

2-1-1975

# Amendment by Convention: Our Next Constitutional Crisis

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## Recommended Citation

Michael A. Almond, *Amendment by Convention: Our Next Constitutional Crisis*, 53 N.C. L. REV. 491 (1975).Available at: <http://scholarship.law.unc.edu/nclr/vol53/iss3/3>

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## COMMENT

### Amendment by Convention: Our Next Constitutional Crisis?

On September 15, 1787, in the waning moments of the Philadelphia Convention, which drafted the United States Constitution, Charles Cotesworth Pinckney of South Carolina observed that "conventions are serious things and ought not to be repeated."<sup>1</sup> Americans have apparently taken Pinckney's wisdom to heart, for in our long history as a constitutional republic, there has never been another federal constitutional convention. This is true although the Constitution expressly authorizes "a Convention for proposing Amendments,"<sup>2</sup> and despite the fact that in the years since the Constitution was ratified approximately two hundred sixty-nine resolutions have been submitted to Congress by the States calling for national constitutional conventions.<sup>3</sup>

Article V is the part of the Constitution that provides for its own amendment. It reads as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as a part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Under article V there are two means of proposing constitutional amendments: either by a two-thirds vote of both Houses of Congress,

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1. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 632 (1911) [hereinafter cited as FARRAND].

2. U.S. CONST. art. V.

3. State Applications Calling for a Constitutional Convention to Propose Amendments to the Constitution of the United States: 1787 to July 1, 1974 (unofficial list prepared by the staff of the United States Senate Subcommittee on Separation of Powers, as revised, September 25, 1974) [hereinafter cited as State Applications].

or by a constitutional convention called by Congress in response to petitions of two-thirds of the state legislatures. The powers of Congress or of the constitutional convention are limited to *proposing* amendments. Proposed amendments become part of the Constitution only when ratified by three-fourths of the States. Congress, regardless of how the amendments are proposed, has the exclusive power to determine the method of ratification<sup>4</sup> and must choose to have the proposed amendments ratified either by the state legislatures or by conventions held in each state for that purpose. Each of the present twenty-six amendments to the Constitution were initially proposed by the Congress. Since the national convention procedure has never been used, it remains a constitutional curiosity. As is clear from the language of article V, the convention would be a truly national forum with the authority to propose important changes in our system of government. But beyond this literal reading, article V is tantalizingly vague.

American constitutional law and history have developed within the long shadow cast by the Philadelphia Convention of 1787, and students and practitioners of our national political system have generally shared Gladstone's opinion of the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." It is, then, understandable that constitutional scholars from James Madison<sup>5</sup> to Senator Sam J. Ervin, Jr.<sup>6</sup> have approached the subject of a new constitutional convention with a prudent degree of apprehension bred by proper respect for the enduring vitality of the Constitution. Much of the fear of a constitutional convention, which might, for example, seek to undermine important rights and freedoms guaranteed by the Bill of Rights, springs undoubtedly from the language of article

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4. *United States v. Sprague*, 282 U.S. 716, 730 (1931).

5. [An article V national convention] would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partisans on both sides; it wd probably consist of the most heterogenous characters; would be the very focus of that flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberation of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a second.

Letter of James Madison to G.L. Turberville, November 2, 1788, in 5 U.S. BUREAU OF ROLLS AND LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 104-05 (1905).

6. See, e.g., Senate Subcommittee on Separation of Powers, Press Release, Aug. 17, 1967.

V itself, which leaves unanswered numerous questions concerning the nature and scope of the powers of a national constitutional convention.<sup>7</sup>

The heat of the controversy surrounding article V represents the constitutional friction generated by the insertion of a new deliberative body into a political system carefully balanced by the doctrine of separation of powers and limited by the principles of federalism.<sup>8</sup> Who determines the validity of state applications? Where would the convention be held and how long would it last? May Congress refuse to call a convention, given a sufficient number of valid applications? Are questions such as these justiciable in the courts, or are they "political questions"<sup>9</sup> to be left to other departments of government?

Since there has never been a constitutional convention under article V, there exists no precedent to suggest solutions for these difficult problems. Likewise, there are no Supreme Court cases directly on point, and precious few on the amendment process generally.<sup>10</sup> Congress, though it has considered the problem on several different occasions,<sup>11</sup> has passed no legislation on the subject. Fear and uncertainty, in many cases justified, have left the convention procedure much ignored and little understood. Yet so long as the words remain in the Constitution, a national constitutional convention is a possibility. Fundamental wisdom and common sense on so important a matter would thus seem to require that the problems in the article V conven-

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7. Concern over the wording of the national convention procedure is as old as article V itself: "Mr. Madison remarked on the vagueness of the terms, 'call a Convention for the purpose,' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?" 2 FARRAND, *supra* note 1, at 558 (quoting Madison's notes).

8. Professor Orfield has suggested that an article V convention would be, in effect, a fourth branch of government, coequal with the Congress, the Executive and the Judiciary. See L. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 47-48 (1942).

9. For a discussion of justiciability and the political question doctrine see text accompanying notes 130-34 *infra*.

10. See text accompanying notes 137-67 *infra*.

11. See, e.g., *Hearings on S. 1272 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973); *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., *STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION* (Comm. Print 1959); *Hearings on Amending the Constitution Relative to Taxes on Incomes, Inheritances, and Gifts Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958); *Hearings on S.J. Res. 23 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. (1954); STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., *PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES* (Comm. Print 1952).

tion process be anticipated and dealt with effectively. Given the dearth of contemporary authority, investigation into the meaning and requirements of article V, as with other parts of the Constitution, might best begin with the comments of the men who wrote it.<sup>12</sup>

## I. BACKGROUND AND HISTORY OF ARTICLE V

Although today it might seem that an amendment clause should be an indispensable part of any national charter, this view was by no means common among eighteenth century political theorists. In fact, just the opposite was true; the idea of making changes in a constitution was foreign to European political systems. The power of amendment was a unique product of the American experience,<sup>13</sup> arising out of the conviction that ultimate sovereignty is in the people. This radical conception of state sovereignty found power in the people not only to make a constitution, but, as a necessary corollary, to amend and to revise it.<sup>14</sup> It was the impotence of the national government under the Articles of Confederation,<sup>15</sup> manifested in part by the unanimity requirement for amendment, that led Congress in 1787 to call for a federal conven-

12. The Supreme Court has long recognized the propriety of drawing upon the debates in the Philadelphia Convention of 1787, the essays of *The Federalist* and other writings of the Founding Fathers as aids in construing vague and ambiguous constitutional provisions. See, e.g., *Missouri Pac. R.R. v. Kansas*, 248 U.S. 276 (1919); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Pollack v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895); *Transportation Co. v. Wheeling*, 99 U.S. 273 (1878); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

13. See, e.g., C. BRICKFIELD, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 1 (Comm. Print 1957); Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME LAW. 46, 48 (1950).

14. L. ORFIELD, *supra* note 8, at 1. For the first time in the history of written constitutions, an amending provision appeared in the Pennsylvania Frame of Government drawn up by William Penn and his colonists in 1683. By 1787 the constitutions of eight states contained clauses dealing with amendment; five provided for amendment by convention and three, by the legislature. W. Pullen, *The Application Clause of the Amending Provision of the Constitution 1* (1951) (unpublished thesis in Wilson Library, University of North Carolina at Chapel Hill). In states such as Virginia, whose constitution did not permit amendment, the need for an amending clause was strongly felt. During debate on article V, Madison lamented that "[t]he Virginia state government was the first which was made, and though its defects are evident to every person, we cannot get it amended. The Dutch have made four several attempts to amend their system without success. The few alterations made in it were by tumult and faction, and for the worse." 1 FARRAND, *supra* note 1, at 476.

15. Article XIII provided (in part): "The Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration shall be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." DOCUMENTS OF AMERICAN HISTORY 115 (8th ed. H. COMMAGER 1968). Note, incidentally, that article XIII made no provision for a constitutional convention.

tion "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation of the Union."<sup>16</sup>

#### A. *Prerequisite Conditions for Amending the Constitution*

In the proceedings and debates of the 1787 Convention, some general philosophical and political considerations emerged as to the intent of the Framers regarding the amendment process generally and the function of an article V convention specifically. Broadly speaking, written into the language of article V as it appears today are three prerequisite conditions for amending the Constitution:

##### (1) "Perfection", and the Amendment Process

The Constitution proposed by the Philadelphia Convention was intended to be the ultimate expression and statement of the sovereignty of the American people. Continued acceptance by the people of the authority and legitimacy of the Constitution requires that amendments be the product of an orderly, controlled and procedurally correct constitutional process.<sup>17</sup> Professor Bonfield summarizes the argument in this manner:

Because of the uniquely fundamental nature of a constitutional amendment, attempts to alter our Constitution should not be filled with highly questionable procedures which could reasonably cast doubt on the ultimate validity of the provision produced. The procedure followed in any effort to amend the Constitution should be so perfect that it renders unequivocal to all reasonable men the binding nature of the product.<sup>18</sup>

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16. 1 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 120 (2d ed. 1836).

17. The Constitution expressly provides that all amendments "shall be valid to *all Intents and Purposes, as part of this Constitution . . .*" U.S. CONST. art. V (emphasis added). As Professor Black has written, "a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all." Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 963 (1963).

18. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659, 661 (1964). The point was also made during debate on article V at the Philadelphia Convention. Col. Mason argued that "[a]mendments will therefore be necessary, and it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence." 1 FARRAND, *supra* note 1, at 202-03. James Iredell of North Carolina, later a United States Supreme Court Jus-

## (2) The Need for a National Consensus

A procedurally "perfect" amendment process should operate to change the Constitution only when there exists a national consensus for change.<sup>19</sup> Such a national consensus is virtually assured by the requirement of article V that amendments be proposed only by a two-thirds majority in both Houses of Congress, or by a convention called at the request of two-thirds of the States. In addition, after the amendments are proposed, they do not become part of the Constitution until ratified by three-fourths of the States in the manner chosen by Congress. Thus at every stage of the amendment process the consent of supermajorities is required, under the presumption that it will be impossible to achieve such majorities without widespread national agreement on the need for amendment.<sup>20</sup>

## (3) Deliberation and Debate Before a National Forum

Given a procedurally correct amendment process and a national consensus for change, the Framers further intended that amendment proposals be brought before a national assembly of representatives of the people.<sup>21</sup> As the United States Supreme Court noted in *Hawke*

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tion, argued before the state convention considering ratification of the Constitution that "it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people." 4 J. ELLIOT, *supra* note 16, at 176-77. Likewise Madison commented in *The Federalist*:

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

THE FEDERALIST No. 43, at 315 (B. Wright ed. 1961) (J. Madison).

19. Professor Dodd has written, "in bringing about a change in the federal Constitution . . . two elements must unite: (a) the sentiment of the people in favor of change, and particularly in favor of the specific change being urged; and (b) operation of the machinery for the purpose of effecting such a change." Dodd, *Amending the Federal Constitution*, 30 YALE L.J. 321, 354 (1921).

20. See, e.g., *Dillon v. Gloss*, 256 U.S. 368 (1921). The provisions of article V thus illustrate "the conviction of the Founding Fathers that the seriousness of this kind of action demands a national consensus of the sort required to achieve such two-thirds votes." Bonfield, *supra* note 18, at 661.

21. "On principle, it appears to me that the point is that no constitutional changes should go forward to ratification without having first undergone examination and debate in a national forum, whether it be Congress or a convention." *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 60, 62 (1968) (statement of A. Bickel).

v. *Smith*,<sup>22</sup> "This article [V] makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed."<sup>23</sup> Once the national forum, whether Congress or convention, is satisfied with the proposal and has submitted it to the States for ratification, article V insures yet further debate and discussion by requiring that the amendment be ratified either by the State legislatures or State conventions, "which it was assumed would voice the will of the people."<sup>24</sup>

### *B. Proposing Amendments by Convention: An Alternative to Congress*

The above-mentioned conditions are satisfied under the procedure whereby Congress proposes amendments. Yet article V provides for an alternative process—proposing amendments by constitutional convention. Since the congressional procedure works effectively, is technically simple in its operation, and has built around it a formidable body of constitutional-amendment law based upon precedent and repetition, what distinguishable purpose is the convention procedure intended to serve?

The delegates to the Philadelphia Convention of 1787 were in sharp disagreement as to how amendments ought to be brought about. At the center of the dispute was the role of the Congress.<sup>25</sup> Some of the delegates were deeply suspicious of allowing the national government to interfere in the amendment process.<sup>26</sup> Eventually a major

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22. 253 U.S. 221 (1920).

23. *Id.* at 226. "What is a convention? A constitutional convention . . . must be a deliberative body, but beyond that it cannot be accurately described." Platz, *Article V of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 45 (1934).

24. *Hawke v. Smith*, 253 U.S. 221, 226-27 (1920).

25. As Madison noted, "the exclusion of the National Legislature from the process was at issue." 1 FARRAND, *supra* note 1, at 202. Some, like Col. Mason, believed that the Congress should not be a part of the amending process. 1 J. ELLIOT, *supra* note 16, at 182. Others, such as Gouverneur Morris, advocated a role for Congress. *Id.* at 498.

26. Resolution 13 of the Virginia Plan introduced by John Randolph provided that "the assent of the National Legislature ought not to be required" to amend the Constitution. 1 FARRAND, *supra* note 1, at 22. Col. Mason defended this position, noting that "[i]t would be improper to require the consent of the Nat'l Legislature, because they may abuse their power and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment." *Id.* at 203.

Hamilton displayed somewhat greater confidence in the integrity of future Congresses: "The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature



compromise was reached, albeit over Madison's misgivings.<sup>27</sup> The Convention drafted article V to require Congress to call a constitutional convention for proposing amendments upon application of two-thirds of the states.<sup>28</sup> This procedure was to be a genuine alternative to the procedure under which Congress proposes amendments.

As the debates make clear,<sup>29</sup> the article V convention provision was inserted to allow the people of the States to propose amendments should the Congress be unwilling to do so. The compromise was motivated by the fear of some that the Congress might someday abuse, neglect, or exceed its constitutional powers and would then be most unlikely to propose amendments on the issue of its own wrongdoing.<sup>30</sup> The convention procedure was conceived as yet another of the fundamental checks and balances written into our constitutional system.

There is nothing to suggest that the Framers intended the congressional procedure to be the predominant amendment process. To the contrary, they felt that they had struck a proper balance in distributing the power to propose amendments, intending to express a preference for neither method.<sup>31</sup> The popular appeal of the alternative amendment process was frequently exploited as delegates pleaded with their various state conventions to ratify the new Constitution.<sup>32</sup> Hamilton defended article V by characterizing the alternative amendment process as a safeguard against a reluctant or despotic Congress. He felt that the process of collecting the required number of state ap-

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will be the first to perceive and will be most sensible to the necessity of amendments. . . . —There could be no danger in giving [Congress] this power [to call a convention], as the people would finally decide in the case." 2 *id.* at 558.

As a result of this disagreement, the Committee of Style and Revision reported back a revised draft of article V that made no provision for proposing amendments independent of the Congress. *Id.* at 602. In the margin of his copy of the revised draft, an outraged Col. Mason scribbled his objection that "should [Congress] prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people." *Id.* at 629 n.8.

27. *Id.* at 629-30.

28. *Id.*

29. See note 26 *supra*.

30. *Id.*

31. The Senate Judiciary Committee in 1973 concluded that "[t]here is no evidence whatsoever that the Framers did not regard this means to be as desirable and as viable as that which allows for constitutional amendment at the initiation of Congress." SENATE COMM. ON THE JUDICIARY, FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. NO. 293, 93d Cong., 1st Sess. 7 (1973).

32. Madison felt that article V "equally enables the general and the State governments to originate the amendments of errors . . ." THE FEDERALIST NO. 43, at 315 (B. Wright ed. 1961).

plications and calling the convention under article V manifested "one of those rare instances in which a political truth can be brought to the test of mathematical demonstration."<sup>33</sup>

### C. *Historical and Political Significance of Article V*

Although a national convention has never been called, still the alternative amendment procedure has played a significant role in the American political process.<sup>34</sup> The constitutional history of the United States is replete with state applications calling for a convention,<sup>35</sup> and more than once the awesome spectre of an impending constitutional convention has inspired an otherwise reluctant Congress to act.<sup>36</sup>

For example, following the adjournment of the Philadelphia Convention during the State ratification debates, anti-federalists in control of legislatures in Virginia<sup>37</sup> and New York<sup>38</sup> led the way in calling for a new constitutional convention. Pressure from these influential states resulted, on September 25, 1789, in the proposal by Congress of twelve amendments.<sup>39</sup> This made the second convention unnecessary, for ten of the proposals, the present Bill of Rights, were ultimately ratified by the States.<sup>40</sup>

Other significant national movements for a second convention arose in the late 1820's and early 1830's during the nullification controversy,<sup>41</sup> and during the crisis period immediately preceding the outbreak of the Civil War.<sup>42</sup>

The twentieth century brought a new period of article V activism among the States. During this century Congress has been flooded with

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33. *Id.* No. 85, at 546 (A. Hamilton).

34. For an excellent general treatment of the historical importance of article V's alternative amendment procedure in national policy-making see W. Pullen, *supra* note 14.

35. *See* State Applications, *supra* note 3.

36. *See, e.g.,* W. Pullen, *supra* note 14, at 105-13.

37. *Id.* at 10-11.

38. *Id.* at 21.

39. *Id.* at 30.

40. U.S. CONST. amends. I-X.

41. W. Pullen, *supra* note 14, at 33-67. The doctrine of Nullification, or State Interposition, held that the States, as sovereigns, retained the power to "veto" or "nullify" acts of Congress when the state legislature determined that the congressional statute was, in its sole opinion, unconstitutional. Calhoun and others were fierce advocates of the doctrine, convinced that it was the only possible way the Union could be preserved short of civil war. *See generally* J. BLUM, B. CATTON, E. MORGAN, A. SCHLESINGER, JR., K. STAMPE, & C. WOODWARD, *THE NATIONAL EXPERIENCE* (2d ed. 1968).

42. W. Pullen, *supra* note 14, at 68-84.

applications for a convention.<sup>43</sup> And as the number of applications has increased sharply, the purpose of the States in submitting them has also changed. States have seized upon the alternative amendment process as a tactical device to catch the attention of Congress.<sup>44</sup>

This shift in purpose is perhaps best illustrated by the national controversy in the early 1900s over direct election of United States Senators.<sup>45</sup> The States played upon the chronic fear of the American people, Congressmen and Senators included, of another constitutional convention, and in the end compelled Congress to propose the seventeenth amendment.<sup>46</sup> Some Senators who were opposed to direct election preferred the submission of the amendment by Congress rather than risk a convention.<sup>47</sup> Between 1893 and 1911, thirty-one applications were collected,<sup>48</sup> and under intense pressure to call the convention, the Congress in 1912 chose to avert a constitutional crisis by proposing the seventeenth amendment. Thus, even though an article V convention was never called, the possibility, or rather the apparent inevitability, of a national convention eventually compelled Congress to take action favored by the people. In this manner, then, the alternative amendment process served precisely the function intended by the Framers.<sup>49</sup>

The most recent effort by the States to have Congress call a

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43. From 1906 to 1916, twenty-seven petitions were filed to propose an amendment banning polygamy; from 1939 to 1960, twenty-eight states called for a convention to limit the taxing power of the federal government; from 1943 to 1949, six states petitioned for a convention on the issue of world federal government; and scattered applications have been filed on such far flung issues as controlling the Communist Party, balancing the federal budget and limiting the tenure of federal judges. See State Applications, *supra* note 3. See also Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175 (1963).

44. "In the [past], application was made by a state because a convention was thought to be desirable. Beginning with the twentieth century, however, the process has been used primarily as a prod in the side of Congress to force that body to propose a specific amendment." W. Pullen, *supra* note 14, at 105.

45. *Id.* at 105-13.

46. S. REP. NO. 293, *supra* note 31, at 6.

47. "In this country, just as soon as a constitutional convention was assembled they would be seeking to open every door to access and to carry out or make impossible the carrying out of the fallacies, the fads, and the fancies of the imagination of the people who talk about Government and the Constitution of the United States as glibly as though they knew something about it . . ." W. Pullen, *supra* note 14, at 111, quoting remarks of Senator Heyburn.

48. See State Applications, *supra* note 3.

49. "The history of the 17th amendment illustrates the usefulness of having a method by which a recalcitrant Congress can be bypassed when it stands in the way of the desires of the country for constitutional change." S. REP. NO. 293, *supra* note 31, at 6. Also recall the intentions of the Framers in providing a genuine alternative to Congress discussed in text accompanying notes 25-33 *supra*.

national convention came in the 1960's in the wake of the landmark Supreme Court decisions on the malapportionment of state legislatures. In 1962 in *Baker v. Carr*<sup>50</sup> the Court held that the issue of state legislative reapportionment was justiciable,<sup>51</sup> abruptly reversing its long-standing position to the contrary.<sup>52</sup> *Baker v. Carr* provoked an explosive reaction among the States. In December 1962 the Council of State Governments passed resolutions urging state legislatures to petition Congress for a national convention to consider constitutional amendments aimed at stripping the federal courts of jurisdiction in matters of legislative reapportionment.<sup>53</sup> Then, in 1964 with *Reynolds v. Sims*<sup>54</sup> as its flagship case,<sup>55</sup> the Supreme Court established the principle of "one-man, one-vote."<sup>56</sup> Following this decision, the Seven-

50. 369 U.S. 186 (1962).

51. "[T]he complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment." *Id.* at 237.

52. *See, e.g.,* *Colegrove v. Green*, 328 U.S. 549, 552 (1946) ("due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."); *cf. Radford v. Gary*, 352 U.S. 991 (1957) (per curiam); *Anderson v. Jordan*, 343 U.S. 912 (1952) (per curiam); *Remmey v. Smith*, 342 U.S. 916 (1952) (per curiam); *South v. Peters*, 339 U.S. 276 (1950) (per curiam); *MacDougall v. Green*, 335 U.S. 281 (1948) (per curiam); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (per curiam); *Cook v. Fortson*, 329 U.S. 675 (1946) (per curiam).

53. *The Sixteenth General Assembly of the States*, 36 STATE GOV'T 2, 10-15 (1963). The Council passed three resolutions calling for amendment of article V designed to overturn the *Baker v. Carr* decision and recommended

[t]hat the attached joint resolutions, dealing with proposed amendments to the United States Constitution be adopted by every State Legislature *without change* and in a uniform manner which will leave no question as to the intent of the several States:

- a. A resolution to amend Article V so as to simplify state initiation of proposed amendments.
- b. An amendment to eliminate federal judicial authority over the apportionment of State Legislatures.
- c. An amendment to establish a "Court of the Union" with authority to review Supreme Court decisions relating to the rights reserved to the States under the Constitution.

*Id.* at 11. The Council proposals created quite a stir. *See, e.g.,* Caldwell, Freund & Bernard, *Debate of Three Proposed Constitutional Amendments*, 53 ILL. B.J. 1040 (1965); Hurst, *Memorandum Regarding Pending Proposals to Amend the United States Constitution*, 36 WIS. B. BULL., Aug. 1963, at 7; Monroe, *To Preserve the United States: A Brief for the Negative on Three Current Plans to Amend the Constitution*, 8 ST. LOUIS U.L.J. 533 (1964); Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A.J. 631 (1963).

54. 377 U.S. 533 (1964).

55. *See also* *Lucas v. Forty-fourth Gen. Assembly*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA v. Lomenzo*, 377 U.S. 633 (1964).

56. "[A]s a basic constitutional standard, the Equal Protection Clause requires

teenth Biennial General Assembly of the States passed a resolution urging States to petition Congress for a convention to propose an amendment that would permit states to apportion one house of a bicameral legislature on some basis other than population.<sup>67</sup> This "quiet campaign to rewrite the Constitution"<sup>68</sup> steadily gained momentum and was abetted by the active support of certain members of Congress.<sup>69</sup> By March 1967, thirty-two states had submitted arguably valid applications to Congress—only two shy of the magic number representing two-thirds of the States.<sup>60</sup>

Senator Sam J. Ervin, Jr. of North Carolina then introduced, for the first time in our nation's history, legislation<sup>61</sup> on article V national conventions.<sup>62</sup> The Ervin Bill was designed to establish effective procedures for the calling and functioning of the convention and to delineate carefully the nature and scope of the convention's powers. Unfortunately, though the Ervin Bill has twice passed the Senate unanimously, it remains languishing in the House Judiciary Committee.<sup>63</sup>

Since 1967 the two additional state applications required to initiate the article V convention process have not been forthcoming. Indeed, the possibility of a constitutional convention has now dimmed considerably since several states have sought to withdraw their applications. At the present, it seems certain that the two-thirds requirement will not be met on reapportionment.

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that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. at 568.

57. *The Seventeenth Biennial General Assembly of the States*, 38 STATE GOV'T 39, 62 (1965).

58. Sorenson, *The Quiet Campaign to Rewrite the Constitution*, 50 SAT. REV., July 15, 1967, at 17.

59. Chief among them was United States Senator Everett McKinley Dirksen of Illinois. See, e.g., Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968).

60. "At this point," Senator Sam J. Ervin, Jr. recalls, "the situation attracted the first attention in the press. . . . The immediate reaction was a rash of newspaper editorials and articles, almost uniformly critical of the effort to obtain a convention, and a flurry of speeches on the subject in the Congress." Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875, 877 (1968).

61. S. 2307, 90th Cong., 1st Sess. (1967).

62. 113 CONG. REC. 23005 (1967).

63. No action was taken by the Congress until October 19, 1971, when the Ervin Bill, slightly amended and renumbered, S. 215, 92d Cong., 1st Sess. (1971), passed the Senate eighty-four to nothing. 117 CONG. REC. 36804 (1971). Action by the House was not forthcoming on the Ervin Bill during the ninety-second congress, and so Senator Ervin reintroduced the bill, S. 1272, 93d Cong., 1st Sess. (1973), in the ninety-third congress in March 1973. 119 CONG. REC. S. 5017 (daily ed. March 19, 1973). On July 9, 1973, S. 1272 passed the Senate on a voice vote with no opposition, 119 CONG. REC. S. 12728 (daily ed. July 9, 1973).

The excellent study, research and scholarship fostered by America's flirtation with a constitutional convention during the late 1960's should not, however, be filed away simply because a convention appears to be a short-term improbability. Today, in a political atmosphere not cankered by partisanship on issues that might be the subject of state applications, is the perfect time for article V to be considered on its own merits.<sup>64</sup> The serious constitutional problems inherent in article V's vagueness ought to be resolved in anticipation of a future time when the Congress finds itself in possession of the required number of state applications. Given that the amendment process in a constitutional political system should be "perfect," unhappily the procedure for assembling and conducting the business of an article V convention is not at all clear, precise or perfect. If past experience is any guide, were a national constitutional convention held today, with no legislative or other authority to guide and limit its activities, it is doubtful that all segments of the population would accept the product of that convention as constitutionally binding.<sup>65</sup>

The most conceptually difficult questions left unanswered by article V concern the powers of Congress and the federal judiciary over the convention. Initially, it is essential to define and analyze the power of Congress, if any, to limit the scope and subject matter of an article V convention. Secondly, to what extent does the power of the federal judiciary extend to the amendment process generally and to national conventions particularly? These twin considerations cannot be resolved independently of one another, for any effort made by Congress to legislate in this field will be limited ultimately by the constitutional

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64. There is now in progress, however, a movement to have a convention called on the issue of forced busing of schoolchildren to achieve racial balance in public schools. To date, the following twelve states have sent applications to Congress asking for a convention on this issue: Alabama, 119 CONG. REC. S. 15869 (daily ed. Sept. 5, 1973); Delaware, 119 CONG. REC. S. 15869 (daily ed. Sept. 5, 1973); Georgia, 119 CONG. REC. H. 5158 (daily ed. June 21, 1973); Louisiana, 116 CONG. REC. 5479 (1970), 111 CONG. REC. 164 (1965); Massachusetts, 120 CONG. REC. S. 7035 (daily ed. May 6, 1974); Michigan, 117 CONG. REC. 41210 (1971); Mississippi, 119 CONG. REC. S. 4839 (daily ed. March 15, 1973), 116 CONG. REC. 6097 (1970); Nevada, 119 CONG. REC. S. 9728 (daily ed. May 29, 1973); Oklahoma, 119 CONG. REC. S. 8316 (daily ed. May 7, 1973); Tennessee, 118 CONG. REC. 16214 (1972), 112 CONG. REC. 44 (1966); Texas, 119 CONG. REC. S. 6878 (daily ed. April 10, 1973); Virginia, 119 CONG. REC. H. 2400 (daily ed. April 3, 1973).

65. For example, the movement in the 1960's for a convention in the wake of *Baker v. Carr* and *Reynolds v. Sims* led to much bickering over whether a malapportioned state legislature could submit a constitutionally-valid application to Congress on the issue of its own malapportionment. See, e.g., 113 CONG. REC. 1010 (1967) (remarks of Senator Tydings).

power and political disposition of the Supreme Court. When presented with such legislation the Court might choose to ignore the issue as properly a "political question,"<sup>66</sup> to uphold the constitutionality of the legislation on the merits, or to toss it on the mile-high scrap heap of congressional dreams wrecked by that relentless engine Judicial Review.

## II. THE POWER OF CONGRESS TO LIMIT THE SCOPE AND SUBJECT MATTER OF AN ARTICLE V NATIONAL CONVENTION

The problem of delineating congressional power<sup>67</sup> springs from the difficulty in reconciling the express language of article V with the purpose the convention procedure is intended to serve. If the Framers intended to eliminate Congress entirely from the alternative amendment process, the language of article V is uncharacteristically misleading. The article clearly establishes an important role for Congress in the convention process. For example, before a convention can be assembled Congress must first perform an affirmative act in calling for it.<sup>68</sup> It is also Congress and not the convention that determines how amendments proposed by the convention shall be ratified by the States.<sup>69</sup>

On the other hand, the convention procedure was intended to be an *alternative* to Congress.<sup>70</sup> Therefore, a search for that proper degree of control that Congress may exert over the convention involves balancing the unambiguous language of article V against the intent of the Framers that the two methods of proposing amendments be genuine alternatives.

The desire of some to have Congress limit the scope and subject matter of a national convention is undoubtedly rooted in the age-old fear of the "runaway" convention.<sup>71</sup> This apprehension is most likely engendered by the rather embarrassing realization that our own political

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66. See text accompanying notes 130-34 *infra*.

67. Discussion of Congress' power to limit the convention should focus upon procedural rather than substantive aspects of the amendment process. There are few constitutional restrictions on the substantive content of a constitutional amendment. See text accompanying notes 154-55 *infra*. Procedural uncertainties are the source of difficulty. Thus, the *subject-matter* validity of an amendment proposed by convention must be determined in its *procedural* context.

68. U.S. CONST. art. V.

69. *Id.*

70. See text accompanying notes 25-33 *supra*.

71. See, e.g., Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1077 (1967).

system is actually the product of clearly *ultra vires* acts committed by a small group of federalist partisans meeting secretly in Philadelphia in 1787.<sup>72</sup> In complete disregard of the Articles of Confederation and their congressional mandate,<sup>73</sup> the delegates to the Philadelphia Convention wrote an entirely new constitution, "the product of a revolution, bloodless though it was."<sup>74</sup> Members of the convention later frankly admitted that the Convention had acted beyond the scope of its authority, but defended the procedure on grounds of absolute necessity.<sup>75</sup> The fear that modern-day convention delegates might fancy themselves similarly inspired has led many to conclude that Congress should protect the nation from such a convention by requiring the States to disclose in their applications the general subject matter or problem area to be considered by the convention.<sup>76</sup> As a corollary to this point, advocates of a limited convention would have Congress refuse to submit for ratification any proposed amendments that deal with any other issue. Others vigorously insist that Congress has no such power.<sup>77</sup>

This latter group stresses the need for the convention to remain independent of Congress.<sup>78</sup> They acknowledge Congress' function in calling the convention and prescribing the mode of ratification, but contend that any other authority Congress may have is limited strictly to routine "housekeeping" functions such as providing for the date, place and financing of the convention.<sup>79</sup> Arguably the purpose of the alternative amendment process would be defeated if Congress could impose substantive restraints disguised as procedure that would effectively block state access to the process or that would allow Congress to ob-

72. See, e.g., Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV. 921, 925 (1968).

73. The mandate of the Philadelphia Convention was expressly limited to proposing amendments to the existing Articles of Confederation. See text accompanying note 16 *supra*.

74. L. ORFIELD, *supra* note 8, at 10.

75. Martig, *Amending the Constitution Article V: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1257 (1937).

76. See, e.g., Bonfield, *supra* note 18; *Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 233 (1967) (memorandum from Philip B. Kurland to Senator Sam J. Ervin, Jr.); *id.* at 46 (remarks of Professor Wallace Mendelson); *id.* at 36 (remarks of Theodore C. Sorenson).

77. See, e.g., *id.* at 231 (letter from Alexander M. Bickel to Professor Philip B. Kurland); Black, *supra* note 17.

78. Professor Black contends that the idea that article V conventions can and ought to be limited in scope is "a child of the twentieth century." Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 203 (1972).

79. See, e.g., *Hearings on S. 2307, supra* note 76, at 7 (statement of Senator Hruska).



struct amendments with which it disagreed.<sup>80</sup> Therefore, the autonomy of the convention must be preserved,<sup>81</sup> and Congress must not impose restrictions inconsistent with the implied requirements of article V.<sup>82</sup>

This position finds some support in the debates of the Philadelphia Convention and in the language of article V itself. The phrase "convention for proposing Amendments,"<sup>83</sup> using the plural form of the noun, indicates that the convention might be able to propose as many amendments as it finds necessary and that Congress is constitutionally unable to restrict this right.<sup>84</sup> Furthermore, it can be argued that the Constitution's draftsmen never intended article V to be so narrowly construed as to limit the power of the convention to propose more than one amendment.<sup>85</sup>

Proponents of an unlimited convention have, in addition, generally taken the position that Congress may not limit the constitutional effect of state applications to the subject or issue, if any, stated therein as the motivation for requesting a convention. Thus, all state applications, regardless of subject, should be counted together in computing the two-thirds requirement.<sup>86</sup> In 1929 the state legislature of Wisconsin concluded that a constitutional convention was long overdue,<sup>87</sup> in the process taking the argument to its extreme. The legislature passed a joint resolution<sup>88</sup> reminding Congress that since the first petition filed in 1788,<sup>89</sup> a sufficient number of state applications had been submitted to Congress in the intervening one hundred forty-one years so that, when counted all together, the two-thirds requirement was satisfied.<sup>90</sup> The more reasonable inference is that "such petitions must be pre-

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80. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1618 (1972).

81. Platz, *Article V of the Federal Constitution*, 3 GEO. WASH. L. REV. 17, 46 (1934).

82. Note, 85 HARV. L. REV., *supra* note 80, at 1618.

83. U.S. CONST. art. V (emphasis added).

84. Forkosch, *supra* note 71, at 1075.

85. *Id.* at 1076.

86. See, e.g., L. ORFIELD, *supra* note 8, at 42; W. Pullen, *supra* note 14, at 155.

87. Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 195 (1951). See also 71 CONG. REC. 3369 (1929).

88. STATE OF WISCONSIN JOINT RESOLUTION 83 (S<sup>pt.</sup> 23, 1929). FEDERAL CONSTITUTIONAL CONVENTIONS, S. Doc. No. 78, 71st Cong., 2d Sess. 32 (1930).

89. See generally W. Pullen, *supra* note 14, at 145.

90. The resolution then requested "that the Congress of the United States perform the mandatory duty imposed upon it by the above quoted Article V and forthwith call a convention to propose amendments to the constitution of the United States. . . ." STATE OF WISCONSIN JOINT RESOLUTION 83, *supra* note 88, at 32.

sented within a sufficiently reasonable time to justify the belief that they represented the state of public sentiment at the time."<sup>91</sup>

The arguments put forward by those who find in article V a requirement for an unlimited convention reveal a certain fascination for the *concept* of a national convention and betray an exaggerated notion of the proper powers of a truly *constitutional* convention. As Cyril Brickfield has noted, "[t]hose who deny that Congress has the power to bind a convention rely heavily on the so-called doctrine of 'conventional sovereignty.'"<sup>92</sup> And as Senator Heyburn explained on the floor of the Senate in 1911: "When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it."<sup>93</sup>

Supporters of this doctrine of conventional sovereignty attempt to soothe fears of a runaway convention by correctly pointing out that a convention can only *propose* amendments, not ratify them.<sup>94</sup> Although the convention would have no power to change the Constitution, it would have the complete power to propose changes. Therefore, when one speaks of an "unlimited convention" this means only that the Convention would be free to propose amendments on any subject it saw fit. Ratification of these proposals by the States would still be required.

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91. Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 794 (1927). See also *Dillon v. Gloss*, 256 U.S. 368, 375 (1921); text accompanying notes 19-20 *supra*.

92. C. BRICKFIELD, *supra* note 13, at 16.

93. 46 CONG. REC. 2769 (1911). Cyril Brickfield has noted that

[a]ccording to this [Heyburn's] theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign powers and therefore is supreme to all other Government branches or agencies.

C. BRICKFIELD, *supra* note 13, at 16.

94. The power of the convention is thus viewed as equal to, but not greater than that of Congress. The convention can only set into motion the amendment process in the same sense as Congress, which is free at any time to propose any amendment whatever upon which two-thirds of both Houses agree. "Why does not this Congress amend in every conceivable manner the Constitution . . . ? It can propose amendments all over the place if it wants to. Why does not this Congress run away in its effort to amend the Constitution? Common sense and good faith restrains it. For the same reason I would be very confident and extend every good faith to the representatives in a national convention." 113 CONG. REC. 10113 (1967) (remarks of Senator Hruska). See also *Hearings on S. 2307*, *supra* note 11, at 7.

On the other hand, a compelling argument can be made that the power of amendment in article V is itself *constitutionally limited*.<sup>95</sup> This approach sees article V as only one part of a fragile and delicately balanced political structure in which the equilibrium between article V's express language and the need for an independent convention is more properly weighted in favor of greater congressional control. Thus Congress should have the power to restrict the convention to those amendments that dealt with the general issue or problem that had inspired two-thirds of the States to call for a convention.<sup>96</sup>

The conceptual framework for this approach to article V appears in Judge Jameson's classic treatise on constitutional conventions.<sup>97</sup> Central to Jameson's analysis in his distinction between the *revolution-*

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95. One of the first acts of the fledgling Congress under the new Constitution was designed to make clear that the overall authority of the Constitution was superior to the power to amend contained in article V. In 1789, reacting to amendments proposed by James Madison, Roger Sherman objected to the idea of interweaving amendments into the text of the original Constitution, urging that the latter sprang from a higher authority than the amending power. 1 ANNALS OF CONG. 707-08 (1789). Accordingly, Sherman suggested that the original text of the Constitution be left undisturbed, and that amendments be proposed as supplementary to it. *Id.* Sherman's proposal eventually prevailed, and the precedent thus created has been followed ever since. Amendments appear as additions to the original document, as is illustrated, by way of example, by the eleventh amendment, which clearly supersedes the original language of portions of article III.

96. Within this general area the convention would have a free hand to propose any amendment it felt necessary to resolve the problem. Outside that area the convention would have no power to act, and Congress might justifiably refuse to submit to the States for ratification any *ultra vires* amendment proposal. See, e.g., STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES 16 (Comm. Print 1952).

The Ervin Bill, discussed in note 63 *supra*, would require a valid state application to specify "the nature of the amendment or amendments to be proposed," S. 1272, 93d Cong., 1st Sess. § 2 (1973), and would give Congress the power to refuse to submit for ratification an amendment proposed by the convention "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 . . . ." *Id.* § 11(b)(1)(B).

The Ervin Bill is likewise careful to preserve the right of a state to call for a *general* revision of the Constitution. S. REP. NO. 293, *supra* note 31, at 1. Those who favor a limited convention do not deny or doubt a power in the States to call for a wide-open convention to propose amendments which, if ratified, would amount to a general revision of the Constitution. They do insist, however, that a general convention should not be called unless the States expressly ask for one. That is, there should be general popular dissatisfaction with the Constitution and a national consensus for wide-ranging reform. Such a consensus should not be inferred from the fact that two-thirds of the States had applied for a convention on a variety of different subjects. See, e.g., *Hearings on S. 2307*, *supra* note 11, at 67 (remarks of Professor Bickel); Bonfield, *supra* note 18; Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903 (1968).

97. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS (4th ed. 1887).

ary and the *constitutional* convention. A revolutionary convention consists of those bodies of men who, in times of political crisis, assume, or have cast upon them, provisionally, *the function of government*. They either supplant or supplement the existing governmental organization. . . . [t]hey are not subaltern or ancillary to any other institution whatever, but lords paramount of the entire political domain. . . . In short, a Revolutionary Convention is simply a PROVISIONAL GOVERNMENT.<sup>98</sup>

The Philadelphia Convention of 1787 meets all of Jameson's criteria for a revolutionary convention.<sup>99</sup> Likewise Jameson implies that most state constitutional conventions held during the independence movement were clearly revolutionary.<sup>100</sup>

In opposition to the revolutionary convention is the constitutional convention.

It differs from the [revolutionary convention] in being, as its name implies, *constitutional*; not simply as having for its object the framing or amending of Constitutions, but as being within, rather than without, the pale of the fundamental law; as ancillary and subservient and not hostile and paramount to it. . . . It is charged with a definite, and not a discretionary and indeterminate, function. It always acts under a commission, for a purpose ascertained and limited by law or by custom. . . . It never supplants the existing organization. It never governs.<sup>101</sup>

Jameson then notes that the two concepts are mutually exclusive, and that a convention may not at the same time claim to be a constitutional convention while exercising revolutionary powers.<sup>102</sup> He objects to the doctrine of conventional sovereignty, calling it promotive of "a degree of omnipotence to which, in a government of law, there can be found no parallel, and which is inconsistent with the fundamental principles of American liberty."<sup>103</sup> Using Jameson's terminology, plainly article V contemplates a constitutional convention as opposed to a revolutionary one.<sup>104</sup>

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98. *Id.* at 6.

99. Although Jameson is loath to admit it. See *id.* at 377-80.

100. *Id.* at 9.

101. *Id.* at 10.

102. Jameson contends that a convention which at any stage of its proceedings overreaches itself becomes *ab initio* a revolutionary convention. *Id.* at 10-11.

103. *Id.* at 15.

104. Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 994 (1968). For example, Jameson postulates that the legislative branch retains considerable power over a convention. As to routine housekeeping matters, "it is in general the right and the duty of a legislature to prescribe *when*, and *where*, and *how* a Convention shall meet and proceed with its business. . . ." J. JAMESON, *su-*

The Jameson analysis is widely accepted,<sup>105</sup> for it blends more smoothly into our constitutional system and more accurately reflects both the expectations of the Framers and the practical realities of modern American politics. Properly understood, the power to amend the Constitution expressed by article V is a constitutionally limited power and can have only the effect that the Constitution, taken as a whole, permits.<sup>106</sup> The express limitations set out in the language of article V contradict the theory that the power to amend springs from the same source as the Constitution itself.

The Founding Fathers apparently felt that, although the Constitution was fundamentally sound, certain defects would be certain to emerge. Thus article V was included as a device by which the Constitution could be adapted to new realities and situations while leaving certain indispensable rights and freedoms undisturbed.<sup>107</sup> Hamilton in *The Federalist* remarked that "every amendment to the constitution, if once established, would be a single proposition, and might be

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*pra* note 97, at 365. On the broader question of congressional power generally, he refers to the legislative branch as "the sentinel on duty," charged with protecting the republic against a runaway convention, an obligation which the legislature "cannot rightfully abdicate." *Id.* Furthermore, the legislature, and only the legislature, "has a clear constitutional right, in its discretion, to prescribe the scope of duties of the Convention it calls. . . ." *Id.* at 364.

105. See, e.g., C. BRICKFIELD, *supra* note 13; Bonfield, *supra* note 104; Gilliam, *Constitutional Conventions: Precedents, Problems, and Proposals*, 16 *ST. LOUIS U.L.J.* 46 (1971).

106. See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 347-49 (1855). Furthermore, the restrictions upon amendment imposed by article V itself contradict the theory that the power to amend springs from the same source as the Constitution. For example, article V clearly prohibited any amendment before 1808 which would have interfered with the African slave trade. Article V also forbids any amendment that would deprive any State of its equal representation in the Senate without its consent. Arguably the Senate could be reorganized on some basis other than equal representation for every State, but this could be accomplished only if every State in the Union consented to the change, for article V's prohibition applies only insofar as a change is attempted without the consent of a State. To illustrate, reorganization of the Senate on some basis other than equal representation can be accomplished under the Constitution. Yet such a change cannot be made under the proposal/ratification procedure in article V. If only one State, for example, failed to ratify an amendment changing the representation formula of the Senate, then presumably that State could not be compelled to accept the change, even though ratified by three-fourths of the other States. Likewise, if *all* fifty States indicated their consent to the change in some manner acceptable to all, but different from the ratification process of article V, then such an expression of consent might be sufficient to amend effectively article I of the Constitution. The power and procedure of amendment under article V are thus not exclusive, reinforcing the idea that the power to amend is constitutionally limited.

107. Madison, in *The Federalist*, speaks of article V only in relation to the "amendment of errors," and suggests a constitutionally limited power of amendment by noting that the article is "under two exceptions." *THE FEDERALIST* No. 43, at 315 (B. Wright ed. 1961) (J. Madison) (emphasis added).

brought forward singly. . . . There can therefore be no comparison between the facility of effecting an amendment, and that of establishing in the first instance a complete constitution."<sup>108</sup>

When taken as a constitutionally limited power of amendment, article V must be made consistent with other powers created and distributed by the Constitution, and, in particular, the power to amend must be reconciled with the power of Congress. For example, although article V is silent on Congress' ability to restrict a convention, persuasive authority for the existence of such powers is found in the general grant of legislative authority in article I. The broad scope of the "necessary and proper"<sup>109</sup> clause was first sketched out in 1816 by the Supreme Court in *Martin v. Hunter's Lessee*.<sup>110</sup> The Court held that:

The constitution unavoidably deals in general language. . . . Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.<sup>111</sup>

As Chief Justice Marshall wrote for the Court three years later in *McCulloch v. Maryland*:<sup>112</sup>

[T]here is no phrase in the Constitution which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.

. . . .

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>113</sup>

One hundred two years later the Supreme Court applied the principles established in these two cases directly to the scope of congressional power in the amendment process. In *Dillon v. Gloss*<sup>114</sup> the Court held that the necessary and proper clause authorized Congress to impose time limits upon the ratification process.<sup>115</sup> Thus the as-

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108. *Id.* No. 85, at 545 (A. Hamilton).

109. U.S. CONST. art. I, § 8.

110. 14 U.S. (1 Wheat.) 304 (1816).

111. *Id.* at 326-27.

112. 17 U.S. (4 Wheat.) 316 (1819).

113. *Id.* at 406, 421.

114. 256 U.S. 368 (1921).

115. "As a rule the Constitution speaks in general terms, leaving Congress to deal

sumption that Congress has a broad power to fashion the ground rules for the convention and, to prescribe basic procedures is well founded.<sup>116</sup>

There is, then, a close relationship between the principal congressional power conferred under article V and the supporting or ancillary powers, conferred under the necessary and proper clause, to execute the principal power.<sup>117</sup> Without this supporting power, the principal power could not exist.<sup>118</sup> These powers apply not only to procedural functions such as calling the convention, but also extend to the vital function of determining the ultimate scope of the convention.<sup>119</sup>

Although the unlimited convention concept does attempt to guarantee a convention as independent of Congress as is constitutionally possible, in doing so it rides roughshod over an equally compelling element of the amendment process. As noted above,<sup>120</sup> regardless of the procedure used, the Framers clearly intended that amendments be proposed only when there exists a broad national consensus for change. While the two-thirds supermajority required before Congress may propose amendments is a proper measure of this consensus, an independent, wide-open convention could easily be the source of proposals that reflect no national consensus at all. Accordingly, the notion that all state applications should be counted together in computing the two-thirds requirement for a convention seems to contradict the need for a national consensus. Equally inconsistent is the argument that the convention, once assembled, is free to propose amendments on any subject it chooses.<sup>121</sup> Manifestly, it is more reasonable to conclude that Congress, having been delegated the exclusive authority to call the con-

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with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule." *Id.* at 376 (footnote omitted).

116. Kauper, *supra* note 96, at 906. "The national legislature is obviously the most appropriate body for exercising a supervisory authority, for the duty to call a convention necessarily embraces the authority to determine whether the conditions which create the duty are satisfied." *Id.* at 906-07.

117. C. BRICKFIELD, *supra* note 13, at 19.

118. *Id.*

119. *Id.*

120. See text accompanying notes 19-20 *supra*.

121. As a 1952 House Judiciary Committee Staff Report concluded,

To argue that Congress must launch the cumbersome, costly, and confusing proceedings of a national convention whenever 32 States fortuitously submit resolutions requesting a convention for one purpose or another does not seem sound when viewed from a realistic standpoint. . . . [T]o transform every petition asking for a specific remedial amendment into a request for a general convention by classifying it with every other application asking for constitutional change would constitute a strained interpretation of article V wholly at variance with the present needs and desires of the States.

STAFF OF HOUSE COMM. ON THE JUDICIARY, *supra* note 96, at 11.

vention, has the power to see to it that all required elements of the amendment process, including the national consensus, are present before issuing such a call. Practically speaking, Congress should not count all applications together regardless of timeliness or subject matter. Moreover, Congress should require that the nature of a particular problem be stated in the language of the state application and should refuse to submit for ratification amendments proposed by the convention unrelated to that problem. Only in this way can the Constitution's national consensus requirement be fulfilled. The independence of the convention can be protected by giving the convention a totally free hand to propose any and all amendments it deems necessary that reasonably relate to the general problem area or subject matter stated in the applications.

Ironically, the wide-open convention approach, which in the abstract seems to facilitate the convention mode of proposing amendments, would in all probability have precisely the opposite effect.<sup>122</sup> States that desire constitutional changes only within a particular problem area will be more reluctant to petition Congress for a convention if they know that their limited applications will be counted together with others dealing with completely different subjects.<sup>123</sup>

In conclusion, an analysis of congressional power over the alternative procedure of article V must take into account the three requisite conditions in the amendment process: perfection, national consensus, and deliberation and debate over a national forum. Additionally, the independence of the convention from Congress must be preserved. Both the congressional and convention procedures satisfy the national forum requirement. The unlimited convention approach emphasizes the independence of the convention, but in so doing loses sight of the need for national consensus, thereby creating the possibility that the perfection of the amendment process will be spoiled by the proposal of amendments that do not reflect the national mood. The proper balance between congressional power and conventional independence can be achieved, however, by an acknowledgement of the power of Congress to limit the subject matter of the convention, but a denial of any power in Congress to interfere with or limit the convention in pro-

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122. See, e.g., Ervin, *supra* note 60, at 883.

123. "Indeed, the usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the states will be defeated if the states are told that it can be invoked only at the price of subjecting the nation to all the problems, expense, and risks involved in having a wide open constitutional convention." Kauper, *supra* note 96, at 911-12; see, e.g., S. REP. No. 293, *supra* note 31, at 9.



posing any and all amendments within that general area. This analysis, it is submitted, successfully integrates all relevant policy considerations germane to the amendment process generally and would provide a climate in which the states could take advantage of the alternative process with hope for success and without fear of provoking a serious constitutional crisis.<sup>124</sup>

### III. THE COURTS AND ARTICLE V

#### A. Introduction

The second great mystery shrouding article V involves the latent power of the federal courts over a constitutional convention. The powers of Congress must be considered in light of the justiciability of issues arising under article V, for it is in the courts that the issue of congressional authority will finally be decided. Should the courts find these issues justiciable, any attempt by Congress to control the convention will most surely be made in anticipation of how the Supreme Court might react. On the other hand, if these problems are found non-justiciable, the only check upon congressional power will be the good faith of Congress itself.<sup>125</sup>

At first blush it seems axiomatic that the great constitutional issues raised by article V are within the scope of the judicial power. There are those who suggest that an issue is rightly before a federal court when its resolution depends upon the construction of the laws or Constitution<sup>126</sup> of the United States,<sup>127</sup> for "the federal judiciary is supreme in the exposition of the law of the Constitution . . . ."<sup>128</sup> Under this view, any question involving the amendment procedure in

124. This is the approach taken by the Ervin Bill, S. 1272, 93d Cong., 1st Sess. (1973), discussed in note 63 *supra*. See also S. REP. NO. 293, *supra* note 31, at 6-7.

125. Concededly, the Congress cannot be forced by the courts or by the provisions of this bill to convene a convention when the constitutional prerequisites have been satisfied. And since the obligation to call the convention is given to Congress, neither the President nor the Supreme Court could act in its stead. However, every Member of Congress has taken an oath to support the Constitution and it is inconceivable that Congress would refuse to perform its duty. No adequate argument has been brought forth to suggest a different conclusion.

S. REP. NO. 293, *supra* note 31, at 9.

126. "[T]he basic operating principle of American federalism [is] that the ultimate determination of federal constitutional questions rests with the Supreme Court of the United States . . . ." Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1, 38 (1963).

127. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821).

128. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

article V presents a federal question that must ultimately be decided by the Supreme Court.<sup>129</sup>

But the issue of judicial authority and article V is not so easily resolved, for over the years the federal courts have imposed upon themselves restrictions in certain areas of constitutional law. The "political questions" doctrine,<sup>130</sup> for example, is a theory of judicial self-restraint whereby the courts refuse to find many constitutional issues<sup>131</sup> justiciable on the grounds that the subject matter involved is more suited to the "political departments" of the government.<sup>132</sup> Through the years the standards formulated by the Supreme Court for determining which issues present nonjusticiable political questions have reflected the Court's self-perception of its own authority. In 1962 the Court substantially revised its approach to political questions,<sup>133</sup> and the new guidelines<sup>134</sup> put forward have thickened the fog of uncertainty shadowing the justiciability of the amendment process.

To further exacerbate the problem, since there has never been an article V convention, the Supreme Court has never had reason to focus its attention directly upon the subject. However, the Court has on numerous occasions considered questions raised by the amendment process generally. As a result, an inquiry into the power of the judiciary over national conventions must proceed in two parts: first, a review of past cases in which the Supreme Court has ruled on issues regarding constitutional amendment generally; second, a bit of speculation as to how the Court might react to particular problems springing from a national convention.

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129. *In re* Opinions of the Justices, 204 N.C. 806, 809, 172 S.E. 474, 476 (1933).

130. *See generally* C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 14 (2d ed. 1970); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966).

131. For example, the Court has determined that the issue of the validity of the Constitution itself is non-justiciable. *Luther v. Borden*, 48 U.S. (7 How.) 1, 39 (1849).

132. "The non-justiciability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint." C. WRIGHT, *supra* note 130, § 14, at 45. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164-66 (1803) (Marshall, C.J.).

133. *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962).

134. Prominent on the surface of any case held to involve a political question is found 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 the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

## B. Justiciability of the Amendment Process

Although state courts have almost uniformly held that the question of amendment of state constitutions is justiciable,<sup>135</sup> the federal courts have been somewhat less than confident in handling the subject, and the Supreme Court has left a trail of confusing decisions.<sup>136</sup> During the nineteenth century,<sup>137</sup> the drift of Supreme Court opinions tended toward nonjusticiability.<sup>138</sup> With the exception of a 1798 case,<sup>139</sup> in which neither the parties nor the Court considered the issue,<sup>140</sup> the Court generally was of the opinion that, with regard to constitutional amendments, "the judicial is bound to follow the action of the political department of the government, and is concluded by it."<sup>141</sup>

It was not until after the turn of the century that the Supreme Court tipped the scales of justiciability in the opposite direction.<sup>142</sup> The Court asserted its power in a number of cases to decide positively several issues of constitutional amendment law, obviously confident of its authority to pass upon both procedural and substantive aspects of the amendment process.<sup>143</sup>

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135. See, e.g., *Collier v. Frierson*, 24 Ala. 100 (1854); *Carton v. Secretary of State*, 151 Mich. 337, 115 N.W. 429 (1908); *Wells v. Bain*, 75 Pa. 39 (1874).

136. See, e.g., *Annot.*, 122 A.L.R. 717 (1939); *Annot.*, 87 A.L.R. 1321 (1933); *Annot.*, 83 A.L.R. 1374 (1933).

137. The Supreme Court was for the first time confronted with the issue of the validity of a constitutional amendment in *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). See note 140 *infra*.

138. In 1849, Chief Justice Taney strongly hinted that constitutional amendments presented nonjusticiable political questions. *Luther v. Borden*, 48 U.S. (7 How.) 1, 39, 47 (1849). Nevertheless, in 1855 Justice Wayne concluded that the power to amend the Constitution is a constitutionally limited one. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 348 (1855). In 1871 the Court, in an aside, held that insofar as the valid ty of the Civil War Amendments was concerned, action by Congress was conclusive upon the courts. *White v. Hart*, 80 U.S. (13 Wall.) 646, 649 (1871).

139. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

140. Neither party to the suit maintained that the issue of constitutional amendment ought to be a political question, and the Court, in its brief five-line opinion, did not discuss the problem. See, e.g., L. ORFIELD, *supra* note 8, at 7.

141. *White v. Hart*, 80 U.S. (13 Wall.) 646, 649 (1871).

142. First of the twentieth century amendment cases was *Myers v. Anderson*, 238 U.S. 368 (1915), in which it was argued that the fifteenth amendment was invalid insofar as it applied to state or municipal elections, on the grounds that when so applied the amendment had the effect of depriving the state of its equal representation in the Senate. *Id.* at 374. The Court ignored the point.

143. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Court held that constitutional amendments can be ratified only in the manner provided for by Congress and that the role of the state legislature in the ratifying process is a federal function, derived not from the people of that State, but rather from the United States Constitution. The Court also reaffirmed *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), that the decision of the Congress to propose an amendment to the States for ratification was not subject to the veto power of the President. See *id.* at 381 (the famous footnote by Justice

Perhaps the most important case in the area of justiciability of constitutional amendment issues came in 1939 in *Coleman v. Miller*.<sup>144</sup> This case involved the validity of Kansas' ratification of the proposed Child Labor Amendment and is significant in that the Court expressly found two areas of constitutional amendment law nonjusticiable. The Court held that the effect of a previous rejection of an amendment by a State "should be regarded as a political question."<sup>145</sup> The Court also held that the validity of a State's ratification of a proposed amendment nearly thirteen years after it had been proposed was also nonjusticiable.<sup>146</sup>

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Chase).

Despite protests by the Solicitor General that the issues presented were nonjusticiable, in the National Prohibition Cases, 253 U.S. 350 (1920), the Court ruled that the substantive content of the eighteenth amendment was within the scope of the amendment power and that the amendment had been properly adopted. The Court also held that the required two-thirds vote in each house is a vote by two-thirds of those members present, presuming a quorum, and not a vote by two-thirds of the total elected membership.

*Dillon v. Gloss*, 256 U.S. 368 (1921), held that constitutional amendments must be ratified within a reasonable time after they are proposed, and that Congress has the power to set a reasonable time limit upon the ratification process. Query: does Congress also have the power to set time limits for ratification of amendments proposed by convention?

*Fairchild v. Hughes*, 258 U.S. 126 (1922), and *Leser v. Garnett*, 258 U.S. 130 (1922), both involved the validity of the nineteenth amendment. In the former case the Court held that a taxpayer lacked standing to challenge the constitutionality of the amendment prior to its ratification by the States. In the latter case, the Court held that equal suffrage was a proper subject for amendment under article V, and restated the federal function of state legislatures in ratifying proposed amendments. At this point, however, the Court's engine of justiciability ran out of steam. The opinion revived the political question doctrine to hold that the proclamation of an amendment by the Secretary of State is conclusive upon the courts. *Id.* at 137.

In *Druggan v. Anderson*, 269 U.S. 36 (1925), the Court held that, although by its own terms the eighteenth amendment would not go into force until one year from the date of ratification, the amendment itself became effective upon its ratification. As a result, Congress was held to have power to legislate in anticipation of enforcement of the amendment and was not obliged to wait until the year had expired.

Six years later, in *United States v. Sprague*, 282 U.S. 716 (1931), the Court rejected the argument that amendments dealing with personal rights and individual liberties must be ratified by state conventions rather than state legislatures. The Court expressly held that regardless of the substantive content of a proposed amendment, Congress has the unqualified power to choose the one or the other method of ratification. *Id.* at 732. More importantly, the language of the opinion is such as to induce the belief that the Court regarded the amending process as generally justiciable. L. ORFIELD, *supra* note 8, at 18.

The effect of the absolute repeal of a constitutional amendment was the issue in *United States v. Chambers*, 291 U.S. 217 (1934). The Court first took judicial notice of the ratification of the twenty-first amendment and then declared the eighteenth amendment "inoperative," *id.* at 223, holding that "neither the Congress nor the courts could give it continued vitality," *id.* at 222.

144. 307 U.S. 433 (1939).

145. *Id.* at 450.

146. The Court distinguished *Dillon v. Gloss*, 256 U.S. 368 (1921), by noting that

The case owes its fame, however, to the concurring opinion of Justice Black,<sup>147</sup> who contended that the entire constitutional amendment process was nonjusticiable:

To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments we are unable to agree.

. . . The Court here treats the amending process of the Constitution in some respects as subject to judicial construction, in others as subject to the final authority of the Congress. . . . No such division between the political and judicial branches of the government is made by Article V which grants power over the amending of the Constitution to Congress alone. Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "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.

. . . .

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.<sup>148</sup>

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in *Dillon* the Court had merely upheld Congress' determination that seven years would be the maximum period for ratification. In *Coleman*, Congress had imposed no such time limit, and the Supreme Court was reluctant to provide one, concluding it lacked the proper criteria for such a determination. It held that the issue "can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment." 307 U.S. at 454.

In a fit of schizophrenia, however, the Court expressly declined to hold nonjustifiable whether the lieutenant governor is part of the "legislature" as contemplated by article V. The majority opinion noted that the Court was "equally divided" on the issue, and "therefore the Court expresses no opinion upon that point." *Id.* at 447. The practical difficulties presented by an "equally divided" nine-man Court are discussed, tongue-in-cheek, in Note, *Sawing a Justice in Half*, 48 YALE L.J. 1455 (1939). It appears, however, that no High Court prestidigitation was involved, for Mr. Justice McReynolds was absent on the day of decision. See, e.g., 28 GEO. L.J. 199, 200 n.7 (1939).

147. He was joined by Justices Roberts, Frankfurter and Douglas.

148. 307 U.S. at 458-60. Black and Douglas clung to their convictions in the companion case of *Chandler v. Wise*, 307 U.S. 474 (1939), where they stated in a concurring opinion that "we do not believe that state or federal courts have any jurisdiction to interfere with the amending process." *Id.* at 478.

The impact of *Coleman v. Miller* has been enormous. Some commentators have concluded, presumably on the basis of Black's concurring opinion, that the case stands for the complete repudiation of judicial power over the amendment process.<sup>149</sup> A number of lower federal courts have so interpreted the case.<sup>150</sup> However, viewed in its historical context and given the proliferation of opinions filed in the case, *Coleman v. Miller* more properly appears to offer extremely weak precedential authority for advocates of nonjusticiability. Since it did not overrule earlier cases such as *Dillon v. Gloss*,<sup>151</sup> and since the Court based its holding on the particular relevance of the economic and social issues involved, *Coleman v. Miller* clearly does not stand for the proposition that absolute nonjusticiability attaches to all questions related to the amendment process.<sup>152</sup> As Professor Orfield remarked, "[i]f the Supreme Court is not ready to apply the doctrine of political questions to all phases of the amending process . . . it will apply it to some phases of the amending process and what such phases are remains largely uncertain."<sup>153</sup>

In 1967 the Supreme Court again touched upon the substantive content of constitutional amendments. In *Whitehill v. Elkins*,<sup>154</sup> Justice Douglas observed that "the Constitution prescribes the method of 'alteration' by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered."<sup>155</sup>

The cases thus reveal three distinct periods in which the attitude of the Supreme Court toward the justiciability of amendment issues has shifted to and fro. In the cases decided in the eighteenth and nineteenth centuries, with the exception of *Hollingsworth v. Virginia*,<sup>156</sup> the Court tended to view article V as a political issue. Then, in the nationwide turmoil over both the eighteenth and nineteenth amendments, the Court jumped headlong into the amendment business, apparently un-

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149. See, e.g., Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931 (1968).

150. See, e.g., *Maryland Petition Comm. v. Johnson*, 265 F. Supp. 823 (D. Md. 1967); *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954).

151. 256 U.S. 368 (1921).

152. See Note, 85 HARV. L. REV., *supra* note 80, at 1636.

153. L. ORFIELD, *supra* note 8, at 36.

154. 389 U.S. 54 (1967).

155. *Id.* at 57.

156. 3 U.S. (3 Dall.) 378 (1798). But recall that the political question issue was not raised in this case. See text accompanying notes 145-46 *supra*.

moved by protests of nonjusticiability.<sup>157</sup> And then, just as suddenly, in *Coleman v. Miller*<sup>158</sup> the Court reversed its ground, reverting to the idea of nonjusticiability and political questions, and coming within a whisper of declaring *all* issues involving the amendment process beyond the scope of the judicial power. In the confused aftermath of *Coleman v. Miller*, the historical record of the Supreme Court can be all things to all men.

Advocates of nonjusticiability emphasize the uniqueness of the amendment process in that it provides the American people with their only means of correcting "errors" in the Supreme Court's interpretation of the Constitution.<sup>159</sup> They argue that since the only way to overturn an unpopular Supreme Court decision is by Constitutional amendment,<sup>160</sup> the Court and all lower federal courts should decline to interfere with the amendment process.

Those who favor justiciability insist that all questions of constitutional law should be resolved ultimately by the Supreme Court, and stress that the Court cannot be coerced into acting upon the basis of any amendment which it does not believe has the force of law.<sup>161</sup> Theoretically, the power to adjudicate amendments is identical to the power to declare laws unconstitutional.<sup>162</sup> Once the Court determines in good conscience that it does have jurisdiction, the argument continues, there is no power in the "political department" capable of stopping the judiciary from hearing the case and deciding the issue.<sup>163</sup>

In conclusion, it seems reasonable to assume the present inclination of the Supreme Court would be to favor justiciability. Since *Coleman*, the Court has reworked its entire conceptual approach to political questions.<sup>164</sup> *Baker v. Carr*,<sup>165</sup> for example, strongly suggests that the

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157. See note 143 *supra*.

158. 307 U.S. 433 (1939).

159. Note, 85 HARV. L. REV., *supra* note 80, at 1640 n.140.

160. Indeed, the eleventh, fourteenth, sixteenth and nineteenth amendments all operated to nullify prior Supreme Court decisions, and had the Child Labor Amendment been ratified, it would have had the same effect. See, e.g., I. BARRON & A. HOLTZHOFF, FEDERAL PRACTICE § 54.1, at 303 (C. Wright ed. 1960).

161. See *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). See also *Black*, *supra* note 78, at 211.

162. L. ORFIELD, *supra* note 8, at 13.

163. "The issue is whether Congress may tell the courts, state or federal, that they may not inquire into certain issues of law, in cases where they *do* have jurisdiction. Unless the whole theory of *Marbury v. Madison* is wrong, it is inconceivable that Congress has such power." *Black*, *supra* note 78, at 211.

164. *Baker v. Carr*, 369 U.S. 186 (1962). See note 134 *supra*.

165. 369 U.S. 186 (1962).

Court will not remain the shrinking violet of the *Coleman v. Miller* era, and possibly forecasts an expanded role for the federal courts in previously uncharted "political thickets." It would appear that many potential amendment-related issues would not fall within the class held by *Baker v. Carr* to constitute political questions,<sup>166</sup> and in the Court's own words, "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability . . . ."<sup>167</sup>

### C. *Justiciability of Issues Raised by National Conventions*

The Supreme Court has never ruled directly on any aspect of the alternative amendment process. Should a national convention ever be called, however, there could arise any number of legal challenges to the power of the federal judiciary over that amendment procedure. For purposes of discussion, then, the amendment process in general will be presumed to be justiciable.<sup>168</sup> The discussion is thus left free to focus upon the particular problems raised by a constitutional convention and to speculate about which of these could ultimately be resolved in the courts.

A serious question looms at the very threshold: the power of the courts to compel the doing of an affirmative act by an elected Congress. This problem might arise in at least two obvious contexts: first, if Congress refused to call a convention, despite submission of a sufficient number of arguably valid state applications to warrant such an act; second, if Congress refused to submit proposed amendments for ratification on the grounds that the convention had exceeded its authority. In these situations, can Congress be *forced* to act?

As to the initial calling of the convention, it was without question the understanding of the Framers that the duty imposed upon the Congress in article V is mandatory rather than discretionary.<sup>169</sup> The express language of article V requires that Congress "*shall* call a Convention."<sup>170</sup> In *Martin v. Hunter's Lessee*,<sup>171</sup> the Supreme Court con-

166. See generally Note, 85 HARV. L. REV., *supra* note 80.

167. 369 U.S. at 217.

168. See text accompanying notes 130-34 *supra*.

169. "[T]he national rulers, whenever nine states concur, will have no option upon the subject. . . . The words of this article [V] are peremptory. The Congress '*shall* call a convention.' Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air." THE FEDERALIST NO. 85, at 546 (B. Wright ed. 1961) (A. Hamilton) (emphasis added).

170. U.S. CONST. art. V (emphasis added).

171. 14 U.S. (1 Wheat.) 304 (1816).



strued the word "shall" in its constitutional context as having mandatory effect.<sup>172</sup> As a result, a number of commentators have generalized that in the two circumstances mentioned above, a coercive writ of mandamus should issue to compel Congress in the first instance, to call the convention, and later to submit all amendments proposed by the convention to the States for ratification.<sup>173</sup> During the height of the reapportionment controversy,<sup>174</sup> when it seemed inevitable that two-thirds of the States would apply for a convention, Senators Dirksen and Hruska vigorously argued for such a broad interpretation of the judicial power,<sup>175</sup> citing as authority Chief Justice Marshall in *Marbury v. Madison*.<sup>176</sup> They claimed that *Marbury* stood for mandamus as a proper remedy to compel the doing of nondiscretionary, purely ministerial acts.<sup>177</sup> At least one authority has concluded that given a refusal by Congress to perform the acts required of it by article V, the Supreme Court itself should call the convention.<sup>178</sup>

This position distorts and exaggerates the power of the federal judiciary and brutalizes the doctrine of separation of powers. The Supreme Court, in contrast, has traditionally upheld the inherent limitations upon the judiciary. In *Mississippi v. Johnson*,<sup>179</sup> the Court, in refusing to enjoin President Andrew Johnson from executing certain Reconstruction Acts, held that "the Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial Department. . . ."<sup>180</sup> Accordingly, the courts have never issued an injunction or

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172. "[W]henver a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded, without violating the first principles of public duty." *Id.* at 327-33.

173. See, e.g., Carson, *supra* note 72; Dirksen, *supra* note 59; Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 CHI.-KENT L. REV. 128 (1952); Tuller, *A Convention to Amend the Constitution—Why Needed—How May It Be Obtained?*, CXCI N. AM. REV. 369 (1911).

174. See text accompanying notes 50-63 *supra*.

175. See, e.g., Dirksen, *supra* note 59; 113 CONG. REC. 12267 (1967) (remarks of Senator Hruska).

176. 5 U.S. (1 Cranch) 137 (1803).

177. See, e.g., 113 CONG. REC. 12272 (1967) (remarks of Senator Hruska).

178. "A deliberate refusal on the part of Congress to call a convention, once the requisite number of state applications were in hand, may be expected, by enlarged analogy to what has been done in the recent civil rights cases and what is being proposed in the electoral apportionment cases, to bring into play the powers of the Supreme Court to direct the setting up of the national convention." Carson, *supra* note 72, at 921. *But cf.* Kauper, *supra* note 96, at 906 ("I find it difficult to believe that the Supreme Court would . . . take it upon itself to prescribe the procedures for a convention").

179. 71 U.S. (4 Wall.) 475 (1866).

180. *Id.* at 500.

writ of mandamus directly against the President or the Congress.<sup>181</sup>

The better view is that article V imposes an "imperfect obligation"<sup>182</sup> upon Congress in which the duty is defined, but the sanction is withheld. Accordingly, while Congress has a clear constitutional obligation under article V, the courts will not compel the discharge of that duty.<sup>183</sup> The proper remedy for congressional inaction is that which congressmen know best and fear most—the ballot box.<sup>184</sup>

In a similar vein, the power of the courts to enjoin the proceedings of the convention once assembled poses a crucial problem. Numerous charges could be raised to present an attractive case for injunctive relief. For example, it could be alleged that the petitions used as a basis

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181. Bonfield, *supra* note 18, at 672. As Professor Dodd has written:

Although there are elements of judicial enforceability in certain constitutional provisions requiring affirmative legislative action, these elements are usually not present, and where they are, courts are loath to take advantage of them. In general, therefore, constitutional provisions that the legislature "shall" do a certain thing are equivalent to statements that the legislature "may" or "shall have the power." The Federal Constitution provides that Congress, "on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments" to the constitution, but there is no compulsion upon Congress to call a convention.

Dodd, *Judicially Non-enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54, 82 (1931).

182. Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1018 (1929).

183. Wheeler, *supra* note 91, at 792. It has been suggested that the doctrine established in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), has not been scrupulously observed. See, e.g., Gilliam, *supra* note 105, who suggests that subsequent Supreme Court cases have seriously eroded the separation of powers doctrine. *Id.* at 51 n.35. Examples of such cases, suggests Gilliam, are *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President Truman held without power to seize steel mills during Korean conflict; Secretary of Commerce enjoined from enforcing Executive Order to that effect); *Powell v. McCormack*, 395 U.S. 486 (1969) (Congress' exclusion of Powell held improper; although Court barred from issuing direct order to members of Congress, Speech and Debate Clause does not prevent action by Court against legislative employees charged with unconstitutional activity). These two cases, along with *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880), seem to suggest, in their cumulative effect, that whenever the Supreme Court desires a particular response from a coequal branch of government, a proper party can be found against whom the Court can act to achieve its purpose. Indeed in *Powell v. McCormack*, *supra*, the Court left open the frightening prospect of action directly against members of Congress: "we need not decide whether under the Speech and Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available." *Id.* at 506 n.26. The Court, it should be noted, still has stopped short of ever ordering a coequal branch or its agents to perform a positive, affirmative act. Both *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, and *Powell v. McCormack*, *supra*, involved essentially negative directives. See Dixon, *supra* note 149.

184. As the Supreme Court held in *Colegrove v. Green*, 328 U.S. 549 (1946), "[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Id.* at 556.

for the convention were invalid in some respect, or that the convention had acted wrongfully or was about to usurp powers not granted to it by the Constitution.

State courts that have considered this problem in the state constitutional convention context have concluded that there exists no provision for court supervision of constitutional conventions, and that the state courts will not anticipate the action of a proposed convention or control it when assembled.<sup>185</sup> That the convention has full control of its proceedings has also been held,<sup>186</sup> but these decisions have not had the effect of precluding subsequent judicial review by state courts of the validity of the convention's work product.<sup>187</sup> In the federal scheme, Professor Orfield views an article V national convention as essentially a fourth branch of government, co-equal with the judiciary and thus entitled to the same respect and autonomy as the executive and legislative branches.<sup>188</sup> Orfield suggests that just as injunctive relief against another branch of government is beyond the power of the courts, these same limitations would apply to a national convention.<sup>189</sup>

Although the Supreme Court would most likely not compel a co-equal branch of government either to do or to stop doing a thing, the federal courts could nevertheless rule upon constitutional issues presented by article V, yet refrain from upsetting the separation of powers equilibrium by exercising their power to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."<sup>190</sup> In cases in which the courts felt that an issue raised by article V was properly justiciable, they could hand down declaratory judgments. The courts would presumably rely upon the good faith of the parties to give such judgments their full effect. If Congress' only justification for refusing to call a convention were that the constitutional requirements of article V had not been met, a declaration by the Supreme Court that the requirements had in fact been satisfied would undermine the excuse.<sup>191</sup> Pressure upon Congress to call the convention in light of such a decision would be

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185. Wheeler, *supra* note 91, at 800.

186. *Id.* at 800-01.

187. Bonfield, *supra* note 18, at 672-73.

188. L. ORFIELD, *supra* note 8, at 47-48.

189. *Id.*

190. Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1970). See also FED. R. CIV. P. 57. For a general review of declaratory judgments in the federal scheme see C. WRIGHT, *supra* note 130, § 100.

191. Note, 85 HARV. L. REV., *supra* note 80, at 1644.

well-nigh irresistible. In *Powell v. McCormack*,<sup>192</sup> the Supreme Court ruled that despite article I, section 5 of the Constitution,<sup>193</sup> Representative Adam Clayton Powell, Jr., of New York was entitled to a declaratory judgment that he had been unlawfully excluded from the House of Representatives for the Ninetieth Congress. The Court said that a "court may grant declaratory relief even though it chooses not to issue an injunction or mandamus."<sup>194</sup> Thus, although the courts may lack power to compel Congress to act, this lack of authority should not deter the use of declaratory relief to decide justiciable article V issues.

The Ervin Bill<sup>195</sup> attempts to bar all judicial review of its provisions by insisting that constitutional issues "shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal Courts."<sup>196</sup> However, there is serious question of the effectiveness and constitutionality of this approach. The Congress has considerable power over the jurisdiction of lower federal courts, the appellate jurisdiction of the Supreme Court, and the jurisdiction of state courts when federal questions are involved.<sup>197</sup> However, Congress has no power to expand or limit

192. 395 U.S. 486 (1969).

193. This section assigns to each house of Congress the exclusive power to judge the elections and qualifications of its members, and to punish them for disorderly conduct. U.S. CONST. art. I, § 5.

194. 395 U.S. at 499. Some pages later the Court elaborated upon the appropriateness of declaratory relief under the circumstances:

Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to "mold effective relief for resolving this case." . . . We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued . . . . The availability of declaratory relief depends upon whether there is a live dispute between the parties, . . . and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate.

*Id.* at 517-18.

195. S. 1272, 93d Cong., 1st Sess. (1973).

196. *Id.* §§ 3(b), 5(c), 10(b), 13(c).

197. [H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.

. . . . [T]he statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has either been directly advanced or tacitly assumed would be tedious and unnecessary.

*Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Likewise, in *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922), the Court noted that "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress." See generally *C. WRIGHT*, *supra* note 130, § 10; Hart, *The Power of Congress to Limit*

the original jurisdiction of the Supreme Court.<sup>198</sup> Thus if the Ervin Bill should be enacted, it would clearly be ineffective to bar an original suit in the Supreme Court in which a State were a party.<sup>199</sup> For example, should a State, whose application for a convention was rejected as inadequate under the Ervin Bill object to the provisions of that bill as unconstitutional, presumably that State could bring suit in the Supreme Court to have its application declared valid under article V. Since there would be both a federal question and a State as a party involved, such a suit would fall squarely within the original jurisdiction of the Supreme Court.<sup>200</sup> Further, since the Court cannot be made to apply a rule of law which it finds unconstitutional,<sup>201</sup> congressional attempts to exclude judicial review or limit the original jurisdiction of the Supreme Court would be ineffective. This fact is of critical importance, for at various stages in the alternative amendment process, it is probable that the States which have petitioned Congress for a convention will be the parties most likely to challenge any act or lack of action by Congress which such States feel interferes with their prerogatives under article V.

The question of justiciability of the amendment process generally and of the alternative amendment procedure specifically remains unsettled. Likewise the power of Congress to limit judicial review of issues arising under article V is restricted, and in an important class of cases, that power is ineffective. The scope of the judicial power over the amendment process is today so poorly defined that no one, for any purpose, should presume that the federal courts will not play an important role in the future development of article V.

#### IV. NOSTRUM

In retrospect, perhaps the most striking feature of the above discussion is the sharp disagreement among legal scholars regarding the distribution and scope of the amendment power, particularly with

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*the Jurisdiction of Federal Courts: an Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

198. *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Wright also points out that the Supreme Court has always understood that the constitutional grant of original jurisdiction is self-executing, and thus Congress cannot take it away. C. WRIGHT, *supra* note 130, § 10.

199. U.S. CONST. art. III, § 2.

200. For a general review of the original jurisdiction of the Supreme Court see C. WRIGHT, *supra* note 130, §§ 109-10.

201. *E.g.*, *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

respect to the convention procedure. Indeed, on the subject of constitutional conventions, the Constitution is either textually ambiguous or provocatively mum. In truth, then, no one really knows how to amend the Constitution by convention, and among those who claim to know, there are general differences of opinion on even the most fundamental propositions. Accordingly, the debate and discussion concerning article V has resolved nothing, but has instead merely isolated the major points of controversy.

In a word, the alternative amendment procedure is "imperfect"; and as such it is repugnant to the first of the three essential prerequisites for amendment discussed earlier.<sup>202</sup> Our present "imperfect" understanding of the convention procedure could forever cloud the legitimacy of any amendment proposed and ratified under this process. The underlying political environment, if cankered by extreme partisanship on some issue of basic concern, could poison the amendment process; and should any sizable portion of the people become convinced that a constitutional amendment was wrongfully adopted or rejected, respect for the authority of the Constitution generally would be undermined.

Clearly some sort of action is required which will clarify the convention procedure and remove the element of risk which has so long forestalled full participation by the States in the amendment process. Now is a most propitious time to formulate policies for change, for there is at present no major nationwide effort by the States to have a convention called.<sup>203</sup> This situation permits the convention process to be examined on its own merits, and not merely as the means to a particular end. The lack of any serious ongoing movement to call a convention enables reform of article V to proceed without suspicion of the true motives of the reformers.

Recent efforts to reform the alternative amendment procedure have focused upon Congress. The Ervin Bill<sup>204</sup> reflects the confidence of many that Congress can solve most of the troublesome problems legislatively. A recent report of the American Bar Association,<sup>205</sup>

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202. See text accompanying notes 17-24 *supra*.

203. The busing controversy could, however, provoke such an effort in the near future. See note 64 *supra*.

204. S. 1272, 93d Cong., 1st Sess. (1973), discussed in notes 61-63, 96 and accompanying text *supra*.

205. SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMERICAN BAR ASSOCIATION, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974).

while suggesting that certain portions of the Ervin Bill warrant substantial revision,<sup>206</sup> concludes nevertheless that legislation by Congress is the proper vehicle for article V reform.<sup>207</sup> However, the power of Congress is too often overstated, and the general confidence in this power is misplaced. Acts of Congress will prove ultimately inadequate for at least two reasons.

First, the present Congress has no power through legislation to bind and limit the discretion of future Congresses. While legislation presently enacted may prove entirely satisfactory for the time being, such legislation would remain subject to revision or repeal at any time. Legislation today cannot eliminate the possibility that some future Congress, confronted with a strong movement to have a convention called, might suddenly enact new legislation, in effect changing the rules to make the convention more difficult to obtain.

Secondly, it begs the question to assert that Congress can resolve article V problems when the power of Congress to interfere in the convention process is itself a focal point of controversy. Any attempt by Congress to regulate the alternative amendment procedure inevitably will raise the question of the power of Congress to do so, serving only to further complicate the issue.

Greater direction and guidance from the Constitution itself is most obviously lacking, and is consequently most desperately required. Since the alternative amendment procedure in article V is imperfect, attention should focus directly upon article V and not upon Congress. In short, the Constitution should be amended to "perfect" article V.<sup>208</sup> Only when the resolution of problems in the convention procedure carries with it the full force and authority of the Constitution will amendment by convention become the genuine alternative to Congress it was intended to be.<sup>209</sup>

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206. In particular, the ABA report would amend the Ervin Bill to provide clearly for federal court jurisdiction of controversies arising under article V without regard to the amount in controversy. *Id.* at 57.

207. *Id.* at 7-9.

208. The idea of amending article V relative to the convention procedure is certainly not a new one. *See, e.g.,* note 53 and accompanying text *supra*. Past attempts to amend article V, however, have always arisen in the context of some other, more immediate political issue. Amending article V has most often been suggested as a secondary device to achieve a primary political purpose. The time has now come for article V to be considered on its own merits.

209. This point, as does this entire comment, presumes that the alternative amendment procedure should be preserved. This commentator rejects arguments suggesting that the convention procedure is a mere historical relic and should be scrapped entirely, leaving the congressional mode as the sole means of proposing constitutional amend-

Congress should propose and the States should ratify a constitutional amendment expanding and clarifying article V. The following language illustrates what such an amendment might attempt to do.<sup>210</sup>

#### ARTICLE V.

SECTION I. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.

SECTION 2. Upon the application of the Legislatures of two-thirds of the several States within any\_\_\_\_-year period, Congress shall call a Convention which shall have the power to propose Amendments to this Constitution; *provided that* Congress shall not have power to call a Convention except upon such application, *and*

- a. such Applications shall
  - i. reasonably reflect a common desire for amendment upon a particular subject, or
  - ii. shall reflect a common desire to amend in a general manner the provisions of this Constitution; *and provided further that*
- b. in issuing the call for a Convention, Congress shall
  - i. provide for the total number of delegates, the manner of their selection, and the apportionment of their number among the several States, and
  - ii. specify the date, time and place of the first meeting of the Convention, and
  - iii. fix the compensation of the delegates and provide for the expenses of the Convention, to be paid from the Treasury.

A convention called under this Article shall not remain in session beyond the expiration of the Congress which originally called it into session, except whenever two-thirds of both Houses of that Congress shall deem it necessary, and then only for a term not to exceed that of the next-elected Congress.

When, under rules and procedures agreed to by the delegates, the Convention shall have concluded its business, it shall present to the Congress all proposed Amendments agreed to; the Congress shall then submit these proposed Amendments to the States for ratification subject to SECTION 3 of this Article: *provided that the*

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ments. Cf. note 49 *supra*. The remainder of the comment is intended to suggest means whereby the convention procedure can be preserved and revitalized.

210. The complete language of present article V appears in text accompanying notes 3-4 *supra*.



Congress shall not be obliged to submit for ratification any proposed amendment which two-thirds of both Houses agree does not reasonably relate to the particular subject manifested in the applications for a Convention under SECTION 2, Clause I(a)(i) of this Article.

SECTION 3. Amendments proposed under this Article shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: *Provided that* no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

SECTION 4. Acts of Congress under this Article are not subject to disapproval by the President under the provisions of Article I, SECTION 7 of this Constitution.

Sections 1 and 3 are intended to preserve the present congressional mode of proposing amendments. Note that the ratification process in section 3 would apply equally to both the congressional and convention procedure. Language in original article V pertaining to the end of the slave trade in 1808 is obsolete and has been eliminated.

Section 2 provides a revised procedure for proposing amendments by constitutional convention and attempts to resolve many of the problems inherent in original article V. Section 2, clause I insures the existence of a national consensus for amendment by requiring that state applications be submitted within a specified number of years in order to be counted toward fulfilling the two-thirds requirement. The precise number of years is left blank and would be subject to thorough consideration by Congress and the States. Clause I, by its use of the plural form "Amendments," is intended to make clear the power of the convention to propose more than one amendment, providing all other conditions are satisfied.

The two provisos to section 2, clause I set out the requirements for a valid application and delineate the powers of Congress over the initial proceedings. In addition, the first clause of the first proviso makes it impossible for Congress to call a convention unless the States apply for one. Congress would not, under this provision, have power to call a convention on its own initiative. A national consensus for amendment, expressed in applications from two-thirds of the States, is thus made a prerequisite to the calling of a convention.

Section 2, clause I, subsection a(i) contemplates an appropriate

national consensus by providing that applications which do not pertain to the same general subject will not be counted toward the two-thirds requirement. Congress, as the body which has responsibility for calling the convention, would make the initial determination of whether a sufficient number of "reasonably-related" applications had been submitted. Any dispute under a(i) whether an application should be counted could be resolved in the courts, and the weight given to Congress' determination that a particular application did not bear sufficient relationship to others would also be for the courts to decide.<sup>211</sup> Subsection a(ii) is cast in disjunctive terms from a(i) and preserves the right of the States to petition for a convention with power to propose general, far-ranging revisions of our constitutional system. Such proposals would, however, be subject to ratification under section 3. Phrasing a(i) and a(ii) in the alternative makes it clear that a general convention may be called only when specifically requested and that applications within the time limit from two-thirds of the States on a variety of different subjects do not warrant or require Congress' calling a general convention.

Section 2, clause I, subsection b(i) gives Congress the power and obligation to determine the number, manner of selection and apportionment of delegates to the convention. The question of whether members of Congress may simultaneously serve as delegates is implicitly left subject to the rulemaking authority of the convention referred to in clause III. Subsection b(ii) permits Congress to fulfill its duty to call the convention by providing for the date, time and place of the *first* meeting of the convention. Once convened, the convention would then be free to determine its own schedule and meeting place. Subsection b(iii) imposes a duty upon Congress to appropriate funds for the expenses of the convention, so that Congress could not by in-

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211. This commentator believes that such issues as this, presented in the context of an article V amended as herein suggested, would clearly be within the judicial power of the federal courts under article III. Accordingly, language to this effect in article V is not required. In order to insure the availability of a judicial forum for the ultimate resolution of article V disputes, Congress could enact a special statute extending jurisdiction over such matters to the federal courts, presumably with no jurisdictional amount requirement. Cf. SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMERICAN BAR ASSOCIATION, *supra* note 205, § 16(a), at 57. Since time is a key factor in assembling the required number of petitions under this amended article V, some provision for expedited appeals should be included if jurisdiction arises originally in the federal district courts. In cases where a State is a party to the action, serious consideration should be given to expressly including such cases within the original and exclusive jurisdiction of the Supreme Court under 28 U.S.C. § 1251 (1970), since such a case would present issues of paramount constitutional significance.

direction defeat the purpose of the convention by depriving it of financial support.

Section 2, clause II is designed to allay fears of those who are anxious that the convention would transform itself into a permanent and perpetual "fourth branch of the government." Under this clause, the maximum length of a convention would be just under four years, presuming the original convention to be called immediately after the swearing-in of a newly-elected Congress. The convention could be extended beyond the two-year term of that Congress only by consent of Congress, and then for only one additional two-year term. Since two-thirds of both houses is required to submit for ratification an amendment proposed by Congress, this same supermajority should be required to extend a convention. Note that "extension" of a convention already in session differs from "calling" a convention originally. Under section 2, clause I, Congress is not permitted to call a convention unless it has a sufficient number of valid applications. Section 2, clause II, however, would permit Congress in its discretion to extend a convention which it had originally called, and such extension would not require further applications. Only one extension is permitted, since there is no assurance that the national consensus would continue for a longer period of time. If such a consensus were to persist, it could again be manifested by applications for a new convention.

Section 2, clause III provides the machinery with which the convention actually proposes amendments. Under the "rules and procedures" authority recognized by this clause, the delegates would adopt their own rules of procedure and would have power to determine the size of the majority needed to propose a particular amendment. The clause requires presentation of all proposed amendments to Congress, which in turn has the responsibility of submitting them to the States for ratification under section 3. The proviso to clause III strikes an essential balance between the powers of Congress and those of the convention. If two-thirds of both houses of Congress agree that any or all of the proposed amendments do not pertain to the particular subject matter stated in the applications [section 2, clause Ia(i)], then Congress may refuse to submit such amendments for ratification. Again, this congressional determination should be reviewable in the federal courts.<sup>212</sup> All amendments proposed by a general convention

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212. See note 211 *supra*.

called under section 2, clause Ia(ii) should be submitted for ratification since the proviso in clause III does not apply in this situation.

Section 4 would write into the Constitution the sound wisdom of the Supreme Court in *Hollingsworth v. Virginia*<sup>213</sup> to the effect that the President's veto does not apply to acts of Congress involving constitutional amendments. This section would apply to acts of Congress pursuant to either mode of amendment.

Recent events have focused popular attention upon our Constitution and the fundamental principles of our form of government to a degree unmatched perhaps since the great ratification debates of the eighteenth century. In return, our constitutional system has proved its worth, its strength and ability to withstand extreme challenge and emerge the better for it. Accordingly, the present affords an ideal time to consider the problems inherent in the procedure whereby our Constitution may be changed as contemporary wisdom dictates. In so doing, the role of the States in the constitutional amendment process can be reaffirmed. This can best be achieved by amending the words of the Founding Fathers to reflect more accurately their original expectations. Until this is done, there remains with us the spectre of a fresh constitutional crisis, one involving not merely the petty motives and ambitions of individual persons, but the very right of States to determine to some extent the essential terms of their federalism.

MICHAEL A. ALMOND

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213. 3 U.S. (3 Dall.) 378 (1798), discussed in note 143 *supra*.

