ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5840 HOUSE JUDICIARY

244

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: JOYCE BURGIN
TITLE:
ADDRESS: 3821 JAMES DRIVE
CITY: ANCHORAGE, AK ZIP: 99504
PHONE: 333-4670
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
SHACKHAMMER	TAYLOR	SZYMANSKI
ULMER	WALLIS	UEHLING
ZAWACKI		ZHAROFF

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE GOLL

NAME: CAROL WILLIAMS
TITLE:
ADDRESS: 1548 CARA LOOP
CITY: ANCHORAGE, AK ZIP: 99515
PHONE: 345-5763
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-HUNTER 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: 03092438
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
SHACKHAMMER	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. /DN

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	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: 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.

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

"ARTICLE —

"SECTION 1. No person may serve any term or portion thereof as a member of the United States House of Representatives if such person has served as a member of the House for each of the six terms, or a portion of any such term, immediately preceding such term.

"SECTION 2. No person may serve any term or portion thereof as a member of the United States Senate if such person has served as a member of the Senate for each of the two terms, or a portion of any such term, immediately preceding such term.

"SECTION 3. For purposes of this article, service as a member in the United States Senate or House of Representatives in any term which commenced before the ratification of this article may not be included in determining the number of terms served.".

O

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.

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

"ARTICLE—

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

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

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

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

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

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the

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

"ARTICLE—

"SECTION 1. The term of office of a Representative in Congress shall be four years, except for two-year terms as provided in this section. Immediately after the Representatives in Congress shall be assembled for the first term with respect to which this section applies, they shall be divided by lot as equally as may be into two classes. The terms of the Representatives of the first class shall expire at the end of the second year, and of the second class at the end of the fourth year, so that one-half may be chosen every second year. In order to meet the requirements of reapportionment, all offices of Representatives in Congress shall be open for election in years ending in two and the same process of division into two classes described hereinbefore shall recur upon the first assembly of Members after each such election. The House of Representatives shall adopt procedures to insure that the size of the two classes of seats shall remain as equal as possible despite changes occurring in the total number of seats in the House of Representatives or in the apportionment of Members among the several States.

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

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

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

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

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

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

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

"SECTION 2. No person who has served three consecutive four-year terms in the House of Representatives shall be eligible to serve in the House of Representatives during the term immediately following the third such consecutive term. No person who has served two consecutive six-year terms in the Senate shall be eligible to serve in the Senate during the term immediately following the second such consecutive term.

"SECTION 3. Only terms beginning after the date of the ratification of this article shall be taken into account in determining eligibility for service under section 2.

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

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years after its submission for ratification:

"ARTICLE —

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

"SECTION 2. Notwithstanding the provisions of section 1 of this article, any person may serve not more than fourteen years as a Senator or not more than fifteen years as a Representative.

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

900 2nd Street, N.E. • Washington, D.C. 20002 • (202) 842-4100

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

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

JKC/lmn

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

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

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 vindicated.

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.

Table of Contents

LIMITED CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V

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

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

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

[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

---

[6] If 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 and that the assent of the National Legislature ought not to be required therto."[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.*

[15] 2 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

[16] Rees, *supra* note 4, at 87.

[17] 2 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

[18] Taking 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, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution.[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).

[21] It is no coincidence that some of those academics who deny the equality of the states and the Congress under Article V likewise deemphasize the importance of the drafting 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 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

---

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*].

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

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

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

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

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

[27] *See* 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.

[44] *Hearing*, *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

[45] 256 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 vindicated. 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]

1.

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

[52] Because 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.

---

[53] *See, 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.

[54] Black, *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

---

[57] *See* 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 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.

---

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

[59] *See* page 9 *supra*.

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

[61] Rees, *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.

[62] Gunther, *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

[63]Our 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.

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

[64]2 U.S. (2 Dall.) 419 (1793).

[65]*Senate 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

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

[67] *Id.*

[68] 377 U.S. 533 (1964).

[69] 410 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

[75] *Id.* at 177-78.

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 Congress[77] *did* speak in broad terms. There were "defects in the present Confederation," and "alterations and provisions"[78] seemed necessary. No specific defects were enumerated.

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

[77] Resolution of Congress, February 21, 1787.

[78] *Id.*

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 argued[81] 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

---

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

[80] Of 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.

[81] *See* 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 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]

---

[82] *Hearing*, *supra* note 4, at 46-47.

[83] 2 Farrand 557.

[84] Virtually 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*.

[85] Ervin, *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 explictly-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

---

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

[90] *See* Article I, Section 8, Clause 18.

[91] 17 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 super-majority 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.

---

[96] Noonan, *supra* note 4, at 642-643.

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

[98] A 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 processs, 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

---

[99] 307 U.S. 433 (1939).

[100] For 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).

[101] The 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 Court[113] 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.

---

[112] The 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).

[113] The 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 illegimately 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

---

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

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

[117] Tribe, *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

---

[118] Weber, *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 finds 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 Bonfield, 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).

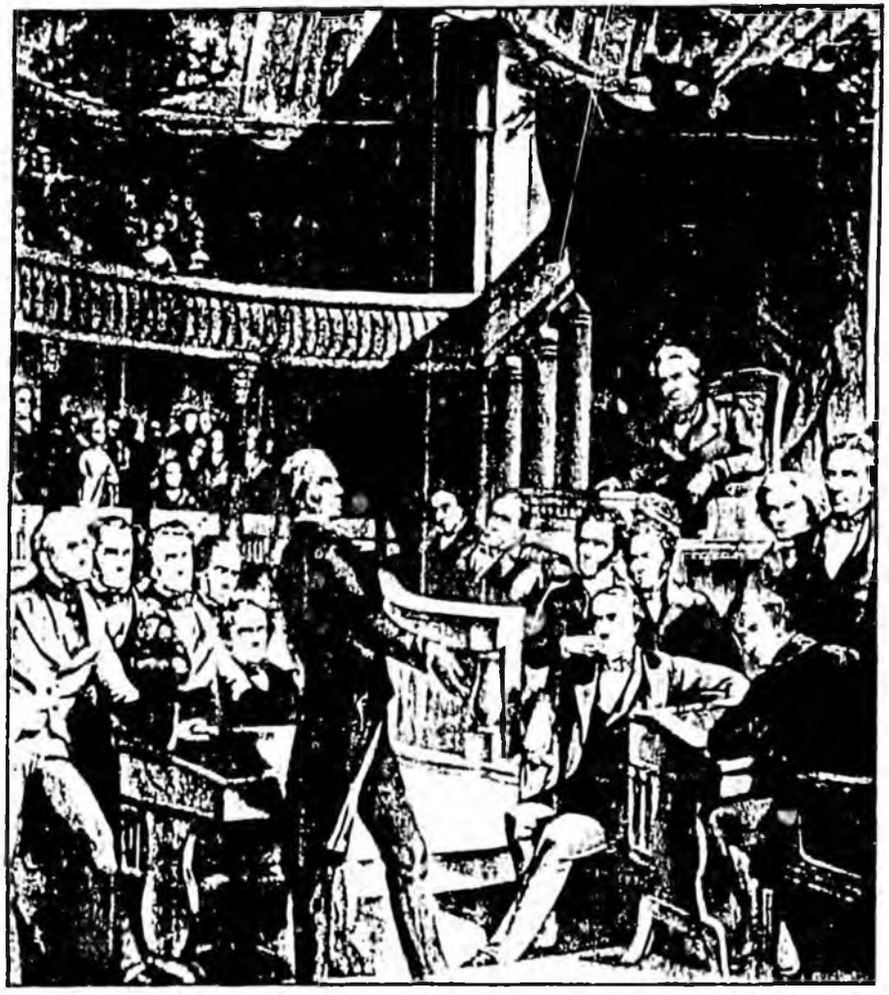
"The most natural reading of the history behind Article V supports the view that the framers wished to assure the people that even if the central government were unresponsive to defects in the Constitution, the people have another option ... This [constitutional convention] check on the central government .... 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.

U. S. Government Printing Office: 1988 - 202 053 (84757)

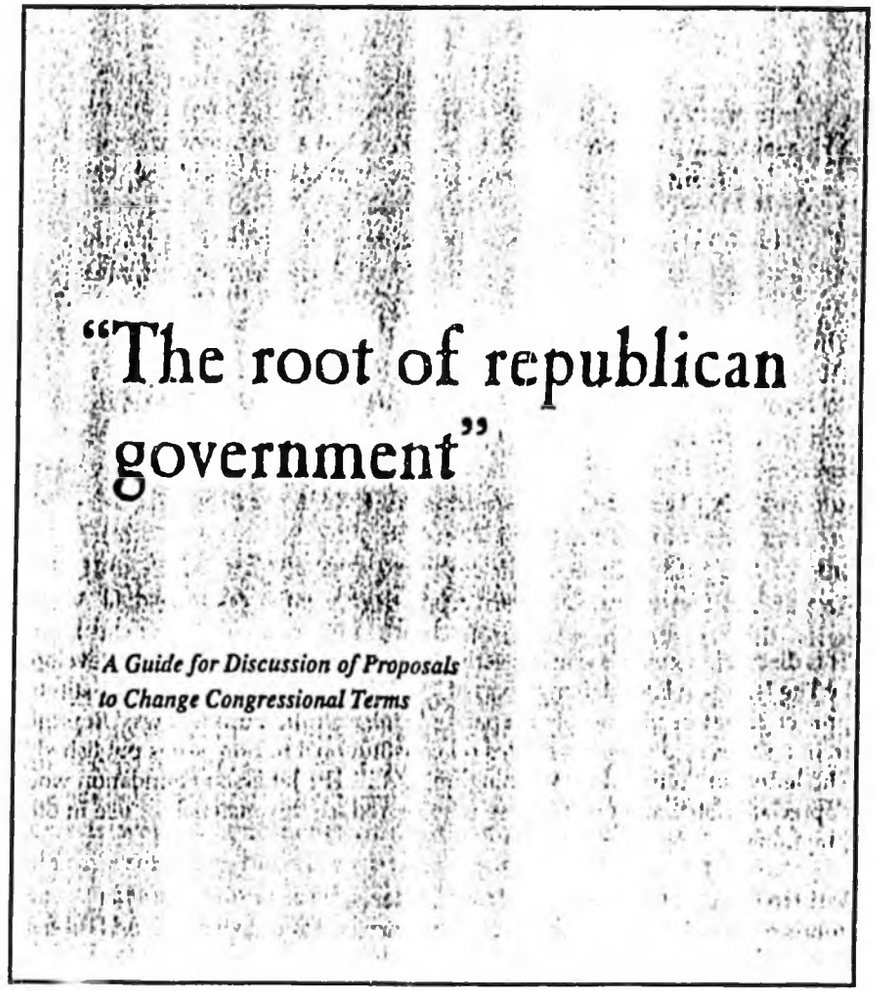
THE HERITAGE FOUNDATION

The seat 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

Written by Alice O'Connor and Mary L. Henze

Cover photo: Library of Congress

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-

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 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)

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)

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.

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?

References

Borden, Morton, ed. *The Anti-Federalist Papers*. Ann Arbor, Mich.: Michigan State University Press, 1965.

Elliott, Jonathan, ed. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*. 5 vols. New York: Burt Franklin, 1888.

Ford, Paul Leicester, ed. *Pamphlets on the Constitution of the United States, Published During the Discussion by the People, 1787-1788*. Brooklyn, N.Y.: Historical Printing Club, 1892.

Hamilton, Alexander, John Jay, and James Madison. *The Federalist Papers*. Available in various editions.

Johnson, Lyndon B. "Message to the Congress." 20 January 1966. House Document 264, 89th Cong., 2d sess. U.S. Government Printing Office.

U.S. Congress. *Four Year Term for Representatives*. Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, 89th Cong., 2d sess., on S.J. Resolutions 72, 126, and 132, and H.J. Resolution 394, 13 and 14 July 1966. U.S. Government Printing Office, 1967.

U.S. Congress. Senate. *Terms of Office in the Senate and House of Representatives*. Hearings, 95th Cong., 2d sess., on S.J. Resolutions 27 and 28, 14 and 16 March 1978. U.S. Government Printing Office, 1978.

Suggested Readings

Foundation for the Study of Presidential and Congressional Terms. "Term Limitation: The Issue That Never Dies." Washington, D.C., 1980.

Charles O. Jones. *Every Second Year: Congressional Behavior and the Two Year Term*. Washington, D.C.: The Brookings Institution, 1967.

Samuel Kernell. "Toward Understanding 19th Century Congressional Careers: Ambition, Competition, and Rotation." *American Journal of Political Science* 21 (1977): 669-93.

David R. Mayhew. *Congress: The Electoral Connection*. New Haven, Conn.: Yale University Press, 1975.

Robert L. Peabody. "Rebuild the House?" *Johns Hopkins Magazine*, March 1966.

James L. Sundquist. *The Decline and Resurgence of Congress*. Washington, D.C.: The Brookings Institution, 1981.

U.S. Congress. House. *Subcommittee on Constitutional Amendments*. H.J. Resolution 204, 62d Cong., 2d sess. U.S. Government Printing Office, 1912.

U.S. Congress. House. *Committee on Election of President, Vice President, and Representatives in Congress*. Four Year Term for Members of Congress. Hearings, 74th Cong., 1st sess., on H.J. Resolution 32, 21 March 1935. U.S. Government Printing Office, 1935.

Gordon Wood. *The Creation of the American Republic, 1776-1787*. Chapel Hill, N.C.: University of North Carolina Press, 1969.

The Jefferson Foundation is a non-profit, tax-exempt organization incorporated in Washington, D.C. The Foundation has two major purposes:

- *To enhance the public's critical understanding of the Constitution and its history by involving citizens in debate and discussion of the fundamental principles of American government.*
- *To study historical trends and stimulate citizen discussion of constitutional reforms which have been proposed in Congress and endorsed by various groups as ways of improving the structure and functioning of government.*

The Jefferson Foundation is a strictly non-partisan, non-advocacy organization which takes no position on any of the reform issues it studies. Its role is to promote informed and rational discussions of the fundamentals of the American system and to facilitate public understanding of how the Constitution was made.

The Jefferson Foundation
1529 18th Street, N.W.
Washington, D.C. 20036
(202) 234-3688

tax limitation research foundation

THE RIGHT OF PEACEFUL CHANGE!

ARTICLE V OF THE CONSTITUTION

John C. Arthur

Tax Limitation Research Foundation

The Tax Limitation Research Foundation (TLRF) is classified as a 501(c)(3) organization under the Internal Revenue Code of 1954 and further classified as a "non-private" (i.e., "public") foundation under Section 170(b)(1)(A)(vi) and Section 509(A)(2) of the Code. The Tax Limitation Research Foundation conducts research on tax and spending limitation and expenditure control measures.

The Foundation conducts and publishes research for the benefit of public policy decision makers.

The Right of Peaceful Change: Article V of the Constitution by John Armor was commissioned by TLRF. The views expressed in TLRF publications are those of the authors.

tax limitation research foundation

THE RIGHT OF PEACEFUL CHANGE:

ARTICLE V OF THE CONSTITUTION

John C. Armor

About the Author

John C. Armor is a Constitutional lawyer who has had eleven cases in the Supreme Court. He is also an Adjunct Professor of Political Science at the University of Baltimore.

He has published articles on various aspects of Constitution law in the *Harvard Political Review* and the American Bar Association *Journal*, among other professional publications. He has also published articles on similar subjects in the *Washington Post* and Long Island *Newsday*, among hundreds of other newspapers. He has also appeared on national news programs on the same subjects.

He is a Senior Fellow of the National Center for Constitutional Studies. This is his third case statement on aspects of the Constitution. The first was on Constitutionality of laws regulating federal election funding. The second was on the meaning of freedom of the press as of 1791.

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.

TABLE OF CONTENTS

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]