

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
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amendment of the Articles of Confederation. The limited authority of the Annapolis Commissioners, however, was made clear:

"If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.

* * *

"Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to Represent, they have nevertheless included from motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States."

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

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

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

And another:

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

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

Power of
Congress with
Respect to an
Article V
Convention

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judicial Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Role
of Executive
(i) President

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

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

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

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

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

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

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

(ii) State
Governor

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

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

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

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

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

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

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

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

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

Article V
Applications
(i) Content

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

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

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

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

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

(ii) Timeliness

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

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

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

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

A uniform rule, as in the case of ratification of proposed amendments since 1913,⁶⁶ would add certainty and avoid the type of confusion which surrounded the apportionment applications. Any rule adopted, however, must take into account the fact that some state legislatures do not meet every year and that in many states the legislative sessions end early in the year.

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

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

(iii) Withdrawal
of
Applications

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

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

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

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

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

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

The
Article V
Convention
(i) Election
of
Delegates

*That is, the reapportionment and tax limitation applications.

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

(ii) Appor-
tionment
of
Delegates

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Members
of
Congress
as
Delegates

We cannot discern any federal constitutional bar against a member of Congress serving as a delegate to a national constitutional convention. We do not believe that the provision of Article I, Section 6 prohibiting congressmen from holding offices under the United States would be held applicable to service as a convention delegate. The available precedents suggest that an "office of the United States" must be created under the appointive provisions of Article II⁷⁸ or involve duties and functions in one of the three branches of government which, if accepted by a member of Congress, would constitute an encroachment on the principle of separation of powers underlying our governmental system.⁷⁹ It is hard to see how a state-elected delegate to a national constitutional convention is within the contemplation of this provision. It is noteworthy in this regard that several delegates to the Constitutional Convention of 1787 were members of the Continental Congress and that the Articles of Confederation contained a clause similar to Article I, Section 6.

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

Ratification

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

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

The difficult legal and policy question is whether a state can withdraw a ratification of a proposed amendment. There is a view that Article V envisions only affirmative acts and that once the act of ratification has taken place in a state, that state has exhausted its power with respect to the amendment in question.⁸⁰ In support, it is pointed out that where the convention method of ratification is chosen, the state constitutional convention would not have the ability to withdraw its ratification after it had disbanded. Consequently, it is suggested that a state legislature does not have the power to withdraw a ratification vote. This suggestion has found support in a few state court decisions⁸¹ and in the action of Congress declaring the ratification of the Fourteenth Amendment valid despite ratification rejections in two of the states making up the three-fourths.

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

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

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

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

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

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

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

Respectfully submitted,

SPECIAL CONSTITUTIONAL CONVENTION
STUDY COMMITTEE

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July, 1973

¹² J. Story, *Commentaries on the Constitution of the United States* § 1826 (5th ed. 1905).

¹³ *The Federalist No. 43*, at 204 (Hallowell; Masters, Smith & Co. ed. 1852) (J. Madison).

¹⁴ J. Wheeler, *The Constitutional Convention: A Manual on its Planning, Organization and Operation* xiii (National Municipal League Series 1, No. 4 1961); see R. Hoar, *Constitutional Conventions* 1-3 (1917).

¹⁵ See A. Sturm, *Thirty Years of State Constitution Making: 1938-1968*, at 51-80, 132-37 (National Municipal League 1970).

¹⁶ 369 U.S. 186 (1962).

¹⁷ 377 U.S. 533 (1964).

¹⁸ See Black, "The Proposed Amendment of Article V: A Threatened Disaster," 72 *Yale L.J.* 957 (1963); Fensterwald, "Constitutional Law: The States and the Amending Process - A Reply," 46 *A.B.A.J.* 717 (1960); Oberst, "The Genesis of the Three States-Rights Amendments of 1963," 39 *Notre Dame Lawyer* 644 (1964); Shanahan, "Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations," 49 *A.B.A.J.* 631 (1963).

¹⁹ See American Enterprise Institute, *A Convention to Amend the Constitution: Questions Involved in Calling a Convention Upon Applications by State Legislatures* (Special Analysis No. 5, 1967).

²⁰ See Martin, "The Application Clause of Article Five," 85 *Pol. Sci. Q.* 616, 626 (1970).

²¹ Ervin, "Proposed Legislation to Implement the Convention Method of Amending the Constitution," 66 *Mich. L. Rev.* 875, 878 (1968).

²² See Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967); S. Rep. No. 336, 92nd Cong., 1st Sess. (1971); 117 *Cong. Rec.* 36803-06 (1971).

²³ The literature in this field deals with various proposals to "reform" Article V by easing, restricting, or otherwise altering the means of proposing amendments to the Constitution through the convention method. See, e.g., L. Orfield, *The Amending of the Federal Constitution*, Chao, VI (1942); McCleskey, "Along the Midway: Some Thoughts on Democratic Constitution-Amending," 66 *Mich. L. Rev.* 1001, 1012-16 (1968).

²⁴ On the other hand, some have suggested that state legislatures will be less likely to seek a national constitutional convention if they are more aware of the risks and uncertainties of the convention method. See, e.g., Buckwalter, "Constitutional Conventions and State Legislators," 20 *J. Pub. Law* 543 (1971).

²⁵ J. Wheeler, *supra* note 3, at xv. There have been occasions on which state constitutional conventions have successfully exceeded limitations placed upon them. Conventions in Georgia (1789), Illinois (1862 and 1869), Pennsylvania (1872), Alabama (1901) and Michigan (1907) all violated legislative directives - either procedur-

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

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

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

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

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

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

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

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

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

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

²⁰ 2 *Id.* 188 (emphasis added).

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

²² 2 *Farrand* 558.

²³ *Id.* 559.

²⁴ *Id.* 629.

²⁵ *Id.* 629, 630.

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

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

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

¹⁹Ga. Const. art. LXIII (1777), at 1 B. Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 383 (1878) [hereinafter cited as *Poore*].

²⁰Pa. Const. § 47 (1776), at 2 *Poore* 1548. Vermont's Constitution of 1786 contained a similar amending article.

²¹"Documents Illustrative of the Formation of the Union of the American States," H. Doc. No. 398, 69th Cong., 1st Sess. 41-43 (1927).

²²A. Sturm, *Methods of State Constitutional Reform* 102 (1954); R. Hoar, *supra* note 3, at 71, 120-1; Dodd, "State Constitutional Conventions and State Legislative Power," 2 *Vand. L. Rev.* 27 (1948). The following state cases support the proposition: *Opinion of the Justices*, 264 A.2d 342 (Del. 1970); *Chenault v. Carter*, 332 S.W.2d 623 (Ky. 1960); *State v. American Sugar Refining Co.*, 137 La. 407, 68 So. 742 (1915); *Opinion of the Justices*, 60 Mass. 133 (1833); *Erwin v. Nolan*, 280 Mo. 401, 217 S.W. 837 (1920); *State ex rel. Kvaalen v. Graybill*, 496 P.2d 1127 (Mont. 1972); *Wood's Appeal*, 75 Pa. 59 (1874); *Wells v. Bain*, 75 Pa. 39 (1873); *In re Opinion of the Governor*, 55 R.I. 56, 178 A. 433 (1935); *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 313 (1949); *Quinlan v. Houston and Texas Central Ry. Co.*, 89 Tex. 356, 34 S.W. 738 (1896); *Staples v. Gilmer*, 183 Va. 613, 33 S.E.2d 158, 158 A.L.R. 495 (1945). See Annot. "Power of state legislature to limit the power of a state constitutional convention," 158 A.L.R. 512 (1945).

²³Roger Hoar has expressed it this way:

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

²⁴*State v. American Sugar Refining Company*, 137 La. 407, 415, 68 So. 742, 745 (1915).

²⁵*State ex rel. McCready v. Hunt*, 25 S.C. (2 Hill's Law) 1, 271 (1834).

²⁶Nearly 15% of the total number of state constitutional conventions called have been substantively limited in one or more respects. The limited or restricted state constitutional convention has been used frequently since World War II. See A. Sturm, *supra* note 4, at 56-60, 113; A. Sturm, "State Constitutions and Constitutional Revision, 1900-1971," in Council of State Gov'ts, *The Book of the States, 1972-1973*, at 20 (1972).

²⁷256 U.S. 368 (1921)

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

²⁹As Justice Felix Frankfurter has observed: "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945). It is not surprising, therefore, that procedural limitations on conventions have been invalidated. See *Carton v. Secretary of State*, 151 Mich. 337, 115 N.W. 429 (1908); *Goodrich v. Moore*, 2 Minn. 61 (1858). See also Jameson, *supra* note 17, at 364; Dodd, *supra* note 32, at 31, 33.

³⁰A number of the Congressional Acts providing for territorial conventions did prescribe that the convention must determine by a majority of the whole number of delegates whether it was expedient for the territory to form a constitution and state government. No such requirement, however, was imposed on the conventions in their

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

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

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

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

⁴²74 U.S. (17 Wall.) 506 (1869), criticized in *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

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

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

⁴⁵307 U.S. 433 (1939).

⁴⁶369 U.S. 186 (1962).

⁴⁷*Id.* 217.

⁴⁸395 U.S. 486 (1969).

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

⁵⁰3 U.S. (3 Dall.) 378 (1798).

⁵¹*Id.* 380 n.1a).

⁵²111 Journal of the Senate 323 (1803) (motion defeated by a vote of 23 to 7).

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

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

⁵⁵253 U.S. 221 (1920).

⁵⁶*Id.* 227.

⁵⁷285 U.S. 355 (1932).

⁵⁸*Id.* 365, 366.

¹⁹ See *Coleman v. Miller*, 146 Kan. 390, 71 P.2d 518 (1937), *aff'd*, 307 U.S. 433 (1939), upholding the right of a lieutenant governor to cast the tie-breaking vote in the state senate on the ratification of the proposed child labor amendment. In affirming, the United States Supreme Court expressed no opinion as to the propriety of the lieutenant governor's participation.

²⁰ The results of a questionnaire-type inquiry which we sent to the fifty states indicate that a substantial majority exclude the governor from participation and that in a number that include him it is not clear whether his inclusion is simply a matter of form. Historically, it appears that the governor generally has not played a role in these processes, although there are exceptions to this rule. See Myers, "The Process of Constitutional Amendment," S. Doc. No. 314, 76th Cong., 3rd Sess., 18 n.47 (1940), wherein it is stated that governors gave 44 approvals in the ratifications of 15 amendments. Whether the approvals were simply a matter of form or were required as a matter of state law is not clear. In several cases there were gubernatorial vetoes of ratifications, including the governor of New Hampshire's attempted veto of his state's ratification of the twelfth amendment.

²¹ H. Ames, "The Proposed Amendments to the Constitution of the United States During the First Century of Its History," H. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., 298 (1897); Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," 39 Notre Dame Lawyer 659, 664-65 (1964); Buckwalter, *supra* note 13, at 551; Brickfield, Staff of House Committee on the Judiciary, 85th Cong., 1st Sess., "Problems Relating to a Federal Constitutional Convention" 7-9 (Comm. Print 1957); Note, "Proposing Amendments to the United States Constitution by Convention," 70 Harv. L. Rev. 1067, 1075 (1957). *See compare* 69 Op. Att'y Gen. of Okla. 200 (1969), in 115 Cong. Rec. 23780 (1969), with *In re Opinion of the Justices*, 118 Maine 544, 107 A. 673 (1919). *See generally* Dodd, *The Revision and Amendment of State Constitutions* 148-55 (1910); Hoar, *supra* note 3, at 90-93; Orfield, *supra* note 12, at 50 & n.30, 66 & n.89.

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

²³ Brickfield, *supra* note 61, at 11-12.

²⁴ 256 U.S. 368, 375 (1921).

²⁵ 307 U.S. 433, 453-54 (1939).

²⁶ Beginning with the proposal of the eighteenth amendment, Congress has, either in the amendment or proposing resolution, included a provision requiring ratification within seven years from the time of the submission to the states.

²⁷ See, e.g., Note "Rescinding Memorialization Resolutions," 30 Chi.-Kent L. Rev. 339 (1952).

²⁸ 297 U.S. 50 (1970).

²⁹ *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 93 S. Ct. 904 (1973).

³⁰ *Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791, 794 (1965).

³¹ See *Forty-Second Legislative Assembly v. Lennon*, 481 P.2d 330 (Mont. 1971); *Jackman v. Bodine*, 43 N.J. 453, 470, 476-77, 205 A.2d 713, 722, 726 (1964). In *Butterworm v. Demsey*, 237 F. Supp. 302 (D. Conn. 1965), a federal court ordered, without indicating the basis for it, apportionment of convention delegates on a one-person, one-vote basis. *See also* *State v. State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968), where a section of the state constitution, requiring that any amendments to that constitu-

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

¹⁷ 376 U.S. 1 (1964).

¹⁸ See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also *United States v. Pipefitters*, 434 F.2d 1116, 1124 (8th Cir. 1971); *United States v. Synnes*, 438 F.2d 764, 771 (8th Cir. 1971); *Henderson v. ASOS, Macon County, Alabama*, 317 F. Supp. 430, 434-35 (M.D. Ala. 1970). See generally *Griffin v. Richardson*, 346 F. Supp. 1226, 1232-33 (D. Md. 1972).

¹⁹ 93 S.Ct. 979 (1973).

²⁰ 403 U.S. 182 (1971).

²¹ 394 U.S. 526, 531 (1968).

²² The present 1970 census establishes the mean population of congressional districts as approximately 467,000. As Alaska has a population of approximately 302,000, the absolute differential is over 50%. There are similar disparities in some states with two representatives (e.g., South Dakota's two Congressmen each represent 333,000 people), but they are not as great.

²³ See *United States v. Germaine*, 99 U.S. 508 (1878); *United States v. Mouat*, 124 U.S. 303 (1888); *United States v. Smith*, 124 U.S. 525 (1888). See generally 1 *Hinds, Precedents of the House of Representatives* § 493 (1907). In *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 439, 229 A.2d 388, 395 (1967), the court held that a delegate to a state constitutional convention was not an "officer" so that a member of the legislature was not guilty of dual office-holding when he simultaneously served as a delegate, accord, *Livingston v. Ogilvie*, 43 Ill.2d 9, 250 N.E.2d 138 (1969). But see *Forty-Second Legislative Assembly v. Lennon*, 461 P.2d 330 (Mont. 1971); *State v. Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935).

²⁴ See 1 *Farrand* 376; *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971).

²⁵ Jameson, *supra* note 17, at §§ 582-584; Dodd, "Amendment to the Federal Constitution," 30 *Yale L.J.* 321, 346 (1919).

²⁶ *Wise v. Chandler*, 270 Ky. 1, 108 S.W.2d 1150 (1937), holding that state legislative rejection of a proposed constitutional amendment cannot be reconsidered; *Coleman v. Miller*, 145 Kan. 390, 71 P.2d 518 (1937) (dicta). The issue was discussed, though not passed on by the Court, in Chief Justice Hughes' opinion in *Coleman v. Miller*, 307 U.S. 433, 447-50 (1932).

²⁷ This rule would take precedence over the action of Congress in refusing to permit New Jersey and Ohio to rescind their ratifications of the fourteenth amendment. The right to ratify after a previous rejection would confirm precedents established in connection with the ratification of the Thirteenth and Fourteenth Amendments. See generally Myers, *The Process of Constitutional Amendment*, S. Doc. No. 314, 76th Cong., 3rd Sess. (1940).

²⁸ S. Rep. No. 336, 92nd Cong., 1st Sess. 2 (1971).

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

93rd Congress
1st Session
S. 1272

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

COMMENTS

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

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

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

A BILL

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

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

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

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

APPLICATION PROCEDURE

Sec.3

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

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

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

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

TRANSMITTAL OF APPLICATIONS

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

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

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

(1) the title of the resolution;

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

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

(3)

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

(4)

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

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

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

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

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

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

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

(d)

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

EFFECTIVE PERIOD OF APPLICATION

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

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

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

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

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

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

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

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

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

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

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

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

CALLING OF A CONSTITUTIONAL CONVENTION

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

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

DELEGATES

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

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

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

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

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

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

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

CONVENING THE CONVENTION

SEC. 8. (a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not

named or described in the concurrent resolution of the Congress by which the convention was called. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

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

(c) The Administrator of General Services shall provide such facilities, and the Congress and each executive department and agency shall provide such information and assistance, as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

The Committee agrees with the principle that each delegate have one vote.

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

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

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

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

PROPOSAL OF AMENDMENTS

(a) The Committee believes that Congress should not impose a vote requirement on a convention. It views as unwise and of questionable validity any attempt to regulate the internal pro-

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

cedures of a convention. It also notes that the vote requirement in S.1272 based on the total number of delegates is more stringent than that required for amendments proposed by Congress. See pages 17 to 20 of this report.

(b) See our comments to Section 2 with regard to the underlining and our comments to Section 3(b) as for the deletions.

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

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

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

(b) The position that the President has no place in this process is discussed at pages 25 to 28.

(b) (1) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to (a) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or (B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called, or because the procedures followed by the convention

As for the language "relates to or includes a subject" in (B), see our comments to Section 2.

in proposing the amendment were not in substantial conformity with the provisions of this Act. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligations imposed upon them by the first sentence of this paragraph.

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

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

RATIFICATION OF PROPOSED AMENDMENTS

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

(b) It is not clear whether this section would accept any special limitation adopted by a state with respect to ratification, other than the assent of the governor or any other body. See our comments to Section 3(a).

The exclusion of the governor from the process, with which we agree, is discussed at pages 28 to 30.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the *State legislatures shall adopt their own rules of procedure*. Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amend-

ment to the Constitution shall become valid when ratified by the legislatures of three-fourths of the several States within seven years from the date of the submission thereof to the States, or within such other period of time as may be prescribed by such proposed amendment.

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

RECISSION OF RATIFICATIONS

(a)-(b) As discussed at pages 37 and 38, the Committee agrees with the principle permitting a state to rescind a ratification or rejection vote.

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

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

(c) See our comments to Section 31b).

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

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

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

EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified,

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

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

(c) See our comments to Section 31(b).

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

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EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified,

in proposing the amendment were not in substantial conformity with the provisions of this Act. No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason, or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligations imposed upon them by the first sentence of this paragraph.

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

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

RATIFICATION OF PROPOSED AMENDMENTS

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

(b) It is not clear whether this section would accept any special limitation adopted by a state with respect to ratification, other than the assent of the governor or any other body. See our comments to Section 3(a).

The exclusion of the governor from the process, with which we agree, is discussed at pages 28 to 30.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the State legislatures shall adopt their own rules of procedure. Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Except as otherwise prescribed by concurrent resolution of the Congress, any proposed amend-

then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

JUDICIAL REVIEW

New. The purpose of our proposed Section 16 is to provide limited judicial review of controversies arising under S.1272. The procedural framework of the bill sets forth clear standards for adjudication of many of the potential controversies, and to this extent judicial interpretation of the act does not differ from the normal role of the courts. Moreover, determinations such as the similarity of applications or the conformity of proposed amendments to the scope of the convention call are no more difficult than, say, interpretation of the general language of the antitrust laws or the securities acts. The fact that these questions occur in a constitutional context does not diminish the skill of the Bench to interpret and develop the law in light of the factual situations of a given controversy.

Selection of a three-judge district court as the initial forum for controversies acknowledges that many controversies may be essentially state questions. For example, Congress might reject an application because of a defect in the composition of the state legislature. *Cf., Peruskey v. Rampson*, 307 F. Supp. 231, 235 (D. Utah 1969), *aff'd*, 431 F. 2d 378 (10th Cir. 1970), *cert. denied*, 401 U.S. 913. In this instance, it seems preferable to provide that the district court, schooled in state matters, make the initial review. Appeal from three-judge courts would lie in the United States Supreme Court.

[SEC. 16. (a) Determinations and findings made by Congress pursuant to the Act shall be binding and final unless clearly erroneous. Any person aggrieved by any such determination or finding or by any failure of Congress to make a determination or finding within the periods provided in this Act may bring an action in a district court of the United States in accordance with 28 U.S.C. § 1331 and 28 U.S.C. § 2201 without regard to the amount in controversy. The action may be brought against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. The district courts of the United States shall have exclusive jurisdiction of any proceedings instituted pursuant to this Act, and such proceedings shall be heard and determined by three judges in accordance with 28 U.S.C. § 2284. Any appeal shall be to the Supreme Court.]

New This subsection would establish a short limitation period. Since the introduction of judicial review should not be allowed to delay the amending process unduly, any claim must be raised promptly. The limitations period combined with expedited judicial procedures is designed to result in early presentation and resolution of any dispute.

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

Article V Applications Submitted Since 1789

PART ONE: A Tabulation of Applications
by States and Subjects

By Barbara Prager and Gregory Milmoë*

A Note on the
Table:

This table is offered as a comprehensive compilation of Article V applications categorized by state and by application content. The table maximizes the number of applications, *i.e.*, whenever any source recognizes an application, it has been included in this table. For this reason it must be emphasized that the totals are valuable only as an overview and not for the purpose of determining whether two-thirds of the states have applied for a convention on any given category.

Allowing for slight semantic differences among the authorities consulted, the categories used are, for the most part, generally accepted. Any readily discernible differences are set forth in the notes below. A more serious problem is the sometimes sharp disparity among the sources consulted with regard to what should be recognized as an application. Rather than attempt to make definitive judgments as to what applications should be treated as such, we have set out in the notes below the generally recognized applications followed by the applications recognized by particular sources.

A total of six sources were selected for consultation in the preparation of this table. They are:

(continued on page 52)

*Barbara Prager is a student at New York Law School and Gregory Milmoë a student at Fordham Law School. We are deeply grateful to them for their time and efforts in preparing these documents for our Committee and are pleased to have them accompany our report. We believe they present an excellent overview of the types of applications which have been submitted to Congress since the adoption of the Constitution.

MISSISSIPPI					1					1		1					2		2	7	
MISSOURI	1	3							1			2							1	8	
MONTANA		6	1		1		1					2			1				1	13	
NEBRASKA		4	1		1							1			1	1				9	
NEVADA		6		1	1							3						1		12	
NEW HAMPSHIRE			1		2							1						1		5	
NEW JERSEY	1	1		1	1	1												1		7	
NEW MEXICO					1							1								2	
NEW YORK	1		1	1															2	5	
NORTH CAROLINA	1	2				1						1								5	
NORTH DAKOTA		1	1									2		1				1		6	
OHIO	1	2	1															2		6	
OKLAHOMA		1	1		1				1			2			1			1		8	
OREGON	1	6	1															1		10	
PENNSYLVANIA		1	2		1														1	5	
RHODE ISLAND					1							1						1		4	
SOUTH CAROLINA	1		1		1				1			2	1							7	
SOUTH DAKOTA		3	1		1				3			2			1			1		12	
TENNESSEE		4	1		1							1							1	9	
TEXAS	1	2	1		1				2			2			1		1	1		15	
UTAH		1			1							2			1					5	
VERMONT			1																	1	
VIRGINIA	2				1				1	1		2					1		1	10	
WASHINGTON	1	1	2									1								5	
WEST VIRGINIA			1															1		2	
WISCONSIN	2	3	1	1	1		1								1					11	
WYOMING		1			2				1			1	1							7	
TOTAL APPLICATIONS BY SUBJECT	18	75	30	5	42	8	5	3	19	6	4	54	5	4	11	3	21	7	4	36	356

Twenty Categories of Applications:	GENERAL	DIRECT ELECTION OF SENATORS	ANTI-POLYGAMY	REPEAL OF PROHIBITION 21ST AMEND.	LIMITATION OF FED. TAXING, REPEAL 16TH AMEND.	WORLD FEDERAL GOVERNMENT	LIMIT PRESIDENTIAL TENURE	TREATY MAKING	REVISION OF ARTICLE V	EXCLUSIVE STATE JURISDICTION OVER SCHOOLS	SUPREME COURT DECISIONS	APPORTIONMENT	COURT OF THE UNION	PRAYER IN SCHOOLS	REDISTRIB. OF PRES. ELECTORS	PRESIDENTIAL DISABILITY & SUCCESSION	REVENUE SHARING	FREEDOM OF CHOICE OF SCHOOLS	PROHIBIT STATE OR MUNI. BOND TAX	MISC.	TOTALS BY STATE	
ALABAMA					1							2	1				1			3	8	
ALASKA												1										1
ARIZONA												1		1								2
ARKANSAS		3			1				1		1	2	1		1					1		11
CALIFORNIA		3	1			1						1								3		9
COLORADO		1			1							2			1	1				1		7
CONNECTICUT			1			1														1		3
DELAWARE			1		1												1					3
FLORIDA					1	3		1	1		1	1	1				2			1		12
GEORGIA	1				1			1		3	1	1					1					9
HAWAII																			1			1
IDAHO		2			1				2			2								2		9
ILLINOIS	1	3	1		1		1		2			2			1		1			1		14
INDIANA	1	1			2			1	1			2								1		9
IOWA		4	1		2		1					1					1					10
KANSAS		4			1				1			2			1							9
KENTUCKY	2	1			1							1										5
LOUISIANA		1	1		2					1	1	1					2	1	1	2		13
MAINE		1	1		2	1											1					6
MARYLAND			2		1							1		1			1					6
MASSACHUSETTS				1	1									1						3		6
MICHIGAN		1	1		2		1		1									1				7
MINNESOTA		2	1									1										4

(continued from page 59)

Buckwalter, "Constitutional Conventions and State Legislators," 20 J.Pub.L. 543 (1971) [hereinafter cited as *Buckwalter*]; *Graham*, "The Role of the States in Proposing Constitutional Amendments," 49 A.B.A.J. 1175 (1963) [hereinafter cited as *Graham*]; E. Hutton, State Applications to Congress Calling for Conventions to Propose Constitutional Amendments (January 1963 to June 8, 1973), June 12, 1973 (Library of Congress, Congressional Research Service, American Law Division Paper) [hereinafter cited as *Library of Congress Study*]; *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 115-18 (1967) [hereinafter cited as *1967 Hearings*]; Tydings, *Federal Constitutional Convention*, S. Doc. No. 78, 71st Cong., 2d Sess. (1930) [hereinafter cited as *1930 S.Doc.*]; and W. Pullen, "The Application Clause of the Amending Provision of the Constitution," 1951 (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as *Pullen*].

It should be noted that certain of the studies consider only limited time periods and, therefore, were consulted only for the time periods indicated: *Buckwalter* (1788-1971); *Graham* (1788-1963); *Library of Congress Study* (1963-73); *1967 Hearings* (1963-67); *1930 S. Doc.* (1788-1911); *Pullen* (1788-1951).

General

Buckwalter, *Pullen*, *1930 S. Doc.* and *Graham* were consulted. All sources cite: Ga. 1832; Mo. 1907; N.Y. 1789; Tex. 1899; Ga. 1788; Wis. 1929.

Buckwalter, *Pullen* and *Graham* cite: Ill. 1861; Ind. 1861; Ky. 1861; Ohio 1861; Wash. 1901; Wis. 1911.

Buckwalter and *Graham* cite: Va. 1861.

Pullen cites: Ky. 1863; N.J. 1861; N.C. 1866; Ore. 1864; S.C. 1832.

Buckwalter apparently categorized 15 applications as "General" applications, which he also included in his "Direct Election of Senators" category. They are: Colo. 1901; Ill. 1903; Iowa 1907, 1909; Kan. 1901, 1905, 1907; La. 1907; Mont. 1911; Neb. 1907; Nev. 1907; N.C. 1907; Okla. 1908; Ore. 1901; Wash. 1903.

Direct
Election of
Senators

Pullen, Graham, 1930 S. Doc., and Buckwalter were consulted. All sources cite: Ark. 1901, 1903; Cal. 1903, 1911; Colo. 1901; Idaho 1903; Ill. 1903, 1907, 1909; Ind. 1907; Idaho 1901*; Iowa 1904, 1909; Kan. 1907; Ky. 1902; La. 1907; Me. 1911; Mich. 1901; Minn. 1901; Mo. 1901, 1905; Mont. 1901, 1905, 1907, 1911; Neb. 1893, 1901, 1903, 1907; Nev. 1901, 1903, 1907; N.J. 1907; N.C. 1901, 1907; Ore. 1901, 1903, 1909; Pa. 1901; S.D. 1901, 1907, 1909; Tenn. 1901, 1905; Tex. 1901; Utah 1903; Wash. 1903; Wis. 1903, 1907.

Pullen, Graham and Buckwalter cite: Ark. 1911; Iowa 1907; Minn. 1911; Mo. 1903; Mont. 1903; Nev. 1905; N.D. 1903; Ohio 1908, 1911; Okla. 1908 [1930 S. Doc. dated this application 1909]; Tenn. 1903; Tex. 1911.

Graham, Buckwalter and 1930 S. Doc. cite: Kan. 1901; Wyo. 1895.

Graham and Buckwalter cite: Kan. 1905, 1909; Mont. 1908; Wis. 1908; Ore. 1907.

Pullen, Graham and 1930 S. Doc. cite: [as second applications] Ore. 1901, 1903.

1930 S. Doc. cites: [second applications] Iowa 1904.

Pullen cites: [second applications] Cal. 1911; Tenn. 1901; Nev. 1901; Iowa 1911; Ore. 1909.

**Graham, Pullen and 1930 S. Doc.* note that this application proposed the direct election of the President and Vice President as well as Senators.

Anti-
Polygamy

Pullen, Graham, Buckwalter and 1930 S. Doc. were consulted. All sources cite: Del. 1907; Ill. 1913; Mich. 1913; Mont. 1911; Neb. 1911; N.Y. 1906; Ohio 1911; S.D. 1909; Tenn. 1911; Vt. 1912; Wash. 1909; Wis. 1913.

Pullen, Graham, and Buckwalter cite: Cal. 1909; Conn. 1915; Iowa 1906; La. 1916; Me. 1907; Md. 1908, 1914; Minn. 1909; N.H. 1911; Okla. 1911; Ore. 1913; Pa. 1907, 1913; S.C. 1915; Tex. 1911; W. Va. 1907.

Graham and Buckwalter cite: N.D. 1907; Wash. 1910.

Repeal of
Prohibition

Pullen, Buckwalter and Graham were consulted.
All sources cite: Mass. 1931; Nev. 1925; N.J. 1932;
N.Y. 1931; Wis. 1931.

Limitation of
Federal Tax-
ing Power and
Repeal of 16th
Amendment

Graham and Buckwalter were consulted.* All
sources cite: Ala. 1943^r; Ark. 1943^r; Del. 1943;
Fla. 1951; Ga. 1952^(a)*; Ill. 1943^r; Ind. 1943,
1957; Iowa 1941^r 1951; Kan. 1951; Ky. 1944^r;
La. 1950^r; Me. 1941, 1951^r; Mass. 1941^r; Mich.
1941, 1949; Miss. 1940; Neb. 1949^r; N.H. 1943,
1951; N.J. 1944^r; N.M. 1951; Nev. 1960^(a); Okla.
1955; Pa. 1943; R.I. 1940^r; Utah 1951; Va.
1952^(a)*; Wis. 1943^r; Wyo. 1939; S.C. 1962^(a).

+Packard, "Constitutional Law; The States and the
Amending Process," 45 A.B.A.J. 161 (1959),
limiting his discussion to this subject, lists applica-
tions (undated) from: Idaho, Mont., S.D. and
Tenn., none of which are cited by any other source.

Graham cites: Colo. 1963; La. 1960^(a); Md. 1939;
Tex. 1961^(a); Wyo. 1959^(a).

^(a) Repeal of 16th Amendment.

**Graham* cites these as Repeal applications while
Buckwalter merely cites them as tax limitation
applications.

r = Rescinded

World
Federal
Government

Pullen, Graham, and Buckwalter were consulted.
All sources cite: Cal. 1949*; Conn. 1949; Fla.
1949; Me. 1949; N.J. 1949*; N.C. 1949*

Graham and Buckwalter cite: Fla. 1943, 1945.

* Rescinded

Limit
Presidential
Tenure

Pullen, Graham, and Buckwalter were consulted.
All sources cite: Ill. 1943; Iowa. 1943; Mich. 1943;
Mont. 1947; Wis. 1943.

Treaty
Making
of the
President

Pullen, Graham, and Buckwalter were consulted.
All sources cite: Fla. 1945.

Buckwalter and Graham cite: Ga. 1952; Ind. 1957.

Revision of
Article V

*Buckwalter, Graham, and Library of Congress
Study** were consulted. All sources cite: Ark.
1963; Fla. 1963; Idaho 1963; Ill. 1963; Kan.
1963^r; Mo. 1963; Okla. 1963; S.C. 1963; S.D.
1963; Tex. 1963; Wyo. 1963.

Buckwalter and *Graham* cite: Idaho 1957; Ill. 1953; Ind. 1957; Mich. 1956; S.D. 1953, 1955; Tex. 1955.

*The *Graham* study continued through 1963, while the *Library of Congress Study* began in 1963.

r = Rescinded

Buckwalter and *Library of Congress Study* cite: Va. 1965.

Give States
Exclusive
Jurisdiction
Over Public
Schools

Buckwalter, *Graham* and *Library of Congress Study* were consulted.

Buckwalter and *Graham* cite: Ga. 1955, 1959.

Buckwalter and *Library of Congress Study* cite: Ga. 1965; La. 1965; Miss. 1965.

Graham cites: Va. 1960*

*The *Graham* study continued through 1963, while the *Library of Congress Study* began in 1963.

Supreme
Court
Decisions

Graham was the only source consulted.

Graham cites: Ark. 1961; Fla. 1957; Ga. 1961; La. 1960.

Apportion-
ment

Buckwalter, *1967 Hearings*, and *Library of Congress Study* were consulted. All sources cite: Ala. 1965; Ariz. 1965; Ark. 1963, 1965; Colo. 1965; Fla. 1965; Idaho 1963, 1965; Ill. 1967; Ind. 1967; Kan. 1963^f, 1965^f; Ky. 1965; Md. 1965; Minn. 1965; Miss. 1965; Mo. 1963, 1965; Mont. 1963, 1965; Neb. 1965; Nev. 1963, 1967; N.H. 1965; N.M. 1966; N.C. 1965; N.D. 1967; Okla. 1965; S.C. 1965; S.D. 1965; Tenn. 1966; Tex. 1963, 1965; Utah 1965; Va. 1964, 1965; Wash. 1963; Wyo. 1963.

Buckwalter and *Library of Congress Study* cite: Ala. 1966; Colo. 1967; Iowa 1969; Ill. 1965; N.D. 1965.

Buckwalter and *1967 Hearings* cite: Ca. 1965; La. 1965; S.C. 1963.

Library of Congress Study and *1967 Hearings* cite: S.D. 1963.

Buckwalter cites: Ind. 1957.

Library of Congress Study cites: Alaska 1965; Cal.

1965; Nev. 1965; Okla. 1963; R.I. 1965; Utah 1963.

r = Rescinded

Court of
the Union

Graham, Library of Congress Study, and Buckwalter were consulted. All sources cite: Ala. 1963; Ark. 1963; Fla. 1963.

Graham and Buckwalter cite: S.C. 1963; Wyo. 1963.

Prayer in
Schools

Buckwalter and Library of Congress Study were consulted. All sources cite: Mass. 1964.

Library of Congress Study cites: Ariz. 1972; Md. 1966; N.D. 1963.

Redistribu-
tion of
Presidential
Electors

Buckwalter, Graham, and Library of Congress Study were consulted. All sources cite: Ark. 1963; Kan. 1963^r; Mont. 1963; Utah 1963; Wis. 1963.

Buckwalter and Library of Congress Study cite: Neb. 1965; Okla. 1965.

Buckwalter and Graham cite: Tex. 1963.

Buckwalter cites: Ill. 1967.

While *Buckwalter* cites Colo. 1965 and S.D. 1965, *Graham* cites those applications as Colo. 1963 and S.D. 1963.

r = Rescinded

Presidential
Disability
and
Succession

Library of Congress Study was the only source consulted. The study cites: Colo. 1965; Neb. 1965; Va. 1965.

Revenue
Sharing

Buckwalter and Library of Congress Study were consulted. All sources cite: Ala. 1967; Fla. 1969; Ill. 1965; Ohio 1965; Tex. 1967.

Buckwalter cites: N.H. 1969.

Library of Congress Study cites: Del. 1971; Fla. 1971; Ga. 1967; Iowa 1972; La. 1970*, 1971; Mass. 1971; N.J. 1970; N.D. 1971; Ore. 1971; S.D. 1971; Ohio 1971; W. Va. 1971.

Received by the Committee from the Attorney Generals of the respective states: Me. 1971; R.I. 1971.

*The La. 1970 application was approved by its House of Representatives only.

Freedom
of Choice
in Selec-
tion of
Schools

Library of Congress Study was the only source consulted. The study cites: La. 1970; Mich. 1971; Miss. 1970, 1973; Nev. 1973; Okla. 1973; Tex. 1973.

Prohibit
Taxation of
State or
Municipal
Bonds

Library of Congress Study was the only source consulted. The study cites: Hawaii 1970; La. 1970; Tenn. 1970; Va. 1970.

Miscellane-
ous

Alabama

1833—Nullification: *1930 S. Doc.* and *Graham*.

Because the resolution of the Alabama Legislature was worded "This assembly . . . recommends to the Congress . . ." *Pullen* views it as merely a recommendation rather than a formal application.

1957—Selection of Federal Judges: *Graham*.

1959—Federal Pre-emption: *Graham*.

Arkansas

1959—Examination of 14th Amendment Ratification: *Buckwalter* and *Graham*.

California

1935—Federal Regulation of Wages and Hours: *Buckwalter* and *Graham*.

1935—Taxation of Federal and State Securities: *Buckwalter*, *Graham*, and *Pullen*.

1952—Distribution of Proceeds of Federal Taxes on Gasoline: *Buckwalter* and *Graham*.

Colorado

1963—Direct Election of President and Vice President: *Library of Congress Study*.

Connecticut

1958—State Tax on Income of Non-residents: *Graham*.

Florida

1972—Replace the Vice President as Head of the Senate: *Library of Congress Study*.

Idaho

1927—Taxation of Federal and State Securities: *Buckwalter*, *Graham*, and *Pullen*.

1953—Federal Debt Limit: *Buckwalter*, *Graham*, and *Library of Congress Study*.

Illinois

1911—Prevention and Suppression of Monopolies:

Buckwalter, Graham, and Pullen.

Indiana

1957—Balancing the Budget: *Buckwalter and Graham.*

Louisiana

1920—Popular Ratification of Amendments: *Buckwalter, Graham, and Pullen.*

1970—Sedition and Criminal Anarchy: *Library of Congress Study.*

Massachusetts

1964—Pensions to Persons Over 65: *Buckwalter and Library of Congress Study.*

1967—Bible Reading in Public Schools: *Library of Congress Study.* *Buckwalter* cites this application as 1964.

1973—Public Funds for Secular Education: *Library of Congress Study.*

Mississippi

1965—Control Communist Party in U.S.: *Buckwalter and Library of Congress Study.*

1973—Prayer in Public Buildings: *Library of Congress Study.*

Missouri

1913—Constitutionality of State Enactments: *Buckwalter, Graham, and Pullen.*

Montana

1953—Direct Election of President and Vice President: *Library of Congress Study.*

New Jersey

1965—Residence of Members of Congress: *Library of Congress Study.*

New York

1965—Equal Rights for Women: *Library of Congress Study.*

1972—Public Funds for Secular Education: *Library of Congress Study.*

Oregon

1939—Townsend Plan: *Buckwalter, Graham, and Pullen.*

Pennsylvania

1943—Prohibition of Conditions in Grants-in-Aid: *Buckwalter, Graham, and Pullen.*

Rhode Island

1790—Revision of Constitution: *Graham.*

Tennessee

1972—Prohibit Interference with Neighborhood Schools: *Library of Congress Study*.

Texas

1949—Tidelands Problem: *Buckwalter, Graham, and Pullen*.

1957—Oil and Mineral Rights: *Graham*

1957—Preservation of States' Rights: *Graham*

Virginia

1973—Prohibiting Deficit Spending: *Library of Congress Study*.

Wisconsin

1973—Right to Life: Received by the Committee from the Attorney General of the state.

Wyoming

1961—Balancing of Budget: *Buckwalter*

PART TWO: A History of Applications

by Barbara Prager

Introduction

Article V of the Constitution provides that "The Congress on the Application of the Legislatures of two-thirds of the Several States shall call a Convention for proposing Amendments . . ." Since 1788, despite a total of more than 300 applications from every state in the Union, there has never been a convention convened by this process. The purpose of this paper is to analyze the unsuccessful attempts made to amend the Constitution by this procedure. When applicable, the following factors will be discussed: description of the problem, reasons for the use of the application process, nature of the requests, reasoning of the states declining to make application to Congress, and the resolution of the problem.

Bill of Rights

The first group of applications was provoked by dissatisfaction with the scope of the Constitution. The Anti-Federalists felt that the Constitution had not provided for certain basic rights of mankind. During the ratification of the Constitution, the Virginia and New York Legislatures submitted separate resolutions to Congress applying for a convention. The text of the Virginia resolution read in part:

that a convention be immediately called . . . with full power to take into their consideration the defects of this constitution that have been suggested by the State conventions . . . and secure to ourselves and our latest posterity the great and unalienable rights of mankind.¹

Madison and Jefferson opposed the idea of a second convention. Madison expressed the view that a second convention would suggest a lack of confidence in the first. Others believed that proposing amendments to the Constitution might better be accomplished by Congress. These sentiments found support in the state legislatures. Pennsylvania and Massachusetts explicitly rejected the idea of a second convention, and the remaining states took no final action in making application to Congress.²

The underlying issue was resolved in 1789 when Congress proposed the Bill of Rights.

The Nullification Applications

South Carolina was in severe economic difficulty in the eighteen-twenties. Believing that this problem was a result of the high protective tariff levied by the federal government, the state developed the nullification theory, *i.e.*, that a sovereign state could declare an act of Congress null and void. James Hamilton, Jr. advocated a convention of the states to resolve this conflict and recommended to the South Carolina legislature that they apply to Congress for such a convention. South Carolina's petition and a similar application from Georgia took the form of resolutions that Congress call a convention for the purpose of resolving questions of disputed power.³ Alabama recommended to her co-states and to Congress that a convention be called to resolve the nullification problem and to make "such other amendments and alterations in the Constitution as time and experience have discovered to be necessary."⁴

No other state petitioned for a convention. The problem was considered and the idea of a convention rejected in eight states.⁵ Opposition to the South Carolina proposal was manifold. Some objecting to the terminology of the proposal, maintained that an article V convention must be a convention of the people's delegates, and not a convention of the states' representatives. Others, disagreeing with South Carolina's statement that the convention would have the power to determine the constitutional issue, asserted that the conven-

tion was limited to proposing amendments. Still others feared the potentially disastrous effects of a convention or considered the call of a convention impolitic, inexpedient, unnecessary, or an appalling task.

The states that declined to apply to Congress during this period apparently were not reaching the merits of the issue. Rather, they rejected the idea of a convention on two main grounds: (1) that South Carolina hoped to invest the convention with arbitration power not provided for by the Constitution; and (2) that such a body would not be subject to sufficient control and might therefore upset the existing governmental structure.

Slavery

The divisive issue of slavery was the next issue to provoke state applications. In 1860 the secession of the lower southern states seemed probable. Seeking to effect a reconciliation, President Buchanan proposed that an explanatory amendment to the Constitution be initiated either by Congress or by the application procedure. In support of this suggestion several Congressmen introduced resolutions in Congress to encourage the legislatures of the states to make applications for the call of a convention. This represented the first attempt by Congress to stimulate the application process. The process received further support from newly elected President Lincoln who in his inaugural address stated:

the convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse. . . .⁶

The states, however, were less enthusiastic. During the entire Civil War period, only seven states took affirmative action.⁷ The applications tended to be broad in scope, requesting a convention to propose amendments to the Constitution. Several resolutions were merely recommendations that Congress call a convention, while others favored a convention only as a last resort and preferred to rely on Congress to propose any amendments. Many resolutions were tabled in the state legislatures or were referred to a committee which failed to report them back to the legislature. The state of Iowa observed that since eleven states were in open

rebellion against the Union, no amendment could be ratified without the votes of at least two rebel states.⁸

Procedural problems played a large role in the states' failure to make successful use of the application process during the Civil War period. Given the frenetic pace of the times, the states failed either to act in strict conformity with article V or to direct their energies to the completion of the process.

Modern Period

Since the turn of the twentieth century, the application process has been used primarily to encourage Congress to propose specific amendments.

Direct Election of Senators

In the eighteen-nineties public sentiment grew for an amendment providing for the direct election of U.S. Senators. On several occasions from 1893 to 1902, the House passed resolutions proposing such an amendment which never came to a vote in the Senate.

In 1906, motivated by the inaction of Congress, a conference of twelve states met and decided to initiate a campaign to urge applications on the direct election issue from the requisite number of states. Thirty states adopted sixty-nine applications for the call of a convention during the period from 1901 to 1911.⁹ Opposition came primarily from two sources: (1) those who objected to the substance of the amendment; and (2) those who feared the potential power of such a convention. The latter group expressed the view that a convention would open the door to recommendations for amendments on a wide variety of sectional interests. The issue was resolved in 1912 when Congress proposed the seventeenth amendment.

Polygamy

Utah was admitted into the Union in 1896, on the condition that her constitution included an irrevocable prohibition of polygamous marriages. Later, when it was brought to public attention that the state was not enforcing this provision, an anti-polygamy amendment to the Constitution which would give the United States jurisdiction of the matter was proposed as a possible solution. However, the amendment was opposed on several grounds: it would interfere with the sovereignty of

the states; the subject was not of sufficient importance to merit a constitutional amendment; and the problem was susceptible of resolution by other means. The state legislatures, however, did not dismiss the problem as quickly as Congress did. From 1906 to 1916, twenty-six states made almost identical applications requesting a convention to propose an amendment prohibiting polygamous marriages.¹⁰ But after this surge of applications, polygamy ceased to be an issue.

Repeal of
Prohibition

A movement for the repeal of prohibition began in the nineteen-twenties. Eleven states considered applications to Congress for a constitutional convention. Five adopted resolutions for a limited convention to propose the specific amendment. Congress responded to the pressure by proposing the twenty-first amendment.

Limitation of
Federal Taxes

Federal taxes were greatly increased during the mid-nineteen-thirties. The American Taxpayers Association failed in its efforts to exert pressure on Congress for an amendment to limit the federal taxing power. The group then began a quiet campaign to apply pressure by use of the application procedure of article V. By 1945, seventeen states had submitted resolutions for the call of a convention.¹¹ The movement lost momentum but was revived again at the end of the decade. Representative Wright Patman from Texas attacked the advocates of the amendment, claiming that their purpose was to make the rich richer and the poor poorer. He advised the states to rescind their applications. By 1963, there were claims that thirty-four states had made applications to Congress, thus meeting the constitutional requirements for a convention.¹² Opponents of the amendment pointed to deficiencies in these claims: twelve states had rescinded their applications;¹³ some resolutions had not requested a convention, but merely had asked Congress to propose the amendment; some applications were for other purposes; and the validity of resolutions passed fifteen or twenty years earlier was questionable.

Limitation of
Presidential
Tenure

When Franklin D. Roosevelt was elected to a third term, the belief that the tenure of the office of President should be limited gained adherents. In 1943, four states submitted applications to Congress requesting a national convention to propose

an amendment to that effect. A few years later, an additional state adopted a similar resolution. Congress then proposed an amendment limiting the number of successive presidential terms.

World
Federal
Governments

At the beginning of the second world war, there was some support for the idea that the United States should commit itself to a world organization aimed at preserving peace. Twenty-three states adopted resolutions urging their representatives in Congress to support such a commitment. In 1949, six states made formal applications to Congress for a constitutional convention to propose an amendment authorizing the United States to participate in a limited world government. Within the following two years, half of the states rescinded their applications.¹⁴

Apportionment

The Supreme Court decisions establishing the "one-person-one-vote" principle and applying it to state legislature apportionment sparked the latest bout of serious interest in a national constitution convention.

The Council of State Governments in 1962 suggested a constitutional convention to propose amendments a) removing apportionment cases from federal jurisdiction, b) establishing a "Court of the Union" to hear certain appeals from the Supreme Court, and c) easing the process whereby states themselves may initiate constitutional amendments under article V.

In 1964, the Council of State Governments suggested an amendment exempting one house of any state legislature from the "one-person-one-vote" rule. When an amendment to that effect failed in the Senate in 1965 (gaining a majority of the votes but not the constitutionally required two-thirds), the Council and Senator Everett Dirksen initiated a national campaign to convene a constitutional convention to deal with the apportionment problem.¹⁵

By 1967, thirty-two states had applied for a constitutional convention, although their applications differed in form, content, and specificity. In the following years, one more state petitioned for a convention, and one withdrew its original application. Since 1969, no further applications have been submitted on this issue.

Throughout the 1960's and into the present decade particularly salient issues have at one time or another provoked scattered applications for a constitutional convention; *e.g.*, school prayer in the early 1960's, revenue sharing and busing of school children to achieve integration more recently. None of these issues, however, has produced applications totalling near the two-thirds required by article V.¹⁶

Conclusion

It is submitted that the majority of applications presented issues of potentially national concern. In some instances, such as the nullification or the slavery issues, the question was initially a sectional concern, but national ramifications developed.

Another generalization that emerges from an historical analysis of the application process is that the majority of concerns raised in state applications have been resolved in some way other than by convention. In a large number of situations Congress took over the initiative and proposed the requested amendment to the Constitution. Numerous examples are readily available. The 1788 and 1789 applications of Virginia and New York for a general convention were resolved by congressionally proposed amendments—the Bill of Rights. Similarly, in the twentieth century, state applications that advocated direct election of senators, the limitation of presidential tenure, presidential disability and succession and the repeal of prohibition were resolved by congressionally proposed amendments. The problems raised by the state applications during the slavery period were resolved in a more revolutionary way. The Civil War and ultimately the thirteenth, fourteenth, and fifteenth amendments rendered the applications moot.

However, there are a number of situations in which there has been no resolution of the problem. In some instances, such as the issue of polygamy, a change in social attitudes over time led to the abandonment of the issue.

This example highlights a problem which may be inherent in the procedure itself: sluggishness. The problem has its roots in a fundamental distinction between the ratification process and the amendment process. While the former only requires the state legislatures to respond to an already form-

ulated amendment the latter requires affirmative action. This is time-consuming since typically before drafting a resolution both houses of each state legislature consider all the other applications on the subject submitted to Congress by other states. The slavery period provides numerous examples of potential applications that were tabled in the state legislatures or were never reported back from committees. Action on the resolution is further delayed by the fact that state legislatures convene at different times during the year. Additional problems arise because Congress has not provided for adequate machinery to handle the applications presented to them. Thus, with the passage of time, new interests tend to replace the proposed interests, so that the issue is eventually resolved by a means other than the convention method or not resolved at all.

It is further evident that the issues that have called for a convention have been popular ones. Historically, although an individual state did not petition Congress for a convention on a particular issue, the state more often than not considered submitting a resolution. The states declining to submit applications generally did not reject the application procedure based on the substantive merits of the problem. Rather, the states expressed fear of the power of a constitutional convention and its potential for revolutionary change.

Notes

- 1 37 American State papers 6-7.
- 2 W. Pullen, *The Application Clause of the Amending Provision of the Constitution* 22-28 (1951) (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as *Pullen*].
- 3 *Id.* at 38-39.
- 4 Massachusetts General Court Committee on the Library, *State Papers on Nullification* 223 (1834). The quote is from the resolution addressed to her co-states. The recommendation to Congress varies slightly.
- 5 *Pullen* at 66.
- 6 S. Jour., 36th Cong., Spec. Sess. 404 (1861).
- 7 *Pullen* at 102.
- 8 1861 *Iowa S. Jour.* 68-69.
- 9 *Pullen* at 108.

- 10 *Id.* at 115.
- 11 *Id.* at 119.
- 12 Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175, 1176-77 (1963).
- 13 See Appendix B.
- 14 Pullen at 126.
- 15 See Dirksen, *The Supreme Court and the People*, 66 Mich. L. Rev. 837 (1968).
- 16 See Appendix B, Part One, for a complete listing.

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HOUSE COMMITTEE REPORT

(7)

Date Referred: May 8, 1989

FURTHER REFERRALS:

Date of Committee Action: 4-18-90

The JUDICIARY Committee considered:

SSHJR 54

SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 54

[AMEND U.S. CONST. ART I/TERMS OF MEMBERS

Relating to amendments to the Constitution of the United States concerned with the Congress.

RECOMMENDATIONS:

- [] be replaced with CS 2d SSHJR 54 (JUD) [] the same title
- [] a new title
- [] have attached amendment(s)
- [] do pass
- [] do not pass
- [] no recommendation
- [] individual recommendations
- [] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s) •
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

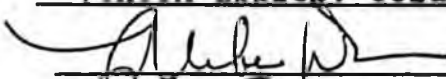
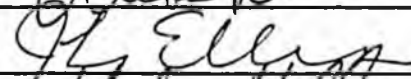
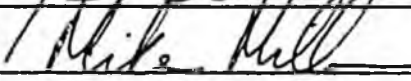
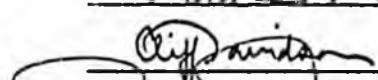
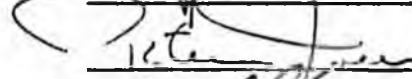

- [] fiscal impact _____
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- [] zero with analysis _____

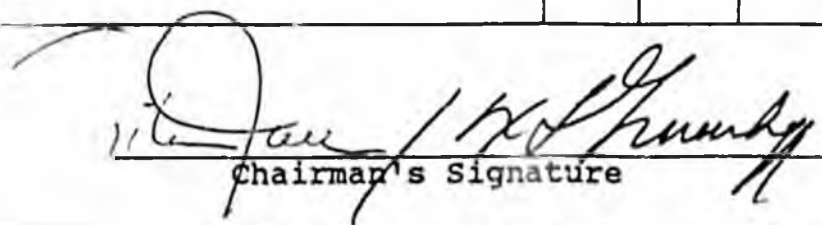
- [] fiscal note(s) _____
- [] zero fiscal note(s) _____
- [] zero fn/analysis _____

SIGNING DO PASS:

SIGNING:
(Check approp. column)

Do Not
Pass No Rec Amend

DAVIS		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
ELLIS		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
MILLER		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
DAVISON		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
GOLL		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
GRUENBERG		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>


Chairman's Signature

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Relating to amendments to the
Constitution of U.S. concerned with Congress.
Sponsor: Representative Pettyjohn
Requestor: House Judiciary

Affected Agency: Legislative Affairs Agency
BRU: Legislative Operating Budget
Components: Legislative Operating Budget

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY91	FY92	FY93	FY94	FY95	FY96
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
----------------	---	---	---	---	---	---

REVENUE	0	0	0	0	0	0
----------------	---	---	---	---	---	---

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	0	0	0	0	0	0
Federal Fund	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

NO FISCAL IMPACT

Prepared By: Pamela A. Stoops, Director
Division: Administrative Services

Pamela Stoops

Phone: 465-3850
Date: 4/19/90

Approved By: Warren Endicott, Executive Director
Agency: Legislative Affairs Agency

Warren Endicott

Date: 4/19/90

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1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 54 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 Relating to amendments to the Consti-
6 tution of the United States concerned
7 with the Congress.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 WHEREAS the Congress was originally envisioned by the Founding Fathers
10 as a nonpartisan, part-time legislative body whose members would take time
11 from their normal businesses and professions to attend the congressional
12 session for four to five months annually; and

13 WHEREAS the press of the nation's business has forced the Congress to
14 become increasingly a highly structured, professional, and hierarchical
15 institution rather than the informal, flexible gathering of citizens and
16 legal intellects that obtained in the Federalist Era; and

17 WHEREAS the power of the incumbency has grown over time and with the
18 institution of electronic media to the point that the incumbent is nearly
19 unassailable in a normal election; and

20 WHEREAS the seniority system in the Congress, though recently re-
21 formed, still places disproportionate stress on electoral longevity; and

22 WHEREAS innovative ideas and rejuvenated vigor are more likely to come
23 to the Congress through new members fresh from association with the people
24 of the United States; and

25 WHEREAS the most common complaint that the public makes about congres-
26 sional service is that members of Congress spend more of their time running
27 for office than attending to their duties; and

28 WHEREAS the power of incumbency makes biennial congressional elections
29 an expensive, exasperating, and ultimately rather meaningless waste of each

1 member's time and talents; and

2 WHEREAS under art. V of the Constitution of the United States, an
3 amendment to the Constitution may be proposed by the Congress, or on the
4 application of the legislatures of two-thirds of the states, the Congress
5 shall call a constitutional convention for the purpose of proposing an
6 amendment, which, in either case, shall become part of the Constitution
7 when ratified by three-fourths of the several States;

8 BE IT RESOLVED by the Alaska State Legislature that the Congress of
9 the United States is requested to propose an amendment to the Constitution
10 of the United States for submission to the states for ratification to limit
11 the number of terms a person may serve in the United States House of Rep-
12 resentatives to no more than six and to limit the number of terms a person
13 may serve in the United States Senate to no more than two; and be it

14 FURTHER RESOLVED that alternatively, effective July 1, 1991, under
15 art. V of the Constitution of the United States, the Legislature of the
16 State of Alaska makes application to the Congress of the United States to
17 call a convention for the specific and exclusive purpose of proposing an
18 amendment to the Constitution of the United States, for submission to the
19 states for ratification, to limit the number of terms a person may serve in
20 the United States House of Representatives to no more than six and to limit
21 the number of terms a person may serve in the United States Senate to no
22 more than two; and be it

23 FURTHER RESOLVED that if the Congress proposes and submits to the
24 states for ratification, within 60 days after the legislatures of two-
25 thirds of the states have made application for a convention, an amendment
26 to the Constitution of the United States similar in subject matter to that
27 contained in this Joint Resolution, then this application for a convention
28 shall no longer be of any force or effect; and be it

29 FURTHER RESOLVED that this application and request be considered null

1 and void, rescinded, and of no effect in the event that the convention not
2 be limited to that specific and exclusive purpose; and be it

3 FURTHER RESOLVED that this application constitutes a continuing appli-
4 cation under art. V of the Constitution of the United States until at least
5 two-thirds of the legislatures of the several States have made application
6 for a similar convention under art. V, until the Congress has proposed an
7 amendment to the Constitution of the United States similar in subject
8 matter to that contained in this Joint Resolution, or until July 1, 2001,
9 whichever occurs first.

10 COPIES of this resolution shall be sent to the Secretary of the United
11 States Senate; to the Clerk of the United States House of Representatives;
12 and to the Honorable Ted Stevens and the Honorable Frank Murkowski, U.S.
13 Senators, and the Honorable Don Young, U.S. Representative, members of the
14 Alaska delegation in Congress; and to the presiding officer of each house
15 of each other state legislature in the United States.

BSN:1253

ALASKA HOUSE OF REPRESENTATIVES
CSSSHJR. 54(JUD).

2ND SESSION 16TH LEG

4/25/90 4:34 PM

		28 YEAS	11 NAYS	0 EXC	1 ABS		
Y	DARNES	Y	ELLIS	Y	JACKO	Y	FETTYJOHN
Y	DOUCHER	Y	FINKELSTEIN	Y	KOPONEN	Y	PHILLIPS
N	BOYER	Y	FOSTER	Y	KUBINA	Y	RIEGER
Y	BROWN	N	FURNACE	N	LARSON	Y	SHARP
Y	COLLINS	N	GOLL	Y	LEMAN	Y	SHULTZ
Y	COTTEN	N	GRUENBERG	Y	MACLEAN	A	SWACKHAMMER
Y	DAVIDSON	N	GRUSSENDORF	Y	MARTIN	Y	TAYLOR
Y	DAVIS. C.	Y	HANLEY	Y	MENARD	N	ULMER
N	DAVIS. M.	N	HOFFMAN	Y	MILLER	N	WALLIS
Y	DONLEY	N	HUDSON	Y	NAVARRE	Y	ZAWACKI

+ VOTED FOR
* CHANGED VOTE

OFFICE OF U.S. SENATOR TED STEVENS
WASHINGTON, D.C. 20510
FAX TRANSMISSION

TO: Diane Sheridan

LOCATION: Office of Max Grunberg

FROM: Svend Brandt-Erichsen

OF PAGES, INCLUDING COVER SHEET: 4

MESSAGE: -3 editorials on limiting terms of office

- Hope this is not too late

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Amend Congress, not the Constitution

In 1948, Harry Truman succeeded himself as president, ensuring two straight decades of Democratic rule in the White House. On Inauguration Day 1949, you could have searched precincts from Bangor, Maine, to San Diego and not have found a conservative who favored increasing the powers of the executive branch.

But four decades later, things have changed. An increasingly liberal Democratic Party has latched onto Congress like an octopus with a stomach cramp. After more than three decades of trying, Republicans have failed to pry them loose either by hard-fought elections or, more recently, by loudly (and, for the most part, accurately) observing just how slimy a creature the Democratic majority is.

Now a group called Americans to Limit Congressional Terms has launched a campaign to amend the Constitution. Its plan is to prevent any member of Congress from serving longer than 12 years in either the House of Representatives or the Senate. Two state legislatures already have passed resolutions recommending such an amendment, 16 others plan to vote on similar resolutions this year and Sen. Gordon Humphrey, a good (and retiring) two-term conservative from New Hampshire, has carried the cause to the Senate floor.

Though they claim to be bipartisan, the supporters of the amendment are mostly Republican. The ALCT's advisory group is something like the mirror image of today's Congress. Three-quarters of its members are Republicans, the rest pliant Democrats. Many of them, ironically, if not surprisingly, are former congressmen, not all of whom left office of their own volition.

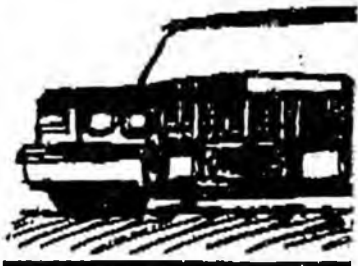
But a term-limitation amendment is a bad idea, not because it might change the balance of power in the current House and Senate, but because it definitely will change the balance of power built into the federal government by the Constitution. The House of Representatives, which is re-elected en masse

power of the president. The president, whether he is a liberal like FDR or a conservative like Ronald Reagan, has ample constitutional power to fight an unbending Congress. Two-thirds of both houses of the Congress, for example, must vote to override a veto.

Nor is long service in any branch of the federal government necessarily an impediment to statesmanship. It is not accidental that the greatest tragedy in our nation's history, the Civil War, broke out only after great and long-serving congressmen like Henry Clay and John C. Calhoun passed from the scene. And what conservatives today, bemoaning the long tenures of our liberal Supreme Court justices, would not like to see justices like William Rehnquist, Antonin Scalia and Anthony Kennedy riding the bench into the next century?

Undoubtedly, the majority and minority in Congress have a shared interest in ensuring their incumbency against all comers. And Congress has abused its power in granting itself privileges that serve more to tilt elections than forward the national interest. Such abuses include government-funded unsolicited mass mail, massive professional staffs, liberal travel expenses and campaign finance laws that favor wealthy lobbyists over individual voters. Congressmen also have a penchant for passing do-gooder laws on everyone else but specifically exempting themselves and their own offices.

The new conservative strategy of limiting congressional terms seems to be a way of admitting that if you can't win the game, change the rules. But the rules aren't there to protect conservatives or liberals or any other partisan or ideological conglomeration. They exist to protect liberty and achieve the ends of government that the Preamble to the Constitution affirms. If American voters don't like today's congressional oligarchy of incumbents, they can throw them out of office. But if the voters don't care enough to win the game for themselves, changing the



Letters

Marxists aren't

Your usually accurate coverage of developments in Angola is marred by an uncharacteristic lapse. An unsigned Agence France-Press dispatch in your Feb. 19 paper, "Angolan Marxists gaining ground," from Luanda, Angola, totally distorts the dynamic military situation in the country.

The unnamed correspondent was in all probability duped by a propaganda specialist for the Popular Front for the Liberation of Angola Workers' Party (MPLA-PT). While from over 400 miles away, the Agence France-Press journal wrote that Mavinga fell to the MPLA-PT on Feb. 2. Jean-Marc Kalfied, a correspondent for the *Quotidien Paris*, was taken to Mavinga on Feb. 11. He reported that Mavinga was

You put words in C

The Archbishop of Washington appreciates the tough but fair coverage by The Washington Times of events concerning the local Catholic community. We have found it