legislature and a clear distinction must be kept in mind between acts which are necessary and proper for Congress to carry out constitutional requirements, and those which in any way seek to restrict the freedom of action of State legislatures. Certainly, Congress may not dictate to the States what they may or may not suggest in proposing a constitutional convention or when they may propose it. Such action would be beyond the scope of article V, either expressed or implied.

Nor may Congress pick the legislature which is to ratify its proposals. In 1866, for example, when the 14th and 15th amendments were under consideration in the United States Senate, resolutions were offered, providing among other things, that the amendment be submitted, not to the State legislatures then in session, but to future legislatures. These proposals were defeated.[2] It was pointed out that the Constitution referred to those legislatures in existence at the time the amendment was submitted. If they failed to act upon the proposal, it was possible that future legislatures may, but Congress had no right to withdraw the power from the existing legislatures and say, that those in existence in 1869 shall not act upon it, but those of 1870 or 1872 may act.[3] While Congress may, as will be discussed later, set a reasonable time within which States must ratify amendments, it appears that it is without power to choose a future legislature or a session of a legislature. This is for the reason that article V provides generally, and without restriction, that amendments become effective when ratified by the legislatures of three-fourths of the States. To permit Congress to so restrict State legislative action would be a misconstruction of article V.

When the Founding Fathers framed the Constitution of 1787, they did so against the background of State laws and legislatures and customs which were already in existence. When they wrote the Constitution they made provision for those laws and they recognized State legislatures as bodies in being. Cooley, in his book on constitutional limitations,[4] points out that when a constitution is adopted there are in existence at the time of adoption known and settled rules and usages, which form a part of the law of the State or Nation, in reference to which their constitutions are evidently framed, and where

the usages and rules require the observance of certain forms and procedures, the constitution itself will also be understood or interpreted as requiring them, because in assuming their existence and being framed with reference to them, it in effect adopts them as part of its provisions as though they had been expressly incorporated therein.[4]

Where, for example, the legislative power is to be exercised by two houses, and by settled and well-understood parliamentary law, these two houses are to hold separate sessions for their deliberations, and the determination of one upon proposed legislation is to be submitted to the other for separate determination, a constitution in providing for two houses, speaks with reference to the settled custom, incorporating within it, so to speak, a rule of constitutional interpretation, so that it would require no prohibitory clause to forbid the two houses from combining in one, and, jointly enacting laws by the vote of a majority of all.[5]

In addition, the customary rules of order and routine, such as every deliberative body must have, are always understood to be under its control, and subject to change at its will. Historic precedents leave to the discretion of the legislative bodies, the choosing of their officers,[6] the determination of their rules of proceedings,[7] and the election and qualification of their members.[8] These bodies also have always had the recognized power to punish their own members for disorderly conduct and other contempts of their authority.[9]

It would seem only proper that such powers should rest with the body immediately interested, so that its members may proceed with their deliberative functions without being subject to undue delay and interruption and confusion.[10] These rights have been developed over the years through socalled "parliamentary precedents."

Legislatures, furthermore, must of necessity be allowed to proceed in their own way, without interference, in the collection of information necessary for the proper discharge of their functions.[11] When deemed desirable to examine witnesses, the legislatures must have the power and authority to seek them out. So also with regard to the voting of legislatures, otherwise Congress would be able to tailor and reorganize those bodies to its own liking, and to dictate procedure to congressional advantage.

Under the rule of Field v. Clark [12] procedural requirements in the passage of legislation are deemed to have been properly met when the legislation is certified correct by the presiding officers. Only the legislators themselves may question whether a bill has been duly enacted into law, and their acquiescence in the record of the legislative proceedings is deemed to be an acknowledgment that the legislative requirements to the passage of the act have been performed. Once performed, such action cannot be questioned even by the courts, though there may be patently an error (omission or otherwise) in the legislation itself. This is so even though the constitutional and legislative requirements are capable of judicial investigation and decision. While mindful that the courts have the duty to enforce constitutional provisions relating to the passage of laws, the United States Supreme Court in the Field case, nevertheless held that the courts should not seek to go behind enrolled acts which carry the solemn assurances of both legislative houses, through the certification of their presiding officers, and the executive, that the legislation has passed.[13]

The Court, in the Field case, classified this problem as a "political question" [14] and stated that the respect due a coordinate branch of the Government required the judiciary department to accept the assurance as evidenced by the authentication that the legislation was validly enacted into law. In engrossing the bill a clause known as section 30 relating to a rebate of taxes on tobacco, which was shown in the journals of both Houses of Congress to have been regularly passed, was omitted in the engrossed bill. This bill was signed by the presiding officers of Congress and approved by the President. In holding that it would not go in back of the enrolled bill the Court pointed out that the evils which could result from accepting an authenticated act as conclusive evidence that it was passed validly by Congress would be far less than those that would certainly result from a rule making the validity of an enactment depend upon the manner in which the journals, and other materials, are kept by legislative clerks and other subordinate officers.

While no doubt Congress could defeat the internal workings of State legislatures by simply refusing to recognize their actions if they did not comply with congressional mandates, it would be more prudent in the light of court decisions and historical precedents to recognize the established rule that deliberative bodies have the right to regulate their own proceedings and to accept State applications when certified to, as having been validly adopted.

CITATIONS

[1] Hawke v. Smith No. 1, 253 U. S. 221, 230 (1920), chapter 4, supra.
[2] Ames, The Proposed Amendments to the Constitution of the United States During the First Century of its History, pp. 288–290.
[3] Cooley, A Treatise on Constitutional Limitations (8th ed.; 1927).
[4] Ibid., I, p. 267.
[5] Ibid., p. 267.
[6] In Re Speakership, 15 Col. 520 (1891).
[7] French v. Senate, 146 Calif. 604 (1905).
[8] The People v. Mahaney, 13 Mich. 481 (1865).
[9] While many State constitutions expressly provide for such authority, such authorization is not necessary, since it is believed to exist in the legislatures whether expressly conferred or not. It is "a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be affected by a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language." And, "independently of parliamentary customs and usages, our legislative houses have the power to protect themselves by the punishment and expulsion of a member." (Hiss v. Bartlett, 3 Gray (Mass.), 468, 473, 475 (1855); see also French v. Senate, 146 Cal. 604, 80 Pac. 1031.)
[10] Cooley, A Treatise on Constitutional Limitations (8th edition: 1927), I, 270–271.
[11] Tillinghast and Arthur v. Carr, 4 McCord 152 (S. C. 1829).
[12] 143 U. S. 649 (1892); see also Kelley v. Marron, 153 Pac. 262 (1915).
[13] Field v. Clark, 143 U. S. 649, 671–672 (1892).
[14] See chap. 12 for a discussion of "Political Questions."

PART III

CONTROL OF CONSTITUTIONAL CONVENTIONS

CHAPTER 6

POWER OF CONGRESS TO BIND A FEDERAL CONSTITUTIONAL CONVENTION AND TO RESTRICT THE SCOPE OF ITS DELIBERATIONS

Probably the most vital question relates to the power of the Congress to bind a constitutional convention, or, to put it another way, the power of the convention to nullify or ignore congressional acts seeking to restrict the scope of its deliberations. Assuming the right of the Congress, for example, to call a convention into being, has it the further right to impose restrictions upon its actions, to dictate to the convention its organization and modes of procedure; in short to subject it to the restraints of legislative law?

Those who deny that Congress has the power to bind a convention rely heavily on the so-called doctrine of "conventional sovereignty." According to this theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign powers and therefore is supreme to all other Government branches or agencies.[1]

On the other hand, those who assert the right of the Congress to bind a convention contend that the convention is, in no proper sense of the term, a sovereign. It is, they argue, but an agency employed by the people to institute or revise fundamental law. While there may be a special dignity attaching to a convention by reason of its framing fundamental law, no such dignity or power should attach which would invest it with a primacy over other branches of government having equally responsible functions. A constitutional convention has the general characteristics of a legislature, but with the functions and organization only of a committee. Since its assembling is infrequent and dependent, for the most part upon considerations of expediency, it follows that the Congress, whose function it would be to declare and enforce the expediency, would be the proper body to determine the time and conditions for its assembling and to announce the will of the people in relation to the scope of the business committed to the convention.

Before considering the power and scope of a constitutional convention, it is important to distinguish between a revolutionary convention and a constitutional convention. The revolutionary convention, as its name implies, is part of the apparatus of a revolution. Jameson says it consists of those bodies of men who, in times of politi-

cal crisis, assume, or have cast upon them, provisionally, the function of government.[2] They either supplant or supplement the existing governmental organization:

> The principal characteristics of this species are, that they are *dehors* the law; that they derive their powers, if justifiable, from necessity,—the necessity, in default of the regular authorities, of protection and guidance to the commonwealth,—or, if not justifiable, from revolutionary force and violence; that they are possessed, accordingly, to an indeterminate extent, depending on the circumstances of each case, *of governmental powers*; finally, *that they are not subaltern or ancillary to any other institution whatever, but lords paramount of the entire political domain.* [Italics in original.][3]

A constitutional convention, on the other hand as its name implies, is constitutional; not simply having for its object the framing or amending of constitutions, but as being within rather than without the pale of fundamental law. It is, says Jameson, "ancillary and subservient and not hostile and paramount to" the government then existing:[4]

> Its principal feature, as contradistinguished from the revolutionary convention, is, that at very step and moment of its existence, it is subaltern,—it is evoked by the side and at the call of a government preexisting and intended to survive it, for the purpose of administering to its special needs. It never supplants the existing organization. It never governs. Though called to look into and recommend improvements in the fundamental laws, it *enacts* neither them nor the statute law; and it performs no act of administration.[5] (Italic in original.)

It is clear from the foregoing that conventions, whose definitions thus mutually exclude each other, cannot be the same. A constitutional convention appointed under law and the Constitution, which presumes to overpass the limits imposed upon it by its creators, and seeks to do acts requiring the exercise of revolutionary powers, ceases to be a constitutional convention and becomes in the eye of law an extralegal or revolutionary convention.[6]

It might be well to note at this point that while the constitutional convention of 1787 acted beyond the scope of its authority, the Congress itself ratified and consented to the action of the convention and, in fact, transmitted its proposals to the States for their ratification. At no time did the convention seek to bypass or overrule the Congress; rather it submitted the draft Constitution to the Congress for its consideration and approval.[7]

Most authorities agree that a constitutional convention, once convened, would be limited by article V. The real area of disagreement is whether a convention would be further limited by the conditions set forth in a congressional act calling it together. Those who do not think a convention would be limited, point out that a convention ought to be independent of Congress—free, even to alter the powers of Congress itself under the Constitution. They offer the argument that it was fear of this contention which caused the Congress, after much pressure had been brought to bear on it for a constitutional convention, to adopt instead, under the first method, the proposal which resulted in the 17th amendment to the Constitution on the popular election of Senators. Many argue that if Jameson's theory of an ancillary and subservient convention was valid, the Congress would have had no need to fear the then proposed constitutional convention in that Congress could have restricted the convention in its work and, among other things, prohibited it from dealing with the question of senatorial elections (art. I, sec. 3). In adopting the first

alternative method in the amending process, they urge that the Congress, in fact, conceded it could not control the scope of a convention's proceedings.

This whole matter, of course, can be dismissed as being more argumentative than decisive. The Senate took the easy way out and avoided the issue. Whatever its merits, it can hardly be said that the Congress, in proposing the 17th amendment to the States, decided this all-important issue.

While this question, then, has never been directly decided by Congress or by the courts, it seems that the whole scheme, history, and development of our Government, its laws and institutions, require the control of any convention and the most logical place for exercising that control would be in the enabling act convening it, or in some other Federal statutory law. Under article V, Congress calls the convention after the required number of states have submitted petitions. It has the duty to announce the will of the State legislatures in relation to the scope of the convention's business and, under the necessary and proper clause, it may set up the procedures and conditions so that the convention may not only function, but that it may control the convention's actions to make certain that it conforms to the mandates and directives of the Congress, the State legislatures, and ultimately the people. This does not mean that the convention may not exercise its free will on the substantive matters before it; it means simply that its will shall be exercised within the framework set by the congressional act calling it into being.

Dodd has no doubt on this question. He points out that a convention does not supersede the existing government; it "is bound by all restrictions either expressly or impliedly placed upon its actions by the Constitution in force at the time."[8] In the case of our Federal Constitution, a new Constitution as proposed by a convention certainly could not become effective until promulgated and, in accordance with article V (which permits Congress to select the mode of notification), ratified by the legislatures of three-fourths of the States. A convention then is an instrument of government and acts properly only when it stays within the orbit of its powers. Since the Congress is the branch of the Federal Government which has the duty of calling the convention, and since it acts at the requests of the States, and since both, in the final analysis, represent the people, the ultimate source of all power, a Federal constitutional convention, to act validly, would necessarily have to stay within the designated limits of the congressional act which called it into being.

"Necessary and proper" clause

Inherent in all questions concerning constitutional law is one relating to the effect various Articles of the Constitution have on each other. Article V is no exception and must be read and viewed in the light of all the other provisions of the Constitution.

In connection with congressional power, a provision which affects substantially all provisions is the so-called necessary and proper clause.[9] It reads:

[The Congress shall have Power] * * * to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

By its terms there is conferred upon Congress:

(1) the power to make all laws which shall be necessary and proper for carrying into execution all powers which had previously been conferred and, in addition, (2) all other powers vested by the Constitution in the Government of the United States * * *.[10]

This clause has been declared to be an enlargement of the powers granted to Congress and enables it to select the means necessary [11] to effectuate those powers. Thus since Congress, under article V must call the convention, it of necessity must have the power to fix the date and place of meeting. Further, since article V places on Congress the function of selecting the method of State ratification, it must legislate into law a set of Federal rules governing the process.[12] There is then a close relationship between the principal congressional power conferred under article V and the supporting or ancillary powers, conferred under the necessary and proper clause, to carry the principal power into execution. Without the supporting power, the principal power would cease to exist.[13]

These powers apply not only to procedural functions such as convening the convention and adopting the mode of ratification, but they also apply to the vital issue of declaring whether the convention shall consider either a single subject, a limited number of subjects, or a large scale overhauling of the Constitution. As will be discussed below, Congress, acting on the applications and at the request of the State legislatures, may limit the scope of such conventions and as a corollary it follows that Congress may adopt the means necessary to invoke such limitation upon the convention.

General revision or specific amendment

Few States in the past, when they submitted applications asking for a constitutional convention, sought merely to have a convention convened. Many have specified the particular subject matter that the convention was to consider. The power to limit a convention to a particular subject, or to several subjects has, of course, never been officially determined. Wheeler, in a University of Illinois law review article,[14] felt that conventions must be general in scope and stated that a State application calling for a specific amendment could have no legal or binding effect on a convention, except that the petition could be counted in determining whether a requisite number of petitions had been submitted for calling a convention.[15] Other writers differ with this view, however, and in fact one has taken the position that not only may a convention be limited to the consideration of specific subjects, but under no circumstances could it be given unlimited general revisionary powers to promulgate a new constitution.[16]

Article V states that Congress shall call a convention "for proposing amendments." If these words were to be literally construed it might be argued that a convention could not create an entirely new instrument to supersede the present Constitution. Yet argument could be made that, under such language, a convention could propose what is equivalent to a new Constitution by a series of separate amendments in the form of an addendum to the present Constitution.

The kind of government which we enjoy would seem to warrant the proposition that our Constitution can be both generally revised or specifically amended if the people so wish it. The Founding Fathers had little doubt about general revisionary powers of a convention. This is reflected in the fact that the first 2 applications for a conven-

tion were submitted less than 2 years after the constitutional convention of 1787 and were petitions for a convention of a general nature.[17] Since that time there have been 29 petitions seeking a general revision of the Constitution.[17a]

At the same time, the action of the States indicates that conventions may also be of a limited nature. Beginning with the present century there have been very few applications for a general convention, and instead there has been an increasing number of petitions requesting conventions to consider specific proposals only.[18] Twenty-seven States have sought a limited convention to prohibit polygamy.[19] Twenty-seven States also wish to change the Constitution, through a convention, to limit the Federal power over the taxation of income.[19] Thirty-one States once sought a convention to deal with the subject of direct election of senators.[19] Other subjects on which applications have been made for limited conventions cover world Federal Government, repeal of the 18th amendment, limitation of presidential tenure, treaty making, taxation of Federal and State securities, protective tariff, Federal regulation of wages and hours of labor, Federal tax on gasoline, tideland boundaries, control of trusts, Federal grants-in-aid, popular ratification of amendments, constitutionality of State enactments, the Townsend plan, revision of article V, reapportionment, balancing the budget, distribution of proceeds of Federal taxes on gasoline, and State control of schools.[20]

The States, of course, are given a major role under article V both in initiating a convention movement and in finally ratifying a convention's work.[21] In addition, as we have seen, one of the major reasons for incorporating the convention method of amending the Constitution into our basic law was to create a remedy by which the States, in the event Congress was unwilling to act, could compel action. The convention method of amending the Constitution would be reduced to an unworkable absurdity both from the standpoint of the States having a voice in the convention process and from the magnitude of the operation and its ultimate effect on our Government, if only general conventions were permissible under article V.

A complete revision of our basic instrument would be the most important task any convention could be asked to undertake. In fact, in all probability, such an event could happen only once under our present Constitution since, if a complete revision were to be accomplished, the powers of amendment under our present Constitution would be superseded by provisions in the new Constitution. It would therefore seem incongruous, as has been suggested, to hold that conventions may be only general in scope and that petitions seeking specific amendments for one purpose or another, should therefore be transformed into requests for a general convention.[22]

The States, of course, ask for either a limited or general reformation of the Constitution. It would be the duty of Congress to promulgate rules for counting the applications and determining the kind of convention to be convened. Congress would have to determine whether the language of State applications seeking an amendment on a specific subject should be identical in their texts, or whether applications using varying language but appertaining to the same subject matter generally would be acceptable. Clearly the latter method is preferable

and has been suggested by Corwin and Ramsey in their law review article, the Constitutional Law of Constitutional Amendment.[25]

CITATIONS

[1] For those who hold that such a Convention would be a "premier assembly" of the people embodying their sovereign powers and would be unlimited and absolute, the following apt description was made in 1847, in connection with the Illinois State Constitutional Convention (and it is pertinent to a Federal convention):

"We are here, the sovereignty of the state. We are what the people of the state would be if they were congregated here in one mass meeting. We are what Louis XIV said he was—'We are the State'. We can trample the constitution under our feet as waste paper, and, no one can call us to an account save the people. * * *" (Illinois, Constitutional Convention (1847), debates p. 27.)

In more recent years a similar view was expressed by Senator Heyburn in the United States Senate:

"When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it." (46 Cong. Rec. p. 2769, Feb. 17, 1911).

[2] Jameson, Constitutional Conventions (4th ed.; 1887), p. 6; see also 35 Michigan Law Review, p. 284-285.

[3] Jameson, ibid., p. 6.

[4] Ibid., p. 10.

[5] Ibid., p. 10.

[6] Behout and Kass, How Can New Jersey Get a New Constitution, 6 University of Newark Law Review (1941) pp. 7-8; Stephens, Constitutional Convention Report, Georgia Bar Association, (1931) p. 219. This issue is discussed in chapter 7 wherein state cases are cited upholding the position that conventions may not go beyond the scope of legislative acts calling them into being. See e. g. Opinion of Justices, 6 Cush. 573 (Mass. 1833); Erwin v. Nolan, 280 Mo. 401 (1920); Wells v. Bain, 75 Pa. 39 (1874).

[7] J. M. Beck, The Constitution of the United States (New York: Oxford University Press, 1924), p. 173 et seq.

Before the convention adjourned it resolved "That the preceding Constitution be laid before the United States in Congress assembled." By direction of the convention, Washington sent a letter in which he said for the convention that "We have now the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the best advisable." (Charles A. Beard, The Supreme Court and the Constitution (1938).)

The Congressional resolution authorizing the transmittal of the draft Constitution reads, in part, as follows:

"That the said report, with the resolutions and the letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a Convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case." (Beck, Constitution of the United States, p. 176; William H. Black, Our Unknown Constitution (Real Book Co., 1933).

[8] Dodd, The Revision and Amendment of State Constitutions (1910), p. 98.

[9] U. S., Constitution, Art. I, sec. 8, cl. 18.

[10] Watson, The Constitution of the United States (1910), I, 701.

[11] McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); U. S. Congress, Senate, 82d Cong., 2d sess., 1952, Senate Doc. 170, Constitution of the United States of America (1952), 307.

[12] Rottschaeffer, Handbook on American Constitutional Law (1939), 367.

[13] Tucker, Constitution of the United States (1899), I, 368, but see Tucker, ibid., p. 365. The "necessary and proper" clause stated to be unnecessary since Congress, having been granted a principal power, by implication may adopt the means necessary to execute the power.

[14] Is a Constitutional Convention Impending? 21 Illinois Law Review (1927), 782, 795.

[15] Applications for different specific amendments ought not be considered as calling for a general revision of the Constitution. A more acceptable view would seem to be that several applications each concerned with a different aspect of the Constitution do not represent a general dissatisfaction with the Constitution taken as a whole.

[16] Child, Revolutionary Amendments to the Constitution, 10 Const. Rev. (1926), 27. Child argues that the phrase in Article V calling a convention "for proposing amendments" excludes the idea that a convention could promulgate a new or substantially revised Constitution. (P. 28.)

[17] New York and Virginia, See Tables I and II, appendix.

[17a] See Table 2, appendix, item 4.

[18] See Tables 1, 2, 3, appendix.

[19] See Table 2, appendix.

[20] See Table 2, appendix.

[21] U. S., Constitution, Art. V.

[22] See footnote 15 above.

[23] 26 Notre Dame Lawyer (1951), 185, 194.

CHAPTER 7

POWER OF STATES TO CONTROL CONSTITUTIONAL CONVENTIONS—BOTH STATE AND FEDERAL

The issue of whether a State legislative body has the power to limit a State convention to the consideration of certain specified topics has arisen many times in connection with State constitutional conventions. While it would be difficult, because of the many situations under which State conventions may convene, to lay down a uniform rule applicable to all State constitutional conventions, it is nevertheless possible to point to certain concepts and principles which are recognized by State judicial authorities as controlling.[1]

To begin with, State legislatures do not have ultimate control over conventions; it is the people who exercise this control. Of course, the power of limiting the scope of State conventions depends, in the first instance, upon the particular provisions in each State constitution. In this connection, State constitutions may be classified into two general groups: (1) those which contain no provision for constitutional conventions, and (2) those which provide, either in elaborate detail or just generally, for conventions.[2]

In States whose constitutions make no provision for constitutional conventions, it has been generally recognized since In Re Opinion to the Governor (Rhode Island) [3] that such conventions may, with the approval of the electorate, be assembled through legislative action and further, that they may be called even though the State constitutions provide a specific method of amendment (other than by convention).

In the Rhode Island case above, the Governor of Rhode Island asked the State supreme court whether it would be a valid exercise of the power of the legislature, if the legislature should provide, by an act or resolution, for the calling of a convention to revise or amend the constitution of the State. The constitution contained no mention of a constitutional convention. It provided for constitutional change only by direct proposals made to the people by the legislature for ratification by three-fifths of the voters. In holding that the method expressly set forth in the constitution did not prohibit the legislature from providing by law for calling a constitutional convention, to be chosen by the people, for revising the constitution, the court stated that one method of amendment could not, by implication, prohibit the legislature from proposing a revision of the constitution by another method, namely, by a constitutional convention. The court pointed out that there was no inconsistence between the power of a legislature to provide for a convention to be chosen by the people, and the power, by following a prescribed procedure, to propose, directly to the people amendments to the constitution.

Argument was made that where a power is given to do a thing in a particular way, the affirmative words marking out the particular way prohibit, by implication, all other ways. In rejecting the argu-

ment the court noted that the power to provide by law for the calling of a convention, while different from the method set out in the constitution, was not an inconsistent power and relied on the rule that if two constructions of a provision are reasonably possible, one of which would diminish or restrict the right of the people, and the other of which would not do so, the latter must be adopted. The court also noted that New York in 1845 had convened a convention even though its constitution provided a different method of amendment.[3a]

Another case in point is State v. American Sugar Refining Co.[4] There the State of Louisiana moved to cancel the license of the Sugar Refining Co. to do business in that State because of the company's violation of section 190 of the 1913 constitution relating to antitrust and monopoly practices. The Sugar Refining Co. protested on the ground, among others, that section 190 of the 1913 constitution was void in that it was adopted in contravention of article 75 of the constitution of 1798 which expressly provided the only method of amending the constitution, namely, by resolution of "the general assembly at any session thereof" with the concurrence of two-thirds of all the members elected to each House. In holding that a convention could be convened even though such a method was not one of the methods provided for by the constitution itself, the court quoted Cooley on Constitutional Limitations:

> Some of these constitutions pointed out the mode of their own modification; others were silent on that subject, but it has been assumed that in such cases the power to originate proceedings for that purpose rested with the legislature of the State, as the department most nearly representing its general sovereignty; and this is doubtless the correct view to take on this subject. Const. Lim. (7th ed.) p. 56. (p. 744).

Specific amending provisions apparently cannot, under State constitutional law, exclude the sovereign right of the people, acting through their legislatures, from making changes in fundamental law through methods other than those expressly provided for in their fundamental law.[5]

The courts also seem to agree that the powers of State constitutional conventions, however convened, may be effectively limited by the terms of the legislative act calling it into existence, the only qualification being that the approval for the limiting power be obtained from the people at an election held for that purpose. A case which clearly outlines this proposition is Cummings, Secretary of State v. Beeler.[6] There the Tennessee Legislature desired to call a convention to consider certain proposals recommended by a commission which had earlier been appointed to study changes needed in the constitution. The legislature wished to have the work of the convention restricted to amending only specified parts of the constitution, in line with the commission's recommendations. It therefore asked the State court for a declaratory judgment on whether it could propose a limited convention to the people.

The State constitution provided two methods of amendment: (1) by legislative proposal to the electorate for direct, popular approval and (2) by convention. The convention provision authorized the legislature "to submit to the people the question of calling a convention to alter, reform or abolish this constitution." The court noted that there was nothing in the constitution expressly prohibiting the legislature from submitting limited questions to the people, and that since the legislature was leaving the question of limited powers to

the people for decision, it was the people and not the legislature who were limiting the work of the convention which they, as sovereign and with ultimate power, had the right to do.

A case with similar issues and reaching the same conclusions is Staples v. Gilmer.[7] Section 197 of the Virginia constitution provided that its legislature could submit to the electors the question "shall there be a convention to revise the constitution and amend the same?" The Virginia Legislature proposed to submit the above question to the electors with the added provision that the convention be limited to amendments regarding the right to vote "by members of the Armed Forces while in active service in time of war."

In holding that such a limitation could be placed upon the convention, the court said:

> If the electors vote in favor of a convention, it may amend the constitution as well as revise it, and where the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the constitution but not the whole constitution, an affirmative vote of the people on such question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the constitution suggested to them by the legislature. The wishes of the people are supreme. Some agency must ascertain the desire of the people, and the legislature, by section 197, has been selected by them to do so (p. 627).

Of special importance on this issue is the case of Wells v. Bain [8] wherein the Pennsylvania State Constitutional Convention declined to observe restrictions placed upon it by the State legislature's act. The act of 1872, under which the convention was assembled, provided that the constitution which it framed should be voted upon at an election held in the same manner as general elections, and that one-third of the members of the convention should have the power to require the separate submission to the people of any change proposed by the convention. The convention disregarded the legislative act by providing machinery of its own for the submission of the constitution to the people in the Philadelphia area, and appointed election commissioners for this special purpose. It also refused to submit an article to the proposed constitution separately although it was claimed that a third of the members of the convention had voted for a separate submission. The court granted an injunction restraining the commissioners appointed by the convention from holding an election in Philadelphia. It declared that the submission of the constitution in a manner different from that provided by law was clearly illegal. The court said that the convention had no power except that conferred by legislative act, and that any violation of that act or any action in the excess thereof would be restrained.

As noted earlier, State legislatures do not exercise ultimate control over conventions; it is the people. However, as a practical matter, the legislatures play an effective and controlling role in calling constitutional conventions. They determine if and when a convention should be had. In the legislative acts submitting the propositions for vote by the people, they determine the specific subjects which the conventions, if voted by the people, will consider. The electorate, in voting, have usually only two choices: either to vote "no," or to vote "yes" for a convention in which the legislature has already prescribed the subjects to be considered.

State power over Federal conventions

Arguments in recent years have sought to shift some of the emphasis on control over Federal conventions from the Congress to the State

legislatures. In support of this position of State legislative control, the State of Georgia,[9] in its application for a Federal constitutional convention which would have taken up the problem of revising the constitution generally, declared in its resolution that the Federal convention was to amend the Constitution—

> * * * in the particulars herein enumerated and in such others as the people of the other States may deem needful of amendment.

New York, in 1931, in declaring its right to control the scope of Federal conventions, made application for a convention to propose an amendment to repeal the 18th amendment "and no other article of the Constitution."[10]

In recent years, many States have expressly cited in their petitions the particular subject matter they intended that the convention should consider.[11] In fact some have included in their applications the exact wording of the amendment to be considered and proposed by the convention.[12]

In the 83d Congress, resolutions were introduced in the Congress itself which sought to amend article V itself.[13] Because Congress took no action, the substance of these measures was set out in a uniform, model resolution and sent to the leaders of State legislative bodies asking them to introduce the proposal and have their legislatures take early action. The sponsors hoped that the several States would adopt these resolutions with their uniform, identical provisions and put them in the form of petitions calling upon the Congress to convene a constitutional convention for the sole purpose of amending article V. Certainly this unified, mass action which, incidentally, has already been adopted by several of the State legislatures, supports the theory that State legislatures can limit a convention to the consideration of specific amendments.[14]

If these contentions be accepted, State applications may be considered as mandates to the Congress, not only to call the convention, but also to specify the scope and limit of a convention's deliberations in accordance with State directives. Only recently the State of Indiana in 5 separate applications [15] calling for conventions to consider 5 different subjects set forth the above theory in the following language in its resolutions:

> For the reason that the power of the sovereign States to propose amendments to the Constitution of the United States by convention under article V has never been exercised and no precedent exists for the calling or holding of such convention, the State of Indiana hereby declares the following basic principles with respect thereto: that the power of the sovereign States to amend the Constitution of the United States under article V is absolute; that the power of the sovereign States to propose amendments to the Constitution by convention under article V is absolute; that the power of the sovereign States extends over such convention and the scope and control thereof and that it is within their sovereign power to prescribe whether such convention shall be general or shall be limited to the proposal of a specified amendment or of amendments in a specified field; that the exercise by the sovereign States of their power to require the calling of such convention contemplates that the applications of the several States for such convention shall prescribe the scope thereof and the essential provisions for holding the same; that the scope of such convention and the provisions for holding the same are established in and by the applications therefor by the legislatures of the two-thirds majority of the several States required by article V to call the same, and that it is the duty of the Congress to call such convention in conformity therewith; that such convention is without power to transcend, and the delegates to such convention are without power to act except within, the limitations and provisions so prescribed.

Just how far States may go in imposing their wills on conventions is a matter on which the Founding Fathers failed to define the limits

in article V. It is evident, however, that together, the Congress and the State legislatures play the dominant roles. Together they not only initiate but also finally approve the work of any convention. With this ultimate power at their commend, they may fence off the boundaries of power within which a convention must operate.

While both have important roles, the greater and final power, as has been and will be further pointed out in other chapters in this thesis, lies in the Congress of the United States, not so much because of the express provisions of article V which creates the power, but by reason of the article's failure to place sanctions on the Congress and for its failure to provide for review of congressional action.

CITATIONS

[1] The power of limiting the scope of state conventions depends, in the first instance, upon the particular provisions in each state constitution. In this connection, state constitutions may be classified into two general groups:

(1) those state constitutions containing no provision for Constitutional Conventions.[a]

(2) those states providing (a) for Constitutional Conventions generally,[b] and (b) in detail what the powers and duties of the convention shall be.[c]

[a] Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, Vermont (2 Vanderbilt Law Review 29 (1948); 21 Tennessee Law Review 867 (1950).

[b] Iowa, Maryland, Michigan, Missouri, New York, New Hampshire, Ohio, Georgia, Maine.

[c] Michigan, Missouri, New York. (For clause and section citations, see chart below.)

State constitutional provisions relating to conventions

State	Clause	Section
Alabama	18	286
Arizona	21	2
Colorado	19	1
Delaware	16	2
Florida	17	2
Georgia	13	1
Idaho	20	3
Illinois	14	1
Iowa	10	3
Kansas	14	2
Kentucky		258
Maine	4	3
Maryland	14	2
Michigan	17	4
Minnesota	14	2
Missouri	15	3
New Hampshire	99	
New York	14	2
Ohio	16	2

[1] See footnote 1 above.

[2] Opinion of the Court to the Governor, 55 R. I. 56, 178 Atl. 433 (1935).

[2a] See discussions of this issue, pp. 62–63, infra.

[4] 137 La. 407, 68 So. 742 (1915).

[5] Opinion of the Court to the Governor, 55 R. I. 56, 178 Atl. 433 (1935). In this case the court noted that there are three known recognized modes by which the people can give consent to an alteration of an existing lawful frame of government, viz:

(1) the mode provided in the existing constitution;

(2) a law, as the instrumental process of raising the body for revision and conveying to it the powers of the people;

(3) a revolution.

The court pointed out that the first two means are peaceful ones through which the consent of the people is obtained. If consent is not given, any change in government would be revolutionary. Irregular action whereby a convention would assume to act for the whole, the state, is revolutionary.

[6] 189 Tenn. 151 (1949).

[7] 183 Va. 613, 33 S. E. 2d 49 (1945).

[8] 75 Pa. 39 (1874).

[9] U. S. Congress, Senate, 71st Cong., 2d sess., 1930, Senate Doc. 78, p. 25.

[10] 75 Cong. Rec. 48.

[11] See appendix, Table 6.

[12] See appendix, Table 8.

[13] U. S. Congress, House, 83d Cong., 2d sess., 1954, H. J. Res. 568, 569, 40 American Bar Journal (1954), pp. 767, 974. Resolutions would add a third method of amending the Constitution. See also U. S. Congress, House, 84th Cong., 1st sess., 1955, H. J. Res. 168, H. J. Res. 169.

[14] See item 19, Table 2, appendix.

[15] Congressional Record, Daily, 1957, pp. 5761–5764, Revision of Art. V, Sec. 3, limit treaty-making power, Sec. 3, Reapportionment, Sec. 3, Limitation of Federal Taxing Power, Sec. 3, Balancing the Budget, Sec. 3; see also to similar effect, Michigan and Nebraska legislatures resolution calling for limitation of Federal taxing power, U. S. Congress, House 82d Cong., 2d Sess., 1952, House Committee on the Judiciary, Problems Relating to State Applications for a Convention to propose Constitutional Limitations on Federal Tax Rates, pp. 26–27.

CHAPTER 8

POWER OF CONGRESS TO REFUSE TO CALL CONSTITUTIONAL CONVENTION

May Congress refuse to call a convention should the requisite number of States comply? Apparently it may, although the intent of the framers of the Constitution was otherwise. The Founding Fathers included the Convention provision in article V as a remedy for the States to bring about constitutional reform in the event the Federal Government refused to do so.[1] It was certainly their intention that Congress should have no discretion in the matter of calling a convention once two-thirds of the States applied.[2]

Madison, on the question, stated:[3]

> It is to be observed however that the question concerning a general convention will not belong to the Federal Legislature. If two-thirds of the States apply for one, Congress cannot refuse to call it: if not, the other mode of amendments must be pursued.

James Iredell, before the North Carolina ratifying convention, also stated:

> that it was very evident that it (the proposal of amendments) did not depend on the will of Congress; for that the legislatures of two-thirds of the States were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress *shall* call such convention, so that they will have no option (italic in original).[4]

In addition to the above statements made contemporaneously with the adoption of the Constitution as to its true intent, there are the express words of article V that Congress "shall call a convention." It is doubtful, however, that there is any process or machinery under our constitutional system by which the Congress could be compelled to perform this duty. It is argued by some that the congressional act being ministerial, the courts could compel the legislative branch to act by way of mandamus, otherwise the whole intention of the framers would be nullified.[5] It seems more likely, however, that the courts would refuse to issue such a writ for the same reasons that they have refused to issue writs on the President of the United States, namely the doctrine of separation of powers which proscribes action by one branch of our Government against another. In Mississippi v. Johnson,[6] the Supreme Court, among other things, pointed out that:

> The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

Courts today in line with that decision, and the more recent case of Coleman v. Miller would probably rule that the question is political and therefore not justiciable.[7]

From a legal standpoint, there is the same situation as arose from the failure of Congress to reapportion the number of Representatives in the House of Representatives, which article I, section 2, clause ?,

requires it to do every 10 years, but which in 1920 Congress failed to do. Thus while Congress has the mandate to perform, its failure or refusal to do so apparently gives rise to no enforcible cause of action. In line with this point, it may be observed that court orders, even if it could be argued that the States had a right to bring legal actions in the courts against an unwilling Congress to call a convention, would have little meaning or effect since the courts lack the necessary tools to enforce their decisions against the Congress.[8]

As a consequence, public opinion and, ultimately, the ballot box,[9] are the only realistic means by which the Congress can be persuaded to act. A Federal statute, as suggested in this thesis, containing the provisions for convening a Convention, could, as a practical matter, go a long way in easing the road for congressional action.

CITATIONS

[1] Farrand, The Records of the Federal Convention of 1787 (Rev. ed. 1937) I, 203.

[2] See excerpts from the constitutional debates, Tuller, W. K., A Convention to Amend the Constitution, quoting from Elliott's Debates, 193 N. Amer. Rev. 375-378 (1911).

[3] Documentary History of the Constitution, V, 141, 143, citing Madison's Letter to Mr. Eve, 1/2/1789.

[4] Elliott's Debates (2d ed.; 1937), IV, p. 178. But see Walter F. Dodd, Judicially Non-Enforceable Provisions of Constitution, 80 University of Pennsylvania Law Review (1931), p. 82: "In general, a constitutional provision which states that a legislature 'shall' perform a duty is equivalent to a statement that it 'may' or 'shall have power'."

[5] Tuller, A Convention to Amend the Constitution, 193. North American Review (1911), pp. 379-381; Cuvillier, Shall We Revise the Constitution (1927), 77 Forum, pp. 323-325; Packard, F. E., Legal Facets of the Income Tax Rate Limitation Program, 30 Chi-Kent Law Rev. 128 (1952).

[6] 4 Wall. 475, 500 (U. S. 1866).

[7] 307 U. S. 433 (1939); Willoughby, The Constitutional Law of the United States (1929), I, 597. Willoughby notes, however, that had the performance of the act of calling a convention been placed in the hands of anyone other than the Congress or the President, there is little doubt that the courts would have compelled some sort of action.

[8] Frank, John P. "Political Questions" set out in Supreme Court and Supreme Law, edited by Edmond N. Cohn, Indiana Univ. Press, Bloomington (1954), p. 39.

[9] See Colegrove v. Green, 328 U. S. 549, 556 (1946).

CHAPTER 9

RIGHT OF REVOLUTION

A theory of constitutional law being urged today by the Communist Party in America, and which is pertinent to the problems involved in this thesis, is one relating to a so-called right of revolution. According to its supporters, the right of revolution is a concept recognized by our Constitution and protected by it.

If such a theory be valid, then it could be argued, since it presupposes changing our form of government in a manner other than that provided for in article V, that a Constitutional Convention, once convened, could disregard congressional directions and article V, and adopt extra-legal means in establishing a new or revised Constitution.

It is a matter of common knowledge, of course, that today free countries with free institutions are on the defensive and, in some instances, are being destroyed by organized violence. Communistic philosophy is based in part on the principle that internal weakness is an inherent character of free institutions and that the American concept of liberty with its constitutional safeguards inhibits any defense against internal enemies.[1] In fact, members of subversive groups in America are cynically taking advantage of the protection of the very constitutional safeguards which they are seeking to destroy.

The decisions of our courts protecting the rights of individuals have been more widely publicized than those which have upheld the right of the Government to defend itself and protect itself against unlawful change. The decisions, nonetheless, have clearly outlined and upheld both kinds of rights. An outline of some of those decisions together with an historical development of this controversial political doctrine can be helpful in obtaining a clearer understanding of a government's power to protect and preserve itself.

When English colonists first migrated to America, they brought with them England's political philosophy, its government, and its law. England itself had experienced attempted unlawful change of government during the so-called English rebellion of 1688. The rule of conduct developed at that time set the standard for future conflicts. In 1688 the King of England was condemned because of his usurpation of governmental power and for tyrannical acts.[2] While it was argued by some that it was the people who, in fact, were in rebellion against their King, Parliament took the position that when the people have entrusted the powers of government to their King and the Parliament, and the King in turn usurps the legislative function and corrupts the Parliament, he is exercising power without lawful authority. In such a situation, as noted by John Locke, the renowned political philosopher of that era,[3] the people are not in rebellion but are acting in self-defense and in behalf of their own self-preservation.[4] Locke asserted that the King had to be resisted when he attempted to do that which he had no authority for doing; that which was a "breach of trust in not preserving the government agreed on."[5] A nation is

ruled by, and with the consent of, the governed, and changes may be made only if the governed so wish.

Our Founding Fathers accepted this principle. Changes, in time, are inevitable and the Founding Fathers wisely made provision in the constitutional instrument to provide for such changes. The provisions, however, envision orderly and lawful change, not change, as will be discussed, by extra-legal or unconstitutional means, be the means violent or nonviolent.

The first substantial challenge to orderly and nonviolent change in this country came in 1820–30 when South Carolina asserted the "right" of a State to nullify an act of Congress. At that time, many of the States, especially those in the South, took the position that the tariff acts with their rising rates were the cause of increased poverty in the southern States. Since northern States were prospering, the tariff acts were looked upon as discriminatory and unconstitutional devices for taxing the South for the benefit of the North. John C. Calhoun, then Vice President of the United States and a South Carolinian, developed a plan to protect the peculiar interests of his and other Southern States—a plan known as the nullification movement. Simply stated, nullification was based on a two part principle: (1) that the Federal Constitution was a compact or agreement between States, and (2) that the individual States were sovereign and indestructible. As sovereign, South Carolina, and any other State for that matter, had the right to judge when its agent, the Federal Government, exceeded its powers. In 1832, after a finding that the Federal Government had exceeded its powers, the South Carolina Legislature declared the Federal tariff acts to be "null, void, and no law" not binding upon her, her officers, or citizens. It forbade Federal officials to collect customs duties within the State and threatened instant secession from the Union if the Federal Government attempted interference.[6]

President Jackson took prompt action to preserve the Union and maintain the law of the land. His position was that the United States was indivisible and that no State could revolt. He reinforced military garrisons in South Carolina and thereafter issued a proclamation stating that the nullification ordinance passed by that State was an overt act of rebellion and had no basis in constitutional law. He pointed to the paradoxical situation of South Carolina seeking to retain its place in the Union and enjoying Federal benefits, and at the same time wishing to be bound only by those laws that it chose to regard as constitutional.[7] Jackson proclaimed:

> I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed (pp. 483–484).

The firm stand of President Jackson won out and, while Federal tariffs were reduced somewhat as a face-saving gesture for South Carolina, its nullification ordinance was repealed. The "right" to destroy the Union by "nullification" was successfully repulsed.

The "right" to destroy the Union by "secession" was also repulsed but it took a civil war to prove it. Lincoln, of course, had long denied any constitutional right of revolution. In his first inaugural address, he summed it up this way:

Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. * * * *it being impossible to destroy it except by some action not provided for in the instrument itself.* [Italics supplied.][7a]

We have, then, instances of the Government deciding, in a political manner, that there is no constitutional right of revolution or rebellion.[8] In another manner—that is, by judicial decision—our United States Supreme Court has also decided the question and declared that the Constitution supports no right of revolution. After the turn of the present century, world unrest and discrimination problems arising under the 14th amendment brought before our courts the whole question of constitutional rights.[9] Shortly after World War II, the Supreme Court was called upon to decide the question on the right to advocate revolution. In Gitlow v. New York,[10] Benjamin Gitlow was convicted under a New York statute which forbade the advocacy of criminal anarchy (overthrowing organized government by force or violence).[11] He published a radical journal called The Revolutionary Age and advocated, among other things, "mass action for the conquest of the power of the state." Quoting Story, the Supreme Court held that the "state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means." [12]

Any consideration of the right of revolution involves first of all the question of how far one may go in advocating changes in government. Criticizing one's government does not automatically constitute incitement to revolution. A distinction is to be made between mere expressions of opinion on the one hand, and urging others to some definite act of violence against the government. This distinction was brought out in Herndon v. Georgia.[13] Herndon, an organizer for the Communist Party, was found guilty, under a Georgia statute, of inciting insurrection among southern Negroes against the state because he urged them to unite against white domination. The Supreme Court, in reversing the conviction, announced the principle that it was not unconstitutional for one to express a belief in the need for a change in, even the complete conversion of, the government so long as it was accomplished by peaceful, constitutional means.

The Gitlow and Herndon cases determined in broad outline the individual's right to advocate political change by lawful means. They also established the right of a government to legislate against acts of incitement and rebellion.[14] Later cases established the right of government to outlaw organizations created for revolutionary purposes.[15] No one—be it an individual, a group, an organization, or a political party—may advocate revolution.[16] The most notable case in which this communistic doctrine was denounced is Dennis v. United States.[17] There, the petitioners, leaders of the Communist Party in the United States, were indicted under the Smith Act,[18] for conspiring to teach and advocate the overthrow and destruction of the United States by force and violence. It was argued, on behalf of the petitioners, that the people, as sovereign, have an "historically established right to advocate revolution," and that the Constitution recognized such right.[19] The Declaration of Independence was cited as proof of the Constitution's and the people's recognition of such a "right." To contend otherwise, according to the petitioners, would mean that the Government was an entity, independent of the people,

endowed with the right of self-perpetuation, even if the people did not wish to perpetuate it.

Judge Learned Hand, when the case was before the court of appeals, in denying that such a right existed under the Constitution, succinctly pointed out that no government could tolerate it and exist.[20] He stated:

> The advocacy of violence may or may not, fail; but in neither case can there be any "right" to use it. Revolutions are often "right" but a "right of revolution" is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution (p. 213).

When the case was decided in the Supreme Court, Chief Justice Vinson, writing for the majority, observed that the Constitution can only be changed by "peaceful, lawful, and constitutional means."[21] He further stated:

> Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. (p. 501).

The fallacy in the Communist party theory lies in the fact that there is a natural law "right" of revolution but not a constitutional "right of revolution." Whenever any form of government becomes oppressive, or when a dictator has usurped the powers of government, there is, of course, the natural right of the people, recognized in international law, to relieve themselves of such oppression, if they are strong enough to do so, by overthrowing the government and initiating a new one.[22] The Declaration of Independence was based on this natural law concept and the American colonists invoked it in throwing off the unyielding yoke of despotism and tyranny forced upon them by England.

The Communist concept adopts this theory but such a concept is clearly to be distinguished from orderly changes in government brought about through constitutional and lawful means. Chief Justice Vinson gave the constitutional answer to this question when he stated that there was no such right "where the existing structure of government provides for peaceful and orderly change." And our Constitution so provides.

The Founding Fathers, fresh from their own revolution, did not seek, in molding the Constitution, to forge a political straitjacket on the generations which were to follow them. Instead, they foresaw that changes, in time, would be inevitable and they wrote article V into the Constitution providing for such changes.

Applying the rule laid down by the Supreme Court in the Dennis and other cases to the problem at hand, and considering the political action taken by our Government to suppress rebellions, it becomes apparent that changes in our form of government can only be accomplished by peaceful, lawful, and orderly means in the manner provided for by the Constitution. A Constitutional Convention, therefore, would be bound to function within, and in accordance with, the provisions of article V and congressional enabling acts, under the "necessary and proper" clause, calling it into being.[23]

CITATIONS

[1] History has shown, unfortunately, that governments have been destroyed from within both by agents of foreign sovereigns and by corrupt or overzealous public officials and organizations.

[2] The English Law Courts at the Close of the Revolution of 1688, 15 Michigan Law Review, 529, 1912.

[3] Locke, Essay Concerning the True and Original Extent of Civil Government (J. P. Dutton, ed. 1924), pp. 224–242.

[4] Ibid., p. 240. The framers of the United States Constitution accepted this theory for their government and, in fact, invoked it when the colonies broke with England because of the oppressive and tyrannical acts of George III. The Declaration of Independence, composed in large part by Thomas Jefferson, contains phrases taken directly from Locke's treatises, and Locke's pronouncements underlying England's action in its own rebellion were recast by Jefferson to fit the American Revolution. (Hayes, Revolution as a Constitutional Right (1938), 13 Temple Law Qt. 19.)

Strangely, however, the Declaration of Independence which was used by our own nation to justify our break with the English government is relied upon by those who today insist that there is a right of revolution which must be recognized if our present Constitution is to be consistent with the ideals of our founding fathers. (Brief for Petitioners before the United States Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951).)

The founding fathers, in framing the Constitution, did not specifically mention that there was no right of revolution or rebellion. They were creating a government, not providing for its overthrow. Since the instrument was silent, it remained for the Supreme Court and the political acts of our government to define the rights of its citizens, acting either as individuals or as groups, to oppose their government. Hayes, Revolution as a Constitutional Right (1938), 13 Temple Law Qt., 19; Brief for petitioners before the United States Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951).

[5] Locke, ibid., p. 240.

[6] U. S., Congress, Senate, 54th Cong., 2d Sess., 1897, Senate Doc. 353, Pt. 2, p. 282; U. S., Congress, Senate, 22d Cong., 2d Sess., 1833, Senate Journal, pp. 65–66, 83; Am. An. Reg. VIII, 297; U. S., Congress, House, 54th Cong., 2d Sess., 1897, Senate Doc. 353, Pt. 2, p. 345.

[7] Morison, S. F., and Commager, H. E., The Growth of the American Republic, 3d ed., Oxford University Press (1942).

[7a] Old South Leaflets, I, Boston, containing Lincoln's Inaugurals, p. 3.

[8] The government, by political action in sustaining the doctrine that there is no constitutional "right of revolution" put down rebellious forces in the Wyoming Valley Insurrection, 1872; Shay's Rebellion, 1786–1787; The Whiskey Rebellion, 1794; Fries's Rebellion, 1842 ("Window Tax war"); Dorr's Rebellion, 1842 (Rhode Island).

[9] At the time of World War I, two decisions were handed down, upholding the right of the government to protect itself against its enemies even to the extent of providing punishment for criticising in newspaper articles the policy of the government. (Schaefer v. United States, 251 U. S. 466 (1919); Gilbert v. Minnesota, 254 U. S. 325 (1920).

[10] 268 U. S. 652 (1925).

[11] McKinney's Consolidated Laws of New York, Penal Law, sections 160, 161 (1909).

[12] 268 U. S. 652, 667 (1925).

[13] 295 U. S. 441 (1935); also Herndon v. Lowry, Sheriff, 301 U. S. 242 (1937).

[14] See also Whitney v. California, 274 U. S. 357 (1927); DeJonge v. Oregon, 299 U. S. 353 (1937); Fiske v. Kansas, 274 U. S. 380 (1927).

[15] Dennis v. United States, 341 U. S. 494 (1951); United States v. Schneiderman, 106 Fed. Supp. 906, 926 (1952); United States v. Foster, 9 F. R. D. 367, 394 (1951).

[16] Kjar v. Doak, 61 F. 2d 566 C. C. A. Ill. (1932); Gitlow v. Kiely, 44 Fed. 2d 227 D. C. N. Y. (1930).

[17] 341 U. S. 494 (1951).

[18] 54 Statutes at Large 671; 18 U. S. Code, sec. 11 et seq., (1952 ed.)

[19] Brief for petitioners before United States Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951).

[20] 183 Fed. 2d 201 (2d Cir. 1950).

[21] United States v. Dennis, 341 U. S. 494, 501 (1951).

[22] Personal Memoirs of U. S. Grant (1885) p. 786.

[23] The philosopher, John Dewey, is quoted in Sidney Hook's Heresy, Yes—Conspiracy, No as saying "The democratic idea of freedom is not the right of each individual to do as he pleases, * * *." (New York: The John Day Co., 1951, p. 15). The free expression and circulation of ideas, as guaranteed by the First Amendment to the Constitution, is not, as we all know, an absolute freedom or right. One cannot, as Justice Holmes noted, yell "fire" in a crowded theater; nor may one blast another's reputation by libelous accusation. Hook stated the governing rule: "no right is absolute when it endangers rights of equal or greater validity." (Ibid., p. 20.)

There is nothing self-contradictory in asserting that, in any society, human beings have a moral right to revolution. What is self-contradictory is the belief that one has a legal right to revolt.

As stated in Herndon v. Georgia, 295 U. S. 441 (1935), merely critizing one's government does not automatically constitute incitement to revolution. Such action is protected by the First Amendment. How far one may go in such criticism is the real problem. Congress, through legislation, sets the bounds. It has enacted laws against sabotage and subversion, and has provided severe penalties for violators of these statutes. However, prison sentences have not been a sufficient deterrent. Furthermore, sentences are usually imposed after a disastrous event has occurred.

A policy of "preventive" action, comparable by way of analogy to preventive medicine, has been developed. It is known, for example, that a few strategically placed communists in government can do incalculable harm. Witness the taking of the atom bomb secrets by Klaus Fuch, Harry Gold, etc., from the government proving grounds in New Mexico. To combat this type of danger a program has been undertaken, the purpose of which is to eliminate questionable persons from sensitive spots in government. As part of this program, Congress, in enacting the Smith Act, has outlawed not only all overt acts to overthrow the government through force and violence, but also has made punishable a conspiracy to teach any doctrine advocating such violence. In other words, mere talking about it can, under certain circumstances, be unlawful.

It may well be that, in an effort to further tighten the defense security of our nation, Congress will outlaw actions and words which years ago would have been considered proper and lawful criticism of the government. So that, while a person has a moral right, protected by the First Amendment, to criticise his government, the right is not only not absolute, but all criticism, words as well as acts, must be done within the bounds set by Congress, which today because of developments in world political conditions, seem to be narrowing.

CHAPTER 10

EXPRESS AND IMPLIED LIMITATIONS CONTAINED IN THE CONSTITUTIONAL INSTRUMENT

A question vigorously debated about the time of World War I concerned the limits—both expressed and implied—imposed by the Constitution itself upon the subject matter of proposed amendments.[1] It will be observed that, by article V, certain amendments to the Constitution were expressly prohibited, namely, (1) those relating to the slave trade, and (2) those which would deprive a State, without its consent, of equal suffrage in the Senate. Article V provides:

> * * * that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V thus contains two express restrictions upon things which might be accomplished by amendment. One of these restrictions expired in 1808, and the other is still in force.

In addition to the express restrictions, it has been argued by reputable writers[2] that there are further limitations implied by the very nature of the instrument itself which are intended to preserve and perpetuate our union and its republican form of political government. These implied limitations are to be found in the instrument when read as a whole and in particular in the 9th and 10th amendments which reserve to the sovereign States those powers which were not expressly delegated to the Federal Government. Police powers and the right of local self-government are cited as examples of powers forever reserved to the States.

It had been argued that the 15th amendment was unconstitutional because it attempted, against the will of the States which did not ratify it, to invade the field of local self-government and fix the composition of the several electorates.[3] Similarly it had been urged that the adoption of the 18th amendment was an unconstitutional exercise of the amending power since it sought to bring within Federal control a matter, which, under the Constitution as originally adopted, was intended never to be withdrawn from State control. The amendment, it was contended, constituted an addition to the Constitution rather than a revision of a subject already incorporated in that instrument, and such a graft upon the Constitution destroyed its essential character as it was originally agreed to.[4] The 19th amendment, on woman suffrage, was objected to upon the grounds that it expanded the proportions of the electorate of the sovereign several States, destroying their autonomy.[5]

All of these problems, of course, have long since been decided by various decisions of the United States Supreme Court.[6] It has always upheld the validity of the present amendments to the Constitution. In fact, by the time Leser v. Garnett[7] was decided (1922), the Court dismissed the argument that the character or subject matter of amend-

ments is intrinsically limited by the Constitution itself with only summary comment. It stated:

> The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extent to this amendment, because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This amendment is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid, although rejected by 6 States including Maryland, has been recognized and acted on for half a century. See United States v. Reese (92 U. S. 214), Neal v. Delaware (103 U. S. 370), Guinn v. United States (238 U. S. 374), Myers v. Anderson (238 U. S. 368) (p. 136).

When the United States Constitution was promulgated it was necessary, in order to create an effective central Government, that some of the powers exercised by the State governments be transferred to the central government. From the very nature of things, the central government was better suited, in certain situations, to exercise powers for all the States which the States, acting individually, could not properly do for themselves. This end could not be accomplished except by the surrender, on the part of the States, of some of their powers. The whole scheme of Government became then a distribution of powers between the central government and the States—determinations were made as to what powers were to be delegated to the Federal Government and what powers were to be reserved to the States.

It is reasonable to assume that the framers of the Constitution divided the powers of government between the States and the Federal Government in a manner they then believed to be necessary. They recognized, however, that as time went on, experience might show that the Constitution could be improved by changing the distribution of powers as then made. If it had been intended that none of the powers then reserved should ever be taken from the States, language undoubtedly would have been used to express such an intent. However, just the opposite took place. At the time article V was under consideration at the Constitutional Convention, a provision was twice proposed that no State, without its consent, should "be affected in its internal police" and it was twice rejected by the Convention.[8] Judged by both the language rejected and the language finally employed in article V, the true intent would seem to have been that there could and would be changes in the distribution of powers and therefore that consideration could be given to matters or subjects not then enumerated in the Constitution.

This conclusion is in accord with actual practice. Amendments since the adoption of the Constitution have been on many subjects. Some have taken from the States power theretofore reserved to them, while others have curtailed the power of the Federal Government. Slavery, for example, was originally a matter solely of State concern subject to the police powers of the States. The intent to continue State control was, in fact, expressly provided for in article V preserving the safeguards of this control to the States until 1808 as against any amendment which could have been made. Even after 1808, slavery continued a matter of State concern. However, when the time came that the sentiment of the people demanded that slavery should no longer exist, the desired end was accomplished through the 13th amendment.

The 14th amendment invaded previously reserved rights by divesting the States of their power to legislate with respect to the individual rights of their citizens where before they had such power. The 15th amendment infringed on State power with relation to voting, and restrains the right of States to regulate suffrage not only as to national elections, but also to internal elections. The 19th amendment on women suffrage also invaded the political autonomy of the States by increasing the number of voters by roughly 100 percent.

The process of amendment has not been a one-way street, however. Amendments have also been adopted limiting the power of the Federal Government, the most notable examples being the first 10 amendments.

In summary it may be said that because of the very nature of things, almost any amendment that could be adopted would take either from the States or from the Federal Government some of the powers belonging to them respectively under the original Constitution. In addition, there is nothing to indicate an intention that amendments should be confined to one subject matter or another. The history of the amendments already adopted and even those which were not adopted but were considered, show that all manner of subjects have been entertained.

Going from implied limitations to express limitations, it will be recalled that article V contained 2 exceptions to the amending powers; 1 was temporary (on slavery and expired in 1808), and 1 permanent (equal suffrage in the Senate). The enumeration of these exceptions in our fundamental law clearly shows that our Founding Fathers intended that the subject matter of these provisions was not to be changed.

It is, of course, a well-recognized rule of construction that an earlier legislative body cannot bind a later legislative body and, therefore, the framers of the Constitution at the Convention of 1787 could not bind the hands of the States and Congress if they called a constitutional convention today. In the light of this rule, it would seem at first blush that the Founding Fathers either wrote into article V a provision that could not be binding, or, if binding, one that could never be changed—even by the people where ultimate power lies. The answer, however, can be found in the clause itself. It does not prohibit change in the representation of a State in the Senate absolutely. It only prohibits change where the State or States concerned have not consented. It reads:

"* * * and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

It will be recalled that amendments to the Constitution generally need only be ratified by the legislatures of three-fourths of the States. In other words, amendments, when three-fourths of the States have approved them, become part of the Constitution and bind all of the States—even those which rejected ratification. However, in connection with the subject of equal State suffrage in the Senate, the provision quoted above goes further and requires not only ratification by three-fourths of the State legislatures, but also the consent of the States concerned. It is inconceivable that any State, especially the smaller States, would ever consent to the abolition of equal suffrage in the Senate of the United States. but even if such a circumstance did come

about, the present restrictive clause would not bar such a change in the Constitution once consented to by the State or States concerned. Once consented to, the prohibition would no longer exist.

CITATIONS

[1] National Prohibition Cases, 253 U. S. 350 (1920), concerning the validity of the Eighteenth Amendment to the United States Constitution.
[2] See Willoughby, The Constitutional Law of the United States (2d ed.; 1929), I, 958.
[3] Machen, Is the Fifteenth Article Void? (1910), 23 Harvard Law Review 169; Neal v. Delaware, 103 U. S. 370 (1880).
[4] Marbury, The limitations Upon the Amending Power (Dec. 1919), 33 Harvard Law Review, p. 223.
[5] See also, for contention that state autonomy and reserved powers may not be altered, Curtis, Constitutional History of the United States (1897), II, 160; McCulloch v. Maryland, 4 Wheat. 316, 403 (1819); Collector v. Day, 11 Wall. 113, 124 (1870); Gordon v. United States, 117 U. S. 697, 705 (1884).
[6] Fifteenth Amendment, by Neal v. Delaware, 103 U. S. 370 (1880); Eighteenth Amendment by National Prohibition Cases, 253 U. S. 350 (1920); Nineteenth Amendment by Leser v. Garnett, 258 U. S. 130 (1922).
[7] 258 U. S. 130 (1922).
[8] Elliott's Debates (2d ed.; 1937), I, 316–317; Madison's Papers 531–532 and 551–552.

PART IV

TIME LIMITATIONS WITH RESPECT TO STATE APPLICATIONS

CHAPTER 11

LAPSE OF TIME AFFECTING APPLICATIONS

When two-thirds of the States have applied for a convention, the applications, supposedly, attain binding force. Such action, ordinarily, would preclude discretionary power or decision on the part of Congress, since article V directs that body to convene a convention. As noted in preceding chapters, however, article V provides no legal sanction for its own enforcement, and there seems to be no judicial process for enforcing its provisions.

A convention, under article V, after the requisite number of States have made application, does not automatically come into being. It must be called by the Congress. Whether Congress can be made to act has already been discussed. Whether Congress should act and when, assuming it is willing, raises still further problems. Does an application, for example, once made, remain always alive and valid, or can it become legally ineffective because of a lapse of time that may have occurred after its adoption by the State legislature and during its pendency before the Congress? Does an application lapse into a state of invalidity because, possibly, some factor intervened to shorten its life? [1]

The amending article is silent on the subject of what force or effect the lapse of time will have on an application. The Supreme Court dealt with an analogous situation concerning the length of pendency of an amendment proposed by the Congress to the States for ratification in the case of Dillon v. Gloss [2] and thought that amendments ought not be left open for all time:

> We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary.

In the Dillon case, Congress proposed to the States for ratification a resolution which resulted in the 18th amendment. In the resolution, Congress fixed a period of 7 years within which three-fourths of the States had to ratify or else the resolution would have been lost. In upholding this action on the part of Congress, the Court announced (1) that Congress could fix a reasonable time within which proposed amendments had to be ratified, and (2) that 7 years was without question a reasonable time. The Court also noted that the proposal of an amendment and its ratification were not unrelated events:

First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.[3]

In passing on this case the Court enunciated the so-called "contemporaneous" test and it would seem logical to apply this same interpretive technique in dealing with State applications for constitutional conventions. Certainly there is nothing in article V which suggests that an application of a State, once made, is to be valid for all time or that the application of one State may be separated from those of other States by many years and still be effective. On the contrary, the implications seem to go the other way. Using the same reasoning which the Court employed in Dillon v. Gloss, quoted above, and employing it by way of analogy, it would appear, first, that State applications and the calling of a convention are not unrelated acts but are succeeding steps in a single endeavor, not to be widely separated in time. Secondly, since it is only when legislatures deem amendments to be necessary that applications for a convention are made to the Congress, a reasonable inference is that such a convention is needed to "presently" dispose of the needs of the people. Thirdly, since an application is made in response to popular demand and is effective when made by the legislatures of two-thirds of the States, "there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people, in all sections at relatively the same period" which applications "scattered through a long series of years would not do." From this the conclusion may be drawn that an application should have force for a reasonable time only.[4]

CITATIONS

[1] The duty of answering or developing solutions for solving these problems finally devolves on Congress. The States, in anticipation, may influence the Congress and even control its decision to some degree by submitting applications in a form and manner which they believe desirable. See ch. 7, supra.

[3] 256 U. S. 368, 374 (1921).

[3] Ibid., pp. 374–375.

[4] See also Coleman v. Miller, 307 U. S. 433, noting statement in Gloss v. Dillon that amendment process is a series of related events, succeeding steps in a single endeavor which should be reasonably related in time.

CHAPTER 12

POLITICAL QUESTIONS

It is well settled that the courts will not decide "political questions." [1] The principal reason is that the duty to determine such questions is to be found in the executive or legislative branches of our Government and not in the judicial. When a case is presented involving a political question the courts will look to the so-called political branches of Government, i. e., the executive and legislative, to learn what position those departments have taken in the matter. The courts then act in conformity with it. The result of such procedure is that the merits of the case are not decided as an independent question by the courts; rather the action of the political department concerned becomes a rule of decision which the courts accept as controlling.[2]

A reading of the cases indicates that the most important facet in the development of the doctrine, insofar as it is pertinent to this thesis, was the fact that the political departments, in the normal performance of their functions, had better means and facilities available to them to determine the question involved.[3] Most questions of policy are based upon the needs and exigencies of the times in which they arise. They involve an appraisal or evaluation of economic, social, and political issues which can hardly be reduced to exact terms for admission as evidence in a court of law and of which the courts cannot reasonably take judicial notice.[4]

As a result, the courts, in developing the "political question" doctrine, have given a finality of action to the decisions of our political departments. Many illustrations are to be found in the field of foreign relations. In Doe v. Braden, for example, the courts refused to inquire into the constitutional powers of the King of Spain with whom the United States had negotiated a treaty.[5] Objection was made that the King, at the time the purchase of the territory of Florida was being considered, could not annul certain grants of land he had made earlier to Spanish citizens within the territory. The court refused to consider the objection, stating that it was for the President and the Senate of the United States to determine whether the King's powers were sufficient in this instance. Whether our Government was right or wrong in interpreting the King's power under Spanish law was not controlling. The conduct of our foreign affairs requires that the State Department have a wide latitude in determining issues in the light of our political needs. To permit others to overrule questions of policy would greatly hamper the conduct of our foreign negotiations. Chief Justice Taney stated the Court's reasoning thusly: [6]

> * * * it would be impossible for the executive department of the Government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power by the constitution and laws, to make the engagements into which he entered.

Whether a treaty has been broken has also been held to be a matter which the courts will not determine. In Ware v. Hylton [7] the United States Supreme Court stated:

> These are considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.

One of the leading cases involving political questions is that of Taylor v. Morton [8] where it was pointed out that the courts had no suitable machinery to determine such questions:

> These powers have not been confined by the people to the judiciary, which has no suitable means to exercise them; but to the executive and legislative departments of our Government. They belong to diplomacy and legislation, not to the administration of existing laws.

This view has been expressed in other cases covering many different subjects such as the beginning and ending of wars as declared by Congress and the President,[9] control of aliens,[10] guaranties of a republican form of government under the United States Constitution,[11] recognition of foreign governments,[12] domestic violences.[13] These cases all treat political questions as ones which should be properly and finally determined by the legislature or the executive.

There is no precise rule which can be cited to describe what is meant by the term "political question." As noted above it has been applied to a variety of issues. John P. Frank states that it is more amenable to description by an itemization of the subjects declared to be political by the courts than by a broad general definition.[14]

Charles Post says that the term "political questions" is a magical formula which has the practical result of relieving the courts from the necessity of further considering a particular problem.[15] It is a device, according to Post, by which the courts transfer the responsibility for deciding questions to another branch of Government.

It is evident from a review of the cases that, upon declaring an issue to be political, the courts disclaim all jurisdiction or authority over the question and accept the decision of the political departments.[16] Some of the reasons for these declarations are apparent. For example, the Constitution places the duty on Congress to detremine the qualifications of its own Members. The courts would not pass upon any issue under this provision because someone else, namely, the Congress, has the clear and unequivocal responsibility to make the particular decision.[17]

John Frank points out that, in some instances, courts declare issues political because they are reluctant to hand down orders which, due to the lack of proper tools, they are unable to enforce.[18] He notes that the judiciary, in many respects, is the weakest division of government, dependent for its effectiveness upon the acquiescence of other branches of government.

Two other categories of political questions—ones directly in point in this dissertation—concern (1) problems which are soluble only by legislative action, and (2) problems where the action involved requires information which a court cannot obtain. For example, in Coleman v. Miller,[19] the Supreme Court was asked to decide how long was a reasonable time for the pendency of a constitutional amendment before the States. In determining that the question was a political one and for the Congress to decide, the Court noted that the issue involved a variety of political, social, and economic conditions

evidence on which could not be appropriately received in a court. Chief Justice Hughes stated: [20]

> * * * the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of revelant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice. * * *

Similarly, in Colegrove v. Green [21] the Court would not interfere with the reapportionment of congressional districts within a State upon the ground that the legislature was better equipped to acquire information and set up a sound districting system. So also in Chicago and Southern Airlines v. Waterman Steamship Co.,[22] the Supreme Court declined to review a decision of the Civil Aeronautics Board relating to international air transportation, because the evidence needed to make a proper determination in the case depended upon information on foreign relations unavailable to the Court.

It is probably easier to look to the effects or results which these decisions have on issues rather than try to reconcile the reasons underlying the decisions. The fact is, however, that the Supreme Court has expanded, over the years, the number of subjects which are classified "political questions." Many of today's political questions might well have been justiciable had the Court so wished to decide them. In general, it may be said the Supreme Court has found it more practical and expedient to leave the decision of certain questions to governmental bodies more appropriately adapted to decide them. And so far as the amending clause, article V, is concerned, at least four members of the Supreme Court have stated that Congress has undivided control over the process:

> Undivided control of that process has been given by the article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point.[23]

Argument may be made that where an appropriate agency of government has failed or refused to act, the courts will be unable to determine a particular issue because they will have no express view of the agency to entertain. What such an argument fails to take into account is that inaction or no action can be regarded as a positive position taken by the agency concerned.[24] All the courts need do is determine that the question is one which should be properly decided by a particular agency and leave it with the agency to decide it. Post has aptly outlined the proposition: When the Court declares a question "political" it accepts the decision of the political departments whether the decision be expressed or not expressed. He stated:

> * * * when a court declares a question to be a political question, it disclaims all jurisdiction and authority over the question and accepts the decision of the political departments, whether this decision be expressed by act of Congress, official statement or declaration, or treaty, though such decision may well be found in the absence of such expressions.[25]

The fact that the matter is left in midair, so to speak, would not seem to foreclose the courts from declaring an issue political.[26] In fact the Supreme Court, in Coleman v. Miller, has indicated that such is the case, in stating that failure on the part of Congress to set up a reasonable time limitation on ratification of amendments did not cast upon the courts the [illegible] of deciding what constitutes "reasonable time"

CITATIONS

[1] Willoughby, The Constitutional Law of the United States (1929), III, 1326.
[2] Field, The Doctrine of Political Questions in the Federal Courts (1924), 8 Minnesota Law Review 485.
[3] Coleman v. Miller, 307 U. S. 433, 454 (1939).
[4] Ibid., 453-454 (1939).
[5] 16 How. 635 (U. S. 1853).
[6] 16 How. 635, 657 (U. S. 1853).
[7] 3 Dall. 199, 200 (U. S. 1796).
[8] 2 Curt. 454, 461 (C. C. Mass. 1885) aff'd. 2 Black 481 (U. S. 1862).
[9] The Protector, 12 Wall. 700 (U. S. 1871); Hamilton v. Dillon, 21 Wall. 73 (U. S. 1874); United States v. 129 Packages, Fed. Case No. 15941 (1862).
[10] Chinese Exclusion Case, 130 U. S. 581 (1889).
[11] Luther v. Borden, 7 How. 1, 42 (U. S. 1849). In this case, the United States Supreme Court observed that "when the Senators and Representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." See also Pacific Telephone Co. v. Oregon, 223 U. S. 118 (1912).
[12] Rose v. Himley, 4 Cranch 241 (U. S. 1808); United States v. Klintock, 5 Wheat. 144 (U. S. 1820).
[13] Luther v. Borden, 7 How. 1 (U. S. 1849).
[14] Frank, John P., "Political Questions" set out in Supreme Court and Supreme Law, edited by Edmond N. Cahn, Indiana Univ. Press, Bloomington (1954).
[15] Post, Charles G., Jr., The Supreme Court and Political Questions (Baltimore: The Johns Hopkins Press, 1936).
[16] Post, p. 124.
[17] U. S. Constitution, Art I, sec. 5.
[18] Frank, p. 39.
[19] 307 U. S. 433 (1939).
[20] Coleman v. Miller, 307 U. S. 433, 453-454 (1939).
[21] 328 U. S. 549 (1946).
[22] 333 U. S. 103 (1948).
[23] Coleman v. Miller, 307 U. S., 433, 459 (1939).
[24] A notable example is when Congress failed to reapportion Congressional districts after the 1920 census. It was clear, because of attendant publicity, that Congress, by its inaction, intended to do nothing about reapportionment.
[25] Post, p. 124.
[26] See also Frank, citing Post, p. 37.
[27] 307 U. S. 433, 452-453 (1939).

CHAPTER 13

"REASONABLE TIME" AFFECTING APPLICATIONS

The conclusion reached in chapter 11 that an application remains in force for a reasonable time raises the further question of what constitutes a "reasonable time." Orfield suggests that the maximum life of an application should not continue for more than a generation. Quite possibly a reasonable time may be measured by changes or improvements of the social or economic conditions out of which an amendatory move arises. The purpose underlying each application no doubt should also be taken into consideration.[1]

The cases of Coleman v. Miller [2] and Wise v. Chandler [3] before the State courts of Kansas and Kentucky presented for judicial determination, among other things, the question of what is a reasonable time under article V. Both cases involved the question of the validity of a State's purported ratification of the proposed child-labor amendment more than 12 years after it was proposed by Congress.[4] The United States Supreme Court, in Dillon v. Glass,[5] had earlier held that Congress, in proposing an amendment, could fix a reasonable time for ratification and that the 7 years which it had prescribed for the adoption of the 18th amendment was, without question, a reasonable time.[6] The Kansas and Kentucky cases offered an opportunity for a further judicial decision on whether a reasonable time had been exceeded in those instances.[7]

The State courts reached opposite results, the Kansas court holding that despite the lapse of 12 years the proposed amendment still reflected the "felt needs of the day" and was, therefore, still open to ratification;[8] the Kentucky court, on the other hand, holding that a reasonable period during which the State might have acted had expired, and that a resubmission of the proposed amendment by Congress was necessary if further action was to be taken on it.[9]

However, the Supreme Court, in Coleman v. Miller,[10] decided the question by concluding that it was essentially political and not subject to judicial determination. In so deciding, the Court reasoned that, inasmuch as the Constitution set forth no satisfactory criteria for judicial determination of the question, and since a decision would involve an appraisal of a great variety of political, social, and economic conditions, the question was more appropriately one for congressional than for judicial determination.

The Court distinguished Dillon v. Gloss [11] on the ground that Congress had set a definite time within which the proposed amendment had to be ratified. It did not follow, as the Court pointed out, that when Congress has not set a time limitation, the courts had to take on the responsibility of deciding what constitutes a reasonable time.[12]

When a proposed amendment is based upon the needs, economic or otherwise, of the Nation, it is necessary to consider, in determining

what is a reasonable time, the conditions then prevailing throughout the country, and whether they had so far changed since the submission of the proposed amendment as to make the proposal no longer responsive to the conception which inspired it. As the Supreme Court stated (p. 453):

> In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the National Legislature of the political, social, and economic conditions which have prevailed during the period since the submission of the amendment.

It must certainly be conceded that what is a reasonable time in one situation will not necessarily be reasonable in another. To illustrate: A comparatively short time could probably be held reasonable in the case of an amendment necessitated by the exigencies of a national emergency such as a war or an economic crisis, whereas a much longer period would conceivably be reasonable in the case of an amendment changing the term of office of the President. The suggested test laid down by Jameson [13] which seems to be a workable one is that a proposed amendment—

> has relation to the sentiment and felt needs of today, and that, if not ratified early while the sentiment may fairly be supposed to exist it ought to be regarded as waived * * *.

Such a test certainly sets up no rigid rule which will result in a similar time limitation being applied to every case. It only prescribes that an independent judgment should be used in each particular case in deciding whether sufficient time has elapsed to render the passage of an amendment unnecessary from a practical standpoint and unsupported by general public sentiment.

CITATIONS

[1] Orfield, Lester B., The amending of the Federal Constitution (Chicago: Callaghan & Co., 1942), p. 42.
[2] 146 Kan. 390 (1937), aff'd, 307 U. S. 433 (1939).
[3] 270 Ky. 1 (1937), aff'd. 271 Ky. 252 (1937), dis'd 307 U. S. 474 (1939).
[4] 43 Stat. 670 (1924).
[5] 256 U. S. 368 (1921).
[6] Ibid., 376. Congress adopted the seven year limitation provision because, at that time, several proposals which had long lain dormant were nevertheless subject to being resurrected and acted upon by several states. Between the adoption of the Constitution and 1920, twenty-one amendments had been proposed by Congress and seventeen had been ratified by the requisite three-fourths of the states—some within a single year after their proposal and all within four years (256 U. S. 372). Each of the remaining four, however, while ratified by some of the states, was not ratified by a sufficient number. Two, in fact, were missing only one state for the required ratification (U. S. Congress, House, 54th Cong., 2d sess., 1897, H. Doc. 353, pp. 300, 322). Ohio tried to ratify a long-dormant amendment, in order to defeat the slavery issue. In the light of these circumstances, Congress, in proposing the Eighteenth Amendment, fixed seven years for the period of ratification (U. S. Congress, Congressional Record, 65th Cong., 1st sess., 1918, ibid., 2d sess., 1919, pp. 423-478).
[7] As of 1940, the average time for ratification of the first twenty-one amendments has been computed to be 1 year, 6 months, 21 days; 3 years, 6 months, 25 days has been the longest time used in ratifying (Coleman v. Miller, 307 U. S. 433, 453 (1939)).
[8] 146 Kan. 390 (1937).
[9] 270 Ky. 1 (1937) aff'd. 271 Ky. 252 (1937), dis'd 307 U. S. 474 (1939).
[10] 307 U. S. 433 (1939); on the same day the court dismissed Chandler v. Wise, 307 U. S. 474 (1939) on the ground that the Governor's action had rendered the question moot.
[11] 256 U. S. 368 (1921).
[12] The view might be taken that as a result of the Coleman case, the issue of "reasonable time" is no longer pertinent, or necessary, that Congress, with sole authority over the amending process, can recognize state action regardless of whether the states acted within a reasonable time. As a practical matter, with legal question put aside, it would seem that Congress should use, as good procedure, the reasonable time method in considering questions relating to the [illegible]
[13] Jameson, Constitutional Conventions (4th ed., 1887), p. 630.

CHAPTER 14

WITHDRAWAL OF STATE APPLICATIONS

May a State, once having made application for the call of a constitutional convention, withdraw or rescind its application? Some writers [1] on the subject believe that the legislatures may do so; at least one does not.[2]

The Supreme Court in Coleman v. Miller,[3] on the question of whether a State could withdraw or rescind its prior rejection of a proposed amendment to the Constitution, stated that the matter concerned a political question over which Congress had the ultimate power of decision. Congress, with respect to the 14th amendment, did not permit the States of Ohio and New Jersey to rescind their ratifications of that amendment. It has taken no position with respect to the withdrawal of State applications.

If precedent of the ratification process is followed, then it would seem that legislatures could not withdraw their applications.[3a] However, the wisdom of applying such similar reasoning may well be questioned.[3a] The rescinding resolutions of Iowa [4] in 1945 and of North Carolina [5] in 1951 both point out that their applications were being withdrawn because of the change in world conditions following World War II. It would not seem politically wise for the Congress to refuse to permit withdrawal of a State application where there was good reason to believe that a proposed amendment would be undesirable and would run counter to the public interest.

The requirement, discussed in other chapters, that applications be "contemporaneous" and related, generally, in subject matter would have reduced meaning if States were not permitted to rescind their applications. Such a requirement would not, in truth and in fact be met, since the general sentiment for a convention could not be said to exist in the necessary two-thirds of the States when one or more of those States are attempting to withdraw their applications.

The present attitude among legislators seems to be that withdrawal is a permissible procedure since 12 States in the last 12 years alone have adopted resolutions rescinding their applications.[6] The application process is, of course, distinguishable from the ratifying of proposed amendments. In the one instance, in a State application only an initiating action is sought with no one finally committed to the substantive proposition contained in the application, not even the State which submits it. In the other instance, Congress has completed its work and is committed to the position outlined in the proposed amendment. Further, many States submit applications for the sole purpose of prodding Congress into taking action on a proposed amendment pending in the Congress, without ever having the slightest hope that Congress will call a convention. To hold them bound to their petitions would not be a politic or realistic approach. Since this question, like others, is a political one, Congress notwithstanding its

earlier decision on the 14th amendment could very well permit the States, when it so finds it to be in the public interest, to withdraw their applications.

CITATIONS

[1] Cuvillier, Shall we Revise the Constitution (1927), 77, Forum, pp. 321, 325. Tuller, A Convention to Amend the Constitution—Why needed—How may it be obtained (1911), 193, North American Review, pp. 383–384.

[2] See Packard, F. E., Rescinding Memorialization Resolutions, 30 Chi-Kent Law Rev. 339 (1952).

[3] 307 U. S. 433, 448–449 (1939).

[3a] It should be pointed out that the 14th amendment was adopted during the reconstruction days after the Civil War. What was then the politically wise thing for Congress to do, would not necessarily be the best move today.

[4] U. S., Congress, Congressional Record, 1945, Vol. 91, p. 2383.

[5] U. S., Congress, Congressional Record, 1951, Vol. 98, p. 4641.

[6] Alabama, Arkansas, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Nebraska, New Jersey, Rhode Island, Wisconsin; see Table 5, appendix.

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PART V

RATIFICATION

CHAPTER 15

REJECTION OR RATIFICATION

The question of whether a State, having once rejected, may later ratify a proposed amendment had, until Coleman v. Miller,[1] long been the subject of controversy. Several writers had taken the position that since article V in terms provides for only affirmative acts, only such acts can have any effect; rejection would be of no more consequence than complete inaction.[2] Thus it had been argued that ratification by a State which had previously rejected a proposed amendment is valid and is as complete and as binding as though there never had been any negative expression.[3] This analysis has found support in actual practice and is evidenced by the fact that several States have effectively assented to constitutional amendments after prior rejections. In the case of the 13th amendment, New Jersey first rejected the amendment in 1865, and then adopted it the following year. In respect to the 14th amendment, four States (Georgia, North Carolina, Virginia, and South Carolina) rejected it when first presented but subsequently ratified. The ratification was treated as valid in each case.[4]

So far as can be determined, in every instance where ratification was made prior to the issuance of the Federal proclamation that the amendment had been adopted, the States which first rejected and later ratified were included in the list of States designated by the Secretary of State as ratifying. It seems clear that on the basis of actual practice, a rejection may be subsequently ratified. In addition, the proposition is sound in principle. Certainly a legislature's action of rejection ought not act with the finality of an executioner's ax. Changing social conditions, or a better educated point of view, may make it more desirable for the States to reverse their vote. As Frank W. Grinnell, writing in the American Bar Association Journal, stated:[5]

> No one knows what amendments may be submitted in the future as the result of political excitement; and, if the entire national structure is to be submitted to the hasty political action of State legislatures without an opportunity for reconsideration the country may wake up and find itself in a most serious situation some day.

This important question was finally presented to the Supreme Court in the cases of Coleman v. Miller[6] and Wise v. Chandler.[7] The State courts had reached opposite conclusions. The Kansas court in Coleman v. Miller adopted the position that a legislature could validly ratify a proposed amendment even though there had been a prior rejection. The Kentucky court, on the other hand, reasoning by analogy to "offer and acceptance" in contract law, refused such a view and held that a rejection of the congressional

offer to the proposed amendment, exhausted a State's power with respect to the particular amendment concerned. It also held, reasoning negatively, that a rejection by more than one-fourth of the States—(article V requires three-fourths approval)—renders an amendment null and void and thus no longer open to ratification.

However, the Supreme Court, when Coleman v. Miller [8] came before it on appeal ruled that the issue was essentially a political one which Congress should properly decide. The Court cited as reasons for its decision (1) the historical precedent in which the Congress declared abortive the attempts made by Ohio and New Jersey to withdraw their ratifications of the proposed 14th amendment,[9] and (2) the fact that there was a complete absence of any "basis in either Constitution or statute" for judicial interference.[10]

A question not raised in the Coleman case, supra, and still left without judicial determination is the converse one of what effect would a legislature's prior ratification have on its subsequent attempt to withdraw ratification? Putting the political question aside for the moment, it would seem to follow logically, that if a State can withdraw a prior rejection, it would be empowered to withdraw a ratification, at least until such time as the requisite number of States (three-fourths of the States) have ratified. However, there are those who say that such a withdrawal would be ineffective.[11] Many of these authorities, in support of their views, draw an analogy between the law of contracts and article V stating that an offer of a proposed amendment, once accepted, is irrevocable. They also point out that prior ratification, being a positive act, could not be withdrawn without considerable inconvenience and confusion. No State, for example, could know what the exact status of a proposed amendment is if another State is permitted to withdraw its approval. It would be difficult to know when three-fourths of the States had ratified.[12] Such a contention would seem to have little merit today. It would be a simple problem in this day and age to determine at any given time whether three-fourths of the States have ratified.

Congress has already been confronted with this question. The legislatures of Ohio and New Jersey first ratified the 14th amendment and then passed resolutions withdrawing their consent. In seeking to determine whether a sufficient number of States had ratified the amendment, Congress adopted a resolution requesting the Secretary of State to submit a list of the States whose "legislatures have ratified the 14th article of amendment." [13] Secretary Seward's report called attention to the action of Ohio and New Jersey [14] and stated that if their ratifications, notwithstanding their attempted withdrawals, were still in full force and effect, the amendment had become part of the Constitution.[15] Congress thereafter adopted a concurrent resolution which, after reciting that three-fourths of the States had ratified, including Ohio and New Jersey, declared the 14th amendment to be a part of the Constitution.[16]

The Supreme Court, in the Coleman case, noted, with approval, the above action by the Congress and the fact that Congress took it upon itself [17] to decide the questions. While the specific question of ratification followed by attempted withdrawal was not presented for decision, the reasoning of the Court clearly indicates that if the problem ever arises, it too will be classified as political. The Court no

doubt would refuse to disturb historical precedent, but could accept as final the political interpretations of Congress. The Court stated: [18]

> We think that in accordance with this historic precedent the question of the efficacy of ratifications by State legislatures, in the light of previous rejections or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

In the light of the Coleman case, it would seem that state court decisions and the views of law commentators on the subject have been rendered academic. Having been declared a political question, Congress, in its discretion, may permit the states to withdraw their ratifications or not, depending upon the political expediencies of the moment. As a guiding rule, Congress may well permit withdrawal of ratifications at any time prior to when three fourths of the states have applications simultaneously pending before the Congress. In this way, Congress will know what the general sentiment among the legislatures is at all times, something that a prohibition on rescinding action would not do.

CITATIONS

[1] 307 U. S. 433 (1939).
[2] Willoughby, The Constitutional Law of the United States (2d ed.; 1929) I, 593; Jameson, Constitutional Conventions (4th ed.; 1887), 628; Orfield, Procedure of the Federal Amending Powers (1930) 25 Illinois Law Review 418.
[3] See Wise v. Chandler, 270 Ky. 1, 12 (1937), affd. 271 Ky. 252, 111 S. W. 2d 633 (1937), disd. 307 U. S. 474 (1939).
[4] 14 Statutes at Large 428 (1867); 15 Statutes at Large 706, 708 (1868); Coleman v. Miller, 307 U. S. 433, 448 (1939).
[5] Grinnell, Finality of State's Ratification of a Constitutional Amendment (1925) 11 American Bar Association Journal 192, 193.
[6] 146 Kan. 390, 71 P. (2d) 518 (1937), affd. 307 U. S. 433 (1939).
[7] 270 Ky. 1, 108 S. W. (2d) 1024 (1937), affd. 271 Ky. 252, 111 S. W. 2d 633 (1937), disd. 307 U. S. 474 (1939).
[8] 307 U. S. 433 (1939).
[9] Ohio, Laws of 1867, p. 330 (ratification); Ohio, Laws of 1868, p. 280 (withdrawal); New Jersey, Acts of 1868 (withdrawal); Congressional action, 15 Stat. 708 (1868).
[10] 307 U. S. 433, 450 (1939).
[11] Jameson, Constitutional Conventions, 628–633, 576–584; Watson on the Constitution, p. 1818; Ames, Proposed Amendments to the Constitution, U. S., Congress, House, 54th Cong., House Doc. 353, 299; Willis, Constitutional Law (1936), 120; Willoughby, Constitutional Law of the United States (2d ed.: 1929), I, 593–594, sec. 329a; Orfield, The Procedure of the Federal Amending Power (1930), 25 Illinois Law Review 418, 429.
[12] See Dodd, Amending the Federal Constitution, 30 Yale Law Journal 321, 346 (1921).
[13] U. S., Congress, 40th Cong., 2d Sess., 1869, Cong. Globe, p. 3857.
[14] U. S., Congress, 40th Cong., 2d Sess., 1869, Cong. Globe, p. 4070.
[15] 15 Stat. 706, 707.
[16] 15 Stat. 709, 710.
[17] 307 U. S. 433, 450 (1939).
[18] Ibid., p. 448.

CHAPTER 16

STATE RATIFYING CONVENTIONS

Problems similar to those involved in a Federal constitutional convention may be found in the makeup of State ratifying conventions called by the Congress pursuant to article V for the purpose of ratifying proposed amendments to the Constitution. Has Congress, for example, the power to prescribe the time, place, and manner of meetings, of State ratifying conventions? May it control the proceedings? In what manner and to what extent may States participate in ratifying conventions? To what extent does article V govern these proceedings?

The congressional proceedings leading to the proposal of the 21st amendment clearly show that there was considerable doubt on the question of congressional control over State ratifying conventions. Two prominent people, Representative James M. Beck and former Attorney General A. Mitchell Palmer, presented legal briefs expressing different opinions. Representative Beck submitted that Congress was limited to directing that ratification be by either State convention or State legislative action. He believed that the details of forming a convention had to be left to the individual State legislatures.[1]

Mr. Beck's position finds support—at least in result—in Herman V. Ames' study on the amending power under the Constitution.[2] Ames noted historic precedent for such action was to be found in the ratification action of the Constitution by the original 13 States. He pointed out that neither Madison nor any other delegate to the Constitutional Convention of 1787 thought of the details of State ratifying conventions, which indicated to him that the matter ought to be left to the States.

Attorney General Palmer, contrary to the position taken by Representative Beck, argued that, since amending the Constitution was purely a Federal question, Congress had the mandate of setting up procedures and specifying the details of the convention.[3] He stated that Congress in calling conventions would—

> * * * prescribe all the essentials necessary for the nomination and election of delegates thereto, and the time, place of meeting, and conduct of the convention (p. 134).

Attorney General Palmer, like Mr. Beck, could also turn to the legal textbooks for support of his own position. In Political Science and Comparative Constitutional Law,[4] John W. Burgess states that since the Constitution itself did not elaborate the details as to the form of the convention, "it therefore impliedly leaves that to Congress" to develop under the "necessary and proper clause of the Constitution."

Congress, at the time, however, never took a determinative position on the 21st amendment and stated only that ratification was to be by "convention in the several States."[5] No doubt Congress decided that it was the wiser approach to follow the precedent set at the time the Constitution itself was originally adopted and simply place the

matter in the hands of the States. This approach not only offered an easy way out of the difficult legal problems involved, but it also permitted Congress to escape the complicated and burdensome task, in the event it decided it had such power, of setting up an elaborate procedure for establishing and controlling the conventions.

When Congress refused to decide these questions and handed the matter, carte blanche, to the States, the responsibility for determining the proper method of calling State conventions, their powers and duties, pursuant to the congressional resolution proposing the 21st amendment, was left to the courts. Several State decisions lend aid in clarifying the situation and indicate the status of State ratifying conventions. In an advisory opinion,[6] the Supreme Judicial Court of Maine decided that the State legislature had the power to call the convention and promulgate rules of procedure, but that such provisions had to be reasonable. It pointed out that a convention was to be distinguished from a legislature only in that a State convention was called for a specific purpose, while the legislature is called for general lawmaking purposes. It also stated that a convention, once organized, has the sole power to act on questions of fraud and irregularity in the election of its delegates.[7]

A question also arose in Ohio on whether State legislative action, in setting up machinery for convening a convention, is subject to a referendum to the people. The Supreme Court of Ohio, in State ex rel. Donnelly v. Myers,[8] held it was not, basing its decision on the holding of the United States Supreme Court in Hawke v. Smith.[9] Hawke v. Smith concerned an earlier Ohio case where an action was brought to restrain the Ohio secretary of state from preparing ballots for submission to the people of a referendum which, pursuant to the Ohio constitution, provided for referendum on the action of its legislature whenever it ratified an amendment to the Constitution of the United States. The United States Supreme Court held that the referendum provision of the Ohio constitution was in direct conflict with article V which does not permit the people, directly, to vote on the ratification or rejectment of any amendment. In so holding, the United States Supreme Court went on to rule that ratification of a constitutional amendment is not an act of legislation within the accepted sense of that word.[10]

The Ohio Supreme Court applied the reasoning of the Hawke case, to the question of State conventions and held that State action in setting up a convention is similar to State action by its legislature in ratifying an amendment and that the legal machinery in assembling a convention could not therefore be subject to referendum.

It might be well to point out that in the Hawke case the referendum was sought after the State legislature had ratified the constitutional amendment, whereas in the Donnelly case the question was whether the State legislature's action in setting up a convention was subject to referendum. While the Donnelly case decided that no such referendum could be had, the dissenting opinion stated that the setting up of a convention through State legislative enactments could only be viewed as a State function. The opinion argued that it is as much a matter of State legislation and State cognizance as are the laws providing for the election of the members of the legislature. While such reasoning may have logic on its side, it nevertheless appears that the

more generally accepted view in the cases follows the majority opinion that amending the Federal Constitution is a Federal function.[11]

Since a State may not require a referendum, it follows that it would have no right to impose, as a condition for ratification, a provision which is now found in the constitution of the State of Missouri that "the legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of the State."[12] So also, a State constitution would have no authority to impose limitations, as are now found in the constitutions of Florida and Tennessee, that no convention or legislature of the State shall act upon any amendment to the Constitution of the United States unless such convention or legislature shall have been elected after the amendment is submitted.[13]

It appears then that the people have no direct power in, and the State legislature may not seek a referendum in, the ratification of a proposed amendment either by a State legislature's action or by convention. The States, in line with historic precedent, may establish reasonable rules for calling and organizing State ratifying conventions, but the conventions once convened may promulgate, following the conclusions reached in chapter 5, rules to govern their own proceedings. Since ratifying conventions have only one duty to perform, that is, approving or disapproving a proposed amendment, the scope of their deliberations is limited to the particular subject matter presented to them for consideration and they may consider nothing else.

Finally, State conventions in ratifying proposed amendments are performing a Federal as distinguished from a State function. State constitutional and statutory provisions, insofar as they may conflict with a congressional resolution proposing the amendment, would, seemingly, be ineffective and of no moment.

CITATIONS

[1] U. S., Congress, House, 72d Cong., 2d Sess., 1933, 76 Congressional Record, pp. 2419-2420.
[2] Ames, Recent Developments of the Amending Power as Applied to the Federal Constitution, American Philosophical Society Proceedings (1933), 72, p. 93.
[3] U. S., Congress, House, 72d Cong., 2d Sess., 1932, 76 Congressional Record, p. 134.
[4] Gin & Co., Boston: (1891), I, 143-144.
[5] U. S., Constitution, Art. XXI.
[6] In re Opinion of the Justices, 132 Me. 491, 167 Atl. 176 (1933).
[7] Ibid., p. 497.
[8] State ex rel. Donnelly v. Myers, 127 Ohio 104, 186 N. E. 918 (1933).
[9] Hawke v. Smith, No. 1, 253 U. S. 221 (1920).
[10] Ibid., p. 229.
[11] Leser v. Garnett, 258 U. S. 130 (1922). The Donnelly case was also followed by the Missouri Court in State ex rel. Tate v. Sevier, 63 So. 2d 895 (1933), on the question of referendum.
[12] Missouri, Constitution (1875), Art. 2, Sec. 3.
[13] Florida, Constitution (1885), Art. 16, sec. 19, Tennessee, Constitution (1870), Art 2, sec. 32.

PART VI

ORGANIC LAWS OF FOREIGN NATIONS

CHAPTER 17

ORGANIC LAWS AND AMENDING PROVISIONS

Although the United States ranks as a relatively young nation among the family of nations, its Constitution is the oldest of all written national constitutions now in force.[1] Because of its success many nations have adopted written constitutions with provisions either identical or substantially similar to our own.

Of the total of 83 sovereign nations, 75, or approximately 90 percent, have written constitutions.[2]. In five instances, written constitutions are in the process of being promulgated.[3]

Because of the material presented in this chapter, it would be helpful, in order to properly evaluate the data, to distinguish between those nations which have federal types of governments (a central government with sovereign political subdivisions), and those having a unitary system of government (a central government with nonsovereign political subdivisions).

About 16 nations, including the United States, may be classified as having governments of the federal or confederation type. They are:

Argentina (Constitution of the Argentine Republic, art. 1).

Australia (Constitution of the Commonwealth of Australia, arts. 1, 62–64, 71, 79).

Brazil (Constitution of the United States of Brazil, art. 1).

Canada (British North American Act, 1867, preamble).

Mexico (Political Constitution of the United States of Mexico, art. 40).

Netherlands (Constitution of the Kingdom of the Netherlands, art. 208).

Switzerland (Federal Constitution of the Swiss Confederation, art. 1).

U. S. S. R. (Constitution of the Union of Soviet Socialist Republics, art. 13).

Venezuela (Constitution of Venezuela, art. 2).

Yugoslavia (Constitution of the Federal Peoples Republic of Yugoslavia, art. 1).

India (Constitution of India (1948), Part 1).

Germany (Western Zone [art. 20] Bonn Constitution [1949]).

Pakistan (Constitution of Pakistan, Resolution, Constituent Assembly, March 7, 1949, preamble).

United States (Constitution of the United States, art. IV).

Burma (Constitution of Burma, art. 2).

Union of South Africa (Constitution of Union of South Africa, art. 4).

Most of the nations with the so-called unitory form of government bear considerable resemblance to those with federal governments, except that their political subdivisions are not free to exercise many of the prerogatives of a sovereign state.

Of the nations, both federal and unitory, which have written constitutions, 61 contain express provisions providing for the amendment and revision of their organic instruments. As will be further noted in the following pages, 5 of the nations authorize constitutional conventions, 44 nations adopt amendments through the action of their legislative assemblies (although in many instances the assemblies do not maintain absolute control over the amendment process), and 11 nations amend their organic laws by way of referendum.

The five states which recognize the convention method of amendment are Argentina, Dominican Republic, El Salvador, Guatemala, and the Philippines:

Argentine Constitution—adopted March 16, 1949—

ART. 21. The Constitution may be amended entirely or in any of its parts. The necessity for a reform must be declared by Congress with the vote of two-thirds of its members present, but it shall not be effected except by a convention called for the purpose.

Constitution of the Dominican Republic—adopted January 10, 1949—

TITLE XVI

CONSTITUTIONAL REFORMS

ART. 108. The Constitution cannot be changed except when two-thirds of the members of each chamber so agree.

ART. 109. The necessity for the reform being declared, Congress, by a law which cannot be the subject of objections by the executive power, shall order the meeting of a revisory assembly to pass upon the reform. The articles whose reform is proposed shall be inserted in the law of convocation.

ART. 110. The election of members of the revisory assembly shall be made by direct vote of the people of the provinces, in the same proportion as for the election of deputies.

No province shall have less than two representatives.

The same qualifications are necessary in order to be elected a member of the revisory assembly as for being a deputy.

Members of the Assembly shall enjoy the same immunities as the members of the two chambers.

ART. 111. The Constitution may not be so amended as to change the form of government, which must always be civil, republican, democratic, and representative.

ART. 112. Reform of the Constitution shall be made only in the manner indicated therein and it shall never be suspended or annulled by any power or authority nor by popular acclamation.

Constitution of El Salvador—adopted August 13, 1886—

TITLE XVI

REFORM OF THE CONSTITUTION AND CONSTITUTIONAL LAWS

ART. 171. The reform of the present Constitution shall be undertaken only upon a resolution passed by two-thirds of the votes of the representatives elected to the Assembly, and this resolution shall express the article or articles which shall be amended. The resolution shall be published in the official newspapers, and shall be considered again in the session of the Assembly of the following year. If ratified by the Assembly, a constitutional convention, consisting of three delegates for each department, shall be called to meet, in order to decide about the suggested reform. But it is hereby declared that in no case shall Articles 80, 81 and 82 prohibiting the reelection of the President, Vice President, and designates and concerning the duration of the presidential term be amended.

ART. 172. The laws relating to the public press, the state of siege, the writ of amparo and the general elections shall rank as constitutional statutes.

They may be amended either by the constitutional convention, or by the ordinary assembly by a two-thirds vote; but in the latter case, the reform shall have no binding force until it has been ratified by the legislative body in the ordinary session of the following year by the same number of votes.

ART. 173. Any other method of amending the Constitution or constitutional laws different from those provided for in the preceding articles shall be illegal and void.

Constitution of Guatemala—adopted March 11, 1945—

TITLE XI

AMENDMENTS TO THE CONSTITUTION

ART. 206. Complete or partial amendment of the Constitution may be decreed only by a vote of at least two-thirds of the total number of deputies making up Congress; the vote will also indicate the article or articles to be amended.

* * * * * * *

Amendments to the Constitution may consist of modifications, suppressions, additions, substitutions or extension of Articles. * * *

ART. 207. Once the amendment is decreed, Congress will convoke elections for a Constituent Assembly which should be installed within the sixty days following the date of convocation. * * *

ART. 208. The Constituent Assembly will be composed of one representative for each forty thousand inhabitants, or fraction over twenty thousand. * * *

ART. 209. The meeting of the Constituent Assembly does not hinder the functioning of Congress.

ART. 210. Once the amendment has been decreed by the Constituent Assembly, and if there are no other constitutional decrees or laws to issue, it will dissolve itself after the promulgation.

ART. 211. This Constitution shall not lose its force or vigor even though rebellion interrupts its observance.

Constitution of the Philippines—February 8, 1935, as amended—

ARTICLE XV

AMENDMENTS

SEC. 1. The Congress in joint session assembled, by a vote of three-fourths of all the members of the Senate and of the House of Representatives voting separately, may propose amendments to this Constitution or call a convention for that purpose. Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification.

The following 44 states provide for the revision of their organic laws by action of their legislatures:

Belgium (art. 131).

Bolivia (art. 174–177).

Brazil (art. 217).

Bulgaria (art. 99).

Burma (art. 207–210).

Byelorussian S. S. R. (art. 122).

Chile (art. 108–110)—generally by legislative action only. If President and legislature cannot agree, President may submit question to a plebiscite.

Colombia (art. 218).

Costa Rica (art. 139–140)—legislature may amend constitution but only a constitutional assembly can effect a general review of the constitution.

Czechoslovakia (sec. 172).
Ecuador (arts. 189–190).
Egypt (arts. 157–158).
Finland (Diet Act art. 67).
France (arts. 90–92)—if after a second reading proposal is not adopted, then it is submitted to a referendum.
Greece (art. 108).
Haiti (arts. 145–148).
Honduras (art. 200)—total reform and the election and term of office of President can only be effected through a constitutional assembly.
Iceland (art. 79)—amendments relating to the status of the church may only be submitted to a plebiscite.
Iraq (arts. 118–119).
Italy (arts. 138–139)—under some conditions a referendum is necessary.
Jordan (art. 47).
Korea (art. 98).
Lebanon (arts. 76–77).
Luxembourg (arts. 114–115).
Mongol People's Republic (art. 95).
Mexico (art. 135).
Venezuela (arts. 248–252).
Netherlands (arts. 202–206).
Nicaragua (arts. 285–287).
Norway (art. 112).
Panama (art. 256).
Peru (art. 236).
Poland (art. 30).
Portugal (arts. 134–135)—some amendments may be submitted to a plebiscite.
Rumania (arts. 103–104).
Sweden (arts. 81–82).
Syria (art. 108).
Thailand (secs. 173–176)—plebiscite is optional with King.
Turkey (art. 102).
Ukrainian S. S. R. (art. 127).
Union of South Africa (pt. 10).
U. S. S. R. (art. 146).
Yugoslavia (art. 72).
India (Part XVI).

Ten states provide for the amendment and revision of their organic acts by referendum. They are:
Australia (art. 128).
Denmark (art. 94).
Ireland (art. 46).
Japan (art. 96).
Liberia (art. V, sec. 17).
Liechtenstein (art. 66).
Paraguay (art. 94).
Spain (Referendum Act—Oct. 22, 1945).
Switzerland (art. 118–123).
Uruguay (art. 281).

Cuba (arts. 285–286) provides for constitutional revisions in three methods—

(*a*) by the Congress alone;
(*b*) by plebiscitary assembly;
(*c*) by referendum.

Nepal (arts. 66–68) permitted the King to promulgate rules to implement the basic organic law until April 1, 1955. After that date, a Commission recommends to the King suggested changes.

CITATIONS

[1] Peaslee, Constitution of Nations (1950), I, 3.
[2] Ibid., p. 1. What constitutes a "nation" is the subject of much controversy; what is to be used as a yardstick for precisely determining a "nation" is also an item of great dispute. The list of nations cannot be limited to those belonging to the United Nations, nor can the list be as all inclusive as the membership of the Universal Postal Union, which in some instances includes territories and colonies. The above figure is based on Peaslee's estimate (Peaslee, Constitution of Nations, I, 3).
[3] Ibid., p. 4.

CHAPTER 18

ORGANIC LAWS CONTAINING CONVENTION PROVISIONS

As noted in chapter 17, five nations provide in their basic charters for amendment and revision by means of constitutional conventions. They are the Republic of Argentina, the Dominican Republic, the Republics of El Salvador, Guatemala, and the Philippines. Only one of these nations—Argentina—has ever amended its present constitution via the convention method.

The Philippines, since it has become an independent nation, has never sought to convene a convention; so also the Dominican Republic.

El Salvador has never had a constitutional convention. Its convention clauses, however, contain many provisions which are of interest to this thesis. Its earlier constitution, in addition to setting forth the authorization for a convention, authorized the National Assembly to prosecute delegates to the convention who were guilty of crimes.[1] The Constitution of 1950 assigns this duty to the National Assembly.[2] The official gazettes available in the Library of Congress point out that under the earlier constitution, the National Assembly, in enabling acts, provided for the number of delegates to be elected to the convention, the manner of election, their qualifications, compensation, privileges, etc. If nothing else, the above information indicates the wide control which the National Assembly exercises over a constitutional convention. The gazettes also point out that the National Assembly could establish the rules and procedures under which the convention was to operate, and it could expressly declare which articles were to be considered by the convention for amendment.[3]

The Constitution of Guatemala (1945), while expressly providing the only method by which the constitution itself could be changed, was nevertheless abrogated on August 11, 1954, by a so-called political statute which placed the nation under a council that governed by decrees. A decree[4] of September 21, 1954, ordered the election of a constituent assembly, which among other things, was to prepare a new constitution.[5] A new constitution was promulgated and became effective March 1, 1956. It is believed that the provision in the 1945 constitution setting forth the procedural pattern for amending a constitution by a convention (which was disregarded in 1945) is also embodied in the new constitution.

The Republic of Argentina has had two constitutional conventions, one in 1866 and another in 1898.

In accordance with the constitution, the senate and chamber of deputies, after declaring on June 9, 1866, that it was necessary to amend article 4 and section I of article 67 of the Argentinian Constitution, convoked a national convention for that purpose. Thereafter through a further enabling act, they set up the time and place where the convention was to be held, and prescribed the number and qualifications of the delegates, their pay, etc. The statute reads: [6]

> The Convention shall consider the reform of Article 4, and section one of Article 67 of the Constitution as declared to be necessary by Congress; the Con-

vention shall be composed of the same number of delegates and in the proportion that is fixed by Article 38 of the Constitution; the qualifications of the delegates of the Convention shall be the same as those required by members of Congress; the Convention shall take place in the city of Santa Fe, on September 1, 1866; the election of the delegates for the Convention shall take place on July 22, 1866; the delegates shall receive a compensation of one thousand pesos and the traveling expenses paid to members of Congress; the election of delegates to the Convention shall be held in accordance with the general election laws; the counting of the votes for the election of delegates shall take place fifteen days after their election; the executive power is authorized to spend the necessary money for the enforcement of this law.

The organization and functioning of the convention in both 1866 and 1898 adhered to the following pattern. Each convention consisted of three sessions—

(1) preparatory session at which a provisional president and two committees, the committee on powers and the committee on rules, were appointed;

(2) deliberative session where the substantive merits of the proposals were debated; and

(3) final session, called the closure session, at which the final drafts and reports were approved.[7]

Article 21 of the Argentine Constitution expressly provides that it may be amended entirely or in any of its parts. The issue was raised, at the time the congressional enabling acts were being passed, as to whether the convention itself could decide on either a piecemeal or general revision or whether such power was solely within the control of the Argentine Legislature. The result of the debate on this issue (and as the enabling acts themselves clearly indicate) was that the convention may only consider those matters stated by the legislature in the enabling act. While it has the power to determine the substance of the amendments, it cannot propose any amendment, the subject matter of which was not expressly presented to it by the legislature.

It seems clear from the foregoing that the Congress in Argentina exercises almost plenary control over the constitutional convention both as to the scope of its deliberations and as to procedure. In addition, the Congress, apparently, acts in these matters without either the concurrence or disapproval of the President. When the enabling acts of 1866 and 1898 were enacted, neither was submitted to the President for his signature upon the ground that the veto power of the President applies only to ordinary legislation.[8] This conclusion is somewhat similar to and is in line with United States Supreme Court decisions holding that resolutions of Congress proposing constitutional amendments do not require Executive approval since they are not considered ordinary legislation.[9]

CITATIONS

[1] El Salvador, Constitution (1886), amended 1945, Arts. 169, 170.
[2] El Salvador, Constitution (1950), Arts. 213, 44, 45.
[3] El Salvador, Constitution (1886), amended 1945, Art. 171.
[4] Guatemala, Decree No. 86 (September 21, 1954).
[5] Guatemala, Decree No. 134 (October 25, 1954). This assembly was ordered to study and determine: (1) tenure of office of the president; (2) ratification of treaties and state contracts; (3) preparation of a new constitution.
[6] Argentina, Coleccion de Leyes Nacionales, II, 271.
[7] Argentina, Coleccion de Leyes Nacionales, XI, 339.
[8] J. Gonzales Calderon, Derecho Constitucional Argentino, III, 34.
[9] Hollingsworth v. Virginia, 3 Dall. 378 (1798); Hawke v. Smith, No. 1, 253 U. S. 221 (1920).

PART VII

HISTORICAL RÉSUMÉ OF A STATE'S CONSTITUTIONAL CONVENTIONS

CHAPTER 19

NEW YORK STATE CONSTITUTIONAL CONVENTIONS

Shortly before the Revolutionary War, the Second Continental Congress adopted legislation urging the several Colony-States, through their "respective assemblies and conventions," to adopt such constitutional government as was necessary for their safety and protection.[1] In New York the task of drafting a constitution was delegated to and performed by "The Convention of the Representatives of the State of New York"—a provisional body.[2]

This body, unlike future New York Constitutional Conventions, engaged in the actual business of government. Due to the exigencies of war, the convention operated under the most difficult conditions. It did adopt, however, a constitution—one which was, for the most part, prepared by a single committee headed by John Jay. It is known as the constitution of 1777.

Generally, the constitution of 1777 set up a system of checks and balances by establishing separate executive, judicial, and legislative branches. Under it the legislature, unlike our National Legislature, had residual, rather than delegated, powers. A so-called council of revision had the power to veto legislative acts, however.

Voting, under the 1777 constitution, was restricted by property qualifications [2a] and the instrument contained no provision providing for its amendment or revision.[2b] The constitution became effective upon its adoption by the delegates to the convention and no opportunity was afforded the electorate to vote upon it.[3] This action was no doubt due, in large part, to the fact that part of the State was in actual control of enemy British forces, rendering a popular referendum impossible.

While the original constitution was workable, it became apparent in time that clarification and revision was necessary. A second constitutional convention was called to accomplish this purpose. Foremost among the causes which gave rise to the second convention (held in 1801) was the conflict of power between the Governor and the constitutionally established council of appointment over the nominating and appointing of persons to political office. The Governor claimed that he had the exclusive right of appointment; the council of appointment denied this and claimed concurrent jurisdiction in the matter.

When attempts to resolve this major issue failed, the legislature adopted a resolution calling, as noted above, the constitutional convention of 1801. The convention was also authorized, pursuant to

a legislative resolution, to consider the advisability of reducing and limiting the number of members in the legislature (which was expanding with the population growth of the State).[4]

This the convention did, and it also adopted a provision vesting concurrent jurisdiction in the Governor and the council of appointment to make appointments to political offices.[5]

The results of this convention became effective without being submitted to the electorate for popular approval; and, like the 1777 convention, set up no provision for the constitution's future amendment.

The work of the convention in placing concurrent jurisdiction over political appointments in the council of appointment proved unfortunate. The council, it is stated, engaged to the fullest extent in the "spoils system," dispensing enormous patronage.[6]

Disappointment with the council of appointment, however, was not alone the motivating force in bringing about the third constitutional convention in 1821. A movement had been underway for some years, seeking the removal of the property qualifications on voting.[7] In addition, dissatisfaction was also expressed concerning the work of another committee—the council on revision—in its vetoing of several popular legislative enactments.[7a]

It is worthy of note that one of the revision council's last acts—vetoing an 1820 act—established a rule of conduct for subsequent constitutional conventions. It took the position that the people should have a voice in deciding whether a convention should be held. It therefore vetoed a bill which would have denied to the people the right to approve or disapprove the then proposed convention of 1821. In rejecting the measure, the council based its veto in the belief that—

> it is the most wise and safe course, and most accordant with the performance of the great trust committed to the representative powers under the Constitution, that the question of a general revision of it should be submitted to the people in the first instance, to determine whether a convention ought to be convened.[8]

These views were eventually adopted by the legislature and the question of whether or not to hold a convention was put to the people in the general election in 1821, and they voted to convene a convention.[9]

The resolution calling the convention provided unlimited revisionary powers. And, in accordance with the views of the council of revision as incorporated in the resolution, the changes proposed by the convention were submitted to the people, who approved the revised constitution.

While the entire instrument was presented for approval to the people, only a few changes were actually made to the original document. The judiciary article was revised, property restrictions on voting were made lenient, and a legislative reapportionment plan adopted.

Like its predecessors, the 1821 convention made no provision in the constitution providing for another convention. A new section did, however, provide for the constitution's amendment by amendments which could automatically become part of the constitution if recommended to the people by two successive legislatures,[10] so-called amendment by legislative initiative.

In spite of this specific method set forth in the instrument for amending the constitution, the legislature in 1845 did what has been

described as an extraconstitutional act when it adopted a resolution providing for a popular vote on whether or not a constitutional convention should again be held.[11] The resolution was overwhelmingly approved by the people and resulted in the constitutional convention of 1846.

While it was urged that such action by the legislature was unconstitutional, in view of the fact that the constitution expressly provided only one method for its own amendment, the legislative act was nevertheless sustained on the theory that amending the constitution by convention is a right underlying the constitution of every free people which, in this instance, had not been renounced simply by providing an additional method of amendment in 1821.[12]

While the 1846 convention was in response to demand for several constitutional reforms, the most important concerned the question of State finances. The commercial panic of 1837 resulted in the State's credit being badly impaired. There were loud voices demanding constitutional regulation of corporations, banking, and the issuing of currency.

The convention responded. Many restraints were placed upon legislative authority; the judiciary provisions were revised, with many offices being made elective instead of appointive.[13]

One of the more important provisions adopted related to the holding of future constitutional conventions. It called for a popular referendum every 20 years, and at such other times as the legislature might decide.[14]

In accordance with this constitutional mandate, a referendum was held 20 years later and the constitutional convention of 1867 was authorized.[15] As might be imagined, the motives and reasons for holding the convention at the end of a 20-year interval were much less apparent than the reasons which inspired those of 1777, 1801, 1821, and 1846. The work of the 1867 convention, with the exception of a separately submitted judiciary article, was rejected.[16]

However, an important outgrowth of the rejection was a legislative enabling act in 1869 which authorized the governor to appoint a constitutional commission of 32 members to study constitutional problems and to submit them to the legislature so that, in turn, the legislature, if it approved the recommendations, could submit them, through the method of legislative initiative, to the people for approval or disapproval. Between the years 1872–94, several constitutional alterations were brought about through this method.[17]

Twenty years later and in 1886, the question of holding a constitutional convention was again, in pursuance of article XIII, section 2, submitted to the people and the vote was in favor of it. Due, however, to a dispute between the governor and the legislature over the election of delegates, the convention was not convened until 1894.[18]

The constitution proposed by this convention and adopted by the people remained in force until 1938.[19] It expanded the convention article (art. XIV) by providing, among other things, for the election of delegates. It also set forth convention procedures. It reads:

AMENDMENT BY CONSTITUTIONAL CONVENTION

At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and also at such times as the Legislature may by law provide, the question, 'Shall there be a convention to revise the

Constitution and amend the same?' shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose the electors of every senate district of the State, as then organized, shall elect three delegates at the next ensuing general election at which members of the Assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates at large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the Assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the Constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees, and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns, and qualifications of its members. In case of a vacancy, by death, resignation, or other cause, of any district delegate elected to the convention, such vacancy shall be filled by the vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval. (Art. XIV, sec. 2, Constitution of 1894.)[20]

A reading of the above article indicates that once the question of holding a constitutional convention has been decided upon, the constitution intends that the procedures relating to the convention—indeed the work of the convention itself—should be self executing and free from legislative control. This was, of course, a complete change from the conduct attendant with earlier conventions.

The above article has clarified and settled two very important questions affecting legislative authority in New York: (1) the structure of the convention, and other details concerning it, and (2) the election of delegates. Prior to 1894, the legislature set the date on which conventions were to convene. However, a dispute in 1886 between the governor and the legislature over the details of the convention postponed the convention for some 8 years even though the people by referendum had voted to hold the convention. Under article XIV, however, once the question of holding a convention is approved, the time is automatically set for the meeting of the convention. So also, with the termination of the convention. Under former procedure the legislature would set a day certain on which the business of the convention was to be accomplished or finished. Experience had shown, however, that it was impractical to so limit the deliberations of the convention and in one instance (1867) the legislature had to pass supplementary legislation extending the time. Under article XIV any convention, once convened, remains in session "until the business of such convention shall have been completed." The only limitation with regard to this matter is the further provision that a 6 week interval must occur between the close of the convention, and the submission of its revised constitution to the people.[21]

Under article XIV, a majority of the convention constituted a quorum both for doing business and for approving proposed amendments. This provision was inserted to prevent a "mere handful" of delegates from being able to control the affairs of the meeting. It might be observed, however, that if the convention of 1777 had had such a limitation it no doubt would not have promulgated the State's first constitution. This was for the reason that the British, in occupying different parts of the State from time to time, made it impossible for a majority of delegates to be always present.

The article also provided that the convention—not the legislature or the courts—determine the rules of its own proceedings, its officers, and all issues relating to the election of the delegates. It is readily understood why a convention should be permitted to adopt rules to govern its own proceedings. However, on the issue of election, the power is not so apparent. The reason advanced at the time this provision was adopted was that by divesting the legislature and the courts of such power, the people, through the conventions, would have, ultimately, such power. It was the only method by which the people, in the final analysis, could have a final say over the legislature and the courts. In any event this safeguard rendered the convention free from legislative control as well as from judicial interference.

A reading and study of the constitutional convention history of New York clearly indicates that a convention clause with self-executing provisions is more expeditious than convention clauses calling for legislative control. Legislative action oftentimes results in delays. The governor, for example, may send his recommendations to the legislature and have that body reject them completely, or accept them only in part. The governor, in turn, has the power of vetoing the legislative acts thereby stymying the work of that body. With self-executing provisions, the convention, once agreed to by the people, eliminates these intermediate steps with their possible resulting delays and conflicts.

The constitutional convention of 1915 was held in pursuance to the amending article of the constitution providing for a referendum at 20-year intervals. The constitution proposed by this convention was rejected upon the ground that it was "not sufficiently progressive." [2]

In 1936, the people again, pursuant to the amending article of the constitution, voted to hold a constitutional convention. This resulted in the convention of 1938. An interesting sidelight on this convention was the fact that, a convention having been decided upon by the vote of the people, the governor asked the legislature to create a special commission to perform essential preparatory work for the convention just as it had created commissions to do preliminary work for the conventions of 1894 and 1915. However, the legislature did not adopt the governor's recommendation. Thereafter, the governor established an unofficial committee, nonpartisan and nonpolitical in character, which undertook the preparation of factual data on several subjects which were certain to be considered at the convention.[2]

The 1938 convention adopted a total of 57 separate measures proposing amendments to the then constitution. To expedite matters it was decided to group 50 of the proposals, which were considered uncontroversial, into 1 amendment. Eight other proposals were submitted singly and appeared on the ballot for the people's consideration as amendments Nos. 2 to 9, inclusive. These latter proposals

were considered controversial and if the people were to reject any of them, it would not affect the remaining amendments.[24]

At the general elections of 1938, six of the proposed amendments were approved. The only change here pertinent concerned the amending article which was renumbered article XIX. The only substantive change made relating to constitutional conventions was changing the date on which to start the 20-year intervals, so that the next convention will be voted upon in 1957, a year when no impending State or National election is likely to inject its issues into the deliberations of the convention.

RÉSUMÉ

In review, there have been 8 constitutional conventions in New York State—1777, 1801, 1821, 1846, 1867, 1894, 1915, and 1938—and of these, 4 have had their work approved and adopted by the people. The work of 2 conventions became effective without ever being referred to the people, and the work of 2 conventions was rejected.

The rejection of the proposed constitution of 1867 engendered a new step in constitutional procedure, for following its rejection, the legislature created the constitutional commission of 1872 to do extensive preliminary work and thus prepare well-reasoned and well-considered proposals to the constitution. Again, because of the rejection of the proposed 1915 constitution, the legislature created a judiciary committee, a body of experts with a knowledge of judicial problems, to submit recommendations containing constitutional changes on the judicial provisions of the constitution (article VI).

Another noteworthy development has been the establishment of special commissions and committees, prior to the convening of the conventions of 1894, 1915, and 1938, to undertake to make studies and prepare statistical and other data on particular subjects for the conventions' aid and consideration when they meet.

While there have been many revisions and many changes and amendments, the New York State constitution has not been much altered in its main structure.

In its history, the legislature has restricted the scope of a convention's deliberations authorizing it to consider, in 1 instance, only 2 subjects. It has, however, authorized unlimited revision on other occasions.

The conventions in like manner have submitted completely revised instruments for approval and also piecemeal changes, even though some conventions had general revisionary powers.

This history also discloses that the trend has been away from legislative and judicial control and toward autonomy on the part of the convention, enabling it to decide for itself the scope of its deliberations as well as the number and kinds of subjects it will consider. This trend has helped in eliminating delays as well as disputes which have arisen between the legislature and the governor. Moreover, the conduct of recent conventions has indicated that there is little likelihood of a so-called runaway convention which would get out of control and promulgate proposals effecting radical, unpopular, or unwanted changes in the constitution. On the contrary, past conventions have suggested only changes which reflected the tempo of the

times and only then on subjects which were in need of constitutional change.

CITATIONS

[1] Problems relating to legislative organization and powers, New York State Constitutional Convention Committee (1938), Albany, p. 336.
[2] Ibid.
[2a] New York, Constitution (1777), Art. VII.
[2b] Lincoln, The Continental History of New York (1906), I, 606. See footnotes to page 2, supra, where eight other state constitutions promulgated during the Revolutionary period expressly provided for constitutional changes.
[3] There was, however, sentiment in favor of a submission. See W. F. Dodd, The Revision and Amendment of State Constitutions (1910), 12.
[4] Lincoln, The Constitutional History of New York (1906), I, 607–608.
[5] Lincoln, ibid., I, 610.
[6] Problems relating to legislative organization and powers, New York State Constitutional Convention Committee (1938), Albany, p. 337.
[7] Lincoln, ibid., I, 615.
[7a] Lincoln, ibid., I, 624–628.
[8] Lincoln, Messages from the Governors (1909), II, 1055, 1057; Lincoln, ibid., I, 626.
[9] Lincoln, ibid., I, 628–629.
[10] Lincoln, ibid., I, 751.
[11] New York, Debates of the 1846 Convention, reported by William G. Bishop and William H. Attree. Lincoln, ibid., II, 210.
[12] Dougherty, Constitutional History of the State of New York (1915), 171–172; see also discussion of this question in chapter 7, supra.
[13] Lincoln, ibid., II, 9–217.
[14] New York, Constitution (1846), Art. XIII, sec. 2, Lincoln, ibid., II, 210.
[15] Lincoln, ibid., II, p. 234.
[16] Lincoln, ibid., II, pp. 268, 422.
[17] Lincoln, ibid., II, pp. 464–574.
[18] Lincoln, ibid., II, p. 682, III, pp. 1–30.
[19] New York, Constitution (1846), Art. XIII, sec. 2, provided that the legislature was to provide by law for the election of delegates.
[20] Lincoln, ibid., IV, p. 797.
[21] Lincoln, ibid., III, pp. 660–678.
[22] New York, Record of the 1915 Constitutional Convention (revised record), (J. B. Lyon Co., Albany, N. Y., 1916), 2 Vols. There was a judicial constitutional convention in 1921 which dealt with the judiciary provisions revision. It was called by the legislature pursuant to the amending article.
[23] New York State Constitutional Convention Committee (1938), (J. B. Lyon Co., Albany, N. Y., 1938), vol. I, pp. v–viii.
[24] New York, What's in the Proposed Constitution, published by National Municipal League (1938).

PART VIII

CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 20

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Introduction

Article V provides two methods for amending the Constitution: (1) Congress itself may propose amendments for ratification by three-fourths of the States; or (2) on application of the legislatures of two-thirds of the States, Congress shall call a Constitutional Convention for proposing amendments.

Twenty-seven proposed amendments have been referred to the States for ratification under the first method,[1] but there has never been, since the adoption of our Constitution, a Constitutional Convention. Because of the growing number of petitions submitted to Congress during recent years for a convention under the second method, and because of the complex issues involved, the question of when and how Congress shall call a convention creates considerable problems which should be faced and solved by responsible Government officials.

Article V of the Constitution is silent as to how and when conventions are to be convened and it does not state how conventions are to be formed or what rules of procedure are to govern their acts. In seeking answers to these problems, little aid can be obtained from the Constitutional Convention of 1787 which raised the issues but left them unanswered.[2]

Further, court decisions furnish little more than signpost assistance. They have relegated the matter of constitutional amendment to that area of constitutional law known as political questions.[3] While this leads one to believe that Congress alone may determine the matter there is nonetheless little guidance as to how and for what purposes constitutional conventions shall be convened.

Article V, for example, sets no requirements concerning what a State application must contain or what standards it must meet in order to be considered as validly made. One petition from the State of Maryland, for instance, was submitted by its house of delegates only.[4] It seems that such a petition is not an application from the "legislature"—both houses—of the State.

One application of a State legislature was vetoed by its governor.[5] This raises the question of whether the Constitution requires action solely by the houses of a State legislature or whether applications must be processed in accordance with procedures for enacting State laws which usually includes action by the State's chief executive.

Another question is, When have two-thirds of the legislatures made application for the calling of a convention? Some petitions to Con-

gress were made over 168 years ago.[6] Do these petitions remain permanently alive or do they lapse after a reasonable period of time?

Article V is also silent on the subject matter which may be considered by conventions, as well as on whether States, once having made application, may later rescind their actions.

Other important questions are whether, after the requisite number of petitions have been submitted, an unwilling Congress could be required to call a convention and, if called, whether it could control a convention with regard to its procedures and the scope of its deliberations. The latter issue is further complicated with respect to the extent to which the States themselves may influence and control the actions of a convention.

These problems and others are discussed at length in the thesis. This summary states the conclusions on the more important ones. Many of these questions can be resolved or otherwise rendered academic by the Congress through the adoption of statutes setting up guides and standards to govern (1) the submission of State applications, and (2) the procedures of constitutional conventions.

Validity of State applications

Article V states that Congress shall call a convention on the application of the "legislatures of two-thirds of the several States" but does not indicate whether the term "legislature" means the usual channels for statutory enactments, including the assent of the governors.

The term "legislature" in different relations does not always imply, as noted in *Smiley* v. *Holm*, the performance of the same function.[7] The legislature, for example, was intended to act (1) as an electoral body under article I, section 3, in the choice of United States Senators; (2) as a ratifying body, under article V, with respect to proposed amendments; and (3) as a consenting body with regard to the acquisition of land by the Federal Government under article I, section 8. Wherever, therefore, the term "legislature" is used in the Constitution, it is necessary to consider the nature of the particular action in view.

The Supreme Court, while never directly deciding, has indicated that in matters pertaining to the amending process, the assent of State governors is unneccessary because the State legislatures are performing a Federal function—clearly different from State lawmaking.[8] Furthermore, the Constitution speaks as of the time it was adopted,[9] and in the beginning very few of the original States granted the veto power to their governors.[10]

As further indicia that gubernatorial action was not intended, the Constitution uses both the term "executives" and the term "legislatures" in its text. If the framers of the Constitution had intended that "legislature" include gubernatorial action, they could have used the word "State" which could include the governor, or some other expression such as "the legislature with the approval of the executive." Both terms are in no way novel and both are used in other provisions of the Constitution.

Another question pertaining to State applications is whether Congress may regulate State procedure in proposing constitutional amendments. It is well established that the amending power is manifestly a Federal function in which the States take part in proposing conventions and ratifying amendments.[11] At the same time, however, State legislatures are not subject to absolute congressional

control. While the act of petitioning or ratifying is a Federal function, the legislature performing the act is nevertheless the State legislature and a clear distinction must be made between acts which are necessary and proper for Congress to carry out constitutional requirements, and those which seek to restrict the free will of State legislatures. Clearly Congress may not dictate to the States what they may or may not suggest in proposing a constitutional amendment or when they may propose it.

Cooley, in his book on constitutional limitations,[12] points out that when a constitution is adopted, there are in existence at the time of adoption known and settled rules and usages, which form a part of the law of the State in reference to which the constitution is evidently framed.

The Founding Fathers framed the Constitution against a background of existing colonial laws, legislatures, and customs. Historic precedents have left to legislatures the choosing of their own officers,[13] the determination of their own rules of proceedings,[14] and the election and qualification of their own members.[15] These so-called inherent rights are well documented in parliamentary rules. They were recognized by the United States Supreme Court in Field v. Clark [16] which held, among other things, that courts may not look behind legislative acts, once certified to as correct by their presiding officers, to determine whether their rules of procedure have been complied with.

While no doubt Congress could impose its will on the internal workings of State legislatures by refusing to recognize their actions if they do not comply with congressional mandates, it would be more prudent in the light of precedents to recognize that deliberative bodies regulate their own proceedings, and to accept State petitions when certified to, as having been validly adopted.

Control of constitutional conventions

Probably the most vital question relates to the power of Congress to bind a constitutional convention, or conversely, the power of a convention to ignore congressional acts seeking to restrict the scope of its deliberations. Assuming the right of Congress, for example, to call a convention into being, has it the further right to impose restrictions upon its actions and subject it to restraints?

Before considering the power and scope of a constitutional convention, it is important to distinguish between a revolutionary convention and a constitutional convention. A revolutionary convention is part of the apparatus of a revolution. Jameson says it consists of those bodies of men who, in times of political crisis, assume or have cast on them, provisionally, the function of government.[17] They supplant the existing government.

A constitutional convention on the other hand, as its name implies, is constitutional and, as Jameson states it, "ancillary and subservient and not hostile and paramount" to existing governments.[18]

A constitutional convention, therefore, that disregards the limits imposed upon it by its creators and seeks to exercise revolutionary powers, would cease to be a constitutional convention.

While the power of Congress to control a convention has never been determined by the courts or by the Congress, it seems that the whole scheme, history, and development of our Government, its laws and institutions, require control. Since a convention is called by Congress

at the request of the States, and since both, in the final analysis, represent the people, the ultimate source of power, a Federal constitutional convention, to act validly, would have to stay within the designated limits of the congressional act which called it. This does not mean that the convention may not exercise its free will on the substantive matters before it; it means only that its free will shall be exercised within the framework set by the act calling it into being.

It may be asked whether the convention, once convened, may adopt extralegal means in proposing amendments? A theory being urged today especially by the Communist Party in America, is the so-called right of revolution. According to its supporters, the "right of revolution" is a concept recognized by our Constitution and protected by it.

If such a theory be valid, it could be argued, since it presupposes changing our form of government in a manner other than that provided for in article V, that a constitutional convention, once convened, could disregard congressional directions and article V and adopt extra legal means in establishing a new and revised Constitution.

This doctrine was denounced in Dennis v. United States,[19] where the petitioners, leaders in the Communist Party in the United States, were indicted for conspiring to teach and advocate the overthrow of the United States by force and violence.[20] It was argued, on their behalf, that the people as sovereign have an "historically established right to advocate revolution" and that the Constitution recognized that "right."[21]

Judge Learned Hand, in denying that such a right exists under the Constitution, succinctly held that no government could tolerate it and exist.[22] He stated that revolutions are often "right" but a "right of revolution" is a contradiction in terms, for a society which acknowledged it would have to tolerate conspiracies to overthrow it.[23] The Supreme Court, in affirming the court of appeals, observed that the Constitution can only be changed by peaceful and orderly means.[24]

Time limitations on the submission of State applications

A convention, under article V, after the constitutional application, does not automatically come into being. It must be called by Congress. The Founding Fathers intended that Congress should be required to call a convention and expressly provided in article V that Congress "shall call a Convention." Among other reasons, they wanted to insure the right of the States to change the Constitution in the event Congress was unwilling to act.[25] It is doubtful, however, that there is any legal process or machinery to compel Congress to perform its duty if it is unwilling to do so. Courts, most likely, would refuse to entertain actions to accomplish this end for the same reason they have refused to issue mandamus writs on the President of the United States—the doctrine of separation of powers.[26]

However, whether Congress, assuming it is willing, should act and when, raises still further problems. Does an application remain always alive, or can it become legally ineffective because of a lapse of time or another intervening factor?

In dealing with an analogous question, the Supreme Court thought that ratification of a proposed amendment by the States ought to be reasonably related in time and that Congress could set up a "reasonable time" within which the States might act.[27] Applying this test

to State petitions seeking a convention, an application once made, would be valid for a reasonable time.

This conclusion raises the further question of what constitutes a "reasonable time." Orfield feels it should not be more than a generation.[28] Jameson takes the position that proposals for amending the Constitution reflect the sentiment of the people at a particular time, and action must be taken while the sentiment is fairly supposed to exist.[29] Congress, in proposing recent amendments, set a specific time limit of 7 years.

Since this issue involves an appraisal of a great variety of political, social, and economic conditions, it would seem that any time period wherein conditions remain substantially unchanged would be an acceptable period. History has shown that 7 years was acceptable, and in all probability longer periods of time would be reasonable too, so long as the political, social, and economic conditions do not change too greatly.

Concerning withdrawal of State applications, the present attitude among legislators at least, indicates that such action is permissible. Twelve States in the last 12 years alone have adopted resolutions rescinding previously made applications.[30] Furthermore, many States submit applications for the sole purpose of prodding Congress into taking action on a proposed amendment pending in the Congress, without ever having any real hope that Congress would call a convention. To hold these States bound to their petitions would not be politic or realistic. It would seem proper to permit withdrawal at least at any time prior to the time when two-thirds of the States have submitted applications for a convention on the same subject matter.

Ratification or rejection

Several writers had taken the position that since article V in terms provides for only affirmative acts, once having ratified or rejected a proposed amendment, a State cannot change its action.

Congress has previously been confronted with these questions. The Legislatures of Ohio and New Jersey first ratified the 14th amendment and then passed resolutions attempting to withdraw their consent. This Congress refused to permit them to do.[31] On the other hand, New Jersey, in connection with the 13th amendment, and Georgia, North Carolina, Virginia, and South Carolina, in connection with the 14th amendment, at first rejected these amendments but subsequently ratified them. These ratifications were treated as valid in each case.[32]

The question of ratification came before the Supreme Court in Coleman v. Miller,[33] and was declared to be a political question, subject to determination not by the courts but by Congress.

Because of the highly developed means of communication today, Congress, as a practical and political matter, could permit States to withdraw their ratifications, and conversely, to ratify proposals which they had previously rejected, up until such time as three-fourths of the States had ratified the proposed amendment. The old argument that such action would create uncertainty as to the exact status of a proposal at any given time loses merit in the light of today's speedy communication systems.

While Congress refused to permit Ohio and New Jersey to withdraw their approvals of the 14th amendment, it should be pointed out that

that amendment was adopted during the reconstruction days after the Civil War and Congress' action under those peculiar political conditions can hardly be accepted as a final settlement of this far reaching question.[34]

Applications to limit Federal taxing power

In recent years Congress has received petitions requesting a constitutional convention to propose amendments to the Constitution which would limit the power of the Federal Government to tax incomes, gifts and inheritances.[35] The amendments requested in these petitions are of 4 general types [36] but for purposes of discussion may be broken down into 2 classifications. First are those petitions seeking an amendment which would limit the maximum rate of Federal taxation of income, gifts and inheritances to 25 percent with a proviso in a number of such petitions that the limitation may be removed by a three-fourths vote of both Houses of Congress during time of war. The second group of applications contain amendments which would limit the Federal taxing power, not by stipulating a maximum rate of levy, but by maintaining several funds into which there would be paid specified portions of all taxes collected by the Federal Government. Provision is made for the distribution of the moneys in these funds to the several States in designated amounts and proportions.

As of June 1957, Congress had received 32 petitions from 27 different States relating in some manner to amending the Constitution so as to limit the Federal taxing power.[37] The legislatures in 12 States have reversed their previous positions, however, and have taken action rescinding their applications.[38] Three States have submitted two applications each, only one of which should be counted for each State.[39]

It might be well to mention that the petitions of 3 other States (not included in the 32 petitions above) requested that Congress itself propose a Federal tax limitation amendment.[40] Such petitions, of course, are not binding upon Congress insofar as summoning a constitutional convention is concerned.

The application of Maryland [41] transmitted to the Congress consisted of a resolution passed by its house of delegates only and may be discounted as not emanating from a State "legislature" as contemplated by article V.

The two houses of the Legislature of the State of Texas passed identical resolutions on the subject of limiting the Federal taxing power but neither house ever concurred in the resolution of the other.[42] Since no agreement between the two legislative chambers was ever reached and since no resolution was transmitted to the Congress, it would appear that the action of the State of Texas would not be an application of a State legislature within the meaning of article V.

How long all these petitions on tax limitation should remain valid has never been determined. The earliest petition on this subject was submitted by the State of Wyoming in 1939—about 18 years ago.[43] Tables 3, 4, and 5, appendix, infra, list all the petitions and indicate their present status.

Accordingly, as of June 195[illegible], and as [illegible] appendix, set forth,[44] Congress, without discounting any applications because of the lapse of time, could well conclude that 16 States have applications validly pending for a constitutional convention limiting the Federal power of taxation. This is 16 short of the necessary 32 applications required by the Constitution for the calling of a constitutional convention.

Conclusions and recommendations

A compilation of the various State applications calling for a Constitutional Convention discloses that over 200 applications have been made since 1789. These applications have covered many subjects: direct election of Senators, limitation on Federal taxing power, prohibition of polygamy, general revision of the Constitution, world federal government, repeal of the 18th amendment, Presidential tenure, treatymaking, taxation of Federal and State securities, protective tariff, wages and hours, gasoline tax, tidelands problem, control of trusts, grants-in-aid, popular ratification of amendments, constitutionality of State enactments, revision of article V, and the Townsend plan.[44]

If the Constitution requires merely that two-thirds of the States submit applications, a convention has been long overdue. Even if the petitions were classified according to subject matter, a convention would be overdue since on two occasions, at least, more than the necessary two-thirds of the States of the number of States then comprising the Union had submitted applications seeking a convention on the same subject matter.[45]

However, other considerations have a controlling effect on these issues. The Supreme Court has indicated that applications ought to be reasonably related in time, so as to reflect a widespread sentiment among the States during a given period in history. It has announced that the burden of deciding what constitutes a reasonable time is on the Congress of the United States.

In addition to the question of being reasonably related in time, some argue that applications should relate only to a complete or substantial revision of the Constitution. This argument is somewhat unrealistic since it would negate amendment by the alternative method of convention. The Founding Fathers intended this method to be workable and incorporated it into the Constitution to permit the States to initiate changes if Congress became oppressive or unwilling to act. Certainly such an intention contemplated piecemeal amendment as well as general revision. This view is supported not only by the constitutional debates at the time of the Convention in 1787, but by many eminent legal authorities since then. Furthermore as a matter of historical precedent, the States have been submitting applications on specific subjects over the years with the number of applications for limited conventions far outnumbering applications for general conventions.

Even with these questions out of the way, there are many procedural questions to be dealt with, among them such matters as the effect of the governor's veto of an application, a State's rescinding action after it has submitted its application, the physical act of forming a convention, providing for its membership, rules of order, and most important of all, outlining the scope of the convention's deliberations.

Inasmuch as the courts have indicated that many of these issues fall into the category of "political questions," not justiciable, Congress may resolve many of them by enacting implementing legislation, containing provisions setting up standards and guides to govern Contitutional Conventions.

These and other issues have already been discussed in the preceeding chapters of this thesis. Two draft bills have been prepared

which set up a framework for giving effect to the application procedure in accordance with the provisions of article V of the Constitution. The first draft bill provides a procedure for processing State applications for a constitutional convention in the Congress, and for convening conventions. The second draft amends the rules of the House so as to make provision for the processing of the applications once they have been submitted. The two pieces of legislation which are set out in their entirety beginning with pages 79 and 82 provide in substance as follows:

Analysis of draft bill for calling a Constitutional Convention

Applications for a convention may request either a general convention or a convention to propose specific amendments (sec. 2).

[As discussed in pp. 19–20, supra, the form of our government warrants a general revision of the Constitution if the people so wish it. In fact, the first two petitions submitted within two years after the Constitution's adoption were petitions calling for a general revision of the Constitution. Specific amendment is also authorized and the history of petitions submitted in the last fifty years clearly indicates a recognition of this form of amendment by a convention.]

State legislatures will determine all questions connected with the adoption of State applications (sec. 3 (b)).

[As developed in chapter 5, parliamentary precedents and court decisions recognize the rule that legislative bodies should have control over their own proceedings.]

Approval of governor is not to be required in application process (sec. 3(c)).

[Court decisions indicate, as pointed out in chapter 4, and the history of amendments to the Constitution show, that the action of the executive power is not required in the amending process.]

Applications must contain certain basic data including the exact text of the State resolution (sec. 4 (a)).

[In order that amendments may be properly classified and counted, it is proposed that the exact text of the State petitions be submitted so that the subject matter of each petition may be authoritatively established, and also to make certain that applications meet the procedural requirements set out in this draft legislation. It is not the underlying intention of this provision, however, to require that the text of applications be identical to be classified together. If they relate generally to the same subject they are to be classified together, since a convention, if called, would be free to adopt its own language in drafting a proposal on the subject.]

An application, once submitted, shall remain valid for 15 years and for such longer time as Congress deems necessary if two-thirds of the States have submitted applications on the same subject (sec. 5 (a)).

[In line with court decisions that proposals should not remain everlastingly alive, but must be "contemporaneous," a 15-year cutoff date was inserted. The same time limitation has been adopted in recent House resolutions and in some State petitions calling for the revision of article V itself.]

States may rescind their applications at any time except when two-thirds of the States have valid applications pending on the same subject (sec. 5 (b)).

[While Congress has never allowed a State, once having ratified, to withdraw its ratification of an amendment, it is believed that because of the present-day means of speedy communications (as noted in chapter 14 and p. 49), and the distinguishing features between applications for conventions and ratifications of amendments, withdrawals should be permitted.]

Congress, when the requisite number of applications have been received, shall call a constitutional convention (sec. 6 (a)), and the Chief Justice of the United States shall preside until the convention is organized (sec. 8).

[The first part of this provision repeats the mandate of article V of the Constitution. Further, a high Government official would seem to be the most appropriate person to initiate the tremendously important task of actually calling a convention to order, and it is believed that the office of Chief Justice of the United States, who is to act as a temporary chairman only, is sufficiently removed from active politics to avoid criticism.]

Delegates are to be elected in accordance with State law (sec. 7 (a)), and each State shall have as many delegates as it has Representatives in Congress (sec. 7 (a)).

[This provision places election procedures in the States, in line with the practice approved by Congress when it proposed the 20th amendment to the Constitution. In providing that delegates should be chosen on the same geographical basis as Congressmen, it is felt that this method, on a national basis, is the most representative and best proportioned.]

Each State is to have one vote to be cast as the majority of its delegates decide (sec. 9 (a)).

[Section 7 provides for representation on a proportional basis; this section gives each State equal suffrage. This procedure is in line with the 12th amendment and article 2, section 1, clause 3, of the United States Constitution which directs the House of Representatives in cases of tie in the electoral votes for President to vote by States, each having one vote.]

The convention will be limited to the consideration of those subjects set out in the congressional resolution calling the convention into being (sec. 8).

[The purpose of this provision, as discussed in chapters 6, 7, 9, and 10, is to give Congress and the States control over the scope and work of constitutional conventions, and to prevent so-called runaway, extra-legal, or revolutionary conventions.]

The convention will be in session not more than 1 year (sec. 9 (c)), and its proposals will be transmitted through Congress to the States for ratification (sec. 11).

[To limit the time of the convention and also to provide for congressional control and approval of the convention's work. This procedure was used by the Constitutional Convention of 1787.]

The presiding officers in Congress must transmit a convention's proposals to the States within 3 months of their receipt but only if Congress does not by affirmative action disapprove the proposals (sec. 12 (a)).

[This procedural provision follows the method adopted by Congress in considering reorganization acts. The burden is placed on the Congress to take action. If it does not the measure is automatically processed by the presiding officers.]

Amendments proposed by the convention must be ratified by the States within the time set by Congress for ratification (sec. 13 a).

[Under the provision Congress may set up a reasonable time limitation. It has limited the time for ratifying in the adoption of the 18th, 20th, 21st, and 22d amendments to the Constitution. (See chapters 11 and 13.)]

Congress may not recall a proposed amendment (sec. 12 (b)).

[Jameson states that the power to submit proposals to the States does not include the power to recall them; otherwise, in recalling proposals, Congress would also have the power to definitively reject such proposals.]

Gubernatorial action is removed from the ratification process (sec. 14 (b)), and States may rescind their action at any time prior to the ratification by three-fourths of the States (sec. 16 (a)). A State may also ratify an amendment it has previously rejected (sec. 16 (b)).

[As previously noted, and in line with court decisions and the practice adopted with other amendments, executive action is not requisite in the amending process. Since the exact status of proposed amendments may now be easily and quickly ascertained, it is no longer necessary to hold States bound to their ratifications unless three-fourths of the States have also ratified the same proposal. Rejection of an amendment presents no real problem since Congress, in the past, has permitted States who have rejected an amendment to later ratify the same.]

Congress will determine all questions relating to ratification (sec. 16 (c)), and the Administrator of General Services, when the requisite number of States have ratified, will officially proclaim the new amendment to be part of the Constitution (sec. 17).

[This provision concerns a "political question" and it is generally recognized that Congress has the power to decide all questions relating to ratification. Official proclamation by the Administrator of General Services is a procedural provision and follows the present law relating to amendments.]

Analysis of draft resolution amending rules of the House of Representatives for processing of State applications seeking Constitutional Conventions

The Speaker is to refer all State applications for a constitutional convention to the House Judiciary Committee (sec. 1(a)).

[This provision follows the present practice for referral of State applications to a congressional committee.]

Within 60 days after the beginning of each session of Congress, the Judiciary Committee must report to the House the number of petitions, according to subject matter, which have been received during the preceeding 15 years (sec. 1 (b)), together with the number of States which have rescinded their applications (sec. 1(b)).

[The 60-day provision is to prevent delay or deferring of action by a committee of Congress. The remainder of the section carries out the provisions of sections 4 and 5 of the draft bill.]

If, during a 15-year period, two-thirds of the States have submitted applications on a particular subject, a resolution must be introduced in the House calling for a convention within 2 years for the purpose set forth in the State applications (sec. 2).

[An enabling provision to initiate action by a House of Congress once the formal requirements outlined in the draft bill have been met.]

The resolution is to be referred to the Judiciary Committee which must report back to the House within 30 days or be automatically discharged (sec. 3 (a)).

[To give preference to this legislation over other matters pending in committee and to provide for not only immediate consideration of the measure by the committee, but also to require the committee to take final action without delay. Consideration was given to setting up a joint committee of the House and Senate; also to a separate commission. However, since applications only trickle in over the years there would be very little work to justify the existence of a joint committee or a commission. The judiciary committees of the Congress are ideally set up to handle the work involved in State applications.]

The resolution is to be considered immediately by the House (sec. 3 (b)), and may be passed by a simple majority vote (sec. 4).

[To give measure highest priority on floor of the House, and at the same time reqlire only a simple majority vote of the members present at time measure is considered.]

If, prior to taking action on a House resolution, the Senate passes a similar resolution, the House will nevertheless consider the House resolution, and, if acted upon favorably, shall then constitute the House resolution for the Senate resolution and adopt the same (sec. 5).

[This provision is similar to the present Rules of the House of Representatives with regard to separate but similar measures which are considered on the floors of both Houses of Congress at the same time or approximately the same time.]

In the absence of a House resolution, a Senate resolution shall be processed in the same manner as though it had been introduced as a House resolution (sec. 6).

[Follows present House rules with regard to a measure which has passed the Senate and on which there is similar measure pending in the House.]

A Congressman may, at any time, inquire whether a sufficient number of applications have been submitted requiring the calling of a convention (sec. 7).

[To authorise Members of Congress to require an accounting by the Judiciary Committee if there is doubt concerning the present status of applications.]

LEGISLATIVE PROPOSAL

A BILL

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Constitutional Convention Act."

ACTION OF STATE LEGISLATURES

SEC. 2. The legislature of a State, in making application for a constitutional convention under article V of the Constitution of the United States, shall, after adopting a resolution pursuant to this Act, petition the Congress stating, in substance, that the legislature favors the calling of a constitutional convention for the purpose of—

(a) proposing a general revision of the Constitution of the United States; or

(b) proposing one or more amendments of a particular nature to the Constitution of the United States stating the specific nature of the amendments to be proposed.

SEC. 3. (a) For the purpose of adopting a resolution pursuant to section 2, the State legislature shall adopt its own rules of procedure.

(b) Questions concerning the State legislative procedure and the validity of the adoption of a State resolution cognizable under this Act are determinable by the State legislature and its decisions thereon are binding on all others, including State and Federal courts, and the Congress of the United States.

(c) A State resolution adopted pursuant to this Act is effective without regard to whether it is approved or disapproved by the Governor of the State.

SEC. 4. (a) Within 60 days after a resolution is adopted by the legislature of the State, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House.

(b) Each copy of the application shall contain—

(1) the title of the resolution,

(2) the exact text of the resolution, signed by the presiding officer of each House of the legislature, and

(3) the date on which the legislature adopted the resolution,

and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

SEC. 5. (a) An application submitted to the Congress pursuant to this Act, unless sooner rescinded by the State legislature, shall remain effective for 16 calendar years after the date it is received by the Congress, unless two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same subject, in which event the application shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 8, calling for a constitutional convention.

(b) A State, upon notification to the Congress in accordance with section 4, may rescind its application calling for a Constitutional Convention except that no State may rescind when two-thirds or more of the State legislatures have applications pending before the Congress seeking amendments on the same subject.

(c) The Congress of the United States has the sole power of determining whether a State's action to rescind its application has been timely made.

COMPOSITION AND PROCEEDINGS OF THE CONVENTION

SEC. 6. (a) Congress, under such rules as it may deem necessary, shall adopt concurrent resolutions calling for the convening of a Federal Constitutional Convention. It may, in such resolution designate the place and time of meeting and it shall set forth therein the particular subjects which the convention is to consider.

(b) When no place or time is specified in the concurrent resolution calling the convention, the convention shall be held in the District of Columbia not later than two years after the adoption of the resolution.

SEC. 7. (a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Representatives in Congress. Each delegate is to be elected or appointed in the manner provided by State law. Alternate delegates, in the number established by State law, shall be elected or appointed at the same time and in the same manner. Any vacancy occurring in the State delegation shall be filled by appointment of one of the alternate delegates in the manner provided at the time of his election or appointment as an alternate delegate. No alternate delegate shall take part in the proceedings of the convention unless he is appointed a delegate.

(b) The Secretary of State of each State, or, if there be no such officer, the person charged by State law to perform such function, shall certify to the Chief Justice of the United States the name of each delegate and alternate delegate appointed or elected pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation at the rate of $50 per day for each day of service and shall be compensated for traveling and related expenses in accordance with the Travel Expense Act of 1949, as amended. The convention shall decide the compensation of alternate delegates and employees of the convention.

(e) The Congress shall appropriate moneys for the payment of all expenses of the convention.

SEC. 8. (a) The Chief Justice of the United States shall convene the constitutional convention. He shall administer the oath of office to the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe an oath not to attempt to change or alter any section, clause or article of the Constitution or propose additions thereto which have not been proposed or fixed by the resolution calling the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as it may adopt.

(b) The performance of the duties required of the Chief Justice of the United States under this Act, shall not be deemed to disqualify him from participating in any case or controversy before the United States Supreme Court.

SEC. 9. (a) Each State shall have one vote. The vote of each State shall be cast on any question before the convention as the majority of the delegates from that State, present at the time, shall agree. If the delegates from any State present are evenly divided on any question before the convention, the vote of that State shall not be cast on the question.

(b) The convention shall keep a daily record of its proceedings and publish the same. The votes of the States on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

SEC. 10. (a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a majority of the total vote cast on the question.

(b) No convention called under this Act to propose an amendment of a limited nature may propose any amendment or amendments, the general nature of which differs from that stated in the concurrent resolution calling the convention. All controversies arising under this subsection shall not be justiciable but shall be determined by the Congress of the United States.

SEC. 11. The presiding officer of the convention, within 1 month after the termination of its proceedings, shall submit the exact text of the amendments agreed upon at the convention to the Congress for approval and transmission to the several States for their ratification.

TRANSMITTAL OF PROPOSED AMENDMENTS

SEC. 12. (a) The President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit the proposed amendments to the Constitution to the Administrator of General Services for submission to the States upon the expiration of the first period of 3 months of continuous session

of the Congress following the date on which such proposals are received, but only if prior to the expiration of such period Congress has not adopted a resolution disapproving the submission of the proposed amendments to the States.

(b) Whenever the President of the Senate and the Speaker of the House of Representatives have jointly transmitted proposed amendments to the Administrator of General Services, the Administrator shall forthwith transmit, with his certification thereof, exact copies of the proposed amendments to the legislatures of the several States.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 13. (a) Amendments proposed by the convention pursuant to and in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when ratified by the legislatures of three-fourths of the States. Congress, in the resolution adopting the proposal, may set the time within which the proposal shall be inoperative unless ratified by the legislatures of three-fourths of the States.

(b) Congress may not recall a proposed amendment after it has been submitted to the States by the Administrator of the General Services Administration.

SEC. 14. (a) For the purpose of ratifying proposed amendments pursuant to this Act the State legislatures shall adopt their own rules of procedure except that the acts of ratification shall be by convention or by State legislative action as the Congress may direct. All questions concerning the validity of State legislative procedure shall be determined by the legislatures and their decisions shall be binding on all others.

(b) Any State resolution ratifying a proposed amendment to the Constitution shall be valid without regard to whether it has been assented to by the Governor of the State.

SEC. 15. The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State resolution ratifying the proposed amendment or amendments to the Administrator of General Services.

SEC. 16. (a) Any state may rescind its ratification of a proposed amendment except that no state may rescind when there are existing valid ratifications by the legislatures of three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it had previously rejected the same proposal.

(c) The Congress of the United States shall have the sole power of determining all questions relating to the ratification, rescission, or rejection of amendments proposed to the Constitution of the United States.

SEC. 17. The Administrator of General Services when three-fourths of the legislatures of the several States have adopted a proposed amendment to the Constitution of the United States, shall issue a proclamation proclaiming the amendment to be a part of the Constitution of the United States.

SEC. 18. An amendment proposed to the Constitution of the United States shall be effective from the date on which the legislature of the last State necessary to constitute three-fourths of the legislatures of the United States, as provided for in article V, has ratified the same.

LEGISLATIVE PROPOSAL

HOUSE RESOLUTION*

To provide rules for the processing of State applications for a Federal Constitutional Convention in the House of Representatives.

Be it resolved in the House of Representatives of the United States of America, That—

(a) The Speaker of the House of Representatives shall refer each application submitted, pursuant to the Federal Constitutional Convention Act, to the House Committee on the Judiciary.

(b) Within sixty days after the commencement of each regular session of the Congress of the United States, the House Committee on the Judiciary shall report to the House concerning the applications received pursuant to the Federal Constitutional Convention Act during the preceding fifteen calendar years. The reports shall be printed in the Congressional Record and shall state—

(1) the total number of applications calling for a convention to propose a general revision of the Constitution,

(2) the total number of applications calling for conventions to propose specific amendments of a limited nature to the Constitution, together with the total number received with respect to each such amendment,

(3) the date of receipt of each application,

(4) the particular State applications, if any, on which states have taken rescinding action, and

(5) such other information as the committee considers appropriate.

SEC. 2. If, during a fifteen year period, applications are received from the legislatures of two-thirds of the several States and

(a) each application seeks the calling of a convention to propose an amendment generally revising the Constitution of the United States, or

(b) each application seeks the calling of a convention to propose an amendment of the same general nature as each other application,

the chairman of the Committee on the Judiciary of the House of Representatives shall, and any other Member may, introduce a concurrent resolution calling for a Constitutional Convention within two years for the purpose sought in the applications.

SEC. 3. (a) Concurrent resolutions calling a convention shall be referred to the Committee on the Judiciary. The committee shall report on the resolution within thirty calendar days after its introduction. If it does not report the resolution before the expiration of thirty calendar days after its introduction, the committee shall be automatically discharged from all further consideration of the measure.

(b) When the committee has reported or has been discharged from further consideration of such a concurrent resolution, it shall, at any time thereafter, be in order for a Member to move to proceed for the immediate consideration of such resolution.

SEC. 4. (a) A concurrent resolution calling for a Constitutional Convention may be adopted by the affirmative vote of a majority of those present and voting.

(b) Except as otherwise provided in this resolution, the rules of the House of Representatives shall govern the conduct of the proceedings hereunder.

SEC. 5. If, prior to the passage by it of a concurrent resolution, the House of Representatives receives from the Senate a resolution calling for a Constitutional Convention for proposing the same amendment, it shall proceed to consider its own resolution and, if favorably acted upon, shall substitute and adopt the resolution of the Senate therefor with such amendment as it deems necessary to reflect its own action.

SEC. 6. Where no similar resolution with respect to such amendment as shall be received from the Senate has been introduced or referred to the Committee on the Judiciary, the resolution from the Senate shall be treated in the same manner as concurrent resolutions under section 3.

*This draft is drawn to reflect changes in the Rules of the House of Representatives. A similar resolution would be needed to provide for Senate procedure. .

SEC. 7. Any Member may introduce a resolution to determine—

(a) whether the rescinding action of a State legislature has been timely made or is otherwise entitled to recognition under the provisions of the Federal Constitutional Convention Act, and

(b) whether a sufficient number of applications have been submitted as to require the introduction of a resolution calling for a constitutional convention.

CITATIONS

[1] Twenty-two amendments have been certified as part of the United States Constitution. Five amendments have been proposed by the Congress but have not been ratified by a sufficient number of States. They relate to (a) the apportionment of Representatives in the House (submitted 1789), (b) the compensation of Senators and Representatives (submitted to the States in 1789), (c) acceptance by United States citizens of foreign titles of nobility (submitted 1810), (d) a proposal relating to slavery (submitted in 1861) and (e) child labor (submitted in 1924) (U. S. Congress, House, 83d Cong., 1st sess., 1953, H. Doc. 211, pp 16–17).

[2] Farrand, The Records of the Federal Convention (1937), II, 558. Madison posed these questions "How was a Convention to be formed? By what rule decide? What the force of its acts?"

[3] See Coleman v. Miller, 307 U. S. 433 (1939).

[4] Maryland, House Journal (1939), p. 899.

[5] Pennsylvania, Session Laws (1943), p. 922.

[6] In 1789 New York and Virginia sought a Constitutional Convention; see Table 1, appendix.

[7] 285 U. S. 355, 365 (1932).

[8] Hawke v. Smith No. 1, 253 U. S. 221 (1920).

[9] Ibid., p. 227.

[10] Only two States had veto powers by the chief executive, Massachusetts and New York, Massachusetts Constitution (1780), ch. 2, sec. 1, Thorpe, American Charters Constitutions and Organic Laws, III, 1890; Laws of New York (1789), ch. 11.

[11] Hawke v. Smith No. 1, 253 U. S. 221, 229 (1920).

[12] Cooley, Thomas M., A Treatise on Constitutional Limitations (8th ed.; 1927) I, 267.

[13] In re Speakership, 15 Col. 520 (1891).

[14] French v. Senate, 146 Cal. 604 (1905).

[15] People v. Mahaney, 13 Mich. 481 (1865).

[16] 143 U. S. 649 (1892).

[17] Jameson, John A., A Treatise on Constitutional Conventions (4th ed.; 1887), p. 6.

[18] Ibid., p. 10.

[19] 183 Fed. 2d 201 (2d Cir. 1950), aff'd. 341 U. S. 494 (1951).

[20] 64 Stat. (1952), 671; 18 U. S. Code, § 11 et seq.

[21] Brief of petitioners before U. S. Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951)

[22] 183 Fed. 2d 201 (2d Cir., 1950).

[23] Ibid., p. 213.

[24] U. S. v. Dennis, 341 U. S. 494, 501 (1951).

[25] Farrand, The Records of the Federal Convention of 1787 (Rev. ed., 1937), I, 203.

[26] Mississippi v. Johnson, 4 Wall. 475 (U. S. 1866); see also on political, nonjusticiable questions Willoughby, The Constitutional Law of the United States (1929), I, 307.

[27] Dillon v. Glass, 256 U. S. 368, 374 (1921).

[28] Orfield, Lester B., The Amending of the Federal Constitution, Chicago, Callahgan & Co. (1942), p. 42.

[29] Jameson, John A., A Treatise on Constitutional Conventions (4th ed.; 1887), p. 634.

[30] Alabama, 91 Congressional Record 6631; Arkansas, 91 Congressional Record 1309; Illinois, 98 Congressional Record 742; Iowa, 91 Congressional Record 2383; Kentucky, 97 Congressional Record 10973; Massachusetts, 98 Congressional Record 4641; Louisiana, 100 Congressional Record 9420; Maine, 99 Congressional Record 4311; Nebraska, 99 Congressional Record 6283; New Jersey, 100 Congressional Record 11943; Rhode Island, 95 Congressional Record 8286; Wisconsin, 91 Congressional Record 8286.

[31] U. S. Congress, 40th Cong., 2d sess., Congressional Globe, p. 4070.

[32] 15 Stat. 709, 710 (1868).

[33] Coleman v. Miller, 307 U. S. 433, 438 (1939).

[34] See F. W. Grinnell, Finality of State's Ratification of a Constitutional Amendment, 25 A. B. A. J. 192 (1926).

[35] See Table 3, appendix.

[36] See Table 6, appendix.

[37] See Table 3, appendix.

[38] See Tables 3 and 4, appendix.

[39] See Tables 3 and 4, appendix. Since it is the number of States rather than the number of petitions which is controlling, only one application from each State can be considered valid.

[40] Nevada, Cong. Rec. Daily, June 28, 1952, p. 8599; Montana, Cong. Rec. Daily, March 26, 1951, pp 2612–2614 (vetoed by Gov.); Massachusetts, Cong. Rec. Daily, March 4, 1952, p. 1611.

[41] 84 Cong. Rec. 3320 (1939).

[42] Texas, House Journal (1943), 48 Reg. Sess., pp. 2339, 2391; Texas, Senate Journal (1943), 48 Reg. Sess. pp. 1120-1121.

[43] See Tables 4 and 5, appendix.

[44] Tables 3, 4, and 5 should be read together.

[45] See table 1, appendix.

[46] Direct election of Senators, and prohibition of polygamy, table 2, appendix, items 1 and 2.

APPENDIX

TABLE 1.—*State applications to Congress to call conventions to propose constitutional amendments (1787–1957)*

State	Year	Passed House	Passed Senate	Source of reference	Amendment to be presented
Alabama	1833	(1)	(1)	23 Senate Journal 194	Against protective tariff.
Do	1943	June 24	July 1	89 Congressional Record 7523	Limitation of Federal taxing power.
Arkansas	1901	Apr. 15	Apr. 16	45 Congressional Record 7113	Direct election of Senators.
Do	1903	Mar. 2	Feb. 27	(2)	Limited to direct election of Senators.
Do	1911	Apr. 24	Apr. 28	(2)	Do.
Do	1943	Mar. 1	Mar. 2	98 Congressional Record 742	Limitation of Federal taxing power.
California	1903	Feb. 16	Feb. 24	(2)	Limited to direct election of Senators.
Do	1909	Mar. 13	Mar. 18	(2)	Prohibition of polygamy.
Do	1911	Mar. 26	Mar. 18	47 Congressional Record 2000	Direct election of Senators.
Do	1935	June 16	June 14	79 Congressional Record 10814	Taxation of Federal and State securities.
Do	1935	do	do	79 Congressional Record 10814	Federal regulation of wages and hours of labor.
Do	1949	Mar. 24	Mar. 31	95 Congressional Record 4568	World federal government.
Do	1952	Apr. 1	do	98 Congressional Record 4003–4004	Distribution of proceeds of Federal taxes on gasoline.
Colorado	1901	Mar. 31	Jan. 17	35 Congressional Record 112; 45 Congressional Record 7113.	General, including direct election of Senators.
Connecticut	1915	Mar. 4	Mar. 11	(2)	Prohibition of polygamy.
Do	1949	May 13	May 3	95 Congressional Record 7689	World federal government.
Delaware	1907	Jan. 23	Feb. 1	41 Congressional Record 3011, 3591	Prohibition of polygamy.
Do	1943	Apr. 9	Mar. 25	89 Congressional Record 4017	Limitation of Federal taxing power.
Florida	1943	May 19	May 26	89 Congressional Record 5090	World federal government.
Do	1945	Apr. 25	Apr. 26	Florida Journal (1945)	Do.
Do	1945	May 3	May 2	91 Congressional Record 4965	Treaty making.
Do	1949	May 6	May 9	95 Congressional Record 7000	World federal government.
Do	1951	Apr. 27	Apr. 20	97 Congressional Record 5155	Limitation of Federal taxing power.
Georgia	1832	(1)	(1)	23 Senate Journal 65	General.
Do	1952	Jan. 21	Jan. 22	98 Congressional Record 1052	Limitation of Federal taxing power.
Do	1952	(1)	(1)	98 Congressional Record 1057	Treaty making.
Do	1955	Jan. 20	Jan. 21	101 Congressional Record 1532, 2086, 2274	State control of school systems.
Idaho	1901	Feb. 21	Feb. 14	35 Congressional Record 306; 45 Congressional Record 7114.	Direct election of President and Senators.
Do	1903	Mar. 3	Feb. 28	(2)	Limited to direct election of Senators.
Do	1927	Mar. 1	Feb. 18	69 Congressional Record 455	Taxation of Federal and State securities.
Do	1957	(1)	(1)	Daily, Congressional Record, 4300	Revision of article V.
Illinois	1861	(1)	(1)	Laws of Illinois (1861) 281	General.
Do	1903	Apr. 9	Feb. 10	45 Congressional Record 7114	General, including direct election of Senators.
Do	1907	May 9	May 10	42 Congressional Record 164, 359	Limited to direct election of Senators.
Do	1909	Apr. 1	Apr. 7	(2)	Do.
Do	1911	Feb. 24	May 11	47 Congressional Record, 1298	Control of trusts.
Do	1913	Mar. 12	Feb. 27	50 Congressional Record, 120–121	Prohibition of polygamy.
Do	1943	Mar. 17	Mar. 10	89 Congressional Record, 2516	Limitation of Presidential tenure.
Do	1943	May 5	May 26	98 Congressional Record, 742	Limitation of Federal taxing power.
Do	1953	(1)	(1)	99 Congressional Record 9864, 10052, 10623	Revision of article V.
Indiana	1861	(1)	(1)	Senate Journal, 420, 421, 36 Cong., 2d sess	General.
Do	1907	Feb. 26	Feb. 28	45 Congressional Record, 7114	Direct election of Senators.
Do	1943	Mar. 2	Mar. 6	98 Congressional Record, 1056	Limitation of Federal taxing power.

Do	1957	(1)	(1)	Daily Congressional Record, 5760–5761	Revision of article V.
Do	1957	(1)	(1)	Daily Congressional Record, 5761–5762	Treaty making.
Do	1957	(1)	(1)	Daily Congressional Record, 5762–5763	Reapportionment.
Do	1957	(1)	(1)	Daily Congressional Record, 5763–5764	Limitation of Federal taxing power.
Do	1957	(1)	(1)	Daily Congressional Record, 5764–5765	Balancing the budget.
Iowa	1904	Mar. 19	Mar. 9	38 Congressional Record, 4959	Limited to direct election of Senators.
Do	1906	Apr. 3	Mar. 31	(2)	Prohibition of polygamy.
Do	1907	Feb. 28	Feb. 13	42 Congressional Record, 204, 895; 45 Congressional Record, 7114.	General, including direct election of Senators.
Do	1909	Apr. 3	Apr. 9	44 Congressional Record, 1620; 45 Congressional Record, 7114.	Do.
Do	1941	Feb. 17	Apr. 10	67 Congressional Record, 3172	Limitation of Federal taxing power.
Do	1943	Mar. 12	Mar. 16	89 Congressional Record, 2728	Limitation of Presidential tenure.
Do	1951	Mar. 28	Mar. 28	97 Congressional Record, 3939	Limitation of Federal taxing power.
Kansas	1901	(1)	(1)	(2)	General, including direct election of Senators.
Do	1905	(1)	(1)	39 Congressional Record, 3466	Do.
Do	1907	Jan. 28	Feb. 5	41 Congressional Record, 2925, 2929, 3005, 3072	Do.
Do	1909	(1)	(1)	45 Congressional Record, 7114	Direct election of Senators.
Do	1951	(1)	(1)	97 Congressional Record, 2936	Limitation of Federal taxing power.
Kentucky	1861	(1)	(1)	Senate Journal, 189, 190, 36 Cong., 2d sess	General.
Do	1902	Jan. 15	Jan. 17	45 Congressional Record, 7115	Direct election of Senators.
Do	1944	Mar. 8	Mar. 14	90 Congressional Record, 4040	Limitation of Federal taxing power.
Louisiana	1907	Nov. 15	Nov. 20	42 Congressional Record 5906; 45 Congressional Record 7115.	General, including direct election of Senators.
Do	1916	May 31	May 30	(2)	Prohibition of polygamy.
Do	1920	May 26	June 23	60 Congressional Record 34	Popular ratification of amendments.
Do	1950	June 12	June 12	99 Congressional Record 320	Limitation of Federal taxing power.
Maine	1907	Feb. 24	Feb. 21	(2)	Prohibition of polygamy.
Do	1911	Feb. 22	do	46 Congressional Record 4280, 4339	Limited to direct election of Senators.
Do	1941	Apr. 17	Apr. 15	87 Congressional Record 3370	Limitation of Federal taxing power.
Do	1949	Apr. 1	Apr. 4	95 Congressional Record 4348	World federal government.
Do	1951	May 15	May 15	97 Congressional Record 6033	Limitation of Federal taxing power.
Maryland	1908	Mar. 30	Mar. 26	(2)	Prohibition of polygamy.
Do	1914	Apr. 4	Mar. 17	(2)	Do.
Do	1939	(1)	(1)	84 Congressional Record, 3320	Limitation of Federal taxing power.
Massachusetts	1931	Mar. 13	Mar. 10	75 Congressional Record 45	Repeal of 18th amendment.
Do	1941	Apr. 29	Apr. 24	87 Congressional Record 3812	Limitation of Federal taxing power.
Michigan	1901	May 8	Apr. 9	35 Congressional Record 117, 293; 45 Congressional Record 7116.	Limited to direct election of Senators.
Do	1913	Apr. 16	Apr. 21	50 Congressional Record 2290	Prohibition of polygamy.
Do	1941	May 16	Apr. 29	87 Congressional Record 3904	Limitation of Federal taxing power.
Do	1943	Mar. 16	Mar. 12	89 Congressional Record 2944	Limitation of Presidential tenure.
Do	1949	Apr. 7	Apr. 11	95 Congressional Record 5628	Limitation of Federal taxing power.
Do	1956	Mar. 22	Apr. 4	102 Congressional Record 7240, 7241, 7304	Revision of article V.
Minnesota	1901	Feb. 2	Jan. 31	34 Congressional Record 2560, 2615, 2680, 2796; 45 Congressional Record 7116.	Limited to direct election of Senators.
Do	1909	Apr. 2	Mar. 24	(2)	Prohibition of polygamy.
Do	1911	Mar. 1	Jan. 27	(2)	Direct election of Senators.
Mississippi	1940	Apr. 29	Apr. 29	86 Congressional Record 6025	Limitation of Federal taxing power.

See footnotes at end of table, p. 86.

TABLE 1.—*State applications to Congress to call conventions to propose constitutional amendments (1787–1967)*—Continued

State	Year	Passed House	Passed Senate	Source of reference	Amendment to be presented
Missouri	1901	Feb. 11	Mar. 8	(2)	Direct election of Senators.
Do	1903	Mar. 3	Mar. 13	(2)	Do.
Do	1905	Feb. 17	Mar. 14	40 Congressional Record 137	Do.
Do	1907	Feb. 27	Jan. 30	45 Congressional Record 7116	General convention.
Do	1913	Mar. 13	Mar. 21	50 Congressional Record 1796	Constitutionality of State enactments.
Montana	1901	Feb. 11	Feb. 19	35 Congressional Record 208	Direct election of Senators.
Do	1903	Feb. 20	Feb. 26	39 Congressional Record	Do.
Do	1905	Jan. 20	Jan. 27	39 Congressional Record 2447	Do.
Do	1907	(1)	(1)	45 Congressional Record 7116	Do.
Do	1909	Feb. 20	Feb. 11	42 Congressional Record 225, 712	Do.
Do	1911	Jan. 30	Jan. 12	46 Congressional Record 2411	General, including direct election of Senators.
Do	1911	Feb. 14	Feb. 27	47 Congressional Record 98	Prohibition of polygamy.
Do	1947	Feb. 10	Feb. 22	(2)	Limitation of Presidential tenure.
Nebraska	1893	Apr. 7	Mar. 30	(2)	Direct election of Senators.
Do	1901	Jan. 28	Feb. 19	35 Congressional Record 1779	Do.
Do	1903	Mar. 18	Mar. 11	45 Congressional Record 7116	Do.
Do	1907	Apr. 2	Mar. 8	(2)	General, including direct election of Senators.
Do	1911	Mar. 9	Feb. 24	47 Congressional Record 99	Prohibition of polygamy.
Do	1949	May 25		95 Congressional Record 7893	Limitation of Federal taxing power.
Nevada	1901	Mar. 16	Mar. 16	35 Congressional Record, 112	Direct election of Senators.
Do	1901	Mar. 12	Mar. 6	(2)	Do.
Do	1903	Feb. 13	Feb. 20	37 Congressional Record 24	Do.
Do	1905	Feb. 18	Feb. 7	(2)	Do.
Do	1907	Feb. 15	Feb. 21	42 Congressional Record 163, 895	Do.
Do	1907	(1)	(1)	42 Congressional Record 163	General, including election of Senators.
Do	1925	Feb. 17	Feb. 18	67 Congressional Record 456	Repeal of 18th amendment.
New Hampshire	1911	Mar. 9	Mar. 7	(2)	Prohibition of polygamy.
Do	1943	Apr. 13	Apr. 21	89 Congressional Record 3761	Limitation of Federal taxing power.
Do	1951	Aug. 21	Aug. 21	97 Congressional Record 10716	Do.
New Jersey	1907	Apr. 12	Mar. 6	42 Congressional Record 164; 45 Congressional Record 7117.	Direct election of Senators.
Do	1932	Jan. 25	Jan. 12	75 Congressional Record 3299	Repeal of 18th amendment.
Do	1944	Mar. 27	Feb. 25	90 Congressional Record 6141	Limitation of Federal taxing power.
Do	1949	Mar. 31	Apr. 8	95 Congressional Record 4871	World federal government.
New Mexico	1951	Feb. 28	Mar. 10	98 Congressional Record 947	Limitation of Federal taxing power.
New York	1789	(1)	(1)	House Journal (1789) 29, 30	General.
Do	1906	Mar. 2	Mar. 1	40 Congressional Record 4581	Prohibition of polygamy.
Do	1931	Feb. 16	Mar. 18	75 Congressional Record 48	Repeal of 18th amendment.
North Carolina	1901	Mar. 11	Mar. 12	(2)	Direct election of Senators.
Do	1907	Feb. 25	Mar. 11	45 Congressional Record 7117	General, including direct election of Senators.
Do	1949	Apr. 11	Apr. 18	95 Congressional Record 6587	World federal government.
North Dakota	1903	Feb. 27	Feb. 25	(2)	Direct election of Senators.
Do	1907	(1)	(1)	41 Congressional Record 4633, 4672	Prohibition of polygamy.

Ohio	1861	(1)	(1)	58 Laws of Ohio (1861) 181	General.
Do	1908	Apr. 15	Apr. 28	House joint resolution	Direct election of Senators.
Do	1911	Mar. 6	Mar. 8	46 Congressional Record, 2413; 47 Congressional Record 660, 661.	Do.
Do	1911	Feb. 17	Mar. 7	47 Congressional Record 85, 114, 148, 690	Prohibition of polygamy.
Oklahoma	1908	(1)	(1)	42 Congressional Record 894; 45 Congressional Record 7117.	General, including direct election of Senators.
Do	1911	Feb. 8	Feb. 8	(2)	Prohibition of polygamy.
Do	1955	(1)	(1)	101 Congressional Record 9941	Limitation of Federal taxing power.
Oregon	1901	Jan. 23	Jan. 25	34 Congressional Record 2290, 2354	General, including direct election of Senators.
Do	1901	Feb. 23	Feb. 23	35 Congressional Record 112, 117	Direct election of Senators.
Do	1908	Feb. 18	Feb. 16	36 Congressional Record 2597; 45 Congressional Record 7118.	Do.
Do	1903	Jan. 27	Jan. 26	45 Congressional Record 7118	Do.
Do	1907	Jan. 22	...do...	41 Congressional Record 2928, 3599	Do.
Do	1909	...do...	Jan. 19	43 Congressional Record 2065, 2071, 2075, 2115, 2116	Do.
Do	1913	Jan. 16	Jan. 15	49 Congressional Record 2463	Prohibition of polygamy.
Do	1930	Jan. 24	Jan. 24	84 Congressional Record 985	Townsend plan.
Pennsylvania	1901	Feb. 6	Feb. 5	34 Congressional Record 2245, 2289, 2493; 45 Congressional Record 7118.	Direct election of Senators.
Do	1907	May 1	May 1	(2)	Prohibition of polygamy.
Do	1913	Feb. 11	June 23	(2)	Do.
Do	1943	May 5	May 8	89 Congressional Record 3220	Limitation of Federal taxing power.
Do	1943	May 7	...do...	89 Congressional Record 3220	Prohibition of conditions in grants-in-aid.
Rhode Island	1790	(1)	(1)	House Journal 148, 1st and 2d Congs	Revision of Constitution.
Do	1940	Mar. 15	Feb. 16	86 Congressional Record 3407	Limitation of Federal taxing power.
South Carolina	1915	Feb. 15	Feb. 15	53 Congressional Record 2442	Prohibition of polygamy.
South Dakota	1901	Mar. 8	Mar. 7	34 Congressional Record 2440, 2493, 2558	Direct election of Senators.
Do	1907	Jan. 19	Jan. 31	41 Congressional Record 2492, 2497, 2621; 45 Congressional Record 7118.	Do.
Do	1909	Jan. 28	Feb. 4	43 Congressional Record 2067, 2070	Do.
Do	1909	...do...	...do...	43 Congressional Record 2070	Prohibition of polygamy.
Do	1953	Mar. 5	Feb. 20	99 Congressional Record 9180, 9181	Revision of article V.
Do	1955	Feb. 15	Feb. 15	101 Congressional Record 2840, 2861, 2862	Do.
Tennessee	1901	Jan. 18	Jan. 19	35 Congressional Record 2344, 2338, 2382, 2707	Direct election of Senators.
Do	1901	Mar. 20	Mar. 18	(2)	Do.
Do	1903	Mar. 9	Feb. 12	(2)	Do.
Do	1905	Mar. 14	Mar. 8	45 Congressional Record 7119	Do.
Do	1911	Feb. 16	Feb. 15	47 Congressional Record 187	Prohibition of polygamy.
Texas	1899	May 19	Feb. 22	33 Congressional Record 219, 280	General.
Do	1901	Mar. 12	Apr. 5	45 Congressional Record 7119	Direct election of Senators.
Do	1911	Feb. 15	Feb. 15	(2)	Do.
Do	1911	Feb. 13	Mar. 10	(2)	Prohibition of polygamy.
Do	1949	Jan. 20	Jan. 19	101 Congressional Record 2840	Tidelands problem.
Do	1949	Mar. 1	Feb. 1	101 Congressional Record 2840	Revision of article V.
Utah	1908	Mar. 6	Mar. 10	45 Congressional Record 7119	Direct election of Senators.
Do	1951	June 15	June 15	98 Congressional Record 947	Limitation of Federal taxing power.
Vermont	1913	Dec. 13	Dec. 17	49 Congressional Record 1433, 2464	Prohibition of polygamy.
Virginia	1788	(1)	(1)	Annals of Congress 248	General.
Do	1861	(1)	(1)	Senate Journal 149	Do.
Do	1952	Feb. 5	Feb. 21	98 Congressional Record 1496	Limitation of Federal taxing power.

See footnotes at end of table, p. 88.

TABLE 1.—*State applications to Congress to call conventions to propose constitutional amendments (1787–1957)*—Continued

State	Year	Passed House	Passed Senate	Source of reference	Amendment to be presented
Washington	1901	Mar. 12	Mar. 12	(2)	General.
Do	1908	Feb. 19	Mar. 7	45 Congressional Record 7119; 46 Congressional Record 3035.	General, including direct election of Senators.
Do	1909	Feb. 24	Feb. 2	44 Congressional Record 50, 127; 46 Congressional Record 651.	Prohibition of polygamy.
Do	1910	(1)	(1)	46 Congressional Record 651	Do.
West Virginia	1907	Jan. 23	Jan. 22	(2)	Do.
Wisconsin	1903	Apr. 29	Apr. 16	37 Congressional Record 276	Direct election of Senators.
Do	1907	June 28	June 20	42 Congressional Record, 165	Do.
Do	1908	(1)	(1)	45 Congressional Record 7119, 7120	Do.
Do	1911	May 13	Apr. 17	47 Congressional Record 1842, 1866, 1873, 1875, 1876, 1948, 2000, 2188, 3087.	General.
Do	1913	Mar. 18	Mar. 11	50 Congressional Record 42, 117	Prohibition of polygamy.
Do	1929	May 27	Apr. 23	71 Congressional Record 2590	General.
Do	1931	Apr. 13	Apr. 17	75 Congressional Record 57	Repeal of eighteenth amendment.
Do	1943	May 7	June 14	89 Congressional Record 7524	Limitation of Federal taxing power.
Do	1943	June 4	June 15	89 Congressional Record 7524	Limitation of Presidential tenure.
Wyoming	1895	(1)	(1)	(2)	Direct election of Senators.
Do	1939	Feb. 10	Feb. 16	84 Congressional Record 1973	Limitation of Federal taxing power.

[1] Dates of passage of application in houses of legislature not obtainable.

[2] Listed in the following documents but not recorded in the Congressional Record: Federal Constitutional Conventions, S. Doc. 78, 71st Cong., 2d sess. (1930), William Russell Pullen, The Application Clause of the Amending Provision of the Constitution (an unpublished dissertation), University of North Carolina, 1951, and House Judiciary Committee Staff Report, Problems Relating to State Applications For a Convention To Propose Constitutional Limitations on Federal Tax Rates (1952).

RESCISSIONS.—A number of the applications listed in this tabulation have subsequently been rescinded by the States which filed them. Resolutions purporting to effect such rescissions have not been included herein.

TABLE 2.—*State applications to Congress for constitutional conventions, listed by subject matter*

1. Direct election of Senators (73 petitions submitted by 31 states):	
Arkansas	1901
Do	1903
Do	1911
California	1903
Do	1911
Colorado [1]	1901
Idaho	1901
Do	1903
Illinois [1]	1903
Do	1907
Do	1909
Indiana	1907
Iowa	1904
Do.[1]	1907
Do.[1]	1909
Kansas [1]	1901
Do.[1]	1905
Do.[1]	1907
Do.[1]	1909
Kentucky	1902
Louisiana [1]	1907
Maine	1911
Michigan	1901
Minnesota	1901
Do	1911
Missouri	1901
Do	1903
Do	1905
Montana	1901
Do	1903
Do	1905
Do	1907
Do	1908
Do.[1]	1911
Nebraska	1893
Do	1901
Do	1903
Do.[1]	1907
Nevada	1901
Do	1901
Do	1903
Do	1905
Do	1907
Do.[1]	1907
New Jersey	1907
North Carolina	1901
Do.[1]	1907
North Dakota	1903
Ohio	1908
Do	1911
Oklahoma [1]	1908
Oregon [1]	1901
Do	1901
Do	1903
Do	1903
1. Direct election of Senators (73 petitions submitted by 31 states)—Continued	
Oregon	1907
Do	1909
Pennsylvania	1901
South Dakota	1901
Do	1907
Do	1909
Tennessee	1901
Do	1901
Do	1903
Do	1905
Texas	1901
Do	1911
Utah	1903
Washington [1]	1903
Wisconsin	1903
Do	1907
Do	1908
Wyoming	1895
2. Limitation of Federal taxing power (32 petitions submitted by 27 States; see also tables 3, 4, and 5, this appendix):	
Alabama	1943
Arkansas	1943
Delaware	1943
Florida	1951
Georgia	1952
Illinois	1943
Indiana	1943
Do	1957
Iowa	1941
Do	1951
Kansas	1951
Kentucky	1944
Louisiana	1950
Maine	1941
Do	1951
Maryland	1939
Massachusetts	1941
Michigan	1941
Do	1949
Mississippi	1940
Nebraska	1949
New Hampshire	1943
Do	1951
New Jersey	1944
New Mexico	1951
Oklahoma	1955
Pennsylvania	1943
Rhode Island	1940
Utah	1951
Virginia	1952
Wisconsin	1943
Wyoming	1939

See footnote at end of table, p. 91.

TABLE 2.—*State applications to Congress for constitutional conventions, listed by subject matter*—Continued

3. Prohibition of polygamy (30 petitions submitted by 27 States):	
California	1909
Connecticut	1915
Delaware	1907
Illinois	1913
Iowa	1906
Louisiana	1916
Maine	1907
Maryland	1908
Do	1914
Michigan	1913
Minnesota	1909
Montana	1911
Nebraska	1911
New Hampshire	1911
New York	1906
North Dakota	1907
Ohio	1911
Oklahoma	1911
Oregon	1913
Pennsylvania	1907
Do	1913
South Carolina	1915
South Dakota	1909
Tennessee	1911
Texas	1911
Vermont	1912
Washington	1909
Do	1910
West Virginia	1907
Wisconsin	1913
4. General revision of Constitution (29 petitions submitted by 22 States):	
Colorado [2]	1901
Georgia	1832
Illinois	1861
Do [2]	1903
Indiana	1861
Iowa [2]	1907
Do [2]	1909
Kansas [2]	1901
Do [2]	1905
Do [2]	1907
Kentucky	1861
Louisiana [2]	1907
Missouri	1907
Montana [2]	1911
Nebraska [2]	1907
Nevada [2]	1907
New York	1789
4. General revision of Constitution (29 petitions submitted by 22 States)—Continued	
North Carolina [2]	1907
Ohio	1861
Oklahoma [2]	1908
Oregon [2]	1901
Texas	1899
Virginia	1788
Do	1861
Washington	1901
Do [2]	1903
Wisconsin	1911
Do	1929
5. World federal government (8 petitions from 6 States):	
California	1949
Connecticut	1949
Florida	1943
Do	1945
Do	1949
Maine	1949
New Jersey	1949
North Carolina	1949
6. Repeal of 18th amendment (5 petitions from 5 States):	
Massachusetts	1931
Nevada	1925
New Jersey	1932
New York	1931
Wisconsin	1931
7. Limitation of Presidential tenure (5 petitions from 5 States):	
Illinois	1943
Iowa	1943
Michigan	1943
Montana	1947
Wisconsin	1943
8. Treaty making (3 petitions from 3 States):	
Florida	1945
Georgia	1952
Indiana	1957
9. Taxation of Federal and State securities (2 petitions from 2 States):	
California	1935
Idaho	1927
10. Against protective tariff (1 petition from 1 State):	
Alabama	1833

See footnote at end of table, p. 90.

TABLE 2.—*State applications to Congress for constitutional conventions, listed by subject matter*—Continued

11. Federal regulation of wages and hours of labor (1 petition from 1 State):
    California 1935
12. Federal tax on gasoline (1 petition from 1 State):
    California 1952
13. Tidelands problem (1 petition from 1 State):
    Texas 1949
14. Control of trusts (1 petition from 1 State):
    Illinois 1911
15. Prohibitions on grants-in-aid (1 petition from 1 State):
    Pennsylvania 1943
16. Popular ratification of amendments (1 petition from 1 State):
    Louisiana 1920
17. Constitutionality of State enactments (1 petition from 1 State):
    Missouri 1913
18. Townsend plan (1 petition from 1 State):
    Oregon 1939
19. Revision of art. V (7 petitions from 6 States):
    Idaho 1957
    Illinois 1953
    Indiana 1957
    Michigan 1956
    South Dakota 1953
    Do 1955
    Texas 1955
20. Reapportionment (1 petition from 1 State):
    Indiana 1957
21. Balancing the budget (1 petition from 1 State):
    Indiana 1957
22. Distribution of proceeds of Federal taxes on gasoline (1 petition from 1 State):
    California 1952
23. State control of schools (1 petition from 1 State):
    Georgia 1955

[1] Petition also called for general revision of Constitution.
[2] Petition also called for direct election of Senators.

TABLE 3.—*State' applications to Congress seeking*

State	Petitions						
	Resolution No.	Passed			Committee referred to	Congressional Record citation	Nature†
		Year	Upper chamber	Lower chamber			
Alabama	H. J. Res. 66	1943	July 1	June 24	H. Judiciary S. Judiciary	89 Congressional Record, pp. 7523–7524.	A
Arkansas	S. Con. Res. 10.	1943	Mar. 2	Mar. 1	S. Judiciary H. Judiciary	98 Congressional Record, p. 742.	C
Delaware	S. Con. Res. 6	1943	Mar. 25	Apr. 9	S. Judiciary H. Judiciary	89 Congressional Record, p. 4017.	C
Florida	S. Con. Res. 206.	1951	Apr. 20	Apr. 27	S. Judiciary H. Judiciary	97 Congressional Record, pp. 5155–5156.	A*
Georgia	H. Res. 218	1952	Jan. 22	Jan. 21	S. Judiciary H. Judiciary	98 Congressional Record, p. 1057.	A*
Illinois	H. J. Res. 32	1943	May 26	May 5	S. Judiciary H. Judiciary	98 Congressional Record, p. 742.	A
Indiana	H. Con. Res. 10.	1943	Mar. 6	Mar. 2	S. Judiciary H. Judiciary	98 Congressional Record, pp. 1056–1057.	C
	H. Con. Res. 8.	1957	.....	.....	S. Judiciary	Daily, May 8, 1957. pp. 5763, 5764.	
Iowa	H. Con. Res. 15.	1941	Apr. 10	Feb. 17	S. Judiciary H. Judiciary	87 Congressional Record, p. 3172; 3232–3233.	C
	S. Con. Res. 11.	1951	Mar. 26	Mar. 28	S. Judiciary H. Judiciary	97 Congressional Record, pp. 3939–3940.	D
Kansas	S. Con. Res. 4	1951	Feb. 15	Mar. 21	H. Ways and Means. S. Judiciary	97 Congressional Record, p. 2936.	A
Kentucky	H. Con. Res. 79.	1944	Mar. 14	Mar. 8	S. Judiciary	90 Congressional Record, pp. 4040–4041.	A
Louisiana	H. Res. 24	1950	June 12	June 12	S. Judiciary H. Judiciary	99 Congressional Record, pp. 320–321.	A
Maine	J. Res	1941	Apr. 15	Apr. 17	S. Judiciary H. Judiciary	87 Congressional Record, pp. 3370–3371.	A
	J. Res	1951	May 15	May 15	S. Judiciary H. Judiciary	97 Congressional Record, pp. 6033–6034.	D
Maryland [1]							
Massachusetts	S. 656	1941	Apr. 24	Apr. 29	S. Judiciary H. Judiciary	87 Congressional Record, pp. 3812–3813.	A
Michigan	S. Con. Res. 20.	1941	Apr. 29	May 16	S. Finance H. Judiciary	87 Congressional Record, p. 8904.	A
	H. Con. Res. 26.	1949	Apr. 11	Apr. 7	S. Judiciary H. Judiciary	95 Congressional Record, pp. 5628–5629.	D
Mississippi	S. Con. Res. 14.	1940	Apr. 29	Apr. 29	S. Judiciary H. Judiciary	86 Congressional Record, p. 6025.	C*
Nebraska	Leg. Res. 32	1949	Uni-cameral	May 25	S. Judiciary	95 Congressional Record, pp. 7893–7894.	D
New Hampshire	H. Con. Res.	1943	Apr. 21	Apr. 13	S. Finance	89 Congressional Record, pp. 3761–3762.	C
	H. Con. Res.	1951	Aug. 21	Aug. 21	S. Judiciary H. Judiciary	97 Congressional Record, pp. 10716–10717.	D
New Jersey	J. Res. 5	1944	Feb. 25	Mar. 27	S. Judiciary H. Judiciary	90 Congressional Record, p. 6141.	B
New Mexico	H. J. Res. 12	1951	Mar. 10	Feb. 28	S. Judiciary H. Judiciary	98 Congressional Record, pp. 947–948.	D
Oklahoma	S. J. Res. 15	1955	May 11	May 23	H. Ways and Means.	101 Congressional Record p. 8397–8398, 8776, 9941.	E

See footnotes at end of table, pp. 94–95.

convention to limit federal income taxing powers

Rescissions						
Resolution No.	Passed			Committee referred to	Congressional Record citation	Nature
	Year	Upper chamber	Lower chamber			
H. J. Res. 10	1945	June 13	June 6	H. Judiciary	91 Congressional Record, pp. 6631-6632.	Rescinds prior action of legislature.
H. Con. Res. 3	1945	Feb. 9	Jan. 16	S. Finance	91 Congressional Record, p. 1209.	Res. 3 rescinds prior resolution.
H. Con. Res. 896.	1953	May 4	May 4			H. Con. Res. 896—never transmitted to Congress.[3]
H. J. Res. 7	1945	Mar. 28	Mar. 13	S. Judiciary [2]H. Judiciary	98 Congressional Record, p. 742.	Expresses opposition to application and intent of prior resolution.
H. Con. Res. 9.	1945	Mar. 14	Feb. 14	S. Judiciary	91 Congressional Record, pp. 2383-2384.	Rescinds H. Con. Res. 15 (1941), and opposes amending Constitution re income taxes.
S. Res. 43	1946	Mar. 13	Mar. 21	S. Judiciary H. Judiciary	97 Congressional Record, p. 10973.	H. Res. 79 is repudiated, retracted, and withdrawn.
S. Con. Res. 15.	1954	June 23	June 24	S. Judiciary H. Judiciary	100 Congressional Record, p. 9420.	Rescinds H. Con. Res. 24.
J. Res	1953	Apr. 22	Apr. 21	S. Judiciary H. Judiciary	99 Congressional Record, pp. 4211, 4434.	Rescinds J. Res. of 1941.
Res	1952	Apr. 22	Apr. 3	H. Judiciary S. Judiciary	98 Congressional Record, p. 4641.	Rescinds S. 688 (1941).
Leg. Res. 27	1953	Unicameral	June 2	S. Judiciary H. Judiciary	99 Congressional Record, pp. 6168, 6283.	Rescinds Leg. Res. 22.
S. J. Res. 4	1954	May 3	June 26	S. Judiciary; H. Judiciary	100 Congressional Record, p. 11943.	Rescinds J. Res. 5.

TABLE 3.—*State applications to Congress seeking*

State	Petitions				Committee referred to	Congressional Record citation	Nature†
	Resolution No.	Passed					
		Year	Upper chamber	Lower chamber			
Pennsylvania	Con. Res. 7	1943	May 8	May 5	S. Judiciary H. Judiciary	89 Congressional Record p. 8220.	C (Vetoed 6-7-43)
Rhode Island	S. 80	1940	Feb. 16	Mar. 15	S. Judiciary H. Judiciary	86 Congressional Record p. 3407.	A
Utah	H. J. Res. 3	1951	June 15	June 15	S. Judiciary H. Judiciary	98 Congressional Record p. 947.	A
Virginia	H. J. Res. 32	1952	Feb. 21	Feb. 5	S. Judiciary H. Judiciary	98 Congressional Record p. 1496.	A°
Wisconsin	J. Res. 55, A	1943	June 14	May 7	S. Judiciary H. Judiciary	89 Congressional Record p. 7524.	A
Wyoming	H. J. Mem. 4	1939	Feb. 16	Feb. 10	S. Judiciary H. Judiciary	84 Congressional Record pp. 1973; 2509–2510.	C°

[1] The House of Delegates of the General Assembly of the State of Maryland adopted a resolution requesting that Congress call a constitutional convention to limit the maximum rate of taxation to 25 percent on March 15, 1939. Despite the fact that only one chamber of the legislature had adopted the proposal, the

† EXPLANAT

A—Petitions make application for a constitutional convention to propose an amendment which would repeal the sixteenth amendment and place a maximum limitation on the rate of Federal taxation of incomes, inheritances, and gifts of 25 percent; provided, however, that in case of war the limitation may be lifted for yearly periods by a three-fourths vote of each House of Congress.

A°—Petitions are identical with A petitions save only that the limitation on rates of taxation in the proposed amendment is automatically suspended during a state of war declared by Congress and may be increased for yearly periods in time of grave national emergency by a three-fourths vote of each House of Congress.

B—Petitions make application for a constitutional convention to propose an amendment which would repeal the sixteenth amendment and place a maximum limitation on the rate of Federal taxation on incomes, gifts, and inheritances of 25 percent, except that in time of war the limitation on the taxation of incomes may be suspended for yearly periods by a vote of three-fourths of each House of Congress.

C—Petitions make application for a constitutional convention to propose an amendment which would repeal the sixteenth amendment and place a maximum limitation of 25 percent on the rate of taxation of incomes, gifts, and inheritances.

C°—Petitions identical with C petitions except for the omission of a single section relating to the effective date of a provision and the following clause in the proposed amendment: "Nothing contained in this article shall affect the power of the United States to collect any tax on any devolution or transfer occurring prior to the taking effect of section 2, laid in accordance with the terms of any law then in effect."

D—Petitions make application for a constitutional convention to propose an amendment which would

convention to limit Federal income taxing powers—Continued

Rescissions						
Resolution No.	Passed			Committee referred to	Congressional Record citation	Nature
	Year	Upper chamber	Lower chamber			
H. Res. 548...	1949	Apr. 27	Mar. 30	S. Judiciary	95 Congressional Record p. 3286.	Repeals prior resolution.
J. Res. 11, A...	1945	Feb. 20	Feb. 14	S. Judiciary H. Judiciary	91 Congressional Record p. 3266.	Rescinds prior resolution.

petition was forwarded to Congress and referred to the Senate Finance Committee and the House Judiciary Committee (84 Congressional Record 3320 (1939)).

[3] Florida's rescinding resolution has not been transmitted to Congress.

ORY NOTES

place limitations on the Federal power of taxation, except during a state of war and except when the legislatures of three-fourths of the States otherwise provide, as follows:

(1) 25 percent of all taxes collected by the United States and all moneys collected in taxes in excess of 50 percent of personal income and 38 percent of corporate income shall be placed respectively in two separate funds after 20 percent of such sums shall have first been used to make payments on the principal of the national debt.

(2) Moneys from the two separate funds shall be annually divided pro rata among the several States as specified.

(3) A minimum deduction of $600 for each dependent and for each person reporting a separate income shall be allowed in levying income taxes.

The proposed amendment contained in these petitions provides also:

(1) That the number of new States which may be formed from the Territories and possessions of the United States shall be limited to three except upon the express consent of the legislatures of three-fourths of the several States.

(2) That the dollar shall be the unit of currency.

(3) That the gold content of the dollar as of January 1, 1949, shall not be decreased.

E—Petition seeks, in the alternative, a convention to shift some of the taxing power from the Federal Government to the States and their subdivisions so as to bring about less reliance upon Federal grants in aid for State and local functions.

TABLE 4.—*Present status of State applications submitted requesting a constitutional convention to propose amendments limiting the Federal power of taxation* [a]

Applications for convention pending	Applications rescinded	Applications otherwise ineffective
Delaware.	Alabama.	Indiana [b].
Florida.	Arkansas.	Michigan [b].
Georgia.	Illinois.	New Hampshire [b].
Indiana [b].	Iowa.	Maryland [c].
Iowa.	Kentucky.	
Kansas.	Louisiana.	
Maine.	Maine.	
Michigan [b].	Massachusetts.	
Mississippi.	Nebraska.	
New Hampshire [b].	New Jersey.	
New Mexico.	Rhode Island.	
Oklahoma.	Wisconsin.	
Pennsylvania.		
Utah.		
Virginia.		
Wyoming.		

[a] Submitted since 1939.
[b] State submitted 2 applications only, 1 of which should be considered as validly pending.
[c] Adopted by only 1 house of the State legislature.

TABLE 5.—*Chronological sequence of the actions of the State legislatures relating to limiting the taxing powers of the Federal Government*

Year	Legislatures passing resolutions	Legislatures rescinding resolutions	Year	Legislatures passing resolutions	Legislatures rescinding resolutions
1939	Wyoming.	None.	1948	None.	Kentucky.
1940	Mississippi.	None.	1949	Michigan.	Rhode Island.
	Rhode Island.			Nebraska.	
1941	Iowa.	None.	1950	Louisiana.	None.
	Maine.		1951	Florida.	None.
	Massachusetts.[a]			Iowa.	
	Michigan.			Kansas.	
1943	Alabama.	None.		Maine.	
	Arkansas.			New Hampshire.	
	Delaware.			New Mexico.	
	Illinois.			Utah.	
	Indiana.		1952	Georgia.	Massachusetts.
	New Hampshire.			Virginia.	
	Pennsylvania.		1953	None.	Maine.
	Wisconsin.				Nebraska.
1944	Kentucky.	None.	1954	None.	Louisiana.
	New Jersey.				New Jersey.
1945	None.	Alabama.	1955	Oklahoma.	None.
		Arkansas.	1957	Indiana.	None.
		Illinois.			
		Iowa.			
		Wisconsin.			

TABLE 6†

TYPES OF AMENDMENTS CONTAINED IN APPLICATIONS SUBMITTED BY THE SEVERAL STATES RELATING TO AMENDING THE CONSTITUTION SO AS TO LIMIT THE FEDERAL POWER OF TAXATION

TYPE A

SECTION 1. The sixteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration: *Provided*, That in no case shall the maximum rate of tax exceed 25 per centum.

SECTION 3. The maximum rate of any tax, duty, or excise which Congress may lay and collect with respect to the devolution or transfer of property, or any interest therein, upon or in contemplation of or intended to take effect in possession or enjoyment at or after death, or by way of gift, shall in no case exceed 25 per centum.

SECTION 4. The limitations upon the rates of said taxes contained in sections 2 and 3 shall, however, be subject to the qualification that in the event of a war in which the United States is engaged creating a grave national emergency requiring such action to avoid national disaster, the Congress by a vote of three-fourths of each House may for a period not exceeding 1 year increase beyond the limits above prescribed the maximum rate of any such tax upon income subsequently accruing or received or with respect to subsequent devolutions or transfers of property, with like power, while the United States is actively engaged in such war, to repeat such action as often as such emergency may require.

SECTION 5. Sections 1 and 2 shall take effect at midnight on the 31st day of December following the ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax on incomes for any period ending on or prior to said 31st day of December laid in accordance with the terms of any law then in effect.

SECTION 6. Section 3 shall take effect at midnight on the last day of the sixth month following the ratification of this article. Nothing contained in this article shall affect the power of the United States to collect any tax on any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect.

(Contained in resolutions of the States of Alabama, Illinois, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Rhode Island, Utah, Wisconsin.)

TYPE A*

Same as type A, differing only in that the limitation on taxation is automatically suspended during a war declared by Congress, and Congress, during a period of national emergency, may likewise suspend the limitation for yearly periods by a vote of three-fourths of each House.

(Contained in resolutions of the States of Florida, Georgia, and Virginia.)

TYPE B

SECTION 1. The sixteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. The maximum aggregate rate of all taxes, duties, and excises which the Congress may lay or collect on, with respect to, or measured by income, however, shall not exceed 25 per centum. In the event that the United States shall be engaged in a war which creates a national emergency so grave as to necessitate such action to avoid national disaster, the Congress by a vote of three-fourths of each House, may while the United States is so engaged, suspend, for periods not exceeding 1 year each, such limitation with respect to income subsequently accruing or received.

SECTION 3. The maximum aggregate rate of all taxes, duties, and excises which the Congress may lay or collect with respect to the devolution or transfer of property, or any interest therein, upon or in contemplation of or intended to take effect in possession or enjoyment at or after death, or by way of gift, shall not exceed 25 per centum.

† Table 6, as revised in this thesis, is from table set out on pp. 24–27 of House Judiciary Committee Staff Report: "Problems Relating to State Applications for a Convention To Propose Constitutional Limitations on Federal Tax Rates" (1952).

SECTION 4. Sections 1 and 2 shall take effect at midnight on the 31st day of December following the ratification of the article. Nothing contained in the article shall affect the power of the United States after said date to collect any tax on, with respect to, or measured by, income for any period ending on or prior to said 31st day of December laid in accordance with the terms of any law then in effect.

SECTION 5. Section 3 shall take effect at midnight on the last day of the sixth month following the ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax with respect to any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect.

(Contained in resolution of the State of New Jersey.)

TYPE C

SECTION 1. The sixteenth amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration; *Provided*, That in no case shall the maximum rate of tax exceed 25 per centum.

SECTION 3. The maximum rate of any tax, duty, or excise which Congress may lay and collect with respect to the devolution or transfer of property, or any interest therein, upon or in contemplation of death or intended to take effect in possession or enjoyment at or after death, or by way of gift, shall in no case exceed 25 per centum.

SECTION 4. Sections 1 and 2 shall take effect at midnight on the 31st day of December, following the ratification of this article. Nothing contained in this article shall affect the power of the United States after said date to collect any tax on any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect.

SECTION 5. Section 3 shall take effect at midnight on the last day of the sixth month following the ratification of this article. Nothing contained in this article shall affect the power of the United States to collect any tax on any devolution or transfer occurring prior to the taking effect of section 3 laid in accordance with the terms of any law then in effect.

(Contained in resolutions of the States of Arkansas, Delaware, Indiana, Iowa, New Hampshire, and Pennsylvania.)

TYPE C*

Identical with type C, except that section 5 is omitted and section 4 does not contain the sentence: "Nothing contained in this article shall affect the power of the United States to collect any tax on any devolution or transfer occurring prior to the taking effect of section 3, laid in accordance with the terms of any law then in effect."

(Contained in resolutions of the States of Mississippi and Wyoming.)

TYPE D

SECTION 1. The power to levy taxes and appropriate the revenues therefrom heretofore granted to the Congress by the States in the several articles of this constitution is hereby limited.

SECTION 2. This article shall be in effect except during a state of war, hereafter declared, when it shall be suspended. The suspension thereof shall end upon the termination of the war but not later than 3 months after the cessation of hostilities, whichever shall be earlier. The cessation of hostilities may be declared by proclamation of the President or by concurrent resolution of the Congress or by concurrent action of the legislatures of 32 States.

SECTION 3. Notwithstanding the provisions of article V, this article may be suspended for a time certain or amended at any time by concurrent action of the legislatures of three-fourths of the States.

SECTION 4. There shall be set aside in the Treasury of the United States a separate fund into which shall be paid 25 percent of all taxes collected by authority derived from the sixteenth amendment to this Constitution, except as provided in section 5, and 25 percent of all sums collected by the United States from any other tax levied for revenue.

SECTION 5. There shall be set aside in the Treasury of the United States a separate fund into which shall be paid all sums received from taxes levied on

personal incomes in excess of 50 percent thereof and from taxes levied on income or profits of corporations in excess of 38 percent thereof.

SECTION 6. Before paying any sums into the funds created by sections 4 and 5 hereof, the Treasurer of the United States shall deduct therefrom 20 percent which shall be used in payment of the principal of the national debt of the United States.

SECTION 7. No tax shall hereafter be imposed on that portion of the incomes of individuals which does not exceed, in the case of unmarried persons, the sum of $600 per annum, and in the case of married persons the sum of $1,200 per annum jointly. A minimum deduction of $600 per annum shall be allowed for each dependent.

SECTION 8. The Treasurer of the United States shall once in each year, from the separate fund created by section 4 hereof, pay to each of the several States ¼ of 1 percent of said fund and from the remainder of said fund shall pay to each State a portion of such remainder determined by the population of each State in ratio to the entire population of the several States according to the last Federal decennial census or any subsequent general census authorized by law.

SECTION 9. The Treasurer of the United States shall, from the separate fund created by section 5 hereof, pay to each State, once in each year, a sum equal to the amount of money in such fund which was collected from persons or corporations within such State.

SECTION 10. Any sums paid hereunder to the several States shall be available for appropriation only by the legislatures thereof. The legislatures may appropriate therefrom for any purpose not forbidden by the constitutions of the respective States and may appropriate therefrom for expenditures within the States for any purpose for which appropriations have heretofore been made by the Congress except such purposes as are specifically reserved by this Constitution for the exclusive power of the Congress. The people of each State may limit the expenditures of funds herein made available to the legislature, but shall not direct the appropriation thereof.

SECTION 11. Each legislature shall have power by rule or resolution to provide for the assembly thereof in special sessions for the purpose of considering amendments to, the suspension of, or the ratification of amendments proposed to this article.

SECTION 12. Each legislature shall have power to elect one or more persons to represent such legislature in any council or convention of States created by concurrent action of the legislatures of 32 States for the purpose of obtaining uniform action by the legislatures of the several States in any matters connected with the amendment of this article.

SECTION 13. The Congress shall not create, admit, or form new States from the territory of the several States as constituted on the 1st day of January 1949, and shall not create, form, or admit more than three States from the Territories and insular possessions under the jurisdiction of the United States on the 1st day of January 1949, or from territory thereafter acquired without the express consent of the legislatures of three-fourths of the several States.

SECTION 14. On and after January 1, 1949, the dollar shall be the unit of the currency. The gold content of the dollar as fixed on January 1, 1949, shall not be decreased.

SECTION 15. Concurrent action of the legislatures of the several States as used herein shall mean the adoption of the same resolution by the required number of legislatures. A limit of time may be fixed by such resolution within which such concurrent action shall be taken. No legislature shall revoke the affirmative action of a preceding legislature taken therein.

SECTION 16. During any period when this article is in effect the Congress may, by concurrent resolution adopted by two-thirds of both Houses wherein declaration is made that additional funds are necessary for the defense of the Nation, limit the amount of money required by this article to be returned to the several States. Such limitation shall continue until terminated by the Congress or by concurrent action of a majority of the legislatures of the several States. Upon termination of any such limitation the Congress may not thereafter impose a limitation without the express consent by concurrent action of a majority of the legislatures of the several States.

SECTION 17. This article is declared to be self-executing.

(Contained in resolutions of the States of Iowa, Maine, Michigan, Nebraska, New Hampshire, and New Mexico.)

TYPE E

SECTION 1. That sound public tax policy requires greater reliance upon State and local sources of revenue for necessary State and local improvements, with less dependence upon Federal appropriations, and the lower Federal taxes which such a policy will make possible.

SECTION 2. That Federal participation in the cost of State and local improvements (in which the Federal Government may have a legitimate interest) would be continued automatically, as long as State and local taxes paid by each taxpayer are deductible in computing the Federal income tax, and that this form of Federal assistance is preferable to outright grants-in-aid, with their accompanying Federal controls and additional costs.

SECTION 3. That such a shift in tax policy can only be instituted and accomplished by action of the Congress, followed by corresponding State and local action, rather than the other way around.

SECTION 4. That the Congress of the United States is therefore respectfully petitioned to institute such a fiscal policy, restudying the financial relationship of the three levels of Government so as to bring about less reliance upon Federal grants-in-aid for traditionally State and local functions of government, and to take appropriate action either to submit a constitutional amendment limiting the taxing powers of Congress (except in time of war or grave national emergency) or to call a constitutional convention for such purpose.

(Contained in resolution from the State of Oklahoma.)

TABLE 7.—*State constitutional conventions* [a]

State	Number of conventions [1]	Procedure for calling a convention [2]		Popular ratification (convention proposals)
		Vote in legislature	Referendum vote	
Alabama	6	Majority members elected	Majority voting at election.	No provision.
Arizona	1	Majority vote	Majority vote on question.	Majority vote on proposals.
Arkansas	6			
California		⅔ members elected	Majority vote on question.	Majority vote cast at special election.
Colorado	1	⅔ members elected	Majority vote on question.	Majority vote at election which may be special election.
Connecticut	2			
Delaware	5	⅔ members elected	Majority vote on question.	No provision.
Florida	5	⅔ all members	Majority vote on question.	No provision.
Georgia	12	⅔ all members	No referendum	Majority vote on proposals in state as a whole and majority vote of local electors in subdivision affected.
Idaho	1	⅔ members elected	Majority of electors voting in next general election.	"Adopted by people."
Illinois	5	⅔ each house	Majority voting at next general election.	Majority vote at special election.
Indiana	2			
Iowa	3	Question mandatory every 10 years beginning 1870; legislature may provide for submission of question.	Majority voting on the question.	No provision.
Kansas	4	⅔ members elected	Majority voting at next general election.	No provision.
Kentucky	6	Majority members elected, 2 successive sessions.	Majority vote on question at least ¼ qualified voters at last election.	No provision.
Louisiana	10	No constitutional provision; practice is proposal by legislature, approved by referendum vote.	No constitutional provision; practice is proposal by legislature, approved by referendum vote.	
Maine	1	⅔ both houses		No provision.
Maryland	4	Question mandatory every 20 years beginning 1930.	Majority voting at election.	Majority vote on proposals.
Massachusetts	5	No constitutional provision; but legislature has submitted question of calling convention to people under its general powers.	Majority voting on question.	
Michigan	[3] 5	Question mandatory every 16 years beginning 1926.	Majority voting at election.	Majority vote on proposals.
Minnesota	1	⅔ members elected	Majority voting at election.	No provision.
Mississippi	7			
Missouri	6	Question mandatory every 20 years.	Majority vote on question.	Majority vote on proposals.
Montana	1	⅔ members elected	Majority vote on question.	Majority vote at elections.
Nebraska	4	⅔ members elected	Majority voting at election.	Majority vote on proposals.
Nevada	2	⅔ members elected	Majority voters at election.	No provision.
New Hampshire	[1] 14	Question mandatory every 7 years.	Majority voting in town meetings.	⅔ voting in same town meetings.
New Jersey	4			
New Mexico	1	⅔ members elected	Majority vote on question.	"Ratified by people
New York	8	Majority of legislature. Question mandatory every 20 years beginning in 1957.	Majority vote on question.	Majority vote on proposals.
North Carolina	6	⅔ members elected	Majority voting at election.	No provision.
North Dakota	1			

See footnotes at end of table, p. 102.

TABLE 7.—*State constitutional conventions*—Continued

State	Number of conventions [1]	Procedure for calling a convention [2]		Popular ratification (convention proposals)
		Vote in legislature	Referendum vote	
Ohio	4	⅗ members elected. Question mandatory every 20 years beginning 1932.	Majority vote on question.	Majority vote on proposals.
Oklahoma		Majority vote of legislature. Question mandatory every 20 years beginning 1907.	Majority vote on question.	Majority vote on proposals.
Oregon	2	Majority of Legislature or initiative petition of 8 percent of legal voters.	Majority vote on question.	No provision.
Pennsylvania	[3] 5 (n)			
Rhode Island	6	Majority votes of legislature.	Majority votes on question.	According to terms of act calling convention.
South Carolina	7	⅔ members elected	Majority voting at election.	No provision.
South Dakota	1	⅔ members elected	Majority voting at election.	No provision.
Tennessee	4	Majority members elected.	Majority voting on question.	No provision.
Texas	5			
Utah	1	⅔ members elected	Majority voting at next general election.	Majority vote at next general election.
Vermont	11			
Virginia	[4] 9	Majority members elected.	Majority vote on question.	No provision.
Washington	1	⅔ members elected	Majority voting at election.	"Adopted by people."
West Virginia	2	Majority members elected.	Majority voting at election which can be a special election.	"Ratified by voters."
Wisconsin	1	Majority of legislature	Majority vote on question.	No provision.
Wyoming	1	⅔ members elected	Majority voting at next general election.	"Adopted by people."
Guam				
Hawaii	1	Question mandatory every 10 years.	Majority voting at election.[5]	Majority vote on proposals.[5]
Puerto Rico	1			
Virgin Islands				

[1] Source: The Book of the States, 1954–55, vol. X. Council of State Governments, Chicago.

[2] For dates of conventions and action taken at each, see The Book of the States, 1941–42, pp. 48–55, and subsequent volumes. Constitutional conventions for the purpose of proposing amendments were held in New Hampshire in 1930, 1938, 1941 and 1948. In New Hampshire eight proposed amendments were drafted by the Limited Constitutional Convention meeting April–July, 1953. They will be submitted to the people on November 3, 1953, and a majority of those voting will be sufficient to ratify each of the eight proposals. A single amendment to Virginia's constitution was effected by a convention on May 2, 1945.

[3] In the states which make no provision for revision or amendment by constitutional convention, it appears that such conventions have been held permissible as an inherent right of the people acting through elected representatives.

[4] One of these was not a convention, but a special constitutional commission appointed by the Governor, under authority of an act of the legislature.

[5] Majority vote must constitute 35 percent of total vote cast at general election, or of registered voters at special election.

Present Federal Procedure for Transmitting Proposed Constitutional Amendments to the States for Ratification

Originally, Revised Statute 205 contained the procedure for transmitting resolutions containing constitutional amendments to States. By its authority, the State Department performed this function.

In 1950, however, Reorganization Plan No. 20 (5 U. S. C. 133z), effective May 24, 1950, transferred the functions to the General Services Administration.

In 1951, Congress enacted section 106b of title 1, United States Code, which repealed Revised Statute 205 and reflected the changes brought about by Reorganization Plan No. 20 of 1950.

The following procedure is not wholly statutory. It has been developed through the years:

(1) When Congress adopts a resolution proposing a constitutional amendment, certified copies are sent to the General Services Administration.

(2) The General Services Administration transmits copies of the resolution with covering letter, to the Governors asking them to advise the State legislatures. Receipt acknowledgment is obtained from the Governors.

(3) When the State legislature approves or disapproves a proposed amendment, General Services Administration receives notification either from (*a*) the Governor, or (*b*) the State legislature.

(4) When it is evident that nearly three-fourths of the States have ratified a proposed amendment, General Services Administration keeps in constant touch with the remaining States, especially those whose legislatures are in session.

(5) When the legislatures of three-fourths of the States have ratified a proposed amendment, the Administrator of General Services issues a proclamation declaring the proposal to be officially part of the United States Constitution.

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