

HJR

54



C. R. Lewis Co. Inc.

MECHANICAL CONTRACTORS - CUSTOM SHEET METAL

1500 POST ROAD. ANCHORAGE. ALASKA 99501 - 907-276-3624

April 5, 1990

Representative Max Gruenberg
Co-Chairman House Judiciary Committee
Pouch "V"
Juneau, AK 99811

Reference: HJR-54

Dear Rep. Gruenberg:

You are to hold hearings on subject Bill April 6th as I understand.

Setting a limit on the terms a Representative can serve is bad legislation. It limits the freedom of the people. They now have and should continue to have the privilege and obligation of removing or retaining their Representatives. Government should not intervene.

Far more insidious is the Constitutional Convention Call now in your Committee and the prior Call passed some years ago; HJR-17, I think.

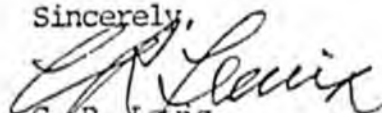
Despite what proponents say there is no way that such a convention could be limited to one subject.

The all but inevitable result of a Constitutional Convention would be an abolition of the marvelous checks & balances of our present Constitution and the implementation of some kind of a parliamentary system such as those of England or France.

Please use all of the great weight of your position to oppose HJR-54 and rescind HJR-17(?), our current Call for a Constitutional Convention.

Thank you for your consideration.

Sincerely,


C. R. Lewis

CRL:de

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: VIRGINIA BOWEN

TITLE:

ADDRESS: 3200 WHISPERING WOOD DRIVE

CITY: WASILLA

ZIP: 99607

PHONE: 376-8520

BILL NO: HJR 54

SUBJECT: AMEND U.S. CONST. ART I/TERMS OF MEMBERS

MESSAGE: I DO NOT BELIEVE THE CONSTITUTIONAL CONVENTION SHOULD BE HELD TO A SINGLE ISSUE. THE CONSTITUTION CAN BE AMENDED IF NEEDED BUT DON'T MAKE OUR GREAT CONSTITUTION SO VULNERABLE. THIS REFERS ALSO HJR17. /MAB

POMID: 03165936

DATE: 04/05/90

TIME: 16:59:36

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: LAWRENCE AND FLORA PUNCHES

TITLE:

ADDRESS: P O BOX 521313

CITY: BIG LAKE

ZIP: 99652

PHONE: 892-7326

BILL NO: HJR 54

SUBJECT: AMEND U.S. CONST. ART I/TERMS OF MEMBERS

MESSAGE: I WANT TO OPPOSE HJR54 AND RECCIND HJR 17. WE DO NOT BELIEVE IN A SINGLE ISSUE TO BE VOTED ON UNLESS NEEDED. DON'T TAKE OUR WHOLE, GREAT CONSTITUTION AWAY FROM US. IT WAS WRITTEN AT A GREAT COST. /MAB

POMID: 03171533

DATE: 04/05/90

TIME: 17:15:33

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: KAREN SCHWANKE

TITLE:

ADDRESS: 9633 ETOLIN CIRCLE

CITY: EAGLE RIVER, AK

PHONE: 694-0476

ZIP: 99577

BILL NO: HB 582

SUBJECT: BLACK BEAR BAITING

MESSAGE: I DO NOT SUPPORT HB 582. IT'S A PLOY BY AN ANTI-HUNTING GROUP, ALASKA REFORM, TO CLOSE DOWN ONE MORE AVENUE OF HUNTING. LET'S BASE THIS DECISION ON BIOLOGICAL FACTS AND NOT FEARS OR EMOTIONS. THE ALASKAN GAME BOARD SAW THROUGH THIS AND LISTENED TO THE ALASKA DEPT OF FISH AND GAME AND VOTED TO KEEP BLACK BEAR BAITING OPEN STATEWIDE.

POMID: 03155320

DATE: 04/05/90

TIME: 15:53:20

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES

BARNES	BOUCHER
BOYER	BROWN
COLLINS	COTTEN
DAVIDSON	DAVIS, C.
DAVIS, M.	DONLEY
ELLIS	FINKELSTEIN
FOSTER	FURNACE
GRUENBERG	GRUSSENDORF
HANLEY	HOFFMAN
HUDSON	JACKO
KOPONEN	KUBINA
LARSON	LEMAN
MACLEAN	MARTIN
MENARD	MILLER
NAVARRÉ	PETTYJOHN
PHILLIPS	RIEGER
SHARP	SHULTZ
SWACKHAMMER	TAYLOR
ULMER	WALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: LYNN WHEELER

TITLE:

ADDRESS: 2649 PORTER PLACE

CITY: ANCHORAGE, AK

PHONE: 272-2730

ZIP: 99508

BILL NO: HJR 54

SUBJECT: CONSTITUTIONAL CONVENTION

MESSAGE: I AM OPPOSED TO THE PASSAGE OF HJR 54 AND ALSO WANT TO URGE YOU TO RESCIND HJR 17 WHICH WAS PASSED IN 1981. USE THE AMENDMENT PROCESS INSTEAD.

POMID: 03155024

DATE: 04/05/90

TIME: 15:58:24

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRÉ	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: ROBERT SCHWANTE

TITLE:

ADDRESS: 9633 ETOLIN CIRCLE

CITY: EAGLE RIVER

PHONE: 694-0476

ZIP: 99577

BILL NO: HB 582

SUBJECT: PROHIBITING BEAR BAITING

MESSAGE: I DO NOT BLACK BEAR BAIT BUT I STILL STRONGLY OPPOSE HB 582 BECAUSE
IT'S SUBMITTED BY AN ANTI-HUNTING GROUP "ALASKA REFORM". THERE IS NO BIOLOGICAL
DATA TO SUPPORT A STATEWIDE CLOSURE, NO OVER HARVEST, AND NO SAFETY PROBLEMS.
ADF&G AND THE ALASKAN GAME BOARD VOTED NOT TO CLOSE BEAR BAITING STATEWIDE.

/BN

POMID: 03150736

DATE: 04/05/90

TIME: 15:07:36

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES

BARNES	BOUCHER
BOYER	BROWN
COLLINS	COTTEN
DAVIDSON	DAVIS, C.
DAVIS, M.	DONLEY
ELLIS	FINKELSTEIN
FOSTER	FURNACE
GRUENBERG	GRUSSENDORF
HANLEY	HOFFMAN
HUDSON	JACKO
KOPONEN	KUBINA
LARSON	LEMAN
MACLEAN	MARTIN
MENARD	MILLER
NAVARRE	PETTYJOHN
PHILLIPS	RIEGER
SHARP	SHULTZ
SWACKHAMMER	TAYLOR
ULMER	HALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: KEVIN THOMAS

TITLE:

ADDRESS: PO BOX 90906

CITY: ANCHORAGE, AK

PHONE: 337-2622

ZIP: 99509

BILL NO: HJR 54

SUBJECT: CONSTITUTIONAL CONVENTION

MESSAGE: I AM OPPOSED TO ANY MEASURE TO TAMPER WITH OUR FINE UNITED STATES
CONSTITUTION. THE ORIGINAL DOCUMENT IS AN EFFECTIVE AND SUFFICIENT MEANS OF
LIMITING THE POWERS OF GOVERNMENT AND INSURING THE FREEDOM WHICH HAS MADE
THIS COUNTRY SO GREAT. PLEASE OPPOSE HJR 54 AND RESCIND HJR 17.

POMID: 03145730

DATE: 04/05/90

TIME: 14:57:30

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	HALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: KEN RIVARD

TITLE:

ADDRESS: PO BOX 871842

CITY: WASILLA

ZIP: 99687

PHONE: 376-2140

BILL NO: HJR 90

SUBJECT: CONSTITUTIONAL AMENDMENT: SUBSISTENCE

MESSAGE: MY WIFE AND I ARE STRONGLY OPPOSED TO AMENDING STATE CONSTITUTION.
 WE FEEL ANILCA SHOULD BE CHANGED SO ALL ALASKANS HAVE EQUAL RIGHTS. WE FEEL
 THIS IS AN ELECTION YEAR ISSUE. WE WOULD APPRECIATE YOUR THOUGHTS ON THIS
 ISSUE.

POMID: 14134813

DATE: 04/05/90

TIME: 13:48:13

LIONAME: MAT-SU LIO

COPIES: REPRESENTATIVES SENATORS

SHULTZ	SZYMANSKI
BOUCHER	KERTTULA
DAVIS, M.	RODEY
GRUENBERG	FAIKS
ELLIS	HALFORD
DAVIDSON	PEARCE
MILLER	
MARTIN	
LARSON	
MENARD	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: MAVER & CARMEN ROTH

TITLE:

ADDRESS: 3614 BISQUIER JR.

CITY: ANC

ZIP: 99508

PHONE: 333-5387

BILL NO:

SUBJECT: SANDRA HENRICKS

MESSAGE: I AM OPPOSED TO THE NOMINATION OF SANDRA HENRICKS TO THE HUMAN RIGHTS
 COMMISSION.

POMID: 03141129

DATE: 04/05/90

TIME: 14:11:29

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REFPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
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PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: ROBERT T. ROGERS
 TITLE:
 ADDRESS: BOX 893
 CITY: PETERSBURG ZIP: 99833
 PHONE: 772-3010

BILL NO: HB 166
 SUBJECT: CIVIL LIABILITY
 MESSAGE: I URGE YOU TO SHOW SUPPORT FOR ALASKA'S SMALL BUSINESS OWNERS BY MOVING, HB166 (TORT REFORM) AS INTRODUCED BY SPEAKER SAM COTTEN, OUT OF COMMITTEE. THANK YOU

POMID: 15114558
 DATE: 04/05/90
 TIME: 11:45:58
 LIONAME: PETERSBURG LIO

COPIES: REPRESENTATIVES SENATOR

GRUENBERG	JONES
DAVIS, M.	
DAVIDSON	
ELLIS	
MARTIN	
MILLER	
TAYLOR	
DAVIS, C.	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: CARLA NOWAG
 TITLE:
 ADDRESS: 3133 NAOMI
 CITY: WASILLA, AK ZIP: 99687
 PHONE: 376-7287
 BILL NO: HJR 54

SUBJECT: CONSTITUTIONAL AMENDMENT
 MESSAGE: FIRST I WOULD LIKE TO OPPOSE HJR 54 AND RESCIND HJR 17. THEN, I WOULD LIKE TO SAY THAT I BELIEVE THE CONSTITUTIONAL CONVENTION CANNOT BE HELD TO A SINGLE ISSUE. THE CONSTITUTION CAN BE AMENDED AS NEEDED, BUT I DO NOT BELIEVE WE SHOULD MAKE OUR GREAT CONSTITUTION VULNERABLE IN THIS WAY.

POMID: 03120645
 DATE: 04/05/90
 TIME: 12:06:45
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRA	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: SUSAN FORD
 TITLE: PROBATION OFFICER III
 ADDRESS: 103 VIKING WAY
 CITY: SITKA, AK ZIP: 99835
 PHONE: 747-3321
 BILL NO: SB 348

SUBJECT: PERS BENEFITS FOR PROBATION OFFICERS
 MESSAGE: SB 348 IS BEING TRANSMITTED TO THE HOUSE FOR A VOTE. I URGE YOUR SUPPORT OF THIS BILL. PROBATION OFFICERS ARE SUBJECTED TO THE SAME STRESS AND DANGER AS OTHER PEACE OFFICERS. WE DEAL EXCLUSIVELY WITH FELONS AND ARE THE ONLY CLASS OF PEACE OFFICERS NOT INCLUDED IN PEACE OFFICER RETIREMENT.

POMID: 12092604
 DATE: 04/05/90
 TIME: 09:26:04
 LIONAME: SITKA LIO

COPIES: REPRESENTATIVES REPRESENTATIVES

MACLEAN	FOSTER
PETTYJOHN	DAVIS, C.
KUBINA	LARSON
HOFFMAN	SWACKHAMMER
WALLIS	KOPONEN
ULMER	BROWN
SHULTZ	RIEGER
PHILLIPS	BARNES
ELLIS	BOYER
JACKO	GRUENBERG
FURNACE	DAVIS, M.
DAVIDSON	MILLER
MARTIN	HEHARD
NAVARRÉ	SHARP
HUDSON	GRUSSENDORF
TAYLOR	COTTEN
DONLEY	BOUCHER
HANLEY	ZAWACKI
FINKELSTEIN	LEMAN
COLLINS	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: RICHARD E. SKEELS
 TITLE:
 ADDRESS: 1005 SUSITNA DRIVE
 CITY: WASILLA ZIP: 99687
 PHONE: 376-2193
 BILL NO:

SUBJECT: CONSTITUTIONAL CONVENTION BILLS
 MESSAGE: PLEASE VOTE AGAINST HJR54 IF IT GETS OUT OF COMMITTEE. LATER, PLEASE VOTE FOR RESCINDING HJR17. THE CONSTITUTION DOES NOT DESERVE EMASCULATION BY A BUNCH OF LIBERAL ACTIVISTS. THE PROCESS FOR AMENDING THE CONSTITUTION IS ALREADY IN PLACE, NOTHING MORE IS NEEDED.

POMID: 14114525
 DATE: 04/05/90
 TIME: 11:45:25
 LIONAME: MAT-SU LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRÉ	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMAŃSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: THOMAS TOPER
 TITLE:
 ADDRESS: 4601 SANDY BEACH DRIVE
 CITY: ANCHORAGE, AK
 PHONE: 243-3227
 ZIP: 99502
 BILL NO:
 SUBJECT: CAPITAL GRANT
 MESSAGE: SUPPORT THE CAPITAL GRANT FOR OUR LOCAL PUBLIC STATION, KAKM. THEY ARE REQUESTING A GRANT OF \$300,000 TO REPLACE OLD EQUIPMENT.

POMID: 03103957
 DATE: 04/05/90
 TIME: 10:39:57
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVAPRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMAWSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: SCOTT SHERRJTT
 TITLE:
 ADDRESS: 3505 WOODLAND PARK DR
 CITY: ANCHORAGE, AK
 PHONE: 248-4563
 ZIP: 99517
 BILL NO: HJR 54
 SUBJECT: CONSTITUTIONAL CONVENTION
 MESSAGE: I AM OPPOSED TO PASSAGE OF HJR 54. I ALSO URGE YOU TO RESCIND HJR 17 WHICH WAS PASSED IN 1981. A CONVENTION CANNOT BE HELD TO A SINGLE ISSUE. USE THE AMENDMENT PROCESS INSTEAD.

POMID: 03104620
 DATE: 04/05/90
 TIME: 10:46:20
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LAPSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRÉ	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMAWSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: TAMARA BROWN
 TITLE:
 ADDRESS: PO BOX 112636
 CITY: ANCHORAGE, AK ZIP: 99511
 PHONE: 279-9407
 BILL NO: HJR 54
 SUBJECT: CONSTITUTIONAL CONVENTION
 MESSAGE: I AM OPPOSED TO PASSAGE OF HJR 54, PERTAINING TO THE CONSTITUTIONAL CONVENTION. ALSO URGE YOU TO RESCIND HJR 17, WHICH WAS PASSED IN 1981. MOST SCHOLARS AGREE THAT A CONVENTION CANNOT BE HELD TO A SINGLE ISSUE. USE THE AMENDMENT PROCESS INSTEAD.

POMID: 03102628
 DATE: 04/05/90
 TIME: 10:26:28
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: DARRELL CHAMBERS
 TITLE:
 ADDRESS: 17433 TEKLANIKA
 CITY: EAGLE RIVER, AK ZIP: 99577
 PHONE: 694-4789
 BILL NO: SB 516
 SUBJECT: HUNTING AND FISHING INFORMATION
 MESSAGE: SB 516 WOULD PROTECT ONLY THE INTERESTS OF TRAPPERS WHO WANT EXCLUSIVITY OF THEIR TRAPPING AREA. WE USE THE HARVEST INFORMATION TO: 1) TO STAY OUT OF OVERLY HUNTED AREAS; 2) STAY CLEAR OF GUIDING AREAS. SB 516 IS REDUNDANT TO SB 409, WHICH PENALIZES INTERFERENCE. NO PROBLEM EXISTS THAT WOULD JUSTIFY THIS DEGREE OF ACTION. PLEASE VOTE NO.

POMID: 03103046
 DATE: 04/05/90
 TIME: 10:30:46
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES

BARNES	BOUCHER
BOYER	BROWN
COLLINS	COTTEN
DAVIDSON	DAVIS, C.
DAVIS, M.	DONLEY
ELLIS	FINKELSTEIN
FOSTER	FURNACE
GRUENBERG	GRUSSENDORF
HANLEY	HOFFMAN
HUDSON	JACKO
KOPONEN	KUBINA
LARSON	LEMAN
MACLEAN	MARTIN
MENARD	MILLER
NAVARRE	PETTYJOHN
PHILLIPS	RIEGER
SHARP	SHULTZ
SWACKHAMMER	TAYLOR
ULMER	WALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: SUE FRANCIS
 TITLE:
 ADDRESS: 3120 E 64TH
 CITY: ANCHORAGE, AK ZIP: 99507
 PHONE: 561-0658
 BILL NO: HJR 54
 SUBJECT: CONSTITUTIONAL CONVENTION
 MESSAGE: I AM OPPOSED TO HJR 54 PERTAINING TO A CONSTITUTIONAL CONVENTION. I ALSO URGE YOU TO RESCIND HJR 17, PASSED IN 1981. MOST SCHOLARS AGREE THAT A CONVENTION CANNOT BE LIMITED TO A SINGLE ISSUE. THE AMENDMENT PROCESS SHOULD BE USED.

POMID: 03102350
 DATE: 04/05/90
 TIME: 10:23:50
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: TIMOTHY DAVIS
 TITLE:
 ADDRESS: 14730 OLD SEWARD HWY
 CITY: ANCH ZIP: 99515
 PHONE: 345-6709
 BILL NO:
 SUBJECT: NOMINATION OF SANDRA HENRICKS TO HRC
 MESSAGE: PLEASE OPPOSE THE NOMINATION OF SANDRA HENRICKS TO THE HUMAN RIGHTS COMMISSION. SHE HAS EXPRESSED A DISCRIMINATORY BIAS TOWARDS ALASKAN HOMEMAKERS, AND THEREFORE A BLATANT DISREGARD FOR THE WELFARE OF ALASKA'S FAMILIES. -TP

POMID: 03094952
 DATE: 04/05/90
 TIME: 09:49:52
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LAPSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: STEVE FRANCIS
 TITLE:
 ADDRESS: 3120 E. 64TH AVENUE
 CITY: ANCHORAGE ZIP: 99507
 PHONE: 279-9407
 BILL NO: HJR 54
 SUBJECT: AMEND U.S. CONST. ART I/TERMS OF MEMBERS
 MESSAGE: I AM OPPOSED TO THE PASSAGE OF HJR 54. I ALSO URGE YOU TO RECIDND HJR 17 THAT PASSED IN 1981. A CONSTITUTIONAL CONVENTION HELD FOR ONE ISSUE WOULD NOT BE LIMITED TO THAT ONE ISSUE. IT WOULD ENCOURAGE CHANGING OTHER PARTS OF OUR CONSTITUTION. THE AMENDMENT PROCESS SHOULD BE USED. /CMR

POMID: 03095331
 DATE: 04/05/90
 TIME: 09:53:31
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: MARY JANE FATE
 TITLE: CITIZENS FOR A DRUG-FREE ALASKA
 ADDRESS: P.O. BOX 607
 CITY: FAIRBANKS ZIP: 99707
 PHONE: 457-6860
 BILL NO:
 SUBJECT: SURVEY BY CITIZENS FOR A DRUG-FREE ALASKA
 MESSAGE: CITIZENS FOR A DRUG-FREE ALASKA IS AN ANTI-DRUG COMMUNITY ORGANIZATION FORMED TO ENSURE THE SUCCESS OF THE INITIATIVE TO RECRIMINALIZE MARIJUANA. PLEASE INDICATE YO VOTE: (SURVEY QUESTION) RECRIMINALIZE THE USE AND POSSESSION OF MARIJUANA - YES ___ NO ___. LEGISLATORS NAME _____
 PLEASE RETURN BY 4-30-90.

POMID: 07100350
 DATE: 04/05/90
 TIME: 10:03:50
 LIONAME: FAIRBANKS LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	DOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
HAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: MARJORIE SMITH
 TITLE:
 ADDRESS: 2265 EAST 56TH, APT 5
 CITY: ANCHORAGE, AK ZIP: 99507
 PHONE: 561-2159
 BILL NO: HJR 54

SUBJECT: CONSTITUTIONAL CONVENTION
 MESSAGE: THE CONSTITUTION OF THE UNITED STATES IS BEING GREATLY THREATENED.
 IMAGINE THE CONSEQUENCE OF THIS GREAT DOCUMENT IF IT WERE TO BE DEBATED IN AN
 OPEN FORUM. AMEND OUR CONSTITUTION IF CHANGES ARE IN ORDER. SAY NO TO A
 CONSTITUTIONAL CONVENTION. OPPOSE HJR 54 AND RESCIND HJR 17.

POMID: 03093220
 DATE: 04/05/90
 TIME: 09:32:20
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	HALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: STEVEN B. PORTER
 TITLE:
 ADDRESS: 10420 LONE TREE DRIVE
 CITY: ANCHORAGE ZIP: 99516
 PHONE: 346-1259
 BILL NO: HD 558

SUBJECT: SUITS TO ENFORCE ENVIRONMENTAL LAWS
 MESSAGE: THIS BILL AS DRAFTED WOULD ENABLE EXTREMIST GROUPS OR ANY INDIVIDUAL
 THE RIGHT TO OPPOSE ALL OFF SHORE EXPLORATION NO MATTER HOW WELL DESIGNED THE
 OPERATION MAY BE. EACH OFF SHORE EXPLORATION PROGRAM ALREADY ALLOWS PUBLIC
 PARTICIPATION THROUGH THE COAST ZONE CONSISTENCY PROCESS. THIS ADDITIONAL
 LEGISLATION IS UNNECESSARY. /BN

POMID: 03090930
 DATE: 04/05/90
 TIME: 09:09:30
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES

BARNES	BOUCHER
BOYER	BROWN
COLLINS	COTTEN
DAVIDSON	DAVIS, C.
DAVIS, M.	DONLEY
ELLIS	FINKELSTEIN
FOSTER	FURNACE
GRUENBERG	GRUSSENDORF
HANLEY	HOFFMAN
HUDSON	JACKO
KOPONEN	KUBINA
LARSON	LEMAN
MACLEAN	MARTIN
MENARD	MILLER
NAVARRE	PETTYJOHN
PHILLIPS	RIEGER
SHARP	SHULTZ
SWACKHAMMER	TAYLOR
ULMER	HALLIS
ZAWACKI	

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: JOYCE BURGIN

TITLE:

ADDRESS: 3821 JAMES DRIVE

CITY: ANCHORAGE, AK

PHONE: 333-4670

ZIP: 99504

BILL NO: HJR 54

SUBJECT: CONSTITUTIONAL CONVENTION

MESSAGE: I AM OPPOSED TO PASSAGE OF HJR 54 PERTAINING TO THE CONSTITUTIONAL CONVENTION. I ALSO URGE YOU TO RESCIND HJR 17, WHICH WAS PASSED IN 1981.

MOST SCHOLARS AGREE THAT A CONVENTION CANNOT BE HELD TO A SINGLE ISSUE, USE THE AMENDMENT PROCESS INSTEAD.

POMID: 03092223

DATE: 04/05/90

TIME: 09:22:23

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: CAROL WILLIAMS

TITLE:

ADDRESS: 1548 CARA LOOP

CITY: ANCHORAGE, AK

PHONE: 345-5763

ZIP: 99515

BILL NO:

SUBJECT: WILDLIFE ISSUES

MESSAGE: SB 516-LIMITS ACCESS TO WILDLIFE DATA. I BELIEVE SB 516 LEAVES HUNTING AND TRAPPING PRACTICES OPEN TO ABUSE AND I OPPOSE THIS BILL. SB 469- UNTER HARRASSMENT. I OPPOSE SB 469. THIS BILL GIVES HUNTERS PRIORITY OVER THOSE OF US WHO WANT TO CAMP AND PHOTOGRAPH AND MAY CAUSE CONFRONTATIONS THAT MAY NOT OTHERWISE OCCUR.

POMID: 03192438

DATE: 04/05/90

TIME: 09:24:38

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: MARY MINDER
 TITLE:
 ADDRESS: 3440 PERENOSA BAY DRIVE
 CITY: ANCHORAGE ZIP: 99515
 PHONE: 344-1250
 BILL NO: HJR 54
 SUBJECT: AMEND U.S. CONST. ART I/TERMS OF MEMBERS
 MESSAGE: I URGE YOU TO OPPOSE HJR 54 AND RECIND HJR 17. KEEP UP THE GOOD WORK. /DH

POMID: 03085134
 DATE: 04/05/90
 TIME: 08:51:34
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: SUSAN FOGARTY
 TITLE:
 ADDRESS: 5601 EAST 104TH
 CITY: ANCHORAGE, AK ZIP: 99516
 PHONE: 345-2922
 BILL NO: HJR 46
 SUBJECT: LIMIT TERMS OF LEGISLATORS
 MESSAGE: I WOULD LIKE TO SEE YOU LIMIT THE TERM.

POMID: 03090903
 DATE: 04/05/90
 TIME: 09:09:03
 LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBINA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MENARD	MILLER	PEARCE
NAVARRE	PETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: GREGG SMITH

TITLE:

ADDRESS: 2265 E. 56TH, #5

CITY: ANCHORAGE

ZIP: 99507

PHONE: 561-2159

BILL NO:

SUBJECT: CONSTITUTIONAL CONVENTION

MESSAGE: A CONSTITUTIONAL CONVENTION CAN NOT BE HELD TO A SINGLE ISSUE.
 AMEND THE CONSTITUTION IF NEEDED, BUT DO NOT MAKE VULNERABLY OUR GREAT
 CONSTITUTION. OPPOSE HJR 54 AND RESEND HJR 17. PLEASE DO NOT LET SUCH AN
 IMPORTANT ISSUE GO BY WITHOUT SERIOUS CONSIDERATION. /BN

POMID: 03083605

DATE: 04/05/90

TIME: 08:36:05

LIONAME: ANCHORAGE LIO

COPIES: REPRESENTATIVES REPRESENTATIVES SENATORS

BARNES	BOUCHER	ADAMS
BOYER	BROWN	BINKLEY
COLLINS	COTTEN	COGHILL
DAVIDSON	DAVIS, C.	DUNCAN
DAVIS, M.	DONLEY	ELIASON
ELLIS	FINKELSTEIN	FAHRENKAMP
FOSTER	FURNACE	FAIKS
GRUENBERG	GRUSSENDORF	FISCHER
HANLEY	HOFFMAN	FRANK
HUDSON	JACKO	HALFORD
KOPONEN	KUBIHA	JONES
LARSON	LEMAN	KELLY
MACLEAN	MARTIN	KERTTULA
MEHARD	MILLER	PEARCE
NAVARRÉ	FETTYJOHN	POURCHOT
PHILLIPS	RIEGER	RODEY
SHARP	SHULTZ	STURGULEWSKI
SWACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: RON HAGERUP

TITLE:

ADDRESS: 4900 THANE ROAD

CITY: JUNEAU

ZIP: 99801

PHONE: 586-3386

BILL NO:

SUBJECT: NOMINATION OF SANDRA HENRICKS

MESSAGE: I AM OPPOSED TO THE NOMINATION OF SANDRA HENRICKS TO THE HUMAN RIGHTS
 COMMISSION. SHE DOES NOT REPRESENT ME ON THE COMMISSION.

POMID: 00082336

DATE: 04/05/90

TIME: 08:23:36

LIONAME: JUNEAU LIO

COPIES: REPRESENTATIVES SENATORS

ELLIS	POURCHOT
BOYER	FAIKS
JACKO	ADAMS
GRUENBERG	KELLY
DAVIS, C.	UEHLING
FURNACE	

101ST CONGRESS
1ST SESSION

H. J. RES. 87

Proposing an amendment to the Constitution of the United States limiting the number of consecutive terms members of the United States Senate and House of Representatives may serve.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 20, 1989

Mr. DORNAN of California 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 limiting the number of consecutive terms members of the United States Senate and House of Representatives may serve.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein), That the fol-*
4 *lowing article is proposed as an amendment to the Constitu-*
5 *tion of the United States, which shall be valid to all intents*
6 *and purposes as part of the Constitution when ratified by the*
7 *legislatures of three-fourths of the several States within*
8 *seven years after the date of its submission for ratification:*

1 "ARTICLE —

2 "SECTION 1. No person may serve any term or portion
3 thereof as a member of the United States House of Repre-
4 sentatives if such person has served as a member of the
5 House for each of the six terms, or a portion of any such
6 term, immediately preceding such term.

7 "SECTION 2. No person may serve any term or portion
8 thereof as a member of the United States Senate if such
9 person has served as a member of the Senate for each of the
10 two terms, or a portion of any such term, immediately pre-
11 ceding such term.

12 "SECTION 3. For purposes of this article, service as a
13 member in the United States Senate or House of Representa-
14 tives in any term which commenced before the ratification of
15 this article may not be included in determining the number of
16 terms served."

○

101ST CONGRESS
1ST SESSION

H. J. RES. 125

Proposing an amendment to the Constitution of the United States limiting the terms of offices of Members of Congress and increasing the term of Representatives to four years.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 6, 1989

Mr. COBLE 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 limiting the terms of offices of Members of Congress and increasing the term of Representatives to four years.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein), That the fol-*
4 *lowing article is proposed as an amendment to the Constitu-*
5 *tion of the United States, which shall be valid to all intents*
6 *and purposes as part of the Constitution when ratified by the*
7 *legislatures of three-fourths of the several States within*
8 *seven years after the date of its submission for ratification:*

1 "ARTICLE —

2 "SECTION 1. The term of office of Representatives shall
3 be four years.

4 "No person shall be elected to the office of Representa-
5 tive more than three times, excluding any election of a
6 person to fill a vacancy of an office of a Representative if
7 such person has held such office for less than two years.

8 "The second clause of this section shall not apply to any
9 person who is a Representative on the date of ratification of
10 this Article so long as such person continues thereafter to be
11 a Representative without an interruption in service.

12 "SECTION 2. No person shall be elected to the office of
13 Senator more than twice, excluding any election of a person
14 to fill a vacancy of an office of a Senator if such person has
15 held such office for less than three years.

16 "This section shall not apply to any person who is a
17 Senator on the date of ratification of this Article so long as
18 such person continues thereafter to be a Senator without an
19 interruption in service."

○

101ST CONGRESS
1ST SESSION

H. J. RES. 201

Proposing an amendment to the Constitution of the United States to provide for four-year terms for Representatives and to limit the number of terms Senators and Representatives may serve.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 1989

Mr. McCOLLUM (for himself, Mr. JOHNSTON of Florida, Mr. HANSEN, Mr. GUNDERSON, Mr. DENNY SMITH, Mr. LIGHTFOOT, Mr. McMILLAN of North Carolina, Mr. SHUMWAY, Mrs. BENTLEY, Mr. BILIRAKIS, Mr. HANCOCK, Mr. CARPER, and Mr. BROWN of Colorado) 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 to provide for four-year terms for Representatives and to limit the number of terms Senators and Representatives may serve.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein), That the fol-*
4 *lowing article is proposed as an amendment to the Constitu-*
5 *tion of the United States, which shall be valid to all intents*
6 *and purposes as part of the Constitution when ratified by the*

1 legislatures of three-fourths of the several States within
2 seven years from the date of its submission by the Congress:

3 "ARTICLE—

4 "SECTION 1. The term of office of a Representative in
5 Congress shall be four years, except for two-year terms as
6 provided in this section. Immediately after the Representa-
7 tives in Congress shall be assembled for the first term with
8 respect to which this section applies, they shall be divided by
9 lot as equally as may be into two classes. The terms of the
10 Representatives of the first class shall expire at the end of
11 the second year, and of the second class at the end of the
12 fourth year, so that one-half may be chosen every second
13 year. In order to meet the requirements of reapportionment,
14 all offices of Representatives in Congress shall be open for
15 election in years ending in two and the same process of divi-
16 sion into two classes described hereinbefore shall recur upon
17 the first assembly of Members after each such election. The
18 House of Representatives shall adopt procedures to insure
19 that the size of the two classes of seats shall remain as equal
20 as possible despite changes occurring in the total number of
21 seats in the House of Representatives or in the apportion-
22 ment of Members among the several States.

23 "SECTION 2. No person who has been elected to the
24 Senate two times shall be eligible for election or appointment
25 to the Senate. No person who has been elected to the House

1 of Representatives a total of four times, or has been elected
2 three times to four-year terms, shall be eligible for election to
3 the House of Representatives.

4 "SECTION 3. For purposes of determining eligibility for
5 election under section 2, only elections occurring by reason of
6 the expiration of the term of office of a Member and elections
7 to terms of office beginning more than one year after the date
8 of the ratification of this article shall be taken into account.

9 "SECTION 4. The first clause of section 2 of article I of
10 the Constitution of the United States is hereby repealed.

11 "SECTION 5. Section 1 shall apply with respect to
12 terms of office beginning more than one year after the date of
13 the ratification of this article. Section 2 shall take effect when
14 the first terms of office begin with respect to which section 1
15 applies."

○

101ST CONGRESS
1ST SESSION

H. J. RES. 300

Proposing an amendment to the Constitution of the United States to provide for four-year terms for Representatives and to limit the number of consecutive terms Senators and Representatives may serve.

IN THE HOUSE OF REPRESENTATIVES

JUNE 21, 1989

Mr. HEFLEY 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 to provide for four-year terms for Representatives and to limit the number of consecutive terms Senators and Representatives may serve.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled,*
3 That the following article is proposed as an amendment to
4 the Constitution of the United States, which shall be valid to
5 all intents and purposes as part of the Constitution when rati-
6 fied by the legislatures of three-fourths of the several States
7 within seven years from the date of its submission by the
8 Congress:

1 "ARTICLE —

2 "SECTION 1. The House of Representatives shall be
3 composed of Members chosen every fourth year by the people
4 of the several States, and the electors of each State shall
5 have the qualifications requisite for electors of the most nu-
6 merous branch of the State legislature. The four-year term of
7 office of the Members of the House of Representatives shall
8 begin on noon of January 3 of the year in which the term of
9 office of the President begins.

10 "SECTION 2. No person who has served three consecu-
11 tive four-year terms in the House of Representatives shall be
12 eligible to serve in the House of Representatives during the
13 term immediately following the third such consecutive term.
14 No person who has served two consecutive six-year terms in
15 the Senate shall be eligible to serve in the Senate during the
16 term immediately following the second such consecutive
17 term.

18 "SECTION 3. Only terms beginning after the date of the
19 ratification of this article shall be taken into account in deter-
20 mining eligibility for service under section 2.

21 "SECTION 4. The provisions of this article shall take
22 effect at noon on January 3 of the first calendar year which
23 begins after the date of the ratification of this article and in
24 which the term of office of the President begins."



101ST CONGRESS
1ST SESSION

S. J. RES. 17

Proposing a constitutional amendment to limit Congressional terms.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. DECONCINI introduced the following joint resolution; which was read twice
and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing a constitutional amendment to limit Congressional
terms.

1 *Resolved by the Senate and House of Representatives*
2 *of the United States of America in Congress assembled*
3 *(two-thirds of each House concurring therein), That the fol-*
4 *lowing article is proposed as an amendment to the Constitu-*
5 *tion of the United States, which shall be valid to all intents*
6 *and purposes as part of the Constitution if ratified by the*
7 *legislatures of three-fourths of the several States within*
8 *seven years after its submission for ratification:*

1 "ARTICLE —

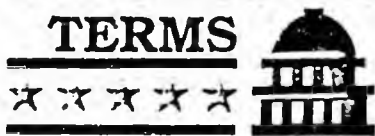
2 "SECTION 1. No person shall be elected to the Senate
3 for more than two full terms. No person shall be elected to
4 the House of Representatives for more than seven l terms.

5 "SECTION 2. Notwithstanding the provisions of section
6 1 of this article, any person may serve not more than four-
7 teen years as a Senator or not more than fifteen years as a
8 Representative.

9 "SECTION 3. For purposes of determining eligibility for
10 election under section 1 of this article, no election occurring
11 before the date of this article is ratified shall be taken into
12 account. For purposes of determining years of service under
13 section 2 of this article, no service of any part of a term of
14 office by a Senator or Representative elected to such term
15 before the date this article is ratified shall be taken into
16 account."

○

AMERICANS TO LIMIT CONGRESSIONAL TERMS



Dear Colleague:

As a respected member of your State Legislature, I am writing to ask for your support in solving a very real crisis facing our representative government.

As you talk with your constituents I'm sure you realize most Americans don't think much of Congress. Voters are simply fed up with rampant abuse of power and corruption in Washington that has produced a crisis in the institution itself.

It's clear to a growing number of opinion leaders and Americans at every level that fundamental reform is needed to make Congress a respected and effective branch of the Federal government once again.

That is why I invite you to join the National Advisory Board of Americans to Limit Congressional Terms (ALCT).

We need your support and the prestige of your name to help us pass a Constitutional Amendment to limit to 12 years the time U.S. Congressmen and Senators can serve in the House and/or Senate.

Today too many Members of Congress are more concerned about what they can do for their careers than what they can do for their country.

In recent years, they have demonstrated real success at getting themselves reelected. Almost 99% of incumbent House Members were reelected in 1988. Newsweek magazine reported that this is "a higher rate than in the Supreme Soviet under Leonid Brezhnev."

Incumbent Congressmen have the same instincts for career preservation that we all have. Unfortunately, they've been able to preserve their individual careers by discouraging competition and the institution of Congress has suffered.

NATIONAL ADVISORY BOARD

The Honorable James G. Abourezk
South Dakota
The Honorable Glenn Andrews
Alabama
The Honorable Lamar Baker
Tennessee
The Honorable Cleve Benedict
West Virginia
The Honorable Ben B. Blackburn
Georgia
The Honorable M. Caldwell Butler
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The Honorable Daniel E. Button
New York
The Honorable Howard H. Callaway
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The Honorable James K. Coyne
Pennsylvania
The Honorable Paul W. Cronin
Massachusetts
The Honorable William P. Curlin, Jr.
Kentucky
The Honorable Thomas B. Curtis
Missouri
The Honorable James W. Dunn
Michigan
The Honorable Arlen I. Erdahl
Minnesota
The Honorable Donald M. Fraser
Minnesota
The Honorable Kent Ronald Hance, Sr.
Texas
The Honorable Thomas F. Harnett
South Carolina
The Honorable James Harvey
Michigan
The Honorable Elwood H. Hillis
Indiana
The Honorable Ken Holland
South Carolina
The Honorable James P. Johnson
Colorado
The Honorable Walter H. Judd
Minnesota
The Honorable John LeBouillier
New York
The Honorable Paul N. McCloskey, Jr.
California
The Honorable Donald F. McGintley
Nebraska
The Honorable Walter L. McVey, Jr.
Kansas
The Honorable William S. Mailliard
California
The Honorable Edwin H. May, Jr.
Connecticut
The Honorable Ronald M. Mott
Ohio
The Honorable Ned Pattison
New York
The Honorable Charlotte T. Reid
Illinois
The Honorable J. Kenneth Robinson
Virginia
The Honorable Donald H. Rumsfeld
Illinois

Recently I had lunch with a distinguished Former Member who was first elected in 1942. He said that today's Members should be called "Delegates of Special Interests", not "Representatives". I suspect that you agree with him. Congress has become bloated with too many staff, distracted by a mindless media, and seduced by too much money.

I am personally convinced that Congress will not provide fundamental reforms unless there is a groundswell of public support. That is why we must "help provide some backbone" by demanding passage of a Constitutional Amendment to limit terms and return Congress to the people.

With this one Constitutional Amendment to limit terms to 12 years, we can bypass all the unfair election laws that favor incumbents and restore competitive elections. Then, Congress can truly represent our Country, with Members who get elected on the basis of today's issues, not because they got in 15 years before and hold on for life.

This cannot happen overnight. Present Members of Congress would have to be "grandfathered" to assure continuity and improve chances for passage.

Organizational efforts are beginning in many states and among Members of Congress of both parties who share our concerns about the ability of Congress to function effectively as the legislative branch of our federal government.

ALCT is planning to hold a press conference later this year in Washington to formally "kick off" our bipartisan national campaign in all 50 states and announce our Advisory Board Members. I hope you will be included on our list of Members.

At that press conference ALCT will issue a "National Call to Action" and announce the cornerstones of the campaign:

- * A grassroots lobbying campaign to have every congressional candidate sign a "Pledge of Support" for the Amendment.
- * An extensive advertising campaign using television, newspapers and direct mail to get supporters for our Amendment from every congressional district in the nation. We've already heard from thousands of people who support our

amendment.

- * Development of a network of support in state capitols including yours to pass resolutions urging adoption of the Amendment by the U.S. Congress.

To win this victory means making limited terms a major campaign issue in every state and congressional district during the 1990 elections.

One thing we all understand is the power of the ballot box. There must be such a groundswell of support for limited terms that incumbent Members of Congress would be courting political suicide by not signing a "Pledge of Support" for the Amendment and working for its passage.

Congress as an institution is in crisis. It is incapable of reforming itself internally to the point it can deal decisively with our nation's economic and social problems.

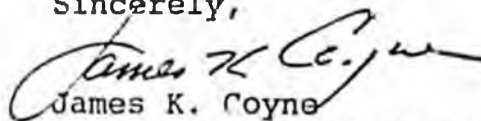
It is time now for legislative leaders like yourself to step forward and help restore the responsibility and respectability of the U.S. Congress by joining our National Advisory Board.

If you would like to introduce a resolution supporting adoption of this amendment in your State Legislature, please let me know. We are developing the language for such a resolution and I would welcome your help in introducing this legislation.

Please take some time now to give me your decision by using the enclosed reply memorandum. Please mail it to me at ALCT's office at 900 2nd St., N.E., #200, Washington, D.C. 20002.

Americans to Limit Congressional Terms is an organization you can be proud to be associated with. Please feel free to call me if you have any questions. Our telephone number is: 202-842-4446.

Sincerely,



James K. Coyne
Former Member of Congress,
8th District, Pennsylvania
National Co-Chairman, ALCT

U.S. Department of Justice

Office of Legal Policy

Report to the Attorney General

Limited Constitutional
Conventions under Article V
of the
United States Constitution

September 10, 1987



**LIMITED CONSTITUTIONAL
CONVENTIONS
UNDER ARTICLE V
OF THE UNITED STATES
CONSTITUTION**

(September 10, 1987)



Office of the Attorney General
Washington, D. C. 20530

Although Article V of our Constitution establishes two means by which proposed amendments may be submitted to the States for their ratification, only one of those methods, submission by initiative of Congress, has ever been employed. The alternative process requires that the Congress call a convention for the purpose of proposing constitutional amendments whenever two-thirds of the States, acting through their legislatures, apply for such a convention.

Recently, there has been increased interest in this alternative means of amending the Constitution -- an interest reflected in the increasing number of state applications to hold a constitutional convention. With the states showing renewed interest in a constitutional convention, there has been significant and far-reaching legal scholarship regarding the nature, purposes, and potential effects of such a convention. Among the questions which have received substantial attention is whether a constitutional convention could be limited to the subjects on which it was called.

The present study, "Limited Constitutional Conventions Under Article V of the United States Constitution," is a contribution to the on-going inquiry into this issue. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues.

This study will generate considerable thought on a topic of great national importance, a topic about which there are several reasonable points of view. It will be of interest to anyone concerned about a provocative and informative examination of the issues.

Edwin Meese III
EDWIN MEESE III
Attorney General

EXECUTIVE SUMMARY

The attached paper examines the process of amending the Constitution through a constitutional convention. Specifically, the paper explores the question of whether such a convention, authorized by Article V of the Constitution, can be limited to the consideration of particular subjects.

The paper concludes that Article V permits the states to apply for, and the Congress to call, a constitutional convention for limited purposes, and that a variety of practical means to enforce such limitations are available. The language and structure of Article V, as well as the history of its drafting, support this conclusion because the two methods of constitutional amendment, Congressional initiative and the state-called convention, are treated by Article V as equally available procedural alternatives. There is no suggestion that the alternative modes are substantively distinct, that one is subordinate to the other, or that use of one mode is restricted to particular topics or circumstances.

Since it is undisputed that Congress possesses the authority to propose amendments limited to a single topic or group of topics, it follows that the applications of the states for calling a constitutional convention also may be limited. This understanding is reinforced by the normal practice of the states in limiting by subject their applications to the Congress.

The paper also notes that the requirements of Article V are designed to ensure that a consensus exists as to the desirability of amendment, whichever method of amendment is employed. As the Supreme Court has held, an Article V consensus is a super-majority agreement on the same subject at the same time that has been made manifest and clear by following the procedures outlined in Article V. If the states choose to condition their application for a convention on discussion of a particular amendment or subject, then the Congress must call a convention of that kind if the principle of consensus is to be indicated.

After establishing that Article V does permit limited constitutional conventions, the paper examines the procedural strictures available to ensure that such limitations are enforced. In particular, the paper concludes that Congress has the authority to adopt legislation providing for the enforcement of limitations. The report also suggests that judicial review to curb convention irregularities and the possibility of holding

convention delegates to their oaths of office are other potentially effective enforcement devices.

The paper concludes by recognizing that there are inevitable uncertainties associated with any as-yet-untried process. However, it is suggested that the adoption of convention-procedures legislation by the Congress would minimize greatly any remaining uncertainties associated with the convention method of amendment.

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INTRODUCTION

Article V of the United States Constitution provides two methods by which constitutional amendments may be proposed: by the Congress, or by a convention called by the Congress on the application of the legislatures of two-thirds of the states. The former method has been employed in the case of each of the first twenty-six amendments to the Constitution. The latter method has never been used, although numerous applications for a convention have been made by the states over the years on a variety of topics.

In this paper, the Office of Legal Policy examines the following issues: (1) whether Article V permits a constitutional convention limited to one or more topics; and (2) if so, whether there are practical means permitted by the Constitution to enforce the limitations.¹

We conclude that Article V does permit a limited convention. This conclusion is premised on three arguments. First, Article V provides for equality between the Congress and the states in the power to initiate constitutional change. Since the Congress may limit its attention to single issues in considering constitutional amendments, the states also have the constitutional authority to limit a convention to a single issue. Second, consensus about the need for constitutional change is a prerequisite to initiating the amendment process. The consensus requirement is better met by the view that Article V permits limited constitutional conventions than by the view that it does not. Third, history and the practice of both the states and the Congress show a common understanding that the Constitution can be amended issue by issue, regardless of the method by which the amendment process is initiated.

We also conclude that there are four possible methods of enforcing the subject matter limitation on the convention. First, and foremost, the states, who exercise ultimate control over the ratification of all constitutional amendments, may withhold ratification of a proposed amendment which is outside the scope of the subject matter limitation. Second, the

¹Although this paper does recommend that the Department of Justice support the need for legislation establishing procedures for a limited convention, it does not treat all the details which would be involved in such legislation.

Congress may enact legislation providing for such limitations as the states request and it may be that the Congress may decline to designate the mode of ratification for those proposed amendments that it determines are outside the scope of the subject matter limitation and therefore beyond the authority of the convention to propose. Third, the courts may review the validity of the constitutional amendment procedure, including whether a proposed amendment was within the subject matter limitation. Fourth, the delegates to a convention may be bound by oath to refrain from proposing amendments on topics other than those authorized under the charter of the convention.

The issues discussed in this paper are of significant practical importance. The possibility that a convention will be called is greater today than ever before in our history. While only ten applications for a convention were received by the Congress from 1788 to 1893, since that time over 300 such applications have been made.² In the late 1960's, the initiative for an apportionment amendment received thirty-two of the required thirty-four applications.³ Today, the initiative for a balanced-budget amendment has also received thirty-two applications.

As the prospect that a convention would be called loomed larger, debate was conducted in both the popular and the academic press over whether Article V permits a limited convention.⁴ Some of this literature

² *Constitutional Convention Implementation Act of 1985*, S. Rep. No. 99-135, 99th Cong., 1st Sess. 13 (1985) [hereinafter *Senate Report*].

³ *Id.* at 12-13.

⁴ A large amount of both popular and academic writing is collected in *Constitutional Convention Procedures, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 96th Cong., 1st Sess.* (1979) [hereinafter *Hearing*]. Some of the scholars who conclude that Article V permits a limited convention are Professor William W. Van Alstyne, Professor (now Judge) Grover Rees III, and Professor (now Judge) John T. Noonan. See, e.g., Van Alstyne, *The Limited Constitutional Convention - The Recurring Answer*, 1979 *Duke L.J.* 985; Rees, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 *Harv. J. L. & Pub. Policy* 79 (1982); Noonan, *The Convention Method of Constitutional Amendment - Its Meaning, Usefulness, and Wisdom*, 10 *Pac. L.J.* 641 (1979). In addition, the American Bar Association, after conducting its own study, has concluded that limited conventions are permissible under Article V. See American Bar Association, *Amendment of the Constitution by the Convention Method Under Article V*, reprinted in *Hearing, supra*, at 69. Some of the scholars who conclude that Article V permits general conventions only are Professor Charles Black, Professor Walter Dellinger and Professor Gerald Gunther. See, e.g., Black, *Amending the Constitution: A Letter to a Congressman*, 82 *Yale L.J.* 189 (1972); Dellinger, *The Recurring Question of*

expressed fear of a "run-away" convention, one that might propose amendments fundamentally altering cherished constitutional liberties or basic institutions of government.⁵ The participants in this debate included some of the most prominent constitutional scholars of our time, and the debate was largely characterized by serious attempts on the part of all concerned to remain faithful to the text of the Constitution. The arguments marshalled in opposition to limited conventions are by no means implausible, and we wish to state at the outset that we do not urge that those arguments are self-evidently wrong. Rather, we believe the interpretation urged here is the more defensible view in light of the language, the framing history, and the purpose of Article V.

Based on our conclusions that the Constitution permits limitations on the subject matter of a convention and permits effective enforcement of those limitations, we believe that fears of a "run-away" convention are not well founded.

I. ARTICLE V AUTHORIZES LIMITED CONSTITUTIONAL CONVENTIONS

In its entirety, Article V provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the States, or by Conventions in three-fourths thereof, as the one or other mode of Ratification may be proposed by the Congress; Provided that no

the "Limited" Constitutional Convention, 88 *Yale L.J.* 1623 (1979); Gunther, *Constitutional Brinkmanship: Stumbling Toward a Convention*, 65 *A.B.A.J.* 1046 (1979).

⁵ See, e.g., *Senate Report, supra* note 2, at 2 ("Concern has frequently been expressed about the possibility of a 'runaway' convention, unfaithful to the mandate with which it was charged by the States and the Congress."); Gunther, *The Convention Method of Amending the United States Constitution*, 14 *Ga. L. Rev.* 1, at 25 (1979) ("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."); *Statement by the National Board of Directors, Americans for Democratic Action, March, 1979, reprinted in Hearing, supra* note 4, at 411 ("[A] constitutional convention will surely plunge us into a crisis of mammoth proportions").

Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth clause 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.

While the text of Article V does not explicitly address the question of limitations on the subject matter of the convention, the structure and purpose of the text, as well as the interpretation of it by the states, the Congress, and the majority of scholars who have taken up the question, all support the view that Article V permits limitation of the subject matter of the convention.

The structure of Article V provides for equality, as between the states and the Congress, in initiating the process of amending the Constitution. This interpretation of the text is supported by the records of the framing of Article V and by other contemporaneous historical sources, as well as by the weight of modern day scholarly opinion. Since the Congress is clearly able to limit its own initiated amendments to a single topic, the "equality argument" leads to the conclusion that the states are equally able to limit the subject matter of initiated amendments. In Part I.A. of this paper, we examine the "equality argument" in detail, showing its fidelity to the text and support in historical sources.

A crucial requirement of Article V, consensus, also supports the interpretation allowing for limited constitutional conventions. Article V requires a broad consensus at two stages in the amendment process: the stage at which those authorized to make a determination that change is necessary decide to initiate the amendment process, and the stage at which a concrete proposal for change is subject to ratification. The first stage implements the consensus requirement by making a supermajority vote of either the Congress or the states a prerequisite to initiation of the amendment process. In Part I.B. of this paper, we will show that the interpretation that Article V permits limited conventions is more in harmony with the consensus requirement than the alternative interpretation, which would permit only unlimited conventions. We also show that the "consensus argument" is supported by legal precedent and historical evidence.

In Part I.C. of the paper, we review the historical practice of both the states and the Congress under Article V to show that these bodies

have consistently interpreted that Article as authorizing a limited convention.

A. The "Equality" Argument: Under Article V, The Congress and the State Legislatures are Equally Able to Initiate the Amendment Process

1. The Congress and the States Are Equal

No one has ever questioned the Congress' authority to propose amendments limited to a single topic or group of topics. The "equality argument" takes it as a given that Congress is free to propose single amendments limited to a single topic. Each of the first sixteen amendments to the Constitution after the adoption of the original ten has been proposed by the Congress in a manner consistent with this authority. If the states are equally able to initiate the amendment process, the states should be equally able to limit the subject matter of proposed amendments. The structure and history of Article V fully support the basic premise of the equality amendment.

a. *The Structure of Article V*

The procedure for amending the Constitution set forth in Article V consists of three stages: a determination that amendment is necessary, formulation of a concrete proposal for amending, and ratification. Each stage may be carried out in two ways. The determination of necessity may be made either by the Congress or by the states; the concrete proposal may be formulated by the Congress or by a convention; ratification may be granted either by state legislatures or state conventions.⁶

The structure of Article V strongly suggests that each optional mode of conducting each stage of the process is different only in form. The Article is a single sentence with parallel constructions. It imposes an identical requirement of a two-thirds majority on the Congress and the States to begin the amendment process. It explicitly states that "in either

⁶If the determination of necessity for change is made by the states, the concrete proposal for change must be formulated by a convention. If the determination of necessity is made by the Congress, the concrete proposal must also be formulated by the Congress. However, even though the "initiation stage" and the "formulation stage" are linked in this fashion, the two stages are distinct activities, as evidenced by their division in the state-initiated amendment process.

Case" — *i.e.*, regardless of the method chosen to determine the necessity of an amendment and the text of a proposal — a proposed amendment is valid if ratified in the required manner. It prescribes an identical supermajority vote for either mode of ratification. On the whole, the structure of the text indicates clearly that the optional modes of conducting each stage are merely procedural alternatives; there is no suggestion in the language or the structure of Article V that the optional modes are substantively distinct, that one is subordinate to the other, or that use of one mode is restricted to particular topics or circumstances.

b. *The Framing of Article V and Contemporaneous Commentary*

The historical record concerning the framing of Article V shows that Article V contemplates an equal power of initiation between the states and the Congress and that this basic equality was the intended result of a compromise at the Federal Convention of 1787 in Philadelphia. Furthermore, it is clear that the compromise was to give Congress power to initiate the amendment process equal to the power of the States: the delegates first agreed that the States should have a power to amend that was not dependent for its exercise on the national legislature; only later did they add a provision giving the Congress equal authority to initiate amendments.

The first issue about the amending power debated in the Federal Convention was whether *any* method of amendment should be included in the Constitution. When the initial proposition regarding amending the Constitution was brought up at the Federal Convention on June 5, 1787, Charles Pinckney of South Carolina objected that such an amending provision in the Constitution was neither proper nor necessary. Almost immediately, a vote was taken to postpone debate.⁷

When the issue was brought up again on June 11, the proposition debated was that a method of amending the Constitution ought to be provided at which the assent of the National Legislature ought not to be required (Article V, § 1, cl. 2).⁸ Several delegates criticized the proposition because it made "the consent of the National Legislature unnecessary."⁹

⁷ 1 *The Records of the Federal Convention of 1787*, at 121 (M. Farrand, ed., rev. ed. 1937) (hereinafter cited as "Farrand").

⁸ 1 Farrand 202.

⁹ *Id.*

It is clear that the advocates of including an amendment provision wanted to provide the states with a method of curbing Congressional power. With fellow Virginian Edmund Randolph in concurrence, George Mason argued:

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.¹⁰

The amendment process was taken up again on September 10. A draft of Article V was debated that provided only for a state-initiated convention and excluded the alternative method of the Congress itself proposing constitutional amendments to the states. Under this version, the Congress was required to call a convention upon the application of two-thirds of the states. Any amendment proposed by the convention would immediately become part of the Constitution. There was no ratification process. Elbridge Gerry criticized the draft because it seemed to him that it presented the danger that two-thirds of the states could band together and bind all the states to "innovations" that could possibly include the complete subversion of all the state constitutions.¹¹

Alexander Hamilton criticized the draft for different reasons. In general he approved of the amending power and thought that the experience of the Articles of Confederation showed that there should be "an easy mode" for amending the Constitution. The current draft was inadequate, Hamilton said, because it presented too much of a danger to the national government — which would be at the mercies of the states. He then proposed to the Convention that the Congress be allowed to propose amendments as well. Hamilton argued that the Congress would "be the first to perceive and will be most sensible to the necessity of amendments."¹² With Hamilton's voice added to Gerry's, the Convention voted to reconsider. At this point, Roger Sherman of Connecticut introduced the idea that amendments — proposed either by the Congress or by the states — should be "consented to" (*i.e.* ratified) by the states.¹³

¹⁰ *Id.*

¹¹ 2 Farrand 557.

¹² *Id.*

¹³ *Id.*

After further discussion, James Madison proposed new language that summarized and reformulated the discussion so far. His new draft was predominantly what became the final version of Article V. However, his new draft also changed the substance of what had been discussed up to that point. Hamilton's proposal — a compromise position — had been to establish equal powers of initiating the amendment process in the states and in the national legislature. Madison's draft provided that the national legislature alone could propose amendments either on its own initiative or upon the applications of two-thirds of the state legislatures. He left out completely the mandatory requirement that Congress call a convention upon the applications of two-thirds of the states. A convention was not even mentioned. Madison's draft passed.¹⁴

On September 15, Madison's draft, slightly altered by the Committee on Style and Arrangement, was brought up again for debate:

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 1st and 4th clauses in the 9th section of Article I.¹⁵

Clearly, this draft refers to both single and multiple amendments. Madison's unification of the proposing power in the Congress makes that evident. No one would read this formulation to mean that the Congress cannot propose single amendments. In fact, it contains the exact language under which the Congress has been proposing single amendments for almost 200 years. Since the Madison draft provides that only the Congress can propose, it must also mean that the Congress can propose single amendments regardless of whether the necessity for amendment is determined by Congress or by an application of the states.

¹⁴*Id.*

¹⁵2 Farrand 629.

As explained by Professor (now Chief Justice of the High Court of American Samoa) Grover Rees III,

It seems crystal clear that this provision referred to such particular amendments as were desired by the states. I cannot imagine anyone suggesting that the states were expected to say to Congress, "We think it is about time for you to propose some amendments. Any amendments will do." Indeed, another part of the same sentence would have rendered such a state "power" superfluous as well as inadequate, since it gave Congress the power to propose amendments at its own discretion. Thus the whole provision was perfectly symmetrical: Such amendments would be proposed as were desired either by two-thirds of both houses of Congress or by two-thirds of the state legislatures.¹⁶

Madison's draft stimulated a debate that led to the final version:

Colonel 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 Government should become oppressive, as he verily believed would be the case.

Mr. Govr. Morris and Mr. Gerry moved to amend the article so as to *require a Convention* on application of two-third of the states. * * * *

The motion of Mr. Govr. Morris and Mr. Gerry was agreed to * * * ¹⁷

Thus, the Gerry/Morris revision providing for the calling of a convention seems to have been made to respond to Mason's concern that the states not be dependent on the national legislature for proposing amendments. The delegates evidently thought that they were restoring

¹⁶Rees, *supra* note 4, at 87.

¹⁷2 Farrand 629 (emphasis added).

the terms of Hamilton's compromise.¹⁸ There was no discussion to the effect that this restoration deprived the states of the power to initiate particular amendments, a power they clearly had under the Madison formulation. Instead, it appears that restoring the convention provision was viewed solely as a way of providing an effective alternative means for the states to initiate constitutional change, including change on a single topic. The clear meaning of the penultimate draft on this point, as pointed out by Rees, obviously obtained in the final draft as well. It obtains in Article V today.

In summary, the debates about what became Article V demonstrate that the power of initiating the amendment process was initially to reside only in the states. The language of the final draft permitting the Congress to initiate the amendment process was a compromise to allow the Congress as much power as the states to initiate the amendment process. Like the text of Article V itself, the history of Article V is devoid of any indication that the convention mode is substantively different from the congressional mode of initiating the amendment process.

This interpretation is supported by contemporaneous accounts of the amending power. Concerning the structure and purpose of Article V, Madison was able to offer this simple but precise explanation:

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

¹⁸Taking away the Congress' exclusive control over the proposing power and dividing it between a convention and the Congress seems to be a clear victory for state prerogatives. Arguably, Madison was wrong when he noted just before the vote on the Gerry-Morris motion that the Congress would "be as much bound to propose amendments applied for by two-thirds of the States [under the penultimate draft] as to call a Convention on the like application [under the Gerry/Morris revision]." 2 Farrand 630.

be pointed out by the experience on one side or on the other.¹⁹

And in explaining why single amendments to the Constitution would be easier to accomplish than the initial ratification of the entire Constitution, Hamilton clearly assumes that the amending power would be used for single amendments and just as clearly makes no substantive distinctions between the two methods of initiating amendments:

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, whether 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.²⁰

c. Scholarly Commentary

A review of the academic literature reveals that a majority of commentators have concluded that Article V equally empowers the states and the Congress to initiate such particular amendments as they desire. It is noteworthy that most of this commentary was written without regard to contemporary amendment controversies such as the balanced-budget amendment. The Appendix is a compendium of authorities who support the permissibility of limited conventions under Article V.

It is no coincidence that many of those scholars who have concluded that Article V permits limited constitutional conventions base their conclusions substantially on the debates at the Federal Convention of 1787.²¹ These scholars emphasize the purpose of Article V, and

¹⁹*The Federalist No. 43*, at 286 (J. Madison) (Modern Library ed. 1937) (emphasis added).

²⁰*The Federalist No. 85*, at 572 (A. Hamilton) (Modern Library ed. 1937).

²¹It is no coincidence that some of those academics who deny the equality of the state and the Congress under Article V likewise deemphasize the importance of the original history. Charles Black, whose views are examined in the next subsection, has

typically they view Article V as a provision governing federal-state relations, or, more pointedly, federal-state antagonisms. Viewed as such, Article V takes its place with the many other provisions of the Constitution that divide and balance governmental power between the states and the national government.

Accordingly, in summarizing the overall meaning and purpose of the Article V debates at the Federal Convention, Professor Paul Bator has remarked:

The central purpose of the convention provision of Article V was to give the states recourse in the event that intransigent central authority refuses to consider a grave constitutional infirmity or defect.²²

Professor William Van Alstyne finds that Article V gives the states a ready means to check any "surprising and alarming" actions of the national government:

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.²³

In its *Report of the ABA Special Constitutional Convention Study Committee*, the American Bar Association agrees:

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

said that the framing history proves "next to nothing." Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 Okla. L. Rev. 626, 637 (1979) [hereinafter *A Letter to a Senator*].

²²Forum, *A Constitutional Convention: How Well Would It Work?* at 11 (American Enterprise Institute, 1979).

²³Hearing, *supra* note 4, at 295 (Statement of William Van Alstyne).

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.²⁴

Professor Kauper sees the convention method as giving the states the power to act when they are "deeply troubled":

If the requisite majority of legislatures is directed solely to the end of calling a convention to propose amendments on a given subject matter, it is in keeping with the underlying purpose of the alternative amendment procedure for Congress to limit the convention to such proposals. The general purpose of the alternative amendment provision is to provide something of a safety valve in case the state legislatures are deeply troubled about a matter which Congress refuses to correct by invoking its own power to propose amendments.²⁵

And Professor Kurland concurs about this fundamental purpose of Article V:

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.²⁶

The debates of the Federal Convention do not give us a detailed record of the intent behind every word of Article V. We can learn nothing from the debates about the details of a convention, for instance.²⁷ But those debates *do* give us a clear record of the purpose of Article V and what critical issues of constitutional principle were resolved by Article V's final draft.

The clear purpose of Article V would be undermined if a convention could not, under any circumstances, be limited, whatever the desires of

²⁴American Bar Association, *Report of the ABA Special Constitutional Convention Study* 16 (1973).

²⁵Kauper, *The Alternative Amendment Process: Some Observations*, 66 Mich. L. Rev. 903, 912 (1968).

²⁶Hearing, *supra* note 4, at 1223 (1968 Memorandum of Philip B. Kurland).

²⁷See Section II B. of this paper, pp. 36-43 *infra*.

the states applying for it. It would be undermined because Article V would no longer provide an equality between the states and the national government in the power to initiate constitutional change or, in Madison's words, to "equally enable" the origination of amendments by the states and by the Congress.

2. Mistaken Views of the Equality of Article V

Contrary to the analysis above, some commentators have reached a different result by adopting other ideas about the envisioned role of a convention under Article V. The problem with these approaches, as discussed below, is that they reflect a misunderstanding of the role of the states and would effectively preclude the states from initiating the amendment process, contrary to the language and purpose of Article V.

a. *Equality Between the Congress and a Convention*

The leading and longstanding opponent of the notion that Article V permits a limited constitutional convention is Professor Charles Black of Yale Law School. He reads Article V to require an equality of the Congress and a constitutional convention:

[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.²⁸

i. *The Congress and a Convention as Equally Independent*

Professors Bickel, Dellinger, and Gunther agree with Black that it is the Congress and a convention that are equal under Article V — not the Congress and the states.²⁹ All four maintain that this basic equality obtains for the purpose of protecting the independence of a convention.

²⁸ *Hearing, supra* note 4, at 191 (Statement of Charles L. Black, Jr.).

²⁹ *Federal Constitutional Convention: Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 90th Cong., 1st Sess. 62 (1967)* [hereinafter *Federal Constitutional Convention*] (Statement of Alexander Bickel); Dellinger, *supra* note 4, at 1630; *Hearing, supra* note 4, at 310-311 (Prepared Statement of Gerald Gunther)

The argument behind their view is that the Congress exercises an absolute discretion when it deliberates and proposes amendments. Deliberating and proposing *presuppose* discretion. Therefore, these scholars argue, the other Article V proposing body, a convention, must also possess such discretion and independence of mind. Thus, there can be no limitations on the agenda of an Article V convention. The states may not attempt to impose limitations by means of their applications, nor may the Congress through its call of the convention. Article V, according to this argument, contemplates an equality of discretion and of independence.

For example, the late Professor Alexander Bickel contended that:

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.³⁰

The argument that a convention must be as free as the Congress to propose amendments, and therefore must be unlimited in its authority, is based on a confusion about the Congress' dual role under the congressionally-initiated mode of amendment. When the Congress initiates the amendment process, it undertakes two logically distinct functions: it determines that a need for change exists, and it proposes a specific amendment. Although these two steps are taken virtually simultaneously, they are in fact separate stages in the amendment process. It is only the former step, the determination of necessity, that necessarily implies unlimited scope in the congressional power to consider any topic. The latter step, formulating a proposed text, is necessarily limited by the topic that led to the determination of necessity.

The parallelism these scholars overlook is that the convention is equal to the Congress as the drafting body but is not equal to the Congress as the body that decides that there is a need for change. Under the convention mode, the states have already determined that there is a need for change; this determination manifests itself in their applications. Thus, the states are equal to the Congress in the determination of necessity stage, the stage that is necessarily unlimited in scope. But the

³⁰ *Federal Constitutional Convention, supra* note 30, at 62. See also Dellinger, *supra* note 4, at 1630-31 (emphasis added).

convention is equal to the Congress in the formulation stage, the stage that is limited in scope.

ii. *A Convention as a Check on the States*

Black, Bickel, Dellinger, and Gunther further believe that an independent convention is essential as an extra check on the states.³¹ Whether the Congress or a convention proposes amendments, the states retain the power to disapprove the amendment before it becomes valid, these scholars argue. If the convention had been intended merely as a tool for the states, then they would have been given complete control over the process, from applying for and conducting the convention to ratifying the amendments proposed by their own conventions.

For example, Professor Dellinger argues that the framers of Article V:

created an alternative 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 the Congress may control it.³²

This argument has a certain constitutional plausibility to it. It appears to be another "check" on governmental power in a charter full of such checks. The argument's drawback, however, is that the framing history itself directly refutes it. Essentially, it is the argument of Roger Sherman who thought that the penultimate draft of Article V (that lacked only the critical "shall call a convention" language) gave the states too much power in the amendment process. Sherman wanted more checks on the collective power of the states, and he proposed several amendments, including the equal suffrage clause, to that effect.³³ He might well have adopted the convention-as-check argument and proposed that Article V be written so as to provide that conventions once

³¹ See Black, *supra* note 4, at 204; Dellinger, *supra* note 4, at 1632; *Federal Constitutional Convention*, *supra* note 30, at 62 (Bickel); *Hearing*, *supra* note 4, at 310 (Prepared Statement of Gerald Gunther).

³² *Hearing*, *supra* note 4, at 262 (Statement of Walter E. Dellinger).

³³ 2 Farrand 557, 629.

applied for by the states and called by the Congress were totally independent of the states. He did not, however. Neither he nor any other delegate proposed or discussed this additional check on the states. A convention as an independent body was never discussed.

Furthermore, the September 15 vote, inspired by Mason, to reinsert the "shall call a convention" language was an emphatic endorsement of the argument for more, not less, state power. The last two clauses of Article V — concerning slavery and equal suffrage in the Senate — are *specific* limitations (or checks) on what a supermajority three-fourths of the states can do to any particular state or states. We have the record of the debates about the purposes of these limitations. There is no record, however, of any other *general* limitations — a convention-as-check provision, for instance — on the states' role in the amendment process. In fact, such a general check, Madison's granting of the proposing power solely to Congress, was removed from the final version.

If this convention-as-check or some further limitation on the power of the states had prevailed at the Federal Convention, arguably we would have an *overchecked* Article V. The states would be effectively checkmated in their power to initiate constitutional change, which is an essential purpose of Article V. In fact, under this view of Article V, the states have no viable role outside of the power to ratify. As the late Senator Sam Ervin correctly pointed out, the states would never attempt to initiate constitutional change under this theory:

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.³⁴

In agreement with Ervin is Professor Brickfield who, writing for the House Judiciary Committee, charges that general and independent conventions would reduce the convention method of amending the Constitution to "an unworkable absurdity."³⁵ Noonan says that it would leave the states "helpless,"³⁶ and the Senate Judiciary Committee argues

³⁴ Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 883 (1968).

³⁵ C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Cong., 1st Sess. 20 (Comm. Print 1957).

³⁶ Noonan, *supra* note 4, at 644.

that it would "undermine" Article V itself by rendering the convention method "a constitutional dead-letter." Van Alstyne calls such an interpretation "peculiar and hostile,"³⁷ and goes on to observe the folly in contending that the States may apply for *only* an unlimited convention, the kind least consistent with the limited purpose of Article V:

I do find it perfectly remarkable that some have argued for a construction not merely limiting the power of state legislatures to have a convention, but limiting that power to its *least* expected, *least* appropriate, and yet most dangerous use.³⁸

Of course, a convention does serve as a check on the states — but only of a certain kind. The state legislatures do not implement all three stages of the convention method. They set the agenda by initiating and amend the Constitution by ratifying. But they do not deliberate; they do not craft the language of an amendment; most critically, they do not decide whether an amendment is to be proposed at all. Regardless, it is erroneous to conclude that because the *proceedings* of a convention are independent of state control that the *agenda* is likewise independent of the purposes for which the states caused the convention to be called.

The convention is itself subject to checks and balances as a temporary fourth branch of government. It is no more "independent" of the influences of the other branches of government than are the executive, legislative, or judicial branches. With their applications, the states indirectly check the authority of the convention by causing the Congress to call into being a convention, but only one of a certain type. The Congress directly exercises this check by means of its power to call such a convention into existence.

b. *The "Second Philadelphia" Argument: Article V Does Not Contemplate Equality*

Many of those who argue for general and independent conventions frequently take their arguments a step farther by urging that the two methods of amending the Constitution have different purposes and are therefore unequal. According to this school of thought the workable and normal method of amending the Constitution is the one that has always been used. The convention method is to be reserved for rare and exotic

³⁷ Van Alstyne, *supra* note 4, at 990.

³⁸ *Id.* at 991-92 (emphasis in original).

occasions. The key feature of this argument is the way its proponents misconceive a convention.

For instance, Alexander Bickel described the convention method as an opportunity for "a national forum" on the Constitution, which should be open and not predetermined by the states.³⁹ Dellinger says that a constitutional convention is "an awesome device" to be used in times of crisis.⁴⁰

Black has said that the convention method looks to "a general dissatisfaction with the national government or a breakdown thereof."⁴¹ Professor Ackerman would restrict the convention method to occasions "when the states are willing to assert the need for an unconditional reappraisal of constitutional foundations."⁴² Professor Tribe of Harvard Law School has said that:

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.⁴³

As noted above, the most reasonable interpretation of the text is that Article V provides for an equality of initiation and that both methods of initiation are designed to be useful and equal in purpose. The history of the framing of Article V is devoid of any details that might provide support for the "second Philadelphia" argument. In addition, Madison's and Hamilton's references to the amending power in *The Federalist* indicate that the Article V process is designed for "useful alterations" rather than merely for "sweeping revisions." The "second Philadelphia" argument is an interesting theory, but no evidence can be marshalled to show that it has anything to do with an Article V convention.

³⁹ *Federal Constitutional Convention*, *supra* note 30, at 62 (Bickel).

⁴⁰ *Hearing*, *supra* note 4, at 254 (Testimony of Walter E. Dellinger).

⁴¹ Black, *supra* note 4, at 201.

⁴² Ackerman, *Unconstitutional Convention*, *New Republic*, March 3, 1979, at 8.

⁴³ *Hearing*, *supra* note 4, at 502 (Statement of Laurence H. Tribe).

B. The Consensus Argument: Article V Requires That the Constitution be Amended If and Only If A Supermajority Agreement Exists

The word "consensus" is used here to mean an agreement based on more than a bare majority, or, in the words of one commentator, a "manifest agreement."⁴⁴ As already pointed out, Article V requires a consensus — a supermajority — when the Congress deems amendment necessary, when the states likewise deem amendment necessary by applying for a convention, and when amendments proposed to the states are ratified. According to the consensus argument, the Constitution requires that a consensus be identified before constitutional change can take place.

The consensus requirements of Article V reflect a clear constitutional presumption in favor of permanency and stability. They serve as hurdles to those who would change the Constitution, and Article V is designed to make clear that the necessary hurdles have been jumped before the Constitution is amended. Only the view that Article V permits limited conventions allows for the necessary clarity about the existence of a consensus. This is perhaps best shown by the arguments that ignore the consensus requirement, as will be seen below.

The text of Article V requires that a consensus be identified at two stages: at the initiation stage and at the ratification stage. The barrier to constitutional change provided by the three-fourths ratification consensus is not a sufficient barrier according to Article V. A prior consensus at the initiation stage must occur before proposing and ratification can even be considered. Without this required prior consensus, there would be no Article V impediments to a "runaway" convention. If the ratification consensus were to be accepted as the only necessary barrier to facile constitutional change, then there would be no reason for Article V to provide for a two-thirds vote of the Congress or an agreement of two-thirds of the applications of the states. In view of the multi-layered consensus requirements provided by the text of Article V, one should be wary of interpretations that ignore them.

Consensus serves to discourage notions about sweeping revisions of the constitutional system. Two hundred years of constitutional experience have shown that it is quite difficult to achieve such a consensus.

⁴⁴Hearing, *supra* note 4, at 293 (Statement of William W. Van Alstyne).

Every one of our constitutional amendments has been a consensual response to a specific problem. If the states are equal to the Congress in the power to originate amendments, they must have equal power to take action based on the only kind of consensus that in practice ever occurs: a consensus about a particular issue or set of issues. The conclusion that Article V permits limited conventions is consonant with the consensus requirement of Article V.

1. Limited Conventions Uphold the Consensus Requirement

a. *Dillon v. Gloss*

The Supreme Court has agreed that consensus is a crucial theme of Article V. In *Dillon v. Gloss*,⁴⁵ the Court was faced with a plaintiff who was seeking to nullify a constitutional amendment. Dillon, a convicted bootlegger, was seeking a writ of *habeas corpus* on the ground, among others, that the Eighteenth Amendment should be declared invalid because the Congressional resolution that had proposed it to the states contained a provision declaring that the amendment must be ratified within seven years. Dillon argued that the Congress' attempt to limit the time had voided the proposal because "Congress has no power to limit the time of deliberation or otherwise control what the legislatures of the states shall do in their deliberations."⁴⁶

In a short and unanimous opinion, the Court generally endorsed the power of the Congress, "as an incident of its power to designate the mode of ratification,"⁴⁷ to set the time for ratification. However, the power of the Congress was not unqualified in this matter, the Court said. There were "reasonable limits,"⁴⁸ and governing these reasonable limits was a principle derived from the "general purport and spirit of the Article":⁴⁹

[I]t 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 * * * [A]s ratification is but the

⁴⁵256 U.S. 368 (1921).

⁴⁶*Id.* at 369.

⁴⁷*Id.* at 376.

⁴⁸*Id.* at 375-76.

⁴⁹*Id.* at 375.

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.⁵⁰

Thus, according to the Supreme Court, an Article V consensus is a super-majority agreement on the same subject at the same time that has been made manifest and clear by the procedures of Article V.

b. *Under the Convention Method, the Congress Carries Out the Consensus of the States*

With respect to the congressional method of initiating amendments, the consensus of the Congress is expressed in the approval of an amendment by two-thirds of the members. With respect to the convention method, the consensus of the states is expressed in the convention applications of two-thirds of them. This necessary consensus then requires the Congress to call ("shall call") a convention. Here the Congress is the servant of the states. It adds nothing to the consensus; it takes away nothing from it. The Congress did nothing to create the consensus, but it must recognize the fact of its existence and respond by calling a convention.

If the states choose to condition their application for a convention on discussion of a particular amendment or subject, then the Congress must call a convention of that kind if the principle of consensus is to be indicated. This is all the more obvious when the equality argument is considered in conjunction with the consensus argument. Under Article V, both the states and the Congress are equally able to vindicate a consensus of their own discretion.

c. *There Is an Intuitive Understanding of the Importance of Consensus*

The Congress currently has pending before it constitutional convention applications from well over two-thirds of the states. There is at

present a total of thirty-nine convention applications.⁵¹ Why is the Congress not already required to call an Article V convention? The answer is that there are not two-thirds calling for the same kind of convention. Some states have called for a convention on the subject of a balanced budget, others for a convention on the abortion issue, others for conventions on entirely different subject matters.

In other words, there is no present requirement that the Congress call a convention because it is well-understood that the Constitution requires *consensus* and because practically everyone shares an intuition about the meaning of consensus. Before a convention can be called, more is required than that two-thirds of the states apply for a convention; rather, there must be two-thirds of the states calling for a convention on the same subject at the same time.

It makes no sense to argue, on the one hand, that the Congress need not call a convention because, though it has more than thirty-four applications, it does not have two-thirds on the same subject, but, on the other hand, that, any convention called by the Congress after receiving the requisite number of applications on a single subject would not be limited to the subject that led to its creation. Either consensus on the *subject* of a convention is essential, in which case there is no present requirement that the Congress call a constitutional convention; or such consensus is irrelevant, in which case a convention must be called immediately.⁵²

⁵¹Since 1977 alone, 36 states have submitted convention applications. See *Senate Report*, *supra* note 2, at 57.

⁵²Because he thinks that applications must specifically call for a general convention (pp. 24-27 *infra*), Black argues that "most or all of the pending applications are invalid." See *Hearing*, *supra* note 4, at 188 (Black). According to their arguments that *limited* applications should be counted toward the calling of an *unlimited* convention (p. 27 *infra*), it might seem that Gunther and Dellinger agree that the Congress is required to call a convention at this time. However, Dellinger answers that certain state applications cannot be lumped together to form the necessary two-thirds "if based on the erroneous assumption that Congress is empowered to impose subject-matter limits." State applications are permitted to "recommend," however, that a convention consider only a particular subject, "provided that it is clear that the suggested limit is only a recommendation." See Dellinger, *supra*, note 4, at 1234. Since the states have been basing their applications on this "erroneous assumption," it can be seen that the practical result of both the Black view and the Gunther/Dellinger view is the same: virtually all of the current applications are invalid; and there is no present requirement that a convention be called.

2. Arguments Against Consensus

In a series of influential articles, Black has argued that the phrase "a convention for proposing Amendments" in Article V prohibits the convening of a limited constitutional convention.⁵³ He "tracks" the language of Article V to derive the following hypothetical application for a convention by a state legislature:

Application is hereby made that Congress call "a Convention for proposing Amendments."

He then asserts that this application would

of course, be valid. . . . 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?⁵⁴

And such an application would necessarily be one for a general convention "to 'propose' such amendments as it thinks proper."⁵⁵ A convention, at its discretion, could propose only a single amendment, of course, but it could not be called for that purpose. Black concludes that to suggest that Article V permits a limited convention imposes a meaning beyond the "plain" meaning established by his hypothetical state application.⁵⁶ In reaching this conclusion, he does not say that state applications must track the precise language of Article V in order to be valid; only that, because an application that does track the language is an application for a general convention, all applications, however worded, must be for a general convention.

The first response to Black's tracking argument is that it does not prove as much as he suggests. Black has proven that Article V *permits* unlimited conventions, but he has not shown that Article V also *prohibits* limited conventions. His hypothetical application may well be one valid possibility, but his argument does nothing to show that it is the *only* possibility. The tracking technique is not inherently wrong, but it is used here in a wrong way.

⁵³See, e.g., Black, *A Letter to a Senator*, *supra* note 22; Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *Yale L.J.* 957 (1963); Black, *supra* note 4.

⁵⁴Black, *A Letter to a Senator*, *supra* note 22, at 628-29.

⁵⁵*Id.*

⁵⁶*Id.*

Furthermore, Black's argument is based on a misunderstanding of the consensus requirement. The consensus requirement provides assurance that the process of constitutional change cannot even begin unless a broad-based agreement on the need for change is clearly expressed. Because Black's model permits only formal applications sanitized of the real motivations behind the applications, it provides no such assurance. It would be impossible to determine from the face of such applications whether two-thirds of the states agreed that any issue was sufficiently important to warrant the submission of amendments. Black's model leaves open the possibility that the process of constitutional change could start even if less than two-thirds of the states believed any specific issues merited an amendment. Under Black's model, an important constitutional safeguard is lost. The first Article V requirement that acts as an impediment to change, namely, the two-thirds consensus at the initiation stage, is no longer functional.

Black's textual analysis is seriously flawed in several additional respects. His argument results in a strained and narrow reading of the plural word "Amendments" in Article V. In the Constitution (as in everyday discourse), plural nouns are used to denote both the singular and plural meaning of those nouns. For example, the executive authority "to make Treaties" clearly includes the power to make a single treaty.⁵⁷

Elsewhere in Article V itself, the congressional authority "whenever two-thirds of both Houses shall deem it necessary, [to] propose Amendments," plainly includes the power to propose an individual amendment. If one were to track this clause as Black tracks the convention clause, however, the Houses would "deem it necessary" for the Congress "to propose Amendments," and (under Black's logic) the Congress would be required to propose at least two amendments, plainly an absurd result.

If a "convention for proposing Amendments" were a permanent branch of government, the phrase "for proposing Amendments" could be read to leave the subject matter and number of amendments to the discretion of the convention itself. Because, however, the phrase "for proposing Amendments" is used in the very clause that empowers the states to require the creation of a convention, the more natural interpretation is to view the phrase as dependent on the purpose for which a convention was created. If the states desire and apply for a

⁵⁷See Article II, Section 2, Clause 2 of the Constitution.

limited convention, the Congress then must call a limited convention.⁵⁸

Rees' observations that the penultimate draft of Article V clearly included the singular ("particular amendments") and the plural in the word "Amendments" and that this inclusiveness was not changed in the transition to the final draft have already been mentioned.⁵⁹

In addition, Rees has provided another counterargument to Black's reading of Article V. Black asserts that the singular cannot be included in the plural word "amendments," because:

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.⁶⁰

Rees takes up Black's marriage metaphor and neatly refutes it in the following fashion:

The power to call a convention to consider the amendments *you* desire, and the power to call a convention to consider *any and all* amendments, are as different as (1) the freedom to marry a person of your own choosing; and (2) the freedom to marry, provided you commit yourself in advance to marry one or more persons selected by somebody else on the day of the ceremony.⁶¹

Gunther and Dellinger argue that a convention's agenda cannot be limited but that the states are permitted to submit applications referring to or recommending a specific issue or issues. In Gunther's words:

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

⁵⁸See *Senate Report*, *supra* note 2, at 26.

⁵⁹See page 9 *supra*.

⁶⁰Black, *A Letter to a Senator*, *supra* note 22, at 630.

⁶¹Rees, *The Amendment Process and Limited Constitutional Conventions*, Benchmark, March-April 1986, at 77. To get the full flavor of the elaborate metaphor that Rees develops to counter Black's marriage argument, the reader should refer to the citation.

grievances in its call for a convention; but that the congressional specification of the subject is not ultimately binding on the convention.⁶²

At bottom, the Gunther/Dellinger view is even more extraordinary than Black's. Under Black's view, it would be unclear whether a genuine consensus had been reached. The general applications would hide the specific intentions. Under Gunther's and Dellinger's view, on the other hand, it would be absolutely clear that a consensus had *not* been reached. According to their scenario, the Congress is allowed to collect different kinds of applications, for instance, ten abortion applications, fifteen balanced-budget applications, and a few other odd applications, and forge them together into a coalition sufficient to trigger a constitutional convention. Indeed, because the language of Article V is mandatory (the Congress "shall call a convention"), it may be that, under the Gunther/Dellinger view, the Congress is *required* to lump together unrelated applications for a convention in just this manner. If so, one may question why the Congress is not presently required to call such a non-consensual convention, because the Congress presently has applications from well over two-thirds of the states.

Clearly this scenario is a prescription for a genuinely runaway convention. No delegation would arrive at such a convention with enough of a consensus or a mandate to accomplish anything. Vote-swapping easily could become the order of the day. If any amendment were proposed by the convention, then several amendments might be proposed as part of "logrolling" deals by delegates. The states might be faced with a smorgasbord of unrelated amendments to ratify.

The arguments of Black, Gunther, and Dellinger concerning consensus effectively cause the convention method to become a constitutional dead-letter. Absent the "complete breakdown" scenario, the states would never apply for a convention. No state interested in a specific issue would apply for a convention whose agenda was required to be open to all issues. No state with a limited grievance would be willing to apply for a convention at which a multitude of grievances could be addressed.

⁶²Gunther, *supra* note 5, at 12.

C. The Argument by Practice: Both the States and the Congress Have Interpreted Article V As Providing for Limited Conventions

The argument by practice points out that the state legislatures have consistently been interpreting Article V as permitting limited conventions and that the U.S. Senate has twice unanimously passed a Constitutional Convention Procedures Act that contained the same interpretation.

This experience under Article V, although by itself not dispositive of the issue, is entitled to great weight. It indicates that Article V has a plain meaning that is cognizable by elected officials at both the state and national levels, representing diverse parts of the country, carried out over a long period of time.

Likewise, this experience under Article V is based on the important principle that branches of government at all levels have the right and duty to interpret the Constitution. This principle does not challenge judicial review. It merely asserts that, in addition to court decisions, the practical application of the Constitution has the effect of establishing constitutional precedents.

1. Elected Officials Have Been Interpreting Article V as Allowing for Limited Conventions

a. *The Experience and the Interpretation of the States*

The practicality and the utility of the amending power anticipated by its framers is more a phenomenon of the Twentieth Century than either the Eighteenth or Nineteenth.⁶³

The experience of the Eleventh Amendment, ratified in 1795, demonstrated that the national government was not at the time the kind of unresponsive and intransigent central authority that required the invocation of the convention method. The Congress quickly responded to the national furor over the increase of the power of the federal judiciary

caused by the Supreme Court's decision in *Chisholm v. Georgia*⁶⁴ by proposing the Eleventh Amendment. It was just as quickly ratified.

Only four amendments were ratified in the Nineteenth Century. The Twelfth Amendment was strictly an administrative measure occasioned by the unexpected and unwanted "tie" vote for the Presidency in the 1800 election. The next three, the Thirteenth, Fourteenth, and Fifteenth, were all occasioned by the extraordinary circumstances of the Civil War.

Forty-three years elapsed between the ratification of the Fifteenth Amendment in 1870 and the ratification of the Sixteenth Amendment in 1913. In the Twentieth Century, a new constitutional amendment has been ratified every eight years on the average.

Like the use of the amending power itself, state invocation of the convention clause of Article V is a phenomenon of the Twentieth Century. This phenomenon is becoming increasingly important in the latter half of the Twentieth Century. From the ratification of the Constitution in 1787 until 1893, only ten convention applications were received by the Congress, and all were received before the Civil War. Since 1893, each of the fifty states has sent in a convention application, and a total of more than 300 applications have been received. In the period 1975-1985 alone, thirty-six of the states applied to the Congress for a convention, and some states applied more than once.⁶⁵ Thus, the history of the interpretation of the convention mode of amendment by elected officials in the states is being written in our time.

All ten of the Nineteenth Century applications were submitted for the purpose of convening a general constitutional convention. In the Twentieth Century, however, the states have, with few exceptions, applied for conventions limited to a single issue, often expressly limiting the convention for the "sole and exclusive" purpose of considering that issue, and occasionally asserting that, if the convention goes beyond this issue, the application would automatically be withdrawn. Some applications have also expressly stated that the authority to limit the subject of an Article V convention cannot be contravened by congressional

⁶³Our analysis excludes the Bill of Rights the passage of which was politically obligatory on the First Congress because so many of the states had conditioned their ratification of the Constitution on the addition of a list of rights.

⁶⁴2 U.S. (2 Dall.) 419 (1793).

⁶⁵Senate Report, *supra* note 2, at 10.

action.⁶⁶

Limited State applications increasingly have become an effective lobbying tool in efforts to encourage the Congress to propose amendments on its own concerning various issues. Indeed, applications often specifically include a request that the Congress propose an amendment on the relevant issue and assert that the application becomes effective only if the Congress fails to act.⁶⁷

In the Twentieth Century, six major issues have come close to receiving enough applications to warrant a convention call. By 1912, the drive of the Progressives to require direct election of U.S. Senators received thirty of the necessary thirty-one applications. This convention drive prompted the Congress to propose the Seventeenth Amendment, which was quickly ratified. Also starting at the turn of the Century, a movement to prevent polygamy received twenty-five applications by 1930. Over an eighteen-year period, 1939-1957, a movement to limit the taxing authority of the national government collected twenty-seven applications. A campaign to partly nullify the Supreme Court's apportionment decision in *Reynolds v. Sims*⁶⁸ received thirty-two of the necessary thirty-four applications in a short period of time from the late 1960's to the early 1970's.

In the late 1970's, nineteen states applied for a convention to prohibit abortion or alter the right to an abortion promulgated by the Supreme Court's decision in *Roe v. Wade*.⁶⁹ And since 1973, thirty-two states have applied for a convention to propose an amendment to balance the budget of the national government.⁷⁰

b. *The Experience and the Interpretation of the Congress*

Prompted by the drive to convene a convention on the issue of apportionment, the Senate in 1967 began to consider legislation providing procedures for the calling of a limited constitution convention. It has been considering such legislation continuously ever since. The Senate has

⁶⁶See *Hearing, supra* note 4, at 263 (Dellinger).

⁶⁷*Id.*

⁶⁸377 U.S. 533 (1964).

⁶⁹410 U.S. 113 (1973).

⁷⁰*Senate Report, supra* note 2, at 13.

twice (1971, 1973) unanimously passed a Constitutional Convention Procedures Act, and the Senate Judiciary Committee has unanimously reported out bills on two other occasions (1984, 1985). The two earlier bills occurred in a Senate controlled by the Democratic Party, while the latter two occurred when the Senate was controlled by the Republican Party.⁷¹

All four of the bills were based on the conclusion that the Congress must call a limited constitutional convention if the requisite number of states apply. Thus, the Senate has repeatedly affirmed the same Article V interpretation articulated by all fifty of the states throughout this century. The U.S. House of Representatives has never taken any action on constitutional convention procedure bills, although Professor Brickfield's study concluding that Article V permits limited conventions was printed by the House Committee on the Judiciary in 1957.⁷²

2. The Arguments of Proponents of an Unlimited Convention Cannot Be Squared With This History

The views of Black, Bickel, Dellinger, and Gunther reviewed throughout this paper, if true, would point to a wide gulf between the correct meaning of Article V and the meaning that the states and the Congress have understood and acted upon. Such a gulf may be possible, but it must bear a heavy burden of proof, especially with respect to the interpretation of a constitutional provision that directly grants elected officials specific powers.

a. *The Relevance of the Early State Applications*

Black has decided that the early practice under Article V must be taken as definitive. The ten early applications, all of which called for a general convention, demonstrate the "original understanding"⁷³ of Article V, Black says. Those ten pre-Civil-War applications were based on the correct "assumption that the provisions in Article V authorized the legislature to apply only for a general convention."⁷⁴ The other more recent 300 applications are "obviously convenient for the state legislatures." They are based "on their own implied claims, which are

⁷¹*Id.* at 13-15.

⁷²*Supra* note 36.

⁷³*Hearing, supra* note 4, at 177 (Testimony of Charles L. Black).

⁷⁴*Id.*

obviously in the nature of self-serving declarations."⁷⁵ Furthermore, Black asserts that the general neglect of the Article V convention mode itself during the early period demonstrates that it is not to be understood as a vehicle to respond to specific political problems.

While not implausible, Black's argument demonstrates only that calls for a general convention were consistent with the "original understanding" of Article V, but it does not clearly show that any kind of limitation was thought to be inconsistent. One can legitimately question the argument that the first ten applications reflect the definitive construction of Article V, while the subsequent 300 applications that reflect a different understanding are to be ignored in determining Article V's proper construction. In addition, it can be considered predictable that more radical constitutional alterations were proposed closer in time to the original Constitution rather than after the passage of time had institutionalized the document more deeply in the national fabric.

Moreover, Black's argument does not take into sufficient account the differing political and legal needs of the early Nineteenth Century and the post-Civil War period. Prior to our era, constitutional adjudication ordinarily did not involve federal intervention in particular legislative and administrative fields traditionally reserved to the states. The growth in the number of topic-specific calls for a convention may be attributable in part to disagreement with particular congressional and judicial decisions viewed as intrusions on state regulatory authority. In addition, until the New Deal and the concomitant expansion of the federal role in daily life, particular federal activities and programs may not have been perceived as sufficiently important to warrant *ad hoc* constitutional modification by the convention mode.

b. Limited State Applications as "Self-Serving Declarations"

Black's claim that the modern practice of the states in requesting limited conventions is no more than the convenient assertion of self-serving declarations is particularly unpersuasive. It is quite clear from the framing history of Article V that the power to initiate constitutional change (including change by single-subject amendments) was originally to be vested *exclusively* in the states; the grant of a like power to the Congress was the result of a subsequent compromise. The states' assertion of the right to a limited convention cannot be compared fairly

with an unsupported self-serving declaration; the convention method, after all, is the explicit constitutional means of effectuating the interests of the states.

Moreover, the states' assertion of interests has commanded the assent of a body which under Article V may often be the natural adversary of those interests. The Senate has concurred several times in the states' assertion of the right to a limited convention; this suggests that the states' view on the matter is shared by federal elected officials whose own political power would in theory be diminished by acceding to state claims to initiate amendments on a single topic.

c. The Federal Convention of 1787 Is Not Analogous to an Article V Convention

It is frequently said that the only constitutional convention with which we have experience, the Federal Convention of 1787, was itself a "runaway convention."⁷⁶ After all, the argument goes, the delegates to that convention were charged to consider amendments to the Articles of Confederation. Instead, the delegates proposed an entirely new charter of government.

This argument is not persuasive for the simple reason that the Philadelphia convention occurred under the aegis of the Articles of Confederation, not Article V of the Constitution. Not only did the Articles of Confederation not provide a convention method of initiating amendments, they provided no amendment power at all.

It is also somewhat misleading to say that the Philadelphia Convention was "runaway," for the "call" for that convention by the Continental Congress⁷⁷ *did* speak in broad terms. There were "defects in the present Confederation," and "alterations and provisions"⁷⁸ seemed necessary. No specific defects were enumerated.

⁷⁶C. Herman Pritchett discusses this in Pritchett, *Why Risk a Constitutional Convention?* The Center Magazine, March, 1980, reprinted in *Hearing*, supra note 4, at 515.

⁷⁷Resolution of Congress, February 21, 1787.

⁷⁸*Id.*

⁷⁵*Id.* at 177-78.

II. THE LIMITATIONS OF A LIMITED CONVENTION CAN BE ENFORCED

As set forth in Part I, we believe that Article V clearly contemplates limited constitutional conventions. A separate but related question is whether the Constitution provides for or permits effective enforcement of limitations imposed on a convention. In this Part, we conclude that the Constitution provides authority for the enforcement of limitations through the states, the Congress, the courts, and the delegates. We also conclude that political constraints would provide an additional means of enforcement.

A. The States

Article V provides that three-fourths of the states must ratify constitutional amendments proposed either by the Congress or by a constitutional convention. This is the ultimate and most important constitutional "check" on the amendment process. Neither a convention nor the Congress can accomplish any constitutional changes by itself. Only the states cause the Constitution to be amended by the act of ratification.

Of the four agents who have power to enforce the limitations of a limited constitutional convention, the state legislatures are likely to be the most vigilant. A convention is called for the purposes of the states. The agenda of a convention is prescribed by them. It is their consensus that causes the convention to come into being. Thus, the states can be expected to be most intolerant of any proposals from a convention that violated the terms of its convening. The states, having previously demonstrated a consensus about a certain subject at the initiation stage, would in all likelihood not suddenly ignore that consensus at the ratification stage.

Historical experience demonstrates the role of the states' ratification power in preventing the amendment of the Constitution without a broad national consensus. In this century, three constitutional amendments proposed by the Congress have failed of ratification by the states — the Child Labor Amendment, the Equal Rights Amendment, and the District of Columbia Voting Rights Amendment. This experience demonstrates that, even where a substantial consensus may exist temporarily in the proposing body, the Congress, a constitutional

amendment cannot achieve ratification unless it is in accord with an enduring national consensus of three-fourths of the states.

B. The Congress

Article V explicitly grants two powers to the Congress under the convention mode. The Congress has the power to "call" a convention and the power to choose between the two methods of ratification: by state conventions or by state legislatures. In addition, the Congress always has the power to make laws "necessary and proper"⁷⁹ to carry into effect its other powers.

The authority of the Congress to enforce the limitations of a limited convention arises from the first of these two powers, the power to call. That power imposes a duty ("shall call") on the Congress to call a convention when the states' consensus has been made manifest. Thus, the power to call is actually a duty to call.⁸⁰ There is no conflict between the congressional power to call and the desires of the states, as Black, among others, has argued⁸¹ because the power to call is not a discretionary power. It is exercisable at the behest of the states and only at the behest of the states.

Since the power to call is a power in the service of the states' objectives, the Congress' ancillary authority under the necessary and proper clause is also authority to effectuate the objectives of the states. If one accepts the conclusion of Part I that the states are free to apply for a limited convention, then the Congress' power to call includes a power to call a limited convention; that would be the only way to exercise the power so as to effectuate the states' wishes. Thus, when the requisite number of states have requested a convention limited to a given topic, the Congress has the power to take all steps necessary and proper for such a limitation. This ancillary power includes the power to set the limitations in advance and to ensure that the limitations have been adhered to. Arguably, one way of ensuring that the limitations have been adhered to is to provide that proposals emanating from the convention which stray

⁷⁹See U.S. Constitution, Article I, Section 8, Clause 18.

⁸⁰Of course, the duty to call a convention arises only if the Congress determines that it has received the required number of applications pertaining to a given issue or group of issues to trigger the duty.

⁸¹See Black, *A Letter to a Senator*, *supra* note 22, at 627.

from the subject matter limitation are not submitted to the states for ratification.

1. Congressional Power to Legislate

a. *The Need for Legislation*

Article V leaves unanswered a host of practical, legal, and constitutional questions about constitutional conventions. Where do the states send their applications? How soon must Congress act after the two-thirds consensus has been achieved? Where and when will a convention be held? Who will be the delegates and how will they be appointed or elected? How many delegates shall each state have? According to what parliamentary rules will the convention be conducted? There are many others.

There have been uncertainties even about the collecting and counting of applications. At a 1979 Senate Judiciary Committee hearing, the following exchange took place:

Senator Hatch. * * * 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 * * * If I could ask, why is there this discrepancy?

Mr. Kimmit [Secretary of the Senate]. 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.⁸²

The Federal Convention of 1787 deliberately left procedural and administrative questions unanswered. The records show that only Madison addressed these questions:

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 decided? what the force of its act? . . . He saw no objection however against providing for a Convention for the

⁸² *Hearing, supra* note 4, at 46-47.

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.⁸³

Madison saw the "difficulties" inherent in the lack of detailed provisions for a convention. The sense of his statement about "constitutional regulations" for a convention seems to be that Article V should have laid out in detail the "form," the "rule," the "quorum," etc., for possible conventions. Madison's views did not prevail, however.

Since 1967, the Senate has sought to articulate in legislation the constitutional powers of the Congress under a limited Article V convention.⁸⁴ The purpose of the Senate has been to permanently settle all questions of procedure with respect to the application, calling, and ratification stages of the convention method; to separate its own authority from a convention's with respect to the convention's internal rules and procedures; and to separate these procedural issues from any ongoing drives to call a convention. In the early 1970's, the Senate attempted to enact legislation before the drive for a re-apportionment convention required the Congress to call the required convention. Likewise, in the early 1980's, the Senate attempted to enact legislation before the drive for a balanced-budget convention was successful.

The late Senator Sam Ervin, the original sponsor of convention legislation, said that the renewed state interest in the convention mode coupled with the lack of any precedents had raised "perplexing constitutional questions" that required "orderly and objective consideration," because

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.⁸⁵

⁸³2 Farrand 557.

⁸⁴Virtually all of the opponents of a limited convention, including Dellinger, Gunther, and Bickel, agree that the Congress has the authority to legislate in this area. See *Hearing, supra* note 4, at 261 (Dellinger) and at 310 (Gunther); *Federal Constitutional Convention, supra* note 30, at 59 (Bickel). But see note 93, *infra*.

⁸⁵Ervin, *supra* note 35, at 878, 879.

In the 1971 committee report that served as the basis of the first unanimous Senate passage of a procedures bill, the Senate Judiciary Committee said that its purpose was to "effectuate" Article V and make it "meaningful" by providing the appropriate "machinery" for a limited constitutional convention.⁸⁶ Furthermore, the Committee urged passage of the bill:

in order to avoid an unseemly and chaotic imbroglio if the question of procedures 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.⁸⁷

In 1985, the Committee summarized its conclusion about the need for enabling legislation for Article V in these terms:

The principal objective of S. 40 is to ensure that the Congress has clear standards and criteria by which to judge convention applications before it, and that any convention which ultimately results is conducted in an orderly and clearly defined manner * * * Much of the credibility in the assertion that a convention would lead to a "constitutional crisis" derives from the fact that so many procedural uncertainties exist with respect to the convention process — uncertainties that S. 40 is intended to resolve.⁸⁸

b. *The Power to Legislate*

As stated above, the power of the Congress to legislate is an incident of its two explicit Article V powers, the power to call and the power to prescribe the mode of ratification, and of its constitutional power to make laws "necessary and proper" for executing its other powers.

The power to call is properly regarded as a power at the service of the states' power to initiate the amendment process. Article V says that

⁸⁶*Federal Constitutional Convention Procedures Act*, S. Rep. No. 92-336, 92d Cong., 1st Sess. 1, 2 (1971).

⁸⁷*Id.* at 2.

⁸⁸*Senate Report*, *supra* note 2, at 2.

Congress "shall call" a convention whenever the requisite two-thirds consensus has been achieved. This is mandatory on the Congress. It is not a legislative power which includes the discretion not to act. It must be done. In *Federalist 85*, Hamilton explained this duty:

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 peremptory. The congress "shall call a convention." Nothing in this particular is left to the discretion of that body.

And in a 1789 letter on the subject, Madison stated that the question whether to call a convention "will not belong to the Federal Legislature. If two-thirds of the states apply for one, the Congress cannot refuse to call it: if not, the other mode of amendments must be pursued."⁸⁹

On the other hand, the Congressional power to prescribe the mode of ratification, in state conventions or in the state legislatures, is an independent and discretionary power not subject to the control or demands of the states.

If the Congress has an explicitly-granted constitutional power, it also has the ancillary power to "make all laws which shall be necessary and proper for carrying into execution" this power.⁹⁰ This is the holding of *McCulloch v. Maryland*, where Chief Justice Marshall wrote:

[B]ut that instrument [the Constitution] does not profess to enumerate the means by which the powers it confers may be executed. * * * [T]he powers given to the government imply the ordinary means of execution. * * * The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means.⁹¹

The Federal Convention deliberately omitted consideration of the means to execute the power to call. The Congress, therefore, because it is charged with that power, is also charged with the means to execute that

⁸⁹Cited in Ervin, *supra* note 35, at 885.

⁹⁰See Article I, Section 8, Clause 18.

⁹¹17 U.S. (4 Wheat) 316, 408, 409, 409-410 (1819).

power, including the power to legislate in a way that it thinks is necessary and proper to effectuate specifically-granted powers.⁹²

2. Powers Under Legislation

In its various attempts to enact legislation pursuant to its powers under Article V, the Senate has included provisions concerning, *inter alia*, the contents of applications, the transmittal of applications, the effective period of applications, the procedures in the Congress for issuing the call, the number of delegates and their mode of voting at the convention, and judicial review.

This paper is not a review of the provisions of those bills and will not attempt to discuss whether each provision decided upon in the past was within the proper scope of the Congress' power to call a convention. Two provisions do merit discussion here, however.

There may be two different points at which the Congress, in the proper exercise of its power, has the duty and the opportunity to enforce the two-thirds consensus of the states.

⁹² Because he desires to avoid judicial review of Article V matters and because he thinks that federal legislation with respect to Article V would inevitably lead to court decisions, Tribe opposes the necessary and proper enactment of legislation and proposes, instead, that Article V itself be amended. *Hearing, supra* note 4, at 506. Black also opposes any congressional legislation, arguing principally that no Congress can presume to bind its successor Congresses on these issues. Black, *supra* note 4, at 191. The Senate Judiciary Committee answered Black with the following: "The Committee also notes the suggestion that legislation such as S. 40 is inappropriate since 'no Congress can bind its successors'. *Cf.*, however, 3 U.S.C. 15 (relating to electoral college procedures). While it is unquestionably true that no such legislation can bind any Member of Congress (whether of a present or future Congress) to vote for a measure he or she believes to be unconstitutional, it nevertheless serves extremely important purposes: (a) such legislation can effectively establish an operative legal rule until affirmatively amended by a future Congress; (b) such legislation can effectively apprise the States of their rights and obligations and inform them of the likely constitutional consequences of their actions; (c) such legislation establishes at least a presumptive constitutional interpretation by the Congress that is not likely to be overturned in the absence of a strongly held view by a subsequent Congress that it incorrectly interpreted the Constitution, and (d) such legislation increases the likelihood that convention applications will be scrutinized on the basis of neutral constitutional procedures rather than through a series of result-oriented policy judgments." *Senate Report, supra* note 2, at 23.

The first point is the point at which the Congress evaluates state applications for content and validity and determines that a supermajority agreement exists on the same subject at the same time and that, consequently, a constitutional convention is required.

Much has been said about the duties of the Congress at this juncture. Black tells us that the Congress in adding up applications may count only applications for a general convention and must ignore all the others.⁹³ Dellinger says that convention applications may include a nonbinding "recommendation" of a specific subject.⁹⁴ Gunther concurs with Dellinger and says that the states in their applications may articulate "a specific grievance" that is not binding on either the Congress or the convention.⁹⁵

All of these arguments are not really arguments about the enforcement power of the Congress. They are, instead, aspects of the question of whether Article V provides for a limited or unlimited convention. Once that question is decided by the force primarily of the equality argument and the consensus argument, then it can be seen that it is the duty of the Congress only to determine if a true consensus has been reached, regardless of the wording of the individual applications. The Congress has no independent power to police the content of state applications. It decides only whether enough of them agree. According to Noonan:

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

⁹³ *Hearing, supra* note 4, at 185 (Prepared Statement of Charles L. Black).

⁹⁴ Dellinger, *supra* note 4, at 1636.

⁹⁵ Gunther, *supra* note 63.

out and Congress has called the Convention for.⁹⁶

S. 40 provided an example of procedures and criteria that the Congress might use for this task. Among other provisions, the bill required a state to specify the "subject matter of the amendment or amendments" it desires to have considered at a convention. An application must have specifically requested Congress to call a convention, not merely expressed an interest in having a convention. In addition, the bill required the President of the Senate and the Speaker of the House to report to each House when a state application was received and to send a copy of each received application to each member of Congress and to every other state legislature.

S. 40 was based on the premise that, although Article V does not explicitly provide for it, the Congress would have a second opportunity to enforce the consensus of the states. The bill declared that a convention would have reported any amendments to the Congress which would then have submitted them to the states along with its decision about the mode of ratification or, in the alternative, would have refused to submit them:

because such proposed amendment relates to or includes subject matter which differs from or was not included in the subject matter named or described in the concurrent resolution of the Congress by which the convention was called.⁹⁷

This provision was not intended as the creation of a new congressional power -- some novel "transmittal power"⁹⁸ — but was based on the notion that, because Article V expressly empowers the Congress to choose the mode of ratification by the states, it may refuse to do so where an amendment has not been proposed in accordance with the terms set out in its previously-exercised power to call. Alternatively, refusing to choose the mode of ratification can be viewed as an explicit function of the power to call.

⁹⁶Noonan, *supra* note 4, at 642-643.

⁹⁷S. 40 (99th Congress), § 11(b)(ii), *reprinted in Senate Report, supra* note 2, at 20.

⁹⁸A formal "transmittal power" of the Congress would appear to conflict with the language and history of Article V, which reflect that the convention mode was adopted as a substitute for direct congressional action on application of the states. See pp. 7-10 *supra* (reflecting Mason's view that the states not be entirely dependent on the Congress for proposing amendments.).

C. The Courts

There has been a vigorous debate concerning the question whether there should be judicial review of issues arising under the convention method. Although almost everyone has rejected the extreme view, based on the Supreme Court's confusing plurality decision in *Coleman v. Miller*,⁹⁹ that the Congress has an absolute and nonreviewable control over every aspect of the amending process, sharp differences remain about both the wisdom and the proper reach of judicial review.¹⁰⁰

This paper concludes that there is ample precedent for judicial review of Article V matters, that there are no persuasive reasons for insulating Article V convention procedures from the usual jurisdiction of the federal courts over federal and constitutional questions, and that, in a proper case where the requirements of ripeness and standing are met, judicial review can serve as a desirable and important check on the convention process.

1. The Availability of Judicial Review

The starting point for discussion of judicial review of Article V matters is *Coleman v. Miller*. In *Coleman*, the issue on appeal was whether Kansas had validly ratified the proposed Child Labor amendment.¹⁰¹ The Supreme Court held that the issues in the case concerning the validity of state ratification were non-justiciable questions which were for the Congress alone to answer.

Four members of the Court — Black, Roberts, Frankfurter, and Douglas — joined in a sweeping opinion which stated that "[u]ndivided

⁹⁹307 U.S. 433 (1939).

¹⁰⁰For a comprehensive statement of the view that amendment matters are justiciable and should be resolved by the courts see Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983). For the view that judicial review should be confined to "the outer boundaries" of the amendment process see Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 434 (1983).

¹⁰¹The Congress proposed the Child Labor amendment to the states in 1924, but the amendment never received the requisite three-fourths ratification. Though the Court ruled by a 5-4 margin in *Coleman* that the petitioners had standing to sue, it seems that there is still a question whether disputes over a single state's action on an unratified constitutional amendment would be ripe for judicial consideration given the Constitution's requirement that the federal courts may only decide "cases or controversies."

control of [the amendment] process has been given by the Article exclusively and completely to Congress."¹⁰² These four justices believed that judicial review had no part whatsoever to play in the amendment process. Chief Justice Hughes authored a more limited opinion which was designated the "opinion of the Court" but which commanded only plurality support. This opinion addressed only the issues of the timeliness of state ratification and the effect of the state's prior rejection of the amendment. The Court held that both issues were non-justiciable. Instead, they posed "a political question, pertaining to the political departments."¹⁰³

The rationale of *Coleman*, while widely cited, is not accepted by anyone as an adequate resolution of the question of judicial review. For instance, even Tribe, an opponent of judicial review in this context, has said:

Could anyone really believe, for example, that a court would feel bound to treat the Equal Rights Amendment as part of the Constitution if Congress determined that the thirty-five states that had ratified the amendment as of July 1, 1982, constituted the "three-fourths" of fifty required by Article V?¹⁰⁴

In addition, the authority of *Coleman* is limited, first, because it is only a plurality opinion, and second, because both earlier and subsequent decisions of the Court call into question the sweeping prohibition of judicial review promulgated in the plurality opinion.

The first Supreme Court case dealing with the amendment process was *Hollingsworth v. Virginia*.¹⁰⁵ In *Hollingsworth* it was argued that the Eleventh Amendment to the Constitution had not been validly adopted because the resolution proposing the amendment was never submitted to the President for his signature, as required by Article I, Section 7 for "every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary." The Court decided that constitutional amendments were not the "ordinary cases of legislation" and held that the amendment had been properly adopted. Nowhere in

¹⁰² *Id.* at 459.

¹⁰³ *Id.* at 450.

¹⁰⁴ Tribe, *supra* note 101, at 433.

¹⁰⁵ 3 U.S. (3 Dall.) 378 (1798).

the opinion did the Court suggest that the determination of the question was one to be left to Congress.

It was not until a series of cases early in the 20th century that the Court again passed on the validity of certain aspects of the amendment process. In *Hawke v. Smith No. 1*,¹⁰⁶ the Court held that a state's ratification of an amendment cannot be undone by a subsequent referendum of its voters. In the *National Prohibition Cases*,¹⁰⁷ it was decided, *inter alia*, that under Article V two-thirds of a quorum of each House, instead of two-thirds of the entire membership, was sufficient to propose an amendment. A year later in *Dillon v. Gloss*,¹⁰⁸ the Court held that the Congress had the power to set a reasonable time limit for ratification when it proposed an amendment. Finally, in *United States v. Sprague*,¹⁰⁹ the Court held that the method of ratification of a constitutional amendment is completely dependent on congressional discretion. Even though the Court upheld the power of Congress in *National Prohibition Cases*, *Dillon*, and *Sprague*, the Court did not treat these cases as non-justiciable; and in *Hawke* the role of the Congress was not at issue. These cases demonstrate none of the deference later accorded the Congress in *Coleman*.

Moreover, the "political question" doctrine itself has been severely weakened since *Coleman*, primarily by the effects of two major cases. In *Baker v. Carr*,¹¹⁰ the Supreme Court ruled that the political question doctrine did not bar Supreme Court resolution of legislative apportionment questions. And in *Powell v. McCormack*,¹¹¹ the Court held that the Congress could not refuse to seat Representative Adam Clayton Powell, despite clear constitutional language commanding that the Congress shall judge the qualifications of its own members.

On the whole, then, there seems to be strong and recent precedent in favor of broad powers of judicial review. *Coleman v. Miller*, the only precedent *contra*, is a dubious and isolated case that has been unable to command the wholehearted allegiance of any scholar — or of the Court

¹⁰⁶ 253 U.S. 221 (1920).

¹⁰⁷ 253 U.S. 350 (1920).

¹⁰⁸ 256 U.S. 368 (1921).

¹⁰⁹ 282 U.S. 716 (1931).

¹¹⁰ 369 U.S. 186 (1962).

¹¹¹ 395 U.S. 486 (1969).

itself. Disputes under Article V have proven to be justiciable, and the Supreme Court has issued significant decisions construing the Constitution's amendment power. We believe that disputes under Article V ought to be and are justiciable under the federal-question jurisdiction of the Supreme Court.

2. Convention-Procedures Legislation and Judicial Review

Some have argued that under its Article III powers and pursuant to various judicial precedents, the Congress may have the power to exclude almost all judicial review of the convention method.¹¹² But there does not seem to be any persuasive reason why the Congress should do so. Article V and any enabling legislation passed pursuant to it present the kind of constitutional and federal questions over which the Supreme Court normally has jurisdiction.

S. 40, the 1985 bill of the Senate Judiciary Committee, granted any state a cause of action with respect to disputes concerning the Congress' calling of the convention and the Congress' transmittal of a convention's proposed amendment to the states. Suit could have been filed directly in the Supreme Court¹¹³ and would have been entitled to "priority" consideration. The Committee advised that it contemplated declaratory relief as the judicial remedy and stated that it expected "that the Court will utilize as a standard in overturning congressional decisions one evidencing some deference to the Congress."¹¹⁴

In addition to this newly-created cause of action, however, the bill explicitly preserved the right of judicial review of other federal and constitutional questions relating to a convention and did not foreclose the routine avenues of access to the federal courts.

¹¹²The Congress would have a variety of options under its power over the jurisdiction of the lower federal courts, its power over the appellate jurisdiction of the Supreme Court, and under settled precedents construing the original jurisdiction of the Supreme Court and the Eleventh Amendment. See U.S. Const. art. III, sections 1 and 2. See also C. Wright, *Law of Federal Courts*, §§ 109-110 (4th ed. 1983).

¹¹³The Senate Judiciary Committee, citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and Article III, Section 2 of the Constitution, found no constitutional impediments to such a suit under the original jurisdiction of the Supreme Court. We do not deal with that issue in this paper.

¹¹⁴*Senate Report*, *supra* note 2, at 45.

Standing and ripeness questions with respect to a suit under Article V procedures legislation might present some difficult judgments as to when a controversy had matured into justiciable form. Clearly, the courts cannot be asked to resolve any issue relating to the calling or conduct of a convention until there arises a specific "case or controversy" involving concrete interests of the parties. In S. 40, the Senate Judiciary Committee attempted to give some guidance to the Court about ripeness by declaring that all claims under the legislation were barred unless they were filed "within sixty days after such claim first arises."¹¹⁵ Claims "first arise," the Committee advised,

normally . . . at the point at which Congress has passed final judgment on some question or at which the time period has expired within which they were to render such judgment.¹¹⁶

3. The Judiciary as a Check on the Congress

Professor Tribe has warned of the danger of having the Supreme Court oversee the use of a constitutional process that might be invoked to reverse its own decisions.¹¹⁷ His point is valid, of course, but it is not conclusive. The Supreme Court has decided a number of important procedural matters with respect to different amendments proposed under Article V, as reviewed above, without illegitimately considering the substance of the amendments involved. Furthermore, it is much too speculative to attempt to think about the judicial politics with respect to any cases that might in the future be heard under Article V. An "activist" Court today might not be so in the future. Of the six significant campaigns to call a convention in this century, only two were provoked by a Supreme Court decision. The most recent convention drive — on behalf of a balanced budget — has been inspired by the actions of the Congress, not the Supreme Court.

As noted in Part I of this paper, the framers of Article V provided the convention mode as a means for the states to correct the actions of the Congress. In creating a cause of action for the states at the calling and submission stages, S. 40 sought to provide a judicial check on any inclinations of the Congress to obstruct the convention process. Disputes

¹¹⁵S. 40 (99th Congress), § 15(b), *reprinted in Senate Report*, *supra* note 2, at 21.

¹¹⁶*Senate Report*, *supra* note 2, at 46.

¹¹⁷Tribe, *supra* note 101, at 435.

between the states and the Congress seem more likely under Article V, with its built-in competition over the power to initiate amendments, than disputes between either of them and the courts.

The judicial deference counseled by the Senate Judiciary Committee seems a likely scenario. But in the case of an impasse between the states and the Congress, the involvement of the Supreme Court might in the end be sought in a proper case to determine such questions as whether the Congress has failed its constitutional duty to call a convention after receiving the requisite number of applications and whether the Congress can prevent state ratification of a convention-proposed amendment by failing to decide the mode of ratification. There are legitimate constitutional questions that are properly within the authority of the Court to address.

D. The Delegates

The supermajority ratification requirement would be a significant restraint on the plans of convention delegates. Delegates would not want to waste time and energy deliberating possible amendment proposals that were outside of the consensus and, thus, had virtually no chance of being ratified.

In addition, the people of the states who choose the delegates would be able to identify and elect those persons who pledge to respect the subject matter limits contained in the state applications. Just as delegates to a political convention are selected based on their predisposition to effect the will of those who chose them, delegates to a limited convention presumably would be elected with respect to their views on those issues that the states desired to be addressed.

As another check, the states or the Congress could require delegates to take an oath of office to remain faithful to the Constitution, including the authority of the states to limit an Article V convention. Such an oath, similar to the oaths of other public officials, would be based on the premise that the invocation of the Constitution itself carries a certain moral authority. S. 40 provided for an oath of this kind.

In summary, we think that American political customs, as well as respect for the Constitution itself among the American people, should not be underestimated in their ability to provide additional enforcement on the propriety of the convention process. In a recent analysis, political

scientist Paul J. Weber has concluded that there are so many political constraints on a Article V convention that it is, in fact, "a safe political option." He puts his own characterization on some of the principles already discussed in this paper and adds others:

What Professor Tribe ignores are the *political* constraints which insure that no convention is likely to get out of control. There are a number of such constraints: the previously cited character of the delegates elected; the media attention which will be given to discrepancies between the campaign statements and promises and the delegates' actual words and actions; the number of delegates and divisions within the convention itself which would make it extraordinarily difficult for one faction or a radical position to prevail; the delegates' awareness that the convention results must be presented to Congress which might not forward any amendment that went beyond the convention mandate; the Supreme Court which might well declare certain actions beyond the constitutional powers of the convention; and most important of all, the need to get the proposed amendment ratified not only by the 34 states that called for the convention, but by 38 states. More effective constraints on a constitutional convention can hardly be imagined. * * *

The original Constitution was not only a legal document; it was a political document. It set out not simply legal principles but legal principles hammered out of political compromise and anchored in political realism. The primary safeguards of democracy envisioned by the Framers were political, not legal.¹¹⁸

CONCLUSION

Because the convention method has never been successfully invoked, and despite the collection of potential enforcement devices reviewed above, there will still be political uncertainties the first time that two-thirds of the states apply for a limited convention. But allowing for such uncertainties, we are convinced that Article V was designed to permit limited conventions and that a variety of legal and political means

¹¹⁸Weber, *The Constitutional Convention: A Safe Political Option*, 3 J. L. & Politics 51, 65-66, 69 (1986) (emphasis in original).

are available to help to enforce such limits. The successful triggering of the convention method would be an extraordinary political event. Precedent and tradition are important in constitutional democracies such as ours, and there is no precedent to guide us here. But we also think that uncertainties should not lead to a questioning of the legitimacy of the convention method nor to a shirking of the duties of the various parties to put into effect, despite difficulties, the meaning of the various clauses of Article V. And we find persuasive the view that convention-procedures legislation would greatly minimize the uncertainties and potential chaos that might be encountered in the Article V convention process.

Appendix

Limited Constitutional Conventions Under Article V (A Compendium of Selected Authorities)*

"In *The Federalist* James Madison urged ratification of the Constitution on the ground that Article V 'equally enables the General and State Governments to originate the amendment of errors as they may be pointed out by the experience on one side or the other.' Professor Black first made this observation fully consistent with his view that limited conventions are unconstitutional, since Madison '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.' But Congress can propose such amendments as its requisite majorities desire, without thereby creating an organism that is empowered to propose amendments that Congress opposes. If the state legislatures' power to initiate amendments is not free from the juridical condition and political risk posed by a general convention, then Madison was wrong to say that Congress and 'the state Governments' were 'equally' enabled to originate amendments." — *Professor Grover Rees III, Constitutional Convention and Constitutional Arguments: Some Thoughts About Limits*, 6 Harv. J. L. and Pub. Policy 79, 90 (1982).

"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." — *Professor Paul Kauper, University of Michigan Law School, The Alternative Amendment Process: Some Reflections*, 66 Mich. L. Rev. 903, 912 (1968).

"This construction [that a convention cannot be limited] 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 with 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

*All but one of these authorities were compiled by the Senate Judiciary Committee. See *Senate Report, supra* note 2, at 58-62.

meet the requirements of Article V." — *U.S. Senator Sam Ervin, Chairman, Subcommittee on the Constitution, The Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 883 (1968).

"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 . . . there is no justification for the view that Article V sanctions only a general convention. Such an interpretation would relegate the alternative method to an 'unequal' method of initiating amendments." — *American Bar Association, Amendment to the Constitution by the Convention Method Under Article V*, at 9, 16 (1973).

"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' . . . Surely it was not thought that by petitioning for an innocuous amendment, for example, on daylight savings time, the State would open up the way for a constitutional convention that would be free to revise the entire taxing authority of the United States or to abolish the House of Representatives." — *Professor Wallace Mendelson, University of Texas, Testimony Before United States Senate Judiciary Committee*, October 31, 1967.

"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 . . . 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." — *Professor Phillip Kurland, University of Chicago Law School, Memorandum to U.S. Senate Judiciary Committee* (1967), 1979 Hearings, p. 1222.

"It is perfectly remarkable that some have argued for a construction [of Article V] not merely limiting the power of State legislatures to have a convention, but limiting that power to its least expected, least appropriate, most difficult (and yet most dangerous) use." — *Professor William Van Alstyne, Duke University Law School, The Limited Constitutional Convention*, 1979 Duke L. Journal 985-98.

"If the States 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." — *Professor John Noonan, University of California School of Law, Testimony Before California State Assembly*, February 15, 1979.

"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 question of amendment upon which the people are to pass." — *Professor Thomas Cooley, A Treatise on Constitutional Limitations* 88 (1927).

"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 specific part, the delegates have no power to act upon and propose amendments in other parts of the Constitution." — *Professor Henry Campbell Black, Handbook of American Constitutional Law* 45 (1927).

"The Constitutional Convention is . . . as its name implies, constitutional not simply as having for its object the framing of constitutions, but as being within, rather than without, the pale of fundamental law: as ancillary and subservient and not hostile and paramount to it . . . it always acts under a commission, for a purpose ascertained and limited by law or by custom. Its principal feature is that, at every step and moment of its existence, it is subaltern — and 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 especial needs." — *Professor John Alexander Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* 10 (1887).

"On the strict legal question, the better view is that there is nothing in Article V to prevent the Congress from limiting the constitutional convention to the subject that made the States call for it." — *Professor Paul Bator, Harvard Law School, A Constitutional Convention: How Well Would it Work?* at 7-8 (American Enterprise Institute Forum, 1979).

"The power of amendment in Article V is itself constitutionally limited . . . Thus Congress should have the power to restrict the convention to those amendments that deal with the general issue or problem that had inspired two-thirds of the States to call for a convention." — *Amendment by Convention: Our Next Constitutional Crisis?*, 53 N.C. L. Rev. 491, 508 (1975).

"The two amendment processes, therefore, must be viewed as equal alternatives. 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 amendments." *Robert M. Rhodes, A Limited Constitutional Convention*, 26 U. Fla. L. Rev. 1, 9 (1973).

"I think the convention can be limited. * * * [T]he fact is that the majority of the scholars in America share my view." — *Hon. Griffin Bell, Attorney General of the United States, Issues and Answers*, February 11, 1979.

"While this question then has never been directly decided by the 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 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." — *Cyril Brickfield, Problems Relating to a Federal Constitutional Convention*, reprinted by House Judiciary Committee, 85th Congress, 1st Session (1957), p. 18.

"The argument that an Article V convention is sovereign and therefore beyond control is specious. The convention is but a constitutional instrumentality of the people, deriving all its powers from Article

V . . . an agreement that a convention ought to be held is required among two-thirds of the state legislatures before Congress is empowered to convene such a body. If the agreement contemplates a convention dealing only with a certain subject matter, as opposed to constitutional revision generally, then the convention must be logically 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 specific consensus which is the absolute prerequisite for its creation and legitimate action." — *Professor Arthur Earl Bosfield, The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949, 994 (1968).

"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. 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, then the convention should not be free to go beyond this consensus and address problems which did not prompt the state applications." — *Note, The Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 Harv. L. Rev. 1612, 1628 (1972).

"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 . . . This [constitutional convention] check on the central government . . . 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." — *Professor Ronald Rotunda, University of Illinois Law School, Letter to Subcommittee on Constitution*, Sept. 27, 1979, Hearing Record, p. 507.

The cost of republican government;

Terms of Office in the Legislative Branch



A Guide for Discussion of Proposals to Change Congressional Terms

**“The root of republican
government”**

*A Guide for Discussion of Proposals
to Change Congressional Terms*

The Root of Republican Government

Terms of Office in the Legislative Branch

"Article— No person who has been elected to the Senate ____ times shall be eligible for election or appointment to the Senate. No person who has been elected to the House of Representatives ____ times shall be eligible for election to the House of Representatives."

"Article— The term of office for Members of the House of Representatives shall be four years."

"Where annual elections end tyranny begins . . ." was the rallying cry for many an Anti-Federalist during the Constitution ratification debate. The proposed length of terms in Congress was high on the grievance list of the Anti-Federalists, who suspected they would create a centralized power removed from the people. Fair representation was the right for which the new nation had fought the Revolution. Elections were *the* link between the people and the government; they embodied the very principle of government by and for the people. Debates over term length were therefore prolonged and impassioned at the Constitutional Convention. The debate is still alive today.

Annual elections rarely get serious mention today, but proposals to reform the system to lengthen or limit congressional terms have been introduced in almost every Congress since 1869. While most have suggested four-year House terms, three and six years have been proposed as well. Amendments to limit tenure in the Senate and House generally set from twelve to twenty-four years as the maximum. In recent years amendments combining the two changes have been introduced. The persistence of these proposals shows just how vigilant Americans are when it comes to making the representative system work. In the concept of representative government lies the American commitment to popular sovereignty and one of the founders' major achieve-

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Written by Alice O'Connor and Mary L. Henze

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ments. As James Madison said after the Constitution had been ratified and amended with the Bill of Rights:

A government deriving its energy from the will of the society . . . on the understanding and interest of the society . . . is the government for which philosophy has been searching, and humanity been fighting, from the most remote ages. Such are republican governments which it is the glory of America to have invented, and her unrivalled happiness to possess. (*National Gazette*, 20 February 1792)

By their constant attention to the effectiveness of their representative institutions, Americans have expressed their desire to safeguard their natural rights and freedoms for over two hundred years.

Representation and the Sovereignty of the People

Confidence and Safety

Underlying the creation of the republican system was the question the founders had seen over and over again in the annals of societies since classical civilization: Why do we have government at all? What is it in human nature that requires governing or, more positively, enables people to govern? The founders had enough faith in human nature to believe people capable of governing themselves. For "Publius," writing in *The Federalist Papers* in praise of the proposed Constitution, this meant that republican government was founded in confidence.

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. (*Federalist* No. 55)

But even an advocate of popular sovereignty as wholehearted as Thomas Jefferson was aware of the need to temper confidence in human nature with limits on the powers entrusted to government officials.

. . . It would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power. . . . (Elliott 1888, 4:543)

In the eighteenth-century debate, optimism about the ability of the people to form their own government never left an awareness of human corruptibility far behind. The founders knew that power could corrupt, and that freedom would be its victim. While the people could be trusted

to choose the government, they would need to protect their liberties by institutional "checks" on power.

Actual and Virtual Representation

The founders were not the first to grapple with the question of popular sovereignty or representation. The ancient republics; the philosophic writings of Plato, Aristotle and, more recently, of John Locke and Montesquieu; and their own British constitutional heritage gave them guidance. But some aspects of their task were truly experimental: the idea of a written constitution and the "scheme of representation" among them. As Publius noted:

The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known to ancient polity; it is in more modern times only, that we are to expect instructive examples. (*Federalist* No. 52)

The founders did have some "instructive examples" in the representative governments that were set up in each of the original thirteen states. But their examples and eighteenth-century republican theory both pointed to the same maxim: the republican system was meant to govern a small geographic area. A large centralized government would be too distant to be truly representative. Despotism would inevitably result. Governor George Clinton of New York, writing under the name of "Cato," wrote:

It is natural, says Montesquieu, to a republic to have only a small territory, otherwise it cannot long subsist: in a large one, there are men of large fortunes, and consequently of less moderation; there are too great deposits to trust in the hands of a single subject; an ambitious person soon becomes sensible that he may be happy, great and glorious by oppressing his fellow citizens, and he might raise himself to grandeur, on the ruins of his country. In large republics, the public good is sacrificed to a thousand views; in a small one, the interest of the public is easily perceived, better understood, and more within the reach of every citizen. . . . (Borden 1965, 37)

The founders were thus taking a chance when they created a republican system to govern a large and diverse geographical area. They drew upon the two kinds of representation they had experienced as British colonists: "actual" representation in the local legislatures and "virtual" representation in the British House of Commons.

In the British representative tradition, the House of Commons was a legitimate sovereign body because it "virtually" represented the people. This idea holds that there is one single homogeneous interest common to all the people and that the role of the representative is to discern and legislate based on that interest. "Actual" representation, on the other

hand, meant that the representative body mirrored the population in all its diversity and acted according to the particular wishes of its constituents. Elected delegates were the instruments of the people. There was a premium on accessibility, local ties, and physical proximity to constituents. Power would always be close to the people.

The question of whether a representative should legislate in what he thought to be the "best interest" of the people or whether he should act only according to their instructions had profound implications for the legislative branch. It was not finally decided upon by the Convention, which instead structured the legislature with elements of both.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of Twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen. (U. S. Const. Art. I, sec. 2)

When electing representatives by district, residence requirements and obtaining the consent of the electorate are part of the actual representation tradition. But federal legislators do not consult the people on every issue. This is because the people give them the power to "virtually" represent their interests. The trust in elected officials necessary to make this type of federal system work made some more uneasy than others.

Terms of Office and Safeguarding Liberties

The Two-Year Term

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House] should have an immediate dependence on and intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose does not appear to be susceptible of any precise calculation, and must depend on a variety of circumstances with which it may be connected. Let us consult experience, the guide that ought always be followed whenever it can be found. (*Federalist* No. 53)

Under the Articles of Confederation, delegates to the Congress were appointed by the state legislature. Their terms varied from state to state, ranging from six months in Connecticut and Rhode Island to two years

A QUESTION OF ARITHMETIC? THE TWO EXTREMES: GOVERNMENT BY THE MANY/GOVERNMENT BY ONE

It is not surprising that the founders were watchful of anything that threatened to return to monarchy. Anti-Federalist Patrick Henry saw the danger of monarchy in the shift of power from the states to the federal government:

The Constitution reflects in the most degrading and mortifying manner on the virtue, integrity, and wisdom of the state legislatures; it presupposes that the chosen few who go to Congress will have more upright hearts, and more enlightened minds than those who are members of the individual legislatures. To suppose that ten gentlemen shall have more real, substantial merit than one hundred-seventy, is humiliating to the last degree. If ten men be better than one hundred-seventy, it follows of necessity that one is better than ten. . . . (Elliott 1888, 3:167)

But they were equally fearful of the threat from "below": too much democracy would degenerate into government by the mob, or no government at all. Publius responded thus:

Nothing can be more fallacious than to found our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionately a better depository. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limitation in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters composed, the passion never failed to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob. (*Federalist* No. 55)

in South Carolina, with the others adhering to the tradition of annual elections. For Publius, frequent elections were important, but annual elections would cause disruption. Biennial elections were both "neces-

sary and useful" because of the greater amount of knowledge required of federal legislators and the distance they were to travel between their homes and the seat of government.

At the Constitutional Convention, the two-year term emerged as a compromise between annual elections and a proposal for triennial elections supported by James Madison and adopted by the Committee of the Whole until final deliberations on the subject, when Edmund Randolph and George Mason were instrumental in amending the provision to two years. Although the committee recommended the change unanimously, the term length question continued to be one of great controversy throughout the ratification process. The failure to include annual elections was enough to prevent Elbridge Gerry from signing the Constitution:

When society has thus deputed a certain number of their equals to take care of their personal rights, and the interest of the whole community, it must be considered that responsibility is the great security of integrity and honor; and that annual election is the basis of responsibility—man is not immediately corrupted, but power without limitation, or amenability, may endanger the brightest virtue—whereas a frequent return to the bar of their constituents is the strongest check against the corruption to which men are liable, either from the intrigues of others of more subtle genius, or the propensities of their own hearts. . . . (Ford 1892, 6-17)

For Gerry, as for many Anti-Federalists, the abstract principle of popular sovereignty over government was not enough; more practical safeguards were needed to protect liberty.

Limits on Tenure

The Constitution departed from the Articles of Confederation again by putting no limitation on the number of terms members of Congress could serve. This provision, based on the principle known as "rotation in office," was a check on the accrued power of veteran legislators. Under the Articles, delegates were restricted to serving only three out of six consecutive years. Publius appealed to the principles of the new system to show that rotation or other limitations were unnecessary; the biggest check on power was the Constitution itself, under which no legislator had more power than any other citizen. Beyond that, there was the more practical consideration of the need for experienced legislators and the dangers of too many freshmen congressmen.

A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent reelections, become members of long standing, will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The

THE "FEDERAL CITY"

The House of Representatives was not the only body that spurred debate over term length. The presidential term caused considerable disagreement and the length of senatorial terms caused proponents of states' rights in particular to dissent. Even though senators until 1913 were elected by the state legislatures, what Anti-Federalist writer "Brutus" said about them in 1788 is relevant to the question of terms in general.

[Senators] should not be so long in office as to be likely to forget the hand that formed them or be insensible of their interest. Men long in office are very apt to feel themselves independent; to form and pursue interests separate from those who appointed them. And this is more likely to be the case with the Senate, as they will for the most part of the time be absent from the state they represent, and association with such company as will possess very little of the feelings of the middling class of people. For it is to be remembered that there is to be a federal city, and the inhabitants of it will be the great and mighty of the earth. For these reasons I would shorten the term of their service to 4 years. Six years is a long period for a man to be absent from his home; it would have a tendency to wean him from his constituents. (*New York Journal*, 10 April 1788)

greater the proportion of new members, and the less information of the bulk of the members, the more apt they will be to fall into the snares that may be laid for them. This remark is no less applicable to the relations which will subsist between the House of Representatives and the Senate. (*Federalist* No. 53)

But in the lack of rotation, Elbridge Gerry found another reason to dissent from the proposed constitution, a reason that outweighed the practical consideration of experience:

There is no provision for a rotation, nor anything to prevent the perpetuity of office in the same hands for life; which by a little well-timed bribery, will probably be done, to the exclusion of men of the best abilities from their share in the offices of government. By this neglect we lose the advantage of that check to the overbearing insolence of office, which by rendering him ineligible at certain periods, keeps the mind of man in equilibrium, and teaches him the feelings of the governed, and better qualifies him to govern in his turn. (Ford 1892, 6-17)

The Nature of the Legislator

Time and time again, in arguing over the institutional provisions of representative government, the founders returned to the fundamental question of what kind of person made the ideal legislator in a republic. Disagree as they might over the amount of control necessary to prevent tyranny, they did agree that in a republic based on the sovereignty of the people, the most appropriate legislator would be a citizen first. The ideal "citizen legislator" was both well-read in classical republican theory and experienced in the "real world" of his constituents and familiar with their characteristic problems and concerns. The legislature was not a career but a tour of duty, not a life in itself but part of a life devoted to the congressional session and the public good, the rest to private activities.

In the citizen legislator, the founders believed they had found the ideal that could balance the demands of knowledge, legislative experience, and efficiency with those of democracy, accountability, and the need to check the accumulation of power. The tension between those demands is one that has lasted, and part of the impulse to reform Congress is an attempt to retain the eighteenth-century balance in the context of the twentieth century. Some of the same questions faced by the founders as they struggled to implement their ideals have resurfaced as modern Americans contemplate whether change in the legislative branch is advisable.

Congressional Tenure Today

Legislative Demands in the Twentieth Century

No man can be a competent legislator who does not add to an upright intention and sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lies within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service ought, therefore, in all cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service. (*Federalist* No. 53)

In Publius' opinion, the length of a congressman's term should be directly related to the amount of knowledge he needs to be an effective official of "the great theatre of the United States." When *The Federalist Papers* were written, that knowledge consisted of the commercial and legal affairs of all the states, the "internal circumstances by which the

states are distinguished from each other," and treaties and laws of other nations. The modern argument for a three- or four-year House term is similar. But today advocates of a longer term point out that legislators must master a much larger body of knowledge than their eighteenth-century counterparts. Now, they claim, we must add to the list the regulations of a bureaucratic federal government with an expanded role in the lives of its constituents, the trends of a more complex scientific and technological society, and the foreign affairs of a major world power.

In a 1966 message to Congress, President Lyndon Johnson reopened the issue of terms in Congress:

There was little magic in the number two, even in the year of its adoption. I am convinced that the question of tenure should be reexamined in light of our needs in the 20th century. (Message to the Congress, 20 January 1966)

Johnson thus revived a debate that originated in the Constitutional Convention: Do short terms contribute to the "best interest of democracy" or to "harassed inefficiency and the loss of invaluable experience"? Applied to the realities of a twentieth-century Congress, these questions took on new meaning.

Change in the congressional workload is clearly illustrated in statistics: the first Congress had 144 bills introduced and passed 108 laws; the Ninety-seventh Congress passed 389 laws out of the 10,582 bills introduced. But what to some may seem an obvious case for "modernization" is not so simple to others. The fact that the legislative demands on the first Congress included the "inauguration of the government and the primeval formation of a federal code" should not be overlooked. Nor did the first Congress have the benefit of "past transactions of the government" as a "ready and accurate source of information to new members." It is questionable whether dealing with the huge and complex government of today can even come close to the initial challenge faced by our first legislators.

From Length to Limitation

Another tenure reform has been attracting more attention in recent Congresses than the call for lengthening terms. There is a growing attempt to revive the ideal of the "citizen legislator" by imposing a limit on congressional tenure. While supporters of limitation do believe it would lessen the constant reelection pressure that preoccupies members today, their major goal is to get Congress out of Washington and back among the people. Says Sen. John Danforth, one of the reform's strongest advocates:

POWER WITHIN GOVERNMENT

Two controversial details of the four-year proposal illustrate why other parts of the government would be concerned about the effect of a change in the House term.

1. Should congressmen all run in the presidential election year or should elections be staggered as they are in the Senate? President Johnson proposed that congressional and presidential elections coincide and was accused of trying to subordinate the House to the president by tying its members to his "coattails." Johnson responded:

If our purpose is to serve the democratic ideal by making the people's House more effective in its performance of the people's business, then we must require that its members be chosen by the largest electorate our democracy can produce. That, assuredly, is the electorate called into being during a presidential year. (Message to Congress, 20 January 1966)

2. Should the proposed amendment require House members to resign their seats if they intend to run for the Senate? Members of the Senate fear a strong challenge from incumbent representatives if they can campaign for Senate seats in the midst of a four-year term. In hearings on the amendment in 1966 and again in 1979, it became clear that a four-year term proposal had no hope of passing the Senate without a clause requiring resignation.

... By limiting terms, I hope to change the course of thinking of the people who come to Washington to serve in Congress. The purpose of my proposal is to make certain that each and every Congressman understands that his tenure here is limited, that—however adept a politician he may be, and however skillful he may be in pleasing special interest groups—he will someday have to answer to as well as for the laws he writes. By limiting terms we will remind each Member of Congress that he is not, by virtue of his election, a member of some ruling class, but a citizen on leave to his government—a public servant first, last, and foremost. (Testimony, 14 March 1978)

In Congress, up until the mid-nineteenth century, the tradition was to serve for two terms and then retire; public service was a "sabbatical"

in the midst of a private career. By the 1920s, the average stay had doubled, the number of committees had grown, and the seniority system was firmly entrenched; serving in Congress had become a career in itself. To some, this meant a more removed and less responsive body. But to others who oppose the concept of limitation, professionalism is not a bad development and the "citizen legislators" may not be equipped to do the job today. Columnist George F. Will wrote:

Americans cling to the idea that government in a modern state can be an amateur's avocation. But in government, as in other serious enterprises, knowledge is cumulative. Government is as much a profession as law or teaching; it is a learned activity and an increasingly complicated one.

Politics in our time has been ennobled by the long careers of such Senators as John Stennis, Hubert Humphrey, and Henry Jackson. Granted, long service is only a necessary, not a sufficient, condition of legislative greatness. Granted, greatness is rare, even among those who have long careers. But it should not be made impossible. (*Washington Post*, 30 October 1977)

A growing dissatisfaction with the behavior of Congress has inspired both political scientists and the general public to look at term limitation as a reform that might make a difference. Junior members of Congress continue to be frustrated by the seniority system which they claim is as firmly entrenched and as obstructive of efficient and fair legislation as ever:

Contrary to popular belief—as fostered in the media—the so-called Watergate class of 1974, of which I am a member, did not destroy the seniority system in the House. Seniority, as we all know, is alive and well, along with its attendant fiefdoms: dominance over legislative priorities, and control of staff and funding in committees. One Senator or one Representative can tie up legislation for months—can, in fact, singlehandedly kill proposals which a majority of his or her committee may favor. A limit on terms would help restrict certain abuses in the committee process. (Rep. Toby Moffett, Testimony, 14 March 1978)

Finally, a major source of support for term limitation comes from internal scrutiny. Members themselves make some of the strongest arguments for limiting themselves. Incumbents are preoccupied with reelection throughout their careers; they never get off the "reelection treadmill." The privileges of being in Congress are constantly abused and the power and perquisites surrounding them in their Washington lives insulate them from the "real world" and seduce them into perpetuating themselves in office indefinitely. In sum, they have seen the future that was predicted by the Anti-Federalist writer Brutus in his criticism of the Senate:

It is probable that Senators once chosen for a state will, as the system now stands, continue in office for life. The office will be honorable if not lucrative. The persons who occupy it will probably wish to continue in it, and therefore use all their influence and that of their friends to continue in office. Their friends will be numerous and powerful, for they will have it in their power to confer great favors; besides it will before long be considered as disgraceful not to be reelected. It will therefore be considered as a matter of delicacy to the character of the senator not to return him again. Everybody acquainted with public affairs knows how difficult it is to remove from office a person who has long been in it. ... (New York Journal, 10 April 1778)

Congressional Reform—Other Approaches

Modern attempts to change congressional terms are not only a response to growth and change but are also a part of a larger reform context in the past fifty years. The 1946 Legislative Reorganization Act was perhaps the most significant attempt to make Congress more efficient. Its internal reforms significantly reduced the number of committees, established clear committee jurisdiction, and initiated the congressional staff. More recent procedural reforms during the 1970s were also meant to strengthen the legislative branch from the inside. In the reform impetus created by the Watergate investigations, Congress took steps to open up the system by reducing the powers of committee chairmen and restricting the number of meetings that could be closed to the public. In an attempt to add more cohesion to the Congress, the tools of party discipline were enhanced.

One charge levied by opponents of changes in congressional terms is that the amendments are "solutions in search of a problem." While not denying the existence of problems, these opponents are skeptical of structural changes where internal solutions may be more to the point.

On the other hand, there are critics who say that term changes are not enough; problems in Congress are only a part of more general problems in the structure of government, and there are ways of integrating the electoral process into a broader reform approach. For example:

- Term lengths and the electoral process could be coordinated to promote a more unified and effective national government. Thus the presidential term could be lengthened to six years to match that in the Senate, and the House term would be lengthened to three years. With this arrangement, the way would be open to link congressional and presidential candidates on a single ticket so that voters would be electing officials pledged to work together from the outset. A similar

arrangement could be effected with presidential and House terms at four years and the Senate at eight.

- Even though the regularity of elections may seem built into the American political tradition, some argue that "special elections" powers could significantly improve the system by placing the strongest tools of accountability in the executive and legislative branches. The special elections power would allow Congress to pass a vote of "no confidence" in the president and then put the question to the people by calling a special election in which it nominated an opposition candidate. The president would be able to initiate a similar process by dissolving the Congress.

Those who look to nonstructural reforms to solve some of the problems diagnosed by Congress-watchers suggest the following:

- Overcome the perpetual reelection preoccupation by passing laws restricting the length of the campaign season and devising a system of public financing for congressional elections to ease the burden of fund-raising and make the system more equitable.

- Within Congress, pass regulations to lessen the power of incumbency and institute a more stringent oversight of the use of mail and travel privileges that tip the balance toward the incumbent. Exercise sanctions to eliminate absenteeism.

- Prevent individual abuses of the system by strengthening party ties, the role of caucuses, and the emphasis on cooperation. A well-disciplined party machinery could help to ease the campaign burden on individual congressmen and make the committee system work in a more open and equitable way.

Arguments For Lengthening Terms in the House

- A longer term would give representatives more time to develop expertise and sound political judgment. They could devote more time to the issues rather than to running for reelection almost as soon as they start a new term.

- Longer legislative sessions and more responsibility call for adjustment in the system to reflect the fact that being a representative is a full-time job.

- Longer terms would make congressional service more attractive to better quality candidates.

- The need to run less often would lower campaign costs and open the office to more people.

- Longer terms would decrease the number of bills introduced purely for reelection purposes.

- With modern communications and travel, a representative can

CONGRESSIONAL TENURE--
A BRIEF LEGISLATIVE HISTORY

- 1789 The first congressional tenure reforms proposed rotation in office provisions and annual elections.
- 1808 Senator Hillhouse called for one-year House terms beginning in 1813.
- 1869-90 The trend shifted toward lengthening House terms to three, four, or six years, generally with the idea that this would eliminate the need to run for reelection.
- 1890-1913 While there were more proposals to lengthen House terms, Senate reforms attracted more attention. Proposals to lengthen Senate terms to eight years failed; the Seventeenth Amendment, mandating direct election of the Senate, was ratified in 1913.
- 1946 The Legislative Reorganization Act was passed.
- 1951 Harry Truman made a proposal for a four-year House term that was to be repeated by Eisenhower, Johnson, and Nixon. He also called for a twelve-year limit on congressional service.
- 1966 Lyndon Johnson's Message to the Congress led to hearings but no action.
- 1972-78 Interest in term limitation gradually surpassed that in lengthening terms. There have consistently been more amendments proposed to limit congressional terms, including twenty-two resolutions in 1977-78.
- 1981 Gallup polls showed 61 percent of the general public in favor of limiting senators' terms and 59 percent for limiting representatives' terms. Both were up a full 10 percent from surveys a decade earlier. Fifty-one percent of the general public responded favorably to the four-year House term, but that figure, interestingly, was down 10 percent from 1966.

keep in touch with constituents more steadily. The two-year term is not necessary for a representative to keep in touch with constituents.

- A four-year term coincident with the presidential term would strengthen the ties between the branches, and representatives would be elected in years when voter turnout is highest.

- A four-year term with staggered elections would preserve the "mid-term" election while gaining the benefits of giving representatives more time to legislate.

- With a longer term and less constant reelection pressure, representatives would not have to rely so heavily on larger and larger staffs.

- Lengthening the federal term would follow the trend set by the states, where it has worked for better government without a loss of responsiveness.

Arguments Against Lengthening Terms in the House

- Extending terms would remove the "mid-term" election, which is an opportunity for voters to have a say on the performance of the president.

- Reelection every two years keeps Congress in touch with the people and ensures that the House will reflect the changing or unchanging mood of the country. Longer terms will create too much inflexibility.

- Extending terms would not decrease the amount spent on campaigns, only increase the amount spent per campaign.

- Modern communications and travel can be used to lessen the burden of frequent campaigning; they make it easier to do the job in two years.

- Technology is not an adequate replacement for the election process in keeping congressmen truly in touch with constituents.

- The last thing people need today is fewer opportunities to vote. Lengthening terms will only widen the gap between government and the people.

- A four-year term coincident with the president's would create a permanent "coattail effect"; candidates would be too dependent on what happened in the presidential campaign and the president can only weaken the legislative branch.

- A four-year term with staggered elections would be unfair to the congressmen who were always running in an "off" year.

- Congress would be more efficient if it passed internal reforms. The people should not be made to suffer because of representatives' inability to work within the constraints set by the Constitution.

POINTS OF VIEW

On the Four-Year Term

... it is easy to examine the attendance record in the second year of every session, the absenteeism created and resulting from the necessity of members to return to their districts for primary elections and for elections—which deprives the people of the productive capacity of the quality of men that they elected to serve them. ... This retards the progress of our great American democracy, because we should not have one productive year out of every two for the issuance of progressive legislation, for the welfare of the great mass of our people. (Rep. Herbert Tenzer, Testimony, 13 July 1966)

Campaigns are at the center of politics. In a democracy, campaigning is a two-day process: it stimulates and educates the public, and it also stimulates public officials and is an important way for them to learn the views of the people. Campaigning is not a necessary evil, or necessarily a heavy burden that interferes with work of an elected official. It is an important part of his service. What we should aim for is to improve the means for campaigning. (Sen. Eugene McCarthy, Testimony, 14 July 1966)

I believe that a four-year term would give a member of Congress a more secure feeling which, in turn, would give him a freedom which he must have in order to devote himself, heart and soul, to his legislative duties. I do not mean to imply that concern for political success and devotion to legislative duty are necessarily contradictory. They may or may not be. The motivation involved in one is likely to be different from that involved in the other. Elected representatives are not meant to enjoy absolute political security. That would contradict the meaning and efficacy of representative government. But the relative political insecurity and apprehension engendered by too-frequent elections are obstacles, I maintain, to wholehearted devotion to public business. ... It is my conviction that both the future role of Congress in national affairs and the fundamental interests of constituents would be enhanced by the four-year term for representatives. (Rep. D. R. Matthews, Testimony, July 1966)

... we have grown, we certainly have come of age. ... And to tell you the truth, there is absolutely no comparison—even at the time I

came here 22 years ago and today. My district has grown from 273,000 to where I represent over 600,000 people. ... And yet I have to service those people. And at the end of the day, there are just so many phone calls, so many letters, and so many people that old Frank can see. There are just so many bricks that a bricklayer can lay, there are so many teeth that a dentist can fill, there are so many patients that a doctor can see. So it is with a member of the House of Representatives. There is a limit to what a man can do, unless he starts delegating it, and who wants to delegate the people's representation? ... (Rep. Frank Chelf, Testimony, 13 July 1966)

If ... representatives feel the Constitution places upon them an undue burden, I can only answer that they are under no obligation to run. Congress was not created for the benefit of congressmen but rather for the people they represent. Neither, I might add, was Congress created for the benefit of the office of the president. (Sen. Sam Ervin, Testimony, 13 July 1966)

For we do not live in a day when news of congressional action requires weeks to reach our constituents, nor when public opinion is obscured by time and distance. Communications media rush the news to every home and shop within minutes of its occurrence. Public opinion polls, and mountains of mail, leave little doubt about what our people think of the issues most vital to them. I do not fear deafness on the part of those who will take their seats in Congress for a four-year term. (President Lyndon Johnson, Message to the Congress, 20 January 1966)

Public opinion polls and mail are insufficient substitutes for the electoral process. Under the parliamentary system, if the government is challenged on a serious national issue, and it is unable to carry the House, the House is dissolved and elections held. Our comparable institution is the biennial election. (Sen. Eugene McCarthy, Testimony, 14 July 1966)

The reasons for the two-year term are as valid today as they were in 1789. Indeed, today, when travel between home and Washington is much less time consuming, and when ease of communications allows us to be informed immediately and accurately on any problems anywhere in the world, a short term is less of a burden than ever before. (Sen. Sam Ervin, Testimony, 13 July 1966)

Arguments For Limiting Congressional Tenure

- Limiting terms would create a constant influx of new blood and fresh ideas from the citizenry. Congress would be more responsive to what is foremost on the public agenda.

- The advantages of incumbency and seniority would be reduced and merit would play a larger role in determining who has power in Congress.

- The lack of limits on service is a congressman's incentive to perpetuate himself in office and in Washington indefinitely, where members become insulated from what is important to constituents.

- Members might look more closely at legislation they know they will have to live with at the close of a limited tenure.

- Limiting terms would open the job to more people, especially the young or older people who would undertake it as a public service during or after another lifelong career. The reform would revive the "citizen legislator" and eliminate "careerism."

- Limitations on tenure would reduce the constant preoccupation with reelection and encourage more serious attention to issues aside from reelection implications.

- Limitation would help alleviate the cynicism people feel toward government by making Congress more genuinely a branch made up of people like themselves.

- Congressional limitation extends the principle of the Twenty-second Amendment (limiting presidents to two terms in office) to the legislative branch.

Arguments Against Limiting Congressional Tenure

- Congress and the people would lose the valuable expertise of experienced members who become better able to serve as they are there longer.

- The decision about how long is long enough should be left up to the voters, who are the best judges of whether their interests are being served.

- Internal reforms of the seniority system have vastly reduced the advantages of long tenure and made committee positions more open to newer members.

- Limiting terms would reduce the power of the legislative branch vis à vis the executive and create "lame duck" representatives and senators for longer periods and in larger numbers.

- It is undemocratic in any way to limit the right of voters to

POINTS OF VIEW

On Term Limitation

Such an amendment is a recipe for further reducing the power of the legislature relative to the "permanent government," the executive bureaucracy. It would prune deadwood, but also would prevent great legislative careers on the scale of Henry Clay's, Sam Rayburn's, and Robert Taft's—the sort of careers that give continuity, cohesion, and energy to the legislature. Besides, a "fresh face" is by another name a "rookie," with a lot to learn in a town where there is a lot to know. (George Will, *Washington Post*, 30 October 1977)

Skilled and experienced statesmen providing leadership in both houses of the Congress are now more vital than ever to check executive power and bureaucratic excess. This proposed amendment would, in practice, weaken the capability of Congress to perform its historic role of restraining runaway executive power. (Dr. Herbert Garfinkel, Testimony, 14 March 1978)

... By shortening terms I feel that the legislative accountability will be enhanced and the forces which nurture it will be strengthened. This may be another way of saying that I have come to prefer democracy over efficiency....

Two thousand years ago, Plato rejected democracy because he believed the decisions of government should not be made by amateurs. He said we needed philosopher-kings to guide us—divinely anointed experts who clearly saw truth. I reject that view because in the realm of politics there is no truth as such. The best we can do is to seek modes of compromise and accommodation so we can live together peacefully. The legislature is the bar of the people—the forum in which we continue the great experiment in self-government. This is not an exercise that requires any special expertise; it requires commitment to the value of democracy. (Sen. Dennis DeConcini, Testimony, 14 March 1978)

... It really is an infringement on individual liberties, both the liberties of voters and officeholders. Moreover it is essentially anti-democratic. It just does not trust the electorate to decide for itself whether an individual should be returned to office or not. In fact, it substitutes an arbitrary rule for the collective judgment of citizens in this country. (Thomas Mann, American Political Science Association, Testimony, March 1978)

continue electing an effective official—whether the president, senators, or representatives.

- Limited terms would increase the number of “amateurs” in Congress and weaken it drastically in the face of the permanent Washington bureaucracy. We need more competent professional legislators.

- The voters themselves are already likely to turn out a legislator who has genuinely overstayed his welcome.

- Reelection pressure is generally a positive and necessary component of our system which should not be eliminated. Reforming the campaign process would be a more appropriate way of alleviating the problems that reelection can pose.

Questions to Guide Discussion

- Is representative government founded in “confidence” in the people, as Madison said, or in “jealousy”—the need to protect individual rights from the encroachments of those in power? How do these attitudes affect our representative institution?

- How do we justify our system of representation? Does our system give us “actual” representation—a mirror of what the people want—or “virtual” representation—a government in the name of the “national interest”? Would changes in government make ours a more representative system?

- Is the ideal of the “citizen legislator” alive today? Can it work in the modern Congress or do we need to revise our ideal to take modern realities into account?

- Would a longer House term allow congressmen to do a better job? Would there be a loss of accountability? If so, how would that affect performance? Are the demands on a congressman’s time more pressing today than in the eighteenth century?

- Would a limit on congressional terms take away the people’s right to choose? Would it deprive them of other benefits they are entitled to?

- Have the founders’ fears of the corrupting influence of power, the vulnerability of inexperienced legislators to the “intrigues of others” and the seduction threatened by the “federal city” proven justified? How important should a suspicion of human nature be in determining the form government takes today?

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THE RIGHT OF PEACEFUL CHANGE:

ARTICLE V OF THE CONSTITUTION

John E. Arthur

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THE RIGHT OF PEACEFUL CHANGE:

ARTICLE V OF THE CONSTITUTION

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THE RIGHT OF PEACEABLE CHANGE:

ARTICLE V OF THE CONSTITUTION

by John C. Armor

April, 1984

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 of 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.

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Introduction

The most important aspect of the amendment process in the Constitution of the United States is not what it allows to happen, but what it prevents. The Framers of our Constitution said in so many words that their work was not perfect. They expected that with time and experience, there would be changes. And they provided a mechanism for change in Article V.

The Framers were students of history. They knew from the experiences of Ancient Greece and Rome, and from the current experiences in Europe, that the price of major, structural changes in governments was usually paid in blood. When they met in Philadelphia in 1787 to draft our Constitution, they knew that millions of people had died, in all eras of history, in international and internecine wars, whose goals were to cause or prevent such governmental changes.

So, the most important aspect of Article V is not any amendment that has ever been made, or any that ever will be. It is the very existence of this mechanism that keeps change from being so easy that our government becomes unstable, but does make it possible, so that change can occur without people killing people. In this article, the Framers gave us the right to peaceable change.

The front pages of modern newspapers demonstrate the accuracy of the Framers' vision. The daily slaughter that goes on in the streets of Beirut, Lebanon, is over the structure of that nation's government. Because the different factions cannot live with one another under the existing government, and because they lack any usable equivalent of Article V, they are killing each other. And Lebanon, unfortunately, is typical.

Most of the 166 nations of the world today lack a means of peaceable change, even on paper in their constitutions. Of those which have a theoretical means, only a handful have demonstrated that it can be effectively used, without the nation degenerating into one or another of the forms of tyranny, or into rebellion or warfare.

The first great value of Article V, then, is that it gives us this right on paper, and that historically, it has worked. Listed in

the index are the tables which show first the history of amendments that were successful, and then the far longer list of amendments which were proposed in one forum or another, but were not successful.

For present purposes, it is enough to note that the amendment process is long and difficult. Even those with apparent widespread support, do not necessarily succeed. The Bill of Rights, as it was passed by Congress in 1791, contained twelve amendments. Ten succeeded, but two failed. So, the Bill of Rights as it exists in the Constitution contains only ten amendments.

For the average citizen, Article V is like the phone number for the fire department. Almost all of the time, it is totally irrelevant. But, when an emergency comes up, it has to be there, and be immediately usable, or else. But, Article V is not such a clear-cut process as pushing certain buttons in a certain sequence. Trying to understand it in the middle of a political emergency is not the easiest task in the world.

The process of amendment is, by itself, politically neutral. If enough people believe that a certain change should be made, the process will begin. And if those beliefs are sufficiently widespread among the people and durable in time, the amendment will be successful. The neutrality of Article V is demonstrated by the 18th and 21st Amendments. The first one established Prohibition in 1919; the second one repealed it in 1933. Both occurred under Article V. The only thing that had changed was the opinions of the American people on the subject of Prohibition.

There are, however, negative aspects of the fact that we turn our attention to Article V only when there are groundswells of public opinion in favor of particular changes. Since the subject matter of the Article is the framework of our federal government, it is unavoidably political. But, it becomes more so when the discussions of it occur under the pressures of specific proposals. The meaning and effective use of Article V is routinely distorted by some of those who oppose a particular amendment. This has happened before in our history. It is happening now. And, it will likely happen again in the future.

This discussion of Article V is being published at a time when the proposed Balanced Budget Amendment to the Constitution is at critical stages, both in the Congress, and in the legislatures of the states. It is very discouraging that in the midst of the public debate on this subject, the Constitution itself is being dragged from pillar to post. The intentions of the Framers

concerning Article V, the circumstances under which it can be used, or should be used in the judgment of the people, and the exact steps which would take place, are being distorted by people who ought to know better. There are lawyers, legislators, and members of the press who, through ignorance (or worse), are in effect, attacking Article V itself.

The Framers said, almost 200 years ago, why they were giving us Article V, the right of peaceable change. And they also said why they were providing two different routes to amendment of the Constitution, proposal by two-thirds of Congress, or by a convention called by two-thirds of the states, followed by ratification by three-fourths of the states.

The reasons they wrote then are just as fresh and valid today, as they were when stated, almost two centuries ago. And, they apply with equal force to all of the amendments that ever have been proposed, are presently proposed, or may be proposed in the future.

Therefore, this discussion is limited solely to Article V. How we got it, why we got it, how it has been used throughout our history, and the exact steps that will take place as it is used again. Nothing will be said about the merits or demerits of the Balanced Budget Amendment, or about the merits or demerits of any other amendment, past, present, or future. The important question here is about the processes of Article V.

There are many examples in history of those who sought to distort Article V, in order to accomplish their particular goals in passing or defeating a particular amendment. There will be many more such examples. To those of us who care about the integrity of the Constitution itself, this is a great danger. Long after the battle over any particular amendment has been consigned to the history books, we Americans will need a continuing and healthy Article V to address new subjects in new times.

Article V, this small but critical corner of the Constitution, needs defenders today. If we are to defend the right of peaceable change, for use by future generations when and as they see fit, it is mandatory that as many as possible of us understand its origins, its methods, and its importance in the American system of government. It is for that purpose this booklet has been written.

Washington, D.C./
Baltimore, Maryland
April, 1984

After the Bill of Rights, So What?

The Central Importance of Article V

The Framers were students of history. They knew that almost no major governmental changes had occurred in the world prior to 1787 other than by warfare. (Not much has changed in the two centuries since then. This is still true for the vast majority of the world's 166 nations.) Our nation was the first ever to state in its basic documents that it is the right of the people to establish their own forms of government, and to alter them as they choose.¹

The Framers well understood, therefore, that a means of peaceable change was a mandatory part of the Constitution, were it to survive. Also, they did not write Article V on a clean slate. Our previous government under the Articles of Confederation contained an amendment process in Article XIII.

The Articles could only be amended by a Congressional proposal that was accepted unanimously by the 13 States. By 1787, this provision was a proven failure. The government was collapsing. It had no direct power to raise money, and no ability to pay its debts, including to its soldiers who had fought and won the revolution. Numerous proposals to improve the Articles were submitted and adopted by most of the states. But none could gain unanimous acceptance.²

On the other hand, the Framers understood that the Constitution should not be changeable at the whim of a temporary majority. If it could, the government would lack stability. Even the most democratic Framers, like James Madison, warned of the possible "tyranny of the majority."³

So, the Framers knew that the process should not be impossible, as in the Articles. But, it should be both difficult and broad in scope, so that no change would be made unless it came from the beliefs of a substantial majority of citizens, held over a long period of time, and shared in almost all parts of the Union.

History has proven the Framers correct on this point. The Civil War was fought over the subject of the structure of the federal government. The Confederate States of America wanted

the right to nullify laws of the federal government which they did not feel should apply within their territory. But all of the other changes, or would-be changes, in the government of the United States have been sought or accomplished under the terms of Article V (see Tables I-III).

Remember that our Bill of Rights, stating our most basic and important freedoms, was a product of Article V. We have changed the methods by which we choose presidents and senators, we have far more than doubled the electorate, by adding black people, women, and citizens over the age of 18. We have terminated slavery, and guaranteed equal rights to all citizens. We have changed the form of taxation. And we have made other, lesser changes, without the necessity for bloodshed.

And in each instance where an amendment has failed, one of the key examples being the proposal to allow state senates to be disproportional to population, in time those who supported the amendment have accepted the verdict of the nation as a whole, and our Constitution has endured. (We did, of course, make one obvious mistake along the way—Prohibition, which was established by the 18th Amendment, and abolished by the 21st Amendment.)

The main point is this, even today thousands and even millions of people, are being killed in nations around the world, because they lack the mechanism for peaceable change, which the Framers gave us in Article V. Sometimes we take our rights as Americans for granted. We need only look beyond our borders in any direction except north, to see their value to us, by the price that others are paying for the lack of such rights.

Undeniably, the first ten Amendments to the Constitution, the Bill of Rights, are far and away more important than all the rest of the amendments. The great guarantees of freedom of religion, freedom of the press, freedom of speech and the like, are more than just additions to the Constitution, they are part of its heart.

Many commentators consider the Bill of Rights not just as amendments, but as part and parcel of the Constitution. This is so because their addition was done by the Framers, in the very first session of Congress, and the promise to add them was the factor that allowed ratification of the Constitution. Without the Bill of Rights, there would have been no Constitution itself.⁴

Even though it is doubtful that the people of the United States will propose and pass later amendments of the importance of the Bill of Rights, this does not diminish the importance of the Article V process. This process is our Constitutional safety valve.

It makes ours one of the handful of the world's nations in which the people can make major changes in their form of government by peaceful means. The continuing vitality of this power, regardless of when and how it is used, is the key to the long-term survival of our Constitution and our form of government.

What If Congress Won't Listen?

The precise reasons that the Framers gave us two methods of amendment, one through Congress, the other through the State legislatures

It was the obvious necessity for means of peaceable, governmental change that caused the Framers to establish the first half of Article V, proposal of amendments by a two-thirds majority of both Houses of Congress, and ratification either by conventions or by the legislatures, in three-fourths of the states. Other than changing the process from effectively impossible to merely difficult, this was the same pattern that was used in the Articles of Confederation.

Late in the convention, however, George Mason raised the question of what would happen, should the people, through their state legislatures, express a desire for a change that Congress would not agree to. He suggested the alternative method of amendment, in which two-thirds of the states could call for a new Convention, in order to propose amendments.

At two points in *The Federalist*, the Framers describe the amendment process, and the reasons for it. These words are as fresh, and clear, and valid today, as they were when written, almost 200 years ago.

"[Article V] 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 State governments to originate the amendment of errors, as they may be pointed out by experience on one side, or on the other."⁵

The Framers had, and expressed, a strong sense of their own fallibility. They expected that changes would become necessary. And they did not believe that either the Congress or the state legislatures held a monopoly on the wisdom of any particular change.⁶

The importance of the second method of amendment, coming from the states, is underscored by its being described again in the summary of the most important points in the entire *Federalist*. The Framers noted the objection of opponents, that Congress, in order to protect its prerogatives, might refuse to consent to an amendment that the people consider desirable. The problem is phrased this way, in *The Federalist*, No. 85: "[I]t 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."

The answer to this problem, based on human nature, is found in the second half of Article V. After stating that "public spirit and integrity" should cause the national leaders to follow "the reasonable expectations of their constituents," the Framers state the guarantee against national blockage of an amendment:

"[T]he national rulers, whenever nine States concur, will have no option on t' 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 today is 34], 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 preremptory. The Congress 'shall call a convention.' Not ing in this particular is left to the discretion of that body."⁷

The Framers assumed that over the years the two methods of amendment would be used equally. Early on, Thomas Jefferson even assumed that we would have a new Constitutional Convention every twenty years or so.⁸ (Cont. p. 12)

"No Taxation Without Representation"

The concept of representative government, which rests on the consent of the governed, and is carried out by representatives who are democratically chosen, derives from a number of sources. Most of them were religious.

The Puritans, the Congregationalists, and the Quakers, among others, came to this nation with the

concepts of participation and voting in their religious bodies. (Among the Quakers, votes were not taken. Instead, discussion continued until consensus was reached.) In all instances, these practices in the religious sphere were translated into civil government.

There was one unique source of the tradition of participation and popular control. The colony of Virginia was founded as a corporation. But, all members of that corporation had a right to vote, much like Lloyd's of London, today.

This tradition existed in some colonies for more than a century prior to 1776. But it was, of course, a series of oppressive measures voted by the English Parliament which compelled the colonies first to join together, and then to choose popular sovereignty as the basis of all governments in the new United States. Those measures, which ultimately produced the Constitution and its critical Article V, were the Stamp Act, the Townsend Acts, the Tea Tax, and the "Intolerable Acts."

Every history book refers to these Acts. But, none give the details of the taxes which caused the Americans to declare our independence, and to fight and win a war. Here are some of those details:

The Stamp Act was passed in 1765, requiring revenue stamps on all newspapers, pamphlets, licenses, and commercial and legal documents. The level of taxation was measured in pence, or pennies. It caused, however, the Stamp Act Congress, in which delegates from nine colonies met in New York to draft a petition to the King. The Stamp Act was repealed in 1766, but at the same time Parliament passed the Declaratory Act, asserting its right to tax the Colonies at any time, and in any way they considered appropriate.⁹

The Townsend Acts were passed in 1767. They imposed duties on a number of commodities which were essential in the colonies and which were imported from England. Glass, lead, painter's colors, tea, and paper were included. A representative tax level was 3 pennies per gallon on molasses. These Acts also suspended the New York Assembly for refusing to supply lodging and supplies for British troops. Protests in the colonies grew, and in 1770, the

Townsend Acts were repealed, except for the tea tax.¹⁰

In 1773, in order to assist the British East India Company in selling its surplus tea, Parliament passed the Tea Act. It gave the Company a monopoly on shipping tea to America, and imposed a duty of a few pennies to be collected when the tea was unloaded. It is interesting to note that Dutch tea was available in America at the same price as English tea with the tax included.¹¹

Nonetheless, the response in Massachusetts was the Boston Tea Party. The Sons of Liberty, disguised as Indians, raided ships of the East India Company and dumped the tea in the harbor.

The British response was the "Intolerable Acts" of 1774. The port of Boston was closed until the colony paid for the destroyed tea. The Massachusetts Charter was abrogated, and town meetings were forbidden in Boston without permission of the Governor. A provision was included that no English officials, either civilian or military, would be tried in colonial courts. Instead, these and other trials would take place only in England. And a new Quartering Act was passed, requiring Massachusetts to provide lodging and food for the soldiers occupying Boston.¹²

The "Intolerable Acts" led directly to the convening of the First Continental Congress in 1774. The events were now underway which would lead to Lexington and Concord, the Declaration of Independence, the Revolutionary War, and ultimately to the Constitution of the United States.

The English colonial laws which produced by far the largest revenues were the Sugar Acts of 1764 and 1766. They produced a low revenue of 14,091 £ sterling in 1765, and a high of 42,570 £ sterling in 1772.¹³ But the Sugar Acts were not the sparks for rebellion.

The hated Stamp Act (1765) was in effect for only one year, and produced only 3,292 £ sterling in revenues. The Townsend Acts, which were the primary focus of revolutionary activity, produced a high of 13,200 £ sterling in 1768, but had declined to only 912 £ by 1774.¹⁴

Even if we assume that the American colonists rebelled against the sum total of English taxation, the specific facts are most curious. The highest total taxes were 45,499 £ in 1769. They came close to that level in 1772, but had dropped to 60% of that level by 1774.¹⁵

The English had a legitimate and practical reason for imposing taxes on the colonies. The English war debt for defending the Americans against both the Indians and the French, reached a maximum of 140,000,000 £ sterling.¹⁶ But the taxes collected by the English never amounted to more than .03% (one-thirtieth of a percent) of this debt. One American scholar has even said this about the inadequacy of English colonial taxation, "These parliamentary revenues from the colonies were never sufficient to meet the charges of collection."¹⁷

On a per capita basis, the English tax burden suffered by our forefathers was in fact only a maximum of 1.82 pennies per year. Of course, a penny then was worth much more than a penny at any time since. A low but tolerable annual income for an individual in the colonies was 15 £ sterling, or 1,800 pennies. So, for a low income person, the total annual tax rate was exactly .1%.

Most of the colonists were subsistence farmers, who used little or no money. If we assume that the whole burden of English taxation fell on only a third of the colonists, that still made the effective tax rate only .3%.

To compare tax burdens then and now, the English taxes, which led to the American Revolution, were less than federal or state income taxes, less than excise taxes, and less than import duties. They were even less than the lowest of modern taxes, the sales taxes that exist in every state in the Union.

It is no wonder that our history books, in discussing the "oppressive" English taxes that caused us to go to war, do not tell us either the rates of those taxes or their total impact. If they did, the comparisons might cause even elementary school children to ask some very embarrassing questions. They might ask why it was that we fought and won a war on the issue

of "no taxation without representation," to eliminate a very moderate sales tax of a few pennies a year. They might even just look at the receipt, with great interest, the next time they buy a hamburger.

Experience has not borne out those assumptions. The reason probably is that Congress sits as a continuous Constitutional Convention. It can at any time, if two-thirds of each House agree, propose any amendment on any subject. And, most of the time, Congress does represent the will of its constituents. So, we have never had another Constitutional Convention, and the second method of amendment has been used only once before, in a situation that was exactly what the Framers described and anticipated.

T Minus Two and Counting

Is the holding of a Convention mandatory from the moment that the 34th State issues its call?

The answer to that question is in the hands of the states. If they pass absolute calls for a convention, then the answer is yes. But, if they issue conditional calls for a convention, the answer is no. The choice of which applies, however, must remain solely in the hands of the state legislatures.

All of the 32 calls to date for a Constitutional Convention on the subject of the Balanced Budget Amendment are written conditionally. There are differences in terms and language, but on this point they all agree. Each state has asked Congress to propose a Balanced Budget Amendment. And each state has said, if Congress fails to act, then the call for a convention is operative.¹⁸

Some of the states have set deadlines by which Congress must act. Others have not set a specific date, which means that a reasonable time to act would be implied. But the fact that the states have been prudent, and made their calls conditional, means that the event which would trigger the necessity for holding a convention would not be the action of the 34th state. It would be the failure of Congress to act on the amendment.

If the second half of Article V had never before been used in our history, this question might pose a problem. But it has been used before.

The full history of the adoption of the 17th Amendment is given in the box on "The Swamp Water Theory." The gist of it is this: until 1912, the members of the Senate were selected by the State legislatures, rather than elected by the people. The mood of the country having become more democratic, five times the House passed an amendment to make the Senate elected.

But the Senate, liking things as they were, killed the amendment in committee, each time. Meanwhile, state legislatures began to pass conditional calls for a new convention to pass the amendment. When 31 of the then-required 32 states had

acted, the Senate relented and passed the amendment. In the process, they added a grandfather clause to protect their existing terms in office.

As reluctant as the Senate was to act, it was more reluctant to let a convention write the amendment, and possibly put all non-elected senators out in the street. This is the proof of the Swamp Water Theory, that Congress will swallow anything if it has only two alternatives, and the other one is worse. This example from our constitutional history is also the proof that even if 34 states issue conditional calls for a new convention, that the result will not be a new convention; instead, it will be belated action by a reluctant Congress. (Cont. p. 16)

The Swamp Water Theory

As all experienced elected officials are well aware, sometimes there is a sharp difference between the paper pattern that was followed to get a result, and the actual forces which were essential to that result. So it is with the second half of Article V.

On paper, every amendment to date has been proposed by Congress, and ratified by the states. But the history of the 17th Amendment shows that it was passed only because the states took the initiative under the second part of Article V.

Until 1912, all members of the U.S. Senate were appointed by the state legislatures, rather than elected by the people. The senators found that arrangement to be very comfortable. But the rising tide of democracy in the United States demanded a different result.

Five times, beginning in 1893, the House passed a proposed amendment that would have made the Senate elected, rather than appointed. Five times that proposal died in committee in the Senate. But, in the meantime, the state legislatures began to act. By 1912, 31 states, or one short of the then-required number, had issued conditional calls for a Constitutional Convention. Then, as now, they left Congress the option to act first and pass the amendment itself.¹⁹

So it was that in 1912, the Senate read the handwriting on the wall, and passed the 17th Amendment. It was ratified a year later, and in its language

contains proof of the political dynamics which led to its passage. Section 3 contains a grandfather clause, which says, "This amend. shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid. . . ."

The grandfathers who wrote that grandfather clause are long dead. But their words demonstrate a universal political truth. If a Convention had been necessary to make the Senate elective, that Convention might have done what the original Convention did. It could have made its terms effective immediately, putting the entire, recalcitrant Senate out on the street, and staggered the terms of the new, elective body, as in Article I, Section 3, Clause 2, of the original Constitution. But by writing the 17th Amendment themselves, the current Senators were able to protect themselves to some degree.

The universal political truth, therefore, is this: If a legislative body is faced unavoidably with a choice between two evils (in its view), and if one has the potential to be far worse than the other, it can be expected to choose the second alternative. I call this the swampwater theory. Congress will swallow anything, if its only choice is unmistakably worse.

In short, Congress did in 1912 what the state legislatures had demanded under the second half of Article V, because the Senate could no longer duck the issue, and that was a better choice than allowing a new Convention to take place.

Exactly the same logic applies today. A Convention could be truly Draconian. It might not only define and require a balanced budget, it could provide that unless Congress passed such a budget by 1 July of every fiscal year, all pay and benefits to all members of Congress would be cut off (with no right of reimbursement), until and unless such a budget was passed. On the other hand, Congress would never do such a thing to itself, if it wrote the amendment.

So, on paper the second half of Article V has never been used. But as a matter of political reality, it was used very effectively in 1912. It was used for exactly the kind of purpose which the Framers intended—to obtain an amendment the people wanted

but to which Congress would not agree. And the methodology used in 1912 was exactly the same as that being used today.

Is It Katie Bar the Door?

Once a Constitutional Convention is convened, can it be limited in subject matter?

The question of whether a new Convention could be limited in its subject matter is related to the history of the one and only Constitutional Convention ever held in this country, in Philadelphia in 1787. Critics today pose the conclusion that the convention of 1787 was a "run-away," and therefore assert that any new Convention could be the same. The answer to the two questions is not the same, and the history from 200 years ago does not support the idea of a "run-away" convention today. Nonetheless, a clear understanding of what did and did not happen both before and at the original Convention, is a proper starting point.

In 1785, Virginia and Maryland were almost at the point of going to war with each other over the subject of shipping rights in the Chesapeake Bay. George Washington intervened personally, to ask the two states to send delegates to meet with him, and see if the differences could be resolved.

Distrust was so high that this meeting could not take place anywhere in either state, including at Washington's home at Mount Vernon. So, it was held on a boat in the Chesapeake. But its results were excellent. All differences were resolved.²⁰

Congress then called for a meeting of "Commissioners" from all states, to convene in Annapolis in 1786. Only five states sent delegates, but among them were leaders such as Alexander Hamilton. The purpose of that meeting was to propose laws concerning trade to be passed by Congress. Lacking a quorum, they could not act. But before disbanding, they asked Congress to request another meeting in Philadelphia, with a broader mission.²¹

Congress agreed, and here is exactly what it said, by Resolution, on 21 February 1787:

"[W]hereas experience has evinced that there are defects in the present Confederation . . . and [a] Convention appearing to be the most probable means of establishing in these states a firm national govern-

ment . . . on the second Monday in May next a Convention of delegates . . . be held in Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures. . . ."

The gist of the argument that the convention was a "run-away," was that it did not simply amend the Articles of Confederation. It wrote an entirely new Constitution. To this argument, the Framers made three responses in *The Federalist*.

The first was that twelve of the thirteen states specifically agreed to what was done. Rhode Island, which represented one-sixtieth of the nation, chose not to participate. That state had declared itself independent prior to 4 July 1776. It remained independent, and did not ratify the Constitution until 1790, when the federal government threatened to treat it as a foreign nation, exchanging ambassadors and imposing import duties.²²

The second argument was that whatever the convention might have done, its work was ratified by the Congress, which after only eight days of debate, approved it and submitted it to the states for ratification.²³

The third point is that the Framers recognized that amendment could not occur under the Articles of Confederation, without unanimous consent of the states. Therefore, in Washington's letter transmitting the Constitution to Congress, for it to submit to the states, he said,

"[I]t is the opinion of this convention, that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same. . . ."

The Resolution went on to state that the House should be elected, the Senate appointed, that the Senate should count the votes for president, and that the new government should begin to function under the new Constitution. The key phrase is, "by the states which shall have ratified the same." In fact, when Washington took office in 1789, two states had not ratified, Rhode Island and North Carolina. Neither was represented in Congress, neither had participated in the first presidential election, won by George Washington.²⁴

In theory, the Articles of Confederation were still in effect, as to those two states only. But neither had any interest in maintaining a federal government solely for their purposes. They were not forced into the United States under the new Constitution against their will. In fact, they eventually ratified, making the action unanimous.

So, it can be argued that the present Constitution was unconstitutional, or more accurately, "unconfederal," when Washington took office in 1789, before North Carolina and Rhode Island had ratified. However, there are several differences between what happened in Philadelphia in 1787, and what might happen now (perhaps in St. Louis), that suggest this problem might not arise again.

First of all, there was no Supreme Court under the Articles. There was also no tradition that such a Court could strike down as unconstitutional, any actions taken by any other branch of government, in violation of the Articles. Lastly, the requirement of unanimous consent to amendments in the Articles was agreed, early on, to be one of the principal problems with the Articles.

What the critics are suggesting is that because the first Convention changed the mode of ratification, a new Convention might do the same. The answer is that under the present Constitution, we have a valid and workable ratification process. If any Convention were to propose a different method, it would not apply until it became part of the Constitution. There is a long line of Supreme Court cases which hold that a proper test of a restriction on political activity is whether that restriction has been successfully met in the past.²⁵ Suffice to say, the unanimous amendment process in the Articles would not be legitimate under the present 1st Amendment, since it was never successfully used; whereas, the present amendment process would be upheld and would be enforced. A change in the amendment process itself could only become a part of the Constitution by succeeding through the existing ratification process.

And lastly, since the results of any Convention now held would have to pass first through Congress, and then would be reviewable by the Supreme Court (should any state challenge the process as illegitimate), it would take failures first by the Convention, then by the Congress, then by the Court, to allow such a thing to happen.

Had Rhode Island attended the convention in 1787, the "run-away" argument would have no validity whatsoever, since the delegates were all appointed by and acting for the state legisla-

tures, and all present agreed both that the Articles were to be flawed simply to be repaired, and that the amendment process had to be changed.

Consideration of the present question, whether a new Convention could be a "run-away," has gone on for approximately 8 years. Especially in the last 20 years, numerous law review articles, and a Special Study by the American Bar Association have been prepared and published on the subject. The leading publication concluding that a new Convention could have its subject matter restricted, is discussed in the box on "The Arguments for Limitation." This was prepared, and officially endorsed, by the American Bar Association, through a special committee of experts and acceptance by its House of Delegates. (Cont. p. 23)

The Arguments for Limitation

The most detailed analysis of the Article V provisions for a Constitutional Convention, was published by the American Bar Association in 1974. This statement is a definitive one, for the depth of its analysis, for those who wrote it, for those who accepted and endorsed its conclusions, and for the circumstances under which it was developed.²⁶

The two most important points are that the Committee which prepared it included three judges, two law school deans, and two former presidents of state constitutional conventions, among others. Its conclusions were accepted by the ABA House of Delegates in August, 1973. Most importantly, the Special Committee who drafted this paper were acting at a time when the Dirksen Amendment had crested, and would apparently fail, and when no new subject had garnered state calls for a Convention from even a third of the states. In short, the ABA study was written and approved at a time when the merits of many procedures for a new Convention were not entangled in the merits of any specific proposal. Although this study began when the Dirksen Amendment was a live issue, by the time it was prepared, approved, and published, there was no substantive Constitutional battle underway.

These are the conclusions of the Special Committee, which were adopted by the ABA House of Delegates:

1. Congress should establish procedures for the Convention method of amending the Constitution.

2. Congress has the power to limit a Convention to the subject or subjects named in the required 34 state calls.

3. There should be limited judicial review of the actions of Congress concerning a Convention.

4. Delegates should be elected in proportion to population.²⁷

The most important point, then as now, was whether a Convention could be limited in its subject matter. In answering this question, the ABA looked first to the history of constitutional conventions in the United States. Although there has been only one national Convention, the original one in Philadelphia in 1787, "[t]here have been more than 200 conventions in the states," with "at least one in every state."²⁸

The experience in the states shows that conventions are either limited to certain subjects or are unlimited (the latter meaning free to deal with any subject), depending on the purposes for which they were called. The ABA concluded, from the history of the adoption of Article V, that the same distinction applies to any new, national Convention.

They discussed at length the debate on Article V, concluding that the third and final version of the Article gave the states the option of calling for either a limited convention or a general one, and that the Congress was bound to carry out the choice of the states, if 34 states concur.²⁹

The review by the ABA was exhaustive, going back to the very first state call, received in May 1789. They included a table of states and subject matter of all calls from 1789 to 1973. The total number of calls was 356, and the subjects ranged widely. (The more obscure ones included Presidential disability and succession, a new type of Supreme Court, Presidential tenure, and U.S. participation in a world, federal government.)³⁰

In Table III, at page 47, the state calls are brought up to 1983, and listed by subject, for all those on which at least ten states have acted. This is the ABA conclusion concerning a limited Convention:

"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-limited convention; [footnote omitted] 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." (Emphasis added.)

Then the ABA addressed the power of Congress to pass a procedures bill which would limit the Convention. They conclude that since Congress has the duty of determining when 34 state calls have been received, it can examine them to see whether they seek a general Convention, or if they deal with the same specific and limited subject or subjects. They conclude that it would be improper of Congress to expect or require that the applications be identical in their wording. Since this method of amending the Constitution was established by the Framers for situations where the states want a change and Congress has not acted, the congressional review of the state calls should not be permitted to delay or defeat the purpose of such calls.³¹

The ABA noted that the Supreme Court had in the past decided questions concerning the amendment process, always dealing with mechanics, and not with the merits or demerits of any proposal. They concluded that in the unlikely event that Congress disobeyed the terms of Article V, the Court could issue a declaratory judgment as it has in the past.³²

The last major question was election of delegates. The delegates in 1787 were "appointed" rather

than "elected." They voted by state, with the majority of a state delegation determining its vote. The ABA concludes that such a pattern would not be suitable today, and would probably be unconstitutional under the Court's "one man - one vote" decisions.³³

The ABA concludes that delegates should be elected from each state in proportion to its members in the House. It rejects the idea that representation should be keyed to the Electoral College votes from each state. (In light of recent Supreme Court decisions, it is likely that if Congress passes a Convention Procedures Bill using the Electoral College as a basis, that this would be upheld. This pattern is common to both past and present procedures bills.)³⁴

There have been numerous law review articles published by individuals, reaching the same conclusion as the ABA, namely that a limited Convention could be requested by the states, and if so requested, it would then be mandatory for Congress to convene a limited Convention. Two of the principal articles are by former Senator Sam Ervin, generally respected as one of the best constitutional scholars ever to serve in national office, and by the late Senator Everett Dirksen. Of the Framers, Senator Dirksen said this:

"They decided that whenever the people felt that an amendment to the Constitution was required they could not be denied by the Congress the right to propose that amendment. Such an amendment would be proposed by a convention assembled on the application of the legislatures of two-thirds of the several states. The people would speak through their state legislatures."³⁵

On the subject of limitation, Senator Dirksen concluded:

"First, I apprehend that when the applications are for a stated purpose or amendment . . . then in effect the state legislatures, which alone possess the initiative in convening a convention, have by their own action taken the first step toward limiting the scope of the convention. It would then remain for the Con-

gress to implement this attempt to limit the convention by making appropriate provision in its call."³⁶

On both points, Senator Ervin concurred with the conclusion, that the second method of Article V was intended to allow the states to compel Constitutional consideration of any subject of their choice, and that Congress could call a limited Convention, if that was the choice expressed by the requisite 34 states.³⁷

Although there are some authorities who argue the contrary, that a Convention cannot be limited, the weight of authority, especially of those who did not have a personal ax to grind when they addressed the subject, is in favor of limitation by the states, recognized and applied by a Congressional procedures bill.

The leading article concluding that a new Convention could not be restricted in subject matter, is discussed in the box on "The Arguments against Limitation." This article was written by Professor Gerald Gunther of Stanford, who is also a leading expert on the Constitution. (Cont. p. 26)

The Arguments Against Limitation

The latest, and most widely circulated article arguing that a Convention cannot be limited, is, "Constitutional Brinkmanship Stumbling Towards a Convention," by Professor Gerald Gunther. His article was published in the ABA Journal in 1979, five years after the ABA itself took its stand contrary to his position.³⁸

He asserts first, that, "It is fair to say that the questions of what a convention might do, and especially whether it could and would be limited to the balanced budget issue, were largely ignored [in the states passing calls]."³⁹ Whether or not that was once fair to say, it no longer is. As the records of the state hearings over the last three years demonstrate, the question of limiting a Convention has come to dominate over the merits or demerits of the amendment now sought.

His article is one of assertions, unsupported and not footnoted.

"One of the very few issues about the convention route on which there is full agreement among scholars is that, once 34 proper applications for a convention are before Congress, Congress is under a duty to call a convention and does not have a legitimate discretion to ignore the applications."⁴⁰

While this is true of unconditional state calls, it does not address the conditional state calls being used now, as they were in 1893 through 1911. If Congress acts on its own (under pressure), it does not ignore any state calls. But it does make them no longer effective, according to their own terms.

On the subject of whether the states may validly issue limited state calls, he agrees that the weight of authority is that they can. "A larger number of scholars believe that applications that are somewhat limited, can be considered valid. . . ."⁴¹

In posing the dangers of using the second half of Article V he says that Congress, "acting on the belief that all conventions had to be general ones, . . . might disregard . . . [the limitations in] the applications and issue a call for a general convention."⁴² The idea that Congress, which does not want any amendments other than its own, would deliberately choose a process that was totally open, is theoretically possible, but politically frivolous.

Then he assumes that a limited Convention would be called, but says that, the delegates, "could legitimately speak as representatives of the people and could make a plausible case that a convention is entitled to set its own agenda."⁴³ It does not seem from this article that the Professor has read the ABA Special Study, especially its sections on the two-century experience with state conventions, in which limitations on conventions, if made, were enforced by both legislative and judicial actions.

Then, the Professor makes contradictory arguments. First, he says that Congress could not refuse to submit excessive amendments (if proposed) to the states for ratification, but second, that the Court would probably lack authority to act on this point. If Congress refuses to submit excessive amendments, and

if the Court cannot act, then the buck stops there. Even if the Convention ignores its limitations, the harm is immediately prevented, if Congress submits only the limited amendments for ratification.

The Professor says that his own "best judgment is that 'Applications' from the states can be limited in subject matter. . . ." But he goes on to say that such limitations, "should be viewed as . . . essentially a moral exhortation to the convention."⁴⁴ He acknowledges that his understanding would undercut the Framers' intention that the Congressional and state methods of initiating amendments be parallel and complementary to one another.

He assumes, contrary to both their history and their words, that the Framers intended the Convention route to be useful only against total and extraordinary nonresponsiveness by Congress. He ignores the statement of the Framers that the two parts of Article V were designed to allow "errors to be corrected as they were perceived" either by Congress or the states.

Some other authors have agreed with the central premise of Professor Gunther that a new convention should be avoided at all costs, though on different reasoning. Ralph M. Carson wrote that a new Convention is undesirable for four main reasons: (1) A new Convention could not be limited. (He assumes this, and does not discuss it.) (2) Life is so much more complex today that major revisions in the Constitution could not be effectively drafted. (3) We no longer have people in our midst to serve as delegates, who match the quality of the Framers. And (4), a new Convention, unlike the original one, would take place in the glare of broadcast media, and therefore could not deliberate secretly, and arrive at fair compromises.⁴⁵

Professor Robert G. Dixon, Jr., states the opposition to the state-initiated amendment process even more boldly, "Is Article V irrelevant to the grander issues of constitutional form and policy which we call constitutional law?"⁴⁶ He argues essentially that all of the Constitutional amending that we require is done either by Congress under the first part of Article V, or by the Supreme Court in the guise of "interpreting" the Constitution.

Although they use different logic and language, the articles opposing the use of the second half of Article V have one, common denominator. They conclude that it is too dangerous in today's world, for the people of the United States to have a direct role in the process of Constitutional amendment. Although they advance reasons why the process should not be used, in fact, they believe that the Framers should never have given it to us in the first place.

Although none of them say this in so many words, all of them mean it: the Constitution is too important to be left to the people of the United States.

Skipping a good bit of the legalese, the reasons in favor of limitation begin with the state calls themselves. In general, they ask for a Convention for the "sole" purpose of proposing a balanced budget amendment. Seventeen of them specifically provide that they are "null and void" in the event that either the Congress or the Convention seek to exceed that limited subject matter. Since the actions of those seventeen states are necessary for Congress to call a Convention, it seems highly unlikely that Congress would disobey that instruction.

Eighteen years ago, Senator Ervin proposed a bill that would define how Congress would set up a Convention. It included provisions under which Congress could recognize and enforce any subject matter limitations that the states might provide. He said at the time that the bill should be considered before any amendment was proposed, so the merits of Constitutional procedures would not be entangled in the merits of any particular proposal. He was right. But no action was taken. There are two bills now pending in Congress which have many of the same terms as the Ervin proposal, including subject limitation.⁴⁷

Should 34 states issue calls, and should Congress be unable or unwilling to pass the proposed amendment itself, it is a near certainty that it will pass a Convention procedures bill. This assertion is based on the difference between the Constitutional majorities required. Any amendment requires two-thirds of each House; whereas, a procedures bill would require only a simple majority. Since the President is on record as favoring the amendment, he should be expected to sign such a bill. And since it requires only a simple majority of Congress to convene a Convention, the same votes necessary to create the Convention would be necessary to seek to limit it.

The argument against limitation is quite clear and simple. It is that the members of a Constitutional Convention represent the sovereign people directly. Their power does not come from the states, nor does it come from the federal government. Therefore, as soon as the gavel falls at such a Convention, and all proposals can be made.

The first logical error made by those who argue that a new Convention could be a "run-away," is the misreading and misrepresentation of the history of the original Convention in 1787. All its actions were authorized by all of the states except Rhode Island, and also accepted by the Congress, before the new Constitution was submitted to the states for ratification.⁴⁸

The second logical error made by these critics is to assume that what happens in 1984, or at some time in the near future, is the same as what happened in 1787. We now have a Supreme Court whose duties include the final interpretation of the constitutionality of the actions of any other part, branch, or agency of the federal government. At the time of the 1787 Convention there was no Supreme Court, there was no assertion that the existing government, the Articles of Confederation, were the "supreme law," and there was no arbiter of any kind which was in a position to challenge the legitimacy of any actions taken at any time by any part of that former government.

The last logical error made by the critics is the assertion without discussion, that a new Convention which was a "run away," would therefore threaten the destruction of basic American freedoms. The obvious and critical flaw in this analogy is that any amendments proposed by a Convention, whether major or minor, have no legal effect whatsoever until they have succeeded in the ratification process. As the history of the rejection of some amendments passed by Congress demonstrate, there are many steps between the proposal of any amendment, and its ultimate ratification, and success in the first step is no guarantee whatever of success in the second (see Table I, on page 42).

The sequence of events necessary for a "run-away" Convention to occur, and for its rogue proposals to become law as part of the Constitution, requires a long series of obvious failures by various parts of the governments of the United States. Critics at this point do not discuss these steps, because listing them make the weakness of their argument apparent. Here are the necessary failures, in the necessary order, for a "run-away" Convention to occur, and to have its proposals adopted as part of the Constitution:

1. Congress fails to act on the proposed amendment.
2. Congress calls for a Convention, but fails to limit its subject matter.
 - 2a. Congress does limit the subject matter, but the Convention chooses to ignore its limits.
3. Any state, or possibly any individual, who feels that the Convention can and should be bound to limits, brings a legal challenge, and the Supreme Court either fails to act, or rules that the Convention is unlimited.
4. The Convention actually passes proposed amendments that are beyond its subject matter.
5. Congress submits the excessive amendments for ratification.
6. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.
7. Three-fourths of the states, by either their legislatures or special conventions, as Congress has required, ratify the excessive amendments.
8. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

In short, for a new Convention to constitute a "run-away," and for those results to become effective parts of the Constitution, the following American political institutions have to fail their duties not once but repeatedly: both Houses of Congress, the Supreme Court, and the legislatures of three-fourths of the United States. The only group of political institutions which would not have to fail would be the Presidency and the governors of the various states, since these people are not part of the amendment or ratification processes.

The question of whether it is theoretically possible for all of these failures to occur must be answered yes. But the question of whether it is likely, or even remotely possible, has a different answer. It is a firm no.

New Framers and a New Philadelphia

If a new Convention is called, how many delegates will there be, how will they be elected, how will they vote?

In the 1787 Convention, each state was free to send as many delegates as they chose although most sent three. The delegate voted not as individuals, but as delegations, each state having one vote, and that vote being controlled by a majority of that state's delegates. Given the tremendous diversity in the populations of the states at present, and also given the more democratic cast of American politics in the 20th century, neither of these patterns would be likely to be followed in a new Convention.

The bill proposed by Senator Ervin many years ago, like the two now pending before the Congress, would provide for each state to have the same number of delegates to a Convention as it has members in the Electoral College. Also, those delegates would be elected from existing districts, matching those of the members of the Senate and the House of Representatives from each state. These proposed laws by Congress to govern a new Convention, are in line with analogous laws now on the books in most states, which suggest similar results.⁴⁹

All states now have provisions for electing their own state conventions to propose constitutional changes, and most have provisions in place for ratification conventions, if needed. The common denominator of these laws across the country is nonpartisan elections by district, usually with runoff elections if no candidate receives more than 50% in the first election. Because these patterns are well known, well established, and have been used hundreds of times with respect to state constitutional conventions, it is likely that they will be adopted for this purpose.⁵⁰

As for the number of delegates, the membership allotted to each state in the Electoral College would probably be used. This would include the District of Columbia, since it has been allotted Electoral College votes. Some adjustment for the residents of the territories—Guam, Virgin Islands, Puerto Rico, etc.-- would probably be made.

As for procedures, in the original Convention the states voted as states, through a majority of their delegations. The largest state was then Virginia, with one-sixth of the total population. The smallest was Rhode Island, with one-sixtieth. (Rhode Island, by the way, did not participate.) Given the more democratic cast of the United States today, and in the interests of allowing and promoting fair consensus, it is more likely that the result would be a two-thirds vote of the delegates, whether that rule is established by law from Congress, or by the Convention for itself.

The only reliance available concerning the quality of the delegates elected is the national experience in Philadelphia in 1787, and the experiences of all the states in conducting one or more conventions concerning their own constitutions. Historically, that experience has been excellent.⁵¹ The obvious importance of the issues being presented, has usually attracted excellent candidates. And because these are nonpartisan elections, organizations such as the Jaycees and the League of Women Voters, as well as more traditional political organizations, become active in trying to find and elect the most able delegates. Sometimes these organizations have even banded together to jointly endorse the best possible candidates.

In short, although this is a political process and contains no guarantees, the history of the process suggests that those elected will be at least as qualified as the leading political figures in each state, but that they will approach their task from a nonpartisan standpoint.

We Have Nothing to Fear But Fear Itself

What are the real risks, if any, to basic American freedoms such as religion, press, speech, and the others?

This is the point at which public discussions of the Constitution get notoriously sloppy. Those who oppose the merits of the present amendment under discussion, claim that a new Convention could destroy our basic rights, especially those fundamental freedoms found in the 1st Amendment. There is nothing new in the argument. It was made 85 years ago by those who wanted to prevent the Senate from being elected by the people directly. It was made 20 years ago by those who wanted to prevent the possibility of one of the two houses of each state legislature being apportioned on a basis other than strict population.

Many of the individuals and many of the groups who have been dragged into the debate over the conditional state calls for a new Convention, have become involved solely on this issue. But it is a false issue.

The proper question is not what might happen under the wildest stretch of the imagination, but instead, what are the genuine risks, based on an honest examination of our Constitutional history.

It is theoretically possible, for instance, that the American people could choose to set aside all of their basic freedoms, and could use the amendment process to establish in this nation either a monarchy, or a military dictatorship. Both are possible, but since neither has any legitimate chance of success, or any likelihood of attracting any significant support, no one bothers to debate either possibility. And yet, the present argument of the dangers to the 1st Amendment is based on the same assumption as those two extreme examples; namely, that Americans are willing and ready to abandon their basic freedoms.

Critics are fond of referring to polls in which the Bill of Rights is presented in modern language with no identification, and citizens are asked to state whether they agree or disagree. The results, frankly, are pretty discouraging to people like me, who

spend our careers trying to protect and advance 1st Amendment freedoms.

Sometimes Americans are illogical in their approach to this Amendment. They count on and claim their right to speak, write, and believe their own ideas, but they support laws and programs which would restrict the rights of others, usually minorities, to do the same things. Not enough Americans fully understand that the freedom of one is the freedom of all, and that the guarantees of the 1st Amendment are indivisible.

Give the devil his due. Assume that if the 1st Amendment was put to a majority vote of all Americans, it would not pass. That still does not answer the practical question about a new Convention. The reason is that we already have the 1st Amendment. It does not need to be passed. For harm to come, it would have to be repealed.

Because the Framers made amendment so difficult, there is a vast middle ground between the strength of opinion and support that are necessary to pass any amendment, and those which are sufficient to defend it once it is in the Constitution. The time that had to pass between the passage and repeal of Prohibition, demonstrates the change of opinion that had to take place. In modern times, we need look no further than the Equal Rights Amendment to demonstrate the point.

All of the reputable, national polls agreed that during the time that the ERA was out for ratification among the states, a majority of all Americans supported it. Those who opposed it were a minority, but a determined one. And, it did not pass. Why not?

The first reason is a matter of statistics and political reality. In theory, 51% would be sufficient to pass any amendment. If it enjoyed that level of support in every state, and in every district for state legislatures, then it would inevitably have to succeed. It would not only be ratified by three-fourths of the states, it would be ratified unanimously.

But Americans are not homogenized, like milk or peanut butter. Each state is not an exact duplicate of national opinions. Each district is not a duplicate of statewide opinions. There are, as the Framers wrote about and well understood two hundred years ago, differences of opinion based on region, sex, race, religion, interest group, and many other personal factors. A support level of 51% would not even guarantee that half of all states would ratify any amendment.

ERA demonstrates the truth about the amendment process. It takes a high level of support, sustained over a long time, to pass any amendment. Remember that in Presidential elections, a difference of 10% (meaning a margin of 55% to 45%), produces a landslide. It takes at least that kind of support, if not more, to gain ratification for any amendment. When the position is one of defending against a bad amendment, rather than supporting a good one, the side in that position can lose by a landslide in the polls but still succeed in stopping the amendment.

Those who say that it is realistically possible for portions of all of the 1st Amendment to be repealed, are necessarily saying that the 1st Amendment would have less supporters who would be less determined than were the opponents of the ERA. It takes a distrust of the American people, a fundamental distrust of democracy itself, to reach such a conclusion.

Furthermore, taking that position ignores the stance that is already being shown by most of the American media. They rise up in defense of the 1st Amendment, even when the publication of a speech that they are defending is one that they personally abhor. Although the press generally supported ERA, there were many exceptions in various parts of the country. If the subject is the maintenance of the 1st Amendment, the ranks of the press will be unbroken.

It is not just politics that makes strange bedfellows. The defense of any and all of our basic, Constitutional freedoms, does the same thing. Our basic freedoms may not have all of the friends and supporters that they should have, or could have. But they have more than enough to defend against any misguided attempts to reduce or repeal any of them.

What is often phrased as a defense of the Constitution by avoiding the risks of a new Convention, is in fact an attack on the Constitution, and on the principle of popular sovereignty on which it is based. This principle was first stated in documents of an government, as opposed to the musings of philosophers, in our Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,--That whenever any

Form of Government becomes destructive of these ends, it is the right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The Article V Little Shop of Horrors

What are the precise evils and dangers that the opponents of Article V claim?

Those who attack the present conditional calls for a new Convention, exactly like those who attacked the conditional call used twice before in our history, have many routes to the conclusions. But, they agree on the final result. They fear, they claim to fear, the erosion of basic American freedoms as result of such a Convention. Here are their points, one at a time.

Charge: The second method in Article V has never been used.

Fact: The second method in Article V has been used twice in our history. It was successful in 1912 with respect to the 17th Amendment, and was used then exactly as the Framers anticipated. It was used in the 1960s in the same manner and for the same reasons, though unsuccessfully, with respect to the Dirks Amendment.

Charge: If 34 states act, a new Convention must be held.

Fact: The calls are conditional, exactly as they were the last two times this method was used. Although the Constitution allows the states to force the calling of a new, general Convention, it does not compel the states to use this entire power once. As a matter of Constitutional theory, Constitutional history, and plain common sense, the states do have the right to give Congress one last chance to act, before their calls become effective. The trigger for a new Convention, if that point should ever in our history be reached, will not be the actions by the states, it will be the inaction by Congress.

Charge: Congress will not act, and the state calls will then become effective, causing a new Convention.

Fact: This assertion ignores the Swamp Water Theorem which applies if Congress is faced with only two choices, pass the amendment that is sought and writing its language for itself or refusing to act and allowing a new Convention to write it for them. Both history and practical politics tell us that under the circumstances, Congress will act.

Charge: If a new Convention is called, it cannot be limited in subject matter.

Fact: This assertion ignores the fact that all of the states have placed in their conditional calls statements to the effect that a new Convention should be for the "sole and express" purpose of the Balanced Budget Amendment (just as in prior generations they have been restricted to the subjects of the 17th Amendment, or the Dirksen Amendment). This charge also ignores the fact that 17 of the states have made their calls "null and void" in the event that a new Convention seeks to stray into other areas than the one designated.⁵²

On this particular point, the critics contradict themselves badly. There are presently in the hands of the Secretary of State of the United States more than 34 state calls for a new Convention. They deal, however, with a variety of subjects, and there are no more than 32 of them on any one subject.⁵³ If the critics were right, that limitation sought by the states is irrelevant and ineffective, then a new Convention would be mandatory as of this moment. Not a single member of either the House or the Senate has suggested that this is so. And since the Constitution leaves the counting of the state calls to the Congress, this charge by the critics necessarily assumes that at least one-half of each House will, in a fit of temporary insanity, count all of the state calls together, regardless of subject matter.

Charge: Regardless of limitations imposed on a new Convention by the Joint Resolution of Congress which calls the Convention, the delegates could break loose into other areas.

Fact: This charge ignores the history of the 1787 Convention in which all states except Rhode Island (which did not participate), and the Congress itself approved what the Convention did, prior to the beginning of the ratification process. It ignores the history of hundreds of state constitutional conventions. It ignores the fact that delegates to any such Convention will be seeking to accomplish results, not to engage in meaningless gestures. The making of proposals which are doomed to failure, either by a Congressional refusal to submit them for ratification, or by rejection at the hands of the states, would only earn for such delegates disrespect, and decrease the chances of success of any of their legitimate proposals.

Lastly, and perhaps most importantly, this charge ignores the fact that in 1787 we had no Supreme Court, much less a tradition that that Court would stand as the guardian of the Constitution itself. This charge assumes not only that the

Convention would ignore the Constitution and the laws, but that the Supreme Court would also ignore the Constitution and the laws.

Charge: A "run-away" Convention could destroy the basic freedoms of Americans.

Fact: Even assuming that all prerequisite failures occur, in the Convention, in Congress, and in the Supreme Court, this charge is still invalid because of the nature of the ratification process. Any amendment, whether its source is the Congress or Convention, is nothing more than a proposal, with no legal force or effect, until and unless it is ratified by 38 states, either by the legislatures, or if Congress shall so choose, by special convention within each state for that purpose. Unless the people of 38 states, through their representatives, are willing and ready to abandon basic American freedoms, no proposal either by Congress or a Convention, poses any real threat to those freedoms.

Charge: The Convention process, the second half of Article V, is too dangerous to use. This argument gets to the nub of the Constitutional debate. When critics go this far, as Melvin Laird did in a recent article in the *Washington Post*, they are saying that the Framers should never have given us a second method of amendment, one which allows us to overrule the judgments of Congress.⁵⁴ They are saying that Washington always knows what is best for the people, better than the people do for themselves.

Fact: The Laird article, which is being widely circulated around the country by those who oppose the present generation's use of the second half of Article V, abuses our Constitutional history and distorts the words of our Framers.

It begins with this quotation from James Madison, ". . . The prospect of a second [constitutional] convention would be viewed by all of Europe as a dark and threatening Cloud hanging over the Constitution." Madison restated and expanded on the same point in *The Federalist*, No. 38. Either through carelessness, or intent to deceive, the author of this article, and all those who circulate and refer to it, are ignoring the question which Madison was then addressing.

He is answering critics of the 1787 Convention. Some of them were saying that the whole Constitution should be rejected and another Convention be convened immediately. They were proposing the well-known political ploy of postponing a decision by studying the question to death.

Although his words are taken out of context to give the impression that Madison opposed the idea of ever holding a no-

Convention, he was not so opposed. He stood firmly with his mentor, Thomas Jefferson, in holding that a new Convention should be an option available to the people, if they chose through the states to demand one. By taking Madison's words out of context, his views are seemingly turned into the opposite of what they really were.

The critics in 1984 are resurrecting and reusing the same arguments that were pressed in 1912, in the attempt to stop the state calls which ultimately produced the 17th Amendment. While they claim now, as they did then, that they are defending the Constitutional rights of the people, that is not their real message. The heart of their position, the one which they dare not express in public, is that the people are not to be trusted with the final say on the form of their government, and the use, abuse, and limitation on its various powers. They are attacking the basic principle stated in our Declaration of Independence, and the central premise of our Constitution.

They are saying that the people acting through their state legislatures, should not possess the right of peaceable change. They are attacking the very right on which the long-term survival of our Constitution depends. While claiming to defend our freedoms, they are attacking the process by which we got them, and without which we cannot keep them.

Those who claim Constitutional grounds for opposing conditional state calls, whether on this subject or any other in the future, are not defending our Constitution. They are only defending the status quo in Washington, against the logical and legitimate use of that Constitution.

In Our System of Government, Where Does the Buck Stop?

What is the relationship between Article V, especially the second half, and the central premise of American government, which is popular sovereignty?

The fundamental political question in the United States is, where does the buck stop? It is, who holds the ultimate power under the Constitution? The answer to this question would seem obvious. All high school students (and most elementary students) know it. Our government is based on popular sovereignty. All governments—federal, state, and local—possess only those powers which the people have given them, through the various constitutions and charters.

This concept was first stated in the basic documents of any nation, in our Declaration of Independence in which we say that the "just powers [of the government] are derived from the consent of the governed." This concept was repeated in many forms by many of the Framers. It is also stated in George Washington's Farewell Address, in which he cautioned us on many points concerning the protection and maintenance of our new Union and our new Constitution. He said this:

"The basis of our political systems is the right of the people to make and alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all."⁵⁵

The same concept is stated in the Constitution, which begins with these words, written in very large capital letters, "WE THE PEOPLE . . ." Why belabor such an obvious point? The reason is that many commentators, including some lawyers and legislators, have apparently neglected their homework.

Those who ask whether the people can be trusted with Constitutional questions, are turning the fundamental issue of

American government upside down. Ever since 4 July 1776, the proper question is, can the people trust the government, not can the government trust the people?

Both halves of Article V are concerned with our fundamental right to form and define governments of our choosing. And both halves of Article V are derivative; either the members of Congress, or the members of state legislatures, may begin the amendment process. But it should not be forgotten that both groups are acting as representatives of the people. (There is a move afoot among some groups to amend the Constitution of the United States to add the processes of initiative and referendum. But until and unless such a further amendment is made, the only ways in which popular sovereignty can be expressed on the subject of Constitutional amendment, is either through Congress or through the state legislatures.)

In considering the amendment process, it is important to remember that the Framers did not believe that either route was more important than the other, nor did they believe that either Congress, or the state legislatures taken as a group, were superior to the other in this regard. In fact, according to their writings, they assumed that the two methods of initiating amendments would be used about equally.

The Framers did express in *The Federalist* their belief that the state governments were closer to, and more amendable to, the will of the people, than was the federal government. This belief may have even more validity today, since Congressmen now represent districts of 520,000, rather than the 30,000 as originally established, and also recognizing the fact that many of our state governments are larger than the entire nation was, with its population of 3.5 million souls in 1776.

Those who say that the second method of amendment in Article V is too dangerous to use, are reversing the answer to the most basic question, who possesses the ultimate power? They are saying that the people cannot be trusted with sovereignty, that if Congress disagrees with the people, Congress wins and the people lose.

The heart of the errors of those who urge us to treat the second method of Article V as a dead letter, is that they agree with King George III, rather than with George Washington. Although their arguments are laced with references to the "good of the people," and "security of our way of life," they boil down to two simple ideas—democracy is too dangerous, and the nation's leaders should not trust its people.

With our experience of 207 years as a free people, and 19 years under our Constitution, we should recognize such argument for what they are, and reject them as untenable.

TABLE I

History of All Amendments Submitted for Ratification, But Not Ratified

House and Senate Salaries Amendment ¹	would have prohibited any raises voted by the Congress from becoming effective until the next Congress convened
Apportionment Amendment ¹	would have stopped the growth of the House of Representatives at 100 members
Labor Law Amendment	would have prohibited any jurisdiction in the Congress over the terms and conditions of workmen, leaving that to state legislation
Child Labor Law Amendment	would have allowed Congress to act with respect to the hours, wages and conditions of child laborers, only
Titles of Nobility Amendment	would have withdrawn U.S. citizenship from any citizen who accepted any title of nobility
Equal Rights Amendment	would have stated that equality under the law shall not be denied on account of sex
District of Columbia Voting Rights Amendment ²	would give voting representation in the Congress, to the District of Columbia

¹These two amendments were part of the Bill of Rights when it was adopted by the Congress. They failed to be ratified.

²This amendment is still out for ratification. From its track record to date, however, it seems likely to fail.

TABLE II

Constitutional Amendments Proposed in Congress, But Not Passed

NOTE: The information below on the more than 2,000 proposals which have been made in Congress for Constitutional amendments between 1789 and 1926 is drawn from these three sources: Ames, Herman V., The Proposed Amendments to the Constitution during the First Century of its History (1897); Senate Document 93, 69th Congress, First Session (1926); and Ames, Herman V., "The Amending Provision of the Federal Constitution in Practice," 63 American Philosophical Society Proceedings 62, (1924). No researcher has brought this material up to date, but the variety of proposals made between 1789 and 1926, and the relative difficulty of getting any of them adopted by Congress, are fairly representative of both points through 1984.

Number of Constitutional Proposals in the First Century

More than 1,300 (this many are known; some records not kept)

Number of Individual Constitutional Amendments Proposed in the First Century

More than 1,900 (this many are known; some records not kept)

Number of Proposed Amendments Which Passed One House but not the Other, Between 1789 and 1926

16 passed the House, but not the Senate
16 passed the Senate, but not the House

Subjects Covered by One-House Amendment Proposals

- Apportionment of House
- Computation of Number of House Members
- Freedom of Religion and Conscience
- Freedom of Speech and Press
- Right to Keep and Bear Arms
- Criminal Trial Provisions and Property Right Guarantees

TABLE II—continued

Trial by Jury
 Protection of Individual Rights from Infringement by States
 Redistribution of Powers among Three Branches of Government
 Reservation of Non-Delegated Powers
 Prohibition of Second Criminal Trial for Same Offense
 Freedom of Religion, Speech and Press
 District Election of Members of Electoral College
 Designation of Presidential Candidate by Presidential Electors
 Maximum of Two Terms for President and Vice President
 (NOTE: like many of these proposals, this ultimately was adopted in one of the existing Amendments. This particular proposal was first made in 1825.)
 Prohibition of Payment of Debts of Confederate States of America
 Congressional Control of Election of Presidential Electors
 Prohibition of Appropriations for Any Religious Body or Sect
 Payment of War Claims to Disloyal Citizens
 Women's Suffrage
 New Date for Inauguration Day

(NOTE: Several of these proposals came up more than once, and some passed both Houses in different forms, but were not adopted as proposed Amendments until a third form was developed.)

Amendment Proposals in Congress in 1884

Prohibition of Grants or Loans to Private Corporations
 Limitation of Time to Make Financial Claims
 Power of Congress to Write Laws on Marriage and Divorce
 Change in Veto Power
 Line Item Veto in Appropriations Bills
 Joint Resolutions to be Submitted to President
 Additional Protection for Civil Rights
 Exemption of Farm Products from Congressional Control
 Override Presidential Veto by Majority, Not Two-Thirds
 Senators to be Popularly Elected
 Election of Certain Officers of Government

TABLE II—continued

Creation of Two Additional Vice Presidents, Definition of Duties
 Export Tax on Cotton
 Popular Election of the President
 State Taxation of Corporations
 Narrow Definition of "Legal Tender"
 Limitation of the National Debt
 Requiring Gold or Silver as Basis for Money
 Six-Year, Single-Term Presidency
 Creation of a Commission to Call for a Constitutional Convention
 House also to Ratify Treaties
 Six-Year, Single-Term Presidency with Pension for Life
 Congressional Consent for Reciprocal Treaties on Revenue

Amendment Proposals in Congress in 1924

Apportionment of Congress after Each Census
 Uniform Federal Laws on Marriage and Divorce
 Regulation of Employment of Those under 16
 Extension of Definition of Treason
 Ratification of Constitutional Amendments by Referendum
 Approval of Declaration of War by Referendum
 Allowing Income Taxes on State Bonds
 Regulation of Employment of Women, and Those under 18
 No Use of Public Money for Religious Institutions
 Change in Inauguration Day, and Electoral College Date
 Making Fraud in Military Procurement an Act of Treason
 Six-Year, One-Term Presidency with Popular Election
 (NOTE: the single most popular subject for proposals for amendment in the history of the United States is alteration or abolition of the Electoral College. There has been, almost from the beginning, a consensus that change was necessary. But, there has never been a consensus on what the change should be.)
 Eight Years for Ratification of Amendments, and only by Either Conventions or by Referenda
 Three-Fourths Vote of both Houses to Declare War
 In Event of War, Congress May Conscript Wealth as well as Manpower
 Four Year Terms for House

TABLE II—continued

(NOTE: In both of the years which were chosen as representative, there were more proposals than those listed. Subjects which were identical were not repeated. Anyone interested in the entire span of proposed amendments during the first century and a third, will find them in a table at the end of Mr. Ames' book, and in Senate Document 93, both cited above.)

TABLE III

Amendments Proposed by Ten or More State Calls

<u>Subject</u>	<u>No. of Calls</u> ¹	<u>No. of States</u> ¹
Direct Election of Senators	75	31
Antipolygamy	30	27
Limitation of Taxation by Repeal of the 16th Amendment	42	34 ²
Revision of Article V	19	14
Apportionment of State Legislatures	54	36 ²
Redistribution of Presidential Electors	11	11
Revenue Sharing	21	18
Balanced Budget Amendment	35	32

¹The total calls are usually more than the total states, due to some states passing multiple calls in successive years.

²Some states repealed their calls, before other states adopted theirs. The minimum required was not in effect at any one time.

FOOTNOTES

¹Dr. Albert Blaustein, *Independence Documents of the World*, 1977.

²During the discussion of Article V, which extended between 29 May and 19 June, Charles Pinckney said this to the Constitutional Convention, "It is to this unanimous consent, the depressed situation of the Union is undoubtedly owing." Max Farrand, *The Records of the Federal Convention of 1787*, 1966 Edition, Vol. 3, p. 120.

³*The Federalist*, No. 10.

⁴Eric Eriksson, *American Constitutional History*, 1933, pp. 214-238, especially pp. 234-236, concerning the critical states of New York and Virginia, in which ratification nearly failed.

⁵*The Federalist*, No. 43.

⁶"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." *The Federalist*, No. 85.

⁷*The Federalist*, No. 85.

⁸Letter from Thomas Jefferson to James Madison, 20 December 1787.

⁹A detailed history of the passage of each of these revenue acts, and the responses of the American colonists to each, is found in R. C. Simmons, *The American Colonies*, W. W. Norton & Co., New York, 1981, at pp. 296ff.

¹⁰*Ibid.*

¹¹*Ibid.*

¹²*Ibid.*

¹³The revenues produced from the various English colonial taxes are taken from *Historical Statistics of the United States*, Department of Commerce, 1976, Part 2, Table Z-611-615, "Tax Collections in America under Different Revenue Laws: 1765 to 1774."

¹⁴*Ibid.*

¹⁵*Ibid.*

¹⁶Charles Andrews, *The Colonial Period of American History* Yale University Press, New Haven, 1938, gives a complete history of the English effort to impose revenue measures, and to set up an effective customs service to limit the rampant smuggling. See pp. 85-220.

¹⁷*Ibid.*, at 215.

¹⁸This assertion comes from the author's review of all 32 state calls, passed to date.

¹⁹Archives, Secretary of State's office, Washington, D.C.

²⁰The history of this meeting is given in *The Constitution of the United States, Analysis and Interpretation*, Congressional Research Service, Library of Congress, 1973, "Historical Note," p. xxxvii.

²¹"Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Congress, 1st Session, pp. 41-43, 1927.

²²The skittishness of Rhode Island, and its reactions to the pressures placed on it, are reflected in its lengthy ratification document. See, *Elliot's Debates*, Book I, Vol. 1, pp. 334-337.

²³*The Federalist*, No. 40.

²⁴Max Farrand, *Records of the Federal Convention*, Vol. 2, pp. 665-666.

²⁵The standard of possibility of use first appears concerning political freedoms, in *Williams v. Rhodes*, 393 US 23 (1968), and is reaffirmed in numerous cases, most recently, *Anderson v. Celebrezze*, ___ US ___, 103, S. Ct. 1564 (1983).

²⁶*Amendment of the Constitution by the Convention Method under Article V*, Special Constitutional Convention Study Committee, American Bar Association, Chicago, 1974. [This is cited hereafter as the "ABA Report."] The nine members of the Special Committee, who are listed on pp. ii-iii of the Report, included two United States District Judges, a Judge of the D.C. Superior Court, 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 experienced in the subject. This group unanimously supported all of the conclusions, with the sole exception that one member did not believe that the "one man-one vote" rule should apply to the election of delegates to a new Convention.

²⁷The full text of the House of Delegates Resolution, which put the American Bar Association itself on record in support of these points, is found in the ABA Report at pp. vii-viii.

²⁸ABA Report, p. 2.

²⁹*Ibid.*, pp. 11-17.

³⁰*Ibid.*, pp. 60-61, gives a table of all 356 state calls for a Convention which had been made to date.

³¹*Ibid.*, pp. 17-19.

³²*Ibid.*, pp. 20-25, especially the discussion of *Powell v. McCormack*, 395 US 486 (1969) which appears at pp. 22-24.

³³*Ibid.*, pp. 34-36.

³⁴See H.R. 3373 and S. 119.

³⁵*The Article V Convention Process: A Symposium*, Da Capo Press, New York, 1971, Everett McKinley Dirksen, "The Supreme Court and the People," at p. 26.

³⁶*Ibid.*, at page 31.

³⁷*The Article V Convention Process: A Symposium*; Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," respectively on the two points, at pp. 43-44 and at 46-48. Note this statement on the latter page, "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."

³⁸Gerald Gunther, "Constitutional Brinkmanship: Stumbling Toward a Convention," *American Bar Association Journal*, Vol. 65, p. 1046, July 1979, hereafter cited as "Gunther."

³⁹Gunther, p. 1047.

⁴⁰*Ibid.*, p. 1048.

⁴¹*Ibid.*

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴*Ibid.*, p. 1049.

⁴⁵*The Article V Convention Process: A Symposium*, Da Capo Press, New York, 1971; Ralph M. Carson, "Disadvantages of a Federal Constitutional Convention," at pp. 85-94.

⁴⁶*The Article V Convention Process: A Symposium*; "Article V: The Comatose Article of Our Living Constitution?", Robert G. Dixon, Jr., p. 95, at p. 111.

⁴⁷See H.R. 3373, and S. 119.

⁴⁸See footnote 22 above.

⁴⁹A. L. Sturm, *Methods of State Constitutional Reform*, 1954.

⁵⁰Cf., 15 Delaware Code Annotated Section 7706.

⁵¹ABA Report, pp. 14-16.

⁵²The quotations come from the author's review of all 32 state calls passed to date.

⁵³"There are nearly forty states which currently have pending before Congress valid Constitutional Convention applications. Why isn't Congress presently required to establish such a Convention? For the simple reason that there are not two-thirds calling for the same kind of Convention. . . . In other words, there has not already been a Convention because it is understood that the Constitution requires consensus—before a Convention can be called more is required that 34 states apply for a Convention; rather, there must be 34 states calling for a Convention on the same subject-matter." [Emphasis in the original.] Stephen J. Markman, Chief Counsel, U.S. Senate Subcommittee on the Constitution, before the Michigan State Senate Committee on Administration and Rules, 29 March 1984.

⁵⁴Melvin Laird, "James Madison Wouldn't Approve," Op-Ed page, *Washington Post*, Monday, 13 February 1984.

⁵⁵George Washington, "Farewell Address, *American Jurisprudence Desk Book*."

Note: The American Bar Association Report, *Amendment of the Constitution by the Convention Method Under Article V*, contains, at pp. 41-46, extensive footnotes on their conclusions. It also contains, at pp. 79-80, an exhaustive bibliography on the subject. Anyone wishing to explore this subject in depth should begin with this source.

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Report of the Committee on the Judiciary, United States Senate, on S. J. Res. 58, 10 July 1981.

Cases

Although the subject of this monograph is Constitutional law at the most basic level, and although the author is a Constitutional lawyer, it is by design that no cases have been cited. First, there have never been any cases squarely on the Article V Convention process. Second, this monograph is intended for a lay audience. Third, for those with a taste for cases, those that apply by analogy are discussed at length in the ABA Report, and in *The Article V Convention Process: A Symposium*, among other sources cited above.

PREFACE

The color of the cover of this monograph is no coincidence. Appropriately, it is grey, symbolizing the great grey area that surrounds a Constitutional Convention. For there is little precedent; there is no law; and there are but few guidelines to follow in the call or organization or conduct of a Constitutional Convention. There are even fewer guidelines with respect to the parameters of the convention, when convened. The only Constitutional Convention ever held was in the year 1787 at which time the Constitution of the United States was written. The rules of its conduct are little known and would not necessarily apply to any convention called subsequent to the ratification of the Constitution. The scope and latitude of the next convention is pure conjecture.

With only two more States needed to petition Congress to call a Convention under Article V of the Constitution, and with Congress apparently unable or unwilling to discipline itself to a balanced budget, it is not unrealistic to anticipate the petition of two more States in the near future. Thus the publication of this study is propitious.

This monograph is intended to serve as a source book for those who would be involved in the convention. It examines the petitions passed by the states; the powers of Congress under Article V regarding its obligation to call a convention; the selection of delegates by the States; the proceedings to be used at the convention; and the ratification by the States of any amendments adopted by the convention.

This monograph presents, for the first time, an analysis of the petitions of each of the thirty-two States. Although the petitions are divergent, it is unthinkable that Congress would shirk its responsibility to call a convention because of such divergence... particularly when Congress has failed on more than one occasion to pass legislation designed to establish standards for such petitions.

This is another of the Judicial Series of monographs published by the National Legal Center as a contribution towards a better understanding of our government, its processes, and the issues it deliberates. It is hoped that the research of these authors will prove of genuine value in the organization and conduct of what would be the most significant convention of our time in American history.

Ernest B. Hueter
President

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THE CONSTITUTIONAL CONVENTION

HOW IS IT FORMED?

HOW IS IT RUN?

WHAT ARE THE GUIDELINES?

WHAT HAPPENS NOW?

by

Dean James E. Bond
Professor David E. Engdahl
Henry N. Butler, J.D., Ph.D.

Introduction

by

Professor James M. Buchanan

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The National Legal Center. . . Its Purpose
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INTRODUCTION

RETURN TO CONSTITUTIONAL BUDGETARY REFORM

by

PROFESSOR JAMES M. BUCHANAN

In its passage of the Gramm-Rudman-Hollings legislation in 1985, Congress acknowledged that established budgetary procedures were failing and that effective reform must modify the constraints within which spending decisions are made. Ordinary politics, in the form of legislative, and executive, response to the spending pressures of rapidly multiplying concentrated interests, cannot but generate continuing and accelerating deficits. The factual record over the 1960s, 1970s, and 1980s is available for all to see. Gramm-Rudman-Hollings sought to impose specific constraints on the proclivity of ordinary politics to generate budget deficits, and to enforce these targets by mandatory spending limits. The enforcement mechanism was severely weakened by the courts in 1986, and Congress was left, in 1987, with little more than promises to itself to keep spending within bounds. Despite the rhetoric, and despite some constraining influence, the Gramm-Rudman-Hollings experiment must be deemed to have failed in its task.

There were important spillover or external damages wrought by the focus of attention on the Gramm-Rudman-Hollings legislation. The shift of attention to the efforts of Congress, through *legislative* action, to reform its budgetary procedures, drew attention away from the more fundamental, and more promising, avenue or reform, that of *constitutional* amendment. The momentum for a constitutional amendment to require Congress to balance the budget, a momentum represented in the resolutions of the several States, was dampened in 1985, after having been strong in 1983 and 1984.

In 1988, it is appropriate that the focus of attention be shifted back to *constitutional* change. Gramm-Rudman-Hollings failed, finally, because it was legislative, because it was a futile exercise in attempted self-control by the Congress. External rather than internal constraints on the spending proclivities of ordinary politics are required, and such external constraints can only be secured through constitutional mandate.

I do not advance any claim that constitutional constraints necessarily and automatically resolve the central issues. Pressures upon legislators to spend beyond any constitutionally mandated limits will not vanish upon approval of a balanced budget amendment, and problems of enforcement of any

constitutional provision may be severe. I should argue, nonetheless, that these enforcement compliance problems become categorically different when the shift is made from legislatively imposed internal constraints to constitutionally imposed external constraints.

We cannot expect the Congress to initiate constitutional reform on its own. It is simply contrary to the interests of those who hold the now-unlimited decision power over spending to ask that external checks be put on this power. Constitutional constraints will only be imposed, if at all, by the citizenry, acting through the agencies of the separate States. The Founding Fathers wisely gave us a means for securing constitutional amendment independently of legislative initiative. The call for a convention embodied in the States' resolutions will, when sufficient States act, result either in a convention or in congressional response action designed to forestall any need for a convention. In either way, citizens must benefit.

For three decades, in many papers and books, I have sought to defend and to restore the classical principles of public debt and deficits as against the dominant Keynesian argument of mid-century; an argument that provided the initial intellectual impetus for the deficit regimes of recent decades. I shall not repeat my earlier analyses here, since there now is widespread recognition that the consequences of long-continued deficit financing are precisely those feared by those who first developed the classical principles.

The observed regime of budgetary deficits cannot be sustained. On this there is general agreement. The only issue concerns the path through which the regime will be changed. Must we wait until ordinary politics produces generalized default via inflation and/or repudiation? Those of us who concentrate on reform in the rules offer the hope that there remains yet time to shore up the decision-structure.

THE DUTIES AND POWERS OF CONGRESS REGARDING CONVENTIONS FOR PROPOSING AMENDMENTS

by

DEAN JAMES E. BOND

and

PROFESSOR DAVID E. ENGDALH

Although the convention method for proposing amendments to the United States Constitution has never been used, a sizeable body of literature about it has been generated by political scientists and lawyers. Much of that literature is shaded, however, either by enthusiasm for particular amendment ideas, or by fear that this untried process might produce results a particular writer opposes. Relatively little has been written by persons with no "ax to grind." Moreover, several important considerations seem still to have been almost, if not entirely, overlooked.

The language of Article V of the Constitution provides:

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 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 first questions raised by this language is whether, when the requisite number of State "applications" are made, Congress may disregard them or is obliged to "call" a convention. The answer to this question is important both for its own sake and because its rationale shapes the answers to several of the other questions that arise.

Three points are persuasive that Congress is obliged to call a convention if two-thirds of the States apply for one. First, the language of Article V on its face suggests that Congress must call a convention. Second, the original understanding of Article V supports this conclusion. Third, sound public policy urges that Congress must call a convention if two-thirds of the States request it.

Let us begin by examining the pertinent language of Article V quoted above. The plain and ordinary meaning of the word "shall" is that Congress *must* rather than *may* call a convention. It leaves no room for any discretion by Congress to ignore the applications of two-thirds of the States. As Hamilton pointed out in The Federalist No. 85:

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 peremptory. The congress "shall call a convention." Nothing in this particular is left to the discretion of that body.

(Emphasis by Hamilton.) The use of the word "shall" elsewhere in the Constitution also demonstrates that the Framers understood its obligatory meaning.

Moreover, the original understanding confirms that Congress must call a convention if two-thirds of the States request it. The debate in the Constitutional Convention demonstrates that the delegates were determined to guarantee the States power to amend the Constitution despite an indifferent or even hostile Congress. Realizing that Congress could frustrate amendments if the amending power were lodged exclusively in the national government, they insisted that the States have power to initiate amendments.

Indeed, the initial suggestion was that only the States should be competent to propose amendments. The amendment process was first discussed pursuant to Resolution 13 of the Virginia plan, which 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.¹

Subsequently the Committee of Detail, reflecting the wishes of the delegates, reported the following as Article XIX of its August 6 draft:

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

Only after Hamilton had protested the lack of any means for Congress to propose amendments by itself did the Convention reconsider. The delegates then agreed to Madison's proposal, seconded by Hamilton, that the national legislature "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 . . ."³ This left the States a means of initiating the process, but put the amendment proposing process itself entirely in Congress' hands. This proposal was incorporated in article XIX of the text referred to the Committee of Style,⁴ which became Article V of that Committee's report.⁵

This, however, did not satisfy Colonel Mason, who had steadfastly

¹ M. Farrand, *Records of The Federal Convention of 1787* (hereinafter "Farrand") 121 (rev. ed. 1937).

² *Id.* at 188, also published in *The Documentary History of the Ratification of the Constitution* (hereinafter "*Doc. Hist.*") 269 (M. Jensen ed. 1976).

³ Farrand at 559.

⁴ Farrand at 578, also *Doc. Hist.* at 283.

⁵ Farrand at 602, also *Doc. Hist.* at 295.

insisted that the States be able to propose amendments free from congressional control. He worried that otherwise "no amendments of the proper kind would ever be obtained by the people, if the [national] Government should become oppressive, as he verily believed would be the case."⁶ Thereupon Article V was amended, according to Madison's notes, "so as to require a Convention on application of 2/3 of the Sts."⁷

The convention possibility seems clearly to have been restored to satisfy the concern expressed by Colonel Mason. However inartfully drawn to accomplish that result, its evident purpose reinforces the conclusion that the delegates wanted to ensure that the States would enjoy an independent power to propose amendments.

Persons who had participated in the debate shaping Article V repeated that understanding of its significance during the ratification debates. In *The Federalist* No. 43, for example, James Madison argued that 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 States could not be said to be on an "equal" footing with the Congress if it could police their initiation of amendments, since the States clearly can exercise no such restraint on the Congress. Hamilton expressed the same understanding. In *The Federalist* No. 85, in addition to the statement quoted earlier, he said: "[W]henever nine⁸ or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place." If Congress could in any way restrain the States in their effort to amend the Constitution, their effort, however united, could hardly be assured of success.

Finally, sound public policy supports the conclusion that Congress must call a convention when enough States apply. The Constitution contemplates a federal system in which the States retain all governing power not delegated to the national government. Those who established this system realized that the States and the national government would each sometimes dispute the scope of the other's power. They were especially sensitive to the danger that the national government might invade the retained powers of the States. Consequently, they wanted to give the States some power by which they could check that invasion. The last century and a half of American history has justified the Framers' concerns, and the need for such a check is as great now as it was when the Constitution was adopted.

Moreover, the availability of an independent mode of amending the Constitution makes Congress more responsive to the will of the people than it might otherwise be. While the State-initiated convention mode of

⁶ Farrand at 629.

⁷ *Id.*

⁸ It may rather be said 11 N, for though two thirds may set on foot the measure, three fourths must ratify." (Footnote by Hamilton.)

amendment has never been used, the accumulation of applications in numbers not quite sufficient to force the issue sometimes has prompted Congress to propose amendments itself rather than face the prospect of an independent convention addressing the issue. This leverage to induce congressional action would be absent if Congress were free to ignore State applications for a convention.

It thus seems quite certain that Congress is obliged to call a convention when the requisite number of States apply, so that its function in doing so is purely ministerial. Even with respect to ministerial acts, however, a number of questions have to be decided. The 1787 Convention realized that it was leaving many questions unanswered. Madison himself mused: "How was a Convention to be formed? by what rule decide? what was the force of its acts?" . . . [D]ifficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."¹⁰

The questions occurring to Madison, however, interesting as they are, are secondary to questions about how Congress should determine whether the requisite number of States have applied for a convention. Must the applications propose a specific amendment, cast in the same language, or may they just ask for a convention on the same subject? May the States apply for a general convention, or must they request a convention only to consider a specific subject? May the Congress specify a time period within which the requisite number of applications must be made, or must Congress call a convention whenever the requisite number of applications have been made, however long the earliest of them has been pending? May Congress ignore a State's rescission of its application for a convention, or must it drop a rescinding State from the count of requisite States? Congress cannot avoid answering such questions if it is to perform its ministerial duty.

The test for determining the validity of Congress' answers to such questions should be whether they ensure that a convention will be called if the applications of two-thirds of the States constitute a contemporaneous consensus that a convention should be held to consider a matter or matters of concern. That is the only criterion which reconciles the right of the States to demand a convention and Congress' duty to call it.

The "contemporaneity" requisite to Congress' call obligation is not explicit in the text of Article V, but it seems implicit even without any certainty as to how much time should be permitted to elapse. The notion that the Congress is obliged to call a convention, simply because two-thirds of the States have — over some extended period of time — requested one, makes little sense. While it may be true that the States would probably not ratify the product of any such convention, it seems useless to call one under

¹⁰ Farrand at 558.

¹¹ *Id.* at 570.

such circumstances. Amendment is after all extremely unlikely in the absence of a contemporaneous belief that amendment is necessary.

The "consensus" requisite seems necessary upon a few moments' reflection. Surely there should be no obligation to call a convention, for example, if just twenty states seek one on a particular topic and just fourteen seek one on another. That clearly would indicate only that minorities are concerned about different points, neither of which concerns a majority.

A more difficult situation is presented when applications differ in lesser degrees, as for example, if ten States request a convention "on fiscal problems," ten "to propose a balanced budget amendment," ten "to limit federal spending," and four to consider specific budget amendment language — the language proposed by each of the four differing slightly. There must be some latitude for judgment whether the thirty-four States are sufficiently in agreement to invoke the congressional call obligation; but at the same time, to permit Congress to decline to call because the applications do not exactly conform would conflict with the principle that Congress has no discretion to refuse when it is evident that two-thirds of the States share substantially the same concern.

Fortunately, it is permissible for Congress to establish rules in advance on such matters, to help everyone in planning and Congress itself in deciding such questions if they arise. Congress can do so by virtue of the "necessary and proper" clause, which gives it power to make laws for carrying all the other federal powers into execution. Eliminating uncertainty on such matters as the similarity and specificity Congress will require in applications, the effect it will give to rescissions, and the time bounds of "contemporaneity" in Congress' view, reasonably should help in fulfilling Congress obligation under Article V. But the "necessary and proper" clause is a one-way ratchet; it only authorizes laws that help effectuate federal duties and powers, not laws that hinder.¹¹ In other words, statutory provisions apt to frustrate or preclude the calling of a convention, even though two-thirds of the States had contemporaneously requested it, would be invalid.

The two recent legislative attempts to lay out congressional guidelines for processing state requests for an Article V convention are generally consistent with this requirement that they facilitate rather than frustrate the actual calling of a convention when required.¹² (This is not to prejudice whether, in some respects other than regarding the call, these bills might be defective for reasons to be discussed later herein.)

Both would establish reasonable periods within which calls would be aggregated and considered "contemporary."¹³ While any specific period is

¹² See generally D. Engdahl, *Constitutional Federalism in a Nutshell*, ch. 3 (1987).

¹³ See generally "Article V and the Proposed Federal Constitutional Convention Procedures Bills" (N.Y.S.B.A. Comm'ee Rpt.), 3 *Cardozo L. Rev.* 529 (1982).

¹⁴ While the process of proposal and the process of ratification differ materially, so that

necessarily somewhat arbitrary, two years or less seems unduly brief, particularly in view of the fact that some legislatures meet only biennially. On the other hand, a time period that extended beyond ten years might reasonably be considered unduly long. One danger of a longer period is that the impetus for a particular kind of amendment will fragment over time, resulting in diversely phrased applications and thereby complicating the congressional decision whether the number of applications sufficient to require a convention have been received.

Both bills would permit a state to rescind its application. This provision is wholly consistent with the state autonomy implicit in the Article V convention mode. Moreover, it seems dictated by the contemporaneity requirement that at some point within a reasonable time span two-thirds of the States agree that they want a convention. However, there is a curious recent Supreme Court decision in a different context,¹⁴ which unjustifiably casts some doubt on unapproved revocation of State consent and makes statutory affirmation of the right desirable.

Both proposals also recognize that the States may apply for either a general or a limited convention. Again, this provision respects State autonomy in the initiation of the amendment process. It also is consistent with the principle that the States should be as free as Congress to propose amendments. Congress is free to propose a single amendment or multiple amendments, so the States should be free to apply for a convention to propose amendments singly or in multiples. To this, however, there is an important caveat. The convention the States ask for and the convention they get might not be the same thing at all. We will consider further below whether either the States or the Congress can effectively control the "agenda," or scope of business, of a convention for proposing amendments.

While the criterion for obliging Congress to call a convention seems reasonably clear, it is less clear whether a refusal would be judicially reviewable. The amendment process often is said to be a political question beyond review in the courts. However true that may be with respect to Congress' own power to propose amendments, it need not be true with respect to Congress' obligation to call a convention requested by two-thirds of the States. The major difference is that Congress has discretionary power over its own initiation of amendments but only a ministerial duty with respect to calling a convention when two-thirds of the States apply. While a court might understandably refrain from second guessing Congress' exercise of its discretionary power, it might feel obliged to review Congress'

analogies are infirm, it is worth noting that the Supreme Court has held that Congress may specify and enforce what it considers a "reasonable" time within which ratification must occur. *Dillon v. Gloss*, 256 U.S. 368 (1921).

¹⁴*North Dakota v. United States*, 460 U.S. 300 (1983).

performance or non-performance of a ministerial duty.

For the same reason, the judicial non-reviewability of whether proposed amendments have been ratified is not necessarily dispositive. The Constitution does not say how or by whom it is to be determined that three-fourths of the States have ratified. Traditionally, the determination has been made as a ministerial function by the Secretary of State or, since 1951, the Administrator of General Services. This has been directed by statute, however, and in the case of the Fourteenth Amendment, Congress did make the determination by itself. This history has induced the conclusion that sufficiency of ratification is for the political branches to decide without judicial review.¹⁵

But the ratification process is very different from the initiation process. Determining the one involves ascertainment of what the States or the people have decided, while determining the other involves whether they shall be consulted at all. Therefore, even if Congress may exercise an unreviewable discretion to determine whether amendments have been ratified, it does not necessarily follow that it must possess a similar unreviewable discretion to determine whether sufficient States have applied for a convention. Indeed, the stronger argument seems to the contrary. Uncontrollable congressional discretion at either the initiation or ratification stage of a convention amendment would make it possible for Congress to frustrate the States' effort to amend the Constitution. That would contravene the Framers' intent to give the States a way to amend the Constitution free of congressional control.

While a blatant attempt by Congress to block an apparently successful effort by the States to amend the Constitution probably would generate a heated political battle, the States could not necessarily protect their interests in that battle through the political process. The direct election of senators has weakened the States' ability to discipline senators who ignore or frustrate their applications for a convention. When state legislatures elected senators, the senators ignored requests from State legislatures at their peril. Thus, the States could influence a senator's behavior through the political process. Since States no longer enjoy that political leverage, courts should not blithely assume that States can protect their interests through the political process, and therefore should be more willing to review serious questions of alleged congressional disregard of the duty to issue a convention call.

Of course, Congress will not necessarily fail or refuse to call a convention for proposing amendments, under circumstances in which the Constitution seems to require it to issue a call. Many other troublesome questions will arise if Congress *does* decide to issue a call.

Three important but often forgotten points about Article V must be

¹⁵*See Coleman v. Miller*, 307 U.S. 433 (1939).

stressed at the outset of any analysis of those questions. First, the functions of Congress under Article V differ in kind from its functions in the ordinary process of legislation. The Supreme Court confirmed this in 1798 when it acknowledged that Congress' actions with regard to constitutional amendments, unlike those with regard to "laws," need not be presented to the president for approval or veto.¹⁶

Second, while a two-thirds vote in both houses is required for Congress itself to propose any amendment, no extraordinary majority is required for Congress to "call a Convention for proposing Amendments." Politically, Congress so far has preferred to draft proposed amendments by itself; but constitutionally, in terms of the level of congressional consensus required, the convention alternative is "easier."

Third, while there is an obligation to call a convention when the requisite fraction of state legislatures apply, the Constitution in no way precludes Congress from calling a convention when fewer legislatures, or even when no legislatures, apply.¹⁷ In view of the first of the three points here emphasized — that Congress' Article V functions differ in kind from its legislative functions — this third point has very great significance. When it acts under Article V, Congress does not act as a governing arm whose actions must be restrained by the doctrine of enumerated powers. Instead, it acts as comprehensive steward and high fiduciary to the nation, to raise matters for decision by others who are nearer to the ultimate sovereign, the people. The steward is not relieved of this trust duty by mere Article V silence. While it certainly must respect limits imposed by Article V, Congress is not disabled to seize the initiative and "call" a convention by itself merely because Article V does not declare on its face that Congress may.

The importance of this point is not diminished at all because Congress never has, and perhaps as a practical matter never will, act on its own to call a convention for proposing amendments. For whether it ever does so or not, the fact that Congress *could* do so without legal impediment has very important implications. In fact, quite a number of otherwise difficult questions simply disappear or become moot when Congress' power to call a convention on its own initiative is acknowledged.

For example, suppose that Congress does call a convention in response

¹⁶*Hollingsworth v. Virginia*, 3 Dall. (U.S.) 378 (1798).

¹⁷The only comment noted when the Committee of Detail's amendment article was first considered on August 30, was Gouverneur Morris' suggestion that "the [national] Legislature should be left at liberty to call a Convention, whenever they please." The article then was approved, "nem. con." 2 Farrand at 469. In view of the Convention's readiness later to give Congress an even easier way to initiate the amending process, this vote can hardly be viewed as rejecting Morris' suggestion. It more plausibly indicates that the delegates considered Morris' suggestion fully satisfied by the language as it then stood, i.e., that Congress indeed could initiate a call on its own.

to applications from two-thirds of the States, but that several of those applications are fifteen, twenty, or even thirty years old. Several writers have argued that because applications so old reflect no contemporary consensus, to count them toward the requisite two-thirds would be improper, or even illegal. The question of just how long an application retains vitality, or when it becomes "too" old, might have to be faced if Congress *refused* to call a convention, but surely it would be irrelevant if Congress *did* call one. How could it matter how old the applications were, if Congress may call a convention even when no State applies for one?

Realistically, such a situation could only arise with an issue over which substantial active controversy persists or is suddenly revived. A convention to propose amendments is a large and serious undertaking, and Congress is not foolish; it will not resort to ancient applications as justification for conventions on dead issues. But if Congress is free to call a convention anyway, it makes no sense to preclude it merely because the formal state legislative expressions of interest came a long time before. If a convention were called while some issue were active, any challenge to old applications predictably would be made by partisans on one side or another of that issue, seeking to gain advantage for their own point of view. There is no principled reason to encourage or reward such attempts to avoid the democratic deliberative process, whatever risks that process might entail.

Here is another example to illustrate the implications of Congress' ability to call a convention even without State legislative applications. Suppose that two-thirds of the State legislatures have approved applications for a convention, but some of those applications contain defects of some kind, or never were properly conveyed to Congress, or have been rescinded by subsequent State legislative action. The formalities of proper application, and the effect of attempted rescissions, have been discussed by commentators at some length without general agreement. But how can any of these things invalidate a call, if Congress is free to call a convention on its own initiative anyway? Once again, these circumstances present problems that might have to be faced if Congress refused to call a convention despite claims that the requisite number of legislatures had applied; but if Congress did call one, none of these circumstances should impair the legality of the convention, or of its products (if any).

Here is yet another example. Suppose the requisite number of legislatures make applications which in one way or another concern balancing the federal budget, but which differ significantly from one another. Suppose that some specify a particular text, others speak of "balancing the budget," others speak of "limiting federal spending," others speak of "dealing with fiscal problems," and so on. How could nice quibbles over whether these applications concerned the same thing have any relevance to the validity of a resulting call, if Congress could validly have issued such a call without any applications at all?

And one final example: Suppose two-thirds of the State legislatures apply

for a convention to consider a balanced budget amendment, while fewer than that fraction apply for one to consider abortion, or school prayer, or some other issue. There would be no obligation upon Congress to call a convention for anything other than the balanced budget matter; but suppose Congress decided the same convention also should consider these other matters — and maybe some more besides? How could one credibly object to Congress' inviting a convention to consider matters which fewer than two-thirds of the States had applied for, if Congress can call a convention on its own in any event? (This is not to assume congressional control over convention agendas; that matter is considered separately below.)

The preceding examples illustrate the importance of Congress' power on its own initiative to call a "convention for proposing amendments." Congress might never do so; but that is not the point. The point is that Congress seems clearly to have *power* to do so; and if Congress can call such a convention on its own initiative, there seems no room for legal objections to Congress' calling one in response to State "applications" regardless how old, or defective, or limited, or defunct, or disparate, those applications might be.

Thus far we have confined our inquiry to questions concerning Congress' power and duty to call a convention for proposing amendments. These, however, comprise only a small fraction of the questions to be faced. Among the others are, when and where is the convention to meet? How many and who shall attend? How and by whom shall they be chosen? What procedures shall the convention follow? What substantive issues may be considered? How are votes to be counted, per individual delegate or per State? Must or may a time limit for the duration of the convention be fixed? Will it have any staff support, or must the delegates work alone? And very important, but almost never asked, who will pay the tab? The list of such questions is not endless, but it is long.

Some writers parade long lists of such questions and counsel abstention for fear of the unknown; but statecraft is not for the faint of heart. While reflection and careful judgment are called for, there are principled ways to organize these questions and resolve them rationally as they arise.

No more acceptable than a claim that all such uncertainties are perils, is the notion that Congress can resolve most of them. The possibility of legislating ground rules for conventions to propose amendments has been considered in Congress at least since the 1950s. Several bills to that end have been introduced during the past two decades; hearings upon them have been held; committees and sometimes even the full Senate have approved them; but none, so far, has become law. For this there actually is reason to be grateful; for an Act of Congress purporting to resolve matters which Congress lacks constitutional power to resolve might only aggravate the confusion.

Congress certainly may call a convention; Article V specifically says so. One should not rush to conclusions, however, about what might be "inci-

dent to" this power to call. "Incidental powers" is one of those unfortunate, imprecise and misleading idioms commonly associated with the "necessary and proper" clause.¹⁸ This clause enables Congress to pass laws "for carrying into Execution" its Article V power, no less than for carrying into execution every other federal power, whether of Congress or of another branch. But the "necessary and proper" clause helps Congress only to implement *federal* powers; and most questions about how an Article V convention for proposing amendments would function are not within *federal* power!

The convention method for proposing amendments was included in the Constitution, after all, specifically to ensure a mode of change that Congress could not frustrate or materially control. One 1930 article,¹⁹ universally overlooked in the glut of more recent writings, argued that the Tenth Amendment was specifically designed to preclude Congress' control of the amendment process. The article is not persuasive that this was the Amendment's sole, or even predominant, aim; but it does underscore the fact that the Tenth Amendment is relevant here.

The only "powers ... delegated to the United States" regarding the convention method of proposing amendments are the power to call a convention and the power to propose one or the other permitted means of ratification — plus the "necessary and proper" clause power, which (as just pointed out) applies only to effectuate some other *federal* power. (A few other federal powers might become germane: for example, Congress might fund the convention, or give the delegates free use of the mails. But these powers entail no authority over convention organization or operations.) It must follow then that all power to determine any other matter regarding conventions to propose amendments is "reserved to the States respectively, or to the people."²⁰

Before considering how "the States ... or ... the people" might deal with such matters, let us examine more closely Congress' power to call. To "call" a convention presumably means more than to recommend that one take place. When State legislatures apply in the requisite number, they are entitled to expect that Congress will take steps to cause a convention to occur. But what is the least and the most that Congress may do, and what must be left for others? Answers to these questions depend at least in part on what it means to "call."

One reasonable way to determine what Article V means by "call" is to

¹⁸See Engdahl, *supra* note 11, at secs. 3-12, 6-03, and 6-08. Even some generally perspicacious studies are much too quick to regard various matters as "incidental" to the call. E.g., G. Rees III, *The Amendment Process and Limited Constitutional Conventions*, 2 *Benchmark* 66, 91 (1986).

¹⁹Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 *Va. L. Rev.* 771 (1930).

²⁰U.S. CONST., Amend. X.

inquire how the men who drafted this language themselves happened to be assembled. They "convened" when and where they did because the Congress that operated under the Articles of Confederation had designated, by Resolution, "the second Monday in May next" for "a Convention of delegates" to "be held at Philadelphia"²¹ (Philadelphia then was small enough that the delegates would be able to find one another without too much inquiring; not even a place or time of day was prescribed.)

The Resolution went on to outline the "sole and express purpose" to which the delegates should devote themselves. But by the time those delegates set about drafting Article V they had gone far beyond that circumscription of purpose, and those who thought that doing so violated the call had long since packed and gone home.

The Resolution also declared that the delegates "shall have been appointed by the several states"; but it did not presume to tell any State how many delegates to appoint, or how. Neither did it indicate whether, or how much, they should be compensated for their expenses and time.

Finally, the Resolution provided that the convention should report its proposals to the State legislatures as well as to Congress, and declared that these proposals should become effective "when agreed to in Congress and confirmed by the states" The Philadelphia delegates disobeyed this part of the Resolution, even though the only mode of alteration allowed by the Articles of Confederation, Art. XIII, was changes "agreed to in a congress ... and ... afterwards confirmed by the legislatures of every state."

They were suggesting an entirely new regime, incompatible even with the alteration procedure of the old; and they transmitted their proposed Constitution, along with a Convention resolution proposing a very different mode of ratification, not to any state legislature but only to the Congress. This disobedience to Congress' earlier Resolution was rendered moot, however, when Congress resolved that the Constitution be transmitted to State legislatures along with the Convention's own resolution concerning the ratification process.

This historical example helps a great deal toward understanding what it means to "call" a convention, even if it does not resolve every uncertainty. At a minimum, an Article V call requires a determination and notice that a meeting will occur at a fixed place and date (and today, no doubt, a fixed address and time). It need not prescribe how many should attend, or how they should be chosen. (Whether Congress is even competent to control either of these matters will be discussed below.)

Like the Resolution calling the 1789 Convention, a call under Article V should and probably must make some reference to the purpose of the assemblage. That reference might be as broad as the declaration of purpose in Article V itself ("for proposing Amendments"); and certainly no more

²¹See Farrand at 13, also *1 Doc. Hist.* at 187.

detail than this is necessary to make a call valid. Some have asserted, however, that a call specifying a purpose narrower than this (e.g., only for budget balancing matters, or legislative apportionment matters, or only for those and abortion or religion matters) would be unconstitutional. Such assertions usually are directed at the possibility of a "limited" convention; but discussions of the "limited convention" idea typically run into error by treating two separate questions as one.

Whether a convention pursuant to a circumscribed call can lawfully meet and conduct business, proposing changes which, if duly ratified, must be acknowledged as amendments to the Constitution, is one question. A negative answer to that question seems implausible. The 1787 Convention which drafted Article V itself was convened under a circumscribed call. Those delegates, seeking to ensure that change could be accomplished when needed, could not have contemplated that any limitations in a call could or should prevent the ensuing assembly being a valid Article V convention.

It is quite a different question, however, whether such scope limitations in a call should or can have any binding force. In this modern age, a convention could not be held in such secrecy as was possible in Philadelphia two centuries ago. Cameras and microphones would be everywhere, and delegates would be subject to incentives, not just for grandstanding, but also for sobriety and caution, entailed by such public exposure. Moreover, any apprehension that sweeping change might be in the offing would be reflected quickly in the stock market, and almost as soon in other sectors of the economy. Such practical factors would create pressures to which convention delegates would not likely be immune. It therefore is quite possible, and perhaps much more probable than in 1787, that delegates might decline to go beyond any circumscriptions in the call.

In point of law, however, and contrary to the opinions of many writers, limitations by Congress on the scope of convention concerns seem inconsistent with the Constitution and therefore unenforceable if voluntary compliance cannot be obtained. The reasons, again, are that the convention mode of proposing amendments was calculated to circumvent control by the Congress, and that the Tenth Amendment reserves the residuum of powers -- including power to decide what to do at a convention once called -- to the States or to the people.

In short, scope limitations in an Article V call, while not impairing its validity or that of any actions taken under it, can be made no more binding than those of the Confederation Congress in 1787 turned out to be. Those were not binding because the Confederation Congress (after some debate on the point²²) understood and accepted the statecraft necessity²³ for that

²²See *1 Doc. Hist.* at 325-42.

²³According to Yates' notes on the 1787 Convention, Colonel Mason acknowledged on June

disobedience and forwarded the Convention's product for ratification notwithstanding. The reasons for considering scope limitations non-binding today go beyond the vagaries of statecraft to clear constitutional purpose and specific constitutional text.

Yet, there would be a mechanism whereby Congress could enforce scope restrictions, or otherwise exercise influence over the success of convention proposals based on its view of their merits, if it were necessary for a convention's product to pass through Congress' hands before the process of ratification could begin. Article V does not make this necessary. It does not even assign Congress a clerical role with respect to amendments proposed by convention: the proposals, from all that appears, would go directly from the proposing convention to the States for ratification. Nevertheless, a passage through Congress would be required if, when the convention's proposals were ready, Congress had not yet exercised the other relevant power given it by Article V: the power to determine which ratification mode should be used.

In every instance but one, Congress has chosen the option of legislative rather than convention ratification. Nonetheless, the choice between ratification modes is far from being an insignificant one. Notwithstanding reapportionment, the composition of State legislatures is different from that which would prevail in State ratification conventions, regardless how chosen and regardless of size.²⁴ The possible differences are manifold, complex, and attributable to peculiar and transitory social and political phenomena rather than to any general principles ascertainable a priori. Practical experience and political accountability; breadth of vision and zeal for particular causes; the probability or absence of reciprocal, parochial obligations or constraints; the degree of interference with participants' normal life and obligations, and estimates of how demanding of time and attention a particular ratification process might be; proximity to (or distance from) the proverbial "grass roots" — these are only a few of the factors that might affect judgments on which ratification method to choose. Every one of the factors might play differently, depending on the particular amendment or amendments at stake. Calculating from such variables the course most likely to produce wanted results in concrete instances is the skill whose mastery measures senators' and representatives' political lives.

Whether a majority in Congress actually *would* base its selection of one mode over the other on a judgment of which would make ratification more or less likely, is not the point. The point is that it *could*, and that is just the

²⁰ that by taking the Virginia Plan as its basis the Convention was operating outside the scope of its call, but observed: "In certain seasons of public danger it is commendable to exceed power." The Congress, having experienced the embarrassments of trying to function under the Articles of Confederation, evidently agreed.

²⁴ The state conventions to ratify the Twenty-First Amendment were assembled by procedures differing from State to State, and varied from 329 to three delegates in size.

kind of congressional influence over the amendment process that the convention proposal alternative was designed to circumvent. It follows that, if the purpose of precluding congressional influence on this alternative method is to be well served, the determination of ratification method must be made before the product of the proposing convention's deliberations is known.

As a practical matter, this virtually requires that an indication of the mode of ratification be another element of an Article V convention call. (It is notable that the 1787 Resolution calling the Philadelphia Convention did include a recitation of how that Convention's proposals should be "agreed to" and "confirmed" — even though, for reasons peculiar to those circumstances, that prescribed method in the end was not used.) If this is true, the two separate powers that Article V gives to Congress with regard to conventions for proposing amendments really must be exercised at once.

This does not quite exhaust Congress' power regarding such conventions, however. Incident to a call (i.e., under the "necessary and proper" clause), Congress might authorize the reservation of meeting facilities, or preparation for the host of logistical matters attending a gathering which inevitably would attract massive media attention. Preparations tend to ensure that the convention actually can occur. (For the federal government to manage such matters once a convention had assembled, however, would not serve to effectuate the *call*; consequently, such a federal role could not be sustained by the "necessary and proper" clause.) Should Congress desire to do so, it might underwrite some (or all) of a convention's expenses; but that would be an exercise of its spending power, not something requiring justification as "necessary and proper" to effectuate the *call*. It might also extend the franking privilege for convention business, as the Confederation Congress did for the Convention of 1787;²⁵ but that would be an exercise of Congress' postal power, again not something to effectuate the *call*.

In sum, the *determinative* function of Congress with regard to Article V conventions for proposing amendments begins and ends with the call; and even the determination *whether* to issue a call is removed from Congress' discretion when two-thirds of the States apply. The Framers seem deliberately to have made it so. If this be true, regardless how desirable it might seem for Congress to legislate answers to some of the many questions that are certain to arise if such a convention is called, those questions simply are beyond Congress' power to resolve. The most it can do, even in the *form* of legislation, is to offer non-binding counsel. That, however, would not necessarily be wasted effort; for as a practical matter, many of Congress' advisory determinations might be followed voluntarily by such a convention, as an expedient alternative to starting from scratch.

²⁵ See 3 Farrand at 17.

The question next in logical sequence to the call of a convention for proposing amendments is, how should that call be answered: i.e., who should attend? This subsumes the questions of the number and constituencies of delegates and how and by whom they should be chosen. Again, the answers do not appear on the face of Article V. Through principled reflection, however, persuasive answers can be found.

The first principle relevant to this reflection is one that infuses our entire constitutional structure: the principle of federalism. Regardless of any disparities of population among them, and notwithstanding the complexities of intergovernmental relations and power allocations, our constitutional union is a federation of distinct political communities and legal entities called States. And despite judicial decrees affecting apportionment of representation within the several States or within the federal House of Representatives, some features of our Constitution preclude subordination of State equality to the democratic ideal of an equal voice for every person. The Senate's composition, with two members from each State regardless of size or population, is one example. The process of amendment under Article V is another.

Ratification must be done State by State, whether by legislatures or by ratification conventions. This means, there now being fifty States of widely different population, that disapproval by barely more than a quarter of those voting in the thirteen least populous States could block an amendment urgently demanded by the overwhelming majority of American citizens. A comparable observation applies to "applications" for a "proposing" convention: Even assuming that State legislatures as now reapportioned mirror exactly the sentiments of the electorate, a bare majority of legislators in each of the thirty-four smallest states could compel a convention that the substantial majority of Americans do not want. These hypotheticals are more extreme than anything reality will present, but they illustrate the ineluctable point: Article V processes cannot be approximated to the ideal of "one person, one vote." Amendment of the Constitution necessitates action State-by-State, not democratic action by the nation as a whole.

It would be anomalous, then, to require delegation strength in a convention for proposing amendments to be proportional to population.²⁶ It would be no less anomalous to require that delegation strength comport with the respective States' representation in Congress, which, except for the equality of representation in the Senate, conforms roughly to the same population proportionality rule.²⁷ And it would be worse than anomalous — it would be an arrogation of forbidden prerogative in order to impose a

²⁶Conceivably, that could be the rule for such a convention called by Congress on its own initiative, without colorable application from two-thirds of the States. But as noted earlier, while important implications can be drawn from the legal possibility that a convention could be called in that way, there is no practical likelihood that one ever will.

²⁷*Id.*

dubious rule — for Congress to direct that delegations to a convention for proposing amendments conform to any such rule.²⁸ Neither Article V nor anything else in the Constitution warrants federal interference with State discretion in this matter. On the contrary, the power to decide delegation size comes within the Tenth Amendment's provision that powers not delegated to the United States are reserved to the States, or to the people.

In default of any other established mechanism by which States (or the people in each of them) could do so, only the States' legislatures could make decisions on the size of State delegations. Whether to do so in the normal mode of legislation, with gubernatorial approval or veto, must be determined in each State on the basis of its peculiar state constitution and practices. It would be naive and ollicious for academics to suggest that State legislators would need extraordinary guidance on how to proceed. They have their staffs and State legal departments — not to mention such organizations as the Council of State Governments and the National Conference of State Legislatures, which are quite capable not only of giving counsel but also of coordinating efforts to prevent extravagant or dysfunctional delegation disparities.

It would not be the first time that several separate legislatures have had to decide how large a delegation to send to a convention. Twelve did so in 1787. On that occasion, two legislatures designated three delegates, two designated four, five designated five, one designated six, and two designated seven.²⁹ Incidentally, there was no correlation between the number of delegates appointed and the States' size or population.

A larger delegation could be of little value unless each delegate were to enjoy a separate vote; and in that case, there would be incentive to send thousands. But the same principle elucidated earlier suggests that voting at such a convention would have to follow the rule of equality among States. That federalism principle which permeates the Constitution and particularly Article V, underscored by the absurd alternative of States vying to pack the house with delegates of their own choosing, compels the conclusion that whatever the number of delegates from each State, every State's delegation must have equal voting power.

This fact will necessarily influence the size of delegations. There being no voting advantage in numbers alone, a typical State legislature would probably weigh such very practical considerations as the impact of sheer numbers on processes of deliberation, debate, and developing consensus, both in a particular delegation and in the convention as a whole; logistics involved with managing different sized groups; means of facilitating diver-

²⁸This is the formula proposed, for example, by the Hatch bill, S. 119, 98th Cong., 1st Sess.

²⁹See 1 *Doc. Hist.* at 192-230; also 3 Farrand at 557-590. It is a mystery how Judge Rees, *supra* note 18, could have concluded so erroneously that "[t]he Philadelphia Convention of 1787 had three delegates from each State," *id.* at 90.

sity or discipline (whichever a particular legislature might desire); and, probably rather high on the list of considerations, the cost.

These all are considerations of the kind that State legislators wrestle with all the time. They need no special assistance in weighing them; nor is it necessary that legislators in every State strike the balance the same. In fact, one might say that the Constitution contemplates that States will and may differ in this regard. At least it seems certain, by virtue of the Tenth Amendment and Article V's failure to give Congress any role, that any effort by Congress to prescribe the size of State delegations would be void. Once again, such federal legislation might induce voluntary compliance by States — either as a convenience to avoid lengthy debate, or because some legislators are timorous and unsure of their powers. However, there is no valid legal principle under which such federal suggestions, regardless how imperatively phrased, could be held binding.

The questions of how and by whom delegates should be chosen yields to a similar analysis. Some writers say that delegates assuredly would be chosen by popular election; and on that assumption they decry the prospect of single issue or narrow focus campaigns thought likely to result in a convention of ideologues. But despite Chicken-Little's panic, the sky did not fall. One must view this very practical matter in sober perspective.

Delegates assuredly *need not* be popularly elected. Congress could not dictate the selection process, for the same reasons discussed earlier. Instead each State, through its legislature, must decide for itself. The choice of selection process is a highly political matter, and State politicians will perceive it as such. With the convention a certainty, it is highly unlikely that state legislators will act so perfunctorily as some writers charge that they have on Article V "applications." They will comprehend the forces at work and will make their several judgments accordingly. They will favor or oppose popular election of delegates in part, perhaps, on principled conviction, but also in part on their estimates of what the outcome might be. Anticipated advantages and risks of issue-dedicated delegations both will be urged by lobbyists, in the press, and in letters from constituents, and doubtless will be debated on all fifty statehouse floors.

The results, predictably, will be anything but uniform. Some ideologue legislators might doubt their political base and prefer delegate selection by the legislature itself; voters in some States might disappoint the cynics by demonstrating remarkable good sense; some resolute partisans — some pro and some con — might be legislatively selected; and some heretofore undiscovered statesmen might emerge from popular election contests. Any statistician is sure to agree: If no central authority can impose a single mode of selection uniformly upon all fifty States, the odds against a convention being dominated by ideologues of any particular stripe are substantial. To a disinterested observer, the practical probabilities support a guarded faith in the democratic process, and a healthy respect for the safeguards that surround conventions for proposing amendments as a result of the interplay

between Article V and Amendment Ten.

Whether delegates are selected by State legislatures or elected by the people themselves, they would probably represent mainstream philosophies. American legislatures seldom breed radicals, and the American people at large rarely embrace radicals. A convention to propose amendments would probably look a lot like an average Congress — and while that might not be an inspiring prospect, it is scarcely an alarming one, either.

The organization and conduct of a convention for proposing amendments, once delegates had been selected and had gathered as ordained in the call, would involve a very large array of questions — but none very difficult to resolve if the fundamental principles already explained were kept in mind. The first to arise would be no different from those presented whenever any new assemblage — whether international colloquium or hobby club, first embarks: "Who's in charge here?" and "What do we do now?" Modern mankind seems never to have been daunted by uncertainties of this kind.

Someone will have the temerity to suggest that a presiding officer be selected; and in the first test of the convention's prospect for success, somehow a prevailing consensus probably will be reached about how that should be done. Perhaps next the question of procedures will arise; most delegates will have had some exposure to "Roberts' Rules of Order," and formally or informally, rigorously or approximately, at the outset those probably will operate by default. Probably a committee will be chosen to formulate some more specialized rules of the house; delegates who make known their experience in some legislature or other public or private deliberative body probably will be preferred. Their report will be considered and in large part approved. None of this should present insurmountable hurdles, although controversy on various issues should be expected. The point is, of the host of questions concerning the operation of a convention, most will be resolved in the way rational people routinely resolve similar questions in voluntary organizations, business assemblies, and public bodies.

A few things, of course, would need special attention. As at the 1787 Convention at Philadelphia, at the beginning of every Congress, and at various other assemblies where participation is restricted, there would be the matter of verifying credentials. Only the most innocent of experience should wonder how to proceed with that. Then there is the matter of quorum. By virtue of the pervasive federalism principle elucidated earlier, the quorum could not be set in terms of delegates present, but must be in terms of States represented; but whether merely one or some greater number of delegates from a State should be requisite to its "presence" for purposes of a quorum, and what number of States a quorum should require, would have to be determined.

More troublesome might be the matter of stalling. Some functions (such as recording of minutes, enforcing decorum, and quieting the noise that

might disrupt proceedings from time to time) could be performed by designated delegates; but it might be thought better that a non-delegate secretary, perhaps professional court reporters or audio or video engineers, and officers in the nature of sergeants-at-arms be employed. There could be no reason against the convention's doing so, unless it had no money and qualified individuals did not volunteer. One or more States might offer such services in kind; and there is no reason why the convention could not accept. The same is true of staff assistance to delegates or (should any be created) to committees. If it should seem needed, such assistance could be purchased if funds had been made available by Congress or by one or more States, or provided by volunteers, or supplied by a State or States in kind. Some States might have provided for staff to support their delegations while other States might have provided for none.

We now have reached the level of the mundane, and must elevate the discussion by summarizing with an important point: a convention can run itself. Some scholars actually have troubled to write arcane treatises on the conduct of conventions in general. But one need not subscribe to, nor even survey, those authors' answers to specific questions of convention process. It all comes down to the fundamental point that, beyond being a deliberative body susceptible of analogy to other deliberative assemblies insofar as that proves helpful, such a "Convention for proposing Amendments" is an entity entire to itself, and as close an approximation to the sovereign "people" as is likely to obtain.

As such, the convention is host to a residuum of powers confirmed by the Tenth Amendment: powers uncatalogued but ample to enable it to carry out fully its function. It is limited in function by Article V: it is a "Convention for proposing Amendments" to the existing Constitution, and nothing more. But because it partakes, so far as is needed, of the sovereign's reserved powers, no constraints sought to be placed upon its operations by legislatures or other government entities — federal or state — can have any more than hortatory effect.

Three specific consequences, to some extent adumbrated in the pages above, may be mentioned in closing. First, the convention itself may decide how to count votes, subject only to the federalism principle that dictates equality of voting strength among States. Neither Congress in a call, nor Congress by such measures as have been considered for fixing groundrules in advance, nor the States themselves, can either prescribe a voting scheme that the convention must follow or release it from the rule of equality among States. The Philadelphia Convention of 1787 took the most obvious expedient of allocating to each State a single vote; each State's vote then was determined by the majority of that State's delegation, a delegation evenly split was recorded as "divided," and if fewer than two of its delegates were present a State's vote was not counted.

It is conceivable, however, to proceed in a different way, still without departing from the rule of State equality. For example, supposing the

smallest delegation to be three, every State might be allocated three votes; the convention then could choose whether to leave the allocation of each State's votes for decision by the delegations respectively, or to require that they be prorated among the State's delegates. Some States having four, or nine, or seventeen delegates, certainly the second and probably the first of these options would entail fractional voting; but that is merely an inconvenience and would not even be that if the convention's funding made possible a little computer support. The offsetting advantage, the convention might believe, would be a somewhat closer approximation to democracy (notwithstanding the different weight that different delegates' votes would receive) than if dissident desires were entirely concealed beneath unitary State votes.

Second, regardless of any parameters in the call and regardless of attempted instructions to its delegates by any State, a convention is master of the scope of its own business — or in the terms most commonly used, has control of its own agenda. The reasons for Congress' incompetence to limit the agenda, as explained earlier, are the limited powers given Congress by Article V and the reserve of the Tenth Amendment. The reasons why States cannot force a limited agenda are that no States can enforce their own will against the others, and (more fundamentally) that the convention is not a functionary of any State or of all, but rather is an independent representative of the sovereign people with an existence and functions of its own.

This presents no real risk of a "runaway" convention, at least if the vision conjured up by that ambiguous and rather pejorative term is one of delegates roaming at large over the range of public affairs, revising and replacing without responsible restraint. While matters might be taken up that had not been specifically anticipated, the practical factors referred to before — scrutinizing media exposure and sensitivity to the economic disarray which apprehensiveness over sweeping proposals for uncertain change would entail — are sufficient assurance against wildest proposals for all who have learned that life gives no absolute guarantees. Of course, they may be insufficient assurance for partisans hell-bent to preclude changes on some particular issue from being put to a popular vote even under the unfavorable odds of a ratification ordeal.

Such a convention, in any event, can only propose; the people through their States, either legislatively or in separate ratification conventions, dispose. The ratification process permits the American people to take a sober second look at proposed amendments. Only once have they upon reflection adopted an amendment profoundly altering the structure of our government: the Fourteenth Amendment. And only once have they upon reflection adopted an amendment that constricted personal choice: the Eighteenth Amendment (and they quickly repented that decision). This record should reassure those who fear that the American people might unthinkingly endorse the proposals of a "runaway" convention.

Bearing in mind the ambiguous and pejorative nature of the term, it seems appropriate to object to characterization of the 1787 Constitutional Convention as a "runaway." It is true that, from the start of its business, the Convention worked beyond the scope set by the Resolution that called it; and it crafted a whole new frame of government rather than making proposals for patching up the old. For that reason, in fact, a handful of the delegates "ran away"! But in no sense can it be said that the Convention ever was out of hand or verged on a political cabal. While there were profound disagreements and tempers occasionally flared, its deliberations were temperate, sober, compromising, and stately, even though conducted in secret. Even if one takes the view that many modern proponents of certain constitutional changes are wacky, are grandstanders, or pander to ignorance and fear, it requires quite a jaded view of mankind and of the democratic political process to imagine that — with the heat as well as the light of modern news coverage — a convention overall is likely to be less temperate, less sober, less compromising, and less stately today.

Finally, the duration of a "Convention for proposing Amendments" is under its own control. Lacking its own source of financing, and comprised of twentieth century delegates less likely than eighteenth century gentlemen to have time and resources to charitably burn, it is unlikely that whatever quorum were agreed upon could be maintained extremely long. Moreover, public impatience and the economic instability likely to be aggravated by prolonged uncertainty make it highly unlikely that the convention *would* drag on to extravagant length even if it could. But while financial and other pressures might test their mettle, the delegates as pro tanto repositories of the peoples' reserved sovereignty would have legal authority to continue as long as they deemed necessary (or as long as they possibly could).

Some bills introduced in Congress purport to limit such a convention to a maximum time period: for example, one year. The notion that twelve months might be consumed by a convention merely to propose amendments to a Constitution that was created virtually from scratch in just four, seems rather absurd, even discounting the unlikelihood that a quorum could be maintained that long. But if the convention should decide that more time were needed, and its delegates were willing to proceed, time limits attempted to be imposed from without could have no binding force.³⁰ Again, the convention has an independent existence. No intrusion on this instrument of the sovereign for proposing measures to refashion its governance could be more severe than to mandate its cloture before it had decided that its business was through.

³⁰The duration of a convention for proposing amendments bears no analogy at all to the period allowed for ratifying after proposal (see *Dillon v. Glass*, 256 U.S. 368 (1921)). Contrast note 13, *supra*.

We have had some experience in this country with conventions. The most prominent one was the 1787 Constitutional Convention, whose product we are celebrating this year. That product — our Constitution — is not sacrosanct, as the Framers themselves realized. Indeed, one of their first orders of business was amending it. And it has been changed many more times during the last two hundred years — and not, unfortunately, by the amendment process alone. Many decisions of the Supreme Court, some deliberately and some inadvertently, have in practical effect altered it fundamentally. If it is conceded that the Supreme Court, by bare majority of a select few, can change the Constitution in the guise of construing it,³¹ why should not the people themselves, through their delegates in solemn convention assembled, be able to propose changes to it?

³¹It is possible to refuse this concession in principle, without denying that it is the error by which we now live, but very few even trouble to question it.

STATE PETITIONS FOR A BALANCED
BUDGET CONSTITUTIONAL
CONVENTION: A DESCRIPTIVE ESSAY
ON THE POLITICAL ECONOMY OF THE
ARTICLE V PROCESS

by

HENRY N. BUTLER, J.D., Ph.D.

The Congress of the United States has failed to address adequately the major economic threat to the welfare of all Americans — the enormous deficits in the federal budgets of the 1980s. There is, however, a constitutional avenue through which the States may be able to force Congress to confront their own ineptitude at balancing the federal budget. Article V of the Constitution provides a procedure whereby two-thirds of the States can petition Congress to call a constitutional convention to propose amendments designed to address problems or issues that Congress has exhibited an unwillingness or inability to address. Although the convention method of amending the Constitution has never been implemented, the States are on the threshold of forcing Congress to call a convention for the purpose of proposing an amendment requiring a balanced federal budget. Thirty-two (of the necessary thirty-four) States have petitioned Congress to call a Constitutional Convention for the purpose of amending the Constitution to prohibit the running of sustained budget deficits.

The call for a balanced budget convention is an excellent example of how the Framers of the Constitution intended for Article V to operate — the petitioning process provides a mechanism for the States to push Congress to action whenever an unaddressed issue is deemed sufficiently important by two-thirds of the States as to require a Constitutional Amendment. The fact that the States may be only two States away from the necessary two-thirds has forced legal commentators and even the Congress to consider the Congressional obligation to call a convention.

The general consensus is that Congress must play an active role in the convention method of amending the Constitution. Congress, however, is not a disinterested party. It is obvious that Congress, as an institution, prefers to run budget deficits and therefore is hostile to the idea of a balanced budget amendment, regardless of the process that leads to its proposal and ratification. Moreover, a balanced budget convention usurps the traditional Congressional control over the amendment process. Because of this, every effort must be made to reduce the role and discretion of Congress in the process.

Given the Congressional proclivity towards running budget deficits and the hard choices that will be forced on Congress should a balanced budget amendment come to pass, it is conceivable that the Congress will attempt to sabotage the Article V process. Thus, for example, one must be skeptical of any moves in Congress that allow Congress to short circuit the Article V process through rather technical or strict interpretations of the importance of differences in the language of the States' petitions.

This essay examines the petitions passed by the States calling for a balanced budget constitutional convention, emphasizing how differences in wording among the petitions could affect Congress's obligation to call an Article V Convention. Rather than presenting an exhaustive treatment of the subtle legal issues involved, this essay presents a consistent application of principles of political economy as a means of resolving some debated legal issues.¹

The first section provides a brief description of the Article V amendment procedures. Special attention is given to the structural reasons for the convention method, including a brief discussion of the political economy of budget deficits. It is argued that the same Congressional incentives that lead to budget deficits will also encourage the Congress to attempt to find avenues of escape from its obligation to call a constitutional convention to address the balanced budget issue. This observation provides the basis for a presumption that Congress has an obligation — akin to a fiduciary obligation — to interpret the petitions in a light most favorable to the petitioners.

The next section describes and analyzes the thirty-two State petitions to Congress for the calling of a balanced budget constitutional convention. Although the petitions may be divided into several categories according to substantive content, it is clear that the dominant intent of *all* petitions is to force Congress to address the States' concerns about federal budget deficits. It is then shown how almost all of Congress's technical, legalistic avenues of escape from the obligation to call a balanced budget constitutional convention are closed by holding Congress to a high standard of responsibility. There is a strong case in support of the position that should two more States petition for a balanced budget convention, Congress would then be constitutionally obligated to call a constitutional convention in response to the clear concern of two-thirds of the States with the federal budget deficits.

¹Every effort is made to keep footnotes to a minimum. Numerous articles, books, Congressional reports and monographs provide detailed analysis of the legal issues. A representative list includes: Paul J. Weber, *A Constitutional Convention: A Safe Political Option*, 3 J. Law & Politics 51 (1986); Paul Bator, Walter Berns, Gerald Gunther, & Antonin Scalia, *A Constitutional Convention: How Well Would It Work?* (American Enterprise Institute, 1979); American Bar Association, Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method of Article V* (1974); and *Constitutional Convention Implementation Act of 1985: Report of the Committee on the Judiciary, United States Senate*, 99th Cong., 1st Sess. (1985).

A final section summarizes the argument for a constitutional convention and offers some suggestions about how such issues be resolved in the future.

I. THE POLITICAL ECONOMY OF ARTICLE V

The Framers of the Constitution of the United States desired to create a document which both established a permanent, functional national government and provided for marginal adjustments in its structure in response to changed circumstances. Most of the discussion at the 1787 Convention was concerned with the structure of government — the granting of authority to the federal government from the people through the States, the States' retention of rights not granted to the federal government, the separation of powers among the three branches, the system of checks and balances, the admission of new States, and so forth. Only a relatively small amount of debate was devoted to the topic of altering the document that they were struggling to create. Ultimately, the Framers concluded that in order to ensure the permanence of the document and the stability of the government, the Framers made it difficult, but not impossible, to modify the Constitution.²

Article V of the Constitution sets forth two methods of proposing and two methods of ratifying amendments to 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.

All twenty-six Amendments to the Constitution have been proposed by Congress, and all but one of them was ratified by State legislatures. The Twenty-first Amendment, which repealed prohibition, was ratified by State conventions.

The convention method of amending the Constitution has never been invoked successfully.³ But this fact should not be interpreted as suggesting that the convention method is of little or no importance. The convention

²See generally Report of the ABA Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V 11-14* (1974); Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D.L. Rev. 355, 365-66 (1979).

³However, a large number of amendments have been proposed over the years. In the period since 1789, State legislatures have submitted more than 400 applications for a petition to consider amendments relating to a wide variety of subjects. In recent years, legislatures have applied to Congress for a convention more often than in the past. During the 174-year period from 1789 to 1963, Congress received approximately 250 applications requesting a convention. In the period since 1963, more than 150 such applications have been received.

method provides an important restraint or check on a nonresponsive or wayward Congress. For example, the role of the convention method in constraining Congress is evident from the text of Article V. The Article leaves nothing to the discretion of Congress — “on the application of the legislatures of two-thirds of the several States, [Congress] shall call a convention for proposing amendments.” In *The Federalist*, Alexander Hamilton commented upon the nondiscretionary nature of the congressional duty to call a convention: “[T]he national rulers, whenever nine States concur, will have no option upon the subject. The words of this [fifth] article are preemptory. The Congress shall call a convention.’ Nothing in this particular is left to the discretion of that body.”⁴

Congress is obligated to call a convention, and Article V does not provide for Congress to make any policy decisions when deciding whether to call the convention. To allow such a role for Congress would clearly violate the reason for and spirit of the convention method of amending the Constitution. For example, George Mason argued that the convention method was necessary because he believed that Congress would not likely propose amendments to counteract congressional abuses of power.⁵ One does not need to be overly cynical, or even skeptical, to find agreement with Mason’s view of this inherent conflict of interest.

The convention method of Article V is merely another example of the brilliance of the Framers at identifying political decisionmakers’ incentives to act in an undesirable manner and then creating institutional constraints to reduce the occurrence of such behavior. Article V deserves to be treated with the same reverence as other important Constitutional provisions — for example, the separation of powers — dealing with the structure of the federal government.

The Scope of the Amending Power of an Article V Convention

Article V grants the States the power to call a general constitutional convention, but does not consider whether a convention can be convened for a more limited purpose. The contemporary discussion of the States’ petitions for a convention to propose a balanced budget amendment has been marked by concerns about a “runaway convention” that would propose numerous amendments beyond the limited subject of the States’ petitions or even the Congress’s convention call.

There is little merit to such an argument, and one suspects that those making it are more concerned with blocking a balanced budget amendment than the remote possibility that the convention would stray from its limited mission. Most impartial experts see nothing to fear coming from a constitu-

tional convention, and a two-year commission of the American Bar Association unanimously concluded that a convention could be limited.⁶

Ratification of the Convention’s Proposed Amendment: An Important Safeguard

In considering the convention method of amending the Constitution, it must be remembered that a convention called pursuant to Article V does not have the power to amend the Constitution but only the power to propose amendments. All proposed amendments — whether proposed by Congress or constitutional convention — must still be ratified by three-fourths of the States.

In general, there is little reason to be more concerned about controlling the subject matter of a constitutional convention than controlling the amendments that may be directly proposed by Congress. The requirement of subsequent ratification limits the possibilities of either a “runaway Congress” or a “runaway constitutional convention.” Moreover, it is not clear *a priori* whether the Congress or a constitutional convention is more prone to tinker with our basic constitutional structure — especially when both bodies would be aware of the extremely low probability of ratification of undemocratic amendments that threaten our republican government.

Constitutional Convention Procedures

Article V does not provide any procedures to guide the States in applying for a constitutional convention and, because the convention method has never been used, there is considerable confusion in Congress and among constitutional scholars over the obligations of Congress and the procedures governing the convention. There appear to be a general consensus that Congress, when complying with its duty to call a convention, could specify the means for the selection of delegates and appropriate money for its activities. Also, in order to bring some order to the process, it would seem reasonable for Congress to set forth the conditions under which it would consider itself to be bound to call a convention. Nonetheless, the steps required to convene an Article V convention and the rules that would govern it have not been set out in statutory law. There have, however, been several unsuccessful movements in the Congress to adopt enabling legislation to cover all situations in which Congress receives petitions on the same subject from two-thirds of the States.

Since 1967, a number of bills dealing with the convention method have been introduced in Congress, but, to date, none of them have passed both houses. Bills introduced in and passed by the Senate but not considered by the House during the 92nd and 93rd Congresses illustrate the types of procedures that Congress needs to establish to provide some order to the

⁴*The Federalist* (No. 85), at 550-51 (A. Hamilton).

⁵See generally *A The Records of the Federal Convention of 1787* 203 (M. Farrand, ed. 1911) (statement of G. Mason); Dellinger, *The Recurring Question of the “Limited” Constitutional Convention*, 88 Yale L.J. 1623, 1625 (1979).

⁶See American Bar Association, Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* (1974).

process.⁷ Among other things, the bills: (1) specified the forms of State applications acceptable to Congress; (2) provided that the applications would remain in effect for seven years; (3) allowed States to rescind applications; (4) limited the jurisdiction of any convention to the subject for which it was called; (5) set forth administrative procedures for convening a convention, such as the method of selecting delegates and the type of vote required to propose an amendment; and (6) permitted Congress to reject a disfavored convention proposal by submitting its own substitute amendment to the States for ratification.

Currently, the Constitutional Convention Implementation Act of 1987 (S. 589), which was introduced by Senator Orrin Hatch of Utah, is before the Senate Judiciary Committee. The bill addresses many of the issues which have surfaced as the number of State resolutions and memorials petitioning Congress to convene a national convention to propose a balanced federal budget approaches the magic number of thirty-four. The proposed legislation, in addition to setting forth procedures for holding constitutional conventions for proposing amendments to the Constitution, also provides a procedure for the Congress to adopt a concurrent resolution calling for a convention whenever it determines that at least two-thirds of the States have submitted, within a seven-year period, valid applications for the calling of a constitutional convention.⁸ In recognition of the current calls for the balanced budget constitutional convention, S. 589 allows applications that have been pending for fourteen years or less to pend an additional two years. Clearly, the passage of such legislation would go a long way towards clarifying the uncertainties surrounding this important

⁷In 1971 (92d Congress), Senator Sam Ervin introduced S. 215, which passed the Senate by a vote of 84-0, but the House did not consider the measure on the floor. In 1973 during the 93rd Congress, a similar bill, S. 1272, passed the Senate by a voice vote, but was not considered on the House floor.

⁸More specifically, S. 589 requires that the convention be convened within 8 months of the adoption of the resolution; entitles each State to send two delegates on an at-large basis and one delegate from each congressional district; prohibits a senator, representative, or other person holding office under the United States from being selected as a delegate; provides that the President pro tempore of the Senate and the Speaker of the House of Representative shall convene the convention; authorizes appropriations for the payment of convention expenses; sets six months as the time limit for the convention to complete its work (unless extended by Congress); authorizes the convention to conduct proceedings in accordance with such rules as it may adopt by a vote of three-fifths of the number of delegates who have subscribed to the oath of office; prohibits such convention from proposing any amendment of a subject matter different from that stated in the concurrent resolution; requires the presiding officers of the convention to submit any proposed amendment to the Congress; authorizes the Congress to disapprove by concurrent resolution or to direct the Administrator of General Services to transmit to the States copies of the proposed amendment and copies of any concurrent resolution agreed to by the Congress prescribing the mode of ratification; provides that if the Congress fails to take action on an amendment proposed by a convention within 6 months, any State may bring an action in the Supreme Court for relief; provides that an amendment shall become valid when ratified by three-fourths of the States; and, finally, permits a State to rescind its ratification, except when valid ratification by three-fourths of the States exist.

process. Past Congressional inaction, however, leads one to question whether Congress really wants to clarify the process.

Public Choice Economics and Budget Deficits

Professor James M. Buchanan of George Mason University's Center for Study of Public Choice was awarded the 1986 Nobel Prize in Economics for his intellectual leadership in the development of a field of economics known as public choice.⁹ Public choice economics applies economics to political behavior. Among other things, Professor Buchanan has argued that political outcomes are determined by the rules governing political behavior. In other words, if we want to change political outcomes, then we must change the rules of the game. Clearly, the Framers of the Constitution of the United States must be counted with the intellectual forefathers of this approach to politics.

At the press conference immediately following the announcement that he was to be awarded the Nobel Prize, Professor Buchanan responded to a reporter's request for an example of public choice theory in action by presenting a classic public choice explanation for the existence of budget deficits: democracies tend to run budget deficits because politicians believe that they can increase their political support today by giving their constituents government goods and services and shifting at least some of the cost to future taxpayers. This simple explanation led some newspaper columnists to suggest that Buchanan had received a Nobel Prize in common sense. What the columnists didn't appreciate was the fact that Buchanan had identified the political incentives to run deficits long before the Congressional balanced budget ethic disappeared.¹⁰

The point of this digression is to illustrate that Congress is not a disinterested party in the debate over whether it has a duty to call a constitutional convention in response to the States' petitions. In fact, as mentioned earlier, one of the reasons for providing for the constitutional convention method was a distrust of Congressional fortitude in correcting major problems created and perpetuated by the Congress. Given this realistic (as opposed to idealistic) view of Congressional incentives, it is reasonable to suspect that the Framers of the Constitution did not intend to grant Congress great deference in its determinations as to the validity of State calls for a constitutional convention. In true public choice fashion, the Framers recognized that situations would arise in which the only way the States would be able to alter Congressional behavior would be for them to

⁹The seminal contribution to public choice theory is James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

¹⁰See generally James M. Buchanan, *Public Principles of Public Debt: A Defense and Restatement* (1958); and James M. Buchanan & Richard E. Wagner, *Democracy in Deficit* (1977). Prior to the 1940s, there was an unwritten constitutional amendment against sustained budget deficits. Keynesian economics gave Congress a theoretical justification for running budget deficits.

change the rules governing Congress — that is, amend the Constitution. It is clear that most States have decided that it is time to prod Congress into action.

The Controversy Over the Wording of the States' Petitions for A Convention to Propose a Balanced Budget Amendment

There is considerable controversy over whether the States' petitions, especially in view of their differences in wording, will be sufficient to force Congress to call a constitutional convention should two additional States petition for a balanced budget constitutional convention. The debate on Congress's duty to call a balanced budget convention has, in most instances, reflected a very benign view of Congress. Commentators on both sides typically accept the premise that Congress, in deciding whether or not to recognize the petitions, will be guided solely by respect for certain values inherent in the Constitution — justice, democracy, the federal system, republican government, and so forth. There is an implicit search by commentators for the "correct" or "right" action to be taken by Congress and it is implicitly assumed that a powerful argument in favor of the "correct" position will persuade Congress to follow such an action.

This view of Congress as a benevolent despot, searching for policies that promote the commonweal, contrasts sharply with the Congressional behavior — the running of enormous budget deficits — that created the petitions for a balanced budget amendment in the first place. Public choice economics teaches us to be skeptical of Congress during every step of the Article V convention process. In order to uphold the spirit of Article V of the Constitution, it is imperative that Congress (or the Supreme Court) decide all controversial issues in the light most favorable to the petitioners.

II THE STATES' BALANCED BUDGET PETITIONS

Thirty-two State legislatures, purporting to act pursuant to Article V of the Constitution of the United States, have enacted resolutions or memorials petitioning Congress to call a national convention to prepare and submit to the States for ratification an amendment requiring a balanced federal budget.¹¹ Because the Congress has failed to provide any guidance to the State legislatures, it is not surprising that there is considerable

¹¹The States that have passed resolutions or memorials requesting a constitutional convention are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Indiana, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Appendix I contains the edited text of the States' petitions for Congress to call for a balanced budget constitutional convention. The legislatures of California, Illinois, Kentucky, and Montana have adopted resolutions requesting that Congress propose a deficit spending amendment, but not asking for a constitutional convention.

variation in the wording of the various petitions. In view of congressional conflict of interest in the call for balanced budget constitutional convention (and, indeed its conflict in the call for any constitutional convention) and in its failure to adopt legislation governing the calling and operation of a constitutional convention, *it would be incredible to allow Congress to relieve itself of its obligation to call a convention on the grounds that the language of the States' petitions were not in conformity with some unspecified standard.*

Nonetheless, it is still important to examine the petitions to make the threshold determination that they ask Congress to address the same general subject. This section examines the petitions passed by the States and considers some of the issues raised by the differences in wording.

The Subject Matter of the Petitions

In general, before Congress calls a constitutional convention, it must first determine whether the requisite number of valid resolutions are before it on the same general subject.¹² It is widely recognized that such a determination will necessarily "be a subjective, quasi-judicial decision to be made by individual Members of Congress."¹³ In this regard, the extent of the Congress' obligation to call a constitutional convention in response to the States' petitions turns, at least in part, on the Congress's determination that the States' petitions address the same general subject matter. An examination of the petitions makes it clear that the States share the same grievance with respect to Congress's handling of the federal budget.

Most of the States' resolutions or memorials include a preamble to the actual petition to Congress to call a convention. In general, the preambles set forth the State legislatures' reasons for asking for a constitutional convention. The Alabama resolution is representative of the tone of the typical preamble:

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility.

Similar forceful language identifying the problem — the unwillingness or

¹²See generally Bonfield, *The Dinkens Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 939, 951 (1968).

¹³S. Rep. 591, 98th Cong., 2d Sess. 37 (1984).

inability of the legislative or executive branches of the federal government to balance the federal deficit -- and the solution is contained in a total of twenty-four petitions: Alabama, Alaska, Arizona, Arkansas, Colorado, Idaho, Kansas, Iowa, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming. Three other States -- Florida, Louisiana, and Mississippi -- identify the national debt and the annual federal budget deficit as the problems they are addressing. North Carolina mentions its concern about the federal budget deficit. Finally, five States -- Delaware, Georgia, Indiana, North Dakota, and Texas -- present their petitions without a preamble or any explicit identification of the problem addressed. It is clear, nonetheless, that all thirty-two balanced budget resolutions and memorials are premised on the belief that federal spending is too high in relation to revenue. Moreover, the constitutional obligation of Congress to call a convention is not affected by the existence of differences in or the lack of the preambles to the petitions.

The proposed solutions to the federal deficit problems are articulated in several different ways in the States' petitions. Nine States -- Florida, Georgia, Indiana, Iowa, Louisiana, Missouri, New Hampshire, North Carolina, and Oregon -- call for a convention mandating a balanced federal budget. Twenty-two States -- Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Kansas, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming -- seek an amendment ensuring that federal appropriations for any fiscal year do not exceed total estimated federal expenditures. Alabama and Colorado request a constitutional prohibition against deficit spending, North Dakota seeks a provision forbidding expenditures from exceeding estimated revenues, and Delaware calls for an amendment guaranteeing that the costs of the federal government shall not exceed its income during any fiscal year.

One must conclude from an examination of the text of the States' resolutions and memorials that there is a consensus among the petitioning State legislatures as to the problem that needs to be addressed at a constitutional convention. No amount of legal technicalities should allow Congress to escape from this finding.

Conditional Requests for Congress to Convene a Convention

Congress is required to call a convention upon application of two-thirds of the State legislatures. Although there are balanced-budget petitions from thirty-two of the necessary thirty-four before the Congress, there is some controversy over whether differences in the wording with respect to conditional requests by States which state, in substance, that if Congress does not submit a balanced budget amendment to the States for ratification, then Congress should call a constitutional convention of the States for purposes of proposing a balanced budget amendment.

The resolutions from several States -- Mississippi, Oregon, Iowa, Missouri and Tennessee -- contain specific time limitations which trigger the Congressional obligation to call a convention. These petitions represent mandatory calls for a convention should Congress fail to propose an amendment by a certain stated date -- January 1, 1976 (Mississippi), January 1, 1979 (Oregon), July 1, 1980 (Iowa), January 1, 1984 (Missouri) -- or "any time prior to sixty (60) days after the legislatures of two-thirds of the several States shall have made application for such convention" (Tennessee). Congress is clearly bound by these petitions, and there is little debate on the issue.

Twenty States -- Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Louisiana, Maryland, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming -- have enacted resolutions which ask Congress to prepare and submit a balanced-budget amendment to the States for ratification or, in the alternative, to call a constitutional convention for the purpose of proposing a balanced-budget amendment to be submitted to the States for ratification.¹⁴ The Alabama resolution is representative of the typical conditional request for Congress to convene a convention:

Be it resolved by the Legislature of Alabama, both houses thereof concurring, that the Legislature of Alabama hereby petitions the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Alabama Legislature requests the Congress to prepare and submit to the several States an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations by the Congress of any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Be it further resolved, that, alternatively the Alabama Legislature makes application and requests that the Congress of the United States call a constitutional convention, pursuant to Article V of the Constitution of the United States, for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 revenues for that fiscal year.

The legal issue that could allow Congress to ignore the "alternative" provision is that the petition suggests a preference by the States for the Congressional method of proposing amendments and that efforts are still under way in Congress for the adoption and submission of a balanced budget amendment. That is, even after thirty-four States have adopted petitions calling for a balanced-budget convention, it may be argued by certain Senators and Members of Congress opposed to a balanced budget

¹⁴Four states -- California, Illinois, Kentucky, and Massachusetts -- have enacted resolutions which do not request a convention, but instead merely ask Congress to prepare and submit an amendment to the States for ratification.

amendment that Congress is not obligated to call the convention because a Congressional amendment may yet be forthcoming.

Such an argument does not hold water. States routinely pass resolutions and memorials requesting Congress to take some type of action. Each such request is merely intended to let Congress know a State's position on specific issues. Most of these requests do not raise any constitutional issues and are not contingent upon the action of other States. The portions of the States' petitions calling on Congress to propose a balanced budget amendment appear to be just such a request. The States are saying, in effect, "even if two-thirds of the States do not make application for a balanced budget constitutional convention, we believe that it is in the best interests of the United States for Congress to submit a balanced budget amendment to the States." On the other hand, the States continue by stating, in effect, that "if two-thirds of the States petition you (the Congress) to call a constitutional convention, then you are obligated under Article V to call such a convention if you have not previously submitted an amendment to the States."

Given the political economy and spirit of Article V, Congress should not be able to escape its Article V duty on the ground that the conditional petitions do not unequivocally request Congress to convene a convention within any specified time period. An overly technical interpretation of the wording of the petitions, especially when Congress has refused to give the States guidelines for acceptable petitions, would violate most standards of equity and propriety by allowing Congress to benefit from its own omissions. Although many of the States give Congress the option to propose its own amendment, it would be disingenious to allow Congress to walk away from the process without either proposing its own amendment or calling a constitutional convention.

Finally, the resolution passed by North Dakota is of doubtful validity because it does not explicitly or even conditionally ask Congress to call a constitutional convention. Instead, North Dakota's resolution "call[s] upon the people of the several States for a convention for such purpose as provided by Article V of the Constitution" and directs that copies of its resolutions be forwarded "to the legislatures of the several States." There are significant Constitutional problems in this resolution. Under Article V, the convention is called by the Congress and the resolution should have been forwarded to the Congress. In fact, North Dakota did not inform Congress of its resolution until four years after it passed. On the other hand, it is clear from the reference to Article V that North Dakota intended its actions to have constitutional significance and it is reasonable to assume that North Dakota's legislature would have provided a clearer, cleaner resolution with the help of a little guidance from Congress. Congress should interpret the North Dakota resolution as a valid application and include it in the count towards the necessary two-thirds. The intent of the North Dakota legislature and the spirit of Article V provide ample support for this position.

Thus, the issue of the validity of the conditional resolutions is merely another area where a little guidance from the Congress would have most likely resulted in resolutions consistent with strict standards of conformity. It is too late, in the balanced budget convention process, for Congress or the Supreme Court to demand strict consistency in the wording of the petitions. The conditional provisions do not prevent the resolutions and memorials containing them from being acceptable as Article V petitions.

Limitations on the Deliberations of the Constitutional Convention

The resolutions and memorials passed by several States attempt to limit the deliberations of the constitutional convention to the consideration of amendments which contain specific language. Some legal commentators suggest that such limitations on the deliberations of any constitutional convention should disqualify those applications from the two-thirds count because the limitations would prohibit the convention from acting as the deliberative body allegedly envisioned by Congress. Professor Arthur Bonfield, for example, has stated that "the process of *proposing* amendments [at a constitutional convention] would seem to contemplate a conscious weighing and evaluation of various solutions to the problems perceived."¹⁵ Thus, it is argued that strict limitations on a convention's deliberations contained in a State's proposed balanced budget amendment should nullify that States' effort to prod Congress into action.

Such a view reflects an idealized approach to the Article V process — an approach in which Congress is the perfect agent of the States, where Congress can be trusted to take the correct action when confronted with "perfect" petitions from the States. However, in the current situation, there is considerable uncertainty as to what constitutes a valid petition. Because this uncertainty is in large part due to inaction on the part of the Congress, minor imperfections in the form of the petitions should be tolerated when there is a clear consensus as to the substantive problem. A consideration of the petitions' limitations on the deliberations of the constitutional convention makes it clear that the dominant intent of every State that inserted such a clause was to limit the scope of the convention. The inconsistencies are the result of uncertainty in how to limit the scope of the convention.

The resolutions from seven States — Delaware, Maryland, Mississippi, North Dakota, South Carolina, Tennessee and Wyoming — request a convention for the purpose of considering a specific balanced budget amendment, the text of which is set out in those resolutions. The Maryland Resolution is representative of the text-limited resolutions:

Resolved, that the proposed new Article XXVII (or whatever numeral may then be appropriate) read substantially as follows:

¹⁵See Bonfield, *supra* note 12, at 953-54. Also, see generally Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 957, 962 (1963).

PROPOSED ARTICLE XXVII

The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriations bills shall comply with this Article. If the President declares a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of the Members elected to each House so determine by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year.

The text-limited resolutions from Maryland, Mississippi, North Dakota, South Carolina, Tennessee, and Wyoming seek a constitutional amendment requiring that "appropriations" or "expenditures" not exceed "estimated revenues."¹⁶ The Delaware resolution would require that the "costs of operating the Federal Government shall not exceed its income during any fiscal year...." It is clear that these States want a convention to address the issue of federal deficits. Any minor differences in how they specify the proposed solution should not exempt them from the count towards two-thirds.

Five of the text-limited resolutions — Maryland, Mississippi, South Carolina, Tennessee, and Wyoming — request a convention for considering a proposed amendment which is "substantially as," "similar to," or "of the nature as" the proposed version of that State. The language of such resolutions allows considerable flexibility in the scope of the convention's deliberations and should not be construed in a manner that limits or disqualifies the resolutions from the count.

The text-limited resolutions of Delaware and North Dakota, however, do not exhibit the same flexibility. North Dakota's resolution appears to contemplate a convention limited to a consideration of the specific text of the article proposed in its resolution. A more flexible reading of the resolution, however, allows for a constitutional convention on the balanced budget which, among other solutions, must consider the amendment proposed by North Dakota.

Delaware contains particularly strict limitations on the convention's deliberations. A strict interpretation of Delaware's limitations suggests that it desired its resolution to be a valid application to Congress *only if* the other States passed an *identical* proposed amendment. A consideration of the complete text of the relevant portion of the resolution, however, reveals that the Delaware legislature was going to great lengths to limit the subject matter of a convention in the absence of any guidance from Congress about the procedures for an Article V constitutional convention:

¹⁶It is clear from the prefaces to almost all the resolutions or memorials that the State legislatures wished to include so called off-budget items in the total of appropriations.

Be it yet further resolved, 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 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 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 thereof nor would it have power to oppose other amendments on the same or different propositions.¹⁷

Most of the debate over the Delaware resolution has focused on the language of the bold text, which appears to be an explicit request for a specific text. Notwithstanding the resolution's clear Statement at the end of the excerpt, the Statements at the beginning of the excerpt suggest that the legislature was struggling through uncharted seas, without any guidance from the Congress, to justify its desire to limit the scope of a constitutional convention. In other words, one suspects that Delaware would not have used the same language had the Congress made it clear that an Article V convention could be limited to a specific subject. This observation, when coupled with the political economy of the Article V process, suggests that Congress or the Supreme Court would be justified in reading the explicit request for a specific text as a request for Congress to call a general balanced budget convention.

Although the validity of the North Dakota and Delaware text-limiting resolutions is not clear, the other text-limiting petitions should not be subject to challenge on the ground that they unduly limit the deliberations of the constitutional convention.

III. CONCLUDING COMMENTS

There is an inherent conflict of interest in the role of Congress in the Article V convention method of amending the Constitution: the convention method is designed to redress problems that Congress has refused to address, but Congress is allowed to determine when a sufficient number of States have called for a convention. Because of this dual role, Congress must be held to the highest standard of responsibility when it evaluates the States' resolutions and memorials calling for a balanced budget constitutional convention.

Congress has failed to provide the States with any guidance as to what it considers to be a valid application for Congress to call an Article V

¹⁷Bold text emphasis added by author.

constitutional convention. The Congressional decision to act on the States' petitions (in the event that two more States pass them) should not be based on legalistic and formalistic differences in the wording of the States' petitions. None of the differences in the wording of the resolutions and memorials preclude them from being accepted by Congress as valid Article V petitions. It is too late in the balanced budget amendment process for Congress or the Supreme Court to demand strict consistency in the wording of the petitions. All reservations about the validity of the petitions must be resolved in favor of the petitioning States.

It is not too late, however, for Congress to take steps to minimize such constitutional confusion in the future. In order to avoid the possibility that the current balanced budget amendment process will be used to set precedent for future uses of the Article V convention method, Congress should preempt the current process by proposing a balanced budget amendment for ratification by the States. Instead of worrying about whether two-thirds of the States desire to have a balanced budget amendment convention, this would resolve the current debate by requiring ratification of three-fourths of the States before the amendment became law. Finally, Congress should clarify its position on what type of State resolution or memorial will be accepted as valid Article V petitions. Congress should do this by enacting legislation governing all aspects of an Article V convention. In the future, Congress should not be allowed to gain from the uncertainty created by its own inaction.

APPENDIX I

EDITED TEXT OF STATES' PETITIONS FOR CONGRESSIONAL CALL FOR A BALANCED BUDGET CONSTITUTIONAL CONVENTION

ALABAMA -- August 18, 1976

HOUSE JOINT RESOLUTION 227

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislature and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Be it resolved by the Legislature of Alabama, both houses thereof concurring, That the Legislature of Alabama hereby petitions the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Alabama Legislature requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, 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 revenues for that fiscal year.

Be it further resolved, That, alternatively the Alabama Legislature makes application and requests that the Congress of the United States call a constitutional convention, pursuant to Article V of the Constitution of the

United States, for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 revenues for that fiscal year.

ALASKA — 1982

LEGISLATIVE RESOLVE NO. 1

Whereas, annually the United States moves more deeply into debt as its expenditures exceed its available revenues and the public debt now exceeds hundreds of billions of dollars; and

Whereas, annually the federal budget demonstrates the unwillingness or inability of the federal government to spend in conformity with available revenues; and

Whereas, proper planning, fiscal prudence, and plain good sense require that the federal budget be in balance absent a national emergency; and

Whereas, a continuously unbalanced federal budget except in time of national emergency causes continuous and damaging inflation and consequently a severe threat to the political and economic stability of the United States; and

Be it resolved by the Alaska State Legislature that the Congress of the United States is requested to propose and submit to the states an amendment to the Constitution of the United States which would require that within four years after its ratification by the various states, in the absence of a national emergency, the total of all appropriations made by Congress for a fiscal year shall not exceed the total of all estimated federal revenues for that fiscal year; and be it

Further resolved, That alternatively, this body makes application and requests that the Congress of the United States call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for that fiscal year; and be it

Further resolved, That if Congress proposes such an amendment to the Constitution this application shall no longer be of any force and effect; and be it

Further resolved, That this application and request shall no longer be of

any force or effect if the convention is not limited to the exclusive purpose specified by this resolution.

ARIZONA — April 10, 1979

SENATE JOINT RESOLUTION 1002

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation; and

Whereas, constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

... Therefore, be it

Resolved by the Legislature of the State of Arizona:

1. That the Congress of the United States institute procedures to add a new article to the Constitution of the United States and that the Congress of the United States prepare and submit to the several states an amendment to the Constitution of the United States 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 revenues for that fiscal year.

2. That, alternatively, the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States 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 revenues for that fiscal year.

3. That this application constitutes a continuing application in accord-

ance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this joint Resolution then this petition for a constitutional convention shall no longer be of any force or effect.

* * *

ARKANSAS — February 1, 1979

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit;

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Now therefore, be it resolved by the seventy-second General Assembly of the State of Arkansas:

That this Body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the General Assembly of the State of Arkansas requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States 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 revenues for that fiscal year; and be it further resolved:

That, alternatively, this Body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal

Constitution 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 revenues for that fiscal year.

* * *

COLORADO — March 31, 1978

SENATE JOINT MEMORIAL No. 1

Whereas, With each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislature and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, Convinced that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility; and

. . . now, therefore,

Be it resolved by the Senate of the Fifty-first General Assembly of the State of Colorado, the House of Representatives concurring herein:

That the Congress of the United States is hereby memorialized to call a constitutional convention pursuant to Article V of the constitution of the United States for the specific and exclusive purpose of proposing an amendment to the federal constitution prohibiting deficit spending except under conditions specified in such amendment.

Be it further resolved, That this application and request be deemed null and void, rescinded, and of no effect at the event that such convention not be limited to such specific and exclusive purpose.

* * *

DELAWARE --- June 23, 1975

HOUSE CONCURRENT RESOLUTION No. 36

Be it resolved by the House of Representatives of the 128th General Assembly, the Senate concurring therein, that the General Assembly of the State of Delaware hereby, and pursuant to Article V of the Constitution of the United States, makes application to the Congress of the United States to call a convention for the proposing of the following amendment to the Constitution of the United States:

"ARTICLE __. The costs of operating the Federal Government shall

not exceed its income during any fiscal year, except in the event of a declared war."

Be it further resolved that this application by the General Assembly of the State of Delaware constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V.

Be it yet further resolved, 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 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 thereof nor would it have power to propose other amendments on the same or different propositions.

* * *

FLORIDA — July 13, 1978

SENATE MEMORIAL No. 234

Whereas, it is estimated, as of August, 1975, that the federal debt at the end of the 1975 fiscal year will be \$8558.637 billion, and

Whereas, the fiscal year deficit for 1976 will be the largest in our history, between \$70 and \$80 billion, and

Whereas, the growing debt is a major contributor to inflation, lagging economic investment, excessive interest rates, and the resulting unemployment, and

Whereas, the economic welfare of the United States and its citizens depends on a stable dollar and a sound economy, . . .

* * *

. . . Now, therefore,

Be it resolved by the Legislature of the State of Florida: That the Legislature of the State of Florida does hereby make application to the Congress of the United States pursuant to Article V of the Constitution of the United States to call a convention for the sole purpose of proposing an amendment to the Constitution of the United States to require a balanced

federal budget and to make certain exceptions with respect thereto

* * *

GEORGIA — February 13, 1976

H.R. No. 469-1267

Be it resolved by the general assembly of Georgia:

That this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto

Be it further resolved that this application by the General Assembly of the State of Georgia constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Resolution before January 1, 1977, this petition for a Constitutional Convention shall no longer be of any force or effect.

* * *

IDAHO - January 20, 1979

HOUSE CONCURRENT RESOLUTION No. 7

Be it Resolved by the Legislature of the State of Idaho: Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Now, therefore, be it resolved by the members of the First Regular Session of the Forty-fifth Idaho Legislature, the House of Representatives and the Senate concurring, that the Legislature proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the legislature requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, 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 revenues for that fiscal year; and

Be it further resolved, that, alternatively, the Legislature makes application and requests that the Congress of the United States call a Constitutional Convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 revenues for that fiscal year; and

Be it further resolved, that this application by this Legislature constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the Legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this resolution then this petition for a Constitutional Convention shall no longer be of any force or effect; and

Be it further resolved, that this application and request be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose; and

* * *

IOWA — June 4, 1979

SENATE JOINT RESOLUTION 1

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good

sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is one of the greatest threats which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Be it resolved by the General Assembly of the State of Iowa:

Section 1. The Iowa general assembly proposes to the Congress of the United States that procedures be instituted in the Congress to propose and submit to the several states before July 1, 1980, an amendment to the Constitution of the United States requiring that the federal budget be balanced in the absence of a national emergency.

Sec. 2. Alternatively, effective July 1, 1980, if the Congress of the United States has not proposed and submitted to the several states an amendment as provided in section one (1) of this resolution, the Iowa general assembly respectfully makes application to and petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto.

Sec. 3. Effective July 1, 1980, this application by the Iowa general assembly constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made similar applications pursuant to Article V, but if the Congress proposes an amendment to the Constitution identical in subject matter to that contained in this resolution, or if before July 1, 1980, the general assembly repeals this application to call a constitutional convention, then this application and petition for a constitutional convention shall no longer be of any force or effect.

Sec. 4. This application and petition shall be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose.

* * *

INDIANA — April 4, 1979

SENATE ENROLLED JOINT RESOLUTION No. 8

Be it resolved by the General Assembly of the State of Indiana:

Section 1. The General Assembly of the State of Indiana makes application to the Congress of the United States for a convention to be called under

Article V of the Constitution of the United States for the specific and exclusive purpose of proposing an amendment to the Constitution to the effect that, in the absence of a national emergency, the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year.

* * *

KANSAS April 26, 1978

SENATE CONCURRENT RESOLUTION No. 1661

Whereas, Annually the United States moves more deeply in debt as its expenditures exceed its available revenues and the public debt now exceeds hundreds of billions of dollars; and

Whereas, Annually the federal budget demonstrates the unwillingness or inability of the federal government to spend in conformity with available revenues; and

Whereas, proper planning, fiscal prudence, and plain good sense require that the federal budget be in balance absent national emergency; and

Whereas, A continuously unbalanced federal budget except in a national emergency causes continuous and damaging inflation and consequently a severe threat to the political and economic stability of the United States; and

* * *

. . . Now, therefore,

Be it resolved by the Legislature of the State of Kansas, . . . That the Congress of the United States is hereby requested to propose and submit to the States an amendment to the Constitution of the United States which would require that within five years after its ratification by the various states, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year; and

Be it further resolved: That, alternatively, the Legislature of the State of Kansas hereby makes application to the Congress of the United States to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year. If Congress shall propose such an amendment to the Constitution, this application shall no longer be of any force or effect:

* * *

LOUISIANA

SENATE CONCURRENT RESOLUTION No. 73

Whereas, the United States Government has, over the past three decades, embarked on a course of continuous and ever increasing deficit spending; and

Whereas, the public debt engendered thereby now far exceeds 300 billion dollars, and current budget proposals include provisions for a further deficit of 43 billion dollars; and

Whereas, such national debt is, in and of itself, a major contributor to the very inflation to which the United States is committed to eradicating; and

Whereas, the massive national debt is inimical to the public welfare, limiting the amount of credit available to private citizens, thus curtailing opportunities for needed economic growth; and

* * *

Whereas, the ability of the Federal Government to avoid the difficult budgetary choices posed by zero debt financing has resulted in a lack of objective budgetary analysis, and thus the funding of unnecessary or inefficient programs.

Therefore, be it resolved by the Senate of the Legislature of the State of Louisiana, the House of Representatives thereof concurring, that pursuant to Article V of the Constitution of the United States, the Legislature of the State of Louisiana does hereby apply to the Congress of the United States for a convention to consider the following amendment to the United States Constitution:

Section 1. Except as provided in Section 3 [a national emergency exception], the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues for the United States for such fiscal year.

Section 2. There shall be no increase in the national debt, and the existing debt, as it exists on the date on which this amendment is ratified, shall be repaid during the one hundred year period following the date of such ratification. . . .

* * *

Be it further resolved that the purview of any convention called by Congress pursuant to this resolution be strictly limited to the consideration of an amendment of the nature as herein proposed.

Be it further resolved that this application by the Legislature of the State of Louisiana constitutes a continuing resolution pursuant to Article V of the United States Constitution, until such time as two-thirds of the Legislatures

of the several states have made similar application, and the convention herein applied for is convened.

MARYLAND — April 3, 1975

RESOLUTION No. 77

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds hundreds of billions of dollars.

Attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of the Congress.

The annual Federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues.

The unified budget of \$304.4 billion dollars for the current fiscal year does not reflect actual spending because of the exclusions of special outlays which are not included in the budget nor subject to the legal public debt limit.

* * *

Knowledgeable planning and fiscal prudence require that the budget reflect all Federal spending and that the budget be in balance.

Believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to reverse this trend.

* * *

Resolved by the General Assembly of Maryland, That this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that the General Assembly of Maryland requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, 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 the estimated Federal revenues, excluding any revenues derived from borrowing, for that fiscal year: and, be it further

Resolved, That this body further and alternatively requests that the Congress of the United States call a constitutional convention for the special and exclusive purpose of proposing such an amendment to the Federal Constitution, to be a new Article XXVII: and be it further

Resolved, That the proposed new Article XXVII (or whatever numeral may then be appropriate) read substantially as follows:

PROPOSED ARTICLE XXVII

"The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of the Members elected to each House of the Congress so determine by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year."

* * *

MISSISSIPPI - February 25, 1975

RESOLUTION

Whereas, an ever-increasing public debt is inimical to the general welfare of the people of the United States; and

Whereas, the national debt is already dangerously high and any further increases will be harmful and costly to the people of the United States; and

Whereas, a continuous program of deficit financing by the Federal Government is one of the greatest factors supporting the inflationary conditions presently existing in this country and therefore has been the chief factor in reducing the value of the American currency; and

Whereas, payment of the increased interest required by the ever increasing debt would impose an undue hardship on those with fixed incomes and those in lower income brackets; and

Whereas, it is not in the best interest of either this or future generations to continue such a practice of deficit spending particularly since this would possibly deplete our supply of national resources for future generations; and

Whereas, by constantly increasing deficit financing the Federal Government has been allowed to allocate considerable funds to wasteful and in many instances nonbeneficial public programs; and

Whereas, by limiting the Federal Government to spend only the revenues that are estimated will be collected in a given fiscal year, except for certain specified emergencies, this could possibly result in greater selectivity of

Federal Government programs for the benefit of the public and which would depend upon the willingness of the public to pay additional taxes to finance such programs, and

* * *

Now Therefore, Be it Resolved by the House of Representatives of the State of Mississippi, the Senate Concerning Therein. That we do hereby pursuant to Article V of the Constitution of the United States, make application to the Congress of the United States to call a convention of the several states for the proposing of the following amendment to the Constitution of the United States:

Article-

Section 1. Except as provided in Section 3, the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues of the United States for such fiscal year.

Section 2. There shall be no increase in the national debt and such debt, as it exists on the date on which this article is ratified, shall be repaid during the one-hundred-year period beginning with the first fiscal year which begins after the date on which this article is ratified. The rate of repayment shall be such that one-tenth (1/10) of such debt shall be repaid during each ten-year interval of such one-hundred-year period.

Section 3. In time of war or national emergency, as declared by the Congress, the application of Section 1 or Section 2 of this article, or both such sections, may be suspended by a concurrent resolution which has passed the Senate and the House of Representatives by an affirmative vote of three-fourths (3/4) of the authorized membership of each such house. Such suspension shall not be effective past the two-year term of the Congress which passes such resolution, and if war or an emergency continues to exist such suspension must be reenacted in the same manner as provided herein.

Section 4. This article shall apply only with respect to fiscal years which begin more than six (6) months after the date on which this article is ratified."

Be it Further Resolved, That this application by the Legislature of the State of Mississippi constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds (2/3) of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical with that contained in this resolution before January 1, 1976, this application for a convention of the several states shall no longer be of any force or effect.

* * *

SENATE CONCURRENT RESOLUTION No. 3

For the purpose of requesting appropriate action by the Congress, either acting by consent of two-thirds of both houses or upon the application of the legislatures of two-thirds of the several states, to propose an amendment to the Federal Constitution to require, with certain exceptions, that the federal budget be balanced.

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds one trillion dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to limit the growth of federal spending and taxes and balance the budget; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget; and

Whereas, knowledgeable planning, fiscal prudence and plain good sense require that the budget reflect all federal spending and be in balance on a regular basis; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, the federal deficit in Fiscal Year 1982 was \$110.7 billion, nearly double the deficit in Fiscal Year 1981; and

Whereas, the Congressional Budget Office projects a deficit for Fiscal Years 1983 and 1984 of \$155 billion and \$200 billion, respectively; and

Whereas, the United States Senate approved a proposed balance budget amendment in response to the efforts of the thirty-one state legislatures which have requested a limited convention on this subject, and its conviction about the need for a constitutional restraint upon Congress' fiscal authority; and

Whereas, the Reagan Administration has indicated that the budget will not be balanced by 1984; and

* * *

Now, therefore, be it resolved by the Senate of the Eighty-second General Assembly of the State of Missouri, the House of Representatives concurring therein, that the Missouri General Assembly proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the Missouri General Assembly requests the Congress to prepare and submit to the several states before January 1, 1984, an amendment to the Constitution

of the United States, requiring a balanced federal budget and to make certain exceptions with respect thereto; and

Be it further resolved that if, by January 1, 1984, the Congress has not proposed and submitted to the several states such an amendment, this body respectfully makes application to the Congress of the United States for a convention to be called under Article V of the Constitution of the United States for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto; and

Be it further resolved that effective January 1, 1984, this application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several States have made similar applications pursuant to Article V, but if the Congress proposes an amendment to the Constitution identical in subject matter to that contained in this resolution, then this application and petition for a constitutional convention shall no longer be of any force or effect; and

Be it further resolved that this application shall be deemed null and void, rescinded and of no effect in the event that such convention not be limited to such specific and exclusive purpose; and

* * *

NEBRASKA — February 23, 1976

LEGISLATIVE RESOLUTION 106

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenue, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenue; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy is the greatest threat which faces our nation, we firmly believe that constitutional restraints is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Now, therefore, be it resolved by the members of the eighty-fourth Legislature of Nebraska, second session:

1. That this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the State of Nebraska requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, 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 revenues for that fiscal year.

2. That, alternatively, this Legislature makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States 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 revenues for that fiscal year. . .

* * *

NEVADA — April 1979

SENATE JOINT RESOLUTION No. 8

Whereas, Proper economic planning, fiscal prudence and common sense require that the federal budget include all federal spending and be in balance; and

Whereas, The annual federal budgets continually reflect the unwillingness or inability of the legislative and executive branches of the Federal Government to balance the budget; and

Whereas, the national debt now amounts to hundreds of billions of dollars and is increasing enormously each year as federal expenditures exceed federal revenues; and

Whereas, The inflation and other results of fiscal irresponsibility of the Federal Government demonstrate the need for a constitutional restraint upon excessive spending; and

* * *

Resolved by the Senate and Assembly of the State of Nevada, jointly. That this legislature requests the Congress of the United States to call a convention limited to proposing an amendment to the Constitution of the United States which would provide that, in the absence of a national emergency, the total of all federal appropriations for any fiscal year must not exceed the total of the estimated federal revenue for that year; and be it further

Resolved, That this legislature conditions this request upon the Congress of the United States' establishing appropriate restrictions limiting the subject matter of a convention called pursuant to this resolution to the subject matter of this resolution, and if the Congress fails to establish such restrictions, this resolution has no effect and must be considered a nullity;

. . .

NEW HAMPSHIRE — May 1979

CONCURRENT RESOLUTION

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, the State of New Hampshire has long been known for its sensible, prudent approach to government spending; and

Whereas, the New Hampshire example of fiscal responsibility is a model for all to follow; and

Whereas, we believe that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

. . .

Resolved by the legislature of the State of New Hampshire, that this body proposes to the Congress of the United States that procedures be instituted in the Congress to propose and submit to the several states an amendment to the Constitution of the United States requiring that the federal budget be balanced in the absence of a national emergency; and be it further

Resolved, that, alternatively, this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto; and be it further

Resolved, that this application by this body constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar application pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this House Concurrent, then this petition for a Constitutional Convention shall no longer be of any force or effect; and be it further

Resolved, that this application and request be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose;

. . .

NEW MEXICO — 1976

SENATE JOINT RESOLUTION 1

Be it resolved by the legislature of the State of New Mexico:

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

. . .

Now, therefore, be it resolved by the legislature of the State of New Mexico that this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the legislature of the State of New Mexico requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, 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 revenues for that fiscal year; and

Be it further resolved that, alternatively, this body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 revenues for that fiscal year; . . .

* * *

NORTH CAROLINA - January 29, 1979

SENATE JOINT RESOLUTION No. 1

Whereas, believing that inflation is the most serious problem facing the people of the United States, and the primary cause of inflation is unchecked federal spending; and

Whereas, the State of North Carolina is required by its Constitution to have a balanced budget, and has long operated on a sound fiscal basis which the federal government would be well-served to emulate; and

* * *

Whereas, by Resolution 97 of the General Assembly, ratified July 1, 1977, the Congress was requested to submit an amendment to the States to require a balanced federal budget, but the Congress has failed to act; Now, therefore, be it resolved by the Senate, the House of Representatives concurring:

Section 1. That the Congress of the United States is requested to propose and submit to the States an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the federal budget be balanced each fiscal year within four years after the amendment is ratified by the various states.

Section 2. That, alternatively, this body respectfully petitions the Congress of the United States to call a convention for the exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget in the absence of a national emergency.

Section 3. That this application constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, or until this application is rescinded by the General Assembly of North Carolina; but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this joint resolution before January 1, 1980, this petition for a Constitutional Convention shall no longer be of any effect.

Section 4. That this application and request be deemed rescinded in the

event that the convention is not limited to the subject matter of this application.

Section 5. That since this application under Article V of the Constitution of the United States is the exercise of a fundamental power of the sovereign states under the Constitution of the United States, it is requested that receipt of this application by the Senate and the House of Representatives of the United States Congress be officially noted and duly entered upon their respective records, and that the full context of this resolution be published in the official publication of both the Senate and the House of Representatives of the Congress.

* * *

NORTH DAKOTA — March 11, 1975

SENATE CONCURRENT RESOLUTION No. 408

Be it resolved by the Senate of the State of North Dakota, the House of Representatives concurring therein:

That we respectively propose an amendment to the Constitution of the United States and call upon the people of the several states for a convention for such purpose as provided by Article V of the Constitution, the proposed Article providing as follows:

ARTICLE —

Section 1. The President shall submit, at the beginning of each new Congress, an annual budget for the ensuing fiscal year setting forth in detail the proposed expenditures and the total estimated revenue of the Federal Government from sources other than borrowing. The President may set new revenue estimates from time to time. Expenditures for each two-year period shall not exceed the estimated revenue except in time of war or a national emergency declared by Congress. The provisions of this Article shall not apply to the refinancing of the national debt;

* * *

OKLAHOMA — April 15, 1976

HOUSE JOINT RESOLUTION No. 1049

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars

Whereas, the annual federal budget continually demonstrates unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues.

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor

subject to the legal public debt limit.

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance,

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility.

* * *

Now, therefore, be it resolved by the House of Representatives and the Senate of the 2nd Session of the 35th Oklahoma legislature:

Section 1. That this Body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Legislature of the State of Oklahoma makes application and requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations be made by the Congress of any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Section 2. That, alternatively, this Body requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 revenues for that fiscal year.

* * *

OREGON — July 11, 1977

SENATE JOINT MEMORIAL 2

* * *

Whereas the level of federal expenditures demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

* * *

Whereas the State of Oregon by its Constitution and its laws in adopting a budget must show a balanced relation between the total proposed spending and the total anticipated revenues or provide for paying the deficiency; and

Whereas it is just and proper that the United States of America in its obligation to provide leadership for all of the states of the union should pursue the same policy; and

Whereas a balanced budget would lessen the economic burden on its citizens; and

Whereas a balanced budget would lessen the need for increased state and local taxes; now, therefore,

Be it Resolved by the Legislative Assembly of the State of Oregon:

(1) That this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto

(2) That this application by this body constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Joint Memorial before January 1, 1979, this petition for a constitutional convention shall no longer be of any force or effect.

* * *

PENNSYLVANIA — March 31, 1976

RESOLUTION No. 236

Whereas, Requesting appropriate action by the Congress, either acting by consent of two-thirds of both Houses or, upon the application of the Legislatures of two-thirds of the several states, calling a Constitutional Convention to propose an amendment to the Federal Constitution to require, with certain exceptions, that the total of all Federal appropriations may not exceed the total of all estimated Federal revenues in any fiscal year.

Whereas, With each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, The annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

Whereas, Unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, Knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, Believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Resolved, (the Senate concurring), That the General Assembly of the Commonwealth of Pennsylvania proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the General Assembly of the Commonwealth of Pennsylvania requests the Congress to prepare and submit to the several states an appendix to the Constitution of the United States, 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 revenues for that fiscal year; and be it further:

Resolved, That, alternatively, the General Assembly of the Commonwealth of Pennsylvania makes application and requests that the Congress of the United States call a Constitutional Convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 expended Federal revenue for that fiscal year; . . .

* * *

SOUTH CAROLINA 1978

CONCURRENT RESOLUTION

Whereas, with each passing year this Nation becomes more deeply in debt as congressional expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds a half-trillion dollars; and

Whereas, attempts to limit spending by means of the new congressional budget committee procedures have proved fruitless; and

Whereas, the annual Federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, the proposed budget of five hundred billion dollars for fiscal year 1978-79 does not reflect total spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the resulting inflation and decline in the Nation's trading position is a

growing and corrosive threat to our economy, to the well-being of our people, and to our representative democracy, that constitutional restraint is necessary to bring the fiscal discipline needed to reverse this trend. Now, therefore,

Be it resolved by the Senate, the House of Representatives concurring:

That Congress is requested, pursuant to Article V of the United States Constitution, to call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution.

Be it further resolved that the proposed new amendment read substantially as follows:

Proposed Article XXVII

The total of all federal appropriations made by the Congress for any fiscal year shall not exceed the total of the estimated federal revenues for that fiscal year, excluding any revenues derived from borrowing, and this prohibition extends to all federal appropriations and all estimated federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress is enacting appropriation bills shall comply with this article.

The provisions of this article shall be suspended for one year upon the proclamation by the President of an unlimited national emergency. The suspension may be extended, but not for more than one year at any one time, if two-thirds of the membership of both Houses of Congress so determine by Joint Resolution."

* * *

SOUTH DAKOTA — January 31, 1979

SENATE JOINT RESOLUTION 1

Whereas, with each passing year this nation becomes more deeply in debt as its annual expenditures frequently exceed annual available revenues, so that the public debt also steadily increases to a size of inordinate proportions; and

Whereas, unified budgets do not necessarily reflect actual spending because of the exclusion of special spending outlays which are not included in the budget nor are subject to the statutory legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, we believe that fiscal irresponsibility at the federal level, with the inflation which results primarily from this policy, is the greatest threat which faces our nation, and that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Be it resolved by the Senate of the State of South Dakota, the House of Representatives concurring therein:

That the Legislature does hereby make application to the Congress of the United States that procedures be instituted on the Congress to add a new article to the Constitution of the United States, and that the Legislature of the State of South Dakota hereby requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency, as defined by law, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved, that alternatively, this Legislature hereby make application under said Article V of the Constitution of the United States and with the same force and effect as if this Resolution consisted of this portion alone and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States requiring in the absence of a national emergency, as defined by law, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved, that this application and request be deemed null and void, rescinded, and of effect in the event that such convention not be limited to such specific and exclusive purpose; and

Be it further resolved, that this application by this legislature constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made applications for similar relief pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Joint Resolution then this petition for a Constitutional Convention shall no longer be of any force or effect; . . .

. . .

TENNESSEE — March 30, 1977

HOUSE JOINT RESOLUTION No. 22

Whereas, each year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the legal public debt has exceeded \$137 billion dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of Congress; and

Whereas, nonetheless, the annual budget repeatedly demonstrates an

unwillingness or inability to curtail spending to conform to available revenues; and

Whereas, the federal budget never reflects actual spending because of the exclusion of special outlays which are neither included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning requires that the budget reflect all federal spending and that the budget be in balance; and Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that a constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; how, therefore,

Be it resolved by the House of Representatives of the Ninetenth General Assembly of the State of Tennessee, the Senate concurring. That pursuant to Article V of the Constitution of the United States application is hereby made to the United States Congress to call a convention for the purpose of considering and proposing an amendment to the Constitution of the United States to require that, in the absence of a national emergency, the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year, such amendment to read substantially as follows:

The total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year; and this prohibition extends to all federal appropriations and all estimated federal revenues without exception. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all federal appropriations not exceed the total estimated federal revenues for a fiscal year, and two-thirds (2/3) of all members elected to each house of the Congress so determine by joint resolution, the total of all federal appropriations may exceed the total estimated federal revenues for that fiscal year.

Be it further resolved, That this application shall constitute a continuing application for such convention under Article V of the Constitution of the United States until the legislatures of at least two-thirds (2/3) of the several states shall have made like applications and such convention shall have been called and held in conformity therewith, unless the Congress itself proposes such amendment within the time and the manner herein provided.

Be it further resolved, That proposal of such amendment by the Congress and its submission for ratification to the legislatures of the several states substantially in the form of the article herein above specifically set forth, at any time prior to sixty (60) days after the legislatures of two-thirds (2/3) of the several states shall have made application for such convention, shall render such convention unnecessary and the same not be held. Otherwise, such convention shall be called and held in conformity with such applications.

Be it further resolved, That as this application under Article V of the Constitution of the United States is the exercise of a fundamental power of the sovereign states under the Constitution of the United States, it is requested that receipt of this application by the Senate and the House of Representatives of the Congress of the United States be officially noted and duly entered upon their respective records, and that the full context of this resolution be published in the official publication of both the Senate and the House of Representatives of the Congress.

* * *

TEXAS -- June 16, 1977

H.C.R. No. 31

Resolved by the House of Representatives of the State of Texas, the Senate concurring, That the 65th Legislature propose to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the State of Texas request the Congress to prepare and submit to the several states an amendment to the Constitution of the United States requiring 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 revenues for that fiscal year; and, be it further

Resolved, That, alternatively, this body request that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the federal constitution 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 revenues for that fiscal year; . . .

* * *

UTAH -- April, 1979

RESOLUTION

Be it resolved by the Legislature of the State of Utah:

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars;

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues;

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance;

Whereas, numerous states have constitutional requirements that appropriations not exceed anticipated revenues for the forthcoming year;

Whereas, believing that fiscal irresponsibility at the federal level, and the inflation which results therefrom, the greatest threat now facing our nation, this Legislature is of the firm conviction that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility;

* * *

Be it resolved by the 43rd Legislature of the State of Utah, That the Congress of the United States is requested to institute procedures to add a new article to the Constitution of the United States and to prepare and submit to the several states an amendment to the Constitution of the United States 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 revenues for that fiscal year.

Be it further resolved, That, alternatively, this Legislature applies to the Congress of the United States to call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the federal constitution which would require, 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 that total of all estimated federal revenues for that fiscal year; . . .

* * *

Be it further resolved, 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 a part of the necessary two-thirds states for such a call only if the convention is limited to the subject matter of this Resolution.

* * *

VIRGINIA - March 10, 1976

SENATE JOINT RESOLUTION No. 36

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the

Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Whereas, we believe such action vital; now, therefore, be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the General Assembly of Virginia proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that this Body hereby requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, 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 revenues for that fiscal year; and, be it

Resolved further, That, alternatively, this Body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution 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 revenues for that fiscal year; and be it. . . .

* * *

WYOMING - March 17, 1977

ENROLLED JOINT RESOLUTION No. 1

Whereas, with each passing year this title becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now amounts to hundreds of billions of dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous assertions that the responsibility for appropriations is the constitutional duty of the Congress; and

Whereas, the annual Federal budget repeatedly demonstrates the unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

Whereas, the unified budget does not reflect actual spending because of the exclusions of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, the U.S. News and World Report reported on February 25, 1974, that of these nonbudgetary outlays in the amount of \$15,600,000,000.00, the sum of \$12,900,000,000.00 represents funding of essentially private agencies which provide special services to the Federal Government and

Whereas, knowledgeable planning and fiscal prudence require that the budget reflect all Federal spending and that the budget be in balance; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; and

* * *

Now, therefore be it resolved by the Legislature of the State of Wyoming, a majority of all members of the two houses, voting separately, concurring herein:

Section 1. That procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that Congress prepare and submit to the several states an amendment to the Constitution of the United States, 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 the estimated Federal revenues, excluding any revenues derived from borrowing, for that fiscal year; or

Section 2. That the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing such an amendment to the Federal Constitution, to be a new Article XXVII.

Section 3. That the legislatures of each of the several states comprising the United States apply to the Congress requiring it to call a constitutional convention for proposing such an amendment to the Federal Constitution, to be a new Article XXVII.

Section 4. That the proposed new Article XXVII (or whatever numeral may then be appropriate) reads substantially as follows:

Proposed Article XXVII

"The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this

prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing, the President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of all Members elected to each House of the Congress concur by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year."

* * *

NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

Publications List

Antitrust Contribution and Claim Reduction: An Objective Assessment, by former U.S. Attorney General Griffin B. Bell with an Introduction by Senator Paul Laxalt and a Preface by Congressman Jack Brooks. (1982 - \$3.50)

Fourteen Years or Life: The Bankruptcy Court Dilemma, by Judge Robert E. DeMascio, Judge William L. Norton and Richard Lieb, Esq. with an Introduction by Senator Strom Thurmond and a Preface by Congressman Peter W. Rodino, Jr. (1983 - \$3.50)

Abolition of Diversity Jurisdiction: An Idea Whose Time Has Come?, by M. Caldwell Butler, Esq., and John P. Frank, Esq., with Observations by Chief Justice Vincent L. McKusick, Maine Supreme Judicial Court. (1983 - \$3.50)

Activism by the Branch of Last Resort: Of the Seizure of Abandoned Swords and Purses, by Judge Malcolm R. Wilkey and a Foreword by the Honorable Sam J. Ervin, former U.S. Senator. (1984 - \$3.50)

Judicial Wage Determination . . . A Volatile Spectre, Perspectives on Comparable Worth, by Frank C. Morris, Esq., et al. with a foreword by Linda Chavez, formerly of the U.S. Commission on Civil Rights. (1984 - \$3.50)

Disinvestment: Is It Legal? Is It Moral? Is It Productive? An Analysis of Politicizing Investment Decisions, by Prof. John H. Langbein, Prof. Roy A. Schotland, and Prof. Albert P. Blaustein with special commentaries by President of Harvard University, Derek Bok and former Governor William G. Milliken. (1985 - \$5.00)

The Legal System Assault on the Economy, Volume I, The High Cost and Effect of Litigation, by Kenneth R. Feinberg, Esq., Jack M. Kress, Esq., and Gary L. McDowell, Esq., with excerpts from the writings of the Honorable Warren E. Burger, Chief Justice of the United States Supreme Court. (1986 - \$5.00)

The Legal System Assault on the Economy, Volume II, Congress, the Courts and the Regulatory System: Into the Abyss and Out Again?, by

Chief Judge Loren A. Smith, United States Claims Court and Joseph A. Morris, Esq., et al. (1986 - \$6.00)

The Legal System Assault on the Economy, Volume III, The Insurance Crisis, Tort Reform, and Alternative Solutions, by Peter Huber, Esq., Professor Jeffrey O'Connell, Victor E. Schwartz, Esq., Robert Selsor, Esq., and Richard K. Willard, Esq., Assistant U.S. Attorney General. (1986 - \$6.00)

American Enterprise, the Law and the Commercial Use of Space, Volume I. An Analysis of Treaties, Legislation, Regulation and the Political Scenario, by Pamela Louise Meredith, Esq., George S. Robinson, Esq., Grier Curran Raclin, Esq., and Rodolphe J.A. De Seife, Esq., with an Introduction by Governor Pierre S. Du Pont IV. (1986 - \$6.00)

American Enterprise, the Law and the Commercial Use of Space, Volume II, Remote Sensing and Telecommunications, How Free? How Regulated? by Robert J. Aamoth, Esq., and Dr. Frederick B. Henderson III, et al. (1986 - \$6.00)

American Enterprise, the Law and the Commercial Use of Space, Volume III, Jurisdiction, Tort Law, Intellectual Property, Communications, Taxation, Patents and Insurance by Richard Dalbello, Esq., Steven H. Flajser, Dennis J. Hellman, Esq., William E. Thiele, et al. (1987 - \$6.00)

The American Law Institute and Corporate Governance: An Analysis and Critique, by George A. Birrell, Esq., Professors William J. Carney, Roberta S. Karmel, and Nicholas Wolfson; Dean James F. Hogg, Donald V. Seibert, William Wemple, Esq., with special commentaries by Walter B. Wriston and John J. Phelan, Jr., Chairman of the New York Stock Exchange. (1987 - \$6.00)

Edited Proceedings of the 1981 National Conference on Workers' Compensation and Workplace Liability. (currently unavailable)

Edited Proceedings of the 1982 National Conference on Product Liability Tort Law Reform. (currently unavailable)

Edited Proceedings of the 1983 National Conference on Health Related Claims: Can the Tort and Compensation Systems Cope? (1984 - \$35.00 Law Libraries: \$50.00 all else)

Judicial/Legislative Watch Report - an update report service of NLCPJ on legislation and activities affecting the judiciary and the judicial system, (published while Congress is in session, \$25.00 per year)

NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

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LIMITING CONGRESSSIONAL TERMS:

An Historical Perspective

by

Michael H. Klein

Americans to Limit Congressional Terms
Washington, DC

September 25, 1989

AMERICANS TO LIMIT CONGRESSIONAL TERMS



LIMITING CONGRESSIONAL TERMS:

An Historical Perspective

INTRODUCTION

In the two hundred years since the Congress of the United States was established in its present configuration, there has been much debate about the effectiveness and accountability of this institution. Specifically, the discussion attempts to answer one basic question: Is Congress structured in such a manner to achieve its founders' objective -- to make the nation's laws in accordance with the wishes of its people?

Among the structural considerations that have periodically been examined in an effort to make Congress act with greater accountability is the duration of individual tenure in Congress. While House members stand for election every two years and Senate members every six years, the re-election rate of members of both chambers has steadily risen in recent years.

In view of recent survey data that indicates that more Americans are dissatisfied with Congress than are satisfied, a number of reform proposals have surfaced to resolve the real or

perceived obstacles to Congressional accountability.¹

One proposal that is structural in nature is a constitutional amendment to limit Congressional terms. This proposal revives a long standing debate as to the advisability of turnover in the legislative branch, one that is older than the Constitution itself.

HISTORICAL CONTEXT

The promotion of turnover in the legislative branch is an idea that in fact predates the present incarnation of Congress. In 1777, the Articles of Confederation were amended to mandate that "no person shall be capable of being a delegate (to the Continental Congress) for more than three years in any term of six years."² The primary idea behind this provision, according to historians of the era, was that the legislative branch should reflect the makeup and outlook of the citizenry that it purports to represent.

The initial attempt at term limitation, however, abruptly was terminated in 1784, when an attempt to enforce the provision

¹. According to a June, 1989 poll taken by the Wirthlin Group, a prominent national public opinion research firm, 48 per cent of Americans are dissatisfied with the performance of Congress, while only 45 per cent approve.

². Edmund C. Burnett, The Continental Congress, (Macmillan, 1941), p. 250.

led to a near-rebellion on the floor of the Continental Congress.³ After a committee of delegates was established to rule on the eligibility of delegates, its rulings were met with pitched resistance from those who were faced with expulsion from the proceedings. Said James Monroe about the level of discourse on the subject: "I never saw more indecent conduct in any assembly before."⁴

In addition to the distraction the term limitation had caused to the deliberations of the Continental Congress, it was also determined that the removal of those delegates who had overstayed their statutory welcome would cause the Congress to suspend its business entirely, as a quorum could not be retained.⁵

With regard to the Constitution, no term limitation provision was proposed at the outset, primarily due to the problems of implementing such a provision under the Articles of

³. Ibid. p.605. On March 1, 1784, it was determined that the first such three year period had indeed passed, and a committee was assembled to determine the eligibility of delegates to the Congress. The first delegate to be ruled ineligible, Samuel Osgood of Massachusetts, angrily bade "farewell all connection with public life." The committee then declared both Delaware delegates retroactively ineligible, and the Rhode Island delegation was slated for dismissal.

⁴. Ibid.

⁵. Ibid.

Confederation. However, the idea of encouraging congressional turnover was one that enjoyed widespread support in the Constitutional Convention.

In attacking a proposal by James Madison for triennial elections, Massachusetts Delegate Elbridge Gerry called such a lengthy term "limited monarchy".⁶ As supporters of annual and triennial elections to the House clashed in the Convention, a compromise proposal to mandate biennial elections to the House of Representatives passed unanimously.⁷

While there was much contention over the specific proposals to ensure turnover in the legislative branch, the general goal of using rotation to ensure accountability was widely supported at this point in time. Rhode Island's Roger Sherman typified the prevailing sentiment by remarking that "Representatives ought to return home and mix with the people. By remaining at the seat of government, they would acquire the habits of the place, which might differ from those of their constituents."⁸

In essence, Sherman and others believed wholeheartedly in the notion of the "citizen legislator", one who would serve his

⁶. Charles O. Jones, Every Second Year, (Brookings Institute, 1968), p.4.

⁷. Ibid. p.6.

⁸. Ibid. p.4.

constituents out of a sense of civic duty, rather than vocational or personal ambition.

In the nineteenth century, Congressional term limitation, at least from a structural or statutory standpoint, was never much of an issue. Aside from the obvious hardships of transportation and climatic extremities that tended to encourage turnover, there was also a tradition in many districts of voluntary term limitations.⁹ Abraham Lincoln, for instance, was limited to a single term by virtue of the tradition in his Illinois district.¹⁰

There were also internal reasons within the House during this period mitigating against extended tenure. Specifically, the House leadership structure was not driven by seniority, instead, party control had a tendency to shift frequently and those Representatives who wished to pursue politics as a career sought seats in the Senate or in their respective Governors' mansions. Of the seven Speakers of the House elected between 1870 and 1894, for instance, one was elected in his third term of service, two in their fourth term, two in their fifth, one in his sixth, and one in his seventh term.¹¹ Additionally, three of those Speakers

⁹. Nelson W. Polsby, The Congressional Career, (Random House, 1971), p.23.

¹⁰. Ibid.

¹¹ Ibid.

left the House to serve in the Senate. one died, and one left to join a Wall Street law firm.

In contrast to Congressional term limitation, Presidential term limitation was an oft-discussed issue since the Constitutional Convention. Every President to serve in the 1800's, with the exception of Abraham Lincoln, publicly supported a two-term, eight-year limit on Presidential service.¹² Even Lincoln, who did not take an explicit stand of the issue, commented: "If our American society and United States Government are overthrown, it will come from the voracious desire for office, this wriggle to live without toil, work, and labor--from which I am not free myself."¹³

In 1951, a limitation on Presidential service was finally ratified as the Twenty-second Amendment to the U.S. Constitution. The 22nd Amendment was introduced in 1947 by the then-majority Republicans in the House in response to Democrat Franklin D. Roosevelt's election to four consecutive Presidential terms. Despite its origin as a partisan initiative, it was ratified by the states in 1951 with widespread support. Said the Washington Post in an editorial describing the bi-partisan nature of ratification:

¹². Presidential and Congressional Term Limitation: The Issue That Stays Alive, (Foundation for the Study of Presidential and Congressional Terms, 1981) pp. 10-11.

¹³. Ibid

The only basic reason for writing this additional restriction into the constitution is the fear that, in these days of big government and perpetual emergency, some future president with dictatorial tendencies might perpetuate himself in office indefinitely. Perhaps that chance is remote, but power-grasping officials are common enough in both history and current world experience to warrant this safeguard.¹⁴

Despite the passage of the 22nd Amendment, the issue of Presidential term succession was never fully settled, at least in the eyes of some scholars. In the 1970's the issue resurfaced as proposals emerged to limit the President to a single, six-year term of service, an idea that was supported by then-President Jimmy Carter.¹⁵

At the same time, in the post-Watergate reform era, the idea of Congressional term limitation resurfaced once again, most notably in several academic discussion forums in 1979 and 1980.¹⁶ While Senator Dennis DeConcini (D-Arizona) and Senator John Danforth (R-Missouri) introduced a bill during this period to limit members of Congress to twelve years of individual service, the lack of organized external pressure and a basic resistance

14. "22nd Amendment", Washington Post, February, 29, 1951, p.8.

15. Limiting Presidential and Congressional Terms, (American Enterprise Institute, 1979), pp.1-5.

16. How Long Should They Serve?: Limiting Terms for the President and Congress, (American Enterprise Institute, 1980) 25 pages.

among sitting members to restrict their own incumbencies prevented this legislation from becoming enacted.¹⁷

In the mid to late 1980's, in the wake of an unprecedented 99 percent re-election rate for incumbent members of the House of Representatives, and following a number of ethics scandals in the House leadership, several reform minded grass-roots and educational groups with an interest in limiting Congressional terms were established.

CONCLUSION

The low estimation in which the American public holds the Congress at this point indicates that there may be the needed impetus to write into the Constitution the expressed wish of its framers for a "citizen legislature". According to a poll taken by the Gallup Organization in 1989, 57 per cent of those surveyed explicitly support a constitutional amendment to limit Congressional terms. With the emergence of a broad-based, bipartisan consensus behind term limitation, a distinct possibility exists that congressional term limitation will reemerge as a salient political issue.

¹⁷. Ibid.

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AMENDING THE CONSTITUTION BY THE CONVENTION METHOD

INTRODUCTION

What has made the United States Constitution an enviable living document is Article V, by which the Constitution provides for its own revision. Under this article, the Constitution has been amended 26 times. Whether there will be a 27th Amendment, to require a federal balanced budget, is something that a number of state legislatures, including those of New Hampshire, Kentucky, and Wisconsin, now are addressing.

Article V of the Constitution provides two methods for proposing amendments: 1) by a two-thirds vote of Congress, and 2) by a convention called by two-thirds of the states.¹ After such amendments are proposed, they must be ratified by three-fourths of the states before they are added to the Constitution.

Two to Go. The first method for passing amendments has been used all 26 times during the past two centuries. No amendments have been proposed through the second method. This may soon change; 32 states have enacted resolutions calling for Congress to convene a constitutional convention to propose the amendment requiring a balanced federal budget. Kentucky, Wisconsin, and some ten other states are considering such resolutions, while several states, including New Hampshire, are reconsidering their previously enacted resolutions. If two more resolutions pass, the nation could see its first constitutional convention under the terms of the 1787 Constitution.

Because no convention under Article V has ever been held, the prospect of a constitutional convention is prompting understandable but unfounded fears. Critics have

¹ Article V provides: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of 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 Congress..."

argued that the convention method of amendment is an untried and dangerous process and that a convention could "run away" beyond its mandate and rewrite the entire Constitution, perhaps even repealing the Bill of Rights.

Safer than Congress. These worries, however, are based on a misperception of the nature of an Article V convention and of the safeguards built into the amendment process. A wide variety of authorities, including a special study committee of the American Bar Association, point out that a convention legally can be limited to a particular subject. These limitations can be enforced by Congress or the courts. A convention also would be constrained by a range of political factors, including the election of its delegates.

Most important, a convention called under Article V could only propose, not enact, amendments. These proposals still would have to be ratified by 38 states — no easy task. Given these strong safeguards, a convention would be far less able to "run away" with the Constitution than Congress itself, which may propose constitutional amendments at any time and on virtually any subject.

Safety Valve. The convention method of amendment is a critical ingredient of the constitutional balance of power. While Congress may in most cases be counted upon to propose constitutional amendments when needed or desired by the American people, the framers knew that Congress would be reluctant to do so if that would lead to a reduction in its own powers. The convention method thus provides a "safety valve" to propose needed amendments in cases where federal lawmakers might impede needed reform.

Even the looming possibility of a convention can be enough to force action by Congress. On at least one occasion this century, the threat of a convention led Congress to propose an amendment, which became the Seventeenth Amendment, establishing the direct popular election of Senators.

Far from being a threat to the Constitution, as critics suggest, the convention method of amending is a necessary and integral part of the Constitution. Constitutional conventions, of course, should not be taken lightly. Yet exaggerated claims should not dissuade state legislators from considering this vital element of the Constitution to deal with Congress's inability to resolve important national problems.

THE FRAMING OF ARTICLE V

Of the 26 amendments to the Constitution, all were proposed by the Congress, none by a convention. This would have surprised the framers of the Constitution, who saw equivalent roles for the Congress and conventions in the amending process. In fact, many preferred the convention method. The first suggestion for an amendment provision saw no role for Congress. The "Virginia Plan" for the Constitution simply 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..."² In accordance with this view, the first draft of Article V, by the Philadelphia convention's "committee of detail,"

2 M. Farrand, *The Records of the Federal Convention* 22 (1937).

provided for the proposal of amendments only by conventions, with no role at all for Congress.³ This was consistent with state practice at the time. As of 1787, only three of the eight states with an amendment process gave their legislatures a role.⁴

Several delegates objected to this draft, fearing that it would give the states too much power at the expense of Congress. As a compromise, the convention settled on the current Article V, under which both the states and the Congress would play a role in proposing amendments. James Madison later wrote that Article V "equally enables the general and the State governments to organize the amendment of errors...."⁵

The delegates clearly felt that a two-pronged amending method would assure that no single institution could block important amendments. As George Mason of Virginia declared, it would be improper to require congressional approval of amendments "because they may abuse their power, and refuse their consent on that very account."⁶ Under Article V, as finally adopted, neither Congress nor the states could, by themselves, block an amendment.

PAST USES OF THE CONVENTION CLAUSE

Although no convention has ever been called under Article V, individual states in hundreds of cases have called for a convention. During the 1800s, most such convention calls were for broad, general revisions of the Constitution. Since the turn of this century, however, resolutions for conventions normally have been limited to specific issues that Congress had refused, or failed, to address. Five times in this century, more than half of the states have requested such a limited convention regarding a particular issue.

The most effective use of the convention clause of Article V was in the campaign for direct election of U.S. Senators. Beginning with the rise of the progressive movement in the 1890s, sentiment began to grow for the election of U.S. Senators by direct popular vote, rather than by state legislatures as originally provided by Article I of the Constitution. Between 1893 and 1902, the House of Representatives passed several resolutions proposing a constitutional amendment requiring direct election. But the Senate, understandably, refused consistently to vote on the issue; many of its members, after all, could expect to lose their jobs if they had to win popular support.

3 *Ibid.*, at 188.

4 See American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* (American Bar Association, 1974, as reprinted by the National Taxpayers Union), p. 15.

5 *The Federalist Papers*, No. 43 (New York: Mentor Books, 1961), p. 278.

6 Office of Legal Policy, U.S. Department of Justice, *Limited Constitutional Interventions Under Article V of the United States Constitution*, September 10, 1987, p.7.

To force Congress's hand, the states turned to the convention provision of Article V. Between 1893 and 1911, some thirty states called for a convention to propose an amendment regarding direct election, only one short of the 31 needed to trigger the convention process.⁷ Rather than face the prospect of a convention, the Senate, on May 13, 1912, approved a direct election amendment, sending it to the states for ratification, where it obtained approval of three-quarters of the states and became the Seventeenth Amendment to the Constitution in 1913.⁸ Thus although no convention took place, Article V had served its purpose by removing the congressional roadblock.

Roadblock. Supporters of the current campaign for a constitutional convention to propose a balanced budget amendment argue that a similar institutional roadblock exists today. While the federal budget is a major national problem, they say, Congress is hesitant to solve it in a way that would curtail congressional powers. Thus another means of initiating change is required.

In 1975, the North Dakota Legislature became the first to call for a convention to propose a balanced budget amendment. By 1983, some 32 states had done so — just two short of the required number. Although no additional states have approved resolutions calling for a such a convention since then, legislation is expected to be considered in at least twelve states this year. Passage of a resolution in any two could trigger the first constitutional convention in 200 years.

MYTH OF THE RUNAWAY CONVENTION

The most common question surrounding the convention clause of Article V is whether a convention could legally be bound by a limit on the subjects it may address, or whether it would be free to rewrite the entire Constitution, much as was done to the Articles of Confederation in 1787. Critics of the convention method often argue that a constitutional convention, by its nature, cannot be limited and thus could revise any part of the Constitution — even the Bill of Rights — if delegates were so inclined.

These fears, however, are unwarranted. There is ample legal authority concluding that any Article V convention legally can be limited to one subject and that such limits can be enforced. Just as important, there are numerous political and restraints which make it virtually impossible for a "runaway" convention to rewrite the Constitution against the wishes of the American people.

Legal Limitations on Conventions Under Article V

When most Americans think of a constitutional convention, they envision a gathering like that held in 1787 — a general convention engaged in an overall rewriting of the

7 There were 46 states in the Union in 1911. Some commentators claim that 31 states in fact did request a convention. Because of the inconsistent way in which applications were recorded, the exact number remains unsettled. See American Bar Association, *op. cit.*, pp. 60-63.

8 See Paul J. Weber, "The Constitutional Convention: A Safe Political Option," 3 *Journal of Law and Politics* 51, 57-58 (1986).

Constitution. A convention under Article V, however, need not have such a broad scope. The article does not refer to a convention for the purpose of rewriting or even revising the Constitution. Instead, it specifically refers to "a Convention for proposing Amendments...."⁹

The history of this clause shows that the framers had in mind conventions assembled to address discrete problems. For instance, Alexander Hamilton, in *The Federalist Papers*, stated that his belief at the time was that "[e]very amendment to the Constitution, if once established, would be a single proposition.... There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution."¹⁰ Specific amendments, rather than comprehensive rewrites of the Constitution, appear to be what most framers expected.

Allowing Limitations. A more difficult question is whether a convention could, in fact, be legally prohibited from considering amendments on more than one subject. Article V itself is silent on this issue, not referring at all to how or whether a convention's scope may be limited. Many constitutional authorities, however, have concluded that such limitations are allowed under Article V. For instance, a special study committee of the American Bar Association, after a two-year study, concluded in 1974 that the Constitution does provide for the limitation of conventions.

The committee based its determination on several factors. It noted that early drafts of Article V had indicated an intention for conventions to be limited to the consideration of particular subjects. The initial draft of the article by the 1787 Constitutional Convention's committee of detail provided that:

"[o]n the application of the Legislatures of two thirds of the States of the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.* (emphasis added.)"¹¹

Standard Practice. The phrase "for that purpose" indicates an intent that conventions would be called for certain, discrete purposes, without authority to conduct a general review of the Constitution. The ABA committee pointed out that limited conventions were in line with the standard practice among state constitutional conventions at the time. Of the state constitutions then providing for conventions, most stated explicitly that the conventions could be limited to particular issues.¹²

The ABA committee also concluded that there are sound policy reasons why states should be able to call limited conventions. The convention method of amendment, it said, was meant to be a workable alternative to Congress in the amendment process. If states could not limit the agenda for such conventions, the ABA scholars reasoned, states would be unduly discouraged from employing this option. In addition, the committee found a limited convention to be more consistent with democratic principles, since voters would know the subject matter to be considered before electing delegates. If the range of topics

9 See footnote 1 above.

10 *The Federalist Papers*, Number 85, *op. cit.*, p. 525.

11 American Bar Association, *op. cit.*, p. 12.

12 *Ibid.*, p. 15.

to be addressed were known and limited, the committee reasoned, the public would be better able to exercise an informed judgment in choosing among different candidates.

Safeguards Against a Runaway Convention

Even if a convention could be limited legally to a particular subject, critics say, it still could ignore its restrictions and embark upon a wide-ranging revision of the Constitution. These arguments, however, ignore the legal and political safeguards built into the amendment system, which make any such "runaway" convention virtually impossible. Among these safeguards:

1) **Election of Delegates.** Article V does not specify exactly how or when delegates to a constitutional convention would be chosen. This power has apparently been left to the Congress, which is given the responsibility to "call" the convention. Thus while Congress has no choice but to call a convention once the requisite number of valid state applications has been received, the power to "call" gives it an opportunity to craft the process by which delegates will be selected.¹³ Using this power, Congress can take steps to provide for an election process which would maximize the public debate on the issue and to ensure the accountability of the delegates.

One bill now pending in Congress, S. 589, sponsored by Senator Orrin Hatch, the Utah Republican, would establish procedures for constitutional conventions.¹⁴ Among other provisions, the bill would allow every state to send one delegate for each of its congressional districts, and two delegates selected on an at-large basis. The convention would begin no more than eight months after passage of a convention resolution by Congress.¹⁵

The election of convention delegates likely would be well contested. Because no such convention ever has been held, it would generate intense media and public interest, probably more than the typical congressional election. Political parties and interest groups could be expected to be very involved, ensuring a spirited debate. The leading candidates, especially in such a short campaign period, probably would be those with strong public name recognition. Thus, the eventual delegates would not be unknown and untried individuals. On the contrary, most likely they would be figures already known to the

¹³ *Ibid.*, p. 9.

¹⁴ While no action has been taken on the Hatch bill in this session, similar bills were unanimously approved by the Senate Judiciary Committee in 1984 and 1985. In addition, similar legislation sponsored by the late Senator Sam Ervin, a Democrat from North Carolina, passed the full Senate in 1971 and 1973. See, S.Rept. No. 135, 99th Cong., 1st Sess. 13-15 (1985).

¹⁵ See, Henry Butler, "State Petitions for a Balanced Budget Constitutional Convention: A Descriptive Essay on the Political Economy of the Article V Process," in *The Constitutional Convention: How is it Formed? How is it Run? What Are the Guidelines? What Happens Now?* (Washington, D.C.: National Legal Center for the Public Interest, 1987), p. 30.

electorate — including civic leaders, government officials, and perhaps even members of Congress.¹⁶

During the campaign, the convention candidates would be asked where they stand not only on the amendments being proposed, but also on such concerns as whether they would attempt to lead the convention away from its defined subject matter. Delegates thus would be required to commit themselves on the question of a "runaway" convention even before they were elected.¹⁷ While the delegates' promises would, of course, not be binding, the public scrutiny of the candidates would make organized efforts to lead the convention beyond its legal scope virtually impossible.

2) Congressional Power to Choose the Mode of Ratification. If, despite the political restraints imposed in the delegate selection process, a convention still strayed and proposed constitutional amendments outside of its designated subject matter, those amendments would face a second obstacle: Congress. Under Article V, the convention could not actually submit amendments to the states for ratification until Congress chose the "Mode of Ratification." Congress must designate whether state legislatures or state ratifying conventions are to ratify the amendments.

This gives Congress a tool to stop, in effect, any amendments that exceed the convention's charge. If amendments proposed by the convention went beyond the limits imposed upon it, Congress simply could decline to choose a mode of ratification for those amendments.¹⁸ The proposed amendments would be able to go no farther.

Congress, of course, could only exercise this option if the proposed amendments were outside the legal scope of the convention. It could not, consistent with the Constitution, block validly adopted proposals. While a determination of the extent of Congress's powers in each case would not always be easy, the real danger faced — given Congress's interest in the matter — is that the convention would be circumscribed too much not too little.¹⁹

3) Review by the Courts. Any amendments proposed that exceeded a convention's powers also would invite a legal challenge and could be invalidated by the Supreme Court.

There has been considerable controversy over the issue of the Court's jurisdiction in such matters. In the 1939 Supreme Court case of *Coleman v. Miller*, for example, the Court was asked to decide whether Kansas had validly ratified a proposed child labor amendment to the federal Constitution.²⁰ It declined to settle the issue, stating that questions regarding

16 The Hatch bill would prohibit federal employees, including members of Congress, from serving as delegates. Given the experience and expertise such individuals could lend to the process, the advisability of this prohibition is not clear.

17 For a more detailed discussion of the probable nature of a convention delegate campaign, see Weber, *op. cit.*, pp. 61-63.

18 Office of Legal Policy, *op. cit.*, p. 13.

19 Congress's decision in this case probably also would be subject to court review.

20 307 U.S. 433 (1939).

the amendment process were "political questions" to be worked out by Congress and the President, without judicial intervention.

More recent decisions, however, indicate that federal courts today would be much more willing to settle political questions. During the 1960s, for example, the Supreme Court intervened to rule on such "political" questions as how state legislature districts should be apportioned and under what circumstances Congress can refuse to seat a member.²¹ Moreover, even before *Coleman*, the Supreme Court settled numerous issues regarding the amendment process.²² Thus it appears that the courts could, and would, resolve any questions arising from a constitutional convention, and prevent it from exceeding its bounds.

4) **Ratification by the States.** In the improbable event that all other safeguards failed, proposals made by a constitutional convention of course still would be only proposals. They would not become part of the U.S. Constitution until ratified by three-quarters of the states. Thus, even if a convention did "run away" and propose far-reaching revisions in the Constitution, those proposals would not become law unless they were approved by legislatures or specially held conventions in 38 states.

This is no easy task even for amendments with broad popular support. In fact, the last two amendments proposed by Congress — the popular equal rights amendment and an amendment to provide the District of Columbia with representation in Congress — failed in their bids for ratification. It is thus virtually inconceivable that some drastic rewriting of the Constitution, devised in smoke-filled rooms and opposed by a large body of the American people, could survive the ratification process. A proposal by a "runaway" convention, lacking broad popular support, would be doomed.

CONCLUSION

Given the numerous safeguards built into the convention method of amendment, fears that use of this method would endanger the Constitution are unfounded. In fact, the convention method actually may be the safer method of amendment. A convention is subject to many constraints, while Congress may propose an amendment to the states at any time, with almost no limits on the subject matter of those amendments.

Framers' Intention. Thirty-two state legislatures have petitioned Congress to convene a constitutional convention to consider a balanced budget amendment, under the provisions of Article V of the U.S. Constitution. Proponents of this action maintain that Congress is incapable of restraining spending and eliminating the deficit, yet refuses to send a balanced budget amendment to the states for their consideration. Opponents of a convention argue that a convention is not an appropriate way of dealing with the problem because convention delegates might mount an assault on the Constitution. But the convention method of amendment is not only a safe method of amendment, it is an integral part of the constitutional system of checks and balances. The framers of the Constitution wisely intended the convention method to be a vital counterweight to the powers of Congress to

²¹ *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969).

²² See cases cited in Office of Legal Policy, *op.cit.*, pp. 45-46.

block amendments. As the campaign for direct elections to the U.S. Senate demonstrated, the threat of a constitutional convention sometimes is necessary to force consideration of amendments that challenge the self-interest of Capitol Hill lawmakers.

The convening of a constitutional convention is, of course, a serious and complex matter. It must not be taken lightly. Nevertheless, the convention clause of Article V is an integral and necessary part of the constitutional system of checks and balances. Americans and their representatives in state legislatures and in Congress should not allow misinformation to divert them from employing this wisely crafted provision. When Congress fails to propose needed amendments to the Constitution, policy makers should not hesitate to put it to use.

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A PROUD, BUT NEGLECTED HISTORY:
THE STATE EXPERIENCE WITH CONSTITUTIONAL CONVENTIONS

by John Charles Armor

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Precis

Fueled by the possibility that two more States will pass convention calls on the Balanced Budget Amendment, a national "debate" among scholars has spilled over to the press and the public. The central issue is whether a new constitutional convention can be limited to a stated subject, or must be unlimited, and able to propose amendments to any part of the Constitution.

The dispute assumes we have only theory, not experience, to answer this question. There has never been a second national convention. There have been hundreds of state conventions. The question whether a convention is sovereign unto itself and cannot be limited, is the same for a State as for the nation. At the State level, the question has been repeatedly raised and answered.

Of all who have studied this critical question, only the American Bar Association has bothered to review the State experiences. That review led the ABA to conclude in 1974, as a matter of official policy, that:

"Our two-year study of the subject has led us to conclude that a national constitutional convention can be channelled so as not to be a force of that kind [dangerous and radical] 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."

The summary of research both by the ABA and in this paper, concerning the limitation of State constitutional conventions is this: 1) it is rare for a state constitutional convention to seek to go beyond its charter. 2) It is unanimous among courts that have considered the issue that by one or more well-recognized means, such amendments may be prevented from going into the ratification process. 3) The lesson to be derived from this significant and well-litigated area of the law is that there are no legitimate dangers from a "runaway" Convention at the national level.

Those interested in finding an answer to the question of limited conventions are invited to review for themselves the history of limited State conventions, and legislative and judicial enforcement of such limits. Those who raise the specter of a "runaway" convention only for immediate political purposes will probably have no interest in either that history, or this paper.

A Proud, But Neglected History:

The State Experience with Constitutional Conventions

by John Charles Armor /¹

The proposed Balanced Budget Amendment to the Constitution is focusing attention on the methods of amending the United States Constitution. In the future, other possible amendments will rise to the top, or close to the top, of national attention. In each instance where the impetus for change comes from the States, and Congress is perceived as part of the problem, rather than the solution, attention will also be focused on the second half of Article V of the Constitution. /² That provision allows the States to initiate constitutional change by calling for a new convention.

Discussions of proposed constitutional amendments are dealing with "supreme law," as the Constitution describes itself. However, the process of seeking passage of any constitutional amendment is, like all public acts in the United States, a political

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² Article V of the Constitution provides these two methods of amendment: "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 Congress...."

act. And every proposal will have its opponents, who will, logically, act in a political manner.

One hallmark of politics is to use whatever weapons one finds at hand. In this particular type of public debate, the most potent weapon seems to be the threat, or the alleged threat, of a "runaway convention." /³ The power of this weapon is that it turns some supporters of the particular amendment into opponents of the mechanism in the Constitution, put there by its authors to deal with a specific problem, a recalcitrant Congress. It accomplishes this reversal by placing reverence for an effective Constitution on both sides of the balance scales.

At first glance, the question of whether a new Constitutional Convention could be limited to a particular subject matter seems unanswerable, until the event occurs and its outcome is known. The national slate is blank of examples beyond the unique and successful first experiment in Philadelphia, in 1787. But, there is a second body of law, the experience of the States with their hundreds of Constitutional Conventions, and amendments to their Constitutions, since 1787. The experience of the States provides a definitive answer to that basic and serious question concerning the ability to limit a new Convention. Without such limitations

³ See, for instance, Gerald Gunther, "Constitutional Brinkmanship: Stumbling Toward a Convention," American Bar Association Journal, Vol. 45, July, 1979. Also see, Melvin R. Laird, "James Madison Wouldn't Approve," Washington Post, 13 February, 1984, Op-Ed page. The latter article takes out of context a Madison quotation about abandoning the results of the 1787 Convention and holding another Convention immediately, and applies it to the possible use of the second half of Article V in the 20th century.

it is clear that the second half of Article V will become a dead letter, and the purposes for which it was designed will be forever frustrated.

This discussion is intended for those who have a serious and legitimate concern with this basic question that arises very seldom, but when it does, is critical. It will be of little use to those for whom the consideration of a proposed constitutional amendment is a purely political question -- to be won or lost by whatever means, including permanent damage to the structure of the Constitution. It is the author's hope despite much evidence to the contrary, that in the long run those who will trample the Constitution in the guise of defending it, do not and will not constitute a majority of the people in the United States, and that historical records and experiences that offer guidance, will be reviewed, considered, and accepted if logical and valid, by most who review this State constitutional experience.

I. Summary.

There is a substantial body of literature on the subject of possible controls on a new Constitutional Convention, if one is called under Article V of the Constitution. The debate is whether Congress or the Supreme Court, or both, would or should have any supervisory powers over the calling, conduct and results of such a Convention. /⁴

⁴ Two major players in the continuing scholarly debate are Professors William Van Alstyne, and Laurence Tribe. See, for instance, Van Alstyne, "The Limited Constitutional Convention -

An unfortunate aspect of this heated and protracted debate is that it takes place in a near vacuum. Nowhere in this blizzard of articles is there a reference to the one source of real experience with that precise subject, the history of regulation of State Constitutional Conventions. Instead, the debate is carried on primarily in the ether of pure theory, which allows widest scope for the intellectual pyrotechnics of the participants, but for the same reason has the least possible application to the real world.

It is frequently valuable to recall Justice Felix Frankfurter's description of the States as, "legislative laboratories." ⁵ It is not just that the States can learn from each other. It is also possible for Congress and the Supreme Court to learn from State legislatures and State Supreme Courts. In short, it would be worthwhile for national leaders to look across the Potomac from time to time and see what is happening in the real world.

To same effect, it would be wise for Constitutional theorists. when they presume to advise Congress and/or the Supreme

The Recurring Answer," 1979 Duke Law Journal 985, and Tribe's "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment," Pacific Law Journal, Vol. 10, July, 1979. As a general proposition, scholarly debates are like chess matches by mail. They take a long time, and the next reply can come from anywhere on the map. A thorough citation of the major articles, and a review of the logic of each, appears in Limited Constitutional Conventions Under Article V of the United States Constitution, issued 10 September, 1987, by the Office of Legal Policy of the Department of Justice.

⁵ Justice Frankfurter was one of the strongest and most articulate supporters of wide latitude for State legislatures in making their policy judgments and passing laws concerning their own citizens. He coined the phrase, "legislative laboratories of the states," which clearly expressed this idea.

Court on matters such as the control of a Constitutional Convention, to look to the States where there is ample experience in this precise subject.

This monograph does exactly that.

State methodologies for peaceable changes in their Constitutions are older than the Constitution itself. All State Constitutions have included such processes from early in the history of the republic. /⁶ Every State has called for itself at least one Constitutional Convention, and the most that have been conducted by any State is 17 in New Hampshire. /⁷

There have been more than 240 State Constitutional Conventions to date. /⁸ Table A describes the whole pattern of constitutional amendment, State by State.

This paper does not discuss the nature of the changes made by any of these conventions, since the focus here is on the process of constitutional amendment, not on the specifics of the amendment or amendments proposed. Likewise, the critical question about Article V of the US Constitution is how the Convention process works, rather than what particular amendments might be produced by

⁶ The pre-1787 Constitutions of Georgia, Massachusetts, New Hampshire and Pennsylvania provided for conventions. Delaware, Maryland and South Carolina provided for amendments, but not conventions. New Jersey, New York, North Carolina and Virginia lacked amendment provisions. Connecticut and Rhode Island lacked constitutions at that time (?). Check weinfeld, harvard Law Review 474, 481 (1938)

⁷ A. Sturm, Thirty Years of State Constitution Making: 1938-1968, National Municipal League, 1970, at pps. 51-80, 132-37. Cited hereafter as Sturm, Thirty Years.

⁸ Sturm, Thirty Years, at p. 00.

it in our time, or any time in the future.

The exception to this general rule are those instances where the subject matter of proposed amendment(s) brought into question the legitimacy of the State Convention and its actions, usually resulting in corrective actions either by the State legislatures, the State supreme courts, or both.

The fundamental political/legal problem in such a conflict is that all commentators recognize that a Constitutional Convention represents the exercise of the sovereign power of the people. It is a political problem because popular sovereignty is the central belief of our system of government. It is a legal problem because every constitution is the supreme law within its jurisdiction, and the very purpose of such conventions is to propose binding changes in that supreme law.

The strongest statement of the power of the people in such an assembly is the repeated reference to the Philadelphia Convention as a "revolutionary" one. It is described as being a "runaway" convention that acted contrary to the instructions from the body (the Congress under the Articles of Confederation) which caused it to meet. /⁹ That charge is based on a failure to read the full history behind the calling of that Convention, and a failure to understand exactly what that Convention did, and especially how its proposed Constitution was handled by the States in the ratification process. It also represents a failure to recall the legal

⁹ See, for instance, Lawrence M. Baskir, "The Dangers of a 'Runaway Convention,'" *The Nation*, April 3, 1982, pps. 391-93.

and Constitutional consequences of the Civil War.

The discussion of the 1787 Convention might not seem germane to a review of what the States have done for themselves in constitutional conventions in the 18th, 19th and 20th centuries. It is necessary, however, because incorrect views of what happened in Philadelphia tend to crop up in State legislatures and supreme courts, in those instances where corrective actions seem necessary because of actions by State constitutional conventions.

Therefore, the political/legal history of the legitimacy of the 1787 Convention, and of the Constitution it produced, is presented in Section II, below.

Several States have Constitutional provisions which require the question of holding a convention to be put to the voters at stated intervals. In the majority of States, however, such conventions have been called only because of a rising tide of public dissatisfaction with certain aspects of the government of the day. Given the nature of the act and the circumstances in which it usually occurs, questions of the legitimacy of the convention and of the amendment(s) it proposes engender the most bitter disputes and involve the highest of stakes.

For all these reasons it is extremely important that the legal decisions on such questions be settled according to clear principles, known in advance, so the results will both be fair to the process of amendment, and will be perceived as fair by the people. It is exactly that issue which has engendered much heat, but very little light, in the scholarly articles to date about

Article V.

However, at the State level, these questions have been repeatedly addressed. The answers found are largely consistent across the country. They are clear, logical, and easy to understand. They square with the history of the United States Constitution. And, most importantly, they have been perceived and accepted as fair by the people of the various States, which is the only true foundation of any constitutional government.

In most cases, the State Constitutional Conventions have been "unlimited" ones. Every single provision of the then-existing State constitution was therefore on the table and subject to proposed change except for the ratification provisions themselves. A change in ratification could be proposed, but it could only go into effect if accepted through the existing ratification process.

There are a few States which exempt their "Bill of Rights" from changes proposed by either the legislature or a Constitutional Convention. No attacks on a Bill of Rights has been mounted from either quarter, so there is no case law on such "entrenchment" clauses. ¹⁰ It is clear that any proposed clauses in a State Constitution that seek to inhibit the application of a

¹⁰ The author was allowed to read an unpublished, book-length manuscript by Professor Albert Blaustein of Rutgers-Camden Law School. The book deals with the amendment process in all the constitutions of the world, and ascribes the birth of "entrenchment" clauses to the US Constitution. That placed three subjects beyond the reach of amendments -- taxes on importation of slaves (which expired in 1808), and guarantees of territorial integrity of each State and representation by two Senators. The three most common uses of entrenchment clauses internationally are the guarantee of a socialist form of government, the establishment of an official religion, and the continuation of a given royal house.

provision of the U.S. Constitution would be invalid.

Rarely has a general revision of a State Constitution sought to create and apply a new ratification provision in one fell swoop. Because such a possibility has been included in the little shop of horrors by some who fear a new, national convention, the applicable State histories on these points are included in Section III. See, especially, *State v. Manley*, 441 So2d 864 (Ala., 1983).

Limitations on the power of Conventions to act in certain areas, or to propose more than a specified number or type of amendments have been routinely upheld. The theory has been that limitations placed on a Constitutional Convention by the sovereign power, i.e. the people, through the existing Constitution, must be obeyed. The limitations can be placed either by the legislature on its own initiative, or by the express terms of the State's existing Constitution. Either way, they are valid, and must be obeyed. /¹¹

The question of "limited" versus "unlimited" Conventions is discussed in Section III, below.

There is an exception to this general rule, which concerns Constitutions that have been accepted by the people in a popular referendum. In some such cases, the courts have accepted the new Constitution as valid, despite the violation of pre-existing conditions that have not been met. /¹²

¹¹ *Staples v. Gilmer*, 33 So2d 49, (Virginia, 1945).

¹² A leading case allowing amendment of a State Constitution despite not following the amendment procedures of the existing Constitution, is *Gatewood v. Matthews*, 403 SW2d 716 (Kentucky,

The theory behind this line of cases is based on the early history of the United States, in which legislatures frequently undertook Constitution-writing duties, and in a few instances, Conventions stayed in session for years at a clip, undertaking ordinary legislative duties. There was even one instance, in Missouri prior to the outbreak of the Civil War, where a Convention that favored the Union viewpoint contributed to the Governor and legislature that favored the Confederate viewpoint, fleeing the State, with the Convention taking over and appointing new State officials. ¹³ In the 20th century, however, such results have been rejected as historical aberrations, rather than correct

1966). Citing older cases, the Gatewood Court upheld the revised Constitution of Kentucky, which had been ratified before the challenge was brought. The same after-the-fact challenge existed in *Wheeler v. Board of Trustees of Fargo School District*, 37 SE2d 322 (1946), on which the Gatewood Court relied. In *Wheeler*, the Court said, "every presumption of law and fact, is to be indulged in favor of the validity of a constitution when it is attacked after its ratification...." 37 SE2d, at p. 329.

For this reason, the dissenting Judge in Gatewood called it "a case of expediency," and the decision was heavily criticized in a case note in 81 *Harvard Law Review* 693 (1968).

¹³ Walter K. Dodd, *The Revision and Amendment of State Constitutions*, Johns Hopkins University, 1910. reprinted by Da Capo Press, New York, 1970, gives a thorough history of early developments in the theory and practice of state constitutional amendment. Cited hereafter as Dodd, *Revision*.

Perhaps the most unusual situation that arose was during Dorr's Rebellion in Rhode Island. The existing government operated under the former Colonial Charter. A self-proclaimed Constitutional Convention wrote and promulgated a new Constitution, and created a new and opposing government. The question of which was the legitimate government of Rhode Island reached the Supreme Court in *Luther v. Borden*, 48 US 1. The Court declined to answer, ruling that the question was a political one that only Congress could answer. See, Dodd, *Revisions*, at p. 60. Based on the modern cases, the Court would rule on such a question if it arose again, and would decide in favor of the government based on the existing Constitution.

indicators of the direction of the law. /¹⁴

In summary, the conclusion is that even an unlimited State convention cannot act as if there were no preexisting constitution and it was writing on a blank slate. Therefore, legislatures have the right to refuse to submit for ratification excessive proposals, and courts have upheld that refusal.

The larger and more important question is first, whether there can be such a thing as a "limited" national constitutional convention, and if so, how can its limits be enforced? Some respected commentators have argued that there can be no such thing as a limited constitutional convention. /¹⁵

The argument is almost always a purely theoretical one, based on the concept that the people are sovereign, and when they are acting in their sovereign capacity, no other governmental structure can restrain their decisions. Even as pure theory, the argument falls of its own weight, since a totally unrestrained convention could not only agree on the changes it wanted, but also sweep aside the ratification process and jump directly from pro-

¹⁴ The present line of cases on adherence to the proscribed methods of amendment do show a slight variance. Some courts require strict and mandatory adherence; see, for instance, *Crawford v. Gilchrist*, 59 So 963, (Florida, 1912), *Stander v. Kelley*, 250 A2d 474, (Penn., 1969), cert. den. and app. dismd, sub nom, *Lindsay v. Kelly*, 395 US 827 (1969). A lesser number of courts require "substantial" compliance, *State ex rel. Board of Fund Commissioners v. Holman*, 296 SW2d 482, (Missouri, 1956).

¹⁵ See, a very thorough and useful bibliography, prepared by James N. Stasny, a member of the staff of the Senate Budget Committee, published in the Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary of the Senate on S. 119, S. Hrg. 98-1263, Serial No. J-98-114, 25 April, 1984, at pps. 63-89

posal to promulgation. Between 1776 and 1787 that did happen at the State level on a number of occasions.

Today, no one argues still argues that such actions are a proper exercise of the sovereign power of the people. And, today, no court would accept such an action as legitimate. /¹⁶

There is, however, a strong, practical basis for the conclusion that a convention can be limited in its scope. The American Bar Association reached that conclusion through the work of a Special Committee on the Amendment of the Constitution by the Convention Method under Article V. A nine-member Special Committee was appointed in 1971 to "study all questions of law concerned with the calling of a national Constitutional Convention...." The Committee consisted of two US District Judges, a Judge of the Superior Court of D.C., a present law school dean, and a former one, two former presidents of state constitutional conventions, and an experienced private practitioner.

As the Special Committee issued a final report that was unanimous (except for one dissenter who said that Congressional districts could not be the election districts for delegates to a convention). The ABA House of Delegates agreed by formal resolution to accept the Committees conclusions as official policy in

¹⁶ See, for instance, *Dade County v. Kelly*, 153 So2d 822, (Florida, 1963), where the Court, quoting George Washington, says, "If in the opinion of the people... [the amendment provision is] wrong, it should be corrected by amendment in the way which the constitution designates. ...no change [should] be made by usurpation."

1973. /¹⁷

The main grounds for reaching this conclusion are two. First is the intent of the drafters of Article V that the powers of Congress and the States to propose amendments would be co-equal. This follows from the reason for giving the States power to initiate Constitutional change -- that the States would be able to force action when the inaction of Congress was a central part of the perceived problem. "It... equally enables the general and the state governments to originate the correction of errors as they may be pointed out one side or the other." /¹⁸

The fact that these two methods of amendment have not been co-equally used says nothing about the extent or importance of the respective Congressional and State powers. It indicates only that the people, acting through their State legislators, have been generally satisfied with the amendments as proposed, or not proposed, by Congress, and have therefore held their power in reserve.

As a technical or legal matter, it is true to say that all of the 26 amendments to date have been adopted by the route of proposal by two-thirds of Congress, followed by ratification by three-fourths of the States. Recognizing, however, that amendment

¹⁷ American Bar Association, Special Constitutional Convention Study Committee, Amendment of the Constitution by the Convention Method Under Article V, American Bar Association, 1974. The description of the Committee and its nearly unanimous conclusion appears at pps. ix-x1. The Resolution of the ABA appears at pps. vii-viii. Cited hereafter as the ABA Report.

¹⁸ James Madison, The Federalist, No. 43.

of the Constitution is both a political and a legal act, it is false to say that the second half of Article V, the State Convention Call mechanism, has never been used. It was successfully used exactly as the Framers intended, to produce the 17th Amendment in 1911. And, that process was nearly successful for the Dirksen Amendment in the late 50's and early 60's.

For those unfamiliar with the political/legal history of the 17th Amendment and the Dirksen Amendment, these are given, respectively, in Appendices A and B, below. It should be noted that the ABA Report was a product of the near-success of the Dirksen Amendment, and the demonstrated necessity therefore to define the parameters of this method of seeking Constitutional change.

Although Constitutional Convention Procedures Acts have frequently been introduced in Congress, none has passed. Two have passed the Senate, but died in the House. The major provisions are given below. They are similar to those in the other, less-successful bills. /¹⁹ At the national level, the procedural vacuum continues.

¹⁹ Senator Ervin's bill, S. 2307, had hearings, did not pass either House in the 90th Congress. Then, he presented S. 623 in the 91st Congress, which did not pass either House. Then he introduced S. 215 in the 92nd Congress, which passed the Senate with a vote of 84 to 0, on 19 October, 1971. There was no action in the House. Then he introduced S. 1272, in the 93rd Congress, with similar provisions. It passed the Senate on 9 July, 1973; there was no action in the House. There were several bills introduced in the 94th, 95th, 96th, and 97th Congresses, none of which came close to passage. Senator Hatch introduced S. 119 in the 98th Congress, which had hearings but did not pass either House. In the 99th Congress, he introduced S. 40; there were hearings but it did not pass either House. He reintroduced the Procedures Bill in the 100th Congress, as S. 589.

At the State level, however, the vacuum has been filled. The national and State procedures bills that impose restraints on Conventions, are discussed in Section IV, below.

The methods by which a State constitutional convention can be limited in its subject matter, are varied. The limitations may appear in the State's Constitution. Or, they might be imposed when the convention is called, either by referendum of the people or by legislative act, or by a combination of both.

The critical question, however, is the enforcement of limitations when a convention, for reasons of its own, seeks to exceed its authority and propose amendments it was not convened to consider. This is the overriding open question at the national level. It is, however, well settled law at the State level. And since there is no distinction in legal logic between the sovereign people acting within their own State and the sovereign people acting at the national level, the answer would be the same.

At the State level, of course, popular sovereignty does not allow a State constitutional provision to violate a federal Constitutional provision. This was Senator Henry Calhoun's Nullification Doctrine that was laid to rest when the guns fell silent at Appomattox. Popular sovereignty at the State level means only that the people can adopt whatever provisions they choose, but only within the area of legal activities that are open to individual States.

There are two different main methods for pulling in the reins on a State constitutional convention that seeks to run away from

its mandate. One is for the legislature to refuse to submit for ratification the parts of a conventions proposals that go beyond its mandate. The other is for the State Supreme Court to rule that the excessive proposals are beyond the mandate and therefore cannot be submitted.

These two methods of control are not discussed separately, but are combined in Section V, below. The reason is that they are often combined in fact. A convention will produce amendments beyond its mandate. The legislature will then refuse to submit those for ratification. The issue will be taken to the court which often rules both that the amendments were excessive, and that the legislature was within its constitutional duties in refusing to submit them. Either grounds for the court decision would be sufficient, but they are often combined in the decisions.

There is a subsidiary question of judicial deference. At the national level it is called the "Political Question Doctrine," and appears primarily in older cases where the Supreme Court left a particular decision to Congress and refused to review it. That question is also addressed in many of the State court decisions in this delicate area. /²⁰

The summary of the research into the restriction of State

²⁰ In *Coleman v. Miller*, 307 US 433 (1939), the Supreme Court decided that the issue of whether a State had ratified a proposed amendment in a timely fashion, was for Congress to decide, not for the Court. It said that there is a "class of questions deemed to be political and not justiciable." Since then the Court has decided to decide many issues previously avoided as "political questions." Still, the doctrine that some questions are beyond judicial determination, retains some validity.

constitutional conventions is this: 1) it is rare for a state constitutional convention to seek to go beyond its charter. 2) It is unanimous that by one or more well-recognized means, such amendments may be prevented from going into the ratification process. 3) The lesson to be derived from this significant and well-litigated area of the law is that there are no legitimate dangers from a "runaway" Convention at the national level.

Some who profess such fears do so only as a pretext for opposition on other grounds to the exercise of this right by the people, through the State legislatures. However, those whose fears are genuine, can allay them by a careful and thoughtful review of how this precise question has been easily and effectively solved by the common sense of state legislators and the legal reasoning of state courts.

The ABA Special Committee reached this conclusion in its report:

"Our two-year study of the subject has led us to conclude that a national constitutional convention can be channelled so as not to be a force of that kind (dangerous and radical) 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." /²¹

II. The "Amendment" of the Articles of Confederation.

The forgotten government in the United States is the Articles of Confederation. This was a compact among the States, acting as

21. ABA Study, supra, p. 39.

sovereign entities. Each State could have, at its own expense, from 3 to 7 members of Congress, but they cast a single, collective vote. The Articles were not finally ratified by all States until 1781, when Maryland accepted them after Virginia and other States had agreed to abandon their unlimited claims to Western lands. /²²

There are many ways in which the Articles failed, and that failure led directly to the Constitutional Convention of 1787. Three examples can stand as representatives of all others.

Under the Articles, the Congress chose annually a "President of the United States in Congress Assembled." There were 11 such "Presidents" elected under the Articles, with the first being John Hancock of Maryland, and the fourth being John Hancock of Massachusetts. Hancock was, in that year, too ill to go to Washington and assume his duties as President. The Congress deemed it unnecessary to declare the office vacant and appoint someone else in his stead. /²³

In light of modern-day experience, that is humorous. Still, it clearly illustrates the fact that under the Articles the United

²² The history of the ratification of the Articles of Confederation is found in C Herman Pritchett, *The American Constitution*, McGraw-Hill, New York, 1959, at pps 10-11. The Articles were proposed in November, 1777, and required unanimous consent. Maryland was the last State to ratify, and did not do so until 1 March, 1781. Cited hereafter as Pritchett, *Constitution*.

²³ The history of the "forgotten Presidents," those who served under the Articles of Confederation, is given in Eric Eriksson & David Rowe, *American Constitutional History*, W.W. Norton & Co., New York, 1933, at p. 00. Cited hereafter as Eriksson, *History*.

States did not have any mechanism for effective, national leadership.

The second example has to do with taxation and national bankruptcy. Under the Articles, Congress had no power of direct taxation. Each year they would estimate the total cost of operating the government, and then send the pro rata assessment to each State Capitol, in the hopes it would be paid. There was no enforcement mechanism for unpaid assessments, unless Congress chose to declare war on State that had not paid its share of the taxes. /²⁴

Given human nature, it is little surprise that a number of States simply declined to pay their assessments. Shays' Rebellion in Massachusetts was led by a disgruntled Army Major who lost his farm because he could not pay a \$12 property tax bill. And, he could not pay it because Congress had long failed to pay its debts to Daniel Shays and the other veterans of the Revolutionary War.

/²⁵

The circumstances of the United States under the Articles of Confederation were such that its Ambassadors to the Capitols of Europe went overseas at their own expense, and spent much of their time begging for loans at high interest rates, to remit to the Capitol in New York, for stop-gap payment of some of the nation's

²⁴ The history of the non-payment of national assessments by the States, is found in Eriksson, History, supra, at pps. 00-00.

²⁵ The payment by the States of about 15% of their assessments from Congress, the non-payment of veterans of the Revolutionary War, and the beginnings of Shays' Rebellion are described in Pritchett, Constitution, supra, at pps 12-13.

debts. /²⁶ It was this sorry state of affairs that led most national leaders to conclude that the Articles were fatally defective, and that a new government with greater and more effective powers, was essential.

This leads to the third failure of the Articles. In the last years of the Confederacy, a number of amendments designed to rescue the government from total collapse, were agreed in Congress and proposed as amendments to the Articles. But, Article XIII required unanimous consent to amend the Articles. Two critical amendments were defeated by the vote of a single State, one by New York and the other by Rhode Island. Rhode Island at that point comprised 60,000 souls; yet the general government of 3 million people effectively collapsed for want of the consent of Rhode Island and Providence Plantations. /²⁷

This was the context in which the Philadelphia Convention was called. It is important, however, to recall how and by whom that Convention was called. An earlier Convention in Annapolis, Maryland, had failed because only five States attended. However, the delegates to the Annapolis Convention asked both Congress and the States to call another Convention a year later. /²⁸

²⁶ A particularly poignant account of how American ambassadors of the time served as beggars for loans, is found in -----
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²⁷ The history of failure of all attempts to amend the Articles of Confederation is found in Pritchett, Constitution, supra, at pps 13-14.

²⁸ In terms, the Report of the Annapolis Convention was directed only to the Governors of the States whose delegations were present. However, the purpose of the 14 delegates from five

Virginia was the first to respond, on 22 January, 1787. It asked all States to attend in Philadelphia. Seven States were already committed to attend when Congress finally responded. Once it was clear that the new Convention was going to take place, whether or not Congress acted, Congress finally issued its call for "the sole and express purpose of amending the Articles of Confederation." /²⁹

This is frequently cited as proof that the Philadelphia Convention exceeded its mandate. The truth is that Congress was boarding a bandwagon that was already underway. With the exception of Delaware, the responses to the Virginia call were unlimited. Of the 12 States that chose to attend (Rhode Island refused to have anything to do with the Convention), only Delaware placed on its delegates the restriction that Congress had sought - amendment of the Articles of Confederation.

For present purposes, we skip entirely the substantive work of the Convention; how and why it wrote the various provisions of the Constitution. At the end, when the delegates were considering

States who attended is made clear by the fact that they sent "courtesy" copies of their report to all the other Governors, and to the leaders of the federal government in New York. The Report is found in Documents Illustrative of the Formation of the Union of the American States, House Document 398, 69th Congress, 1st Session, 1927, reprinted by Spencer Judd Publishers, Sewanee, Tennessee, 1984, at pps. 39-43. This publication is cited hereafter as Documents Illustrative.

²⁹ The dates of each State's commitment to attend in Philadelphia, the conditions which each placed on their "Commissioners" (or delegates), and the belated Congressional call for the Convention, are found in Documents Illustrative, supra, at pps. 55-84, and 44-46, respectively.

ratification, they determined that acceptance by nine of the 13 States would be sufficient. They drafted a carefully-worded Resolution which is the fifth page of the Constitution, from George Washington as President of the Convention, to the Congress in New York. In that letter they stated that the Constitution would be effective "among the States so ratifying the same." /³⁰

It was not until after Washington was elected as the first President that North Carolina and Rhode Island eventually ratified the Constitution. Neither took part in the election of Washington. Neither took part in the federal government until they had ratified.

In short, what happened after the Constitution was sent out for ratification was that 11 States chose to abandon the Articles of Confederation, and join together under the new Constitution. The Articles of Confederation were not illegally amended. The States simply walked out of the government under the Articles.

That was a legitimate, theoretical option for any State at any time, until after the Civil War. The Confederate States of America cited at length the views of many of the Framers that they had a right to leave the Union at will. Their quotations were correct. However, in losing the war, they lost the political debate as well.

Since the Civil War, no State has had the "right" to walk

³⁰ This Resolution was carefully drafted by the legal scholars at the Convention, and its contents were debated over three days on the floor of the Convention. Its text can be found in Documents Illustrative, supra, pps. 1005-1006.

away from the existing government. That means that amendment of any Constitution today, whether the federal one or those of the States, must take place according to the terms of the existing Constitutions. That legal conclusion, which is quite different from what happened between 1787 and 1790, has been stated and restated in many court decisions. /³¹

The fear that is sometimes raised, that a new Constitutional Convention could "do what the first one did," and not only write an entirely new document but change the terms for its ratification, is based on a careless reading of the history of the Philadelphia Convention, and a misunderstanding of the legal basis for, and consequences of, the Civil War.

III. General versus Limited Conventions.

In the early history of constitution-writing, from 1776 through 1789, the States took the position that they were free and sovereign, and able to rewrite their charters at will. ("Charter" was the common word, rather than "Constitution," but the meaning was the same, the fundamental law of the jurisdiction.)

There was no tradition of popular referenda on this or any other subject. And, there was no tradition of bodies of representatives selected for the express purpose of drafting new Constitu-

³¹ See, *State v. Manley*, 441 So2d 864 (Ala., 1983), in which the Alabama Supreme Court held an act of its legislature unconstitutional for proposing a new Constitution contrary to the amendment provisions of the existing Constitution, and also issued an injunction against the holding of an election to present that proposal to the people for ratification.

tions. There were also no provisions in any existing Charters to govern the process. Of necessity, legislatures simply wrote and promulgated new Charters, in much the same way as they did laws.

Massachusetts and New Hampshire were the first to add a "popular will" element in this process. First, the townships and localities objected to the legislative promulgation process without consultation with them. Then, popular referenda on the adoption of new Constitutions were added in those two States. /³²

It took a century for all of the States to move to the modern practice of allowing the legislatures to propose amendments to the State Constitution, subject to popular ratification, and to call for a constitutional convention for general revisions, also subject to popular vote.

The States are highly individual in the patterns that they use. Eleven still have no express provision in their Constitutions for the calling of a constitutional convention. The case law, however, has established that it is part of the inherent right of any legislature, acting on behalf of the people, to call for a Constitutional Convention. /³³

Some earlier State Constitutions incorporated Jefferson's

³² See, Dodd, Revision, supra, at pps. 2-7.

³³ Albert Sturm regularly updates his seminal works, *Methods of State Constitutional Reform*, -----, 1954, and *Thirty Years of State Constitution Making: 1938-1968*, National Municipal League, New York, 1970, with articles on constitutional revision in *The Book of the States*, published by the Council of State Governments, the latest of which is the 1984-85 Edition. This is a short summary of his Tables on pps. 16-22. For more detailed information, see Table I, ante.

language from the Declaration of Independence that it is part of the "inalienable rights of the people... to alter or amend their forms of government." All of the cases are consistent that even when a Constitution is silent on the subject of amendment, the right to seek that remains with the people.

One State requires that any Convention be a general one, able to propose any changes in the State's Constitution that the Convention deems appropriate. /³⁴ In all other States, however, a Convention is called pursuant to its enabling legislation, and is bound by the terms of that legislation. /³⁵

The first area of control of a Convention by the legislature is universal. The legislature states the time, place and duration of the Convention, the manner of election of its members, and the pay and expenses that will be provided. /³⁶ These provisions are not considered to be a limitation on the subject matter of any Convention, and apply equally to general and limited Conventions. (For a general discussion of such procedure bills at the State and

³⁴ See, Alaska Constitution, Article XIII, Section 4.

³⁵ "When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained in a state of peace. Irregular action, whereby a certain number of people assume to act for the whole, is evidently revolutionary." (Emphasis in the original.) Wells v. Bain, 75 Pa. 39 (1874), cited in In re Opinion to the Governor, 178 A, at 446.

³⁶ Note Livingston v. Ogilvie, 250 NE2d 138 (Illinois, 1969), in which the Court approved the legislature setting a different manner of electing delegates to the Convention than applied to the legislators themselves.

national level, see Section IV, below.)

Most of the State Conventions called since 1787 have been general ones, able to propose amendments in any and all areas, and able to propose an entirely new Constitution, if they so choose. A few have been limited, sometimes to a single, narrow subject such as the application of the poll tax to residents of military reservations. /³⁷

There are also restrictions in some State Constitutions concerning the number of Articles for which a Convention can propose amendments, or certain subjects that are declared to be beyond the scope of a Convention, etc. /³⁸

The theory behind such limitations is that the Convention is a representative of the people, the ultimate sovereign power. The existing Constitution is the prior embodiment of the will of the people. If, by that document, the people have either restricted the subject matter of a Convention, or have granted power to the legislature to limit a Convention, then the Convention is limited by the people themselves.

³⁷ One of the most restrictive Convention mandates ever issued was in Virginia. The legislature decided that the Convention should be restricted only to the subject of the payment of poll taxes by members of the military. The Court upheld this restriction, in *Staples v. Gilmer*, 33 SE2d 49, (Virginia, 1945), annotated at 158 ALR 495.

³⁸ The restrictions are widely varied in type and effect. One State does not permit a convention to be held within 6 years of the last convention. Many States forbid amendment of certain portions, or all parts of, their Bills of Rights. Some States allow only a certain number of amendment proposals to be placed on the ballot at one time. Courts have upheld all types of such restrictions, when based on constitutional language.

The contrary argument, that the Convention "is" the sovereign people, and therefore cannot be limited, ignores the fact that the existing Constitution in every State, and at the federal level, also represents the people. There are older cases, primarily in the 19th century, that take the contrary view. They stem primarily from the history of State Constitution-writing before provisions for Conventions and for popular voting to ratify Constitutions were added to most such documents. /³⁹

In short, every State recognizes the difference between a limited Convention and a general one. One State makes it impossible to conduct a limited Convention. But, in all others, if limitations are placed, they should be obeyed.

The instances of a limited Convention seeking to act outside its mandate are rare. The two primary methods of holding a Convention to its set limits are refusal by the legislature to submit improper results for ratification, and orders of courts that they not be submitted, or if already submitted (and even ratified in some instances), that they be struck as improper. The specific controls on a limited Convention are discussed in Section V, below.

IV. Constitutional Convention Procedures Bills.

³⁹ In Re Opinion to the Governor, 55 R.I. 56, 178 A 433 (1935), accepts as valid the ratified work of a Convention despite violation of prior Constitutional provisions about amendment, on the grounds that after ratification the new document represented "the explicit and authentic act of the of the whole people," quoting from George Washington's Farewell Address.

The development of State Convention Procedures Bills was a natural consequence of the addition to State Constitutions of provisions allowing legislatures to call a Convention. A leading case is *City of Bessemer v. Birmingham Electric Co.*, 252 Ala. 171, 40 So2d 193 (1949). In *Bessemer*, the Supreme Court of Alabama concluded that the legislature had "the inherent power to call a constitutional convention." /40

The same logic has been followed in States which lack a specific provision for the calling of a Convention, but the courts conclude that the right to change the form of government is inherent in any legislature. It then follows that the legislature can set conditions on the holding of a Convention, once it decides that one should be held. /41

Where operating procedures are included in the text of the Constitution, however, the legislature is without power to change those. See *42nd Legislative Assembly v. Lennon*, 481 P2d 334, (Mont., 1971).

This point really has no controversy to it. The power to pass Procedures Bills is universally recognized. The critical

40 See, *City of Bessemer*, supra, 40 So2d, at p. 197.

41 In *Chenault v. Carter*, 332 SW2d 623, (Kentucky, 1960), the legislature proposed a constitutional convention dealing with only 12 subjects. It planned to submit that proposal to the people for their approval. Against a challenge that the convention could not be so limited, the Court upheld the planned restrictions. It said, at p. 626, "The delegates to the convention are the agents not of the legislature, but of the people themselves. As a principal may limit the authority of his agent, so may the sovereign people of this state limit the authority of their delegates. This they may do by accepting and approving... a limited constitutional convention."

question is whether that power includes the right to place limitations on the substantive work of the Convention. Such restraints are included in the five Bills which have been submitted in Congress to date.

The first Convention Procedures Bill was introduced in the 90th Congress by Senator Sam Ervin, on 17 August, 1967. Hearings were held, but no action was taken. As Senator Ervin stated then,

"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." /⁴²

Senator Ervin was right in this analysis, but his words were not headed.

Since that time, Procedures Bills have been introduced in every Congress to the present. Twice, such bills have passed the Senate, but not the House. The full history of these bills is given in footnote 19, supra. All these bills have certain common features including recognition of a limited convention, methods for collecting and reviewing state calls, and grandfather clauses for calls that precede passage of the bill and deadlines for calls that come afterwards. /⁴³

⁴² Sam Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Michigan Law Review 875 (1968), at p. 878.

⁴³ Provisions that have appeared in some, but not all bills, include: 1) A grandfather clause accepted all prior State calls, but for future purposes establishing a seven-year deadline for concurrent State calls. 2) Congress to determine the subject matter jointly sought by 34 States. 3) Congress to call a Conven-

There should be no concern that a new Constitutional Convention will ever be called, in the absence of a Procedures Bill. It takes a simple majority of Congress to call a Convention, the same vote necessary to pass any Bill. It is a logical assumption that a majority in Congress required to call a Convention will not be assembled until after a Procedures Bill has been passed and signed into law. Congress might even wait until after an accelerated Supreme Court review had determined that Bill to be constitutional, before acting on a call for a Convention. /⁴⁴

Even the opponents of a limited constitutional convention are nearly unanimous in concluding that Congress has the power under the Necessary and Proper Clause to legislate on procedures for a constitutional convention. The two exceptions are Professors Black and Tribe. Professor Tribe holds that Congress cannot pass a procedures bill, the Supreme Court cannot rule on its validity, and therefore Article V as written cannot be used. Professor Black argues that one Congress cannot bind a future Congress,

tion, with delegates elected from House Districts in each State, and two elected at large. 4) Congress would determine where, when, and how long the Convention would meet. 5) Congress to state the subject matter of the Convention. 6) Congress reserves the right to refuse to submit for ratification any proposed amendment outside the stated mandate of the Convention. 7) Accelerated judicial review, so the Supreme Court could rule promptly on the constitutionality of the bill itself.

⁴⁴ Although getting a test case from trial level through a final decision in the Supreme Court usually takes three years or more, Congress is capable of shortening that process to less than six months. In the Federal Election Campaign Act of 1976, Congress provided special provisions for prompt judicial review. As a result, the final decision on that Act came less than six months after it went into effect. See, *Buckley v. Valeo*, 424 US 1, 1976.

which therefore vitiates any procedures bill. /⁴⁵

Actually, Professor Black's position is a qualified negative, since the passage by Congress of a procedures bill and the approval of that by the Supreme Court would establish the authority chain. It would be clear that States could call for a limited convention. It would be clear that Congress could impose those limitations on a convention whenever one was called, and could enforce those limitations by refusing to submit for ratification proposed amendments, if any, that exceeded the mandate.

At such time in this or any future century, when the necessary 2/3rds of the States called for a convention limited to a specific subject, the Congress then sitting might vary the terms of the procedures bill it then passed, along with the call for the convention itself. (Both actions require only a majority of Congress.) Still, the extent of Congress' authority to act would be clear, as a result of the prior Act and the Supreme Court decision concerning it.

V. Legislative and Judicial Restraints on a Convention.

There are several key cases on the power to hold a Convention within defined limits. In *Chenault v, Carter*, supra, the legislature proposed voter approval for a Constitutional Convention limited to 12 stated subjects. In a declaratory judgment action,

⁴⁵ For a discussion of the views of most major authorities, and the dissenting views of Professors Black and Tribe, see *Limited Constitutional Conventions...* Office of Legal Policy, Department of Justice, footnote 4, ante, at pps. 36-43, and especially footnotes 85 and 93.

officials and voters attacked that proposal on many grounds, including the idea that a convention cannot be so limited.

They claimed that a Convention represented the sovereign people, and as such, could not be restrained by a mere "statute of the legislature."

The Court disagreed, and bound the Convention to the limits set by the legislature. Their logic was not that the legislature was superior in authority to the Convention. It was that the people are sovereign over both, and that once the people approved the calling of a Convention with the limits stated on the ballot when they voted, the legislature was required to hold the Convention to those limits, and the Convention was then so limited.

The common law authority that is often cited for such a result is that an agent cannot go beyond the authority granted by his principal. In this case, the principal is the people, and the agent is both the legislature and the Convention. (At the beginning of this process, of course, the legislature could have asked the people to vote on the calling of a general convention. A favorable vote on that would have produced a general convention.)

The strongest case concerning limitations on a Convention concerns one in the Commonwealth of Virginia. The legislature called for a Convention limited to the sole subject of provisions for poll taxes as applied to residents of military reservations. Members of the Convention brought a court challenge, saying this was unduly restrictive of the purposes of a Convention.

The Court disagreed. It held that the power to call a gen-

eral Convention included the lesser power to call a Convention limited to only certain subjects. Once the body given the power to call for the Convention has spoken, the Convention then has only such power as it has been granted. /⁴⁶

Related cases that lead to the same general conclusion include *Ellingham v. Dye*, 178 Ind. 336, 97 N.E. 1 (Indiana, 1912). There, the legislature proposed amendments to the Constitution in a manner different from the steps spelled out in the Constitution. The Court barred those amendments from being submitted to the voters, on the grounds that the methods for amending the Indiana Constitution were those contained in its text, until and unless the people saw fit to change those, by using the stated methods to propose and ratify any change.

To similar effect is *Holmes v. Appling*, 237 Or. 546, 392 P2d 636, (Oregon, 1964). The Oregon Constitution contained a provision for the proposal of amendments through the initiative process. Certain residents proposed what was called an "amendment," but in fact, it repealed and reenacted the entire Oregon Constitution.

The Court held that the total rewriting of the Constitution was different in kind from the proposal of one or more amendments. Therefore, even though the proposal had garnered sufficient valid signatures to appear on the ballot, it struck the proposal as being invalid under the terms of the Oregon Constitution.

The leading case on the subject of abiding by the terms of

⁴⁶ See, the Virginia poll tax case, *Staples v. Gilmer*, supra.

the existing Constitution in any effort to amend it, is *State v. Manley*, supra. Alabama had both of the normal provisions: submission of individual amendments to the voters by the legislature, and the calling of a Constitutional Convention, if first approved by the voters. Instead of using either of these provisions, the Alabama legislature completely revised the Constitution, and sought to submit that to the voters for approval.

This Court did perhaps the most thorough job of analysis of any that has ever considered the limitations on amendments to constitutions. It went back to Daniel Webster's arguments on the nature of conventions, and the right of the people to amend or alter their forms of government. It carefully distinguished all contrary cases. And, it concluded that the legislature was bound to follow the terms of the existing Constitution, and ordered that the new Constitution not be submitted to the people.

This Court discussed an aspect of the case which has been raised in some arguments today. Can a new Constitution provide for a new method of proposal or ratification of itself, without that change in the amendment process having been first approved under the preexisting methods? The Court noted that buried in the 40-some pages of this new Constitution was a provision that would allow the legislature in the future to do exactly what it was then attempting, to make complete revisions, rather than propose singular amendments. This was one of the reasons why the Court struck the proposal down.

The Manley Court first discussed *Wheeler v. Fargo School*

District, 37 SE2d 322 (Georgia, 1946), in which the Georgia legislature submitted to a vote a new Constitution that was drafted by it contrary to the terms of the existing Constitution. The legal challenge to this process did not come until after the voters had approved the new Constitution. The Court relied on older cases, going back to the Post-Revolutionary period, when there were few established procedures for amendment of State Constitutions, and decided to let the Constitution stand as valid. The logic of its decision was that the people are sovereign and by their approval can forgive whatever flaws there are in the process prior to that point.

Although Manley represents the majority view among the highest State Courts, Wheeler is a troublesome case, but only at the State level. There is no popular referendum on either specific amendments or a new Constitution at the federal level. The will of the people is represented by the actions of Congress and of the State legislatures (or by special ratifying conventions elected in the States), under the terms of Article V of the Constitution.

The will of the people is first expressed, either by two-thirds of Congress proposing an amendment, or by two-thirds of the State legislatures calling for a Convention.

The handful of cases, like Wheeler, in which a State court has approved a constitutional amendment even though the stated procedures were not followed, all share one characteristic. In each instance, the new constitutional provisions had been ratified before the matter reached the court for review, in one instance

the ratification had been sixteen years earlier.

The posture of these cases therefore put the courts on the horns of a dilemma. They were sitting under the authority of the new constitution. They would have to reach backwards, beyond their own current authority, to strike the new constitution to validate the terms of the old one.

As discussed below, the United States Supreme Court has the ability to act in a matter of months, on matters of urgency. Also, all of the convention procedures bills considered by Congress either expressly mandate accelerated judicial review, or leave intact the normal judicial review standards of the Court.

Therefore, the only way that the Wheeler dilemma could confront the Supreme Court would be if no State, no Congressmen, and no individuals were sufficiently concerned about a possibly invalid amendment to the Constitution to go to court promptly and bring a competent challenge to the process before the amendment was ratified. While it might be theoretically possible for 50 States, 547 Congressmen, and 240 million Americans to remain asleep at the switch for a year or more of ratification, anyone whose argument is based on that occurrence is dealing in the realm of foolishness -- not law, or logic, or constitutionalism.

It is clear that the States can call for a new, general convention, if that is what they want. Only three States have ever done that in our history, and all such calls occurred shortly after the 1787 Convention, from States that were generally dissatisfied with our new Constitution. No State has called for a

general Convention in the 19th or 20th centuries. /⁴⁷

The critical question is whether the States can exercise less than all of their power -- whether they can call for a Convention limited to one or more subjects. At the federal level, there is only the history of the drafting of Article V in Philadelphia, the writings of the Framers, and whatever theories modern experts might graft onto those sources, to answer the question.

But, at the State level, there is ample experience and case law to answer it. If the State legislatures, who are the appointed representatives of the people under Article V, decide that there should be a limited Convention, then that is the voice of the sovereign people, and must be obeyed.

Once the will of the people has been expressed on the nature of a Constitutional Convention, the duties of Congress are ministerial. It can pass a Procedures Bill for the Convention, but it cannot enlarge the mandate of the people concerning the content of the Convention.

Also based on the State experiences, if Congress were so foolish as to attempt to convene a general Convention when the States had demanded only a limited one, the Supreme Court would have both the power and the obligation to strike that law down

⁴⁷ The complete history of the 356 State calls for a national Constitutional Convention, through 1971, is found in the ABA Report, Appendix B, at p. 59. Since that time, there have been additional State calls for a Convention, all limited to specific subjects. The three primary subjects have been school prayer, abortion, and the balanced budget amendments. Only the latter has attracted anything approaching the trigger number of 34 States. It now stands at 32 States, and is being considered in several other States in 1988.

because Congress had exceeded the authority given to it in that situation.

What if Congress obeys the limitations in the State calls and convenes a limited Convention, but for whatever reason the Convention ignores its stated limits and ventures into other areas? Again, based on the State experience, Congress would have the power and the obligation to refuse to submit for ratification any proposed amendments that were outside the mandate of the Convention. The power of Congress to refuse to submit for ratification a proposed amendment that exceeds the mandate of a Convention, is stated in all versions of the Procedures Bills considered to date. If such a Bill is passed, and reviewed and approved by the Supreme Court before a Convention is called, there will be no question of the right of Congress to reject excessive amendments, should the delegates to the Convention violate their oaths of office and the terms of the law under which they meet. /⁴⁸

And lastly, based on the State experience, if the Convention went beyond its mandate and proposed amendments outside its stated subjects, and if Congress decided to submit those amendments for ratification despite that violation of the law, the Supreme Court would have the power and the obligation to order that the excess amendments not be submitted for ratification, and to declare that they would be unconstitutional, even if ratified.

⁴⁸ The non-submission provision in S. 40, in the 99th Congress, for instance, also included a provision for any State to bring an action in the Supreme Court within sixty days, to test the constitutionality of the Congressional decision. See also note 44, supra.

It is clear that there would be a significant Constitutional crisis if those who were concerned about amendments exceeding the Convention's mandate, waited until after such an amendment had been declared as ratified before they brought a challenge in Court. However, no amendment to the Constitution has ever been ratified in less than a year, and that is ample time for individual citizens, or States in their sovereign capacity, or both, to recognize the problem and bring the challenges.

Again, the State experience is instructive. State Courts have demonstrated that they can conduct trials and appellate decisions from start to finish in less than a month, to determine the validity of amendment processes before the matters would be submitted to the voters. The Supreme Court has also demonstrated in urgent cases, such as *U.S. v. Nixon*, 418 US 683, 1974, concerning the Watergate tapes, that it is also capable of very prompt action. If it came down to the final protection against improper action, a Supreme Court decision, it could be made before ratification of any unconstitutional amendment was completed.

In short, much of the "debate" about the calling, controlling, and conduct of Constitutional Conventions at the federal level begins with the assumption that there is a void of both theory and fact on the subject. Into that void various professors have leaped, bearing fistfuls of theories. However, there is more than 200 years of experience in the process of writing and amending State Constitutions. That experience includes both legislative and judicial control of the process.

It is all based on the same two foundations that apply at the federal level. First, the people are sovereign, and their will as expressed through the legal processes, must govern. Second, and flowing directly from the first consideration, the Constitution as it presently exists must be obeyed by all organs and agencies of government at all levels, until such time as the people use the provisions of that Constitution to make changes in it.

George Washington stated the point as well or better than anyone else, when he said in his Farewell Address, "The Constitution is sacredly obligatory upon all, until it is changed by the explicit and authentic act of the whole people." /⁴⁹ That quotation from Washington appears in many of the State Court decisions concerning the amendment process. It appears because the logic of a constitution is the same, whether at the State or federal level.

Every Constitution in the United States represents both the fundamental law of that jurisdiction and the embodiment of the will of the people concerning the structure of their government. The people can change their Constitutions any time they want, in any way they want, but only by the mechanisms that they have already established to make such changes. /⁵⁰

⁴⁹ The text of George Washington's Farewell Address, delivered on 17 September, 1797, is found in the American Jurisprudence Desk Book, among many other sources.

⁵⁰ Interestingly, the amendment process in Article V is the second most common target of the more than 5,000 proposed amendments that have been introduced in Congress over the last two centuries. (The most common target, more than 20% of all proposals, has been the Electoral College method of electing the President, and/or, the number or length of Presidential terms.) In both instances, although there is substantial dissatisfaction with

Anyone who seeks to frustrate the process of constitutional change at the State or federal level, on the basis that it is too dangerous to attempt, is in fact saying that the American people can no longer be trusted with their own fundamental law. Not only is that an attack on the most basic right of all Americans, the right to frame our own governments, it is also contrary to the meaning and purpose of Article V, as 200 years of experience with State Constitutions has amply demonstrated.

In short, the people have a right to say through their State legislatures whether they want a Constitutional Convention, and if so, what limits they want placed on such a Convention. Once the people have spoken, both the Congress and the Supreme Court have an obligation to carry out that will, in accord with its terms. That is the principal lesson that the history of State constitutional revision offers to the nation.

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the present Constitutional provisions, there is no consensus on the mechanism that should replace the original. Therefore, we continue to operate under the provisions of Articles II and V, as written in Philadelphia.

TABLE OF STATE CONSTITUTIONAL AMENDMENT PROVISIONS
AND NUMBER OF CONSTITUTIONS

State	Const's since 1776	Methods of Amendment			
		by Legis.	by Init've	by Con Conv'n	by Con Comm'n
Alabama	6	X*		X	
Alaska	1	X*		X&	
Arizona	1	X	X	X	
Arkansas	5	X			
California	2	X*	X	X	
Colorado	1	X*	X	X	
Connecticut	4	X**		X&	
Delaware	4	X*		X	
Florida	6	X*	X	X	
Georgia	10	X*		X	
Hawaii	1	X**		X&	
Idaho	1	X*		X	
Illinois	4	X*	X	X&	
Indiana	2	X			
Iowa	2	X		X&	
Kansas	1	X*		X	
Kentucky	4	X*		X	
Louisiana	11	X*		X	
Maine	1	X*		X	
Maryland	4	X*		X&	
Massachusetts	1	X	X		
Michigan	4	X*	X	X&	
Minnesota	1	X		X	
Mississippi	4	X*			
Missouri	4	X	X	X&	Y
Montana	2	X*	X	X&	
Nebraska	2	X*	X	X	
Nevada	1	X	X	X	
New Hampshire	2	X*		X&	
New Jersey	3	X**			Y
New Mexico	1	X***		X	
New York	4	X		X&	
North Carolina	3	X*		X	
North Dakota	1	X	X		
Ohio	2	X*	X	X&	

State	Const's since 1776	Methods of Amendment			
		by Legis.	by Init've	by Con Conv'n	by Con Comm'n
Oklahoma	1	x	x	x&	
Oregon	1	x***	x	x	
Pennsylvania	5	x			
Rhode Island	2	x		x&	y
South Carolina	7	x*		x	
South Dakota	1	x	x	x	
Tennessee	3	x*		x	
Texas	5	x			
Utah	1	x		x	
Vermont	3	x			
Virginia	6	x		x	
Washington	1	x		x	
West Virginia	2	x		x	
Wisconsin	1	x		x	
Wyoming	1	x		x	

* A supra-majority is required.

** A supra-majority is required if an amendment is passed by one legislature. A simple majority is required if passed in two sessions.

*** A simple majority is required, except for amendments on certain, specified subjects.

& Requires periodic submission to the voters of whether a constitutional convention should be held. Times range from 9 to 20 years.

y These States used Constitutional Commissions created by Executive Order or statute. Commissions recommend only, their results go back to the legislatures for modification and submission to the voters.

The information above is summarized from Albert Sturm and Janice May's Tables 1.1 through 1.5, in the Book of the States, 1984-1985, pps. 14-22.

APPENDIX A

HISTORY OF THE ADOPTION OF THE 17TH AMENDMENT

The effort to amend the Constitution so that members of the Senate would be popularly elected, rather than appointed by the State legislatures, began in earnest in 1893. Between then and 1910, five times the House of Representatives passed a proposed amendment to make the Senate elective. Five times the proposal died in Committee in the Senate without reaching the floor.

In the meantime, States began passing conditional calls for a Constitutional Convention for the purpose of writing such an amendment. While the language of the State calls varied, the methodology was much the same as current State calls on the balanced budget amendment and other subjects. They called on Congress to act, and in the absence of Congressional action, they called for a Convention. And, also similar to present calls, they employed various language and methods of restricting any such Convention to the subject matter of this one amendment.

At the time, the United States contained 46 States; therefore the trigger number of 2/3rds amounted to 32 States to call for a new Convention. By 1912, 31 of the required 32 States had acted. The Senate then read the handwriting on the wall, and recognized that it had only two choices -- participate in the drafting and passage of the amendment itself, or leave the task to an unrestrained Convention. They ran the risk a Convention could put all unelected Senators out in the street and require the staggered election of a new Senate, as did the original Constitution.

Faced with two undesirable choices, the Senate accepted the lesser of two evils. It passed the 17th Amendment in 1912. However, the Senate included what protective language it could. Section 3 of that Amendment is a grandfather clause, and says, "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid...."

The 17th Amendment was ratified by the States, a year later.

For a more complete discussion of the history of the adoption of the 17th Amendment, and its importance in demonstrating the use and effectiveness of the second half of Article V, see, John C. Armor, "The Right of Peaceful Change: Article V of the Constitution," Tax Limitation Research Foundation, Washington, D.C., 1984, especially the Section entitled, "The Swamp Water Theory."

APPENDIX B

HISTORY OF THE FAILURE OF THE DIRKSEN AMENDMENT

The Dirksen Amendment was proposed by Senator Everett Dirksen of Illinois in 1964, in response to the Supreme Court decisions in *Baker v. Carr*, 369 US 186 (1962), and *Reynolds v. Sims*, 377 US 533 (1964). Between them, these decisions determined that the "one man, one vote" principle applied in State elections, and that no house of any State legislature could be apportioned other than on that basis.

The Dirksen Amendment would have partially reversed those decisions by allowing one house of a bicameral legislature to be "apportioned other than on the basis of population." The common other basis for State Senate Districts at the time was county lines, regardless of population contained in the various counties.

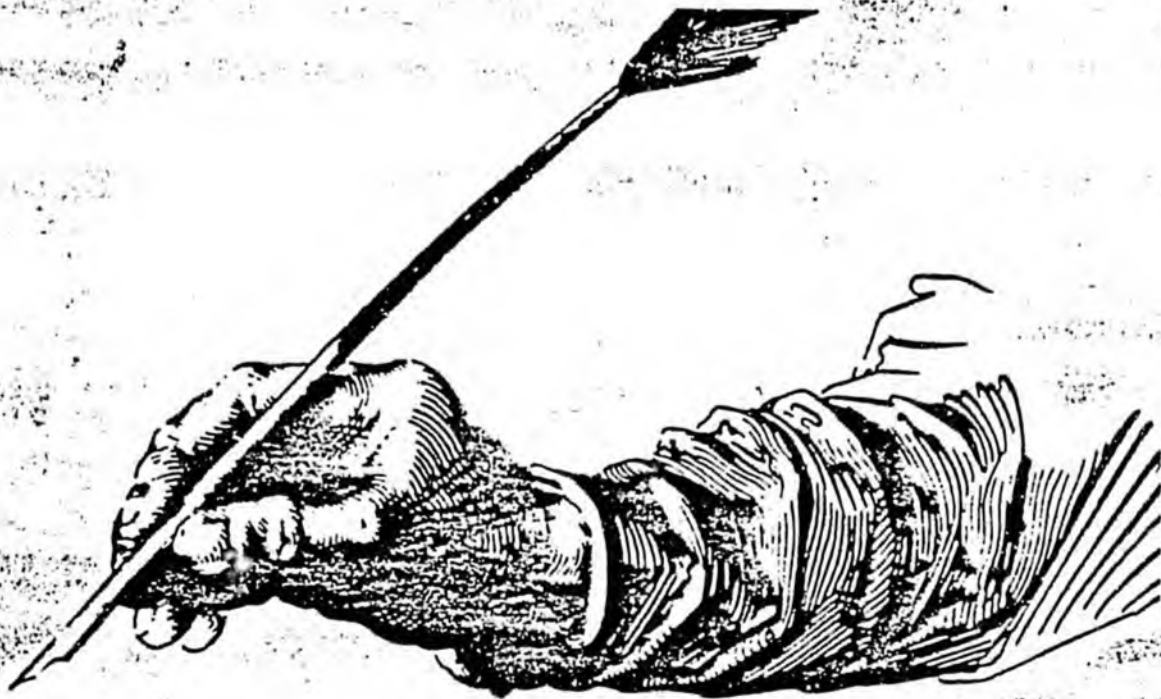
Supported by the Council of State Governments and other institutions, this effort started strongly. By 1967, 32 States (of the then-required 34) passed such calls for a Constitutional Convention on this specific subject. In 1969, an additional State issued a call, but another State rescinded its call, so the number outstanding remained at 32. After that, one more call was passed, but there were a number of rescissions.

A total of 42 calls were passed on this subject, from a total of 34 States. However, because of rescissions there were never 34 calls in effect at any one time. Ultimately, after all State legislatures had been reapportioned pursuant either to law suits based on *Baker* and *Reynolds*, or because of the real possibility of

such suits, the effort to force the adoption of the Dirksen Amendment died away.

There was never a significant possibility that Congress would adopt the Dirksen Amendment except in response to pressure from the State calls for a Convention on this issue. Then as now, a number of the State calls were conditional. They asked for Congress to act and only failing that, asked for a Convention. Then as now, a number of the calls contained various types of restrictive language intended to hold any Convention to the precise subject of the calls, namely State legislative reapportionment.

For a fuller history of the failed effort to adopt the Dirksen Amendment, see the ABA Report, at pps. 2-4, and the Table of State Calls at pps. 60-61.



AMENDMENT OF THE CONSTITUTION
BY THE CONVENTION METHOD UNDER ARTICLE V

AMERICAN BAR ASSOCIATION

SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE



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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

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.² 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-

²These 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.³

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 1959, one additional state⁸ 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.+

⁸Making 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 should 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

²³Mason'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 529 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

²⁸Note the similarity between this language (*emendatio puris*) and the language contained in the earliest drafts of Article V (p. 12, *supra*).

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.

* * *

"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 included 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-limited 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 § 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

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 McCordle*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.

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.

Role
of Executive
(i) President

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 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 . . . The bill was vetoed by the governor and not re-passed 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 then 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 assemblies 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

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 1913,⁶⁶ 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*.

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

The
Article V
Convention
(i) Election
of
Delegates

*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) Appor-
tionment
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 geographic 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 II⁷⁸ 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 decisions⁸¹ 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. Glass* 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 unnecessary 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

¹² J. Story, *Commentaries on the Constitution of the United States* § 1826 (5th ed. 1905).

¹³ *The Federalist No. 43*, at 204 (Hallowell; Masters, Smith & Co. ed. 1852) (J. Madison).

¹⁴ 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).

¹⁵ See A. Sturm, *Thirty Years of State Constitution Making: 1938-1968*, at 51-80, 132-37 (National Municipal League 1970).

¹⁶ 369 U.S. 186 (1962).

¹⁷ 377 U.S. 533 (1964).

¹⁸ 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).

¹⁹ 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).

²⁰ See Martin, "The Application Clause of Article Five," 85 *Pol. Sci. Q.* 616, 626 (1970).

²¹ Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 *Mich. L. Rev.* 875, 878 (1968).

²² 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).

²³ 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*, Chao, VI (1942); McCleskey, "Along the Midway: Some Thoughts on Democratic Constitution-Amending," 66 *Mich. L. Rev.* 1001, 1012-16 (1968).

²⁴ 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).

²⁵ 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.

¹⁹Ga. 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*].

²⁰Pa. Const. § 47 (1776), at 2 *Poore* 1548. Vermont's Constitution of 1786 contained a similar amending article.

²¹"Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Cong., 1st Sess. 41-43 (1927).

²²A. 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. 133 (Cusn.) 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 313 (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).

²³Roger 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.

²⁴*State v. American Sugar Refining Company*, 137 La. 407, 415, 68 So. 742, 745 (1915).

²⁵*State ex rel. McCready v. Hunt*, 25 S.C. (2 Hill's Law) 1, 271 (1834).

²⁶Nearly 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, 1900-1971," in Council of State Gov'ts, *The Book of the States, 1972-1973*, at 20 (1972).

²⁷256 U.S. 368 (1921)

²⁸258 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."

²⁹As 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.

³⁰A 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).

⁴¹To 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.

⁴²74 U.S. (17 Wall.) 506 (1869), criticized in *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

⁴³See 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).

⁴⁴The 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).

⁴⁵307 U.S. 433 (1939).

⁴⁶369 U.S. 186 (1962).

⁴⁷*Id.* 217.

⁴⁸395 U.S. 486 (1969).

⁴⁹See *Butterworth v. Demsey*, 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).

⁵⁰3 U.S. (3 Dall.) 378 (1798).

⁵¹*Id.* 380 n.1a).

⁵²111 Journal of the Senate 323 (1803) (motion defeated by a vote of 23 to 7).

⁵³Cong. 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.

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

⁵⁵253 U.S. 221 (1920).

⁵⁶*Id.* 227.

⁵⁷285 U.S. 355 (1932).

⁵⁸*Id.* 365, 366.

¹⁹ 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.

²⁰ 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.

²¹ 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). *See 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.

²² 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).

²³ Brickfield, *supra* note 61, at 11-12.

²⁴ 256 U.S. 368, 375 (1921).

²⁵ 307 U.S. 433, 453-54 (1939).

²⁶ 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.

²⁷ See, e.g., Note "Rescinding Memorialization Resolutions," 30 Chi.-Kent L. Rev. 339 (1952).

²⁸ 297 U.S. 50 (1970).

²⁹ *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 93 S. Ct. 904 (1973).

³⁰ *Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791, 794 (1965).

³¹ 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 *Butterworm v. Demsey*, 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.

¹⁷ 376 U.S. 1 (1964).

¹⁸ 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. ASOS, 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).

¹⁹ 93 S.Ct. 979 (1973).

²⁰ 403 U.S. 182 (1971).

²¹ 394 U.S. 526, 531 (1968).

²² 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.

²³ 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*, 461 P.2d 330 (Mont. 1971); *State v. Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935).

²⁴ See 1 *Farrand* 376; *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971).

²⁵ Jameson, *supra* note 17, at §§ 582-584; Dodd, "Amendment to the Federal Constitution," 30 *Yale L.J.* 321, 346 (1919).

²⁶ *Wise v. Chandler*, 270 Ky. 1, 108 S.W.2d 1150 (1937), holding that state legislative rejection of a proposed constitutional amendment cannot be reconsidered; *Coleman v. Miller*, 145 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 (1932).

²⁷ 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 ratification of the Thirteenth and Fourteenth Amendments. See generally Myers, *The Process of Constitutional Amendment*, S. Doc. No. 314, 76th Cong., 3rd Sess. (1940).

²⁸ S. Rep. No. 336, 92nd Cong., 1st Sess. 2 (1971).

This appendix is designed to capsule 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

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

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.

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 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.

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).

(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.

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) 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) *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."

[(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;]

(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) *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.

[(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 continuous 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.]

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.

(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.

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) 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).

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

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.

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.

Questions concerning the rescission 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

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 31(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,

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-

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

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., Peruskey v. Rampson*, 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.

[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 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.)

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 52)

*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		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		10	
PENNSYLVANIA		1	2		1															5	
RHODE ISLAND					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	9	
TEXAS	1	2	1		1				2			2			1		1	1		15	
UTAH		1			1							2			1					5	
VERMONT			1																	1	
VIRGINIA	2				1				1	1		2					1		1	10	
WASHINGTON	1	1	2									1								5	
WEST VIRGINIA			1															1		2	
WISCONSIN	2	3	1	1	1		1								1					11	
WYOMING		1			2				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								3		9
COLORADO		1			1							2			1	1				1		7
CONNECTICUT			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
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		9
IOWA		4	1		2		1					1					1					10
KANSAS		4			1				1			2			1							9
KENTUCKY	2	1			1							1										5
LOUISIANA		1	1		2					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	1		2		1		1									1				7
MINNESOTA		2	1									1										4

(continued from page 59)

Buckwalter, "Constitutional Conventions and State Legislators," 20 J.Pub.L. 543 (1971) [hereinafter cited as *Buckwalter*]; *Graham*, "The Role of the States in Proposing Constitutional Amendments," 49 A.B.A.J. 1175 (1963) [hereinafter cited as *Graham*]; E. Hutton, State Applications to Congress Calling for Conventions to Propose Constitutional Amendments (January 1963 to June 8, 1973), June 12, 1973 (Library of Congress, Congressional Research Service, American Law Division Paper) [hereinafter cited as *Library of Congress Study*]; *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 115-18 (1967) [hereinafter cited as *1967 Hearings*]; Tydings, *Federal Constitutional Convention*, S. Doc. No. 78, 71st Cong., 2d Sess. (1930) [hereinafter cited as *1930 S.Doc.*]; and W. Pullen, "The Application Clause of the Amending Provision of the Constitution," 1951 (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as *Pullen*].

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.

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 Tax-
ing 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 applica-
tions (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.

Apportion-
ment

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^f, 1965^f; 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: Ca. 1965; La. 1965; S.C. 1963.

Library of Congress Study and *1967 Hearings* cite: S.D. 1963.

Buckwalter cites: Ind. 1957.

Library of Congress Study cites: Alaska 1965; Cal.

1965; Nev. 1965; Okla. 1963; R.I. 1965; Utah 1963.

r = Rescinded

Court of
the Union

Graham, Library of Congress Study, and Buckwalter were consulted. All sources cite: Ala. 1963; Ark. 1963; Fla. 1963.

Graham and Buckwalter cite: S.C. 1963; Wyo. 1963.

Prayer in
Schools

Buckwalter and Library of Congress Study were consulted. All sources cite: Mass. 1964.

Library of Congress Study cites: Ariz. 1972; Md. 1966; N.D. 1963.

Redistrib-
tion 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

Presidential
Disability
and
Succession

Library of Congress Study was the only source consulted. The study cites: Colo. 1965; Neb. 1965; Va. 1965.

Revenue
Sharing

Buckwalter and Library of Congress Study were consulted. All sources cite: Ala. 1967; Fla. 1969; Ill. 1965; Ohio 1965; Tex. 1967.

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.

Freedom
of Choice
in Selec-
tion of
Schools

Library of Congress Study was the only source consulted. The study cites: La. 1970; Mich. 1971; Miss. 1970, 1973; Nev. 1973; Okla. 1973; Tex. 1973.

Prohibit
Taxation of
State or
Municipal
Bonds

Library of Congress Study was the only source consulted. The study cites: Hawaii 1970; La. 1970; Tenn. 1970; Va. 1970.

Miscellane-
ous

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.

1957—Selection of Federal Judges: *Graham*.

1959—Federal Pre-emption: *Graham*.

Arkansas

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*.

1952—Distribution of Proceeds of Federal Taxes on Gasoline: *Buckwalter* and *Graham*.

Colorado

1963—Direct Election of President and Vice President: *Library of Congress Study*.

Connecticut

1958—State Tax on Income of Non-residents: *Graham*.

Florida

1972—Replace the Vice President as Head of the Senate: *Library of Congress Study*.

Idaho

1927—Taxation of Federal and State Securities: *Buckwalter*, *Graham*, and *Pullen*.

1953—Federal Debt Limit: *Buckwalter*, *Graham*, and *Library of Congress Study*.

Illinois

1911—Prevention and Suppression of Monopolies:

Buckwalter, Graham, and Pullen.

Indiana

1957—Balancing the Budget: *Buckwalter and Graham.*

Louisiana

1920—Popular Ratification of Amendments: *Buckwalter, Graham, and Pullen.*

1970—Sedition and Criminal Anarchy: *Library of Congress Study.*

Massachusetts

1964—Pensions to Persons Over 65: *Buckwalter and Library of Congress Study.*

1967—Bible Reading in Public Schools: *Library of Congress Study.* *Buckwalter* cites this application as 1964.

1973—Public Funds for Secular Education: *Library of Congress Study.*

Mississippi

1965—Control Communist Party in U.S.: *Buckwalter and Library of Congress Study.*

1973—Prayer in Public Buildings: *Library of Congress Study.*

Missouri

1913—Constitutionality of State Enactments: *Buckwalter, Graham, and Pullen.*

Montana

1953—Direct Election of President and Vice President: *Library of Congress Study.*

New Jersey

1965—Residence of Members of Congress: *Library of Congress Study.*

New York

1965—Equal Rights for Women: *Library of Congress Study.*

1972—Public Funds for Secular Education: *Library of Congress Study.*

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

1972—Prohibit Interference with Neighborhood Schools: *Library of Congress Study*.

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 expressed 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 divisive 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 W. 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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HOUSE COMMITTEE REPORT

(7)

Date Referred: May 8, 1989

FURTHER REFERRALS:

Date of Committee Action: 4-18-90

The JUDICIARY Committee considered:

SSHJR 54

SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 54

[AMEND U.S. CONST. ART I/TERMS OF MEMBERS

Relating to amendments to the Constitution of the United States concerned with the Congress.

RECOMMENDATIONS:

- [] be replaced with CS 2d SSHJR 54 (JUD) [] the same title
- [] a new title
- [] have attached amendment(s)
- [] do pass
- [] do not pass
- [] no recommendation
- [] individual recommendations
- [] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s) •
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- [] fiscal impact _____
- [] zero fiscal note _____
- [] zero with analysis _____

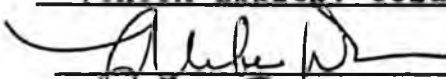
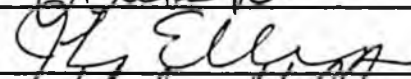
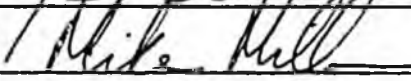
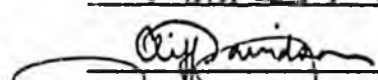
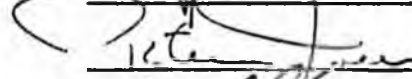

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- [] zero fn/analysis _____

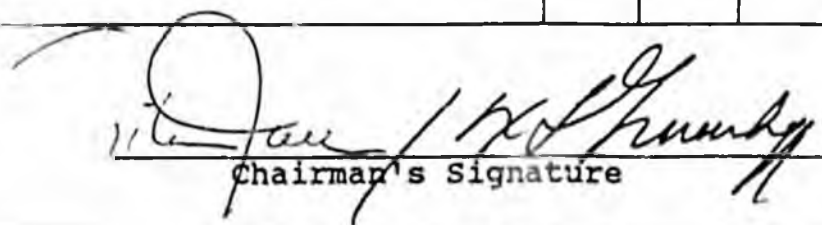
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SIGNING:

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Do Not
Pass No Rec Amend

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ELLIS		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
MILLER		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DAVISON		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
GOLL		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
GRUENBERG		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>


Chairman's Signature

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to amendments to the
Constitution of U.S. concerned with Congress.
Sponsor: Representative Pettyjohn
Requestor: House Judiciary

Affected Agency: Legislative Affairs Agency
BRU: Legislative Operating Budget
Components Legislative Operating Budget

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY91	FY92	FY93	FY94	FY95	FY96
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
----------------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
----------------	---	---	---	---	---	---

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	0	0	0	0	0	0
Federal Fund	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

NO FISCAL IMPACT

Prepared By: Pamela A. Stoops, Director
Division: Administrative Services

Pamela Stoops

Phone: 465-3850
Date: 4/19/90

Approved By: Warren Endicott, Executive Director
Agency: Legislative Affairs Agency

Warren Endicott

Date: 4/19/90

DISTRIBUTION (BY PREPARER)
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
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Original sponsor(s): REP. PETTYJOHN, Taylor, Hanley, Leman

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 54 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 Relating to amendments to the Consti-
6 tution of the United States concerned
7 with the Congress.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 WHEREAS the Congress was originally envisioned by the Founding Fathers
10 as a nonpartisan, part-time legislative body whose members would take time
11 from their normal businesses and professions to attend the congressional
12 session for four to five months annually; and

13 WHEREAS the press of the nation's business has forced the Congress to
14 become increasingly a highly structured, professional, and hierarchical
15 institution rather than the informal, flexible gathering of citizens and
16 legal intellects that obtained in the Federalist Era; and

17 WHEREAS the power of the incumbency has grown over time and with the
18 institution of electronic media to the point that the incumbent is nearly
19 unassailable in a normal election; and

20 WHEREAS the seniority system in the Congress, though recently re-
21 formed, still places disproportionate stress on electoral longevity; and

22 WHEREAS innovative ideas and rejuvenated vigor are more likely to come
23 to the Congress through new members fresh from association with the people
24 of the United States; and

25 WHEREAS the most common complaint that the public makes about congres-
26 sional service is that members of Congress spend more of their time running
27 for office than attending to their duties; and

28 WHEREAS the power of incumbency makes biennial congressional elections
29 an expensive, exasperating, and ultimately rather meaningless waste of each

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2 WHEREAS under art. V of the Constitution of the United States, an
3 amendment to the Constitution may be proposed by the Congress, or on the
4 application of the legislatures of two-thirds of the states, the Congress
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6 amendment, which, in either case, shall become part of the Constitution
7 when ratified by three-fourths of the several States;

8 BE IT RESOLVED by the Alaska State Legislature that the Congress of
9 the United States is requested to propose an amendment to the Constitution
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11 the number of terms a person may serve in the United States House of Rep-
12 resentatives to no more than six and to limit the number of terms a person
13 may serve in the United States Senate to no more than two; and be it

14 FURTHER RESOLVED that alternatively, effective July 1, 1991, under
15 art. V of the Constitution of the United States, the Legislature of the
16 State of Alaska makes application to the Congress of the United States to
17 call a convention for the specific and exclusive purpose of proposing an
18 amendment to the Constitution of the United States, for submission to the
19 states for ratification, to limit the number of terms a person may serve in
20 the United States House of Representatives to no more than six and to limit
21 the number of terms a person may serve in the United States Senate to no
22 more than two; and be it

23 FURTHER RESOLVED that if the Congress proposes and submits to the
24 states for ratification, within 60 days after the legislatures of two-
25 thirds of the states have made application for a convention, an amendment
26 to the Constitution of the United States similar in subject matter to that
27 contained in this Joint Resolution, then this application for a convention
28 shall no longer be of any force or effect; and be it

29 FURTHER RESOLVED that this application and request be considered null

1 and void, rescinded, and of no effect in the event that the convention not
2 be limited to that specific and exclusive purpose; and be it

3 FURTHER RESOLVED that this application constitutes a continuing appli-
4 cation under art. V of the Constitution of the United States until at least
5 two-thirds of the legislatures of the several States have made application
6 for a similar convention under art. V, until the Congress has proposed an
7 amendment to the Constitution of the United States similar in subject
8 matter to that contained in this Joint Resolution, or until July 1, 2001,
9 whichever occurs first.

10 COPIES of this resolution shall be sent to the Secretary of the United
11 States Senate; to the Clerk of the United States House of Representatives;
12 and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S.
13 Senators, and the Honorable Don Young, U.S. Representative, members of the
14 Alaska delegation in Congress; and to the presiding officer of each house
15 of each other state legislature in the United States.

BSN:1253

ALASKA HOUSE OF REPRESENTATIVES
CSSSHJR. 54(JUD).

2ND SESSION 16TH LEG

4/25/90 4:34 PM

		28 YEAS	11 NAYS	0 EXC	1 ABS		
Y	DARNES	Y	ELLIS	Y	JACKO	Y	FETTYJOHN
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Y	COLLINS	N	GOLL	Y	LEMAN	Y	SHULTZ
Y	COTTEN	N	GRUENBERG	Y	MACLEAN	A	SWACKHAMMER
Y	DAVIDSON	N	GRUSSENDORF	Y	MARTIN	Y	TAYLOR
Y	DAVIS. C.	Y	HANLEY	Y	MENARD	N	ULMER
N	DAVIS. M.	N	HOFFMAN	Y	MILLER	N	WALLIS
Y	DONLEY	N	HUDSON	Y	NAVARRE	Y	ZAWACKI

+ VOTED FOR
* CHANGED VOTE

OFFICE OF U.S. SENATOR TED STEVENS
WASHINGTON, D.C. 20510
FAX TRANSMISSION

TO: Diane Sheridan

LOCATION: Office of Max Grunberg

FROM: Svend Brandt-Erichsen

OF PAGES, INCLUDING COVER SHEET: 4

MESSAGE: -3 editorials on limiting terms of office

- Hope this is not too late

Senator Stevens' Washington D.C. office: 202-224-3004
fax: 202-224-1044



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Amend Congress, not the Constitution

In 1948, Harry Truman succeeded himself as president, ensuring two straight decades of Democratic rule in the White House. On Inauguration Day 1949, you could have searched precincts from Bangor, Maine, to San Diego and not have found a conservative who favored increasing the powers of the executive branch.

But four decades later, things have changed. An increasingly liberal Democratic Party has latched onto Congress like an octopus with a stomach cramp. After more than three decades of trying, Republicans have failed to pry them loose either by hard-fought elections or, more recently, by loudly (and, for the most part, accurately) observing just how slimy a creature the Democratic majority is.

Now a group called Americans to Limit Congressional Terms has launched a campaign to amend the Constitution. Its plan is to prevent any member of Congress from serving longer than 12 years in either the House of Representatives or the Senate. Two state legislatures already have passed resolutions recommending such an amendment, 16 others plan to vote on similar resolutions this year and Sen. Gordon Humphrey, a good (and retiring) two-term conservative from New Hampshire, has carried the cause to the Senate floor.

Though they claim to be bipartisan, the supporters of the amendment are mostly Republican. The ALCT's advisory group is something like the mirror image of today's Congress. Three-quarters of its members are Republicans, the rest pliant Democrats. Many of them, ironically, if not surprisingly, are former congressmen, not all of whom left office of their own volition.

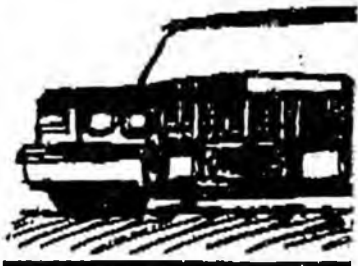
But a term-limitation amendment is a bad idea, not because it might change the balance of power in the current House and Senate, but because it definitely will change the balance of power built into the federal government by the Constitution. The House of Representatives, which is re-elected en masse

power of the president. The president, whether he is a liberal like FDR or a conservative like Ronald Reagan, has ample constitutional power to fight an unbending Congress. Two-thirds of both houses of the Congress, for example, must vote to override a veto.

Nor is long service in any branch of the federal government necessarily an impediment to statesmanship. It is not accidental that the greatest tragedy in our nation's history, the Civil War, broke out only after great and long-serving congressmen like Henry Clay and John C. Calhoun passed from the scene. And what conservatives today, bemoaning the long tenures of our liberal Supreme Court justices, would not like to see justices like William Rehnquist, Antonin Scalia and Anthony Kennedy riding the bench into the next century?

Undoubtedly, the majority and minority in Congress have a shared interest in ensuring their incumbency against all comers. And Congress has abused its power in granting itself privileges that serve more to tilt elections than forward the national interest. Such abuses include government-funded unsolicited mass mail, massive professional staffs, liberal travel expenses and campaign finance laws that favor wealthy lobbyists over individual voters. Congressmen also have a penchant for passing do-gooder laws on everyone else but specifically exempting themselves and their own offices.

The new conservative strategy of limiting congressional terms seems to be a way of admitting that if you can't win the game, change the rules. But the rules aren't there to protect conservatives or liberals or any other partisan or ideological conglomeration. They exist to protect liberty and achieve the ends of government that the Preamble to the Constitution affirms. If American voters don't like today's congressional oligarchy of incumbents, they can throw them out of office. But if the voters don't care enough to win the game for themselves, changing the



Letters

Marxists aren't

Your usually accurate coverage of developments in Angola is marred by an uncharacteristic lapse. An unsigned Agence France-Press dispatch in your Feb. 19 paper, "Angolan Marxists gaining ground," from Luanda, Angola, totally distorts the dynamic military situation in the country.

The unnamed correspondent was in all probability duped by a propaganda specialist for the Popular Front for the Liberation of Angola Workers' Party (MPLA-PT). While from over 400 miles away, the Agence France-Press journal wrote that Mavinga fell to the MPLA-PT on Feb. 2. Jean-Marc Kalfied, a correspondent for the *Quotidien Paris*, was taken to Mavinga on Feb. 11. He reported that Mavinga was

You put words in C

The Archbishop of Washington appreciates the tough but fair coverage by The Washington Times of events concerning the local Catholic community. We have found it

The Washington Post

AN INDEPENDENT NEWSPAPER

Lost Cause

THE GROUPS now trying to clean up congressional campaign finance need all the help they can get, but some of it needs to be taken with a couple of pounds of salt. We have in mind the loose network of defeated former candidates brought to town this week by an entity called the Coalition to End the Permanent Congress.

However worthy and underappreciated their candidacies may have been and however justified they may be in thinking that it was only a stacked deck that did them in, their complaints have two major defects. The first is that no matter how hard they try not to, they sound like sore losers. The second is an unspoken predicate in much of what they say—that incumbency and incumbents are bad and the longer someone has been in office the better the public interest will be served by his being turned out.

It's true that the current combination of perks and campaign finance is tilted in favor of incumbents and

needs to be fixed. But the problem is not that incumbents are returned to office; it's how they are returned. The possibility even exists—we're not saying it's so, please understand, but it's possible—that one reason some of these incumbents are reelected is that their constituents *like* them and want to be represented by them. What won't they think of next?

Some of the members of this coalition got less than a third of the vote. Yes, the frank is much abused, and incumbents are able to raise too much money from PACs, but there is a limit to what those forms of decadence can explain. There are even people out there—above all Republicans seeking to break the Democratic lock on the House—who want to limit congressional service: so many terms and you're out. It's a bad idea that would make Congress even more of a lightweight than it already is. The system protects incumbents, but the quarrel is with the system, not the incumbency.

Congress's Terms: Just Fine As They Are

By ALBERT R. HUNT

The Democrats have few peers when it comes to rationalizing their inability to win the presidency: one time it's their clunker candidate, another it's the superficial television appeal of Ronald Reagan or the "unfair" hardball tactics of GOP strategist Lee Atwater.

These are exercises in self-delusion. The Democrats lost five of the past six presidential races because most Americans have more confidence in the Republicans on the broad issues of the economy and peace and war.

Yet, during those same two decades, the Republicans' strength actually declined at every other political level, including Congress. Today the Democrats enjoy the same 55-to-45 advantage in the Senate that they had 20 years ago. They have 16 more House members. The GOP, like the Democrats on the presidential level, offer all manner of rationalizations: redistricting, the campaign financing system and the generous perquisites of incumbency.

Now there's a new GOP-inspired initiative to do something about it: constitutionally limiting congressional terms to 12 years. Former Republican office holders and some GOP political consultants, together with a sprinkling of disgruntled or "populist" Democrats, have banded together to form Americans to Limit Congressional Terms. The idea commands majority support among the public.

The objective, they claim, is to return to the "citizen legislators" that the Founding Fathers envisioned. The real goal, however, is to break the decades-old Democratic lock on Congress.

There's nothing wrong with posturing for political advantage, but the term-limitation proposal is a bad idea that likely would have unintended consequences. It's another of those schemes to take politics out of politics. We don't want to take businessmen out of business or athletes out of sports or doctors out of medicine. Nor should we try to limit the role of politicians in politics.

Term limitation, by removing years of expertise from Capitol Hill, would increase the power of the permanent bureaucracy. "Power would flow from elected to unelected officials," says Thomas Mann of the Brookings Institution.

It would enhance too the power of special interests. Instead of fresh-faced citizen legislators we'd end up with men and women who knew that after 12 years they had to seek a new line of work, most probably with the very interests that are lobbying them. "Most members today don't think about what they're going to do next until their last term," notes Rep. Vin Weber, a conservative Minnesota Republican. "But with a term limitation, the clock would start ticking right away with members thinking, 'What am I going to do when I get out of here in 12 years?' For many, the obvious answer would be to cultivate a relationship with those who can help you later."

Moreover, the premise that this would enhance GOP prospects is dubious. In the 1980s, while Ronald Reagan was riding high, there were 147 wide-open contests for House seats—elections in which there was no incumbent because of either retirement or death; there was a net Democratic gain in those contests of 1.

For years Republicans have been insisting they would dominate politics in the South as soon as the old-time Democrats retired. In 1981, at the dawn of the Reagan era, Virginia seemed the model, with Republicans controlling nine of the 10 House seats; eight years later the Democrats had won back half of the House seats.

But this isn't simply a Southern phenomenon. Going back to 1972, Republicans eyed the third congressional district on the New Jersey shore with its relatively affluent retirees. When incumbent Democrat Jim Howard died in 1988 the GOP saw a golden opportunity, particularly in a year in which George Bush would carry the district by more than 60,000 votes. The result: Frank Pallone Jr., a Democrat, won by 10,000 votes.

The notion of a permanently embedded Congress is an exaggeration; two-thirds of the current members have been there for less than 12 years. To be sure, there are some extraordinary advantages of incumbency: campaign finance laws and mailing privileges, are major assets. And since the Democrats control most state legislatures, gerrymandering of congressional districts probably adds between a half dozen and a dozen seats to the Democratic majority in the House.

But far more importantly, Democrats dominate congressional elections for the same reasons that Republicans dominate presidential elections: The voters think they're better suited.

That was dramatically evident in a Wall Street Journal-NBC News survey in November. On the broad national challenges pertaining to presidential leadership, the Republicans win in a walk: a 43%-to-13% edge on dealing with the Russians, 40% to 26% on dealing with the economy and 31% to 17% on keeping world peace. But when it came to the day-to-day quality-of-life issues, voters are just as decidedly pro-Democratic: 36% to 15% on protecting the environment, 30% to 15% on education and 44% to 21% on helping the middle class.

"Just as Democrats have not gotten their act together in speaking coherently about broad national interests neither have the Republicans gotten our act together about how government responds to personal and local needs," says Rep. Vin Weber. "That is much more our problem than incumbency." Republicans like Rep. Weber—and Jack Kemp and Newt Gingrich—have been trying to fashion responsive Republican alternatives, but they still have a ways to go.

Republicans also would do well to remember 40 years ago when they used term limitations to do what they never could do to the late Franklin Roosevelt in life: enact the 22nd Amendment limiting presidents to two terms. Since then it has affected two presidents: Dwight Eisenhower and Ronald Reagan.

Mr. Hunt heads the Journal's Washington bureau.

6-1352J
Bradley
2/14/90

BY REP. PETTYJOHN, Taylor

1 IN THE HOUSE

2 2d SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 54

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 Relating to amendments to the Consti-
6 tution of the United States concerned
7 with the Congress.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 WHEREAS the Congress was originally envisioned by the Founding Fathers
10 as a nonpartisan, part-time legislative body whose members would take time
11 from their normal businesses and professions to attend the congressional
12 session for four to five months annually, and

13 WHEREAS the press of the nation's business has forced the Congress to
14 become increasingly a highly structured, professional, and hierarchical
15 institution rather than the informal, flexible gathering of citizens and
16 legal intellects that obtained in the Federalist Era; and

17 WHEREAS the power of the incumbency has grown over time and with the
18 institution of electronic media to the point that the incumbent is nearly
19 unassailable in a normal election; and

20 WHEREAS the seniority system in the Congress, though recently re-
21 formed, still places disproportionate stress on electoral longevity; and

22 WHEREAS innovative ideas and rejuvenated vigor are more likely to come
23 to the Congress through new members fresh from association with the people
24 of the United States; and

25 WHEREAS the most common complaint that the public makes about congres-
26 sional service is that members of Congress spend more of their time running
27 for office than attending to their duties; and

28 WHEREAS the power of incumbency makes biennial congressional elections
29 an expensive, exasperating, and ultimately rather meaningless waste of each

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6 amendment, which, in either case, shall become part of the Constitution
7 when ratified by three-fourths of the several States;

8 BE IT RESOLVED by the Alaska State Legislature that the Congress of
9 the United States is requested to propose an amendment to the Constitution
10 of the United States for submission to the states for ratification to limit
11 the number of terms a person may serve in the United States House of Rep-
12 resentatives to no more than six and to limit the number of terms a person
13 may serve in the United States Senate to no more than two; and be it

14 FURTHER RESOLVED that alternatively, effective July 1, 1991, under
15 art. V of the Constitution of the United States, the Legislature of the
16 State of Alaska makes application to the Congress of the United States to
17 call a convention for the specific and exclusive purpose of proposing an
18 amendment to the Constitution of the United States, for submission to the
19 states for ratification, to limit the number of terms a person may serve in
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21 the number of terms a person may serve in the United States Senate to no
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27 contained in this Joint Resolution, then this application for a convention
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29 FURTHER RESOLVED that this application and request be considered null

1 and void, rescinded, and of no effect in the event that the convention not
2 be limited to that specific and exclusive purpose; and be it

3 FURTHER RESOLVED that this application constitutes a continuing appli-
4 cation under art. V of the Constitution of the United States until at least
5 two-thirds of the legislatures of the several States have made application
6 for a similar convention under art. V or the Congress has proposed an
7 amendment to the Constitution of the United States similar in subject
8 matter to that contained in this Joint Resolution.

9 COPIES of this resolution shall be sent to the Secretary of the United
10 States Senate; to the Clerk of the United States House of Representatives;
11 and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S.
12 Senators, and the Honorable Don Young, U.S. Representative, members of the
13 Alaska delegation in Congress; and to the presiding officer of each house
14 of each other state legislature in the United States.

REVIEW & OUTLOOK

Rotation in Office

You'd think the hot topic of concern on Capitol Hill last week might have been whether Mikhail Gorbachev will survive or even which military bases will be closed by the Bush budget. No way. Members and staffers were abuzz over a front-page headline in the Capitol Hill newspaper, Roll Call. It read: "Drive to Restrict Hill Tenure Gaining National Momentum." Now that is something for Members to worry about.

Until recently, the drive to put a limit on terms of service

in Congress has been ignored in Washington, though it's been a fixture on radio talk shows around the country for months. Tomorrow, a Washington group called Americans to Limit Congressional Terms (ALCT) will bring the battle inside the Beltway with a news conference kicking off a campaign for a constitutional amendment to limit Members to 12 years of consecutive service. They will also ask all candidates for Congress in this year's elections to pledge they will not serve more than 12 years.

The effort to limit congressional tenure—what Thomas Jefferson approvingly called "rotation in office"—is riding a tidal wave of voter disgust with Congress. Last month, a Gallup Poll found that 70% of those polled support the term-limitation idea. Not surprisingly, the same poll showed that 70% of those in Congress oppose any limit on terms.

Former GOP Congressman Jim Coyne, the co-chairman of ALCT, isn't surprised at this sharp division between the voters and their elected representatives. "Members of Congress have no idea of how frustrated people are with the institution," he says. "Voters feel the only way to control it is to limit how long people can remain part of the problem."

Mr. Coyne isn't the only former Member to have left Capitol Hill and come to the same conclusion. Some 33 former Members of Congress, including eight Democrats, are supporting ALCT's effort (see box).

Other former Members support limiting terms but stop short of endorsing a specific proposal. John Lindsay, a Democrat who also served as mayor of New York City, notes that the 98% re-election rate for House incumbents means "you no longer have effective competition for seats." He told us a term limit would mean there was at least "some way to sweep out the old wood."

For an idea only months old, term limitation has built up an impressive head of steam. Resolutions calling for

a constitutional amendment are pending in 10 states, and both houses of the South Dakota Legislature have already approved it. Initiatives to limit the terms of state officeholders have qualified for the November ballot in California and Oklahoma.

Many supporters of term limits come to their position reluctantly. We are well aware, for instance, of the argument that such a system might place even more legislative power in the hands of unelected committee staffs, though we don't think this is an unavoidable result. Others argue that the idea limits the right of voters to elect whom they choose.

At the end of the day, however, one is left with the plain fact that the current incumbent-protection machine

**12
is
Enough!**

Voices of Experience

Americans to Limit Congressional Terms boasts a National Advisory Board comprising the following former Members of Congress:

James G. Abourezk (D., S.D.)
Glenn Andrews (R., Ala.)
Lamar Baker (R., Tenn.)
Cleve Benedict (R., W. Vir.)
Ben Blackburn (R., Ga.)
M. Caldwell Butler (R., Vir.)
Daniel E. Burton (R., N.Y.)
Howard Callaway (R., Ga.)
James Cleveland (R., N.H.)
James Coyne (R., Penn.)
Paul Cronin (R., Mass.)
William Curlin (D., Ky.)
Thomas Curtis (R., Mo.)
James Dunn (R., Mich.)
Arlen Erdahl (R., Minn.)
Donald Fraser (D., Minn.)
Kent Hance (D., Texas)
Thomas Hartnett (R., S.C.)
Elwood Hillis (R., Ind.)
Ken Holland (D., S.C.)
James Johnson (R., Colo.)
Walter Judd (R., Minn.)
John LeBoutillier (R., N.Y.)
Paul McCloskey (R., Calif.)
Donald McGinley (D., Neb.)
Walter McVey (R., Kansas)
William S. Mailliard (R., Calif.)
Edwin May Jr. (R., Conn.)
Ronald Mottl (D., Ohio)
Ned Pattison (D., N.Y.)
Charlotte T. Reid (R., Ill.)
J. Kenneth Robinson (R., Vir.)
Donald Rumsfeld (R., Ill.)

lets Members ward off nearly all challengers. In 1988, one out of five House Members had no major-party opposition. This year, 12 out of 27 Texas districts will see an incumbent running unopposed or with only a third-party opponent.

Of course, the term-limitation effort doesn't have to succeed to force Congress to clean up its playpen. Members know that a limit on terms would be the public's ultimate vote of no-confidence in them. If the term-limitation movement gathers steam after tomorrow, we hope that Congress for once will have the sense to see clearly where the problem lies.

Rasputin Sununu

The Rasputin Theory of presidential decision-making is once again popular in Washington. This theory holds that a President, say George Bush, is generally an empty vessel into which is poured the devious polit-

doubt takes us deeper into the biological life of the Beltway than most readers normally wish to go, is instructive.

Last year, the EPA pushed through an absolutist policy that preserves

Mandela
I need today oh so very badly
Nelson Mandela
out of the prison gates
to walk broad shouldered
among counsel
down Commissioner
up West Street
and lead us away from the shadow
of impotent word-weavers
his clenched fist hoisted higher
than hope
for all to see and follow

SiphoSepamla

By FRANCES KENDALL

JOHANNESBURG—This poem, which evokes the hope shared by most black South Africans, came to life yesterday when Nelson Mandela walked free after 27 years of imprisonment.

Black South Africans, regardless of the language they speak or the value system they espouse, whether they are urban businessmen or traditional rural tribesmen, are largely united in their belief that Mr. Mandela will be the man who leads them to liberation. More and more, white South Africans, too, are pinning their hopes on Mr. Mandela, leader of the recently unbanned African National Congress. Will he be able to meet these great expectations?

The South African media have relentlessly attempted to ascertain his views on the future of the country. These attempts have not proved very successful. Any hint that Mr. Mandela might hold views other than those spelled out in the Freedom Charter, drawn up in 1955 and described by him in 1964 as "the most important political document ever adopted by the ANC" has been quickly disavowed.

Inclined to Free Enterprise?

For example, Johannesburg businessman Richard Maphonya informed journalists, after dining with Mr. Mandela in January, that Mr. Mandela was "definitely inclined towards a free enterprise system . . . [and] concerned as to whether black people were getting themselves geared up to take up opportunities as they arose. . . . He said he did not believe in nationalization because it was clear such a policy ran counter to the need to keep the South African economy growing to provide jobs."

Within a week a spokesman had released a statement from Mr. Mandela saying that any change in the policy of nationalization of the mines, banks and monopoly industries as laid out in the Freedom Charter was "inconceivable." Evidently Mr. Mandela is determined not to embarrass his organization or to jeopardize his own support by offering any position that conflicts with the ANC party line. In his speech in Cape Town yesterday evening to thousands of cheering supporters, he said he was "a loyal and disciplined member of the ANC. I am therefore in full agreement

The

By Byron Harris
The U.S. has achieved convictions in most of its cases against high ranking S&L officers. But crimes in thriffts, where they did occur, often required the cooperation of groups of people, in what might be called a "chain of greed."

At their worst, the chains included five kinds of professionals, in addition to the borrowers who benefited from the questionable loans. At the beginning of a transaction, real estate brokers masterminded the shady deals. Crooked appraisers then inflated real estate values to make the deals work. Inside the institutions, an array of employees from loan officers hungry for a loan commission to the executives themselves participated in the fraud.

C-122



Citizens To Protect The Constitution

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*Former President,
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Important

TO: Chairman, House Judiciary Committee *Rep. GOLLC*

TELEPHONE NO.: 907-463-5661

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MESSAGE: please deliver the attached testimony
to the Chairman of the House Judiciary Committee
immediately upon receipt. ----- A hearing
on this issue has been scheduled this morning!
Thank you in advance, for your assistance.

Thanks again



Citizens To Protect The Constitution

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Testimony of Linda Rogers-Kingsbury, President

Before the Alaska House Judiciary Committee

on

H.J.R. 54

Citizens To Protect the Constitution is a private, nonpartisan, nonprofit organization formed to protect the Constitution of the United States. In particular, the individuals and organizations which have come together to form "Citizens" have become increasingly concerned over the dangerous and uncharted course on which this Nation will embark if a Federal Constitution Convention is convened. While some members of "Citizens" may differ on the need or desirability of a particular amendment, all agree that a constitutional convention should be convened only under the most extreme circumstances.

Background of Terms Limitation Campaign:

This particular campaign for a federal constitutional convention to limit congressional terms, is a result of the National Republican Committee and others contracting with Ed Mahe, a former Deputy Director of RNC to form a national grassroots campaign in support of limiting terms in anticipation of the 1990 and 1992 elections with an eye toward the time when reapportionment would occur.

Thus far, only South Dakota has requested a convention, and six other states, including Alaska are currently considering the issue. In addition, proponents of limitations of terms are also working at the state level to limit state legislators' terms, and have garnered sufficient signatures for a voter referendum in Oklahoma, and are currently gathering signatures in Arizona, California and Colorado. It is also worth noting that, bills have been introduced in eight states that would amend state constitutions to limit the terms of state legislators.

Why a Constitutional Convention is Not a Good Idea:

Under Article V, there are two procedures for amending the U.S. Constitution. The first procedure, under which all 26 amendments have been adopted, involves a process by which Congress (after two-thirds approval in both houses) submits a proposed amendment to the states for ratification. If then ratified by three-quarters of the states, the amendment becomes a part of the Constitution. Over the past 200 years, this method has proven to be an orderly procedure.

The second procedure requires the convening of a constitutional convention whose scope and authority are not defined or limited by our Constitution. If 34 states submit valid petitions to Congress for a convention, it must be convened and any amendments that are considered and passed by such a convention are then forwarded to the states for ratification.

The only precedent we have for a constitutional convention took place in Philadelphia in 1787. That convention broke every legal restraint designed by the Continental Congress to limit its power and agenda. It not only violated specific instructions to confine itself to amending the Articles of Confederation but discarded the Articles completely and wrote the present Constitution. In addition the convention then devised a new method for ratifying the proposed Constitution, all of which was specifically prohibited by the Continental Congress, and the Articles of Confederation.

There is little historical or constitutional guidance as to the Constitutional Convention's proper powers and scope. The Constitution, for example, does not spell out what constitutes a valid petition, how delegates would be chosen, time limits for the convention, payment of costs, or most importantly, whether the convention can be limited to addressing a single narrow issue, or whether the entire Constitution is open for debate.

Those who have worked to promote a constitutional convention offer various assurances that limits can be set on what a convention can do. Legislators are told, for example, that a convention would be limited to a single amendment. This assurance is based upon the common wording of the petitions which includes

"for the sole and express purpose of" a particular amendment. It should be noted that the resolution of the Continental Congress authorizing the 1787 Philadelphia convention included the same language in an attempt to constrain the convention's action -- all to no avail!

Charles Alan Wright, the highly respected constitutional scholar, wrote in a letter dated April 16, 1987 to a Texas state legislator:

My own belief ... is that a constitutional convention cannot be confined to a particular subject ... we have only one precedent, the convention in Philadelphia in 1787. It was summoned '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. From the very beginning it did not feel confined by the call and gave us a totally new Constitution that completely replaced the Articles of Confederation. I see no reason to believe that a constitutional convention 200 years later could be more narrowly circumscribed.

State legislators have also been told that, despite the adoption of these petitions, a Convention will never be held -- that the threat of a convention is simply a method of pressuring Congress to adopt a particular amendment. With considerable confidence, convention proponents state that upon receipt of 34 petitions, Congress will be forced to forward an amendment to the States for ratification, rather than face a constitutional convention.

In response to that assertion, Article V of the Constitution is clear. Congress must call a convention if 34 petitions are received: "The Congress ... on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments" Moreover, in Federalist 85, Alexander Hamilton, wrote: "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 other words, once Congress has received 34 valid petitions, it cannot ignore them and avoid calling a constitutional convention by passing an amendment.

Convention supporters also assure the public that even if a convention is convened, there is no danger that it would consider any issues other than the particular amendment for which it was called. This bold assertion ignores considerable historic precedent. It would be impossible to find a more persuasive precedent for opening a convention's agenda, than the Founding Fathers' actions in 1787, and the actual language of Article V where reference is made to "Amendments." Edmund Randolph, a delegate to the 1787 convention felt justified in broadening the

convention's agenda and was quoted as saying. "There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it." Would a delegate to any future convention feel less justified than Randolph and attempt to broaden the agenda to encompass contemporaneous issues?

In a speech on January 30, 1987, in Detroit, Michigan, Warren Burger, former Chief Justice of the United States said:

There is no way, any more than the Continental Congress could control the convention in Philadelphia, to put a muzzle on a Constitutional Convention. Once it meets it will do whatever the majority wants to do. I would not favor it.

Finally, assurances are given that if by some chance the convention strays from its authorized agenda, the Congress and the courts will step in to rein the runaway convention back to its proper jurisdiction. However, scholars warn that even if Congress passed limiting legislation, which would be constitutionally questionable, a convention once assembled could reject any or all restrictions on its activity and assert its supreme authority by virtue of its direct authority from the "people."

Stanford Law Professor Gerald Gunther testified in 1985 before the U.S. House Judiciary Subcommittee on Civil and Constitutional Rights stating:

.... (I) f 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.

Again a reenactment of the thoughts and actions of the 1787 Convention.

With respect to court interjection in an October 16, 1983 Chicago Tribune article former Supreme Court Justice Arthur J. Goldberg said:

... If convention issues are not reviewable, then the convention would take place outside our system of checks and balances and the dangers of a runaway convention increase... If convention issues are reviewable by the courts, then serious enforcement problems arise.

In the minds of most Americans, our Constitution is more than a charter of government whose primary function is to assign various duties and functions among the executive, legislative and judicial branches. Across almost two centuries, the Constitution has evolved into the vehicle through which we protect our individual rights and liberties, and it stands squarely between individual Americans and their government. It is a tribute to the viability and effectiveness of this document that many Americans take for granted that their rights will be effectively protected by the Constitution. Unfortunately, we sometimes lose sight of the fact that such rights and protections of the individual are not commonplace, but are indeed extraordinary. It is our Constitution which more than any other institution makes us the rare exception to this rule.