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The importance of the second method of amendment, coming from the states, is underscored by its being described again in the summary of the most important points in the entire Federalist. The Framers noted the objection of opponents, that Congress, in order to protect its prerogatives, might refuse to consent to an amendment that the people consider desirable. The problem is phrased this way, in The Federalist, No. 85: "[I]t has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed."

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

> "[T]he national rulers, whenever nine States concur, will have no option on t' subject. By the fifth article of the plan, the Congress will be obliged 'on the application of the legislatures of two thirds of the States [which today is 34], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.' The words of this article are preremptory. The Congress 'shall call a convention.' Not ing in this particular is left to the discretion of that body."[7]

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

"No Taxation Without Representation"

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

The Puritans, the Congregationalists, and the Quakers, among others, came to this nation with the concepts of participation and voting in their religious bodies. (Among the Quakers, votes were not taken. Instead, discussion continued until consensus was reached.) In all instances, these practices in the religious sphere were translated into civil government.

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

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

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

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

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

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

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

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

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

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

The English colonial laws which produced by far the largest revenues were the Sugar Acts of 1764 and 1766. They produced a low revenue of 14,091 £ sterling in 1765, and a high of 42,570 £ sterling in 1772.[13] But the Sugar Acts were not the sparks for rebellion.

The hated Stamp Act (1765) was in effect for only one year, and produced only 3,292 £ sterling in revenues. The Townsend Acts, which were the primary focus of revolutionary activity, produced a high of 13,200 £ sterling in 1768, but had declined to only 912 £ by 1774.[14]

Even if we assume that the American colonists rebelled against the sum total of English taxation, the specific facts are most curious. The highest total taxes were 45,499 £ in 1769. They came close to that level in 1772, but had dropped to 60% of that level by 1774.[15]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Swamp Water Theory

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

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

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

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

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

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

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

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

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

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

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

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

Is It Katie Bar the Door?

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

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

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

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

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

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

> "[W]hereas experience has evinced that there are defects in the present Confederation . . . and [a] Convention appearing to be the most probable means of establishing in these states a firm national government . . . on the second Monday in May next a Convention of delegates . . . be held in Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures. . . ."

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

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

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

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

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

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

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

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

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

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

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

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

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

Consideration of the present question, whether a new Con vention could be a "run-away," has gone on for approximately 8 years. Especially in the last 20 years, numerous law revie articles, and a Special Study by the American Bar Associatio have been prepared and published on the subject. The leadin publication concluding that a new Convention could have it subject matter restricted, is discussed in the box on "The Argu ments for Limitation." This was prepared, and officiall endorsed, by the American Bar Association, through a specia committee of experts and acceptance by its House of Delegate

(Cont. p. 23)

The Arguments for Limitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On the subject of limitation, Senator Dirksen concluded:

"First, I apprehend that when the applications are for a stated purpose or amendment . . . then in effect the state legislatures, which alone possess the initiative in convening a convention, have by their own action taken the first step toward limiting the scope of the convention. It would then remain for the Congress to implement this attempt to limit the convention by making appropriate provision in its call."[36]

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

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

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

The Arguments Against Limitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Congress fails to act on the proposed amendment.

2. Congress calls for a Convention, but fails to limit its subject matter.

2a. Congress does limit the subject matter, but the Convention chooses to ignore its limits.

3. Any state, or possibly any individual, who feels that the Convention can and should be bound to limits, brings a legal challenge, and the Supreme Court either fails to act, or rules that the Convention is unlimited.

4. The Convention actually passes proposed amendments that are beyond its subject matter.

5. Congress submits the excessive amendments for ratification.

6. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

7. Three-fourths of the states, by either their legislatures or special conventions, as Congress has required, ratify the excessive amendments.

8. Another Supreme Court challenge is brought and lost by a dissatisfied state or individual.

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

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

New Framers and a New Philadelphia

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

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

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

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

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

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

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

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

We Have Nothing to Fear But Fear Itself

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is not just politics that makes strange bedfellows. Th defense of any and all of our basic, Constitutional freedoms, doe the same thing. Our basic freedoms may not have all of th friends and supporters that they should have, or could have. Bu they have more than enough to defend against any misguide attempts to reduce or repeal any of them.

What is often phrased as a defense of the Constitution b avoiding the risks of a new Convention, is in fact an attack on th Constitution, and on the principle of popular sovereignty on whic it is based. This principle was first stated in documents of an government, as opposed to the musings of philosophers, in ou Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any

Form of Government becomes destructive of these ends, it is the right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

The Article V Little Shop of Horrors

What are the precise evils and dangers that the opponents of Article V claim?

Those who attack the present conditional calls for a ne Convention, exactly like those who attacked the conditional ca used twice before in our history, have many routes to the conclusions. But, they agree on the final result. They fear, they claim to fear, the erosion of basic American freedoms as result of such a Convention. Here are their points, one at a time

Charge: The second method in Article V has never be used.

Fact: The second method in Article V has been used twi in our history. It was successful in 1912 with respect to the 17 Amendment, and was used then exactly as the Framers anti pated. It was used in the 1960s in the same manner and for t same reasons, though unsuccessfully, with respect to the Dirks Amendment.

Charge: If 34 states act, a new Convention must be held.

Fact: The calls are conditional, exactly as they were t last two times this method was used. Although the Constituti allows the states to force the calling of a new, general Conve tion, it does not compel the states to use this entire power once. As a matter of Constitutional theory, Constitutio history, and plain common sense, the states do have the right give Congress one last chance to act, before their calls beco effective. The trigger for a new Convention, if that point sho ever in our history be reached, will not be the actions by t states, it will be the inaction by Congress.

Charge: Congress will not act, and the state calls will th become effective, causing a new Convention.

Fact: This assertion ignores the Swamp Water Theo which applies if Congress is faced with only two choices, pass the amendment that is sought and writing its language for itse or refusing to act and allowing a new Convention to write it them. Both history and practical politics tell us that under th circumstances, Congress will act.

Charge: If a new Convention is called, it cannot be limited in subject matter.

Fact: This assertion ignores the fact that all of the states have placed in their conditional calls statements to the effect that a new Convention should be for the "sole and express" purpose of the Balanced Budget Amendment (just as in prior generations they have been restricted to the subjects of the 17th Amendment, or the Dirksen Amendment). This charge also ignores the fact that 17 of the states have made their calls "null and void" in the event that a new Convention seeks to stray into other areas than the one designated.[52]

On this particular point, the critics contradict themselves badly. There are presently in the hands of the Secretary of State of the United States more than 34 state calls for a new Convention. They deal, however, with a variety of subjects, and there are no more than 32 of them on any one subject.[53] If the critics were right, that limitation sought by the states is irrelevant and ineffective, then a new Convention would be mandatory as of this moment. Not a single member of either the House or the Senate has suggested that this is so. And since the Constitution leaves the counting of the state calls to the Congress, this charge by the critics necessarily assumes that at least one-half of each House will, in a fit of temporary insanity, count all of the state calls together, regardless of subject matter.

Charge: Regardless of limitations imposed on a new Convention by the Joint Resolution of Congress which calls the Convention, the delegates could break loose into other areas.

Fact: This charge ignores the history of the 1787 Convention in which all states except Rhode Island (which did not participate), and the Congress itself approved what the Convention did, prior to the beginning of the ratification process. It ignores the history of hundreds of state constitutional conventions. It ignores the fact that delegates to any such Convention will be seeking to accomplish results, not to engage in meaningless gestures. The making of proposals which are doomed to failure, either by a Congressional refusal to submit them for ratification, or by rejection at the hands of the states, would only earn for such delegates disrespect, and decrease the chances of success of any of their legitimate proposals.

Lastly, and perhaps most importantly, this charge ignores the fact that in 1787 we had no Supreme Court, much less a tradition that that Court would stand as the guardian of the Constitution itself. This charge assumes not only that the

Convention would ignore the Constitution and the laws, but the the Supreme Court would also ignore the Constitution and th laws.

Charge: A "run-away" Convention could destroy the basi freedoms of Americans.

Fact: Even assuming that all prerequisite failures occur, i the Convention, in Congress, and in the Supreme Court, thi charge is still invalid because of the nature of the ratificatio process. Any amendment, whether its source is the Congress or Convention, is nothing more than a proposal, with no legal forc or effect, until and unless it is ratified by 38 states, either by th legislatures, or if Congress shall so choose, by special convention within each state for that purpose. Unless the people of 3 states, through their representatives, are willing and ready t abandon basic American freedoms, no proposal either by Congres or a Convention, poses any real threat to those freedoms.

Charge: The Convention process, the second half of Articl V, is too dangerous to use. This argument gets to the nub of th Constitutional debate. When critics go this far, as Melvin Lair did in a recent article in the Washington Post, they are sayin that the Framers should never have given us a second method o amendment, one which allows us to overrule the judgments o Congress.[54] They are saying that Washington always knows wha is best for the people, better than the people do for themselves.

Fact: The Laird article, which is being widely circulate around the country by those who oppose the present generation' use of the second half of Article V, abuses our Constitutiona history and distorts the words of our Framers.

It begins with this quotation from James Madison, ". . . Th prospect of a second [constitutional] convention would be viewe by all of Europe as a dark and threatening Cloud hanging over th Constitution." Madison restated and expanded on the same poin in The Federalist, No. 38. Either through carelessness, or inten to deceive, the author of this article, and all those who circulat and refer to it, are ignoring the question which Madison was ther addressing.

He is answering critics of the 1787 Convention. Some o them were saying that the whole Constitution should be rejected and another Convention be convened immediately. They wer proposing the well-known political ploy of postponing a decisio by studying the question to death.

Although his words are taken out of context to give th impression that Madison opposed the idea of ever holding a no

Convention, he was not so opposed. He stood firmly with his mentor, Thomas Jefferson, in holding that a new Convention should be an option available to the people, if they chose through the states to demand one. By taking Madison's words out of context, his views are seemingly turned into the opposite of what they really were.

The critics in 1984 are resurrecting and reusing the same arguments that were pressed in 1912, in the attempt to stop the state calls which ultimately produced the 17th Amendment. While they claim now, as they did then, that they are defending the Constitutional rights of the people, that is not their real message. The heart of their position, the one which they dare not express in public, is that the people are not to be trusted with the final say on the form of their government, and the use, abuse, and limitation on its various powers. They are attacking the basic principle stated in our Declaration of Independence, and the central premise of our Constitution.

They are saying that the people acting through their state legislatures, should not possess the right of peaceable change. They are attacking the very right on which the long-term survival of our Constitution depends. While claiming to defend our freedoms, they are attacking the process by which we got them, and without which we cannot keep them.

Those who claim Constitutional grounds for opposing conditional state calls, whether on this subject or any other in the future, are not defending our Constitution. They are only defending the status quo in Washington, against the logical and legitimate use of that Constitution.

In Our System of Government, Where Does the Buck Stop?

What is the relationship between Article V, especially the second half, and the central premise of American government, which is popular sovereignty?

The fundamental political question in the United States is, where does the buck stop? It is, who holds the ultimate power under the Constitution? The answer to this question would seem obvious. All high school students (and most elementary students) know it. Our government is based on popular sovereignty. All governments—federal, state, and local—possess only those powers which the people have given them, through the various constitutions and charters.

This concept was first stated in the basic documents of any nation, in our Declaration of Independence in which we say that the "just powers [of the government] are derived from the consent of the governed." This concept was repeated in many forms by many of the Framers. It is also stated in George Washington's Farewell Address, in which he cautioned us on many points concerning the protection and maintenance of our new Union and our new Constitution. He said this:

> "The basis of our political systems is the right of the people to make and alter their constitutions of government. But the constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all."[55]

The same concept is stated in the Constitution, which begins with these words, written in very large capital letters, "WE THE PEOPLE . . ." Why belabor such an obvious point? The reason is that many commentators, including some lawyers and legislators, have apparently neglected their homework.

Those who ask whether the people can be trusted with Constitutional questions, are turning the fundamental issue of

American government upside down. Ever since 4 July 1776, the proper question is, can the people trust the government, not can the government trust the people?

Both halves of Article V are concerned with our fundamental right to form and define governments of our choosing. And both halves of Article V are derivative; either the members of Congress, or the members of state legislatures, may begin the amendment process. But it should not be forgotten that both groups are acting as representatives of the people. (There is a move afoot among some groups to amend the Constitution of the United States to add the processes of initiative and referendum. But until and unless such a further amendment is made, the only ways in which popular sovereignty can be expressed on the subject of Constitutional amendment, is either through Congress or through the state legislatures.)

In considering the amendment process, it is important to remember that the Framers did not believe that either route was more important than the other, nor did they believe that either Congress, or the state legislatures taken as a group, were superior to the other in this regard. In fact, according to their writings, they assumed that the two methods of initiating amendments would be used about equally.

The Framers did express in The Federalist their belief that the state governments were closer to, and more amendable to, the will of the people, than was the federal government. This belief may have even more validity today, since Congressmen now represent districts of 520,000, rather than the 30,000 as originally established, and also recognizing the fact that many of our state governments are larger than the entire nation was, with its population of 3.5 million souls in 1776.

Those who say that the second method of amendment in Article V is too dangerous to use, are reversing the answer to the most basic question, who possesses the ultimate power? They are saying that the people cannot be trusted with sovereignty, that if Congress disagrees with the people, Congress wins and the people lose.

The heart of the errors of those who urge us to treat the second method of Article V as a dead letter, is that they agree with King George III, rather than with George Washington. Although their arguments are laced with references to the "good of the people," and "security of our way of life," they boil down to two simple ideas—democracy is too dangerous, and the nation's leaders should not trust its people.

With our experience of 207 years as a free people, and 19 years under our Constitution, we should recognize such argument for what they are, and reject them as untenable.

TABLE I

History of All Amendments Submitted for Ratification, But Not Ratified

House and Senate Salaries Amendment[1]	would have prohibited any raises voted by the Congress from becoming effective until the next Congress convened
Apportionment Amendment[1]	would have stopped the growth of the House of Representatives at 100 members
Labor Law Amendment	would have prohibited any jurisdiction in the Congress over the terms and conditions of workmen, leaving that to state legislation
Child Labor Law Amendment	would have allowed Congress to act with respect to the hours, wages and conditions of child laborers, only
Titles of Nobility Amendment	would have withdrawn U.S. citizenship from any citizen who accepted any title of nobility
Equal Rights Amendment	would have stated that equality under the law shall not be denied on account of sex
District of Columbia Voting Rights Amendment[2]	would give voting representation in the Congress, to the District of Columbia

[1]These two amendments were part of the Bill of Rights when it was adopted by the Congress. They failed to be ratified.

[2]This amendment is still out for ratification. From its track record to date, however, it seems likely to fail.

TABLE II

Constitutional Amendments Proposed in Congress, But Not Passed

NOTE: The information below on the more than 2,000 proposals which have been made in Congress for Constitutional amendments between 1789 and 1926 is drawn from these three sources: Ames, Herman V., The Proposed Amendments to the Constitution during the First Century of its History (1897); Senate Document 93, 69th Congress, First Session (1926); and Ames, Herman V., "The Amending Provision of the Federal Constitution in Practice," 63 American Philosophical Society Proceedings 62, (1924). No researcher has brought this material up to date, but the variety of proposals made between 1789 and 1926, and the relative difficulty of getting any of them adopted by Congress, are fairly representative of both points through 1984.

Number of Constitutional Proposals in the First Century

More than 1,300 (this many are known; some records not kept)

Number of Individual Constitutional Amendments Proposed in the First Century

More than 1,900 (this many are known; some records not kept)

Number of Proposed Amendments Which Passed One House but not the Other, Between 1789 and 1926

16 passed the House, but not the Senate
16 passed the Senate, but not the House

Subjects Covered by One-House Amendment Proposals

Apportionment of House
Computation of Number of House Members
Freedom of Religion and Conscience
Freedom of Speech and Press
Right to Keep and Bear Arms
Criminal Trial Provisions and Property Right Guarantees

TABLE II—continued

Trial by Jury
Protection of Individual Rights from Infringement by States
Redistribution of Powers among Three Branches of Government
Reservation of Non-Delegated Powers
Prohibition of Second Criminal Trial for Same Offense
Freedom of Religion, Speech and Press
District Election of Members of Electoral College
Designation of Presidential Candidate by Presidential Electors
Maximum of Two Terms for President and Vice President (NOTE: like many of these proposals, this ultimately was adopted in one of the existing Amendments. This particular proposal was first made in 1825.)
Prohibition of Payment of Debts of Confederate States of America
Congressional Control of Election of Presidential Electors
Prohibition of Appropriations for Any Religious Body or Sect
Payment of War Claims to Disloyal Citizens
Women's Suffrage
New Date for Inauguration Day

(NOTE: Several of these proposals came up more than once, and some passed both Houses in different forms, but were not adopted as proposed Amendments until a third form was developed.)

Amendment Proposals in Congress in 1884

Prohibition of Grants or Loans to Private Corporations
Limitation of Time to Make Financial Claims
Power of Congress to Write Laws on Marriage and Divorce
Change in Veto Power
Line Item Veto in Appropriations Bills
Joint Resolutions to be Submitted to President
Additional Protection for Civil Rights
Exemption of Farm Products from Congressional Control
Override Presidential Veto by Majority, Not Two-Thirds
Senators to be Popularly Elected
Election of Certain Officers of Government

TABLE II—continued

Creation of Two Additional Vice Presidents, Definition of Duties
Export Tax on Cotton
Popular Election of the President
State Taxation of Corporations
Narrow Definition of "Legal Tender"
Limitation of the National Debt
Requiring Gold or Silver as Basis for Money
Six-Year, Single-Term Presidency
Creation of a Commission to Call for a Constitutional Convention
House also to Ratify Treaties
Six-Year, Single-Term Presidency with Pension for Life
Congressional Consent for Reciprocal Treaties on Revenue

Amendment Proposals in Congress in 1924

Apportionment of Congress after Each Census
Uniform Federal Laws on Marriage and Divorce
Regulation of Employment of Those under 16
Extension of Definition of Treason
Ratification of Constitutional Amendments by Referendum
Approval of Declaration of War by Referendum
Allowing Income Taxes on State Bonds
Regulation of Employment of Women, and Those under 18
No Use of Public Money for Religious Institutions
Change in Inauguration Day, and Electoral College Date
Making Fraud in Military Procurement an Act of Treason
Six-Year, One-Term Presidency with Popular Election (NOTE: the single most popular subject for proposals for amendment in the history of the United States is alteration or abolition of the Electoral College. There has been, almost from the beginning, a consensus that change was necessary. But, there has never been a consensus on what the change should be.)
Eight Years for Ratification of Amendments, and only by Either Conventions or by Referenda
Three-Fourths Vote of both Houses to Declare War
In Event of War, Congress May Conscript Wealth as well as Manpower
Four Year Terms for House

TABLE II—continued

(NOTE: In both of the years which were chosen as representative, there were more proposals than those listed. Subjects which were identical were not repeated. Anyone interested in the entire span of proposed amendments during the first century and a third, will find them in a table at the end of Mr. Ames' book, and in Senate Document 93, both cited above.)

TABLE III

Amendments Proposed by Ten or More State Calls

Subject	No. of Calls[1]	No. of States[1]
Direct Election of Senators	75	31
Antipolygamy	30	27
Limitation of Taxation by Repeal of the 16th Amendment	42	34[2]
Revision of Article V	19	14
Apportionment of State Legislatures	54	36[2]
Redistribution of Presidential Electors	11	11
Revenue Sharing	21	18
Balanced Budget Amendment	35	32

[1]The total calls are usually more than the total states, due to some states passing multiple calls in successive years.

[2]Some states repealed their calls, before other states adopted theirs. The minimum required was not in effect at any one time.

FOOTNOTES

[1]Dr. Albert Blaustein, *Independence Documents of the World*, 1977.

[2]During the discussion of Article V, which extended between 29 May and 19 June, Charles Pinckney said this to the Constitutional Convention, "It is to this unanimous consent, the depressed situation of the Union is undoubtedly owing." Max Farrand, *The Records of the Federal Convention of 1787*, 1966 Edition, Vol. 3, p. 120.

[3]*The Federalist*, No. 10.

[4]Eric Eriksson, *American Constitutional History*, 1933, pp. 214-238, especially pp. 234-236, concerning the critical states of New York and Virginia, in which ratification nearly failed.

[5]*The Federalist*, No. 43.

[6]"I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs, and to expose the union to the jeopardy of successive experiments in the chimerical pursuit of a perfect plan." *The Federalist*, No. 85.

[7]*The Federalist*, No. 85.

[8]Letter from Thomas Jefferson to James Madison, 20 December 1787.

[9]A detailed history of the passage of each of these revenue acts, and the responses of the American colonists to each, is found in R. C. Simmons, *The American Colonies*, W. W. Norton & Co., New York, 1981, at pp. 296ff.

[10]Ibid.

[11]Ibid.

[12]Ibid.

[13]The revenues produced from the various English colonial taxes are taken from *Historical Statistics of the United States*, Department of Commerce, 1976, Part 2, Table Z-611-615, "Tax Collections in America under Different Revenue Laws: 1765 to 1774."

[14]Ibid.

[15]Ibid.

[16]Charles Andrews, *The Colonial Period of American History* Yale University Press, New Haven, 1938, gives a complete history of the English effort to impose revenue measures, and to set up an effective customs service to limit the rampant smuggling. See pp. 85-220.

[17]Ibid., at 215.

[18]This assertion comes from the author's review of all 32 state calls, passed to date.

[19]Archives, Secretary of State's office, Washington, D.C.

[20]The history of this meeting is given in *The Constitution of the United States, Analysis and Interpretation*, Congressional Research Service, Library of Congress, 1973, "Historical Note," p. xxxvii.

[21]"Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Congress, 1st Session, pp. 41-43, 1927.

[22]The skittishness of Rhode Island, and its reactions to the pressures placed on it, are reflected in its lengthy ratification document. See, *Elliot's Debates*, Book I, Vol. 1, pp. 334-337.

[23]*The Federalist*, No. 40.

[24]Max Farrand, *Records of the Federal Convention*, Vol. 2, pp. 665-666.

[25]The standard of possibility of use first appears concerning political freedoms, in *Williams v. Rhodes*, 393 US 23 (1968), and is reaffirmed in numerous cases, most recently, *Anderson v. Celebrezze*, __ US __, 103, S. Ct. 1564 (1983).

[26]*Amendment of the Constitution by the Convention Method under Article V*, Special Constitutional Convention Study Committee, American Bar Association, Chicago, 1974. [This is cited hereafter as the "ABA Report."] The nine members of the Special Committee, who are listed on pp. ii-iii of the Report, included two United States District Judges, a Judge of the D.C. Superior Court, a present and a former law school dean, two former presidents of state constitutional conventions, a former Deputy Attorney General of the United States, and a private practitioner experienced in the subject. This group unanimously supported all of the conclusions, with the sole exception that one member did not believe that the "one man-one vote" rule should apply to the election of delegates to a new Convention.

[27]The full text of the House of Delegates Resolution, which put the American Bar Association itself on record in support of these points, is found in the ABA Report at pp. vii-viii.

[28]ABA Report, p. 2.

[29]Ibid., pp. 11-17.

[30]Ibid., pp. 60-61, gives a table of all 356 state calls for a Convention which had been made to date.

[31]Ibid., pp. 17-19.

[32]Ibid., pp. 20-25, especially the discussion of *Powell v. McCormack*, 395 US 486 (1969) which appears at pp. 22-24.

[33]Ibid., pp. 34-36.

[34]See H.R. 3373 and S. 119.

[35]*The Article V Convention Process: A Symposium*, Da Capo Press, New York, 1971, Everett McKinley Dirksen, "The Supreme Court and the People," at p. 26.

[36]Ibid., at page 31.

[37]*The Article V Convention Process: A Symposium*; Sam J. Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," respectively on the two points, at pp. 43-44 and at 46-48. Note this statement on the latter page, "The role of the states in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be called by reason of such action by the states would then be to decide whether the problem called for correction by constitutional amendment and, if so, to frame the amendment itself and propose it for ratification as provided in article V."

[38]Gerald Gunther, "Constitutional Brinkmanship: Stumbling Toward a Convention," *American Bar Association Journal*, Vol. 65, p. 1046, July 1979, hereafter cited as "Gunther."

[39]Gunther, p. 1047.

[40]Ibid., p. 1048.

[41]Ibid.

[42]Ibid.

[43]Ibid.

[44]Ibid., p. 1049.

[45]*The Article V Convention Process: A Symposium*, Da Capo Press, New York, 1971; Ralph M. Carson, "Disadvantages of a Federal Constitutional Convention," at pp. 85-94.

[46]*The Article V Convention Process: A Symposium*; "Article V: The Comatose Article of Our Living Constitution?", Robert G. Dixon, Jr., p. 95, at p. 111.

[47]See H.R. 3373, and S. 119.

[48]See footnote 22 above.

[49]A. L. Sturm, *Methods of State Constitutional Reform*, 1954.

[50]Cf., 15 Delaware Code Annotated Section 7706.

[51]ABA Report, pp. 14-16.

[52]The quotations come from the author's review of all 32 state calls pas[illegible] date.

[53]"There are nearly forty states which currently have pending before Congress valid Constitutional Convention applications. Why isn't Congress presently required to establish such a Convention? For the simple reason that there are not two-thirds calling for the same kind of Convention. . . . In other words, there has not already been a Convention because it is understood that the Constitution requires consensus—before a Convention can be called more is required that 34 states apply for a Convention; rather, there must be 34 states calling for a Convention on the same subject-matter." [Emphasis in the original.] Stephen J. Markman, Chief Counsel, U.S. Senate Subcommittee on the Constitution, before the Michigan State Senate Committee on Administration and Rules, 29 March 1984.

[54]Melvin Laird, "James Madison Wouldn't Approve," Op-Ed page, *Washington Post*, Monday, 13 February 1984.

[55]George Washington, "Farewell Address, *American Jurisprudency Desk Book*."

Note: The American Bar Association Report, *Amendment of the Constitution by the Convention Method Under Article V*, contains, at pp. 41-46, extensive footnotes on their conclusions. It also contains, at pp. 79-80, an exhaustive bibliography on the subject. Anyone wishing to explore this subject in depth should begin with the source.

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Cases

Although the subject of this monograph is Constitutional law at the most basic level, and although the author is a Constitutional lawyer, it is by design that no cases have been cited. First, there have never been any cases squarely on the Article V Convention process. Second, this monograph is intended for a lay audience. Third, for those with a taste for cases, those that apply by analogy are discussed at length in the ABA Report, and in *The Article V Convention Process: A Symposium*, among other sources cited above.

PREFACE

The color of the cover of this monograph is no coincidence. Appropriately, it is grey, symbolizing the great grey area that surrounds a Constitutional Convention. For there is little precedent; there is no law; and there are but few guidelines to follow in the call or organization or conduct of a Constitutional Convention. There are even fewer guidelines with respect to the parameters of the convention, when convened. The only Constitutional Convention ever held was in the year 1787 at which time the Constitution of the United States was written. The rules of its conduct are little known and would not necessarily apply to any convention called subsequent to the ratification of the Constitution. The scope and latitude of the next convention is pure conjecture.

With only two more States needed to petition Congress to call a Convention under Article V of the Constitution, and with Congress apparently unable or unwilling to discipline itself to a balanced budget, it is not unrealistic to anticipate the petition of two more States in the near future. Thus the publication of this study is propitious.

This monograph is intended to serve as a source book for those who would be involved in the convention. It examines the petitions passed by the states; the powers of Congress under Article V regarding its obligation to call a convention; the selection of delegates by the States; the proceedings to be used at the convention; and the ratification by the States of any amendments adopted by the convention.

This monograph presents, for the first time, an analysis of the petitions of each of the thirty-two States. Although the petitions are divergent, it is unthinkable that Congress would shirk its responsibility to call a convention because of such divergence... particularly when Congress has failed on more than one occasion to pass legislation designed to establish standards for such petitions.

This is another of the Judicial Series of monographs published by the National Legal Center as a contribution towards a better understanding of our government, its processes, and the issues it deliberates. It is hoped that the research of these authors will prove of genuine value in the organization and conduct of what would be the most significant convention of our time in American history.

Ernest B. Hueter
President

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Legal Center
for the Public Interest

THE CONSTITUTIONAL CONVENTION

HOW IS IT FORMED?

HOW IS IT RUN?

WHAT ARE THE GUIDELINES?

WHAT HAPPENS NOW?

by

Dean James E. Bond
Professor David E. Engdahl
Henry N. Butler, J.D., Ph.D.

Introduction
by
Professor James M. Buchanan

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INTRODUCTION

RETURN TO CONSTITUTIONAL BUDGETARY REFORM

by

PROFESSOR JAMES M. BUCHANAN

In its passage of the Gramm-Rudman-Hollings legislation in 1985, Congress acknowledged that established budgetary procedures were failing and that effective reform must modify the constraints within which spending decisions are made. Ordinary politics, in the form of legislative, and executive, response to the spending pressures of rapidly multiplying concentrated interests, cannot but generate continuing and accelerating deficits. The factual record over the 1960s, 1970s, and 1980s is available for all to see. Gramm-Rudman-Hollings sought to impose specific constraints on the proclivity of ordinary politics to generate budget deficits, and to enforce these targets by mandatory spending limits. The enforcement mechanism was severely weakened by the courts in 1986, and Congress was left, in 1987, with little more than promises to itself to keep spending within bounds. Despite the rhetoric, and despite some constraining influence, the Gramm-Rudman- Hollings experiment must be deemed to have failed in its task.

There were important spillover or external damages wrought by the focus of attention on the Gramm-Rudman-Hollings legislation. The shift of attention to the efforts of Congress, through *legislative* action, to reform its budgetary procedures, drew attention away from the more fundamental, and more promising, avenue or reform, that of *constitutional* amendment. The momentum for a constitutional amendment to require Congress to balance the budget, a momentum represented in the resolutions of the several States, was dampened in 1985, after having been strong in 1983 and 1984.

In 1988, it is appropriate that the focus of attention be shifted back to *constitutional* change. Gramm-Rudman-Hollings failed, finally, because it was legislative, because it was a futile exercise in attempted self-control by the Congress. External rather than internal constraints on the spending proclivities of ordinary politics are required, and such external constraints can only be secured through constitutional mandate.

I do not advance any claim that constitutional constraints necessarily and automatically resolve the central issues. Pressures upon legislators to spend beyond any constitutionally mandated limits will not vanish upon approval of a balanced budget amendment, and problems of enforcement of any

constitutional provision may be severe. I should argue, nonetheless, that these enforcement compliance problems become categorically different when the shift is made from legislatively imposed internal constraints to constitutionally imposed external constaints.

We cannot expect the Congress to initiate constitutional reform on its own. It is simply contrary to the interests of those who hold the now-unlimited decision power over spending to ask that external checks be put on this power. Constitutional constraints will only be imposed, if at all, by the citizenry, acting through the agencies of the separate States. The Founding Fathers wisely gave us a means for securing constitutional amendment independently of legislative intiative. The call for a convention embodied in the States' resolutions will, when sufficient States act, result either in a convention or in congressional response action designed to forestall any need for a convention. In either way, citizens must benefit.

For three decades, in many papers and books, I have sought to defend and to restore the classical principles of public debt and deficits as against the dominant Keynesian argument of mid-century; an argument that provided the initial intellectual impetus for the deficit regimes of recent decades. I shall not repeat my earlier analyses here, since there now is widespread recognition that the consequences of long-continued deficit financing are precisely those feared by those who first developed the classical principles.

The observed regime of budgetary deficits cannot be sustained. On this there is general agreement. The only issue concerns the path through which the regime will be changed. Must we wait until ordinary politics produces generalized default via inflation and/or repudiation? Those of us who concentrate on reform in the rules offer the hope that there remains yet time to shore up the decision-structure.

THE DUTIES AND POWERS OF CONGRESS REGARDING CONVENTIONS FOR PROPOSING AMENDMENTS

by

DEAN JAMES E. BOND

and

PROFESSOR DAVID E. ENGDAHL

Although the convention method for proposing amendments to the United States Constitution has never been used, a sizeable body of literature about it has been generated by political scientists and lawyers. Much of that literature is shaded, however, either by enthusiasm for particular amendment ideas, or by fear that this untried process might produce results a particular writer opposes. Relatively little has been written by persons with no "ax to grind." Moreover, several important considerations seem still to have been almost, if not entirely, overlooked.

The language of Article V of the Constitution provides:

> The Co[illegible]ress, . . . on the Application of the Legislatures of two thirds of the several States, sh[illegible]all a Convention for proposing amendments, which . . . shall be valid to all Intents a[illegible]poses, as Part of this Constitution, when ratified by the Legislatures of three fourt[illegible] several States, or by Conventions in three fourths thereof, as the one or th[illegible] other [illegible] ratification may be proposed by the Congress; . . .

The first [illegible]estions raised by this language is whether, when the requisite number of State "applications" are made, Congress may disregard them or is obliged to "call" a convention. The answer to this question is important both for its own sake and because its rationale shapes the answers to several of the other questions that arise.

Three points are persuasive that Congress is obliged to call a convention if two-thirds of the States apply for one. First, the language of Article V on its face suggests that Congress must call a convention. Second, the original understanding of Article V supports this conclusion. Third, sound public policy urges that Congress must call a convention if two-thirds of the States request it.

Let us begin by examining the pertinent language of Article V quoted above. The plain and ordinary meaning of the word "shall" is that Congress *must* rather than *may* call a convention. It leaves no room for any discretion by Congress to ignore the applications of two-thirds of the States. As Hamilton pointed out in The Federalist No. 85:

> By the fifth article of the plan the congress will be *obliged*, "on the application of the

> legislatures of two thirds of the states, ... to call a convention for proposing amendments ...." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion of ... that body

(Emphasis by Hamilton.) The use of the word "shall" elsewhere in the Constitution also demonstrates that the Framers understood its obligatory meaning.

Moreover, the original understanding confirms that Congress must call a convention if two-thirds of the States request it. The debate in the Constitutional Convention demonstrates that the delegates were determined to guarantee the States power to amend the Constitution despite an indifferent or even hostile Congress. Realizing that Congress could frustrate amendments if the amending power were lodged exclusively in the national government, they insisted that the States have power to initiate amendments.

Indeed, the initial suggestion was that only the States should be competent to propose amendments. The amendment process was first discussed pursuant to Resolution 13 of the Virginia plan, which stated:

> that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.[1]

Subsequently the Committee of Detail, reflecting the wishes of the delegates, reported the following as Article XIX of its August 6 draft:

> On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.[2]

Only after Hamilton had protested the lack of any means for Congress to propose amendments by itself did the Convention reconsider. The delegates then agreed to Madison's proposal, seconded by Hamilton, that the national legislature "whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution ...."[3] This left the States a means of initiating the process, but put the amendment proposing process itself entirely in Congress' hands. This proposal was incorporated in article XIX of the text referred to the Committee of Style,[4] which became Article V of that Committee's report.[5]

This, however, did not satisfy Colonel Mason, who had steadfastly

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[1] M. Farrand, *Records of The Federal Convention of 1787* (hereinafter "Farrand") 121 (rev. ed. 1937).

[2] *Id.* at 188, also published in 1 *The Documentary History of the Ratification of the Constitution* (hereinafter "*Doc. Hist.*") 269 (M. Jensen ed. 1976).

[3] Farrand at 559.

[4] Farrand at 578, also 1 *Doc. Hist.* at 283.

[5] Farrand at 602, also 1 *Doc. Hist.* at 295.

insisted that the States be able to propose amendments free from congressional control. He worried that otherwise "no amendments of the proper kind would ever be obtained by the people, if the [national] Government should become oppressive, as he verily believed would be the case."[6] Thereupon Article V was amended, according to Madison's notes, "so as to require a Convention on application of 2/3 of the Sts."[7]

The convention possibility seems clearly to have been restored to satisfy the concern expressed by Colonel Mason. However inartfully drawn to accomplish that result, its evident purpose reinforces the conclusion that the delegates wanted to ensure that the States would enjoy an independent power to propose amendments.

Persons who had participated in the debate shaping Article V repeated that understanding of its significance during the ratification debates. In The Federalist No. 43, for example, James Madison argued that Article V "equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other." The States could not be said to be on an "equal" footing with the Congress if it could police their initiation of amendments, since the States clearly can exercise no such restraint on the Congress. Hamilton expressed the same understanding. In The Federalist No. 85, in addition to the statement quoted earlier, he said: "[W]henever nine[8] or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place." If Congress could in any way restrain the States in their effort to amend the Constitution, their effort, however united, could hardly be assured of success.

Finally, sound public policy supports the conclusion that Congress must call a convention when enough States apply. The Constitution contemplates a federal system in which the States retain all governing power not delegated to the national government. Those who established this system realized that the States and the national government would each sometimes dispute the scope of the other's power. They were especially sensitive to the danger that the national government might invade the retained powers of the States. Consequently, they wanted to give the States some power by which they could check that invasion. The last century and a half of American history has justified the Framers' concerns, and the need for such a check is as great now as it was when the Constitution was adopted.

Moreover, the availability of an independent mode of amending the Constitution makes Congress more responsive to the will of the people than it might otherwise be. While the State-initiated convention mode of

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[6] Farrand at 629.

[7] *Id.*

[8] "It may rather be said TEN, for though two thirds may set on foot the measure, three fourths must ratify." (Footnote by Hamilton.)

amendment has never been used, the accumulation of applications in numbers not quite sufficent to force the issue sometimes has prompted Congress to propose amendments itself rather than face the prospect of an independent convention addressing the issue. This leverage to induce congressional action would be absent if Congress were free to ignore State applications for a convention.

It thus seems quite certain that Congress is obliged to call a convention when the requisite number of States apply, so that its function in doing so is purely ministerial. Even with respect to ministerial acts, however, a number of questions have to be decided. The 1787 Convention realized that it was leaving many questions unanswered. Madison himself mused: "How was a Convention to be formed? by what rule decide? what was the force of its acts?"[9] ". . . [D]ifficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."[10]

The questions occurring to Madison, however, interesting as they are, are secondary to questions about how Congress should determine whether the requisite number of States have applied for a convention. Must the applications propose a specific amendment, cast in the same language, or may they just ask for a convention on the same subject? May the States apply for a general convention, or must they request a convention only to consider a specific subject? May the Congress specify a time period within which the requisite number of applications must be made, or must Congress call a convention whenever the requisite number of applications have been made, however long the earliest of them has been pending? May Congress ignore a State's rescission of its application for a convention, or must it drop a rescinding State from the count of requisite States? Congress cannot avoid answering such questions if it is to perform its ministerial duty.

The test for determining the validity of Congress' answers to such questions should be whether they ensure that a convention will be called if the applications of two-thirds of the States constitute a contemporaneous consensus that a convention should be held to consider a matter or matters of concern. That is the only criterion which reconciles the right of the States to demand a convention and Congress' duty to call it.

The "contemporaneity" requisite to Congress' call obligation is not explicit in the text of Article V, but it seems implicit even without any certainty as to how much time should be permitted to elapse. The notion that the Congress is obliged to call a convention, simply because two-thirds of the States have — over some extended period of time — requested one, makes little sense. While it may be true that the States would probably not ratify the product of any such convention, it seems useless to call one under

[9] 2 Farrand at 558

[10] *Id.* at 630

such circumstances. Amendment is after all extremely unlikely in the absence of a contemporaneous belief that amendment is necessary.

The "consensus" requisite seems necessary upon a few moments' reflection. Surely there should be no obligation to call a convention, for example, if just twenty states seek one on a particular topic and just fourteen seek one on another. That clearly would indicate only that minorities are concerned about different points, neither of which concerns a majority.

A more difficult situation is presented when applications differ in lesser degrees, as for example, if ten States request a convention "on fiscal problems," ten "to propose a balanced budget amendment," ten "to limit federal spending," and four to consider specific budget amendment language — the language proposed by each of the four differing slightly. There must be some latitude for judgment whether the thirty-four States are sufficiently in agreement to invoke the congressional call obligation; but at the same time, to permit Congress to decline to call because the applications do not exactly conform would conflict with the principle that Congress has no discretion to refuse when it is evident that two-thirds of the States share substantially the same concern.

Fortunately, it is permissible for Congress to establish rules in advance on such matters, to help everyone in planning and Congress itself in deciding such questions if they arise. Congress can do so by virtue of the "necessary and proper" clause, which gives it power to make laws for carrying all the other federal powers into execution. Eliminating uncertainty on such matters as the similarity and specificity Congress will require in applications, the effect it will give to recissions, and the time bounds of "contemporaneity" in Congress' view, reasonably should help in fulfilling Congress obligation under Article V. But the "necessary and proper" clause is a one-way rachet: it only authorizes laws that help effectuate federal duties and powers, not laws that hinder.[11] In other words, statutory provisions apt to frustrate or preclude the calling of a convention, even though two-thirds of the States had contemporaneously requested it, would be invalid.

The two recent legislative attempts to lay out congressional guidelines for processing state requests for an Article V convention are generally consistent with this requirement that they facilitate rather than frustrate the actual calling of a convention when required.[12] (This is not to prejudge whether, in some respects other than regarding the call, these bills might be defective for reasons to be discussed later herein.)

Both would establish reasonable periods within which calls would be aggregated and considered "contemporary."[13] While any specific period is

[11] *See generally* D. Engdahl, *Constitutional Federalism in a Nutshell*, ch. 3 (1987).

[12] *See generally* "Article V and the Proposed Federal Constitutional Convention Procedures Bills" (N.Y.S.B.A. Comm'ee Rpt.), 3 Cardozo L. Rev. 529 (1982).

[13] While the process of proposal and the process of ratification differ materially, so that

necessarily somewhat arbitrary, two years or less seems unduly brief, particularly in view of the fact that some legislatures meet only biennially. On the other hand, a time period that extended beyond ten years might reasonably be considered unduly long. One danger of a longer period is that the impetus for a particular kind of amendment will fragment over time, resulting in diversely phrased applications and thereby complicating the congressional decision whether the number of applications sufficient to require a convention have been received.

Both bills would permit a state to rescind its application. This provision is wholly consistent with the state autonomy implicit in the Article V convention mode. Moreover, it seems dictated by the contemporaneity requirement that at some point within a reasonable time span two-thirds of the States agree that they want a convention. However, there is a curious recent Supreme Court decision in a different context,[14] which unjustifiably casts some doubt on unapproved revocation of State consent and makes statutory affirmation of the right desirable.

Both proposals also recognize that the States may apply for either a general or a limited convention. Again, this provision respects State autonomy in the initiation of the amendment process. It also is consistent with the principle that the States should be as free as Congress to propose amendments. Congress is free to propose a single amendment or multiple amendments, so the States should be free to apply for a convention to propose amendments singly or in multiples. To this, however, there is an important caveat. The convention the States ask for and the convention they get might not be the same thing at all. We will consider further below whether either the States or the Congress can effectively control the "agenda," or scope of business, of a convention for proposing amendments.

While the criterion for obliging Congress to call a convention seems reasonably clear, it is less clear whether a refusal would be judicially reviewable. The amendment process often is said to be a political question beyond review in the courts. However true that may be with respect to Congress' own power to propose amendments, it need not be true with respect to Congress' obligation to call a convention requested by two-thirds of the States. The major difference is that Congress has discretionary power over its own initiation of amendments but only a ministerial duty with respect to calling a convention when two-thirds of the States apply. While a court might understandably refrain from second guessing Congress' exercise of its discretionary power, it might feel obliged to review Congress'

analogies are infirm, it is worth noting that the Supreme Court has held that Congress may specify and enforce what it considers a "reasonable" time within which ratification must occur. *Dillon v. Gloss*, 256 U.S. 368 (1921).

[14] *North Dakota v. United States*, 460 U.S. 300 (1983).

performance or non-performance of a ministerial duty.

For the same reason, the judicial non-reviewability of whether proposed amendments have been ratified is not necessarily dispositive. The Constitution does not say how or by whom it is to be determined that three-fourths of the States have ratified. Traditionally, the determination has been made as a ministerial function by the Secretary of State or, since 1951, the Administrator of General Services. This has been directed by statute, however, and in the case of the Fourteenth Amendment, Congress did make the determination by itself. This history has induced the conclusion that sufficiency of ratification is for the political branches to decide without judicial review.[15]

But the ratification process is very different from the initiation process. Determining the one involves ascertainment of what the States or the people have decided, while determining the other involves whether they shall be consulted at all. Therefore, even if Congress may exercise an unreviewable discretion to determine whether amendments have been ratified, it does not necessarily follow that it must possess a similar unreviewable discretion to determine whether sufficient States have applied for a convention. Indeed, the stronger argument seems to the contrary. Uncontrollable congressional discretion at either the initiation or ratification stage of a convention amendment would make it possible for Congress to frustrate the States' effort to amend the Constitution. That would contravene the Framers' intent to give the States a way to amend the Constitution free of congressional control.

While a blatant attempt by Congress to block an apparently successful effort by the States to amend the Constitution probably would generate a heated political battle, the States could not necessarily protect their interests in that battle through the political process. The direct election of senators has weakened the States' ability to discipline senators who ignore or frustrate their applications for a convention. When state legislatures elected senators, the senators ignored requests from State legislatures at their peril. Thus, the States could influence a senator's behavior through the political process. Since States no longer enjoy that political leverage, courts should not blithely assume that States can protect their interests through the political process, and therefore should be more willing to review serious questions of alleged congressional disregard of the duty to issue a convention call.

Of course, Congress will not necessarily fail or refuse to call a convention for proposing amendments, under circumstances in which the Constitution seems to require it to issue a call. Many other troublesome questions will arise if Congress *does* decide to issue a call.

Three important but often forgotten points about Article V must be

[15] *See* Coleman v. Miller, 307 U.S. 433 (1939).

stressed at the outset of any analysis of those questions. First, the functions of Congress under Article V differ in kind from its functions in the ordinary process of legislation. The Supreme Court confirmed this in 1798 when it acknowledged that Congress' actions with regard to constitutional amendments, unlike those with regard to "laws," need not be presented to the President for approval or veto.[16]

Second, while a two-thirds vote in both houses is required for Congress itself to propose any amendment, no extraordinary majority is required for Congress to "call a Convention for proposing Amendments." Politically, Congress so far has preferred to draft proposed amendments by itself; but constitutionally, in terms of the level of congressional consensus required, the convention alternative is "easier."

Third, while there is an obligation to call a convention when the requisite fraction of state legislatures apply, the Constitution in no way precludes Congress from calling a convention when fewer legislatures, or even when no legislatures, apply.[17] In view of the first of the three points here emphasized — that Congress' Article V functions differ in kind from its legislative functions — this third point has very great significance. When it acts under Article V, Congress does not act as a governing arm whose actions must be restrained by the doctrine of enumerated powers. Instead, it acts as comprehensive steward and high fiduciary to the nation, to raise matters for decision by others who are nearer to the ultimate sovereign, the people. The steward is not relieved of this trust duty by mere Article V silence. While it certainly must respect limits imposed by Article V, Congress is not disabled to seize the initiative and "call" a convention by itself merely because Article V does not declare on its face that Congress may.

The importance of this point is not diminished at all because Congress never has, and perhaps as a practical matter never will, act on its own to call a convention for proposing amendments. For whether it ever does so or not, the fact that Congress *could* do so without legal impediment has very important implications. In fact, quite a number of otherwise difficult questions simply disappear or become moot when Congress' power to call a convention on its own initiative is acknowledged.

For example, suppose that Congress does call a convention in response

[16] *Hollingsworth v. Virginia*, 3 Dall. (3. U.S.) 378 (1798).

[17] The only comment noted when the Committee of Detail's amendment article was first considered on August 30, was Gouverneur Morris' suggestion that "the [national] Legislature should be left at liberty to call a Convention, whenever they please." The article then was approved, "nem con." 2 Farrand at 469. In view of the Convention's readiness later to give Congress an even easier way to initiate the amending process, this vote can hardly be viewed as rejecting Morris' suggestion. It more plausibly indicates that the delegates considered Morris' suggestion fully satisfied by the language as it then stood, i.e., that Congress indeed could initiate a call on its own.

to applications from two-thirds of the States, but that several of those applications are fifteen, twenty, or even thirty years old. Several writers have argued that because applications so old reflect no contemporary consensus, to count them toward the requisite two-thirds would be improper, or even illegal. The question of just how long an application retains vitality, or when it becomes "too" old, might have to be faced if Congress *refused* to call a convention, but surely it would be irrelevant if Congress *did* call one. How could it matter how old the applications were, if Congress may call a convention even when no State applies for one?

Realistically, such a situation could only arise with an issue over which substantial active controversy persists or is suddenly revived. A convention to propose amendments is a large and serious undertaking, and Congress is not foolish; it will not resort to ancient applications as justification for conventions on dead issues. But if Congress is free to call a convention anyway, it makes no sense to preclude it merely because the formal state legislative expressions of interest came a long time before. If a convention were called while some issue were active, any challenge to old applications predictably would be made by partisans on one side or another of that issue, seeking to gain advantage for their own point of view. There is no principled reason to encourage or reward such attempts to avoid the democratic deliberative process, whatever risks that process might entail.

Here is another example to illustrate the implications of Congress' ability to call a convention even without State legislative applications. Suppose that two-thirds of the State legislatures have approved applications for a convention, but some of those applications contain defects of some kind, or never were properly conveyed to Congress, or have been rescinded by subsequent State legislative action. The formalities of proper application, and the effect of attempted recissions, have been discussed by commentators at some length without general agreement. But how can any of these things invalidate a call, if Congress is free to call a convention on its own initiative anyway? Once again, these circumstances present problems that might have to be faced if Congress refused to call a convention despite claims that the requisite number of legislatures had applied; but if Congress did call one, none of these circumstances should impair the legality of the convention, or of its products (if any).

Here is yet another example. Suppose the requisite number of legislatures make applications which in one way or another concern balancing the federal budget, but which differ significantly from one another. Suppose that some specify a particular text, others speak of "balancing the budget," others speak of "limiting federal spending," others speak of "dealing with fiscal problems," and so on. How could nice quibbles over whether these applications concerned the same thing have any relevance to the validity of a resulting call, if Congress could validly have issued such a call without any applications at all?

And one final example: Suppose two-thirds of the State legislatures apply

for a convention to consider a balanced budget amendment, while fewer than that fraction apply for one to consider abortion, or school prayer, or some other issue. There would be no obligation upon Congress to call a convention for anything other than the balanced budget matter; but suppose Congress decided the same convention also should consider these other matters — and maybe some more besides? How could one credibly object to Congress' inviting a convention to consider matters which fewer than two-thirds of the States had applied for, if Congress can call a convention on its own in any event? (This is not to assume congressional control over convention agendas; that matter is considered separately below.)

The preceding examples illustrate the importance of Congress' power on its own initiative to call a "convention for proposing amendments." Congress might never do so; but that is not the point. The point is that Congress seems clearly to have *power* to do so; and if Congress can call such a convention on its own initiative, there seems no room for legal objections to Congress' calling one in response to State "applications" regardless how old, or defective, or limited, or defunct, or disparate, those applications might be.

Thus far we have confined our inquiry to questions concerning Congress' power and duty to call a convention for proposing amendments. These, however, comprise only a small fraction of the questions to be faced. Among the others are, when and where is the convention to meet? How many and who shall attend? How and by whom shall they be chosen? What procedures shall the convention follow? What substantive issues may be considered? How are votes to be counted, per individual delegate or per State? Must or may a time limit for the duration of the convention be fixed? Will it have any staff support, or must the delegates work alone? And very important, but almost never asked, who will pay the tab? The list of such questions is not endless, but it is long.

Some writers parade long lists of such questions and counsel abstention for fear of the unknown; but statecraft is not for the faint of heart. While reflection and careful judgment are called for, there are principled ways to organize these questions and resolve them rationally as they arise.

No more acceptable than a claim that all such uncertainties are perils, is the notion that Congress can resolve most of them. The possibility of legislating ground rules for conventions to propose amendments has been considered in Congress at least since the 1950s. Several bills to that end have been introduced during the past two decades; hearings upon them have been held; committees and sometimes even the full Senate have approved them; but none, so far, has become law. For this there actually is reason to be grateful; for an Act of Congress purporting to resolve matters which Congress lacks constitutional power to resolve might only aggravate the confusion.

Congress certainly may call a convention; Article V specifically says so. One should not rush to conclusions, however, about what might be "incident to" this power to call. "Incidental powers" is one of those unfortunate, imprecise and misleading idioms commonly associated with the "necessary and proper" clause.[18] This clause enables Congress to pass laws "for carrying into Execution" its Article V power, no less than for carrying into execution every other federal power, whether of Congress or of another branch. But the "necessary and proper" clause helps Congress only to implement *federal* powers; and most questions about how an Article V convention for proposing amendments would function are not within *federal* power!

The convention method for proposing amendments was included in the Constitution, after all, specifically to ensure a mode of change that Congress could not frustrate or materially control. One 1930 article,[19] universally overlooked in the glut of more recent writings, argued that the Tenth Amendment was specifically designed to preclude Congress' control of the amendment process. The article is not persuasive that this was the Amendment's sole, or even predominant, aim; but it does underscore the fact that the Tenth Amendment is relevant here.

The only "powers ... delegated to the United States" regarding the convention method of proposing amendments are the power to call a convention and the power to propose one or the other permitted means of ratification -- plus the "necessary and proper" clause power, which (as just pointed out) applies only to effectuate some other *federal* power. (A few other federal powers might become germane: for example, Congress might fund the convention, or give the delegates free use of the mails. But these powers entail no authority over convention organization or operations.) It must follow then that all power to determine any other matter regarding conventions to propose amendments is "reserved to the States respectively, or to the people."[20]

Before considering how "the States ... or ... the people" might deal with such matters, let us examine more closely Congress' power to call. To "call" a convention presumably means more than to recommend that one take place. When State legislatures apply in the requisite number, they are entitled to expect that Congress will take steps to cause a convention to occur. But what is the least and the most that Congress may do, and what must be left for others? Answers to these questions depend at least in part on what it means to "call."

One reasonable way to determine what Article V means by "call" is to

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[18]See Engdahl, *supra* note 11, at secs. 3.12, 6.04, and 6.08. Even some generally perspicacious studies are much too quick to regard various matters as "incidental" to the call. *E.g.*, G. Rees III, *The Amendment Process and Limited Constitutional Conventions*, 2 Benchmark 66, 91 (1986).

[19]Bacon, *How the Tenth Amendment Affected the Fifth Article of the Constitution*, 16 Va. L. Rev. 771 (1930).

[20]U.S. CONST., Amend. X.

inquire how the men who drafted this language themselves happened to be assembled. They "convened" when and where they did because the Congress that operated under the Articles of Confederation had designated, by Resolution, "the second Monday in May next" for "a Convention of delegates" to "be held at Philadelphia ...."[21] (Philadelphia then was small enough that the delegates would be able to find one another without too much inquiring; not even a place or time of day was prescribed.)

The Resolution went on to outline the "sole and express purpose" to which the delegates should devote themselves. But by the time those delegates set about drafting Article V they had gone far beyond that circumscription of purpose, and those who thought that doing so violated the call had long since packed and gone home.

The Resolution also declared that the delegates "shall have been appointed by the several states"; but it did not presume to tell any State how many delegates to appoint, or how. Neither did it indicate whether, or how much, they should be compensated for their expenses and time.

Finally, the Resolution provided that the convention should report its proposals to the State legislatures as well as to Congress, and declared that these proposals should become effective "when agreed to in Congress and confirmed by the states ...." The Philadelphia delegates disobeyed this part of the Resolution, even though the only mode of alteration allowed by the Articles of Confederation, Art. XIII, was changes "agreed to in a congress ... and ... afterwards confirmed by the legislatures of every state."

They were suggesting an entirely new regime, incompatible even with the alteration procedure of the old; and they transmitted their proposed Constitution, along with a Convention resolution proposing a very different mode of ratification, not to any state legislature but only to the Congress. This disobedience to Congress' earlier Resolution was rendered moot, however, when Congress resolved that the Constitution be transmitted to State legislatures along with the Convention's own resolution concerning the ratification process.

This historical example helps a great deal toward understanding what it means to "call" a convention, even if it does not resolve every uncertainty. At a minimum, an Article V call requires a determination and notice that a meeting will occur at a fixed place and date (and today, no doubt, a fixed address and time). It need not prescribe how many should attend, or how they should be chosen. (Whether Congress is even competent to control either of these matters will be discussed below.)

Like the Resolution calling the 1789 Convention, a call under Article V should and probably must make some reference to the purpose of the assemblage. That reference might be as broad as the declaration of purpose in Article V itself ("for proposing Amendments"); and certainly no more

[21] *See* 1 Farrand at 13; also 1 *Doc. Hist.* at 187.

detail than this is necessary to make a call valid. Some have asserted, however, that a call specifying a purpose narrower than this (e.g., only for budget balancing matters, or legislative apportionment matters, or only for those and abortion or religion matters) would be unconstitutional. Such assertions usually are directed at the possibility of a "limited" convention; but discussions of the "limited convention" idea typically run into error by treating two separate questions as one.

Whether a convention pursuant to a circumscribed call can lawfully meet and conduct business, proposing changes which, if duly ratified, must be acknowledged as amendments to the Constitution, is one question. A negative answer to that question seems implausible. The 1787 Convention which drafted Article V itself was convened under a circumscribed call. Those delegates, seeking to ensure that change could be accomplished when needed, could not have contemplated that any limitations in a call could or should prevent the ensuing assembly being a valid Article V convention.

It is quite a different question, however, whether such scope limitations in a call should or can have any binding force. In this modern age, a convention could not be held in such secrecy as was possible in Philadelphia two centuries ago. Cameras and microphones would be everywhere, and delegates would be subject to incentives, not just for grandstanding, but also for sobriety and caution, entailed by such public exposure. Moreover, any apprehension that sweeping change might be in the offing would be reflected quickly in the stock market, and almost as soon in other sectors of the economy. Such practical factors would create pressures to which convention delegates would not likely be immune. It therefore is quite possible, and perhaps much more probable than in 1787, that delegates might decline to go beyond any circumscriptions in the call.

In point of law, however, and contrary to the opinions of many writers, limitations by Congress on the scope of convention concerns seem inconsistent with the Constitution and therefore unenforceable if voluntary compliance cannot be obtained. The reasons, again, are that the convention mode of proposing amendments was calculated to circumvent control by the Congress, and that the Tenth Amendment reserves the residuum of powers -- including power to decide what to do at a convention once called — to the States or to the people.

In short, scope limitations in an Article V call, while not impairing its validity or that of any actions taken under it, can be made no more binding than those of the Confederation Congress in 1787 turned out to be. Those were not binding because the Confederation Congress (after some debate on the point[22]) understood and accepted the statecraft necessity[23] for that

[22] *See* 1 *Doc. Hist.* at 325-42.

[23] According to Yates' notes on the 1787 Convention, Colonel Mason acknowledged on June

disobedience and forwarded the Convention's product for ratification notwithstanding. The reasons for considering scope limitations non-binding today go beyond the vagaries of statecraft to clear constitutional purpose and specific constitutional text.

Yet, there would be a mechanism whereby Congress could enforce scope restrictions, or otherwise exercise influence over the success of convention proposals based on its view of their merits, if it were necessary for a convention's product to pass through Congress' hands before the process of ratification could begin. Article V does not make this necessary. It does not even assign Congress a clerical role with respect to amendments proposed by convention; the proposals, from all that appears, would go directly from the proposing convention to the States for ratification. Nevertheless, a passage through Congress would be required if, when the convention's proposals were ready, Congress had not yet exercised the other relevant power given it by Article V: the power to determine which ratification mode should be used.

In every instance but one, Congress has chosen the option of legislative rather than convention ratification. Nonetheless, the choice between ratification modes is far from being an insignificant one. Notwithstanding reapportionment, the composition of State legislatures is different from that which would prevail in State ratification conventions, regardless how chosen and regardless of size.[24] The possible differences are manifold, complex, and attributable to peculiar and transitory social and political phenomena rather than to any general principles ascertainable a priori. Practical experience and political accountability; breadth of vision and zeal for particular causes; the probability or absence of reciprocal, parochial obligations or constraints; the degree of interference with participants' normal life and obligations, and estimates of how demanding of time and attention a particular ratification process might be; proximity to (or distance from) the proverbial "grass roots" — these are only a few of the factors that might affect judgments on which ratification method to choose. Every one of the factors might play differently, depending on the particular amendment or amendments at stake. Calculating from such variables the course most likely to produce wanted results in concrete instances is the skill whose mastery measures senators' and representatives' political lives.

Whether a majority in Congress actually *would* base its selection of one mode over the other on a judgment of which would make ratification more or less likely, is not the point. The point is that it *could*, and that is just the

[24] that by taking the Virginia Plan as its basis the Convention was operating outside the scope of its call, but observed: "In certain seasons of public danger it is commendable to exceed power." The Congress, having experienced the embarrassments of trying to function under the Articles of Confederation, evidently agreed.

[24] The state conventions to ratify the Twenty-First Amendment were assembled by procedures differing from State to State, and varied from 329 to three delegates in size.

kind of congressional influence over the amendment process that the convention proposal alternative was designed to circumvent. It follows that, if the purpose of precluding congressional influence on this alternative method is to be well served, the determination of ratification method must be made before the product of the proposing convention's deliberations is known.

As a practical matter, this virtually requires that an indication of the mode of ratification be another element of an Article V convention call. (It is notable that the 1787 Resolution calling the Philadelphia Convention did include a recitation of how that Convention's proposals should be "agreed to" and "confirmed" — even though, for reasons peculiar to those circumstances, that prescribed method in the end was not used.) If this is true, the two separate powers that Article V gives to Congress with regard to conventions for proposing amendments really must be exercised at once.

This does not quite exhaust Congress' power regarding such conventions, however. Incident to a call (i.e., under the "necessary and proper" clause), Congress might authorize the reservation of meeting facilities, or preparation for the host of logistical matters attending a gathering which inevitably would attract massive media attention. Preparations tend to ensure that the convention actually can occur. (For the federal government to manage such matters once a convention had assembled, however, would not serve to effectuate the *call*; consequently, such a federal role could not be sustained by the "necessary and proper" clause.) Should Congress desire to do so, it might underwrite some (or all) of a convention's expenses; but that would be an exercise of its spending power, not something requiring justification as "necessary and proper" to effectuate the *call*. It might also extend the franking privilege for convention business, as the Confederation Congress did for the Convention of 1787;[25] but that would be an exercise of Congress' postal power, again not something to effectuate the *call*.

In sum, the *determinative* function of Congress with regard to Article V conventions for proposing amendments begins and ends with the call; and even the determination *whether* to issue a call is removed from Congress' discretion when two-thirds of the States apply. The Framers seem deliberately to have made it so. If this be true, regardless how desirable it might seem for Congress to legislate answers to some of the many questions that are certain to arise if such a convention is called, those questions simply are beyond Congress' power to resolve. The most it can do, even in the *form* of legislation, is to offer non-binding counsel. That, however, would not necessarily be wasted effort; for as a practical matter, many of Congress' advisory determinations might be followed voluntarily by such a convention, as an expedient alternative to starting from scratch.

[25] See 3 Farrand at 17.

The question next in logical sequence to the call of a convention for proposing amendments is, how should that call be answered: i.e., who should attend? This subsumes the questions of the number and constituencies of delegates and how and by whom they should be chosen. Again, the answers do not appear on the face of Article V. Through principled reflection, however, persuasive answers can be found.

The first principle relevant to this reflection is one that infuses our entire constitutional structure: the principle of federalism. Regardless of any disparities of population among them, and notwithstanding the complexities of intergovernmental relations and power allocations, our constitutional union is a federation of distinct political communities and legal entities called States. And despite judicial decrees affecting apportionment of representation within the several States or within the federal House of Representatives, some features of our Constitution preclude subordination of State equality to the democratic ideal of an equal voice for every person. The Senate's composition, with two members from each State regardless of size or population, is one example. The process of amendment under Article V is another.

Ratification must be done State by State, whether by legislatures or by ratification conventions. This means, there now being fifty States of widely different population, that disapproval by barely more than a quarter of those voting in the thirteen least populous States could block an amendment urgently demanded by the overwhelming majority of American citizens. A comparable observation applies to "applications" for a "proposing" convention: Even assuming that State legislatures as now reapportioned mirror exactly the sentiments of the electorate, a bare majority of legislators in each of the thirty-four smallest states could compel a convention that the substantial majority of Americans do not want. These hypotheticals are more extreme than anything reality will present, but they illustrate the ineluctable point: Article V processes cannot be approximated to the ideal of "one person, one vote." Amendment of the Constitution necessitates action State-by- State, not democratic action by the nation as a wh .e.

It would be anomalous, then, to require delegation strength in a convention for proposing amendments to be proportional to population.[26] It would be no less anomalous to require that delegation strength comport with the respective States' representation in Congress, which, except for the equality of representation in the Senate, conforms roughly to the same population proportionality rule.[27] And it would be worse than anomalous — it would be an arrogation of forbidden prerogative in order to impose a

[26]Conceivably, that could be the rule for such a convention called by Congress on its own initiative, without colorable application from two-thirds of the States. But as noted earlier, while important implications can be drawn from the legal possibility that a convention could be called in that way, there is no practical likelihood that one ever will.

[27]*Id.*

dubious rule — for *Congress* to direct that delegations to a convention for proposing amendments conform to any such rule.[28] Neither Article V nor anything else in the Constitution warrants federal interference with State discretion in this matter. On the contrary, the power to decide delegation size comes within the Tenth Amendment's provision that powers not delegated to the United States are reserved to the States, or to the people.

In default of any other established mechanism by which States (or the people in each of them) could do so, only the States' legislatures could make decisions on the size of State delegations. Whether to do so in the normal mode of legislation, with gubernatorial approval or veto, must be determined in each State on the basis of its peculiar state constitution and practices. It would be naive and officious for academics to suggest that State legislators would need extraordinary guidance on how to proceed. They have their staffs and State legal departments — not to mention such organizations as the Council of State Governments and the National Conference of State Legislatures, which are quite capable not only of giving counsel but also of coordinating efforts to prevent extravagant or dysfunctional delegation disparities.

It would not be the first time that several separate legislatures have had to decide how large a delegation to send to a convention. Twelve did so in 1787. On that occasion, two legislatures designated three delegates, two designated four, five designated five, one designated six, and two designated seven.[29] Incidentally, there was no correlation between the number of delegates appointed and the States' size or population.

A larger delegation could be of little value unless each delegate were to enjoy a separate vote; and in that case, there would be incentive to send thousands. But the same principle elucidated earlier suggests that voting at such a convention would have to follow the rule of equality among States. That federalism principle which permeates the Constitution and particularly Article V, underscored by the absurd alternative of States vying to pack the house with delegates of their own choosing, compels the conclusion that whatever the number of delegates from each State, every State's delegation must have equal voting power.

This fact will necessarily influence the size of delegations. There being no voting advantage in numbers alone, a typical State legislature would probably weigh such very practical considerations as the impact of sheer numbers on processes of deliberation, debate, and developing consensus, both in a particular delegation and in the convention as a whole; logistics involved with managing different sized groups; means of facilitating diver-

[28]This is the formula proposed, for example, by the Hatch bill, S. 119, 98th Cong., 1st Sess.

[29]See 1 *Doc. Hist.* at 192-230; also 3 Farrand at 557-590. It is a mystery how Judge Rees, *supra* note 18, could have concluded so erroneously that "[t]he Philadelphia Convention of 1787 had three delegates from each State," *id.* at 90.

sify or discipline (whichever a particular legislature might desire); and, probably rather high on the list of considerations, the cost.

These all are considerations of the kind that State legislators wrestle with all the time. They need no special assistance in weighing them; nor is it necessary that legislators in every State strike the balance the same. In fact, one might say that the Constitution contemplates that States will and may differ in this regard. At least it seems certain by virtue of the Tenth Amendment and Article V's failure to give Congress any role, that any effort by Congress to prescribe the size of State delegations would be void. Once again, such federal legislation might induce voluntary compliance by States — either as a convenience to avoid lengthy debate, or because some legislators are timorous and unsure of their powers. However, there is no valid legal principle under which such federal suggestions, regardless how imperatively phrased, could be held binding.

The questions of how and by whom delegates should be chosen yields to a similar analysis. Some writers say that delegates assuredly would be chosen by popular election; and on that assumption they decry the prospect of single issue or narrow focus campaigns thought likely to result in a convention of ideologues. But despite Chicken-Little's panic, the sky did not fall. One must view this very practical matter in sober perspective.

Delegates assuredly *need not* be popularly elected. Congress could not dictate the selection process, for the same reasons discussed earlier. Instead each State, through its legislature, must decide for itself. The choice of selection process is a highly political matter, and State politicians will perceive it as such. With the convention a certainty, it is highly unlikely that state legislators will act so perfunctorily as some writers charge that they have on Article V "applications." They will comprehend the forces at work and will make their several judgments accordingly. They will favor or oppose popular election of delegates in part, perhaps, on principled conviction, but also in part on their estimates of what the outcome might be. Anticipated advantages and risks of issue-dedicated delegations both will be urged by lobbyists, in the press, and in letters from constituents, and doubtless will be debated on all fifty statehouse floors.

The results, predictably, will be anything but uniform. Some ideologue legislators might doubt their political base and prefer delegate selection by the legislature itself; voters in some States might disappoint the cynics by demonstrating remarkable good sense; some resolute partisans — some pro and some con — might be legislatively selected; and some heretofore undiscovered statesmen might emerge from popular election contests. Any statistician is sure to agree: If no central authority can impose a single mode of selection uniformly upon all fifty States, the odds against a convention being dominated by ideologues of any particular stripe are substantial. To a disinterested observer, the practical probabilities support a guarded faith in the democratic process, and a healthy respect for the safeguards that surround conventions for proposing amendments as a result of the interplay

between Article V and Amendment Ten.

Whether delegates are selected by State legislatures or elected by the people themselves, they would probably represent mainstream philosophies. American legislatures seldom breed radicals, and the American people at large rarely embrace radicals. A convention to propose amendments would probably look a lot like an average Congress — and while that might not be an inspiring prospect, it is scarcely an alarming one, either.

The organization and conduct of a convention for proposing amendments, once delegates had been selected and had gathered as ordained in the call, would involve a very large array of questions — but none very difficult to resolve if the fundamental principles already explained were kept in mind. The first to arise would be no different from those presented whenever any new assemblage — whether international colloquium or hobby club, first embarks: "Who's in charge here?" and "What do we do now?" Modern mankind seems never to have been daunted by uncertainties of this kind.

Someone will have the temerity to suggest that a presiding officer be selected; and in the first test of the convention's prospect for success, somehow a prevailing consensus probably will be reached about how that should be done. Perhaps next the question of procedures will arise; most delegates will have had some exposure to "Roberts' Rules of Order," and formally or informally, rigorously or approximately, at the outset those probably will operate by default. Probably a committee will be chosen to formulate some more specialized rules of the house; delegates who make known their experience in some legislature or other public or private deliberative body probably will be preferred. Their report will be considered and in large part approved. None of this should present insurmountable hurdles, although controversy on various issues should be expected. The point is, of the host of questions concerning the operation of a convention, most will be resolved in the way rational people routinely resolve similar questions in voluntary organizations, business assemblies, and public bodies.

A few things, of course, would need special attention. As at the 1787 Convention at Philadelphia, at the beginning of every Congress, and at various other assemblies where participation is restricted, there would be the matter of verifying credentials. Only the most innocent of experience should wonder how to proceed with that. Then there is the matter of quorum. By virtue of the pervasive federalism principle elucidated earlier, the quorum could not be set in terms of delegates present, but must be in terms of States represented; but whether merely one or some greater number of delegates from a State should be requisite to its "presence" for purposes of a quorum, and what number of States a quorum should require, would have to be determined.

More troublesome might be the matter of staffing. Some functions (such as recording of minutes, enforcing decorum, and quieting the noise that

might disrupt proceedings from time to time) could be performed by designated delegates; but it might be thought better that a non-delegate secretary, perhaps professional court reporters or audio or video engineers, and officers in the nature of sergeants-at-arms be employed. There could be no reason against the convention's doing so, unless it had no money and qualified individuals did not volunteer. One or more States might offer such services in kind; and there is no reason why the convention could not accept. The same is true of staff assistance to delegates or (should any be created) to committees. If it should seem needed, such assistance could be purchased if funds had been made available by Congress or by one or more States, or provided by volunteers, or supplied by a State or States in kind. Some States might have provided for staff to support their delegations while other States might have provided for none.

We now have reached the level of the mundane, and must elevate the discussion by summarizing with an important point: a convention can run itself. Some scholars actually have troubled to write arcane treatises on the conduct of conventions in general. But one need not subscribe to, nor even survey, those authors' answers to specific questions of convention process. It all comes down to the fundamental point that, beyond being a deliberative body susceptible of analogy to other deliberative assemblies insofar as that proves helpful, such a "Convention for proposing Amendments" is an entity entire to itself, and as close an approximation to the sovereign "people" as is likely to obtain.

As such, the convention is host to a residuum of powers confirmed by the Tenth Amendment: powers uncatalogued but ample to enable it to carry out fully its function. It is limited in function by Article V: it is a "Convention for proposing Amendments" to the existing Constitution, and nothing more. But because it partakes, so far as is needed, of the sovereign's reserved powers, no constraints sought to be placed upon its operations by legislatures or other government entities — federal or state — can have any more than hortatory effect.

Three specific consequences, to some extent adumbrated in the pages above, may be mentioned in closing. First, the convention itself may decide how to count votes, subject only to the federalism principle that dictates equality of voting strength among States. Neither Congress in a call, nor Congress by such measures as have been considered for fixing groundrules in advance, nor the States themselves, can either prescribe a voting scheme that the convention must follow or release it from the rule of equality among States. The Philadelphia Convention of 1787 took the most obvious expedient of allocating to each State a single vote; each State's vote then was determined by the majority of that State's delegation, a delegation evenly split was recorded as "divided," and if fewer than two of its delegates were present a State's vote was not counted.

It is conceivable, however, to proceed in a different way, still without departing from the rule of State equality. For example, supposing the

smallest delegation to be three, every State might be allocated three votes; the convention then could choose whether to leave the allocation of each State's votes for decision by the delegations respectively, or to require that they be prorated among the State's delegates. Some States having four, or nine, or seventeen delegates, certainly the second and probably the first of these options would entail fractional voting; but that is merely an inconvenience and would not even be that if the convention's funding made possible a little computer support. The offsetting advantage, the convention might believe, would be a somewhat closer approximation to democracy (notwithstanding the different weight that different delegates' votes would receive) than if dissident desires were entirely concealed beneath unitary State votes.

Second, regardless of any parameters in the call and regardless of attempted instructions to its delegates by any State, a convention is master of the scope of its own business — or in the terms most commonly used, has control of its own agenda. The reasons for Congress' incompetence to limit the agenda, as explained earlier, are the limited powers given Congress by Article V and the reserve of the Tenth Amendment. The reasons why States cannot force a limited agenda are that no States can enforce their own will against the others, and (more fundamentally) that the convention is not a functionary of any State or of all, but rather is an independent representative of the sovereign people with an existence and functions of its own.

This presents no real risk of a "runaway" convention, at least if the vision conjured up by that ambiguous and rather pejorative term is one of delegates roaming at large over the range of public affairs, revising and replacing without responsible restraint. While matters might be taken up that had not been specifically anticipated, the practical factors referred to before — scrutinizing media exposure and sensitivity to the economic disarray which apprehensiveness over sweeping proposals for uncertain change would entail — are sufficient assurance against wildcat proposals for all who have learned that life gives no absolute guarantees. Of course, they may be insufficient assurance for partisans hell-bent to preclude changes on some particular issue from being put to a popular vote even under the unfavorable odds of a ratification ordeal.

Such a convention, in any event, can only propose; the people through their States, either legislatively or in separate ratification conventions, dispose. The ratification process permits the American people to take a sober second look at proposed amendments. Only once have they upon reflection adopted an amendment profoundly altering the structure of our government: the Fourteenth Amendment. And only once have they upon reflection adopted an amendment that constricted personal choice: the Eighteenth Amendment (and they quickly repented that decision). This record should reassure those who fear that the American people might unthinkingly endorse the proposals of a "runaway" convention.

Bearing in mind the ambiguous and pejorative nature of the term, it seems appropriate to object to characterization of the 1787 Constitutional Convention as a "runaway." It is true that, from the start of its business, the Convention worked beyond the scope set by the Resolution that called it; and it crafted a whole new frame of government rather than making proposals for patching up the old. For that reason, in fact, a handful of the delegates "ran away"! But in no sense can it be said that the Convention ever was out of hand or verged on a political cabal. While there were profound disagreements and tempers occasionally flared, its deliberations were temperate, sober, compromising, and stately, even though conducted in secret. Even if one takes the view that many modern proponents of certain constitutional changes are wacky, are grandstanders, or pander to ignorance and fear, it requires quite a jaded view of mankind and of the democratic political process to imagine that — with the heat as well as the light of modern news coverage — a convention overall is likely to be less temperate, less sober, less compromising, and less stately today.

Finally, the duration of a "Convention for proposing Amendments" is under its own control. Lacking its own source of financing, and comprised of twentieth century delegates less likely than eighteenth century gentlemen to have time and resources to charitably burn, it is unlikely that whatever quorum were agreed upon could be maintained extremely long. Moreover, public impatience and the economic instability likely to be aggravated by prolonged uncertainty make it highly unlikely that the convention *would* drag on to extravagant length even if it could. But while financial and other pressures might test their mettle, the delegates as pro tanto repositories of the peoples' reserved sovereignty would have legal authority to continue as long as they deemed necessary (or as long as they possibly could).

Some bills introduced in Congress purport to limit such a convention to a maximum time period: for example, one year. The notion that twelve months might be consumed by a convention merely to propose amendments to a Constitution that was created virtually from scratch in just four, seems rather absurd, even discounting the unliklihood that a quorum could be maintained that long. But if the convention should decide that more time were needed, and its delegates were willing to proceed, time limits attempted to be imposed from without could have no binding force.[30] Again, the convention has an independent existence. No intrusion on this instrument of the sovereign for proposing measures to refashion its governance could be more severe than to mandate its cloture before it had decided that its business was through.

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[30]The duration of a convention for proposing amendments beats no analogy at all to the period allowed for ratifying after proposal (*see Dillon v. Gloss*, 256 U.S. 368 (1921)). Contrast note 13, *supra*

We have had some experience in this country with conventions. The most prominent one was the 1787 Constitutional Convention, whose product we are celebrating this year. That product — our Constitution — is not sacrosanct, as the Framers themselves realized. Indeed, one of their first orders of business was amending it. And it has been changed many more times during the last two hundred years — and not, unfortunately, by the amendment process alone. Many decisions of the Supreme Court, some deliberately and some inadvertently, have in practical effect altered it fundamentally. If it is conceded that the Supreme Court, by bare majority of a select few, can change the Constitution in the purse of construing it,[31] why should not the people themselves, through their delegates in solemn convention assembled, be able to propose changes to it?

[31]It is possible to refuse this concession in principle, without denying that it is the error by which we now live, but very few even trouble to question it

STATE PETITIONS FOR A BALANCED BUDGET CONSTITUTIONAL CONVENTION: A DESCRIPTIVE ESSAY ON THE POLITICAL ECONOMY OF THE ARTICLE V PROCESS

by

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The Congress of the United States has failed to address adequately the major economic threat to the welfare of all Americans — the enormous deficits in the federal budgets of the 1980s. There is, however, a constitutional avenue through which the States may be able to force Congress to confront their own ineptitude at balancing the federal budget. Article V of the Constitution provides a procedure whereby two-thirds of the States can petition Congress to call a constitutional convention to propose amendments designed to address problems or issues that Congress has exhibited an unwillingness or inablity to address. Although the convention method of amending the Constitution has never been implemented, the States are on the threshold of forcing Congress to call a convention for the purpose of proposing an amendment requiring a balanced federal budget. Thirty-two (of the necessary thirty-four) States have petitioned Congress to call a Constitutional Convention for the purpose of amending the Constitution to prohibit the running of sustained budget deficits.

The call for a balanced budget convention is an excellant example of how the Framers of the Constitution intended for Article V to operate — the petitioning process provides a mechanism for the States to push Congress to action whenever an unaddressed issue is deemed sufficiently important by two-thirds of the States as to require a Constitutional Amendment. The fact that the States may be only two States away from the necessary two-thirds has forced legal commentators and even the Congress to consider the Congressional obligation to call a convention.

The general concensus is that Congress must play an active role in the convention method of amending the Constitution. Congress, however, is not a disinterested party. It is obvious that Congress, as an institution, prefers to run budget deficits and therefore is hostile to the idea of a balanced budget amendment, regardless of the process that leads to its proposal and ratification. Moreover, a balanced budget convention usurps the traditional Congressional control over the amendment process. Because of this, every effort must be made to reduce the role and discretion of Congress in the process.

Given the Congressional proclivity towards running budget deficits and the hard choices that will be forced on Congress should a balanced budget amendment come to pass, it is conceivable that the Congress will attempt to sabotage the Article V process. Thus, for example, one must be skeptical of any moves in Congress that allow Congress to short circuit the Article V process through rather technical or strict interpretations of the importance of differences in the language of the States' petitions.

This essay examines the petitions passed by the States calling for a balanced budget constitutional convention, emphasizing how differences in wording among the petitions could affect Congress's obligation to call an Article V Convention. Rather than presenting an exhaustive treatment of the subtle legal issues involved, this essay presents a consistent application of principles of political economy as a means of resolving some debated legal issues.[1]

The first section provides a brief description of the Article V amendment procedures. Special attention is given to the structural reasons for the convention method, including a brief discussion of the political economy of budget deficits. It is argued that the same Congressional incentives that lead to budget deficits will also encourage the Congress to attempt to find avenues of escape from its obligation to call a constitutional convention to address the balanced budget issue. This observation provides the basis for a presumption that Congress has an obligation — akin to a fiduciary obligation — to interpret the petitions in a light most favorable to the petitioners.

The next section describes and analyzes the thirty-two State petitions to Congress for the calling of a balanced budget constitutional convention. Although the petitions may be divided into several categories according to substantive content, it is clear that the dominant intent of *all* petitions is to force Congress to address the States' concerns about federal budget deficits. It is then shown how almost all of Congress's technical, legalistic avenues of escape from the obligation to call a balanced budget constitutional convention are closed by holding Congress to a high standard of responsibility. There is a strong case in support of the position that should two more States petition for a balanced budget convention, Congress would then be constitutionally obligated to call a constitutional convention in response to the clear concern of two- thirds of the States with the federal budget deficits.

[1]Every effort is made to keep footnotes to a minimum. Numerous articles, books, Congressional reports and monographs provide detailed analysis of the legal issues. A representative list includes: Paul J. Weber, *A Constitutional Convention: A Safe Political Option*, 3 J. Law & Politics 51 (1986); Paul Bator, Walter Berns, Gerald Gunther, & Antonin Scalia, *A Constitutional Convention: How Well Would It Work?* (American Enterprise Institute, 1979); American Bar Association, Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method of Article V* (1974); and *Constitutional Convention Implementation Act of 1985, Report of the Committee on the Judiciary, United States Senate*, 99th Cong., 1st Sess. (1985).

A final section summarizes the argument for a constitutional convention and offers some suggestions about how such issues be resolved in the future.

I. THE POLITICAL ECONOMY OF ARTICLE V

The Framers of the Constitution of the United States desired to create a document which both established a permanent, functional national government and provided for marginal adjustments in its structure in response to changed circumstances. Most of the discussion at the 1787 Convention was concerned with the structure of government — the granting of authority to the federal government from the people through the States, the States' retention of rights not granted to the federal government, the separation of powers among the three branches, the system of checks and balances, the admission of new States, and so forth. Only a relatively small amount of debate was devoted to the topic of altering the document that they were struggling to create. Ultimately, the Framers concluded that in order to ensure the permanence of the document and the stability of the government, the Framers made it difficult, but not impossible, to modify the Constitution.[2]

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

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

All twenty-six Amendments to the Constitution have been proposed by Congress, and all but one of them was ratified by State legislatures. The Twenty-first Amendment, which repealed prohibition, was ratified by State conventions.

The convention method of amending the Constitution has never been invoked successfully.[3] But this fact should not be interpreted as suggesting that the convention method is of little or no importance. The convention

[2]*See generally* Report of the ABA Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* 11-14 (1974); Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D.L. Rev. 355, 365-66 (1979).

[3]However, a large number of amendments have been proposed over the years. In the period since 1789, State legislatures have submitted more than 400 applications for a petition to consider amendments relating to a wide variety of subjects. In recent years, legislatures have applied to Congress for a convention more often than in the past. During the 174-year period from 1789 to 1963, Congress received approximately 250 applications requesting a convention. In the period since 1963, more than 150 such applications have been received.

method provides an important restraint or check on a nonresponsive or wayward Congress. For example, the role of the convention method in constraining Congress is evident from the text of Article V. The Article leaves nothing to the discretion of Congress — "on the application of the legislatures of two-thirds of the several States, [Congress] *shall* call a convention for proposing amendments." In *The Federalist*, Alexander Hamilton commented upon the nondiscretionary nature of the congressional duty to call a convention: "[T]he national rulers, whenever nine States concur, will have no option upon the subject. The words of this [fifth] article are preemptory. The Congress shall call a convention.' Nothing in this particular is left to the discretion of that body."[4]

Congress is obligated to call a convention, and Article V does not provide for Congress to make any policy decisions when deciding whether to call the convention. To allow such a role for Congress would clearly violate the reason for and spirit of the convention method of amending the Constitution. For example, George Mason argued that the convention method was necessary because he believed that Congress would not likely propose amendments to counteract congressional abuses of power.[5] One does not need to be overly cynical, or even skeptical, to find agreement with Mason's view of this inherent conflict of interest.

The convention method of Article V is merely another example of the brilliance of the Framers at identifying political decisionmakers' incentives to act in an undesirable manner and then creating institutional constraints to reduce the occurrence of such behavior. Article V deserves to be treated with the same reverence as other important Constitutional provisions — for example, the separation of powers — dealing with the structure of the federal government.

The Scope of the Amending Power of an Article V Convention

Article V grants the States the power to call a general constitutional convention, but does not consider whether a convention can be convened for a more limited purpose. The contemporary discussion of the States' petitions for a convention to propose a balanced budget amendment has been marked by concerns about a "runaway convention" that would propose numerous amendments beyond the limited subject of the States' petitions or even the Congress's convention call.

There is little merit to such an argument, and one suspects that those making it are more concerned with blocking a balanced budget amendment than the remote possibility that the convention would stray from its limited mission. Most impartial experts see nothing to fear coming from a constitutional convention, and a two-year commission of the American Bar Association unanimously concluded that a convention could be limited.[6]

[4] *The Federalist* (No. 85), at 550-51 (A. Hamilton).

[5] *See generally* 1 *The Records of the Federal Convention of 1787* 203 (M.Farrand, ed. 1911)(statement of G. Mason); Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 Yale L. J. 1623, 1625 (1979).

Ratification of the Convention's Proposed Amendment: An Important Safeguard

In considering the convention method of amending the Constitution, it must be remembered that a convention called pursuant to Article V does not have the power to amend the Constitution but only the power to propose amendments. All proposed amendments — whether proposed by Congress or constitutional convention — must still be ratified by three-fourths of the States.

In general, there is little reason to be more concerned about controlling the subject matter of a constitutional convention than controlling the amendments that may be directly proposed by Congress. The requirement of subsequent ratification limits the possibilities of either a "runaway Congress" or a "runaway constitutional convention." Moreover, it is not clear *a priori* whether the Congress or a constitutional convention is more prone to tinker with our basic constitutional structure — especially when both bodies would be aware of the extremely low probability of ratification of undemocratic amendments that threaten our republican government.

Constitutional Convention Procedures

Article V does not provide any procedures to guide the States in applying for a constitutional convention and, because the convention method has never been used, there is considerable confusion in Congress and among constitutional scholars over the obligations of Congress and the procedures governing the convention. There appear to be a general concensus that Congress, when complying with its duty to call a convention, could specify the means for the selection of delegates and appropriate money for its activities. Also, in order to bring some order to the process, it would seem reasonable for Congress to set forth the conditions under which it would consider itself to be bound to call a convention. Nonetheless, the steps required to convene an Article V convention and the rules that would govern it have not been set out in statutory law. There have, however, been several unsuccessful movements in the Congress to adopt enabling legislation to cover all situations in which Congress receives petitions on the same subject from two-thirds of the States.

Since 1967, a number of bills dealing with the convention method have been introduced in Congress, but, to date, none of them have passed both houses. Bills introduced in and passed by the Senate but not considered by the House during the 92nd and 93rd Congresses illustrate the types of procedures that Congress needs to establish to provide some order to the

[6] *See* American Bar Association, Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* (1974).

process.[7] Among other things, the bills: (1) specified the forms of State applications acceptable to Congress; (2) provided that the applications would remain in effect for seven years; (3) allowed States to rescind applications; (4) limited the jurisdiction of any convention to the subject for which it was called; (5) set forth administrative procedures for convening a convention, such as the method of selecting delegates and the type of vote required to propose an amendment; and (6) permitted Congress to reject a disfavored convention proposal by submitting its own substitute amendment to the States for ratification.

Currently, the Constitutional Convention Implementation Act of 1987 (S.589), which was introduced by Senator Orrin Hatch of Utah, is before the Senate Judiciary Committee. The bill addresses many of the issues which have surfaced as the number of State resolutions and memorials petitioning Congress to convene a national convention to propose a balanced federal budget approaches the magic number of thirty-four. The proposed legislation, in addition to setting forth procedures for holding constitutional conventions for proposing amendments to the Constitution, also provides a procedure for the Congress to adopt a concurrent resolution calling for a convention whenever it determines that at least two-thirds of the States have submitted, within a seven-year period, valid applications for the calling of a constitutional convention.[8] In recognition of the current calls for the balanced budget constitutional convention, S. 589 allows applications that have been pending for fourteen years or less to pend an additional two years. Clearly, the passage of such legislation would go a long ways towards clarifying the uncertainties surrounding this important

[7] In 1971 (92d Congress), Senator Sam Ervin introduced S. 215, which passed the Senate by a vote of 84-0, but the House did not consider the measure on the floor. In 1973 during the 93d Congress, a similar bill, S. 1272, passed the Senate by a voice vote, but was not considered on the House floor.

[8] More specifically, S. 589 requires that the convention be convened within 8 months of the adoption of the resolution; entitles each State to send two delegates on an at-large basis and one delegate from each congressional district; prohibits a senator, representative, or other person holding office under the United States from being selected as a delegate; provides that the President pro tempore of the Senate and the Speaker of the House of Representative shall convene the convention; authorizes appropriations for the payment of convention expenses; sets six months as the time limit for the convention to complete its work (unless extended by Congress); authorizes the convention to conduct proceedings in accordance with such rules as it may adopt by a vote of three-fifths of the number of delegates who have subscribed to the oath of office; prohibits such convention from proposing any amendment of a subject matter different from that stated in the concurrent resolution; requires the presiding officers of the convention to submit any proposed amendment to the Congress; authorizes the Congress to disapprove by concurrent resolution or to direct the Administrator of General Services to transmit to the States copies of the proposed amendment and copies of any concurrent resolution agreed to by the Congress prescribing the mode of ratification; provides that if the Congress fails to take action on an amendment proposed by a convention within 6 months, any State may bring an action in the Supreme Court for relief; provides that an amendment shall become valid when ratified by three-fourths of the States; and, finally, permits a State to rescind its ratification, except when valid ratification by three-fourths of the States exist.

process. Past Congressional inaction, however, leads one to question whether Congress really wants to clarify the process.

Public Choice Economics and Budget Deficits

Professor James M. Buchanan of George Mason University's Center for Study of Public Choice was awarded the 1986 Nobel Prize in Economics for his intellectual leadership in the development of a field of economics known as public choice.[9] Public choice economics applies economics to political behavior. Among other things, Professor Buchanan has argued that political outcomes are determined by the rules governing political behavior. In other words, if we want to change political outcomes, then we must change the rules of the game. Clearly, the Framers of the Constitution of the United States must be counted with the intellectual forefathers of this approach to politics.

At the press conference immediately following the announcement that he was to be awarded the Nobel Prize, Professor Buchanan responded to a reporter's request for an example of public choice theory in action by presenting a classic public choice explanation for the existence of budget deficits: democracies tend to run budget deficits because politicians believe that they can increase their political support today by giving their constituents government goods and services and shifting at least some of the cost to future taxpayers. This simple explanation led some newspaper columnists to suggest that Buchanan had received a Nobel Prize in common sense. What the columnists didn't appreciate was the fact that Buchanan had identified the political incentives to run deficits long before the Congressional balanced budget ethic disappeared.[10]

The point of this digression is to illustrate that Congress is not a disinterested party in the debate over whether it has a duty to call a constitutional convention in response to the States' petitions. In fact, as mentioned earlier, one of the reasons for providing for the constitutional convention method was a distrust of Congressional fortitude in correcting major problems created and perpetuated by the Congress. Given this realistic (as opposed to idealistic) view of Congressional incentives, it is reasonable to suspect that the Framers of the Constitution did not intend to grant Congress great deference in its determinations as to the validity of State calls for a constitutional convention. In true public choice fashion, the Framers recognized that situations would arise in which the only way the States would be able to alter Congressional behavior would be for them to

[9] The seminal contribution to public choice theory is James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

[10] *See generally* James M. Buchanan, *Public Principles of Public Debt: A Defense and Restatement* (1958); and James M. Buchanan & Richard E. Wagner, *Democracy in Deficit* (1977). Prior to the 1940s, there was an unwritten constitutional amendment against sustained budget deficits. Keynesian economics gave Congress a theoretical justification for running budget deficits.

change the rules governing Congress — that is, amend the Constitution. It is clear that most States have decided that it is time to prod Congress into action.

The Controversy Over the Wording of the States' Petitions for A Convention to Propose a Balanced Budget Amendment

There is considerable controversy over whether the States' petitions, especially in view of their differences in wording, will be sufficient to force Congress to call a constitutional convention should two additional States petition for a balanced budget constitutional convention. The debate on Congress's duty to call a balanced budget convention has, in most instances, reflected a very benign view of Congress. Commentators on both sides typically accept the premise that Congress, in deciding whether or not to recognize the petitions, will be guided solely by respect for certain values inherent in the Constitution — justice, democracy, the federal system, republican government, and so forth. There is an implicit search by commentators for the "correct" or "right" action to be taken by Congress and it is implicitly assumed that a powerful argument in favor of the "correct" position will persuade Congress to follow such an action.

This view of Congress as a benevolent despot, searching for policies that promote the commonweal, contrasts sharply with the Congressional behavior — the running of enormous budget deficits — that created the petitions for a balanced budget amendment in the first place. Public choice economics teaches us to be skeptical of Congress during every step of the Article V convention process. In order to uphold the spirit of Article V of the Constitution, it is imperative that Congress (or the Supreme Court) decide all controversial issues in the light most favorable to the petitioners.

II. THE STATES' BALANCED BUDGET PETITIONS

Thirty-two State legislatures, purporting to act pursuant to Article V of the Constitution of the United States, have enacted resolutions or memorials petitioning Congress to call a national convention to prepare and submit to the States for ratification an amendment requiring a balanced federal budget.[11] Because the Congress has failed to provide any guidance to the State legislatures, it is not surprising that there is considerable

[11] The States that have passed resolutions or memorials requesting a constitutional convention are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Indiana, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. Appendix I contains the edited text of the States' petitions for Congress to call for a balanced budget constitutional convention. The legislatures of California, Illinois, Kentucky, and Montana have adopted resolutions requesting that Congress propose a deficit spending amendment, but not asking for a constitutional convention.

variation in the wording of the various petitions. In view of Congress's conflict of interest in the call for balanced budget constitutional convention (and, indeed its conflict in the call for any constitutional convention) and in its failure to adopt legislation governing the calling and operation of a constitutional convention, *it would be incredulous to allow Congress to relieve itself of its obligation to call a convention on the grounds that the language of the States' petitions were not in conformity with some unspecified standard.*

Nonetheless, it is still important to examine the petitions to make the threshold determination that they ask Congress to address the same general subject. This section examines the petitions passed by the States and considers some of the issues raised by the differences in wording.

The Subject Matter of the Petitions

In general, before Congress calls a constitutional convention, it must first determine whether the requisite number of valid resolutions are before it on the same general subject.[12] It is widely recognized that such a determination will necessarily "be a subjective, quasi-judicial decision to be made by individual Members of Congress."[13] In this regard, the extent of the Congress' obligation to call a constitutional convention in response to the States' petitions turns, at least in part, on the Congress's determination that the States' petitions address the same general subject matter. An examination of the petitions makes it clear that the States share the same grievence with respect to Congress's handling of the federal budget.

Most of the States' resolutions or memorials include a preamble to the actual petition to Congress to call a convention. In general, the preambles set forth the State legislatures' reasons for asking for a constitutional convention. The Alabama resolution is representative of the tone of the typical preamble:

> Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and
>
> Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and
>
> Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility.

Similar forceful language identifying the problem — the unwillingness or

[12] *See generally* Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949, 951 (1968).

[13] S. Rep. 594, 98th Cong., 2d Sess. 37 (1984).

inability of the legislative or executive branches of the federal government to balance the federal deficit — and the solution is contained in a total of twenty four petitions: Alabama, Alaska, Arizona, Arkansas, Colorado, Idaho, Kansas, Iowa, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, and Wyoming. Three other States — Florida, Louisiana, and Mississippi — identify the national debt and the annual federal budget deficit as the problems they are addressing. North Carolina mentions its concern about the federal budget deficit. Finally, five States — Delaware, Georgia, Indiana, North Dakota, and Texas — present their petitions without a preamble or any explicit identification of the problem addressed. It is clear, nonetheless, that all thirty-two balanced budget resolutions and memorials are premised on the belief that federal spending is too high in relation to revenue. Moreover, the constitutional obligation of Congress to call a convention is not affected by the existence of differences in or the lack of the preambles to the petitions.

The proposed solutions to the federal deficit problems are articulated in several different ways in the States' petitions. Nine States — Florida, Georgia, Indiana, Iowa, Louisiana, Missouri, New Hampshire, North Carolina, and Oregon — call for a convention mandating a balanced federal budget. Twenty-two States — Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Kansas, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming — seek an amendment ensuring that federal appropriations for any fiscal year do not exceed total estimated federal expenditures. Alabama and Colorado request a constitutional prohibition against deficit spending, North Dakota seeks a provision forbidding expenditures from exceeding estimated revenues, and Delaware calls for an amendment guaranteeing that the costs of the federal government shall not exceed its income during any fiscal year.

One must conclude from an examination of the text of the States' resolutions and memorials that there is a consensus among the petitioning State legislatures as to the problem that needs to be addressed at a constitutional convention. No amount of legal technicalities should allow Congress to escape from this finding.

Conditional Requests for Congress to Convene a Convention

Congress is required to call a convention upon application of two-thirds of the State legislatures. Although there are balanced- budget petitions from thirty-two of the necessary thirty-four before the Congress, there is some controversy over whether differences in the wording with respect to conditional requests by States which state, in substance, that if Congress does not submit a balanced budget amendment to the States for ratification, then Congress should call a constitutional convention of the States for purposes of proposing a balanced budget amendment.

The resolutions from several States — Mississippi, Oregon, Iowa, Missouri and Tennessee — contain specific time limitations which trigger the Congressional obligation to call a convention. These petitions represent mandatory calls for a convention should Congress fail to propose an amendment by a certain Stated date — January 1, 1976 (Mississippi), January 1, 1979 (Oregon), July 1, 1980 (Iowa), January 1, 1984 (Missouri) — or "any time prior to sixty (60) days after the legislatures of two-thirds of the several States shall have made application for such convention" (Tennessee). Congress is clearly bound by these petitions, and there is little debate on the issue.

Twenty States — Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Louisiana, Maryland, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming — have enacted resolutions which ask Congress to prepare and submit a balanced-budget amendment to the States for ratification or, in the alternative, to call a constitutional convention for the purpose of proposing a balanced- budget amendment to be submitted to the States for ratification.[14] The Alabama resolution is representative of the typical conditional request for Congress to convene a convention:

> Be it resolved by the Legislature of Alabama, both houses thereof concurring, that the Legislature of Alabama hereby petitions the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Alabama Legislature requests the Congress to prepare and submit to the several States an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations by the Congress of any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.
>
> Be it further resolved, that, alternatively the Alabama Legislature makes application and requests that the Congress of the United States call a constitutional convention, pursuant to Article V of the Constitution of the United States, for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

The legal issue that could allow Congress to ignore the "alternative" provision is that the petition suggests a preference by the States for the Congressional method of proposing amendments and that efforts are still under way in Congress for the adoption and submission of a balanced budget amendment. That is, even after thirty-four States have adopted petitions calling for a balanced-budget convention, it may be argued by certain Senators and Members of Congress opposed to a balanced budget

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[14] Four states — California, Illinois, Kentucky, and Massachusetts — have enacted resolutions which do not request a convention, but instead merely ask Congress to prepare and submit an amendment to the states for ratification.

amendment that Congress is not obligated to call the convention because a Congressional amendment may yet be forthcoming.

Such an argument does not hold water. States routinely pass resolutions and memorials requesting Congress to take some type of action. Each such request is merely intended to let Congress know a State's position on specific issues. Most of these requests do not raise any constitutional issues and are not contingent upon the action of other States. The portions of the States' petitions calling on Congress to propose a balanced budget amendment appear to be just such a request. The States are saying, in effect, "even if two-thirds of the States do not make application for a balanced budget constitutional convention, we believe that it is in the best interests of the United States for Congress to submit a balanced budget amendment to the States." On the other hand, the States continue by stating, in effect, that "if two-thirds of the States petition you (the Congress) to call a constitutional convention, then you are obligated under Article V to call such a convention if you have not previously submitted an amendment to the States."

Given the political economy and spirit of Article V, Congress should not be able to escape its Article V duty on the ground that the conditional petitions do not unequivocally request Congress to convene a convention within any specified time period. An overly technical interpretation of the wording of the petitions, especially when Congress has refused to give the States guidelines for acceptable petitions, would violate most standards of equity and propriety by allowing Congress to benefit from its own omissions. Although many of the States give Congress the option to propose its own amendment, it would be disingenious to allow Congress to walk away from the process without either proposing its own amendment or calling a constitutional convention.

Finally, the resolution passed by North Dakota is of doubtful validity because it does not explicitly or even conditionally ask Congress to call a constitutional convention. Instead, North Dakota's resolution "call[s] upon the people of the several States for a convention for such purpose as provided by Article V of the Constitution" and directs that copies of its resolutions be forwarded "to the legislatures of the several States." There are significant Constitutional problems in this resolution. Under Article V, the convention is called by the Congress and the resolution should have been forwarded to the Congress. In fact, North Dakota did not inform Congress of its resolution until four years after it passed. On the other hand, it is clear from the reference to Article V that North Dakota intended its actions to have constitutional significance and it is reasonable to assume that North Dakota's legislature would have provided a clearer, cleaner resolution with the help of a little guidance from Congress. Congress should interpret the North Dakota resolution as a valid application and include it in the count towards the necessary two-thirds. The intent of the North Dakota legislature and the spirit of Article V provide ample support for this position.

Thus, the issue of the validity of the conditional resolutions is merely another area where a little guidance from the Congress would have most likely resulted in resolutions consistent with strict standards of conformity. It is too late, in the balanced budget convention process, for Congress or the Supreme Court to demand strict consistency in the wording of the petitions. The conditional provisions do not prevent the resolutions and memorials containing them from being acceptable as Article V petitions.

Limitations on the Deliberations of the Constitutional Convention

The resolutions and memorials passed by several States attempt to limit the deliberations of the constitutional convention to the consideration of amendments which contain specific language. Some legal commentators suggest that such limitations on the deliberations of any constitutional convention should disqualify those applications from the two-thirds count because the limitations would prohibit the convention from acting as the deliberative body allegedly envisioned by Congress. Professor Arthur Bonfield, for example, has stated that "the process of *proposing* amendments [at a constitutional convention] would seem to contemplate a conscious weighing and evaluation of various solutions to the problems perceived."[11] Thus, it is argued that strict limitations on a convention's deliberations contained in a State's proposed balanced budget amendment should nullify that States' effort to prod Congress into action.

Such a view reflects an idealized approach to the Article V process — an approach in which Congress is the perfect agent of the States, where Congress can be trusted to take the correct action when confronted with "perfect" petitions from the States. However, in the current situation, there is considerable uncertainty as to what constitutes a valid petition. Because this uncertainty is in large part due to inaction on the part of the Congress, minor imperfections in the form of the petitions should be tolerated when there is a clear consensus as to the substantive problem. A consideration of the petitions' limitations on the deliberations of the constitutional convention makes it clear that the dominant intent of every State that inserted such a clause was to limit the scope of the convention. The inconsistencies are the result of uncertainty in how to limit the scope of the convention.

The resolutions from seven States — Delaware, Maryland, Mississippi, North Dakota, South Carolina, Tennessee and Wyoming — request a convention for the purpose of considering a specific balanced budget amendment, the text of which is set out in those resolutions. The Maryland Resolution is representative of the text-limited resolutions:

> Resolved, that the proposed new Article XXVII (or whatever numeral may then be appropriate) read substantially as follows:

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[11] *See* Bonfield, *supra* note 12, at 953-54. Also, *see generally* Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 957, 962 (1963).

PROPOSED ARTICLE XXVII

The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriations bills shall comply with this Article. If the President declares a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of the Members elected to each House so determine by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year.

The text-limited resolutions from Maryland, Mississippi, North Dakota, South Carolina, Tennessee, and Wyoming seek a constitutional amendment requiring that "appropriations" or "expenditures" not exceed "estimated revenues."[16] The Delaware resolution would require that the "costs of operating the Federal Government shall not exceed its income during any fiscal year...." It is clear that these States want a convention to address the issue of federal deficits. Any minor differences in how they specify the proposed solution should not exempt them from the count towards two-thirds.

Five of the text-limited resolutions — Maryland, Mississippi, South Carolina, Tennessee, and Wyoming — request a convention for considering a proposed amendment which is "substantially as," "similar to," or "of the nature as" the proposed version of that State. The language of such resolutions allows considerable flexibility in the scope of the convention's deliberations and should not be construed in a manner that limits or disqualifies the resolutions from the count.

The text-limited resolutions of Delaware and North Dakota, however, do not exhibit the same flexibility. North Dakota's resolution appears to contemplate a convention limited to a consideration of the specific text of the article proposed in its resolution. A more flexible reading of the resolution, however, allows for a constitutional convention on the balanced budget which, among other solutions, must consider the amendment proposed by North Dakota.

Delaware contains particularly strict limitations on the convention's deliberations. A strict interpretation of Delaware's limitations suggests that it desired its resolution to be a valid application to Congress *only if* the other States passed an *identical* proposed amendment. A consideration of the complete text of the relevant portion of the resolution, however, reveals that the Delaware legislature was going to great lengths to limit the subject matter of a convention in the absence of any guidance from Congress about the procedures for an Article V constitutional convention:

[16]It is clear from the prefaces to almost all the resolutions or memorials that the State legislatures wished to include so called off-budget items in the total of appropriations.

Be it yet further resolved, that since this method of proposing amendments to the Constitution has never been completed to the point of calling a convention and no interpretation of the power of the States in the exercise of this right has ever been made by any court or qualified tribunal, if there be such, and since the exercise of the power is a matter of basic sovereign rights and the interpretation thereof is primarily in the sovereign government making such exercise and, since the power to use such right in full also carries the power to use such right in part, the General Assembly of the State of Delaware interprets Article V to mean that if two-thirds of the States make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would have power only to propose the specified amendment and would be limited to such proposal and would not have power to vary the text thereof nor would it have power to oppose other amendments on the same or different propositions."[17]

Most of the debate over the Delaware resolution has focused on the language of the bold text, which appears to be an explicit request for a specific text. Notwithstanding the resolution's clear Statement at the end of the excerpt, the Statements at the beginning of the excerpt suggest that the legislature was struggling through uncharted seas, without any guidance from the Congress, to justify its desire to limit the scope of a constitutional convention. In other words, one suspects that Delaware would not have used the same language had the Congress made it clear that an Article V convention could be limited to a specific subject. This observation, when coupled with the political economy of the Article V process, suggests that Congress or the Supreme Court would be justified in reading the explicit request for a specific text as a request for Congress to call a general balanced budget convention.

Although the validity of the North Dakota and Delaware text-limiting resolutions is not clear, the other text-limiting petitions should not be subject to challenge on the ground that they unduely limit the deliberations of the constitutional convention.

III. CONCLUDING COMMENTS

There is an inherent conflict of interest in the role of Congress in the Article V convention method of amending the Constitution: the convention method is designed to redress problems that Congress has refused to address, but Congress is allowed to determine when a sufficient number of States have called for a convention. Because of this dual role, Congress must be held to the highest standard of responsibility when it evaluates the States' resolutions and memorials calling for a balanced budget constitutional convention.

Congress has failed to provide the States with any guidance as to what it considers to be a valid application for Congress to call an Article V

[17]Bold text emphasis added by author.

constitutional convention. The Congressional decision to act on the States' petitions (in the event that two more States pass them) should not be based on legalistic and formalistic differences in the wording of the States' petitions. None of the differences in the wording of the resolutions and memorials preclude them from being accepted by Congress as valid Article V petitions. It is too late in the balanced budget amendment process for Congress or the Supreme Court to demand strict consistency in the wording of the petitions. All reservations about the validity of the petitions must be resolved in favor of the petitioning States.

It is not too late, however, for Congress to take steps to minimize such constitutional confusion in the future. In order to avoid the possibility that the current balanced budget amendment process will be used to set precedent for future uses of the Article V convention method, Congress should preempt the current process by proposing a balanced budget amendment for ratification by the States. Instead of worrying about whether two-thirds of the States desire to have a balanced budget amendment convention, this would resolve the current debate by requiring ratification of three-fourths of the States before the amendment became law. Finally, Congress should clarify its position on what type of State resolution or memorial will be accepted as valid Article V petitions. Congress should do this by enacting legislation governing all aspects of an Article V convention. In the future, Congress should not be allowed to gain from the uncertainty created by its own inaction.

APPENDIX I

EDITED TEXT OF STATES' PETITIONS FOR CONGRESSIONAL CALL FOR A BALANCED BUDGET CONSTITUTIONAL CONVENTION

ALABAMA -- August 18, 1976

HOUSE JOINT RESOLUTION 227

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislature and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Be it resolved by the Legislature of Alabama, both houses thereof concurring, That the Legislature of Alabama hereby petitions the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Alabama Legislature requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Be it further resolved, That, alternatively the Alabama Legislature makes application and requests that the Congress of the United States call a constitutional convention, pursuant to Article V of the Constitution of the

United States, for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

* * *

ALASKA — 1982

LEGISLATIVE RESOLVE NO. 1

Whereas, annually the United States moves more deeply into debt as its expenditures exceed its available revenues and the public debt now exceeds hundreds of billions of dollars; and

Whereas, annually the federal budget demonstrates the unwillingness or inability of the federal government to spend in conformity with available revenues; and

Whereas, proper planning, fiscal prudence, and plain good sense require that the federal budget be in balance absent a national emergency; and

Whereas, a continuously unbalanced federal budget except in time of national emergency causes continuous and damaging inflation and consequently a severe threat to the political and economic stability of the United States; and

* * *

Be it resolved by the Alaska State Legislature that the Congress of the United States is requested to propose and submit to the states an amendment to the Constitution of the United States which would require that within four years after its ratification by the various states, in the absence of a national emergency, the total of all appropriations made by Congress for a fiscal year shall not exceed the total of all estimated federal revenues for that fiscal year; and be it

Further resolved, That alternatively, this body makes application and requests that the Congress of the United States call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for that fiscal year; and be it

Further resolved, That if Congress proposes such an amendment to the Constitution this application shall no longer be of any force and effect; and be it

Further resolved, That this application and request shall no longer be of

any force or effect if the convention is not limited to the exclusive purpose specified by this resolution.

* * *

ARIZONA — April 10, 1979

SENATE JOINT RESOLUTION 1002

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation; and

Whereas, constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

. . . Therefore, be it

Resolved by the Legislature of the State of Arizona:

1. That the Congress of the United States institute procedures to add a new article to the Constitution of the United States and that the Congress of the United States prepare and submit to the several states an amendment to the Constitution of the United States requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

2. That, alternatively, the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

3. That this application constitutes a continuing application in accord-

ance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this joint Resolution then this petition for a constitutional convention shall no longer be of any force or effect.

• • •

ARKANSAS — February 1, 1979

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit;

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

• • •

Now therefore, be it resolved by the seventy-second General Assembly of the State of Arkansas:

That this Body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the General Assembly of the State of Arkansas requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and be it further resolved:

That, alternatively, this Body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal

Constitution requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year;

• • •

COLORADO — March 31, 1978

SENATE JOINT MEMORIAL No. 1

Whereas, With each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislature and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, Convinced that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is vital to bring the fiscal discipline needed to restore financial responsibility; and

. . . now, therefore,

Be it resolved by the Senate of the Fifty-first General Assembly of the State of Colorado, the House of Representatives concurring herein:

That the Congress of the United States is hereby memorialized to call a constitutional convention pursuant to Article V of the constitution of the United States for the specific and exclusive purpose of proposing an amendment to the federal constitution prohibiting deficit spending except under conditions specified in such amendment.

Be it further resolved, That this application and request be deemed null and void, rescinded, and of no effect at the event that such convention not be limited to such specific and exclusive purpose.

• • •

DELAWARE — June 23, 1975

HOUSE CONCURRENT RESOLUTION No. 36

Be it resolved by the House of Representatives of the 128th General Assembly, the Senate concurring therein, that the General Assembly of the State of Delaware hereby, and pursuant to Article V of the Constitution of the United States, makes application to the Congress of the United States to call a convention for the proposing of the following amendment to the Constitution of the United States:

"ARTICLE ___. The costs of operating the Federal Government shall

not exceed its income during any fiscal year, except in the event of a declared war."

Be it further resolved that this application by the General Assembly of the State of Delaware constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V.

Be it yet further resolved, that since this method of proposing amendments to the Constitution has never been completed to the point of calling a convention and no interpretation of the power of the States in the exercise of this right has ever been made by any court or any qualified tribunal, if there be such, and since the exercise of the power is a matter of basic sovereign rights and the interpretation thereof is primarily in the sovereign government making such exercise and, since the power to use such right in full also carries the power to use such right in part, the General Assembly of the State of Delaware interprets Article V to mean that if two-thirds of the States make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would have power only to propose the specified amendment and would be limited to such proposal and would not have power to vary the test thereof nor would it have power to propose other amendments on the same or different propositions.

* * *

FLORIDA — July 13, 1978

SENATE MEMORIAL No. 234

Whereas, it is estimated, as of August, 1975, that the federal debt at the end of the 1975 fiscal year will be $8558.637 billion, and

Whereas, the fiscal year deficit for 1976 will be the largest in our history, between $70 and $80 billion, and

Whereas, the growing debt is a major contributor to inflation, lagging economic investment, excessive interest rates, and the resulting unemployment, and

Whereas, the economic welfare of the United States and its citizens depends on a stable dollar and a sound economy, . . .

* * *

. . . Now, therefore,

Be it resolved by the Legislature of the State of Florida: That the Legislature of the State of Florida does hereby make application to the Congress of the United States pursuant to Article V of the Constitution of the United States to call a convention for the sole purpose of proposing an amendment to the Constitution of the United States to require a balanced

federal budget and to make certain exceptions with respect thereto

* * *

GEORGIA — February 13, 1976

H.R. No. 469-1267

Be it resolved by the general assembly of Georgia:

That this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto

Be it further resolved that this application by the General Assembly of the State of Georgia constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Resolution before January 1, 1977, this petition for a Constitutional Convention shall no longer be of any force or effect.

* * *

IDAHO - January 20, 1979

HOUSE CONCURRENT RESOLUTION No. 7

Be it Resolved by the Legislature of the State of Idaho: Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Now, therefore, be it resolved by the members of the First Regular Session of the Forty-fifth Idaho Legislature, the House of Representatives and the Senate concurring, that the Legislature proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the legislature requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved, that, alternatively, the Legislature makes application and requests that the Congress of the United States call a Constitutional Convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved, that this application by this Legislature constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the Legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this resolution then this petition for a Constitutional Convention shall no longer be of any force or effect; and

Be it further resolved, that this application and request be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose; and

* * *

IOWA — June 4, 1979

SENATE JOINT RESOLUTION 1

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good

sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is one of the greatest threats which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Be it resolved by the General Assembly of the State of Iowa:

Section 1. The Iowa general assembly proposes to the Congress of the United States that procedures be instituted in the Congress to propose and submit to the several states before July 1, 1980, an amendment to the Constitution of the United States requiring that the federal budget be balanced in the absence of a national emergency.

Sec. 2. Alternatively, effective July 1, 1980, if the Congress of the United States has not proposed and submitted to the several states an amendment as provided in section one (1) of this resolution, the Iowa general assembly respectfully makes application to and petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto.

Sec. 3. Effective July 1, 1980, this application by the Iowa general assembly constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several states have made similar applications pursuant to Article V, but if the Congress proposes an amendment to the Constitution identical in subject matter to that contained in this resolution, or if before July 1, 1980, the general assembly repeals this application to call a constitutional convention, then this application and petition for a constitutional convention shall no longer be of any force or effect.

Sec. 4. This application and petition shall be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose.

* * *

INDIANA — April 4, 1979

SENATE ENROLLED JOINT RESOLUTION No. 8

Be it resolved by the General Assembly of the State of Indiana:

Section 1. The General Assembly of the State of Indiana makes application to the Congress of the United States for a convention to be called under

Article V of the Constitution of the United States for the specific and exclusive purpose of proposing an amendment to the Constitution to the effect that, in the absence of a national emergency, the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year.

* * *

KANSAS April 26, 1978

SENATE CONCURRENT RESOLUTION No. 1661

Whereas, Annually the United States moves more deeply in debt as its expenditures exceed its available revenues and the public debt now exceeds hundreds of billions of dollars; and

Whereas, Annually the federal budget demonstrates the unwillingness or inability of the federal government to spend in conformity with available revenues; and

Whereas, proper planning, fiscal prudence, and plain good sense require that the federal budget be in balance absent national emergency; and

Whereas, A continuously unbalanced federal budget except in a national emergency causes continuous and damaging inflation and consequently a severe threat to the political and economic stability of the United States; and

* * *

. . . Now, therefore,

Be it resolved by the Legislature of the State of Kansas, . . .: That the Congress of the United States is hereby requested to propose and submit to the States an amendment to the Constitution of the United States which would require that within five years after its ratification by the various states, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year; and

Be it further resolved: That, alternatively, the Legislature of the State of Kansas hereby makes application to the Congress of the United States to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the total of all appropriations made by the Congress for a fiscal year shall not exceed the total of all estimated federal revenues for such fiscal year. If Congress shall propose such an amendment to the Constitution, this application shall no longer be of any force or effect:

* * *

LOUISIANA

SENATE CONCURRENT RESOLUTION No. 73

Whereas, the United States Government has, over the past three decades, embarked on a course of continuous and ever increasing deficit spending; and

Whereas, the public debt engendered thereby now far exceeds 300 billion dollars, and current budget proposals include provisions for a further deficit of 43 billion dollars; and

Whereas, such national debt is, in and of itself, a major contributor to the very inflation to which the United States is committed to eradicating; and

Whereas, the massive national debt is inimical to the public welfare, limiting the amount of credit available to private citizens, thus curtailing opportunities for needed economic growth; and

* * *

Whereas, the ability of the Federal Government to avoid the difficult budgetary choices posed by zero debt financing has resulted in a lack of objective budgetary analysis, and thus the funding of unnecessary or inefficient programs.

Therefore, be it resolved by the Senate of the Legislature of the State of Louisiana, the House of Representatives thereof concurring, that pursuant to Article V of the Constitution of the United States, the Legislature of the State of Louisiana does hereby apply to the Congress of the United States for a convention to consider the following amendment to the United States Constitution:

Section 1. Except as provided in Section 3 [a national emergency exception], the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues for the United States for such fiscal year.

Section 2. There shall be no increase in the national debt, and the existing debt, as it exists on the date on which this amendment is ratified, shall be repaid during the one hundredyear period following the date of such ratification. ...

* * *

Be it further resolved that the purview of any convention called by Congress pursuant to this resolution be strictly limited to the consideration of an amendment of the nature as herein proposed.

Be it further resolved that this application by the Legislature of the State of Louisiana constitutes a continuing resolution pursuant to Article V of the United States Constitution, until such time as two-thirds of the Legislatures

of the several states have made similar application, and the convention herein applied for is convened.

MARYLAND — April 3, 1975

RESOLUTION No. 77

Whereas, with each passing year this Nation becomes more deeply in debt as its e[illegible]enditures grossly and repeatedly exceed available revenues so that the public debt now exceeds hundreds of billions of dollars.

Attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of the Congress.

The annual Federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues.

The unified budget of $304.4 billion dollars for the current fiscal year does not reflect actual spending because of the exclusions of special outlays which are not included in the budget nor subject to the legal public debt limit.

* * *

Knowledgeable planning and fiscal prudence require that the budget reflect all Federal spending and that the budget be in balance.

Believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to reverse this trend.

* * *

Resolved by the General Assembly of Maryland, That this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that the General Assembly of Maryland requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues, excluding any revenues derived from borrowing, for that fiscal year: and, be it further

Resolved, That this body further and alternatively requests that the Congress of the United States call a constitutional convention for the special and exclusive purpose of proposing such an amendment to the Federal Constitution, to be a new Article XXVII: and be it further

Resolved, That the proposed new Article XXVII (or whatever numeral may then be appropriate) read substantially as follows:

PROPOSED ARTICLE XXVII

"The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of the Members elected to each House of the Congress so determine by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year."

* * *

MISSISSIPPI - February 25, 1975

RESOLUTION

Whereas, an ever-increasing public debt is inimical to the general welfare of the people of the United States; and

Whereas, the national debt is already dangerously high and any further increases will be harmful and costly to the people of the United States; and

Whereas, a continuous program of deficit financing by the Federal Government is one of the greatest factors supporting the inflationary conditions presently existing in this country and therefore has been the chief factor in reducing the value of the American currency; and

Whereas, payment of the increased interest required by the ever increasing debt would impose an undue hardship on those with fixed incomes and those in lower income brackets; and

Whereas, it is not in the best interest of either this or future generations to continue such a practice of deficit spending particularly since this would possibly deplete our supply of national resources for future generations; and

Whereas, by constantly increasing deficit financing the Federal Government has been allowed to allocate considerable funds to wasteful and in many instances nonbeneficial public programs; and

Whereas, by limiting the Federal Government to spend only the revenues that are estimated will be collected in a given fiscal year, except for certain specified emergencies, this could possibly result in greater selectivity of

Federal Government programs for the benefit of the public and which would depend upon the willingness of the public to pay additional taxes to finance such programs, and

* * *

Now Therefore, Be it Resolved by the House of Representatives of the State of Mississippi, the Senate Concurring Therein, That we do hereby pursuant to Article V of the Constitution of the United States, make application to the Congress of the United States to call a convention of the several states for the proposing of the following amendment to the Constitution of the United States:

Article-

Section 1. Except as provided in Section 3, the Congress shall make no appropriation for any fiscal year if the resulting total of appropriations for such fiscal year would exceed the total revenues of the United States for such fiscal year.

Section 2. There shall be no increase in the national debt and such debt, as it exists on the date on which this article is ratified, shall be repaid during the one-hundred-year period beginning with the first fiscal year which begins after the date on which this article is ratified. The rate of repayment shall be such that one-tenth (1/10) of such debt shall be repaid during each ten-year interval of such one-hundred-year period.

Section 3. In time of war or national emergency, as declared by the Congress, the application of Section 1 or Section 2 of this article, or both such sections, may be suspended by a concurrent resolution which has passed the Senate and the House of Representatives by an affirmative vote of three-fourths (3/4) of the authorized membership of each such house. Such suspension shall not be effective past the two-year term of the Congress which passes such resolution, and if war or an emergency continues to exist such suspension must be reenacted in the same manner as provided herein.

Section 4. This article shall apply only with respect to fiscal years which begin more than six (6) months after the date on which this article is ratified."

Be it Further Resolved, That this application by the Legislature of the State of Mississippi constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds (2/3) of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical with that contained in this resolution before January 1, 1976, this application for a convention of the several states shall no longer be of any force or effect.

* * *

MISSOURI - 1983

SENATE CONCURRENT RESOLUTION No. 3

For the purpose of requesting appropriate action by the Congress, either acting by consent of two-thirds of both houses or upon the application of the legislatures of two-thirds of the several states, to propose an amendment to the Federal Constitution to require, with certain exceptions, that the federal budget be balanced.

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds one trillion dollars; and

Whereas, the annual federal budget continually demonstrates in unwillingness or inability of both the legislative and executive branches of the federal government to limit the growth of federal spending and taxes and balance the budget; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget; and

Whereas, knowledgeable planning, fiscal prudence and plain good sense require that the budget reflect all federal spending and be in balance on a regular basis; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

Whereas, the federal deficit in Fiscal Year 1982 was $110.7 billion, nearly double the deficit in Fiscal Year 1981; and

Whereas, the Congressional Budget Office projects a deficit for Fiscal Years 1983 and 1984 of $155 billion and $200 billion, respectively; and

Whereas, the United States Senate approved a proposed balance budget amendment in response to the efforts of the thirty-one state legislatures which have requested a limited convention on this subject, and its conviction about the need for a constitutional restraint upon Congress' fiscal authority; and

Whereas, the Reagan Administration has indicated that the budget will not be balanced by 1984; and

* * *

Now, therefore, be it resolved by the Senate of the Eighty- second General Assembly of the State of Missouri, the House of Representatives concurring therein, that the Missouri General Assembly proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the Missouri General Assembly requests the Congress to prepare and submit to the several states before January 1, 1984, an amendment to the Constitution

of the United States, requiring a balanced federal budget and to make certain exceptions with respect thereto; and

Be it further resolved that if, by January 1, 1984, the Congress has not proposed and submitted to the several states such an amendment, this body respectfully makes application to the Congress of the United States for a convention to be called under Article V of the Constitution of the United States for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto; and

Be it further resolved that effective January 1, 1984, this application constitutes a continuing application in accordance with Article V of the Constitution of the United States until the legislatures of at least two-thirds of the several States have made similar applications pursuant to Article V, but if the Congress proposes an amendment to the Constitution identical in subject matter to that contained in this resolution, then this application and petition for a constitutional convention shall no longer be of any force or effect; and

Be it further resolved that this application shall be deemed null and void, rescinded and of no effect in the event that such convention not be limited to such specific and exclusive purpose; and

• • •

NEBRASKA — February 23, 1976

LEGISLATIVE RESOLUTION 106

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenue, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenue; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy is the greatest threat which faces our nation, we firmly believe that constitutional restraints is necessary to bring the fiscal discipline needed to restore financial responsibility; and

• • •

Now, therefore, be it resolved by the members of the eighty-fourth Legislature of Nebraska, second session:

1. That this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the State of Nebraska requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

2. That, alternatively, this Legislature makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year. . .

• • •

NEVADA — April 1979

SENATE JOINT RESOLUTION No. 8

Whereas, Proper economic planning, fiscal prudence and common sense require that the federal budget include all federal spending and be in balance; and

Whereas, The annual federal budgets continually reflect the unwillingness or inability of the legislative and executive branches of the Federal Government to balance the budget; and

Whereas, the national debt now amounts to hundreds of billions of dollars and is increasing enormously each year as federal expenditures exceed federal revenues; and

Whereas, The inflation and other results of fiscal irresponsibility of the Federal Government demonstrate the need for a constitutional restraint upon excessive spending; and

• • •

Resolved by the Senate and Assembly of the State of Nevada, jointly, That this legislature requests the Congress of the United States to call a convention limited to proposing an amendment to the Constitution of the United States which would provide that, in the absence of a national emergency, the total of all federal appropriations for any fiscal year must not exceed the total of the estimated federal revenue for that year; and be it further

Resolved, That this legislature conditions this request upon the Congress of the United States' establishing appropriate restrictions limiting the subject matter of a convention called pursuant to this resolution to the subject matter of this resolution, and if the Congress fails to establish such restrictions, this resolution has no effect and must be considered a nullity;

• • •

NEW HAMPSHIRE — May 1979

CONCURRENT RESOLUTION

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, the State of New Hampshire has long been known for its sensible, prudent approach to government spending; and

Whereas, the New Hampshire example of fiscal responsibility is a model for all to follow; and

Whereas, we believe that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

• • •

Resolved by the legislature of the State of New Hampshire, that this body proposes to the Congress of the United States that procedures be instituted in the Congress to propose and submit to the several states an amendment to the Constitution of the United States requiring that the federal budget be balanced in the absence of a national emergency; and be it further

Resolved, that, alternatively, this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto; and be it further

Resolved, that this application by this body constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar application pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this House Concurrent, then this petition for a Constitutional Convention shall no longer be of any force or effect; and be it further

Resolved, that this application and request be deemed null and void, rescinded, and of no effect in the event that such convention not be limited to such specific and exclusive purpose;

• • •

NEW MEXICO — 1976

SENATE JOINT RESOLUTION 1

Be it resolved by the legislature of the State of New Mexico:

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

• • •

Now, therefore, be it resolved by the legislature of the State of New Mexico that this body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the legislature of the State of New Mexico requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved that, alternatively, this body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; . . .

• • •

NORTH CAROLINA - January 29, 1979

SENATE JOINT RESOLUTION No. 1

Whereas, believing that inflation is the most serious problem facing the people of the United States, and the primary cause of inflation is unchecked federal spending; and

Whereas, the State of North Carolina is required by its Constitution to have a balanced budget, and has long operated on a sound fiscal basis which the federal government would be well-served to emulate; and

• • •

Whereas, by Resolution 97 of the General Assembly, ratified July 1, 1977, the Congress was requested to submit an amendment to the States to require a balanced federal budget, but the Congress has failed to act; Now, therefore, be it resolved by the Senate, the House of Representatives concurring:

Section 1. That the Congress of the United States is requested to propose and submit to the States an amendment to the Constitution of the United States which would require that, in the absence of a national emergency, the federal budget be balanced each fiscal year within four years after the amendment is ratified by the various states.

Section 2. That, alternatively, this body respectfully petitions the Congress of the United States to call a convention for the exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget in the absence of a national emergency.

Section 3. That this application constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, or until this application is rescinded by the General Assembly of North Carolina; but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this joint resolution before January 1, 1980, this petition for a Constitutional Convention shall no longer be of any effect.

Section 4. That this application and request be deemed rescinded in the

event that the convention is not limited to the subject matter of this application.

Section 5. That since this application under Article V of the Constitution of the United States is the exercise of a fundamental power of the sovereign states under the Constitution of the United States, it is requested that receipt of this application by the Senate and the House of Representatives of the United States Congress be officially noted and duly entered upon their respective records, and that the full context of this resolution be published in the official publication of both the Senate and the House of Representatives of the Congress.

• • •

NORTH DAKOTA — March 11, 1975

SENATE CONCURRENT RESOLUTION No. 408

Be it resolved by the Senate of the State of North Dakota, the House of Representatives concurring therein:

That we respectively propose an amendment to the Constitution of the United States and call upon the people of the several states for a convention for such purpose as provided by Article V of the Constitution, the proposed Article providing as follows:

ARTICLE —

Section 1. The President shall submit, at the beginning of each new Congress, an annual budget for the ensuing fiscal year setting forth in detail the proposed expenditures and the total estimated revenue of the Federal Government from sources other than borrowing. The President may set new revenue estimates from time to time. Expenditures for each two-year period shall not exceed the estimated revenue except in time of war or a national emergency declared by Congress. The provisions of this Article shall not apply to the refinancing of the national debt;

• • •

OKLAHOMA — April 15, 1976

HOUSE JOINT RESOLUTION No. 1049

Whereas, with each passing year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars;

Whereas, the annual federal budget continually demonstrates unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues.

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor

subject to the legal public debt limit.

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance.

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility.

• • •

Now, therefore, be it resolved by the House of Representatives and the Senate of the 2nd Session of the 35th Oklahoma legislature:

Section 1. That this Body proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that the Legislature of the State of Oklahoma makes application and requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all federal appropriations be made by the Congress of any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Section 2. That, alternatively, this Body requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

• • •

OREGON — July 11, 1977

SENATE JOINT MEMORIAL 2

• • •

Whereas the level of federal expenditures demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

• • •

Whereas the State of Oregon by its Constitution and its laws in adopting a budget must show a balanced relation between the total proposed spending and the total anticipated revenues or provide for paying the deficiency; and

Whereas it is just and proper that the United States of America in its obligation to provide leadership for all of the states of the union should pursue the same policy; and

Whereas a balanced budget would lessen the economic burden on its citizens; and

Whereas a balanced budget would lessen the need for increased state and local taxes; now, therefore,

Be it Resolved by the Legislative Assembly of the State of Oregon:

(1) That this body respectfully petitions the Congress of the United States to call a convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget and to make certain exceptions with respect thereto

(2) That this application by this body constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made similar applications pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Joint Memorial before January 1, 1979, this petition for a constitutional convention shall no longer be of any force or effect.

• • •

PENNSYLVANIA — March 31, 1976

RESOLUTION No. 236

Whereas, Requesting appropriate action by the Congress, either acting by consent of two-thirds of both Houses or, upon the application of the Legislatures of two-thirds of the several states, calling a Constitutional Convention to propose an amendment to the Federal Constitution to require, with certain exceptions, that the total of all Federal appropriations may not exceed the total of all estimated Federal revenues in any fiscal year.

Whereas, With each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, The annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

Whereas, Unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, Knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, Believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Resolved, (the Senate concurring), That the General Assembly of the Commonwealth of Pennsylvania proposes to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the General Assembly of the Commonwealth of Pennsylvania requests the Congress to prepare and submit to the several states an appendix to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and be it further:

Resolved, That, alternatively, the General Assembly of the Commonwealth of Pennsylvania makes application and requests that the Congress of the United States call a Constitutional Convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all expended Federal revenue for that fiscal year; . . .

* * *

SOUTH CAROLINA 1978

CONCURRENT RESOLUTION

Whereas, with each passing year this Nation becomes more deeply in debt as congressional expenditures grossly and repeatedly exceed available revenues so that the public debt now exceeds a half-trillion dollars; and

Whereas, attempts to limit spending by means of the new congressional budget committee procedures have proved fruitless; and

Whereas, the annual Federal budget repeatedly demonstrates an unwillingness or inability of both the legislative and executive branches of the Federal government to curtail spending to conform to available revenues; and

Whereas, the proposed budget of five hundred billion dollars for fiscal year 1978-79 does not reflect total spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the resulting inflation and decline in the Nation's trading position is a

growing and corrosive threat to our economy, to the well-being of our people, and to our representative democracy, that constitutional restraint is necessary to bring the fiscal discipline needed to reverse this trend. Now, therefore,

Be it resolved by the Senate, the House of Representatives concurring:

That Congress is requested, pursuant to Article V of the United States Constitution, to call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution.

Be it further resolved that the proposed new amendment read substantially as follows:

Proposed Article XXVII

The total of all federal appropriations made by the Congress for any fiscal year shall not exceed the total of the estimated federal revenues for that fiscal year, excluding any revenues derived from borrowing, and this prohibition extends to all federal appropriations and all estimated federal revenues, excluding any revenues derived from borrowing. The President in submitting budgetary requests and the Congress is enacting appropriation bills shall comply with this article.

The provisions of this article shall be suspended for one year upon the proclamation by the President of an unlimited national emergency. The suspension may be extended, but not for more than one year at any one time, if two-thirds of the membership of both Houses of Congress so determine by Joint Resolution."

* * *

SOUTH DAKOTA — January 31, 1979

SENATE JOINT RESOLUTION 1

Whereas, with each passing year this nation becomes more deeply in debt as its annual expenditures frequently exceed annual available revenues, so that the public debt also steadily increases to a size of inordinate proportions; and

Whereas, unified budgets do not necessarily reflect actual spending because of the exclusion of special spending outlays which are not included in the budget nor are subject to the statutory legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance; and

Whereas, we believe that fiscal irresponsibility at the federal level, with the inflation which results primarily from this policy, is the greatest threat which faces our nation, and that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Be it resolved by the Senate of the State of South Dakota, the House of Representatives concurring therein:

That the Legislature does hereby make application to the Congress of the United States that procedures be instituted on the Congress to add a new article to the Constitution of the United States, and that the Legislature of the State of South Dakota hereby requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency, as defined by law, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved, that alternatively, this Legislature hereby make application under said Article V of the Constitution of the United States and with the same force and effect as if this Resolution consisted of this portion alone and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Constitution of the United States requiring in the absence of a national emergency, as defined by law, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and

Be it further resolved, that this application and request be deemed null and void, rescinded, and of effect in the event that such convention not be limited to such specific and exclusive purpose; and

Be it further resolved, that this application by this legislature constitutes a continuing application in accordance with Article V of the Constitution of the United States until at least two-thirds of the legislatures of the several states have made applications for similar relief pursuant to Article V, but if Congress proposes an amendment to the Constitution identical in subject matter to that contained in this Joint Resolution then this petition for a Constitutional Convention shall no longer be of any force or effect; . . .

* * *

TENNESSEE — March 30, 1977

HOUSE JOINT RESOLUTION No. 22

Whereas, each year this nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the legal public debt has exceeded $437 billion dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous objections that the responsibility for appropriations is the constitutional duty of Congress; and

Whereas, nonetheless, the annual budget repeatedly demonstrates an

unwillingness or inability to curtail spending to conform to available revenues; and

Whereas, the federal budget never reflects actual spending because of the exclusion of special outlays which are neither included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning requires that the budget reflect all federal spending and that the budget be in balance; and Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that a constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; how, therefore,

Be it resolved by the House of Representatives of the Ninetieth General Assembly of the State of Tennessee, the Senate concurring, That pursuant to Article V of the Constitution of the United States application is hereby made to the United States Congress to call a convention for the purpose of considering and proposing an amendment to the Constitution of the United States to require that, in the absence of a national emergency, the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year, such amendment to read substantially as follows:

The total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated federal revenues for that fiscal year; and this prohibition extends to all federal appropriations and all estimated federal revenues without exception. The President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all federal appropriations not exceed the total estimated federal revenues for a fiscal year, and two-thirds (2/3) of all members elected to each house of the Congress so determine by joint resolution, the total of all federal appropriations may exceed the total estimated federal revenues for that fiscal year.

Be it further resolved, That this application shall constitute a continuing application for such convention under Article V of the Constitution of the United States until the legislatures of at least two-thirds (2/3) of the several states shall have made like applications and such convention shall have been called and held in conformity therewith, unless the Congress itself proposes such amendment within the time and the manner herein provided.

Be it further resolved, That proposal of such amendment by the Congress and its submission for ratification to the legislatures of the several states substantially in the form of the article herein above specifically set forth, at any time prior to sixty (60) days after the legislatures of two-thirds (2/3) of the several states shall have made application for such convention, shall render such convention unnecessary and the same not be held. Otherwise, such convention shall be called and held in conformity with such applications.

Be it further resolved, That as this application under Article V of the Constitution of the United States is the exercise of a fundamental power of the sovereign states under the Constitution of the United States, it is requested that receipt of this application by the Senate and the House of Representatives of the Congress of the United States be officially noted and duly entered upon their respective records, and that the full context of this resolution be published in the official publication of both the Senate and the House of Representatives of the Congress.

• • •

TEXAS -- June 16, 1977

H.C.R. No. 31

Resolved by the House of Representatives of the State of Texas, the Senate concurring, That the 65th Legislature propose to the Congress of the United States that procedures be instituted in the Congress to add a new article to the Constitution of the United States, and that the State of Texas request the Congress to prepare and submit to the several states an amendment to the Constitution of the United States requiring the absence of a national emergency, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; and, be it further

Resolved, That, alternatively, this body request that the Congress of of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the federal constitution requiring in the absence of a national emergency that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year; . . .

• • •

UTAH — April, 1979

RESOLUTION

Be it resolved by the Legislature of the State of Utah:

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars;

Whereas, the annual federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the federal government to curtail spending to conform to available revenues;

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all federal spending and be in balance;

Whereas, numerous states have constitutional requirements that appropriations not exceed anticipated revenues for the forthcoming year;

Whereas, believing that fiscal irresponsibility at the federal level, and the inflation which results therefrom, the greatest threat now facing our nation, this Legislature is of the firm conviction that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility;

• • •

Be it resolved by the 43rd Legislature of the State of Utah, That the Congress of the United States is requested to institute procedures to add a new article to the Constitution of the United States and to prepare and submit to the several states an amendment to the Constitution of the United States requiring, in the absence of a national emergency, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated federal revenues for that fiscal year.

Be it further resolved, That, alternatively, this Legislature applies to the Congress of the United States to call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the federal constitution which would require, in the absence of a national emergency, that the total of all federal appropriations made by the Congress for any fiscal year may not exceed that total of all estimated federal revenues for that fiscal year; . . .

• • •

Be it further resolved, That this application for a Convention Call for proposing amendments be limited to the subject matter of this Resolution and that the State of Utah be counted as a part of the necessary two-thirds states for such a call only if the convention is limited to the subject matter of this Resolution.

• • •

VIRGINIA - March 10, 1976

SENATE JOINT RESOLUTION No. 36

Whereas, with each passing year this Nation becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues, so that the public debt now exceeds hundreds of billions of dollars; and

Whereas, the annual Federal budget continually demonstrates an unwillingness or inability of both the legislative and executive branches of the

Federal government to curtail spending to conform to available revenues; and

Whereas, unified budgets do not reflect actual spending because of the exclusion of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, knowledgeable planning, fiscal prudence, and plain good sense require that the budget reflect all Federal spending and be in balance; and

Whereas, believing that fiscal irresponsibility at the federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal discipline needed to restore financial responsibility; and

* * *

Whereas, we believe such action vital; now, therefore, be it

Resolved by the Senate of Virginia, the House of Delegates concurring, That the General Assembly of Virginia proposes to the Congress of the United States that procedures be instituted in the Congress to add a new Article to the Constitution of the United States, and that this Body hereby requests the Congress to prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and, be it

Resolved further, That, alternatively, this Body makes application and requests that the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing an amendment to the Federal Constitution requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year; and be it. . . .

* * *

WYOMING - March 17, 1977

ENROLLED JOINT RESOLUTION No. 1

Whereas, with each passing year this title becomes more deeply in debt as its expenditures grossly and repeatedly exceed available revenues so that the public debt now amounts to hundreds of billions of dollars; and

Whereas, attempts to limit spending, including impoundment of funds by the President of the United States, have resulted in strenuous assertions that the responsibility for appropriations is the constitutional duty of the Congress; and

Whereas, the annual Federal budget repeatedly demonstrates the unwillingness or inability of both the legislative and executive branches of the Federal Government to curtail spending to conform to available revenues; and

Whereas, the unified budget does not reflect actual spending because of the exclusions of special outlays which are not included in the budget nor subject to the legal public debt limit; and

Whereas, the U.S. News and World Report reported on February 25, 1974, that of these nonbudgetary outlays in the amount of $15,600,000,000.00, the sum of $12,900,000,000.00 represents funding of essentially private agencies which provide special services to the Federal Government and

Whereas, knowledgeable planning and fiscal prudence require that the budget reflect all Federal spending and that the budget be in balance; and

Whereas, believing that fiscal irresponsibility at the Federal level, with the inflation which results from this policy, is the greatest threat which faces our Nation, we firmly believe that constitutional restraint is necessary to bring the fiscal disciplines needed to reverse this trend; and

* * *

Now, therefore be it resolved by the Legislature of the State of Wyoming, a majority of all members of the two houses, voting separately, concurring herein:

Section 1. That procedures be instituted in the Congress to add a new Article XXVII to the Constitution of the United States, and that Congress prepare and submit to the several states an amendment to the Constitution of the United States, requiring in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues, excluding any revenues derived from borrowing, for that fiscal year; or

Section 2. That the Congress of the United States call a constitutional convention for the specific and exclusive purpose of proposing such an amendment to the Federal Constitution, to be a new Article XXVII.

Section 3. That the legislatures of each of the several states comprising the United States apply to the Congress requiring it to call a constitutional convention for proposing such an amendment to the Federal Constitution, to be a new Article XXVII.

Section 4. That the proposed new Article XXVII (or whatever numeral may then be appropriate) reads substantially as follows:

Proposed Article XXVII

"The total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of the estimated Federal revenues for that fiscal year, excluding any revenues derived from borrowing; and this

prohibition extends to all Federal appropriations and all estimated Federal revenues, excluding any revenues derived from borrowing, the President in submitting budgetary requests and the Congress in enacting appropriation bills shall comply with this Article. If the President proclaims a national emergency, suspending the requirement that the total of all Federal appropriations not exceed the total estimated Federal revenues for a fiscal year, excluding any revenues derived from borrowing, and two-thirds of all Members elected to each House of the Congress concur by Joint Resolution, the total of all Federal appropriations may exceed the total estimated Federal revenues for that fiscal year."

* * *

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Edited Proceedings of the 1981 National Conference on Workers' Compensation and Workplace Liability. (currently unavailable)
Edited Proceedings of the 1982 National Conference on Product Liability Tort Law Reform. (currently unavailable)

Edited Proceedings of the 1983 National Conference on Health Related Claims: Can the Tort and Compensation Systems Cope? (1984 - $35.00 Law Libraries; $50.00 all else)

Judicial/Legislative Watch Report - an update report service of NLCPI on legislation and activities affecting the judiciary and the judicial system, (published while Congress is in session, $25.00 per year)

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LIMITING CONGRESSSIONAL TERMS:

An Historical Perspective

by

Michael H. Klein

Americans to Limit Congressional Terms
Washington, DC

September 25, 1989

AMERICANS TO LIMIT CONGRESSIONAL TERMS

LIMITING CONGRESSIONAL TERMS:

An Historical Perspective

INTRODUCTION

In the two hundred years since the Congress of the United States was established in its present configuration, there has been much debate about the effectiveness and accountability of this institution. Specifically, the discussion attempts to answer one basic question: Is Congress structured in such a manner to achieve its founders' objective -- to make the nation's laws in accordance with the wishes of its people?

Among the structural considerations that have periodically been examined in an effort to make Congress act with greater accountability is the duration of individual tenure in Congress. While House members stand for election every two years and Senate members every six years, the re-election rate of members of both chambers has steadily risen in recent years.

In view of recent survey data that indicates that more Americans are dissatisfied with Congress than are satisfied, a number of reform proposals have surfaced to resolve the real or

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perceived obstacles to Congressional accountability.[1]

One proposal that is structural in nature is a constitutional amendment to limit Congressional terms. This proposal revives a long standing debate as to the advisability of turnover in the legislative branch, one that is older than the Constitution itself.

HISTORICAL CONTEXT

The promotion of turnover in the legislative branch is an idea that in fact predates the present incarnation of Congress. In 1777, the Articles of Confederation were amended to mandate that "no person shall be capable of being a delegate (to the Continental Congress) for more than three years in any term of six years."[2] The primary idea behind this provision, according to historians of the era, was that the legislative branch should reflect the makeup and outlook of the citizenry that it purports to represent.

The initial attempt at term limitation, however, abruptly was terminated in 1784, when an attempt to enforce the provision

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1. According to a June, 1989 poll taken by the Wirthlin Group, a prominent national public opinion research firm, 48 per cent of Americans are dissatisfied with the performance of Congress, while only 45 per cent approve.

2. Edmund C. Burnett, The Continental Congress, (Macmillan, 1941), p. 250.

led to a near-rebellion on the floor of the Continental Congress.[3] After a committee of delegates was established to rule on the eligibility of delegates, its rulings were met with pitched resistance from those who were faced with expulsion from the proceedings. Said James Monroe about the level of discourse on the subject: "I never saw more indecent conduct in any assembly before."[4]

In addition to the distraction the term limitation had caused to the deliberations of the Continental Congress, it was also determined that the removal of those delegates who had overstayed their statutory welcome would cause the Congress to suspend its business entirely, as a quorum could not be retained.[5]

With regard to the Constitution, no term limitation provision was proposed at the outset, primarily due to the problems of implementing such a provision under the Articles of

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[3]. Ibid. p.605. On March 1, 1784, it was determined that the first such three year period had indeed passed, and a committee was assembled to determine the eligibility of delegates to the Congress. The first delegate to be ruled ineligible, Samuel Osgood of Massachusetts, angrily bade "farewell all connection with public life." The committee then declared both Delaware delegates retroactively ineligible, and the Rhode Island delegation was slated for dismissal.

[4]. Ibid.

[5]. Ibid.

Confederation. However, the idea of encouraging congressional turnover was one that enjoyed widespread support in the Constitutional Convention.

In attacking a proposal by James Madison for triennial elections, Massachusetts Delegate Elbridge Gerry called such a lengthy term "limited monarchy".[6] As supporters of annual and triennial elections to the House clashed in the Convention, a compromise proposal to mandate biennial elections to the House of Representatives passed unanimously.[7]

While there was much contention over the specific proposals to ensure turnover in the legislative branch, the general goal of using rotation to ensure accountability was widely supported at this point in time. Rhode Island's Roger Sherman typified the prevailing sentiment by remarking that "Representatives ought to return home and mix with the people. By remaining at the seat of government, they would acquire the habits of the place, which might differ from those of their constituents."[8]

In essence, Sherman and others believed wholeheartedly in the notion of the "citizen legislator", one who would serve his

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6. Charles O. Jones, Every Second Year, (Brookings Institute, 1968), p.4.

7. Ibid. p.6.

8. Ibid. p.4.

constituents out of a sense of civic duty, rather than vocational or personal ambition.

In the nineteenth century, Congressional term limitation, at least from a structural or statutory standpoint, was never much of an issue. Aside from the obvious hardships of transportation and climatic extremities that tended to encourage turnover, there was also a tradition in many districts of voluntary term limitations.[9] Abraham Lincoln, for instance, was limited to a single term by virtue of the tradition in his Illinois district.[10]

There were also internal reasons within the House during this period mitigating against extended tenure. Specifically, the House leadership structure was not driven by seniority, instead, party control had a tendency to shift frequently and those Representatives who wished to pursue politics as a career sought seats in the Senate or in their respective Governors' mansions. Of the seven Speakers of the House elected between 1870 and 1894, for instance, one was elected in his third term of service, two in their fourth term, two in their fifth, one in his sixth, and one in his seventh term.[11] Additionally, three of those Speakers

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[9]. Nelson W. Polsby, The Congressional Career, (Random House, 1971), p.23.

[10]. Ibid.

[11] Ibid.