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left the House to serve in the Senate. one died, and one left to join a Wall Street law firm.

In contrast to Congressional term limitation, Presidential term limitation was an oft-discussed issue since the Constitutional Convention. Every President to serve in the 1800's, with the exception of Abraham Lincoln, publicly supported a two-term, eight-year limit on Presidential service.¹² Even Lincoln, who did not take an explicit stand of the issue, commented: "If our American society and United States Government are overthrown, it will come from the voracious desire for office, this wriggle to live without toil, work, and labor--from which I am not free myself."¹³

In 1951, a limitation on Presidential service was finally ratified as the Twenty-second Amendment to the U.S. Constitution. The 22nd Amendment was introduced in 1947 by the then-majority Republicans in the House in response to Democrat Franklin D. Roosevelt's election to four consecutive Presidential terms. Despite its origin as a partisan initiative, it was ratified by the states in 1951 with widespread support. Said the Washington Post in an editorial describing the bi-partisan nature of ratification:

¹². Presidential and Congressional Term Limitation: The Issue That Stays Alive, (Foundation for the Study of Presidential and Congressional Terms, 1981) pp. 10-11.

¹³. Ibid

The only basic reason for writing this additional restriction into the constitution is the fear that, in these days of big government and perpetual emergency, some future president with dictatorial tendencies might perpetuate himself in office indefinitely. Perhaps that chance is remote, but power-grasping officials are common enough in both history and current world experience to warrant this safeguard.¹⁴

Despite the passage of the 22nd Amendment, the issue of Presidential term succession was never fully settled, at least in the eyes of some scholars. In the 1970's the issue resurfaced as proposals emerged to limit the President to a single, six-year term of service, an idea that was supported by then-President Jimmy Carter.¹⁵

At the same time, in the post-Watergate reform era, the idea of Congressional term limitation resurfaced once again, most notably in several academic discussion forums in 1979 and 1980.¹⁶ While Senator Dennis DeConcini (D-Arizona) and Senator John Danforth (R-Missouri) introduced a bill during this period to limit members of Congress to twelve years of individual service, the lack of organized external pressure and a basic resistance

14. "22nd Amendment", Washington Post, February, 29, 1951, p.8.

15. Limiting Presidential and Congressional Terms, (American Enterprise Institute, 1979), pp.1-5.

16. How Long Should They Serve?: Limiting Terms for the President and Congress, (American Enterprise Institute, 1980) 25 pages.

among sitting members to restrict their own incumbencies prevented this legislation from becoming enacted.¹⁷

In the mid to late 1980's, in the wake of an unprecedented 99 percent re-election rate for incumbent members of the House of Representatives, and following a number of ethics scandals in the House leadership, several reform minded grass-roots and educational groups with an interest in limiting Congressional terms were established.

CONCLUSION

The low estimation in which the American public holds the Congress at this point indicates that there may be the needed impetus to write into the Constitution the expressed wish of its framers for a "citizen legislature". According to a poll taken by the Gallup Organization in 1989, 57 per cent of those surveyed explicitly support a constitutional amendment to limit Congressional terms. With the emergence of a broad-based, bipartisan consensus behind term limitation, a distinct possibility exists that congressional term limitation will reemerge as a salient political issue.

¹⁷. Ibid.

March 8, 1988

AMENDING THE CONSTITUTION BY THE CONVENTION METHOD

INTRODUCTION

What has made the United States Constitution an enviable living document is Article V, by which the Constitution provides for its own revision. Under this article, the Constitution has been amended 26 times. Whether there will be a 27th Amendment, to require a federal balanced budget, is something that a number of state legislatures, including those of New Hampshire, Kentucky, and Wisconsin, now are addressing.

Article V of the Constitution provides two methods for proposing amendments: 1) by a two-thirds vote of Congress, and 2) by a convention called by two-thirds of the states.¹ After such amendments are proposed, they must be ratified by three-fourths of the states before they are added to the Constitution.

Two to Go. The first method for passing amendments has been used all 26 times during the past two centuries. No amendments have been proposed through the second method. This may soon change; 32 states have enacted resolutions calling for Congress to convene a constitutional convention to propose the amendment requiring a balanced federal budget. Kentucky, Wisconsin, and some ten other states are considering such resolutions, while several states, including New Hampshire, are reconsidering their previously enacted resolutions. If two more resolutions pass, the nation could see its first constitutional convention under the terms of the 1787 Constitution.

Because no convention under Article V has ever been held, the prospect of a constitutional convention is prompting understandable but unfounded fears. Critics have

¹ Article V provides: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress..."

argued that the convention method of amendment is an untried and dangerous process and that a convention could "run away" beyond its mandate and rewrite the entire Constitution, perhaps even repealing the Bill of Rights.

Safer than Congress. These worries, however, are based on a misperception of the nature of an Article V convention and of the safeguards built into the amendment process. A wide variety of authorities, including a special study committee of the American Bar Association, point out that a convention legally can be limited to a particular subject. These limitations can be enforced by Congress or the courts. A convention also would be constrained by a range of political factors, including the election of its delegates.

Most important, a convention called under Article V could only propose, not enact, amendments. These proposals still would have to be ratified by 38 states — no easy task. Given these strong safeguards, a convention would be far less able to "run away" with the Constitution than Congress itself, which may propose constitutional amendments at any time and on virtually any subject.

Safety Valve. The convention method of amendment is a critical ingredient of the constitutional balance of power. While Congress may in most cases be counted upon to propose constitutional amendments when needed or desired by the American people, the framers knew that Congress would be reluctant to do so if that would lead to a reduction in its own powers. The convention method thus provides a "safety valve" to propose needed amendments in cases where federal lawmakers might impede needed reform.

Even the looming possibility of a convention can be enough to force action by Congress. On at least one occasion this century, the threat of a convention led Congress to propose an amendment, which became the Seventeenth Amendment, establishing the direct popular election of Senators.

Far from being a threat to the Constitution, as critics suggest, the convention method of amending is a necessary and integral part of the Constitution. Constitutional conventions, of course, should not be taken lightly. Yet exaggerated claims should not dissuade state legislators from considering this vital element of the Constitution to deal with Congress's inability to resolve important national problems.

THE FRAMING OF ARTICLE V

Of the 26 amendments to the Constitution, all were proposed by the Congress, none by a convention. This would have surprised the framers of the Constitution, who saw equivalent roles for the Congress and conventions in the amending process. In fact, many preferred the convention method. The first suggestion for an amendment provision saw no role for Congress. The "Virginia Plan" for the Constitution simply stated that "provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required..."² In accordance with this view, the first draft of Article V, by the Philadelphia convention's "committee of detail,"

2 M. Farrand, *The Records of the Federal Convention* 22 (1937).

provided for the proposal of amendments only by conventions, with no role at all for Congress.³ This was consistent with state practice at the time. As of 1787, only three of the eight states with an amendment process gave their legislatures a role.⁴

Several delegates objected to this draft, fearing that it would give the states too much power at the expense of Congress. As a compromise, the convention settled on the current Article V, under which both the states and the Congress would play a role in proposing amendments. James Madison later wrote that Article V "equally enables the general and the State governments to organize the amendment of errors...."⁵

The delegates clearly felt that a two-pronged amending method would assure that no single institution could block important amendments. As George Mason of Virginia declared, it would be improper to require congressional approval of amendments "because they may abuse their power, and refuse their consent on that very account."⁶ Under Article V, as finally adopted, neither Congress nor the states could, by themselves, block an amendment.

PAST USES OF THE CONVENTION CLAUSE

Although no convention has ever been called under Article V, individual states in hundreds of cases have called for a convention. During the 1800s, most such convention calls were for broad, general revisions of the Constitution. Since the turn of this century, however, resolutions for conventions normally have been limited to specific issues that Congress had refused, or failed, to address. Five times in this century, more than half of the states have requested such a limited convention regarding a particular issue.

The most effective use of the convention clause of Article V was in the campaign for direct election of U.S. Senators. Beginning with the rise of the progressive movement in the 1890s, sentiment began to grow for the election of U.S. Senators by direct popular vote, rather than by state legislatures as originally provided by Article I of the Constitution. Between 1893 and 1902, the House of Representatives passed several resolutions proposing a constitutional amendment requiring direct election. But the Senate, understandably, refused consistently to vote on the issue; many of its members, after all, could expect to lose their jobs if they had to win popular support.

3 *Ibid.*, at 188.

4 See American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method Under Article V* (American Bar Association, 1974, as reprinted by the National Taxpayers Union), p. 15.

5 *The Federalist Papers*, No. 43 (New York: Mentor Books, 1961), p. 278.

6 Office of Legal Policy, U.S. Department of Justice, *Limited Constitutional Interventions Under Article V of the United States Constitution*, September 10, 1987, p.7.

To force Congress's hand, the states turned to the convention provision of Article V. Between 1893 and 1911, some thirty states called for a convention to propose an amendment regarding direct election, only one short of the 31 needed to trigger the convention process.⁷ Rather than face the prospect of a convention, the Senate, on May 13, 1912, approved a direct election amendment, sending it to the states for ratification, where it obtained approval of three-quarters of the states and became the Seventeenth Amendment to the Constitution in 1913.⁸ Thus although no convention took place, Article V had served its purpose by removing the congressional roadblock.

Roadblock. Supporters of the current campaign for a constitutional convention to propose a balanced budget amendment argue that a similar institutional roadblock exists today. While the federal budget is a major national problem, they say, Congress is hesitant to solve it in a way that would curtail congressional powers. Thus another means of initiating change is required.

In 1975, the North Dakota Legislature became the first to call for a convention to propose a balanced budget amendment. By 1983, some 32 states had done so — just two short of the required number. Although no additional states have approved resolutions calling for a such a convention since then, legislation is expected to be considered in at least twelve states this year. Passage of a resolution in any two could trigger the first constitutional convention in 200 years.

MYTH OF THE RUNAWAY CONVENTION

The most common question surrounding the convention clause of Article V is whether a convention could legally be bound by a limit on the subjects it may address, or whether it would be free to rewrite the entire Constitution, much as was done to the Articles of Confederation in 1787. Critics of the convention method often argue that a constitutional convention, by its nature, cannot be limited and thus could revise any part of the Constitution — even the Bill of Rights — if delegates were so inclined.

These fears, however, are unwarranted. There is ample legal authority concluding that any Article V convention legally can be limited to one subject and that such limits can be enforced. Just as important, there are numerous political and restraints which make it virtually impossible for a "runaway" convention to rewrite the Constitution against the wishes of the American people.

Legal Limitations on Conventions Under Article V

When most Americans think of a constitutional convention, they envision a gathering like that held in 1787 — a general convention engaged in an overall rewriting of the

7 There were 46 states in the Union in 1911. Some commentators claim that 31 states in fact did request a convention. Because of the inconsistent way in which applications were recorded, the exact number remains unsettled. See American Bar Association, *op. cit.*, pp. 60-63.

8 See Paul J. Weber, "The Constitutional Convention: A Safe Political Option," 3 *Journal of Law and Politics* 51, 57-58 (1986).

Constitution. A convention under Article V, however, need not have such a broad scope. The article does not refer to a convention for the purpose of rewriting or even revising the Constitution. Instead, it specifically refers to "a Convention for proposing Amendments...."⁹

The history of this clause shows that the framers had in mind conventions assembled to address discrete problems. For instance, Alexander Hamilton, in *The Federalist Papers*, stated that his belief at the time was that "[e]very amendment to the Constitution, if once established, would be a single proposition.... There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution."¹⁰ Specific amendments, rather than comprehensive rewrites of the Constitution, appear to be what most framers expected.

Allowing Limitations. A more difficult question is whether a convention could, in fact, be legally prohibited from considering amendments on more than one subject. Article V itself is silent on this issue, not referring at all to how or whether a convention's scope may be limited. Many constitutional authorities, however, have concluded that such limitations are allowed under Article V. For instance, a special study committee of the American Bar Association, after a two-year study, concluded in 1974 that the Constitution does provide for the limitation of conventions.

The committee based its determination on several factors. It noted that early drafts of Article V had indicated an intention for conventions to be limited to the consideration of particular subjects. The initial draft of the article by the 1787 Constitutional Convention's committee of detail provided that:

"[o]n the application of the Legislatures of two thirds of the States of the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.* (emphasis added.)"¹¹

Standard Practice. The phrase "for that purpose" indicates an intent that conventions would be called for certain, discrete purposes, without authority to conduct a general review of the Constitution. The ABA committee pointed out that limited conventions were in line with the standard practice among state constitutional conventions at the time. Of the state constitutions then providing for conventions, most stated explicitly that the conventions could be limited to particular issues.¹²

The ABA committee also concluded that there are sound policy reasons why states should be able to call limited conventions. The convention method of amendment, it said, was meant to be a workable alternative to Congress in the amendment process. If states could not limit the agenda for such conventions, the ABA scholars reasoned, states would be unduly discouraged from employing this option. In addition, the committee found a limited convention to be more consistent with democratic principles, since voters would know the subject matter to be considered before electing delegates. If the range of topics

9 See footnote 1 above.

10 *The Federalist Papers*, Number 85, *op. cit.*, p. 525.

11 American Bar Association, *op. cit.*, p. 12.

12 *Ibid.*, p. 15.

to be addressed were known and limited, the committee reasoned, the public would be better able to exercise an informed judgment in choosing among different candidates.

Safeguards Against a Runaway Convention

Even if a convention could be limited legally to a particular subject, critics say, it still could ignore its restrictions and embark upon a wide-ranging revision of the Constitution. These arguments, however, ignore the legal and political safeguards built into the amendment system, which make any such "runaway" convention virtually impossible. Among these safeguards:

1) **Election of Delegates.** Article V does not specify exactly how or when delegates to a constitutional convention would be chosen. This power has apparently been left to the Congress, which is given the responsibility to "call" the convention. Thus while Congress has no choice but to call a convention once the requisite number of valid state applications has been received, the power to "call" gives it an opportunity to craft the process by which delegates will be selected.¹³ Using this power, Congress can take steps to provide for an election process which would maximize the public debate on the issue and to ensure the accountability of the delegates.

One bill now pending in Congress, S. 589, sponsored by Senator Orrin Hatch, the Utah Republican, would establish procedures for constitutional conventions.¹⁴ Among other provisions, the bill would allow every state to send one delegate for each of its congressional districts, and two delegates selected on an at-large basis. The convention would begin no more than eight months after passage of a convention resolution by Congress.¹⁵

The election of convention delegates likely would be well contested. Because no such convention ever has been held, it would generate intense media and public interest, probably more than the typical congressional election. Political parties and interest groups could be expected to be very involved, ensuring a spirited debate. The leading candidates, especially in such a short campaign period, probably would be those with strong public name recognition. Thus, the eventual delegates would not be unknown and untried individuals. On the contrary, most likely they would be figures already known to the

¹³ *Ibid.*, p. 9.

¹⁴ While no action has been taken on the Hatch bill in this session, similar bills were unanimously approved by the Senate Judiciary Committee in 1984 and 1985. In addition, similar legislation sponsored by the late Senator Sam Ervin, a Democrat from North Carolina, passed the full Senate in 1971 and 1973. See, S.Rept. No. 135, 99th Cong., 1st Sess. 13-15 (1985).

¹⁵ See, Henry Butler, "State Petitions for a Balanced Budget Constitutional Convention: A Descriptive Essay on the Political Economy of the Article V Process," in *The Constitutional Convention: How is it Formed? How is it Run? What Are the Guidelines? What Happens Now?* (Washington, D.C.: National Legal Center for the Public Interest, 1987), p. 30.

electorate — including civic leaders, government officials, and perhaps even members of Congress.¹⁶

During the campaign, the convention candidates would be asked where they stand not only on the amendments being proposed, but also on such concerns as whether they would attempt to lead the convention away from its defined subject matter. Delegates thus would be required to commit themselves on the question of a "runaway" convention even before they were elected.¹⁷ While the delegates' promises would, of course, not be binding, the public scrutiny of the candidates would make organized efforts to lead the convention beyond its legal scope virtually impossible.

2) Congressional Power to Choose the Mode of Ratification. If, despite the political restraints imposed in the delegate selection process, a convention still strayed and proposed constitutional amendments outside of its designated subject matter, those amendments would face a second obstacle: Congress. Under Article V, the convention could not actually submit amendments to the states for ratification until Congress chose the "Mode of Ratification." Congress must designate whether state legislatures or state ratifying conventions are to ratify the amendments.

This gives Congress a tool to stop, in effect, any amendments that exceed the convention's charge. If amendments proposed by the convention went beyond the limits imposed upon it, Congress simply could decline to choose a mode of ratification for those amendments.¹⁸ The proposed amendments would be able to go no farther.

Congress, of course, could only exercise this option if the proposed amendments were outside the legal scope of the convention. It could not, consistent with the Constitution, block validly adopted proposals. While a determination of the extent of Congress's powers in each case would not always be easy, the real danger faced — given Congress's interest in the matter — is that the convention would be circumscribed too much not too little.¹⁹

3) Review by the Courts. Any amendments proposed that exceeded a convention's powers also would invite a legal challenge and could be invalidated by the Supreme Court.

There has been considerable controversy over the issue of the Court's jurisdiction in such matters. In the 1939 Supreme Court case of *Coleman v. Miller*, for example, the Court was asked to decide whether Kansas had validly ratified a proposed child labor amendment to the federal Constitution.²⁰ It declined to settle the issue, stating that questions regarding

16 The Hatch bill would prohibit federal employees, including members of Congress, from serving as delegates. Given the experience and expertise such individuals could lend to the process, the advisability of this prohibition is not clear.

17 For a more detailed discussion of the probable nature of a convention delegate campaign, see Weber, *op. cit.*, pp. 61-63.

18 Office of Legal Policy, *op. cit.*, p. 13.

19 Congress's decision in this case probably also would be subject to court review.

20 307 U.S. 433 (1939).

the amendment process were "political questions" to be worked out by Congress and the President, without judicial intervention.

More recent decisions, however, indicate that federal courts today would be much more willing to settle political questions. During the 1960s, for example, the Supreme Court intervened to rule on such "political" questions as how state legislature districts should be apportioned and under what circumstances Congress can refuse to seat a member.²¹ Moreover, even before *Coleman*, the Supreme Court settled numerous issues regarding the amendment process.²² Thus it appears that the courts could, and would, resolve any questions arising from a constitutional convention, and prevent it from exceeding its bounds.

4) **Ratification by the States.** In the improbable event that all other safeguards failed, proposals made by a constitutional convention of course still would be only proposals. They would not become part of the U.S. Constitution until ratified by three-quarters of the states. Thus, even if a convention did "run away" and propose far-reaching revisions in the Constitution, those proposals would not become law unless they were approved by legislatures or specially held conventions in 38 states.

This is no easy task even for amendments with broad popular support. In fact, the last two amendments proposed by Congress — the popular equal rights amendment and an amendment to provide the District of Columbia with representation in Congress — failed in their bids for ratification. It is thus virtually inconceivable that some drastic rewriting of the Constitution, devised in smoke-filled rooms and opposed by a large body of the American people, could survive the ratification process. A proposal by a "runaway" convention, lacking broad popular support, would be doomed.

CONCLUSION

Given the numerous safeguards built into the convention method of amendment, fears that use of this method would endanger the Constitution are unfounded. In fact, the convention method actually may be the safer method of amendment. A convention is subject to many constraints, while Congress may propose an amendment to the states at any time, with almost no limits on the subject matter of those amendments.

Framers' Intention. Thirty-two state legislatures have petitioned Congress to convene a constitutional convention to consider a balanced budget amendment, under the provisions of Article V of the U.S. Constitution. Proponents of this action maintain that Congress is incapable of restraining spending and eliminating the deficit, yet refuses to send a balanced budget amendment to the states for their consideration. Opponents of a convention argue that a convention is not an appropriate way of dealing with the problem because convention delegates might mount an assault on the Constitution. But the convention method of amendment is not only a safe method of amendment, it is an integral part of the constitutional system of checks and balances. The framers of the Constitution wisely intended the convention method to be a vital counterweight to the powers of Congress to

²¹ *Baker v. Carr*, 369 U.S. 186 (1962) and *Powell v. McCormack*, 395 U.S. 486 (1969).

²² See cases cited in Office of Legal Policy, *op.cit.*, pp. 45-46.

block amendments. As the campaign for direct elections to the U.S. Senate demonstrated, the threat of a constitutional convention sometimes is necessary to force consideration of amendments that challenge the self-interest of Capitol Hill lawmakers.

The convening of a constitutional convention is, of course, a serious and complex matter. It must not be taken lightly. Nevertheless, the convention clause of Article V is an integral and necessary part of the constitutional system of checks and balances. Americans and their representatives in state legislatures and in Congress should not allow misinformation to divert them from employing this wisely crafted provision. When Congress fails to propose needed amendments to the Constitution, policy makers should not hesitate to put it to use.

James L. Gattuso
McKenna Senior Policy Analyst
in Regulatory Affairs

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☒ #5 Sierragate Plaza
Suite 309
Roseville, CA 95678
(916) 786-9400

201 Massachusetts Ave. NE
Suite C-7
Washington, DC 20002
(202) 547-4196

A PROUD, BUT NEGLECTED HISTORY:
THE STATE EXPERIENCE WITH CONSTITUTIONAL CONVENTIONS

by John Charles Armor

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Precis

Fueled by the possibility that two more States will pass convention calls on the Balanced Budget Amendment, a national "debate" among scholars has spilled over to the press and the public. The central issue is whether a new constitutional convention can be limited to a stated subject, or must be unlimited, and able to propose amendments to any part of the Constitution.

The dispute assumes we have only theory, not experience, to answer this question. There has never been a second national convention. There have been hundreds of state conventions. The question whether a convention is sovereign unto itself and cannot be limited, is the same for a State as for the nation. At the State level, the question has been repeatedly raised and answered.

Of all who have studied this critical question, only the American Bar Association has bothered to review the State experiences. That review led the ABA to conclude in 1974, as a matter of official policy, that:

"Our two-year study of the subject has led us to conclude that a national constitutional convention can be channelled so as not to be a force of that kind [dangerous and radical] but rather an orderly mechanism of effecting constitutional change when circumstances require its use. The charge of radicalism does a disservice to the ability of the states and people to act responsibly when dealing with the Constitution."

The summary of research both by the ABA and in this paper, concerning the limitation of State constitutional conventions is this: 1) it is rare for a state constitutional convention to seek to go beyond its charter. 2) It is unanimous among courts that have considered the issue that by one or more well-recognized means, such amendments may be prevented from going into the ratification process. 3) The lesson to be derived from this significant and well-litigated area of the law is that there are no legitimate dangers from a "runaway" Convention at the national level.

Those interested in finding an answer to the question of limited conventions are invited to review for themselves the history of limited State conventions, and legislative and judicial enforcement of such limits. Those who raise the specter of a "runaway" convention only for immediate political purposes will probably have no interest in either that history, or this paper.

A Proud, But Neglected History:

The State Experience with Constitutional Conventions

by John Charles Armor /¹

The proposed Balanced Budget Amendment to the Constitution is focusing attention on the methods of amending the United States Constitution. In the future, other possible amendments will rise to the top, or close to the top, of national attention. In each instance where the impetus for change comes from the States, and Congress is perceived as part of the problem, rather than the solution, attention will also be focused on the second half of Article V of the Constitution. /² That provision allows the States to initiate constitutional change by calling for a new convention.

Discussions of proposed constitutional amendments are dealing with "supreme law," as the Constitution describes itself. However, the process of seeking passage of any constitutional amendment is, like all public acts in the United States, a political

¹ B.A., Yale University; J.D., University of Maryland; Adjunct Professor of Political Science, University of Baltimore; Supreme Court practitioner, and author.

² Article V of the Constitution provides these two methods of amendment: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress...."

act. And every proposal will have its opponents, who will, logically, act in a political manner.

One hallmark of politics is to use whatever weapons one finds at hand. In this particular type of public debate, the most potent weapon seems to be the threat, or the alleged threat, of a "runaway convention." /³ The power of this weapon is that it turns some supporters of the particular amendment into opponents of the mechanism in the Constitution, put there by its authors to deal with a specific problem, a recalcitrant Congress. It accomplishes this reversal by placing reverence for an effective Constitution on both sides of the balance scales.

At first glance, the question of whether a new Constitutional Convention could be limited to a particular subject matter seems unanswerable, until the event occurs and its outcome is known. The national slate is blank of examples beyond the unique and successful first experiment in Philadelphia, in 1787. But, there is a second body of law, the experience of the States with their hundreds of Constitutional Conventions, and amendments to their Constitutions, since 1787. The experience of the States provides a definitive answer to that basic and serious question concerning the ability to limit a new Convention. Without such limitations

³ See, for instance, Gerald Gunther, "Constitutional Brinkmanship: Stumbling Toward a Convention," American Bar Association Journal, Vol. 45, July, 1979. Also see, Melvin R. Laird, "James Madison Wouldn't Approve," Washington Post, 13 February, 1984, Op-Ed page. The latter article takes out of context a Madison quotation about abandoning the results of the 1787 Convention and holding another Convention immediately, and applies it to the possible use of the second half of Article V in the 20th century.

it is clear that the second half of Article V will become a dead letter, and the purposes for which it was designed will be forever frustrated.

This discussion is intended for those who have a serious and legitimate concern with this basic question that arises very seldom, but when it does, is critical. It will be of little use to those for whom the consideration of a proposed constitutional amendment is a purely political question -- to be won or lost by whatever means, including permanent damage to the structure of the Constitution. It is the author's hope despite much evidence to the contrary, that in the long run those who will trample the Constitution in the guise of defending it, do not and will not constitute a majority of the people in the United States, and that historical records and experiences that offer guidance, will be reviewed, considered, and accepted if logical and valid, by most who review this State constitutional experience.

I. Summary.

There is a substantial body of literature on the subject of possible controls on a new Constitutional Convention, if one is called under Article V of the Constitution. The debate is whether Congress or the Supreme Court, or both, would or should have any supervisory powers over the calling, conduct and results of such a Convention. /⁴

⁴ Two major players in the continuing scholarly debate are Professors William Van Alstyne, and Laurence Tribe. See, for instance, Van Alstyne, "The Limited Constitutional Convention -

An unfortunate aspect of this heated and protracted debate is that it takes place in a near vacuum. Nowhere in this blizzard of articles is there a reference to the one source of real experience with that precise subject, the history of regulation of State Constitutional Conventions. Instead, the debate is carried on primarily in the ether of pure theory, which allows widest scope for the intellectual pyrotechnics of the participants, but for the same reason has the least possible application to the real world.

It is frequently valuable to recall Justice Felix Frankfurter's description of the States as, "legislative laboratories." ⁵ It is not just that the States can learn from each other. It is also possible for Congress and the Supreme Court to learn from State legislatures and State Supreme Courts. In short, it would be worthwhile for national leaders to look across the Potomac from time to time and see what is happening in the real world.

To same effect, it would be wise for Constitutional theorists. when they presume to advise Congress and/or the Supreme

The Recurring Answer," 1979 Duke Law Journal 985, and Tribe's "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment," Pacific Law Journal, Vol. 10, July, 1979. As a general proposition, scholarly debates are like chess matches by mail. They take a long time, and the next reply can come from anywhere on the map. A thorough citation of the major articles, and a review of the logic of each, appears in Limited Constitutional Conventions Under Article V of the United States Constitution, issued 10 September, 1987, by the Office of Legal Policy of the Department of Justice.

⁵ Justice Frankfurter was one of the strongest and most articulate supporters of wide latitude for State legislatures in making their policy judgments and passing laws concerning their own citizens. He coined the phrase, "legislative laboratories of the states," which clearly expressed this idea.

Court on matters such as the control of a Constitutional Convention, to look to the States where there is ample experience in this precise subject.

This monograph does exactly that.

State methodologies for peaceable changes in their Constitutions are older than the Constitution itself. All State Constitutions have included such processes from early in the history of the republic. /⁶ Every State has called for itself at least one Constitutional Convention, and the most that have been conducted by any State is 17 in New Hampshire. /⁷

There have been more than 240 State Constitutional Conventions to date. /⁸ Table A describes the whole pattern of constitutional amendment, State by State.

This paper does not discuss the nature of the changes made by any of these conventions, since the focus here is on the process of constitutional amendment, not on the specifics of the amendment or amendments proposed. Likewise, the critical question about Article V of the US Constitution is how the Convention process works, rather than what particular amendments might be produced by

⁶ The pre-1787 Constitutions of Georgia, Massachusetts, New Hampshire and Pennsylvania provided for conventions. Delaware, Maryland and South Carolina provided for amendments, but not conventions. New Jersey, New York, North Carolina and Virginia lacked amendment provisions. Connecticut and Rhode Island lacked constitutions at that time (?). Check weinfeld, harvard Law Review 474, 481 (1938)

⁷ A. Sturm, Thirty Years of State Constitution Making: 1938-1968, National Municipal League, 1970, at pps. 51-80, 132-37. Cited hereafter as Sturm, Thirty Years.

⁸ Sturm, Thirty Years, at p. 00.

it in our time, or any time in the future.

The exception to this general rule are those instances where the subject matter of proposed amendment(s) brought into question the legitimacy of the State Convention and its actions, usually resulting in corrective actions either by the State legislatures, the State supreme courts, or both.

The fundamental political/legal problem in such a conflict is that all commentators recognize that a Constitutional Convention represents the exercise of the sovereign power of the people. It is a political problem because popular sovereignty is the central belief of our system of government. It is a legal problem because every constitution is the supreme law within its jurisdiction, and the very purpose of such conventions is to propose binding changes in that supreme law.

The strongest statement of the power of the people in such an assembly is the repeated reference to the Philadelphia Convention as a "revolutionary" one. It is described as being a "runaway" convention that acted contrary to the instructions from the body (the Congress under the Articles of Confederation) which caused it to meet. /⁹ That charge is based on a failure to read the full history behind the calling of that Convention, and a failure to understand exactly what that Convention did, and especially how its proposed Constitution was handled by the States in the ratification process. It also represents a failure to recall the legal

⁹ See, for instance, Lawrence M. Baskir, "The Dangers of a 'Runaway Convention,'" *The Nation*, April 3, 1982, pps. 391-93.

and Constitutional consequences of the Civil War.

The discussion of the 1787 Convention might not seem germane to a review of what the States have done for themselves in constitutional conventions in the 18th, 19th and 20th centuries. It is necessary, however, because incorrect views of what happened in Philadelphia tend to crop up in State legislatures and supreme courts, in those instances where corrective actions seem necessary because of actions by State constitutional conventions.

Therefore, the political/legal history of the legitimacy of the 1787 Convention, and of the Constitution it produced, is presented in Section II, below.

Several States have Constitutional provisions which require the question of holding a convention to be put to the voters at stated intervals. In the majority of States, however, such conventions have been called only because of a rising tide of public dissatisfaction with certain aspects of the government of the day. Given the nature of the act and the circumstances in which it usually occurs, questions of the legitimacy of the convention and of the amendment(s) it proposes engender the most bitter disputes and involve the highest of stakes.

For all these reasons it is extremely important that the legal decisions on such questions be settled according to clear principles, known in advance, so the results will both be fair to the process of amendment, and will be perceived as fair by the people. It is exactly that issue which has engendered much heat, but very little light, in the scholarly articles to date about

Article V.

However, at the State level, these questions have been repeatedly addressed. The answers found are largely consistent across the country. They are clear, logical, and easy to understand. They square with the history of the United States Constitution. And, most importantly, they have been perceived and accepted as fair by the people of the various States, which is the only true foundation of any constitutional government.

In most cases, the State Constitutional Conventions have been "unlimited" ones. Every single provision of the then-existing State constitution was therefore on the table and subject to proposed change except for the ratification provisions themselves. A change in ratification could be proposed, but it could only go into effect if accepted through the existing ratification process.

There are a few States which exempt their "Bill of Rights" from changes proposed by either the legislature or a Constitutional Convention. No attacks on a Bill of Rights has been mounted from either quarter, so there is no case law on such "entrenchment" clauses. ¹⁰ It is clear that any proposed clauses in a State Constitution that seek to inhibit the application of a

¹⁰ The author was allowed to read an unpublished, book-length manuscript by Professor Albert Blaustein of Rutgers-Camden Law School. The book deals with the amendment process in all the constitutions of the world, and ascribes the birth of "entrenchment" clauses to the US Constitution. That placed three subjects beyond the reach of amendments -- taxes on importation of slaves (which expired in 1808), and guarantees of territorial integrity of each State and representation by two Senators. The three most common uses of entrenchment clauses internationally are the guarantee of a socialist form of government, the establishment of an official religion, and the continuation of a given royal house.

provision of the U.S. Constitution would be invalid.

Rarely has a general revision of a State Constitution sought to create and apply a new ratification provision in one fell swoop. Because such a possibility has been included in the little shop of horrors by some who fear a new, national convention, the applicable State histories on these points are included in Section III. See, especially, *State v. Manley*, 441 So2d 864 (Ala., 1983).

Limitations on the power of Conventions to act in certain areas, or to propose more than a specified number or type of amendments have been routinely upheld. The theory has been that limitations placed on a Constitutional Convention by the sovereign power, i.e. the people, through the existing Constitution, must be obeyed. The limitations can be placed either by the legislature on its own initiative, or by the express terms of the State's existing Constitution. Either way, they are valid, and must be obeyed. /¹¹

The question of "limited" versus "unlimited" Conventions is discussed in Section III, below.

There is an exception to this general rule, which concerns Constitutions that have been accepted by the people in a popular referendum. In some such cases, the courts have accepted the new Constitution as valid, despite the violation of pre-existing conditions that have not been met. /¹²

¹¹ *Staples v. Gilmer*, 33 So2d 49, (Virginia, 1945).

¹² A leading case allowing amendment of a State Constitution despite not following the amendment procedures of the existing Constitution, is *Gatewood v. Matthews*, 403 SW2d 716 (Kentucky,

The theory behind this line of cases is based on the early history of the United States, in which legislatures frequently undertook Constitution-writing duties, and in a few instances, Conventions stayed in session for years at a clip, undertaking ordinary legislative duties. There was even one instance, in Missouri prior to the outbreak of the Civil War, where a Convention that favored the Union viewpoint contributed to the Governor and legislature that favored the Confederate viewpoint, fleeing the State, with the Convention taking over and appointing new State officials. ¹³ In the 20th century, however, such results have been rejected as historical aberrations, rather than correct

1966). Citing older cases, the Gatewood Court upheld the revised Constitution of Kentucky, which had been ratified before the challenge was brought. The same after-the-fact challenge existed in *Wheeler v. Board of Trustees of Fargo School District*, 37 SE2d 322 (1946), on which the Gatewood Court relied. In *Wheeler*, the Court said, "every presumption of law and fact, is to be indulged in favor of the validity of a constitution when it is attacked after its ratification...." 37 SE2d, at p. 329.

For this reason, the dissenting Judge in Gatewood called it "a case of expediency," and the decision was heavily criticized in a case note in 81 *Harvard Law Review* 693 (1968).

¹³ Walter K. Dodd, *The Revision and Amendment of State Constitutions*, Johns Hopkins University, 1910. reprinted by Da Capo Press, New York, 1970, gives a thorough history of early developments in the theory and practice of state constitutional amendment. Cited hereafter as Dodd, *Revision*.

Perhaps the most unusual situation that arose was during Dorr's Rebellion in Rhode Island. The existing government operated under the former Colonial Charter. A self-proclaimed Constitutional Convention wrote and promulgated a new Constitution, and created a new and opposing government. The question of which was the legitimate government of Rhode Island reached the Supreme Court in *Luther v. Borden*, 48 US 1. The Court declined to answer, ruling that the question was a political one that only Congress could answer. See, Dodd, *Revisions*, at p. 60. Based on the modern cases, the Court would rule on such a question if it arose again, and would decide in favor of the government based on the existing Constitution.

indicators of the direction of the law. /¹⁴

In summary, the conclusion is that even an unlimited State convention cannot act as if there were no preexisting constitution and it was writing on a blank slate. Therefore, legislatures have the right to refuse to submit for ratification excessive proposals, and courts have upheld that refusal.

The larger and more important question is first, whether there can be such a thing as a "limited" national constitutional convention, and if so, how can its limits be enforced? Some respected commentators have argued that there can be no such thing as a limited constitutional convention. /¹⁵

The argument is almost always a purely theoretical one, based on the concept that the people are sovereign, and when they are acting in their sovereign capacity, no other governmental structure can restrain their decisions. Even as pure theory, the argument falls of its own weight, since a totally unrestrained convention could not only agree on the changes it wanted, but also sweep aside the ratification process and jump directly from pro-

¹⁴ The present line of cases on adherence to the proscribed methods of amendment do show a slight variance. Some courts require strict and mandatory adherence; see, for instance, *Crawford v. Gilchrist*, 59 So 963, (Florida, 1912), *Stander v. Kelley*, 250 A2d 474, (Penn., 1969), cert. den. and app. dismd, sub nom, *Lindsay v. Kelly*, 395 US 827 (1969). A lesser number of courts require "substantial" compliance, *State ex rel. Board of Fund Commissioners v. Holman*, 296 SW2d 482, (Missouri, 1956).

¹⁵ See, a very thorough and useful bibliography, prepared by James N. Stasny, a member of the staff of the Senate Budget Committee, published in the Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary of the Senate on S. 119, S. Hrg. 98-1263, Serial No. J-98-114, 25 April, 1984, at pps. 63-89

posal to promulgation. Between 1776 and 1787 that did happen at the State level on a number of occasions.

Today, no one argues still argues that such actions are a proper exercise of the sovereign power of the people. And, today, no court would accept such an action as legitimate. /¹⁶

There is, however, a strong, practical basis for the conclusion that a convention can be limited in its scope. The American Bar Association reached that conclusion through the work of a Special Committee on the Amendment of the Constitution by the Convention Method under Article V. A nine-member Special Committee was appointed in 1971 to "study all questions of law concerned with the calling of a national Constitutional Convention...." The Committee consisted of two US District Judges, a Judge of the Superior Court of D.C., a present law school dean, and a former one, two former presidents of state constitutional conventions, and an experienced private practitioner.

As the Special Committee issued a final report that was unanimous (except for one dissenter who said that Congressional districts could not be the election districts for delegates to a convention). The ABA House of Delegates agreed by formal resolution to accept the Committees conclusions as official policy in

¹⁶ See, for instance, *Dade County v. Kelly*, 153 So2d 822, (Florida, 1963), where the Court, quoting George Washington, says, "If in the opinion of the people... [the amendment provision is] wrong, it should be corrected by amendment in the way which the constitution designates. ...no change [should] be made by usurpation."

1973. /¹⁷

The main grounds for reaching this conclusion are two. First is the intent of the drafters of Article V that the powers of Congress and the States to propose amendments would be co-equal. This follows from the reason for giving the States power to initiate Constitutional change -- that the States would be able to force action when the inaction of Congress was a central part of the perceived problem. "It... equally enables the general and the state governments to originate the correction of errors as they may be pointed out one side or the other." /¹⁸

The fact that these two methods of amendment have not been co-equally used says nothing about the extent or importance of the respective Congressional and State powers. It indicates only that the people, acting through their State legislators, have been generally satisfied with the amendments as proposed, or not proposed, by Congress, and have therefore held their power in reserve.

As a technical or legal matter, it is true to say that all of the 26 amendments to date have been adopted by the route of proposal by two-thirds of Congress, followed by ratification by three-fourths of the States. Recognizing, however, that amendment

¹⁷ American Bar Association, Special Constitutional Convention Study Committee, Amendment of the Constitution by the Convention Method Under Article V, American Bar Association, 1974. The description of the Committee and its nearly unanimous conclusion appears at pps. ix-x1. The Resolution of the ABA appears at pps. vii-viii. Cited hereafter as the ABA Report.

¹⁸ James Madison, The Federalist, No. 43.

of the Constitution is both a political and a legal act, it is false to say that the second half of Article V, the State Convention Call mechanism, has never been used. It was successfully used exactly as the Framers intended, to produce the 17th Amendment in 1911. And, that process was nearly successful for the Dirksen Amendment in the late 50's and early 60's.

For those unfamiliar with the political/legal history of the 17th Amendment and the Dirksen Amendment, these are given, respectively, in Appendices A and B, below. It should be noted that the ABA Report was a product of the near-success of the Dirksen Amendment, and the demonstrated necessity therefore to define the parameters of this method of seeking Constitutional change.

Although Constitutional Convention Procedures Acts have frequently been introduced in Congress, none has passed. Two have passed the Senate, but died in the House. The major provisions are given below. They are similar to those in the other, less-successful bills. /¹⁹ At the national level, the procedural vacuum continues.

¹⁹ Senator Ervin's bill, S. 2307, had hearings, did not pass either House in the 90th Congress. Then, he presented S. 623 in the 91st Congress, which did not pass either House. Then he introduced S. 215 in the 92nd Congress, which passed the Senate with a vote of 84 to 0, on 19 October, 1971. There was no action in the House. Then he introduced S. 1272, in the 93rd Congress, with similar provisions. It passed the Senate on 9 July, 1973; there was no action in the House. There were several bills introduced in the 94th, 95th, 96th, and 97th Congresses, none of which came close to passage. Senator Hatch introduced S. 119 in the 98th Congress, which had hearings but did not pass either House. In the 99th Congress, he introduced S. 40; there were hearings but it did not pass either House. He reintroduced the Procedures Bill in the 100th Congress, as S. 589.

At the State level, however, the vacuum has been filled. The national and State procedures bills that impose restraints on Conventions, are discussed in Section IV, below.

The methods by which a State constitutional convention can be limited in its subject matter, are varied. The limitations may appear in the State's Constitution. Or, they might be imposed when the convention is called, either by referendum of the people or by legislative act, or by a combination of both.

The critical question, however, is the enforcement of limitations when a convention, for reasons of its own, seeks to exceed its authority and propose amendments it was not convened to consider. This is the overriding open question at the national level. It is, however, well settled law at the State level. And since there is no distinction in legal logic between the sovereign people acting within their own State and the sovereign people acting at the national level, the answer would be the same.

At the State level, of course, popular sovereignty does not allow a State constitutional provision to violate a federal Constitutional provision. This was Senator Henry Calhoun's Nullification Doctrine that was laid to rest when the guns fell silent at Appomattox. Popular sovereignty at the State level means only that the people can adopt whatever provisions they choose, but only within the area of legal activities that are open to individual States.

There are two different main methods for pulling in the reins on a State constitutional convention that seeks to run away from

its mandate. One is for the legislature to refuse to submit for ratification the parts of a conventions proposals that go beyond its mandate. The other is for the State Supreme Court to rule that the excessive proposals are beyond the mandate and therefore cannot be submitted.

These two methods of control are not discussed separately, but are combined in Section V, below. The reason is that they are often combined in fact. A convention will produce amendments beyond its mandate. The legislature will then refuse to submit those for ratification. The issue will be taken to the court which often rules both that the amendments were excessive, and that the legislature was within its constitutional duties in refusing to submit them. Either grounds for the court decision would be sufficient, but they are often combined in the decisions.

There is a subsidiary question of judicial deference. At the national level it is called the "Political Question Doctrine," and appears primarily in older cases where the Supreme Court left a particular decision to Congress and refused to review it. That question is also addressed in many of the State court decisions in this delicate area. /²⁰

The summary of the research into the restriction of State

²⁰ In *Coleman v. Miller*, 307 US 433 (1939), the Supreme Court decided that the issue of whether a State had ratified a proposed amendment in a timely fashion, was for Congress to decide, not for the Court. It said that there is a "class of questions deemed to be political and not justiciable." Since then the Court has decided to decide many issues previously avoided as "political questions." Still, the doctrine that some questions are beyond judicial determination, retains some validity.

constitutional conventions is this: 1) it is rare for a state constitutional convention to seek to go beyond its charter. 2) It is unanimous that by one or more well-recognized means, such amendments may be prevented from going into the ratification process. 3) The lesson to be derived from this significant and well-litigated area of the law is that there are no legitimate dangers from a "runaway" Convention at the national level.

Some who profess such fears do so only as a pretext for opposition on other grounds to the exercise of this right by the people, through the State legislatures. However, those whose fears are genuine, can allay them by a careful and thoughtful review of how this precise question has been easily and effectively solved by the common sense of state legislators and the legal reasoning of state courts.

The ABA Special Committee reached this conclusion in its report:

"Our two-year study of the subject has led us to conclude that a national constitutional convention can be channelled so as not to be a force of that kind (dangerous and radical) but rather an orderly mechanism of effecting constitutional change when circumstances require its use. The charge of radicalism does a disservice to the ability of the states and people to act responsibly when dealing with the Constitution." /²¹

II. The "Amendment" of the Articles of Confederation.

The forgotten government in the United States is the Articles of Confederation. This was a compact among the States, acting as

21. ABA Study, supra, p. 39.

sovereign entities. Each State could have, at its own expense, from 3 to 7 members of Congress, but they cast a single, collective vote. The Articles were not finally ratified by all States until 1781, when Maryland accepted them after Virginia and other States had agreed to abandon their unlimited claims to Western lands. /²²

There are many ways in which the Articles failed, and that failure led directly to the Constitutional Convention of 1787. Three examples can stand as representatives of all others.

Under the Articles, the Congress chose annually a "President of the United States in Congress Assembled." There were 11 such "Presidents" elected under the Articles, with the first being John Hancock of Maryland, and the fourth being John Hancock of Massachusetts. Hancock was, in that year, too ill to go to Washington and assume his duties as President. The Congress deemed it unnecessary to declare the office vacant and appoint someone else in his stead. /²³

In light of modern-day experience, that is humorous. Still, it clearly illustrates the fact that under the Articles the United

²² The history of the ratification of the Articles of Confederation is found in C Herman Pritchett, *The American Constitution*, McGraw-Hill, New York, 1959, at pps 10-11. The Articles were proposed in November, 1777, and required unanimous consent. Maryland was the last State to ratify, and did not do so until 1 March, 1781. Cited hereafter as Pritchett, *Constitution*.

²³ The history of the "forgotten Presidents," those who served under the Articles of Confederation, is given in Eric Eriksson & David Rowe, *American Constitutional History*, W.W. Norton & Co., New York, 1933, at p. 00. Cited hereafter as Eriksson, *History*.

States did not have any mechanism for effective, national leadership.

The second example has to do with taxation and national bankruptcy. Under the Articles, Congress had no power of direct taxation. Each year they would estimate the total cost of operating the government, and then send the pro rata assessment to each State Capitol, in the hopes it would be paid. There was no enforcement mechanism for unpaid assessments, unless Congress chose to declare war on State that had not paid its share of the taxes. /²⁴

Given human nature, it is little surprise that a number of States simply declined to pay their assessments. Shays' Rebellion in Massachusetts was led by a disgruntled Army Major who lost his farm because he could not pay a \$12 property tax bill. And, he could not pay it because Congress had long failed to pay its debts to Daniel Shays and the other veterans of the Revolutionary War.

/²⁵

The circumstances of the United States under the Articles of Confederation were such that its Ambassadors to the Capitols of Europe went overseas at their own expense, and spent much of their time begging for loans at high interest rates, to remit to the Capitol in New York, for stop-gap payment of some of the nation's

²⁴ The history of the non-payment of national assessments by the States, is found in Eriksson, History, supra, at pps. 00-00.

²⁵ The payment by the States of about 15% of their assessments from Congress, the non-payment of veterans of the Revolutionary War, and the beginnings of Shays' Rebellion are described in Pritchett, Constitution, supra, at pps 12-13.

debts. /²⁶ It was this sorry state of affairs that led most national leaders to conclude that the Articles were fatally defective, and that a new government with greater and more effective powers, was essential.

This leads to the third failure of the Articles. In the last years of the Confederacy, a number of amendments designed to rescue the government from total collapse, were agreed in Congress and proposed as amendments to the Articles. But, Article XIII required unanimous consent to amend the Articles. Two critical amendments were defeated by the vote of a single State, one by New York and the other by Rhode Island. Rhode Island at that point comprised 60,000 souls; yet the general government of 3 million people effectively collapsed for want of the consent of Rhode Island and Providence Plantations. /²⁷

This was the context in which the Philadelphia Convention was called. It is important, however, to recall how and by whom that Convention was called. An earlier Convention in Annapolis, Maryland, had failed because only five States attended. However, the delegates to the Annapolis Convention asked both Congress and the States to call another Convention a year later. /²⁸

²⁶ A particularly poignant account of how American ambassadors of the time served as beggars for loans, is found in -----
-----.

²⁷ The history of failure of all attempts to amend the Articles of Confederation is found in Pritchett, Constitution, supra, at pps 13-14.

²⁸ In terms, the Report of the Annapolis Convention was directed only to the Governors of the States whose delegations were present. However, the purpose of the 14 delegates from five

Virginia was the first to respond, on 22 January, 1787. It asked all States to attend in Philadelphia. Seven States were already committed to attend when Congress finally responded. Once it was clear that the new Convention was going to take place, whether or not Congress acted, Congress finally issued its call for "the sole and express purpose of amending the Articles of Confederation." /²⁹

This is frequently cited as proof that the Philadelphia Convention exceeded its mandate. The truth is that Congress was boarding a bandwagon that was already underway. With the exception of Delaware, the responses to the Virginia call were unlimited. Of the 12 States that chose to attend (Rhode Island refused to have anything to do with the Convention), only Delaware placed on its delegates the restriction that Congress had sought - amendment of the Articles of Confederation.

For present purposes, we skip entirely the substantive work of the Convention; how and why it wrote the various provisions of the Constitution. At the end, when the delegates were considering

States who attended is made clear by the fact that they sent "courtesy" copies of their report to all the other Governors, and to the leaders of the federal government in New York. The Report is found in Documents Illustrative of the Formation of the Union of the American States, House Document 398, 69th Congress, 1st Session, 1927, reprinted by Spencer Judd Publishers, Sewanee, Tennessee, 1984, at pps. 39-43. This publication is cited hereafter as Documents Illustrative.

²⁹ The dates of each State's commitment to attend in Philadelphia, the conditions which each placed on their "Commissioners" (or delegates), and the belated Congressional call for the Convention, are found in Documents Illustrative, supra, at pps. 55-84, and 44-46, respectively.

ratification, they determined that acceptance by nine of the 13 States would be sufficient. They drafted a carefully-worded Resolution which is the fifth page of the Constitution, from George Washington as President of the Convention, to the Congress in New York. In that letter they stated that the Constitution would be effective "among the States so ratifying the same." /³⁰

It was not until after Washington was elected as the first President that North Carolina and Rhode Island eventually ratified the Constitution. Neither took part in the election of Washington. Neither took part in the federal government until they had ratified.

In short, what happened after the Constitution was sent out for ratification was that 11 States chose to abandon the Articles of Confederation, and join together under the new Constitution. The Articles of Confederation were not illegally amended. The States simply walked out of the government under the Articles.

That was a legitimate, theoretical option for any State at any time, until after the Civil War. The Confederate States of America cited at length the views of many of the Framers that they had a right to leave the Union at will. Their quotations were correct. However, in losing the war, they lost the political debate as well.

Since the Civil War, no State has had the "right" to walk

³⁰ This Resolution was carefully drafted by the legal scholars at the Convention, and its contents were debated over three days on the floor of the Convention. Its text can be found in Documents Illustrative, supra, pps. 1005-1006.

away from the existing government. That means that amendment of any Constitution today, whether the federal one or those of the States, must take place according to the terms of the existing Constitutions. That legal conclusion, which is quite different from what happened between 1787 and 1790, has been stated and restated in many court decisions. /³¹

The fear that is sometimes raised, that a new Constitutional Convention could "do what the first one did," and not only write an entirely new document but change the terms for its ratification, is based on a careless reading of the history of the Philadelphia Convention, and a misunderstanding of the legal basis for, and consequences of, the Civil War.

III. General versus Limited Conventions.

In the early history of constitution-writing, from 1776 through 1789, the States took the position that they were free and sovereign, and able to rewrite their charters at will. ("Charter" was the common word, rather than "Constitution," but the meaning was the same, the fundamental law of the jurisdiction.)

There was no tradition of popular referenda on this or any other subject. And, there was no tradition of bodies of representatives selected for the express purpose of drafting new Constitu-

³¹ See, *State v. Manley*, 441 So2d 864 (Ala., 1983), in which the Alabama Supreme Court held an act of its legislature unconstitutional for proposing a new Constitution contrary to the amendment provisions of the existing Constitution, and also issued an injunction against the holding of an election to present that proposal to the people for ratification.

tions. There were also no provisions in any existing Charters to govern the process. Of necessity, legislatures simply wrote and promulgated new Charters, in much the same way as they did laws.

Massachusetts and New Hampshire were the first to add a "popular will" element in this process. First, the townships and localities objected to the legislative promulgation process without consultation with them. Then, popular referenda on the adoption of new Constitutions were added in those two States. /³²

It took a century for all of the States to move to the modern practice of allowing the legislatures to propose amendments to the State Constitution, subject to popular ratification, and to call for a constitutional convention for general revisions, also subject to popular vote.

The States are highly individual in the patterns that they use. Eleven still have no express provision in their Constitutions for the calling of a constitutional convention. The case law, however, has established that it is part of the inherent right of any legislature, acting on behalf of the people, to call for a Constitutional Convention. /³³

Some earlier State Constitutions incorporated Jefferson's

³² See, Dodd, Revision, supra, at pps. 2-7.

³³ Albert Sturm regularly updates his seminal works, *Methods of State Constitutional Reform*, -----, 1954, and *Thirty Years of State Constitution Making: 1938-1968*, National Municipal League, New York, 1970, with articles on constitutional revision in *The Book of the States*, published by the Council of State Governments, the latest of which is the 1984-85 Edition. This is a short summary of his Tables on pps. 16-22. For more detailed information, see Table I, ante.

language from the Declaration of Independence that it is part of the "inalienable rights of the people... to alter or amend their forms of government." All of the cases are consistent that even when a Constitution is silent on the subject of amendment, the right to seek that remains with the people.

One State requires that any Convention be a general one, able to propose any changes in the State's Constitution that the Convention deems appropriate. /³⁴ In all other States, however, a Convention is called pursuant to its enabling legislation, and is bound by the terms of that legislation. /³⁵

The first area of control of a Convention by the legislature is universal. The legislature states the time, place and duration of the Convention, the manner of election of its members, and the pay and expenses that will be provided. /³⁶ These provisions are not considered to be a limitation on the subject matter of any Convention, and apply equally to general and limited Conventions. (For a general discussion of such procedure bills at the State and

³⁴ See, Alaska Constitution, Article XIII, Section 4.

³⁵ "When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained in a state of peace. Irregular action, whereby a certain number of people assume to act for the whole, is evidently revolutionary." (Emphasis in the original.) Wells v. Bain, 75 Pa. 39 (1874), cited in In re Opinion to the Governor, 178 A, at 446.

³⁶ Note Livingston v. Ogilvie, 250 NE2d 138 (Illinois, 1969), in which the Court approved the legislature setting a different manner of electing delegates to the Convention than applied to the legislators themselves.

national level, see Section IV, below.)

Most of the State Conventions called since 1787 have been general ones, able to propose amendments in any and all areas, and able to propose an entirely new Constitution, if they so choose. A few have been limited, sometimes to a single, narrow subject such as the application of the poll tax to residents of military reservations. /³⁷

There are also restrictions in some State Constitutions concerning the number of Articles for which a Convention can propose amendments, or certain subjects that are declared to be beyond the scope of a Convention, etc. /³⁸

The theory behind such limitations is that the Convention is a representative of the people, the ultimate sovereign power. The existing Constitution is the prior embodiment of the will of the people. If, by that document, the people have either restricted the subject matter of a Convention, or have granted power to the legislature to limit a Convention, then the Convention is limited by the people themselves.

³⁷ One of the most restrictive Convention mandates ever issued was in Virginia. The legislature decided that the Convention should be restricted only to the subject of the payment of poll taxes by members of the military. The Court upheld this restriction, in *Staples v. Gilmer*, 33 SE2d 49, (Virginia, 1945), annotated at 158 ALR 495.

³⁸ The restrictions are widely varied in type and effect. One State does not permit a convention to be held within 6 years of the last convention. Many States forbid amendment of certain portions, or all parts of, their Bills of Rights. Some States allow only a certain number of amendment proposals to be placed on the ballot at one time. Courts have upheld all types of such restrictions, when based on constitutional language.

The contrary argument, that the Convention "is" the sovereign people, and therefore cannot be limited, ignores the fact that the existing Constitution in every State, and at the federal level, also represents the people. There are older cases, primarily in the 19th century, that take the contrary view. They stem primarily from the history of State Constitution-writing before provisions for Conventions and for popular voting to ratify Constitutions were added to most such documents. /³⁹

In short, every State recognizes the difference between a limited Convention and a general one. One State makes it impossible to conduct a limited Convention. But, in all others, if limitations are placed, they should be obeyed.

The instances of a limited Convention seeking to act outside its mandate are rare. The two primary methods of holding a Convention to its set limits are refusal by the legislature to submit improper results for ratification, and orders of courts that they not be submitted, or if already submitted (and even ratified in some instances), that they be struck as improper. The specific controls on a limited Convention are discussed in Section V, below.

IV. Constitutional Convention Procedures Bills.

³⁹ In Re Opinion to the Governor, 55 R.I. 56, 178 A 433 (1935), accepts as valid the ratified work of a Convention despite violation of prior Constitutional provisions about amendment, on the grounds that after ratification the new document represented "the explicit and authentic act of the of the whole people," quoting from George Washington's Farewell Address.

The development of State Convention Procedures Bills was a natural consequence of the addition to State Constitutions of provisions allowing legislatures to call a Convention. A leading case is *City of Bessemer v. Birmingham Electric Co.*, 252 Ala. 171, 40 So2d 193 (1949). In *Bessemer*, the Supreme Court of Alabama concluded that the legislature had "the inherent power to call a constitutional convention." /40

The same logic has been followed in States which lack a specific provision for the calling of a Convention, but the courts conclude that the right to change the form of government is inherent in any legislature. It then follows that the legislature can set conditions on the holding of a Convention, once it decides that one should be held. /41

Where operating procedures are included in the text of the Constitution, however, the legislature is without power to change those. See *42nd Legislative Assembly v. Lennon*, 481 P2d 334, (Mont., 1971).

This point really has no controversy to it. The power to pass Procedures Bills is universally recognized. The critical

40 See, *City of Bessemer*, supra, 40 So2d, at p. 197.

41 In *Chenault v. Carter*, 332 SW2d 623, (Kentucky, 1960), the legislature proposed a constitutional convention dealing with only 12 subjects. It planned to submit that proposal to the people for their approval. Against a challenge that the convention could not be so limited, the Court upheld the planned restrictions. It said, at p. 626, "The delegates to the convention are the agents not of the legislature, but of the people themselves. As a principal may limit the authority of his agent, so may the sovereign people of this state limit the authority of their delegates. This they may do by accepting and approving... a limited constitutional convention."

question is whether that power includes the right to place limitations on the substantive work of the Convention. Such restraints are included in the five Bills which have been submitted in Congress to date.

The first Convention Procedures Bill was introduced in the 90th Congress by Senator Sam Ervin, on 17 August, 1967. Hearings were held, but no action was taken. As Senator Ervin stated then,

"Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment -- and I am admittedly a partisan on the issue -- should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process." /⁴²

Senator Ervin was right in this analysis, but his words were not headed.

Since that time, Procedures Bills have been introduced in every Congress to the present. Twice, such bills have passed the Senate, but not the House. The full history of these bills is given in footnote 19, supra. All these bills have certain common features including recognition of a limited convention, methods for collecting and reviewing state calls, and grandfather clauses for calls that precede passage of the bill and deadlines for calls that come afterwards. /⁴³

⁴² Sam Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 Michigan Law Review 875 (1968), at p. 878.

⁴³ Provisions that have appeared in some, but not all bills, include: 1) A grandfather clause accepted all prior State calls, but for future purposes establishing a seven-year deadline for concurrent State calls. 2) Congress to determine the subject matter jointly sought by 34 States. 3) Congress to call a Conven-

There should be no concern that a new Constitutional Convention will ever be called, in the absence of a Procedures Bill. It takes a simple majority of Congress to call a Convention, the same vote necessary to pass any Bill. It is a logical assumption that a majority in Congress required to call a Convention will not be assembled until after a Procedures Bill has been passed and signed into law. Congress might even wait until after an accelerated Supreme Court review had determined that Bill to be constitutional, before acting on a call for a Convention. /⁴⁴

Even the opponents of a limited constitutional convention are nearly unanimous in concluding that Congress has the power under the Necessary and Proper Clause to legislate on procedures for a constitutional convention. The two exceptions are Professors Black and Tribe. Professor Tribe holds that Congress cannot pass a procedures bill, the Supreme Court cannot rule on its validity, and therefore Article V as written cannot be used. Professor Black argues that one Congress cannot bind a future Congress,

tion, with delegates elected from House Districts in each State, and two elected at large. 4) Congress would determine where, when, and how long the Convention would meet. 5) Congress to state the subject matter of the Convention. 6) Congress reserves the right to refuse to submit for ratification any proposed amendment outside the stated mandate of the Convention. 7) Accelerated judicial review, so the Supreme Court could rule promptly on the constitutionality of the bill itself.

⁴⁴ Although getting a test case from trial level through a final decision in the Supreme Court usually takes three years or more, Congress is capable of shortening that process to less than six months. In the Federal Election Campaign Act of 1976, Congress provided special provisions for prompt judicial review. As a result, the final decision on that Act came less than six months after it went into effect. See, *Buckley v. Valeo*, 424 US 1, 1976.

which therefore vitiates any procedures bill. /⁴⁵

Actually, Professor Black's position is a qualified negative, since the passage by Congress of a procedures bill and the approval of that by the Supreme Court would establish the authority chain. It would be clear that States could call for a limited convention. It would be clear that Congress could impose those limitations on a convention whenever one was called, and could enforce those limitations by refusing to submit for ratification proposed amendments, if any, that exceeded the mandate.

At such time in this or any future century, when the necessary 2/3rds of the States called for a convention limited to a specific subject, the Congress then sitting might vary the terms of the procedures bill it then passed, along with the call for the convention itself. (Both actions require only a majority of Congress.) Still, the extent of Congress' authority to act would be clear, as a result of the prior Act and the Supreme Court decision concerning it.

V. Legislative and Judicial Restraints on a Convention.

There are several key cases on the power to hold a Convention within defined limits. In *Chenault v, Carter*, supra, the legislature proposed voter approval for a Constitutional Convention limited to 12 stated subjects. In a declaratory judgment action,

⁴⁵ For a discussion of the views of most major authorities, and the dissenting views of Professors Black and Tribe, see *Limited Constitutional Conventions...* Office of Legal Policy, Department of Justice, footnote 4, ante, at pps. 36-43, and especially footnotes 85 and 93.

officials and voters attacked that proposal on many grounds, including the idea that a convention cannot be so limited.

They claimed that a Convention represented the sovereign people, and as such, could not be restrained by a mere "statute of the legislature."

The Court disagreed, and bound the Convention to the limits set by the legislature. Their logic was not that the legislature was superior in authority to the Convention. It was that the people are sovereign over both, and that once the people approved the calling of a Convention with the limits stated on the ballot when they voted, the legislature was required to hold the Convention to those limits, and the Convention was then so limited.

The common law authority that is often cited for such a result is that an agent cannot go beyond the authority granted by his principal. In this case, the principal is the people, and the agent is both the legislature and the Convention. (At the beginning of this process, of course, the legislature could have asked the people to vote on the calling of a general convention. A favorable vote on that would have produced a general convention.)

The strongest case concerning limitations on a Convention concerns one in the Commonwealth of Virginia. The legislature called for a Convention limited to the sole subject of provisions for poll taxes as applied to residents of military reservations. Members of the Convention brought a court challenge, saying this was unduly restrictive of the purposes of a Convention.

The Court disagreed. It held that the power to call a gen-

eral Convention included the lesser power to call a Convention limited to only certain subjects. Once the body given the power to call for the Convention has spoken, the Convention then has only such power as it has been granted. /⁴⁶

Related cases that lead to the same general conclusion include *Ellingham v. Dye*, 178 Ind. 336, 97 N.E. 1 (Indiana, 1912). There, the legislature proposed amendments to the Constitution in a manner different from the steps spelled out in the Constitution. The Court barred those amendments from being submitted to the voters, on the grounds that the methods for amending the Indiana Constitution were those contained in its text, until and unless the people saw fit to change those, by using the stated methods to propose and ratify any change.

To similar effect is *Holmes v. Appling*, 237 Or. 546, 392 P2d 636, (Oregon, 1964). The Oregon Constitution contained a provision for the proposal of amendments through the initiative process. Certain residents proposed what was called an "amendment," but in fact, it repealed and reenacted the entire Oregon Constitution.

The Court held that the total rewriting of the Constitution was different in kind from the proposal of one or more amendments. Therefore, even though the proposal had garnered sufficient valid signatures to appear on the ballot, it struck the proposal as being invalid under the terms of the Oregon Constitution.

The leading case on the subject of abiding by the terms of

⁴⁶ See, the Virginia poll tax case, *Staples v. Gilmer*, supra.

the existing Constitution in any effort to amend it, is *State v. Manley*, supra. Alabama had both of the normal provisions: submission of individual amendments to the voters by the legislature, and the calling of a Constitutional Convention, if first approved by the voters. Instead of using either of these provisions, the Alabama legislature completely revised the Constitution, and sought to submit that to the voters for approval.

This Court did perhaps the most thorough job of analysis of any that has ever considered the limitations on amendments to constitutions. It went back to Daniel Webster's arguments on the nature of conventions, and the right of the people to amend or alter their forms of government. It carefully distinguished all contrary cases. And, it concluded that the legislature was bound to follow the terms of the existing Constitution, and ordered that the new Constitution not be submitted to the people.

This Court discussed an aspect of the case which has been raised in some arguments today. Can a new Constitution provide for a new method of proposal or ratification of itself, without that change in the amendment process having been first approved under the preexisting methods? The Court noted that buried in the 40-some pages of this new Constitution was a provision that would allow the legislature in the future to do exactly what it was then attempting, to make complete revisions, rather than propose singular amendments. This was one of the reasons why the Court struck the proposal down.

The Manley Court first discussed *Wheeler v. Fargo School*

District, 37 SE2d 322 (Georgia, 1946), in which the Georgia legislature submitted to a vote a new Constitution that was drafted by it contrary to the terms of the existing Constitution. The legal challenge to this process did not come until after the voters had approved the new Constitution. The Court relied on older cases, going back to the Post-Revolutionary period, when there were few established procedures for amendment of State Constitutions, and decided to let the Constitution stand as valid. The logic of its decision was that the people are sovereign and by their approval can forgive whatever flaws there are in the process prior to that point.

Although Manley represents the majority view among the highest State Courts, Wheeler is a troublesome case, but only at the State level. There is no popular referendum on either specific amendments or a new Constitution at the federal level. The will of the people is represented by the actions of Congress and of the State legislatures (or by special ratifying conventions elected in the States), under the terms of Article V of the Constitution.

The will of the people is first expressed, either by two-thirds of Congress proposing an amendment, or by two-thirds of the State legislatures calling for a Convention.

The handful of cases, like Wheeler, in which a State court has approved a constitutional amendment even though the stated procedures were not followed, all share one characteristic. In each instance, the new constitutional provisions had been ratified before the matter reached the court for review, in one instance

the ratification had been sixteen years earlier.

The posture of these cases therefore put the courts on the horns of a dilemma. They were sitting under the authority of the new constitution. They would have to reach backwards, beyond their own current authority, to strike the new constitution to validate the terms of the old one.

As discussed below, the United States Supreme Court has the ability to act in a matter of months, on matters of urgency. Also, all of the convention procedures bills considered by Congress either expressly mandate accelerated judicial review, or leave intact the normal judicial review standards of the Court.

Therefore, the only way that the Wheeler dilemma could confront the Supreme Court would be if no State, no Congressmen, and no individuals were sufficiently concerned about a possibly invalid amendment to the Constitution to go to court promptly and bring a competent challenge to the process before the amendment was ratified. While it might be theoretically possible for 50 States, 547 Congressmen, and 240 million Americans to remain asleep at the switch for a year or more of ratification, anyone whose argument is based on that occurrence is dealing in the realm of foolishness -- not law, or logic, or constitutionalism.

It is clear that the States can call for a new, general convention, if that is what they want. Only three States have ever done that in our history, and all such calls occurred shortly after the 1787 Convention, from States that were generally dissatisfied with our new Constitution. No State has called for a

general Convention in the 19th or 20th centuries. /⁴⁷

The critical question is whether the States can exercise less than all of their power -- whether they can call for a Convention limited to one or more subjects. At the federal level, there is only the history of the drafting of Article V in Philadelphia, the writings of the Framers, and whatever theories modern experts might graft onto those sources, to answer the question.

But, at the State level, there is ample experience and case law to answer it. If the State legislatures, who are the appointed representatives of the people under Article V, decide that there should be a limited Convention, then that is the voice of the sovereign people, and must be obeyed.

Once the will of the people has been expressed on the nature of a Constitutional Convention, the duties of Congress are ministerial. It can pass a Procedures Bill for the Convention, but it cannot enlarge the mandate of the people concerning the content of the Convention.

Also based on the State experiences, if Congress were so foolish as to attempt to convene a general Convention when the States had demanded only a limited one, the Supreme Court would have both the power and the obligation to strike that law down

⁴⁷ The complete history of the 356 State calls for a national Constitutional Convention, through 1971, is found in the ABA Report, Appendix B, at p. 59. Since that time, there have been additional State calls for a Convention, all limited to specific subjects. The three primary subjects have been school prayer, abortion, and the balanced budget amendments. Only the latter has attracted anything approaching the trigger number of 34 States. It now stands at 32 States, and is being considered in several other States in 1988.

because Congress had exceeded the authority given to it in that situation.

What if Congress obeys the limitations in the State calls and convenes a limited Convention, but for whatever reason the Convention ignores its stated limits and ventures into other areas? Again, based on the State experience, Congress would have the power and the obligation to refuse to submit for ratification any proposed amendments that were outside the mandate of the Convention. The power of Congress to refuse to submit for ratification a proposed amendment that exceeds the mandate of a Convention, is stated in all versions of the Procedures Bills considered to date. If such a Bill is passed, and reviewed and approved by the Supreme Court before a Convention is called, there will be no question of the right of Congress to reject excessive amendments, should the delegates to the Convention violate their oaths of office and the terms of the law under which they meet. /⁴⁸

And lastly, based on the State experience, if the Convention went beyond its mandate and proposed amendments outside its stated subjects, and if Congress decided to submit those amendments for ratification despite that violation of the law, the Supreme Court would have the power and the obligation to order that the excess amendments not be submitted for ratification, and to declare that they would be unconstitutional, even if ratified.

⁴⁸ The non-submission provision in S. 40, in the 99th Congress, for instance, also included a provision for any State to bring an action in the Supreme Court within sixty days, to test the constitutionality of the Congressional decision. See also note 44, supra.

It is clear that there would be a significant Constitutional crisis if those who were concerned about amendments exceeding the Convention's mandate, waited until after such an amendment had been declared as ratified before they brought a challenge in Court. However, no amendment to the Constitution has ever been ratified in less than a year, and that is ample time for individual citizens, or States in their sovereign capacity, or both, to recognize the problem and bring the challenges.

Again, the State experience is instructive. State Courts have demonstrated that they can conduct trials and appellate decisions from start to finish in less than a month, to determine the validity of amendment processes before the matters would be submitted to the voters. The Supreme Court has also demonstrated in urgent cases, such as *U.S. v. Nixon*, 418 US 683, 1974, concerning the Watergate tapes, that it is also capable of very prompt action. If it came down to the final protection against improper action, a Supreme Court decision, it could be made before ratification of any unconstitutional amendment was completed.

In short, much of the "debate" about the calling, controlling, and conduct of Constitutional Conventions at the federal level begins with the assumption that there is a void of both theory and fact on the subject. Into that void various professors have leaped, bearing fistfuls of theories. However, there is more than 200 years of experience in the process of writing and amending State Constitutions. That experience includes both legislative and judicial control of the process.

It is all based on the same two foundations that apply at the federal level. First, the people are sovereign, and their will as expressed through the legal processes, must govern. Second, and flowing directly from the first consideration, the Constitution as it presently exists must be obeyed by all organs and agencies of government at all levels, until such time as the people use the provisions of that Constitution to make changes in it.

George Washington stated the point as well or better than anyone else, when he said in his Farewell Address, "The Constitution is sacredly obligatory upon all, until it is changed by the explicit and authentic act of the whole people." /⁴⁹ That quotation from Washington appears in many of the State Court decisions concerning the amendment process. It appears because the logic of a constitution is the same, whether at the State or federal level.

Every Constitution in the United States represents both the fundamental law of that jurisdiction and the embodiment of the will of the people concerning the structure of their government. The people can change their Constitutions any time they want, in any way they want, but only by the mechanisms that they have already established to make such changes. /⁵⁰

⁴⁹ The text of George Washington's Farewell Address, delivered on 17 September, 1797, is found in the American Jurisprudence Desk Book, among many other sources.

⁵⁰ Interestingly, the amendment process in Article V is the second most common target of the more than 5,000 proposed amendments that have been introduced in Congress over the last two centuries. (The most common target, more than 20% of all proposals, has been the Electoral College method of electing the President, and/or, the number or length of Presidential terms.) In both instances, although there is substantial dissatisfaction with

Anyone who seeks to frustrate the process of constitutional change at the State or federal level, on the basis that it is too dangerous to attempt, is in fact saying that the American people can no longer be trusted with their own fundamental law. Not only is that an attack on the most basic right of all Americans, the right to frame our own governments, it is also contrary to the meaning and purpose of Article V, as 200 years of experience with State Constitutions has amply demonstrated.

In short, the people have a right to say through their State legislatures whether they want a Constitutional Convention, and if so, what limits they want placed on such a Convention. Once the people have spoken, both the Congress and the Supreme Court have an obligation to carry out that will, in accord with its terms. That is the principal lesson that the history of State constitutional revision offers to the nation.

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the present Constitutional provisions, there is no consensus on the mechanism that should replace the original. Therefore, we continue to operate under the provisions of Articles II and V, as written in Philadelphia.

TABLE OF STATE CONSTITUTIONAL AMENDMENT PROVISIONS
AND NUMBER OF CONSTITUTIONS

State	Const's since 1776	Methods of Amendment			
		by Legis.	by Init've	by Con Conv'n	by Con Comm'n
Alabama	6	X*		X	
Alaska	1	X*		X&	
Arizona	1	X	X	X	
Arkansas	5	X			
California	2	X*	X	X	
Colorado	1	X*	X	X	
Connecticut	4	X**		X&	
Delaware	4	X*		X	
Florida	6	X*	X	X	
Georgia	10	X*		X	
Hawaii	1	X**		X&	
Idaho	1	X*		X	
Illinois	4	X*	X	X&	
Indiana	2	X			
Iowa	2	X		X&	
Kansas	1	X*		X	
Kentucky	4	X*		X	
Louisiana	11	X*		X	
Maine	1	X*		X	
Maryland	4	X*		X&	
Massachusetts	1	X	X		
Michigan	4	X*	X	X&	
Minnesota	1	X		X	
Mississippi	4	X*			
Missouri	4	X	X	X&	Y
Montana	2	X*	X	X&	
Nebraska	2	X*	X	X	
Nevada	1	X	X	X	
New Hampshire	2	X*		X&	
New Jersey	3	X**			Y
New Mexico	1	X***		X	
New York	4	X		X&	
North Carolina	3	X*		X	
North Dakota	1	X	X		
Ohio	2	X*	X	X&	

State	Const's since 1776	Methods of Amendment			
		by Legis.	by Init've	by Con Conv'n	by Con Comm'n
Oklahoma	1	x	x	x&	
Oregon	1	x***	x	x	
Pennsylvania	5	x			
Rhode Island	2	x		x&	y
South Carolina	7	x*		x	
South Dakota	1	x	x	x	
Tennessee	3	x*		x	
Texas	5	x			
Utah	1	x		x	
Vermont	3	x			
Virginia	6	x		x	
Washington	1	x		x	
West Virginia	2	x		x	
Wisconsin	1	x		x	
Wyoming	1	x		x	

* A supra-majority is required.

** A supra-majority is required if an amendment is passed by one legislature. A simple majority is required if passed in two sessions.

*** A simple majority is required, except for amendments on certain, specified subjects.

& Requires periodic submission to the voters of whether a constitutional convention should be held. Times range from 9 to 20 years.

y These States used Constitutional Commissions created by Executive Order or statute. Commissions recommend only, their results go back to the legislatures for modification and submission to the voters.

The information above is summarized from Albert Sturm and Janice May's Tables 1.1 through 1.5, in the Book of the States, 1984-1985, pps. 14-22.

APPENDIX A

HISTORY OF THE ADOPTION OF THE 17TH AMENDMENT

The effort to amend the Constitution so that members of the Senate would be popularly elected, rather than appointed by the State legislatures, began in earnest in 1893. Between then and 1910, five times the House of Representatives passed a proposed amendment to make the Senate elective. Five times the proposal died in Committee in the Senate without reaching the floor.

In the meantime, States began passing conditional calls for a Constitutional Convention for the purpose of writing such an amendment. While the language of the State calls varied, the methodology was much the same as current State calls on the balanced budget amendment and other subjects. They called on Congress to act, and in the absence of Congressional action, they called for a Convention. And, also similar to present calls, they employed various language and methods of restricting any such Convention to the subject matter of this one amendment.

At the time, the United States contained 46 States; therefore the trigger number of 2/3rds amounted to 32 States to call for a new Convention. By 1912, 31 of the required 32 States had acted. The Senate then read the handwriting on the wall, and recognized that it had only two choices -- participate in the drafting and passage of the amendment itself, or leave the task to an unrestrained Convention. They ran the risk a Convention could put all unelected Senators out in the street and require the staggered election of a new Senate, as did the original Constitution.

Faced with two undesirable choices, the Senate accepted the lesser of two evils. It passed the 17th Amendment in 1912. However, the Senate included what protective language it could. Section 3 of that Amendment is a grandfather clause, and says, "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid...."

The 17th Amendment was ratified by the States, a year later.

For a more complete discussion of the history of the adoption of the 17th Amendment, and its importance in demonstrating the use and effectiveness of the second half of Article V, see, John C. Armor, "The Right of Peaceful Change: Article V of the Constitution," Tax Limitation Research Foundation, Washington, D.C., 1984, especially the Section entitled, "The Swamp Water Theory."

APPENDIX B

HISTORY OF THE FAILURE OF THE DIRKSEN AMENDMENT

The Dirksen Amendment was proposed by Senator Everett Dirksen of Illinois in 1964, in response to the Supreme Court decisions in *Baker v. Carr*, 369 US 186 (1962), and *Reynolds v. Sims*, 377 US 533 (1964). Between them, these decisions determined that the "one man, one vote" principle applied in State elections, and that no house of any State legislature could be apportioned other than on that basis.

The Dirksen Amendment would have partially reversed those decisions by allowing one house of a bicameral legislature to be "apportioned other than on the basis of population." The common other basis for State Senate Districts at the time was county lines, regardless of population contained in the various counties.

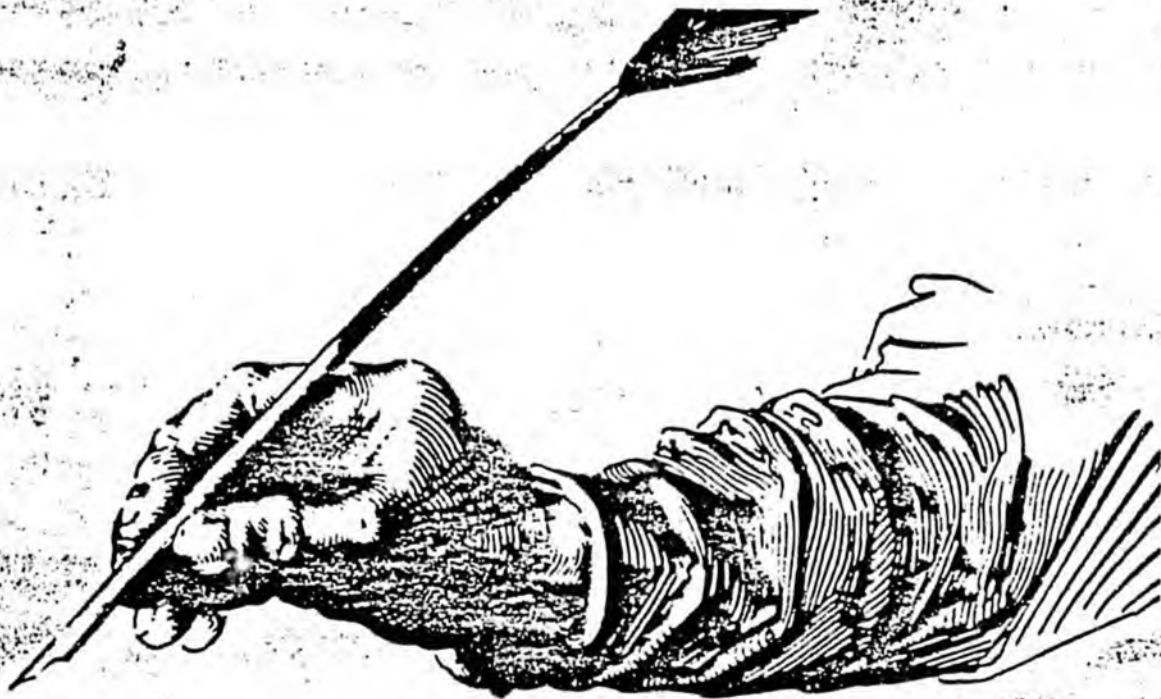
Supported by the Council of State Governments and other institutions, this effort started strongly. By 1967, 32 States (of the then-required 34) passed such calls for a Constitutional Convention on this specific subject. In 1969, an additional State issued a call, but another State rescinded its call, so the number outstanding remained at 32. After that, one more call was passed, but there were a number of rescissions.

A total of 42 calls were passed on this subject, from a total of 34 States. However, because of rescissions there were never 34 calls in effect at any one time. Ultimately, after all State legislatures had been reapportioned pursuant either to law suits based on *Baker* and *Reynolds*, or because of the real possibility of

such suits, the effort to force the adoption of the Dirksen Amendment died away.

There was never a significant possibility that Congress would adopt the Dirksen Amendment except in response to pressure from the State calls for a Convention on this issue. Then as now, a number of the State calls were conditional. They asked for Congress to act and only failing that, asked for a Convention. Then as now, a number of the calls contained various types of restrictive language intended to hold any Convention to the precise subject of the calls, namely State legislative reapportionment.

For a fuller history of the failed effort to adopt the Dirksen Amendment, see the ABA Report, at pps. 2-4, and the Table of State Calls at pps. 60-61.



AMENDMENT OF THE CONSTITUTION
BY THE CONVENTION METHOD UNDER ARTICLE V

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Special
Constitutional
Convention Study
Committee

The Honorable C. Clyde Atkins,
Chairman
P.O. Box 3009
Miami, Florida 33101

Warren Christopher, Esq.
611 West 6th Street
Los Angeles, California 90017

Professor David Dow
University of Nebraska
College of Law
Lincoln, Nebraska 68508

John D. Feerick, Esq.
919 Third Avenue
New York, New York 10022

Adrian M. Foley, Jr., Esq.
Gateway I
Newark, New Jersey 07102

The Honorable Sarah T. Hughes
Federal Courthouse
1100 Commerce Street
Dallas, Texas 75221

Dean Albert M. Sacks
Harvard University Law School
Cambridge, Massachusetts 02138

The Honorable William S. Thompson
Suite 205, Building B
Superior Court of DC
Washington, D.C. 20001

Samuel W. Witwer, Esq.
141 West Jackson Boulevard
Chicago, Illinois 60604

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Clyde Atkins,*
Chairman

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

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

REPORT OF THE ABA SPECIAL CONSTITUTIONAL
CONVENTION STUDY COMMITTEE

Introduction

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

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

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

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

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

has not been a national constitutional convention since 1787, there have been more than 300 applications from state legislatures over the past 184 years seeking such a convention.² Every state, at one time or another, has petitioned Congress for a convention. These state applications have ranged from applications calling for a general convention to a convention dealing with a specific subject, as, for example, slavery, anti-polygamy, presidential tenure, and repeal of prohibition. The pressure generated by numerous petitions for a constitutional convention is believed to have been a factor in motivating Congress to propose the Seventeenth Amendment to change the method of selecting Senators.

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

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

²These applications are classified by subject and state in *Appendix B, Part One*. They are also discussed generally in Barbara Prager's paper, which is also included in *Appendix B, Part Two*.

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

By 1967 thirty-two state legislatures had adopted applications calling for a constitutional convention on the question of apportionment. The wording of these petitions varied. Several sought consideration of an amendment to abolish federal judicial review of state legislative apportionment. Others sought a convention for the purpose of proposing an amendment which would "secure to the people the right of some choice in the method of apportionment of one house of a state legislature on a basis other than population alone." A substantial majority of states requested a convention to propose a specific amendment set forth *haec verba* in their petitions. Even here, there was variation of wording among a few of these state petitions.³

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

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

As the debate on the convention method of initiating amendments continued into 1959, one additional state⁹ submitted an application for a convention on the reapportionment issue while another state adopted a resolution rescinding its previous application.⁹ Thereafter, the effort to call a convention on that issue diminished. Recently, however, the filing of state applications for a convention on the school busing issue has led to a new flurry of discussion on the question of a national constitutional convention.

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

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

After hearings and amendments to the original legislation, Senator Ervin's bill (S.215) passed the Senate by an 84 to 0 vote on October 19, 1971.¹¹ Although there was no action in the House of Representatives in the Ninety-Second Session of Congress, comparable legislation is expected to receive attention in both Houses in the future.+

⁹Making thirty-three in all, including applications from two state legislatures made in 1963.

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

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

- 1) If the legislatures of two-thirds of the states apply for a convention limited to a specific matter, must Congress call such a convention?
- 2) If a convention is called, is the limitation binding on the convention?
- 3) What constitutes a valid application which Congress must count and who is to judge its validity?
- 4) What is the length of time in which applications for a convention will be counted?
- 5) How much power does Congress have as to the scope of a convention? As to procedures such as the selection of delegates? As to the voting requirements at a convention? As to refusing to submit to the states for ratification the product of a convention?
- 6) What are the roles of the President and state governors in the amending process?
- 7) Can a state legislature withdraw an application for a convention once it has been submitted to Congress or rescind a previous ratification of a proposed amendment or a previous rejection?
- 8) Are issues arising in the convention process justiciable?
- 9) Who is to decide questions of ratification?

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

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

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

General

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

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

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

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

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

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

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

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

Specific

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

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

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

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

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

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

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

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

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

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

Authority of
an Article V
Convention

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

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

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

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

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

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

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

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

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

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

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

²³Mason's draft of the Constitution, as it stood at that point in the Convention, contained the following notations: "Article 5th - By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." 2 The Records of the Federal Convention of 1787, at 529 n. 8 (Farrand ed. 1937)

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁸Note the similarity between this language (*emendatio puris*) and the language contained in the earliest drafts of Article V (p. 12, *supra*).