North Dakota Law Review

Volume 55 | Number 3 Article 2

1979

Amending the Constitution by the Article V Convention Method

Douglas G. Voegler

How does access to this work benefit you? Let us know!

Follow this and additional works at: https://commons.und.edu/ndlr

Part of the Law Commons

Recommended Citation

Voegler, Douglas G. (1979) "Amending the Constitution by the Article V Convention Method," *North Dakota Law Review*: Vol. 55: No. 3, Article 2.
Available at: https://commons.und.edu/ndlr/vol55/iss3/2

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

AMENDING THE CONSTITUTION BY THE ARTICLE V CONVENTION METHOD

DOUGLAS G. VOEGLER*

I. INTRODUCTION

Article V of the United States Constitution 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 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 Sufferage in the Senate.[1]

Two methods of amending the Constitution are provided for in this Article. Under one method, the amendment is initiated by Congress. Under the alternative method, Congress, after being petitioned by the states, calls a convention to propose amendments. Since our Constitution was adopted in 1787, it has been amended only twenty-six times. If the first ten amendments, the Bill of

*B. A., University of Nebraska, 1973; J. D., University of Nebraska — Lincoln School of Law, 1976; former law clerk, Honorable Paul W. White, Chief Justice, Nebraska Supreme Court.

1. U. S. CONST. art. V.

Rights, (which were adopted almost simultaneously with the adoption of the Constitution, and can therefore be considered a part of the original document) are excluded from this count, the Constitution has been amended a mere sixteen times in nearly two hundred years.

To date, all of the amendments to the Constitution have been proposed by Congress. There has never been a constitutional convention, "despite the fact that in the years since the Constitution was ratified . . . [several hundred] resolutions have been submitted to Congress by the States calling for national constitutional conventions."[2]

The Article V convention method has been called a "constitutional curiosity,"[3] the forgotten part of the article,[4] and "[o]ne of the best-known 'dead letter' clauses in the federal Constitution."[5]

While there has never been a constitutional convention, the Article V provision has not been without effect in our nation's history.[6] During the ratification of the Constitution, the Anti-Federalists expressed concern that the Constitution did not contain any provisions for the protection of certain basic rights of mankind. Virginia and New York petitioned Congress to call a convention to deal with this perceived defect. This led to Congress' proposing, in 1789, the Bill of Rights to quell these concerns.[7] At the turn of the century, public agitation grew for an amendment to the Constitution for the direct election of Senators. On several occasions between 1893 and 1902, the House of Representatives had passed resolutions calling for such an amendment. The Senate, naturally reluctant to propose an amendment which would place in jeopardy the tenure of its current members, refused to act. After a significant number of states petitioned Congress for a constitutional convention to deal with the problem, Congress, afraid of the peoples'

2. Comment, *Amendment by Convention, Our Next Constitutional Crisis?*, 53 N.C.L. REV. 491 (1975) [hereinafter cited as Comment].

For a comprehensive list and analysis of the state resolutions calling for a constitutional convention *see* American Bar Association Special Constitutional Convention Study Committee, *Amendment of the Constitution By the Convention Method Under Article V* App. B, at 59-77 (1974) [hereinafter cited as A.B.A. Study].

3. Comment, *supra* note 2, at 492.

4. Dirksen, *The Supreme Court and the People*, 66 MICH. L. REV. 837 (1968) [hereinafter cited as Dirksen].

5. Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 943 (1968) [hereinafter cited as Dixon].

6. Comment, *supra* note 2, at 499.

7. *See* A.B.A. Study, *supra* note 2, at 69-70.

reaction should such a convention come into being, proposed the seventeenth amendment providing for the direct election of Senators.[8]

In recent times, a significant attempt was made to invoke an Article V convention to reverse the Supreme Court decisions of *Baker v. Carr,*[9] and *Reynolds v. Sims,*[10] concerning state legislative reapportionment. The Council of State Governments and the late Senator Everett M. Dirksen of Illinois led an attempt to amend the Constitution to permit one house of a state legislature to be exempt from the "one man, one vote" rule.[11] After the Congressional route failed, the Article V convention method was pursued. 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."[12] On March 18, 1967, a *New York Times'* story caught the nation off guard, with these comments:

"(A) campaign for a Constitutional convention to modify the Supreme Court's 'one man-one vote' rule is nearing success. It would be the first such Convention since the Constitution was drafted in Philadelphia in 1787."[13].

While this attempt to call a constitutional convention did not succeed, it did serve to stimulate a great deal of scholarly and Congressional debate over the Article V convention method. As a direct result, Senator Sam J. Ervin, Jr., of North Carolina introduced comprehensive legislation to deal with the Article V convention method on August 17, 1967.[14] Senator Ervin's

---

8. "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. 93-293, REPORT OF THE COMM. ON THE JUDICIARY UNITED STATES SENATE TOGETHER WITH ADDITIONAL VIEWS TO ACCOMPANY S. 1272, 93d Cong., 1st Sess. 6 (1973) [hereinafter cited as S. REP. No. 93-293]. *See also* A.B.A. Study, *supra* note 2, at 72.

9. 369 U. S. 186 (1961).

10. 377 U. S. 533 (1964).

11. *See* Dirksen, *supra* note 4.

12. Comment, *supra* note 2, at 502.

13. New York Times, March 18, 1967 (city ed.) at 1, col. 6.

14. The legislation was first introduced as S. 2307, 90th Cong., 1st Sess. (1967). Hearings were held on the bill. *Hearings on S. 2307 Before the Sub-Committee on Separation of Powers of the Senate Committee on the Judiciary,* 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings on S. 2307*]. Thereafter the bill was revised and reintroduced. S. 623, 91st Cong., 1st Sess. (1969). The Subcommittee reported S. 623 to the full Committee on the Judiciary but no action was taken during the 91st Cong. The legislation was reintroduced in the 92d Cong., as S. 215. The Subcommittee reported the bill to the full Committee which reported the bill to the Senate on July 20, 1971. With one amendment the bill passed by a vote of 84-0. The bill was then referred to the House Judiciary Committee. No action was taken on the bill by the House during the 92d Cong. The legislation was reintroduced in the 93d Cong., 1st Sess. as S. 1272, which was identical to S. 215. The Subcommittee reported the bill to the Committee which reported the bill favorably to the full Senate. *See* S. REP. No. 93-293, *supra* note 7. The bill was again passed by the Senate, and again referred to the House Judiciary Committee. Again, no further action was taken. During the 94th Congress the "Ervin" legislation was introduced as S. 1815 by Senator Abourezk. The bill was referred to the Senate Judiciary Committee. No action was taken. During the 95th Congress, the "Ervin" legislation was introduced

legislation was the first comprehensive attempt by Congress to deal with the Article V convention method, though it had previously touched upon the problem.[15] Senator Ervin's efforts received much attention and stimulated long-needed discussion.[16] Senator Ervin gave these reasons for introducing the legislation:

> The scant information and considerable misinformation and even outright ignorance displayed on the subject of constitutional amendment, both within the Congress and outside it — and particularly the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth — prompted me to introduce in the Senate a legislative proposal designed to implement the convention amendment provision in article V.[17]

Congress to date, however, has refused to take action on comprehensive legislation dealing with the Article V convention method.[18]

It has been observed that "the primary importance of Article V may be found in the *in terrorem* effect of an ultimate appeal to the people for the correction of the abuses of their government."[19] In the past, states applied to Congress for a constitutional convention because they thought such a convention would be desirable. However, "[b]eginning with the twentieth century . . . the process has been used primarily as a prod in the side of Congress to force that body to propose a specific amendment."[20] Currently there are

---

as H.R. 7008 by Congressman Hyde, and as S. 1880 by Senator Helms. H.R. 7008 was referred to the House Judiciary Committee which referred it to its Subcommittee on Civil and Constitutional Rights. S. 1880 was referred to the Senate Judiciary Committee. No action was taken on either bill.

Because Senator Ervin was the first to consider this issue and draft legislation and because subsequent Congressional legislation has been substantially identical to Senator Ervin's, this article will cite Senator Ervin's legislation, S. 1272, as exemplifying the Congressional approach.

15. *See, e.g., Hearings on Amending the Constitution Relative to Taxes on Income, Inheritance, 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 the Subcommittee of the Senate Committee on the Judiciary,* 83d Cong., 2d Sess. (1954); 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); STAFF OF THE 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).

16. *See, e.g.,* Black, *Amending The Constitution: A Letter To a Congressman,* 82 YALE L. J. 189 (1972) [hereinafter cited as Black]; Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution,* 85 HARV. L. REV. 1612 (1972).

17. Ervin, *Proposed Legislation To Implement The Convention Method of Amending The Constitution,* 66 MICH L. REV. 875 (1968) [hereinafter cited as Ervin].

18. *See also* H. Con. Res. 340, 95th Cong., 1st Sess. (1977); H. Con. Res. 28, 94th Cong., 1st Sess. (1975).

19. Kurland, *Article V and the Amending Process,* in AN AMERICAN PRIMER 148, 152. (D. Boorstin ed. 1966).

20. Comment, *supra* note 2, at 500, *citing,* W. Pullen, The Application Clause of the Amending

attempts to have an Article V convention call on the issues of forced school busing,[21] abortion,[22] and a balanced federal budget.[23]

Even though there has never yet been an Article V convention, the possibility of one being convened is not so remote that the issues raised by the convention method should be ignored. The attempt to call a constitutional convention to deal with reapportionment of state legislatures came very close to success. As long as the states use the convention method to prod Congress, the prospect exists that someday a convention may be brought into being.

It further seems that the convention method is well suited to highly controversial and emotional issues. The congressional method of amending the Constitution depends upon the actions of the Members of Congress. In all practicality there is little effective recourse which can be taken by a dissatisfied group against a Congressman who votes against its proposed Constitutional amendment. They could only work for his defeat in the next general election, where his vote on the amendment would be just one of many which the voters would have to decide upon. Also, proposed amendments are often killed in committees, thereby giving all but a few Members the opportunity of avoiding responsibility for the fate of the amendment. A citizen or group, however, has much greater impact with members of a state legislature, where a single vote on one issue can be very important. It thus seems likely that those favoring constitutional amendments dealing with emotional and controversial issues will increase use of the Article V convention method.

The purpose of this article is to explore the issues raised by the Article V convention method.

II. THE GENESIS OF ARTICLE V AND THE CONVENTION METHOD

As has been observed, "[t]he idea of amending the organic instrument of a state is peculiarly American."[24] Prior to adoption

---

Provision of the Constitution 105 (1951) (unpublished thesis in Wilson Library, University of North Carolina at Chapel Hill) [hereinafter cited as W. Pullen].

21. Comment, *supra* note 2, at 503 n.64.

22. As of August 3, 1978, 13 states had petitioned Congress for a constitutional convention on the subject of a pro-life amendment to the Constitution. Interview with Edward Zorinsky, U. S. Senator (Aug. 3, 1978).

23. As of August 3, 1978, 23 states had filed petitions with Congress calling for a convention to produce an amendment which would require a balanced federal budget. Interview with Edward Zorinsky, U. S. Senator (Aug. 3, 1978).

24. L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 1 (1942) [hereinafter cited as L. ORFIELD].

of the Constitution, several states had provisions for amending their constitutions. Article XIII of the Articles of Confederation provided for such amendment in the following manner:

> And 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 be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every state.[25]

The unanimous consent requirement created many difficulties for the united colonies after the Revolution.[26] As Charles Pinckney of South Carolina observed, "it is to this unanimous consent, the depressed situation of the Union is undoubtedly owing."[27]

On February 21, 1787, Congress passed a resolution calling a convention,

> 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 in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.[28]

It was inevitable that this convention would consider a provision permitting admendments with the consent of less than the whole number of states.[29]

In May, 1787, the convention convened at Philadelphia. Several plans of proposed government, which contained provisions for amendment, were presented during the convention.[30] Of the

---

25. Martig, *Amending the Constitution, Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1255 (1937) [hereinafter cited as Martig], *citing*, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. No. 398, 69th Cong., 1st Sess. 35 (1927).

26. For a review of the events leading up to the 1787 convention, *see, e.g.*, M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 4-5 (1962); Martig, *supra* note 25, at 1253-61.

27. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 120 (1937) [hereinafter cited as M. FARRAND].

28. 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120 (2d ed. 1896) [hereinafter cited as J. ELLIOT].

29. Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME LAW 46, 48 (1950).

30. On May 29, Edmund Randolph of Virginia introduced his plan (The Virginia Plan). On the same date, after Randolph had introduced his plan, Charles Pinckney of South Carolina introduced his plan, Article 16, which provided as follows:

> If Two Thirds of the Legislatures of the States apply for the same The Legislature

various plans presented, the resolutions of Edmund Randolph of Virginia are the most important,[31] and are the proper place to begin an inquiry into the genesis of the Article V convention method. Resolution 13 of the Randolph Resolutions (the Virginia Plan) provided as follows: "Resd. that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."[32]

Resolution 13 was discussed on June 11th, with the convention resolved into a Committee of the Whole House. Several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary.[33] Colonel George Mason of Virginia argued in favor of the necessity of such a provision by stating the following:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular, and Constitutional way than to trust them to chance and violence. It would be improper to require the consent of the Natl. 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.[34]

Randolph supported Mason's arguments.[35] However, the latter

---

> of the United States shall call a convention for the purpose of amending the Constitution — or should Congress with the Consent of Two Thirds of each house propose to the States amendments to the same — the agreement of Two Thirds of the Legislatures of the States shall be sufficient to make the said amendments Parts of the Constitution.
>
> The Ratifications of the Conventions of ______ States shall be sufficient for organizing this Constitution.

1. M. FARRAND, *supra* note 27 at 23;3 M. FARRAND, *supra* app. D, at 601.

On June 15, William Patterson of New Jersey introduced nine resolutions (The New Jersey Plan). Resolution 2 of the plan provided that "in addition to the powers vested in the U. States in Congress, by the present existing article of Confederation, they be authorized . . . to alter and amend in such manner as they shall think proper . . ." 1 M. FARRAND, *supra* at 243.

On June 18, Alexander Hamilton of New York read a sketch of a plan of government, which was never formally placed before the convention. Article IX, Section 12 of Hamilton's plan provided the following:

> This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two thirds of the members of both Houses, and ratified by the Legislatures of, or by Conventions of deputies chosen by the people in, two-thirds of the States composing the Union. 3 M. FARRAND, *supra* at 630.

31. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 68 (1962).
32. 1 M. FARRAND, *supra* note 27, at 22.
33. *Id.* at 202.
34. *Id.* at 202-03 (Madison's notes).
35. *Id.* at 203.

part of the resolution, providing that the consent of the national legislature should not be required, was lost.[36] The remainder of the resolution was accepted and referred to the Committee of Detail[37] wherein the provision for amending the Constitution was discussed.[38]

On August 6, the Committee of Detail presented the first draft of the Constitution to the full convention. Article XIX of the draft read as follows:

"On the application of the Legislatures of two thirds of the states in the Union, for an amendment, of this Constitution, the Legislature of the United States shall call a Convention for that purpose.[39]

This draft was printed for the use of the convention delegates and occupied their discussions for over a month. Article XIX of the draft came up for discussion on August 30th. Gouverneur Morris of Pennsylvania suggested that the Legislature should be left at liberty to call a convention whenever they pleased.[40] Thereafter the article was unanimously agreed to.[41]

On September 10th, Elbridge Gerry of Massachusetts moved to reconsider Article XIX of the first draft on the grounds that since the Constitution was to be paramount to the state constitutions, two-thirds of the states could obtain a convention wherein a majority could bind the union to innovations which might subvert the state constitutions.[42] Alexander Hamilton of New York seconded Gerry's motion to reconsider, citing the following different reasons:

> He (Hamilton) did not object to the consequences stated by Mr. Gerry — There was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State — It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed was not adequate. The State

36. *Id.*
37. *Id.* at 237; 2 M. FARRAND, *supra* at 83.
38. *Id.* at 148, 152, 159, 174.
39. *Id.* at 188.
40. *Id.* at 468.
41. *Id.*
42. *Id.* at 557-58.

> Legislatures will not apply for alterations but with a view to increase their own powers — The National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention — There could be no danger in giving this power, as the people would finally decide in the case.[43]

James Madison of Virginia also favored the motion to reconsider, perceiving the vagueness of the provision.

"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 act?"[44]

The motion to reconsider was passed.[45] James Wilson of Pennsylvania and Roger Sherman of Connecticut then moved to amend the proposed article.[46] Consideration of this was postponed upon a motion by Madison, who suggested the following provision in place of what had previously been agreed to:

> The Legislature of the U.S. — whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three-fourths at least of the Legislatures of the several States, or by Conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[47]

Madison's motion was seconded by Hamilton. John Rutledge of South Carolina moved to amend Madison's proposal to protect slavery interests.[48] His amendment was accepted by the convention, and Madison's proposal, as amended, approved.[49]

Article XIX of the first draft of the Constitution was reported

43. *Id.* at 558 (Madison's notes).
44. *Id.*
45. *Id.*
46. *Id.* at 558-59.
47. *Id.* at 559.
48. *Id.*
49. *Id.*

out of the Committee of Style and Revision as Article V of the second draft of the Constitution. Article V then read as follows:

> The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this consitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the____ and ____ sections of article ________.[50]

Article V came up for discussion on September 15. Sherman expressed fears that three-fourths of the states might abolish particular states or deprive them of their equal representation in the Senate, and felt that the Article V provision which prevented use of the amendment power to affect slavery should be expanded to provide that no State could be affected in its internal police power or deprived of its equality in the Senate.[51] Mason thought that the plan for amending the Constitution as proposed was exceptionable and dangerous. He pointed out that as proposing amendments, under both modes, depended either immediately or ultimately upon the Congress, no amendments could ever be obtained by the people should the government become oppressive, as he believed it someday would.[52] Upon Mason's objections, Gouverneur Morris and Eldbridge Gerry moved to amend the article so as to require a Convention upon the application of two-thirds of the states.[53] Madison stated that he did not see why the Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a convention on like application. He added, however, that he saw no objection against providing for a Con-

50. *Id.* at 629. The blanks were filled in to read, "affect the first and fourth sections of Article I."

51. *Id.*

52. *Id.* In the margin of his copy of the second draft (September 12) Mason wrote as follows:

> Article 5th — By this article Congress only have the power of proposing amendments at any future time to this constitution and should it prove ever so oppressive, the whole people of America can't make, or even propose alterations to it; a doctrine utterly subversive of the fundamental rights and liberties of the people.

Id. n.8.

53. *Id.* at 629.

vention for the purpose of proposing amendments, except for the difficulties which might arise as to the form, the quorum, etc., which he thought in Constitutional regulations ought to be avoided as much as possible.[54] The Morris and Gerry amendment was accepted. After further discussion, Article V was amended a final time, to quell the fears raised by Sherman and the smaller states, adding the proviso, "[t]hat no State, without its consent shall be deprived of its equal sufferage in the Senate."[55] Article V thus assumed its present form.

When the Constitution was before the various state conventions for ratification, the amendment procedure in Article V appears generally to have been viewed positively, a reason for ratification.[56]

James Madison, in *The Federalist No. 43*, made these observations regarding Article V:

> 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 the extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables that general and state governments to originate the amendment of errors as they may be pointed out by experience on one side or another.[57]

Article V, like numerous other constitutional provisions, is a result of compromise. The majority of convention members recognized that the new Constitution should contain a method whereby it could be altered or amended if such need should arise in the future. One faction did not trust giving the states the amending power for fear that they would use this power either to weaken the strong national union being forged or to destroy and discriminate

54. *Id.* at 629-30.

55. *Id.* at 631.

56. Before North Carolina's ratifying convention James Iredell argued, "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 28, at 176-77.

57. THE FEDERALIST No. 43 (Cooke ed. 1961).

Justice Story also spoke highly of the usefulness and propriety of the amending provision. J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1827-28(5th ed. 1891)[hereinafter cited as J. STORY].

against other states. The other faction did not trust the national legislature with sole possession of the amending power, fearing that if the government became oppressive, it would never permit amendments to end the abuses.

The debates of 1787 make it clear that the convention method of amending the Constitution was devised as a protection against this latter concern. There was to be an amending process whereby Congress would be bypassed, and the people could initiate amendments, despite opposition from Congress.[58] When trying to resolve the issues and questions raised by the Article V convention method, this purpose must be clearly kept in mind.

III. ISSUES RAISED BY THE ARTICLE V CONVENTION METHOD

Article V speaks in general terms. It neither describes nor defines the convention which it contemplates. The debates of the 1787 convention are not very helpful in attempting to perceive the constitutional shape of such a convention. It would appear initially that an Article V convention must be some sort of deliberative body.[59]

Many questions have been raised concerning the Article V convention method, some of which have been satisfactorily resolved. Others continue to plague those concerned in this area. This section of the article will discuss these questions.

A. CAN CONGRESS CALL A CONSTITUTIONAL CONVENTION ABSENT STATE APPLICATIONS?

One question that has arisen is whether Congress on its own initiative can call an Article V convention. It is generally agreed that Congress does not have the power to do so. The argument against Congress' power to do so, has been thusly stated:

> Congress is neither authorized nor compelled to summon an Article V convention prior to the submission by two-thirds of the state legislatures of proper and timely applications for such a convention. The reasons for this are

58. Comment, *supra* note 2, at 498.

59. *See* Bonfield, Proposing Constitutional Amendments by Convention: Some Problems, 39 NOTRE DAME LAW. 659, 662 (1964); Platz, Article V of the Federal Constitution: 3 GEO. WASH. L. REV. 17, 45 (1934) [hereinafter cited as Platz].

> several. Since the United States is a government of delegated powers, it possesses no authority except that conferred upon it by the Constitution. Article V, the only provision in the Constitution dealing with its amendment, must therefore be deemed exhaustive and not merely illustrative of the federal government's power in this regard. That provision explicitly sets out two modes for proposing constitutional amendments, only one of which contemplates the convening of a convention empowered to propose amendments. Such a convention is authorized by Article V only when two-thirds of the state legislatures have made 'Applications' for a convention. As a result, applications within the meaning of Article V from two-thirds of the states legislatures must fairly be deemed absolute prerequisites to the summoning of such a body.[60]

A contrary argument, however, has been advanced.[61]

Nothing in the 1787 convention debates supports the view that Article V was merely meant to be illustrative of one method of constitutional amendment,[62] and that Congress could therefore, in the absence of state applications, call a convention.[63]

B. IS CONGRESS OBLIGATED TO CALL A CONSTITUTIONAL CONVENTION WHEN PROPERLY PETITIONED?

It has been argued that the terms of Article V, providing that Congress shall call a constitutional convention when petitioned, are

60. Bonfield, *The Dirksen Amendment and the Article V Convention Process,* 66 MICH. L. REV. 949, 951 (1968) [hereinafter cited as Bonfield]. *See also* L. ORFIELD, *supra* note 24, at 37, 40.

61. *See* Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment,* 26 NOTRE DAME LAW 185, 196 (1951) [hereinafter cited as Corwin & Ramsey].

62. On August 30, Morris suggested that the national legislature should be at liberty to call a convention whenever they pleased. *Supra* note 40 and accompanying text. On September 10, Hamilton also suggested that the national legislature should be empowered to call a convention absent state application. *Supra* note 43 and accompanying text.

These actions clearly would not support an argument that Article V is merely illustrative. At the time these actions were taken, the only method contemplated by the convention for proposing amendments was to call a convention for that purpose. Thus Morris and Hamilton were merely stating their viewpoint that the national legislature should also be able to initiate amendments — not conventions — without the need for state request, which ultimately it was given the power to do.

63. It could be argued that Congress does in fact have such a power. By accepting the liberal interpretation that all applications from the States, regardless of their reasons, should be counted together to meet the two-thirds requirement, and by accepting a lengthy period during which applications would be counted, at almost any given point, Congress would have no difficulty in finding the Article V prerequisites to a constitutional convention arguably met.

64. *See, e.g.,* Dodd, *Judicially Non-Enforceable Provisions of the Constitution,* 80 U. PA. L. REV. 54, 82 (1931); Platz, *supra* note 59, at 44.

not mandatory but merely permissive.[64] There has been strong objection to this viewpoint.[65] The evidence that Article V places a mandatory duty upon Congress to call a convention, when properly petitioned, is overwhelming.

The wording of Article V supports this argument. Article V provides that "on the Application of the Legislatures of two-thirds of the several States (Congress) *shall* call a Convention for proposing Amendments . . . "[66] In *Martin v. Hunter's Lessee,*[67] the Supreme Court interpreted the word "shall" as having a mandatory effect in the contest of the Constitution.[68]

It seems clear that the framers intended that Congress be subjected to a mandatory duty to call a convention when properly petitioned.[69] In *The Federalist No. 85*, Hamilton wrote:

> In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portions of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone I think there is little weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing thirteen states at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion constantly impose on the national rules the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But

65. *See Bonfield, supra* note 60, at 976; *Ervin, supra* note 17, at 886.
66. U.S. CONST. art. V.
67. 14 U.S. (1 Wheat.) 304 (1816).
68. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 327 (1816).
69. In a letter on the subject, Madison observed that the question concerning the calling of a convention, "will not belong to the Federal Legislature. If two-thirds of the states apply for one, Congress cannot refuse to call it; if not, the other mode of amendments must be pursued." Letter from Madison to Mr. Eve, dated January 2, 1789, REPRINTED IN 5 U. S. BUREAU OF ROLLS & LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870 143.

One delegate to the North Carolina ratifying convention explained Article V as follows:

> ". . . that it is very evident that . . . [the proposal of amendments] does not depend on the will of Congress; for . . . the legislatures of two-thirds of the states were authorized to make applications for calling a convention to propose amendments, and, on such applications, it is provided that Congress shall call such convention, so that they will have no option."

4 J. ELLIOT, *supra* note 28, at 178. *See also* Corwin & Ramsey, *supra* note 61, at 195.

> there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obligated 'on the application of the legislatures of two thirds of the States (which at present-amount to nine), to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.' The words of this article are 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.[70]

Further, keeping in mind the purpose behind the Article V convention method; *i.e.,* insuring that the people would always have at their disposal a method of correcting defects in the system should the national government become oppressive and refuse to initiate changes, it becomes apparent that the duty imposed upon Congress must be mandatory. Were Congress to have discretion over the calling of a convention, the purpose behind the provision would be nullified.

C. STATE APPLICATIONS FOR A CONSTITUTIONAL CONVENTION

The duty of Congress to call a convention when properly petitioned is mandatory. Congress, however, has the power to ascertain whether the prerequisites to this duty have been met.[71] Article V states that Congress shall call a convention "on the Applications of the Legislatures of two-thirds of the several states."[72] This provision raises several questions. How long should Congress count state applications? Should only those applications which deal with the same subject matter be counted together, or should all states applications regardless of subject matter be included? May a state rescind its application for a convention?

It is generally agreed that Congress should consider only those applications which are submitted reasonably contemporaneously

70. THE FEDERALIST No. 85 (Cooke ed. 1961).

71. Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 790 (1927) [hereinafter cited as Wheeler].

72. U.S. CONST., art. V.

with one another when determining whether the prerequisites of its Article V duty have been met.[73] The framers intended that the Constitution be modified only when there was significant agreement among the states and the people to do so.[74] The framers thus provided that Congress must call a convention only when two-thirds of the states petitioned for one; that an amendment would not be ratified unless three-fourths of the states agreed thereto; and that two-thirds of both Houses of Congress must concur before the amendment was initiated. The framers required significantly more than mere majority agreement at all phases of the amending process. The implicit requirement of substantial agreement, when applied to the application process, calls for two-thirds of the states to agree that the convention procedure be invoked. Inherent in the concept of agreement is a contemporaneous convergence of desire for a specified course of action.

The next issue then is what constitutes a contemporaneous period during which to count applications? One writer has suggested that applications tendered during one "generation" be counted together.[75] Another suggests that Congress count only those applications which it receives during one session.[76] The best view appears to be that there be no definite period since what is contemporaneous in each case will vary, depending on factors such as the issues involved and the political climate. In *Coleman v. Miller,*[77] involving the validity of Kansas' ratification of the proposed Child Labor Amendment, the Supreme Court held that the validity of a state's ratification of a proposed amendment, nearly thirteen years after it has been proposed, was nonjusticiable.[78] The Court stated that the question of a reasonable time for ratification involved considerations of political, social, and economical conditions prevailing since the amendment was submitted for ratification and that Congress, not the Court, was in the best position to evaluate these.[79] Applying the same rationale to applications, the converse side of the amending process, in determining whether the prerequisites of its duty to call a convention have been met, Congress would analyze the above

73. *See* Bonfield, *supra* note 60, at 958; Corwin & Ramsey, *supra* note 61, at 195-96.

74. Note, *Proposing Amendments to the United States Constitution by Convention,* 70 HARV. L. REV. 1067, 1071-72 (1957).

75. L. ORFIELD, *supra* note 24, at 42.

76. Sprague, *Shall We Have a Federal Constitutional Convention, and What Shall it Do?,* 3 ME. L. REV. 115, 123 (1910) [hereinafter cited as Sprague].

77. 307 U.S. 433 (1939).

78. Coleman v. Miller, 307 U.S. 433, 450 (1939).

79. *Id.* at 453-54.

mentioned factors and decide whether contemporaneous agreement for a constitutional convention was present.[80]

Congress may, if it so desired, choose to set a definite period during which applications calling for a convention to deal with a particular subject would be counted. In *Dillon v. Gloss,* [81] the Supreme Court upheld the validity of a definite period imposed by Congress for state ratifications. The Court held:

> We do not find anything in the Article [V] which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective . . . First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time . . . . [A]s ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.'[82]

Applying the rationale of *Dillon* to the application process, Congress may impose a reasonable period during which state applications would be considered together.[83] Such a definite period would have the advantage of removing the subjective determinations previously mentioned, but would not unduly burden the use of the convention method, as state legislatures could

80. *See* Bonfield, *supra* note 60, at 961.
81. 256 U.S. 368 (1921).
82. Dillon v. Gloss, 256 U.S. 368, 374-75 (1921).
83. *Accord,* A.B.A. Study, *supra* note 2, at 31-32.

periodically renew their applications, if they retained their interest in calling a convention.

The Ervin legislation provides that an application submitted to the Congress by a state shall remain effective for seven calendar years after the date it is received by Congress.[84] Presumably this time period was suggested by analogy to the limitation period set for ratifications.[85] It has been suggested, however, that the considerations pertinent to ratification are not the same for the application process, and that four years might be a more appropriate period.[86]

Another issue raised is whether only those applications which deal with the same issue should be counted together, or whether all state applications requesting a constitutional convention, regardless of the reasons cited by the state in its application therefor, should be included.

Initially, in order to be an "application" within the meaning of Article V, a state's communication with Congress must somewhere contain a request for a constitutional convention.[87] It also appears that Congress may not require the state's application to be in any particular form.[88]

Article V seems to require a general consensus among two-thirds of the states that a constitutional convention be called. Thus, only those applications which request a convention to deal with the same issue should be counted together. If one state, for example, desires a constitutional convention to propose a pro-life amendment, and another state desires a convention to propose an amendment requiring a balanced federal budget, there is a general consensus or agreement that a convention be called, but a basic disagreement exists regarding what the convention should consider. If two states, however, request a convention to consider a balanced budget amendment, then the requisite agreement exists. The Ervin legislation adopts this approach, counting together only those applications which call for a constitutional convention to deal with "the same subject."[89]

Another issue concerning state applications is whether a state may rescind its application for a constitutional convention. The Ervin legislation permits such recission up until the required number of states have petitioned Congress for a convention.[90] This

84. S. 1272, *supra* note 14, § 5(a).
85. *See* S. REP. No. 93-293, *supra* note 8, at 11.
86. Note, 85 HARV. L. REV. *supra* note 16, at 1620-21; A.B.A. Study, *supra* note 2, at 32.
87. A.B.A. Study, *supra* note 2, at 30.
88. *See* Dirksen, *supra* note 4, at 864; S. REP. No. 93-293, *supra* note 8, at 10.
89. S. 1272, *supra* note 14, §§ 5(a), 6(b).
90. *Id.* § 5(b).

is clearly the correct approach. State applications for a convention should show a general consensus among the requisite number of states that a constitutional convention be held. A state can hardly be said to be part of a consensus to call a convention after it has rescinded its application. After the requisite number of states have petitioned Congress and invoked its duty to call a convention, a state has other courses of action open to it should it, after reconsidering, no longer desire the convention. Allowing a state to rescind its application after the required number of states have submitted applications and the duty to call the convention has arisen would amount to giving a single state, or handful of states, a veto power over the convention method after it has been set in motion.

A final issue with state applications is the effect of calling a constitutional convention upon previously submitted applications. If one accepts the viewpoint that a duly convened constitutional convention has the power to propose amendments on any subject, it would appear that all previously submitted applications would lose their validity once the convention is held, since each state would have the right to seek adoption by the convention of amendments on any subject. If the viewpoint is accepted that the convention can be limited in scope to consideration of the topic placed by Congress in the call, then only those state applications dealing with that topic should lose their validity once the convention is held.

D. THE ROLE OF THE PRESIDENT, STATE GOVERNORS, AND THE VICE-PRESIDENT IN THE ARTICLE V CONVENTION METHOD.

Article 1, Section 7 of the Constitution in part provides as follows:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules of Limitations prescribed in the case of a Bill.[91]

91. U.S. CONST. art. I, § 7.

The Supreme Court has held that provisions of the Constitution must be read in light of each other.[92] Consequently, it has been argued that the President has the power to veto Congress' call of a constitutional convention.[93] It is pointed out that Congress must enact legislation, pursuant to its call of the Convention, which is similar to other types of legislation which Congress normally deals with, and therefore, no logical reason exists to exclude the convention process from the scope of Article I, Section 7.[94] The President, it is urged, would be under a duty to veto a call if he believed the constitutional prerequisites were not met[95] or if he believed that the convention was not in the nation's best interests.[96]

This viewpoint is clearly untenable. Despite the surface similarity between legislation which Congress must enact incidental to a convention call and other types of legislation over which the President possesses the veto power, Congress, when enacting legislation pursuant to the call of a constitutional convention, is performing a unique function delegated to it by a specific article of the Constitution. Congress is not acting in its regular lawmaking role. Congress is merely the agency selected by the framers through which this process is to be effectuated.[97]

The history of Article V lends no support to the proposition that the President has a role in the amendment by convention process. Article V speaks only of Congress. No mention is made of the President, nor can a role for him be inferred into the article from its specific language or from the 1787 debates.[98] Were the President given a veto power over the Article V convention method a great obstacle would stand in the way of the people as they attempt to amend the Constitution. The Article V convention method was designed to insure the people a way to amend the Constitution in the event the national government, presumably including the President, should ever become oppressive. To include

92. *See* Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964); Prout v. Starr, 188 U.S. 537 (1902).

93. *See, e.g.*, Black, *supra* note 16, at 206-09.

94. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L. J., 957, 965 (1963) [hereinafter cited as Black]; Bonfield, *supra* note 60, at 986.

95. *See, e.g.*, Bonfield, *supra* note 60, at 986.

96. Black *supra* note 94, at 965.

97.

> Since Article V is a grant of power to Congress, and not to the Federal Government, as we have seen, and since Congress is bound to call a convention upon the application of the requisite number of states, it would seem that such act should not be subject to the President's veto.

Platz, *supra* note 59, at 37.

98. *See* Gilliam, *Constitutional Conventions: Precedents, Problems, and Proposals*, 16 ST. LOUIS U.L.J. 46, 48 (1971) [hereinafter cited as Gilliam].

the President in this process would be contrary to the intent of the framers. Presumably, the act of calling a convention, and all legislation incidental thereto, would require a mere majority vote of both houses.[99] If the President had the power to veto matters relating to the call of such a convention, each house would be required by Article I, Section 7 to repass the measures by a two-thirds vote. This would greatly inhibit the effectiveness of the convention method.[100]

The first ten amendments were submitted to the states for approval without having first been sent to President Washington.[101] In *Hollingsworth v. Virginia,*[102] the Supreme Court considered a case involving the validity of the eleventh amendment. It was argued that the amendment was void because it was not proposed in the form prescribed by the Constitution, having never been submitted to the President for his approval, as it was contended was required under Article I, Section 7.[103] Counsel argued that the President's concurrence was required in matters of infinitely less importance than amending the Constitution and that the language of Article I, Section 7 applied equally, whether on subjects of ordinary legislation or of constitutional amendment.[104] *Hollingsworth* involved the congressional method of amending whereby amendments are proposed by two-thirds of the members of each house. Counsel stated as follows:

> . . . . it is no answer to the objection, to observe, that as two-thirds of both houses are required to originate the proposition, it would be nugatory to return it with the president's negative, to be repassed by the same number; since the reasons assigned for his disapprobation might be so satisfactory as to reduce the majority below the constitutional proposition.[105]

The Attorney General pointed out that the same course (not requiring the approval of the President) had been followed in all the other amendments which had been adopted. He argued that the case of amendments is a substantive act, unconnected with the

99. Platz, *supra* note 59, at 37.
100. The A.B.A. Study, *supra* note 2, supports the opinion that the President has no role in the amendment process. *Id.* at 26-28.
101. Annot., Article 1, Section 7, in THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 136 (1964 ed.).
102. 3 U.S. (3 Dall.) 378 (1798).
103. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 378-79 (1798).
104. *Id.* at 379.
105. *Id.* at 378-79.

ordinary business of legislation, and not within the policy or terms investing the President with a qualified negative on acts and resolutions of Congress.[106] In a footnote to the Attorney General's argument, Justice Chase wrote, "[t]here can, surely, be no necessity to answer that argument. The negative of the president applies only to ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution."[107]

In 1803, a motion to submit the twelfth amendment to the President was defeated in the Senate. In 1861, a proposed amendment on slavery was presented to and signed by President Buchanan. In 1865, the proposed thirteenth amendment was submitted to President Lincoln and signed by him, in apparent inadvertence. This matter was discussed in the Senate and a resolution was passed declaring that the President's signature was unneccessary, that his actions were inconsistent with previous practice and that this should not constitute a precedent for the future. In 1866, President Andrew Johnson made clear, in a report sent to Congress, that actions taken by the President relating to amendments were ministerial in nature and did not commit the President to a role in the process. Since that time, no proposed amendment has been submitted to the President.[108] Finally, in *Hawke v. Smith, No. 1,*[109] the Supreme Court, citing *Hollingsworth*, stated unequivocably that, "[A]t an early day this court settled that the submission of a constitutional amendment did not require the action of the President."[110]

While *Hollingsworth* dealt with the Congressional amendment process, there is no reason to believe that had the question arisen in connection with the Article V convention method that a different result would have been reached. The Ervin legislation provides that the convention shall be called by the passage of a concurrent resolution which does not require the signature of the President.[111]

Another issue concerns the role of a state governor in the Article V convention method. May the governor veto a state's application to Congress for a constitutional convention? Article V provides that, "[c]ongress . . . on the Application of the Legislatures of two-thirds of the several States, shall call a

106. *Id.* at 380.
107. *Id.*
108. A.B.A. Study, *supra* note 2, at 27.
109. 253 U.S. 221 (1920).
110. Hawke v. Smith, No. 1, 253 U.S. 221, 229 (1920).
111. S. 1272, *supra* note 14, § 6(a).

convention for proposing Amendments. . . ."[112] The answer to the question concerning the role of the state governor in this process revolves around the meaning of the word "Legislatures" as used in Article V.

The Supreme Court has held that the term "legislature" in a particular clause of the Constitution depends upon the type of activity that the legislature is called upon to perform. In *Smiley v. Holm,*[113] the Supreme Court held that when a state legislature prescribes the time, place, and manner of holding elections under Article I, Section 4 of the Constitution, it is enacting legislation and in that context "legislature" means the entire legislative process of the state, including the executive veto. As stated by the Court, "[w]herever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view."[114]

In *Hawke v. Smith, No. 1,*[115] the Supreme Court struck down a provision in Ohio's constitution requiring ratification of proposed constitutional amendments by popular referendum. The Court found this to be invalid because Article V required ratification by "legislatures" and that a popular referendum was not a "legislature" within the sense the term was used in Article V. The Court wrote as follows:

> The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by *"Legislatures"*? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.[116]

Ratification of a proposed amendment, the Court stated, was not an act of legislation within the proper sense of the word, but merely an expression of assent for which no legislative action is authorized or required. The Court further held that the power to ratify a proposed amendment to the Federal Constitution had its source in the Federal Constitution; and the act of ratification by a state

112. U.S. CONST. art. V.
113. 285 U.S. 355 (1932).
114. Smiley v. Holm, 285 U.S. 355, 366 (1932). *See also* Note, 70 HARV. L. REV., *supra* note 74, at 1074.
115. 253 U.S. 221 (1920).
116. *Id.* at 227.

derived its authority from the Federal Constitution to which the state and its people had assented.[117]

The term "legislatures" in Article V thus means the representative body which ordinarily makes the laws. The function given to this agency by Article V is a federal function derived from the Constitution. Consequently, when state legislatures apply to Congress for an Article V convention they are not acting as lawmakers under their state constitutions but as federal agents performing a federal function. They are representatives of the people of the State under the power granted by Article V. The article imports a function different from that of lawmakers and renders inapplicable the conditions which usually attach to the making of state laws, such as the governor's approval.[118] The Ervin legislation follows this viewpoint by providing that a state's application for a convention need not be approved by the state's governor.[119]

The final issue for discussion is whether the Vice-President has a role in the Article V convention process. Article I, Section 3 provides that, "[t]he Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."[120] If the Senate is equally divided on the calling of a constitutional convention, may the Vice-President cast his vote to break the tie? As in the case of the President, Article V makes no specific reference to the Vice-President, nor do the debates of 1787. There exists, however, evidence that the framers did not intend for the Vice-President to have a role in the amending process.[121]

In applying the same reasoning to the Vice-President as applies to the role of the President, it appears that the Vice-President should likewise have no role in the amending process. Just as the power of the President to veto legislation under Article I,

---

117. *Accord*, Leser v. Garnett, 258 U.S. 130, 137 (1922). *See also* Petuskey v. Rampton, 307 F. Supp. 235 (1969), *rev'd on other grounds*, 431 F.2d 378 (10th Cir. 1970), *cert. denied*, 401 U.S. 913 (1971).

118. C. BRICKFIELD, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 10-11 (Comm. Print 1957) [hereinafter cited as C. BRICKFIELD]. *See* State ex. rel. Sanstead v. Freed, 251 N.W.2d 898 (N.D. 1977) (lieutenant governor could not vote upon final disposition of resolutions proposing amendments to the U. S. Constitution); Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977) (signature of Governor not required on resolutions calling for a national convention).

119. S. 1272, *supra* note 14, § 3(a); *But see* Black, *supra* note 16, at 209-10, where the author argues that state governors should not be excluded from the amendment by convention process of Article V.

120. U.S. CONST. art. I, § 3.

121. In 1803, Pierce Butler, then Vice-President of the United States, who had been a delegate from South Carolina to the 1787 Convention, stated on the floor of the Senate, "It was never intended by the Constitution that the Vice-President, should have a vote in altering the Constitution."

3 M. FARRAND, *supra* note 27, at 400.

Section 7 applies only to ordinary legislation, so should the power of the Vice-President to cast a deciding vote in the Senate. It would be anomalous if the Vice-President were to have a role in the amending process, but not the President or the state governors. *Hollingsworth* and *Hawke,* which held that the President had no role in the amendment process should apply to the Vice-President by analogy. Provision is made in the Ervin legislation for the Vice-President to convene the constitutional convention, administer the oath of office, and preside until the delegates elect a presiding officer.[122]

E. REPRESENTATION AT AND DELEGATES TO AN ARTICLE V CONVENTION.

One of the most important issues concerning an Article V convention is representation. Should each state have one vote, should delegates be apportioned strictly on the basis of population, or according to some other scheme?

It seems reasonable that the framers, when devising the convention method, contemplated a convention substantially similar, if not identical, to the one they were then attending. The 1787 convention was organized on the basis of state representation. Each state had one vote. Seven states, a simple majority, constituted a quorum, a majority of those states present being competent to decide all questions.[123] The provision in Article V for a separate ratification stage was adopted after it was pointed out in the debates that if the convention were to have both the power to propose and to adopt amendments,[124] a majority of the *states* could bind the whole union.

The entire scheme for amendment as provided for in Article V is evidence that the framers viewed amendments to the Constitution as alternations in the fundamental compact between the states. In this compact each state is the theoretical and legal equal of the others, regardless of such differences as wealth or population. Article V provides that whenever two-thirds of the legislatures of the *several states* apply, a convention shall be called. This convention shall then propose amendments which when ratified by the legislatures of three-fourths of the several *states* or by conventions in the *states*, shall be valid. The states have an equal

122. S. 1272, *supra* note 14, § 8(a).
123. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 57 (1962).
124. *Supra* note 42 and accompanying text.

voice in both the application stage and in the ratification stage of the amending process. It would be illogical to assume that the framers did not intend for the states to have an equal voice during the convention.[125] Madison wrote in *The Federalist No. 43* concerning Article V, "[i]t moreover equally enables the general and *state governments* to originate the amendment of errors as they may be pointed out by experience on one side or another."[126] While the amendment power ultimately rests with the people, it is exercised by them through the states, and, in the legal contemplation of the Constitution, each state is regarded as an equal. As stated by one eminent authority, Article V:

> recognizes the concept of dual constituency of the Federal Government. A ratification signifies not only the assent of a section of the *people* of the United States, expressed by their agent, but that of a *state,* regarded as a political community, as well, and the vote of New York . . . has no more weight than that of . . . Nevada. Likewise, no state may be deprived of its equal sufferage in the Senate without *its* consent. Finally, a convention is to be called upon the application of two-thirds of the states, and here also the shout from New York has no more weight than the whisper from Nevada.[127]

It is interesting to note that the legislation originally drafted by Senator Ervin provided for representation modeled after the 1787 convention; *i.e.,* each state having one vote.[128] Senator Ervin, however, was forced to modify this, after hearings, presumably as the result of political pressure from the populous states. S. 1272 provides that a convention shall be composed of as many delegates from each state as it is entitled to Senators and Representatives in Congress.[129]

The American Bar Association's Special Study Committee believes that convention representation should be guided by the Supreme Court's "one man, one vote" rule. It suggests representation identical to that of the states in the House of

125. *See Hearings on S. 2307, supra* note 14, at 33 (remarks of Senator Hruska); Note, 85 HARV. L. REV., *supra* note 16, at 1625.
126. THE FEDERALIST No. 43 (Cooke ed. 1961) (emphasis added).
127. Platz, *supra* note 59, at 29.
128. "[I]n voting on any question before the convention each state shall have one vote which shall be cast as the majority of the delegates from the state, present at the time, shall agree." S. 2307, 90th Cong., 1st Sess., § 9(a) (1967).
129. S. 1272, *supra* note 14, § 7(a).

Representatives.[130] Another writer has suggested a bicameral convention modeled after Congress.[131]

Those who disagree with the idea of representation at an Article V convention patterned after the 1787 convention either ignore the clear intent of the framers,[132] or in the alternative argue that even if this was their intent we should no longer be bound to follow it.[133]

If the argument that a convention should be based upon proportionate representation is followed to its logical conclusion, then representation at an Article V convention should be totally on the basis of one man, one vote. There is no compelling reason, once the intent of the framers is cast aside, to accord each state even a minimum of one delegate, since even this would result in population deviations of up to fifty percent.[134] While the specific language of Article V arguably does not bar a convention based upon proportionate representation according to population, such a convention would be an anomaly within the Article V scheme of amendment. The application and ratification provisions of Article V clearly give each state an equal vote. This language cannot be ignored. What would be the advantage of having a convention, based solely upon proportionate representation by population, propose amendments which would have to be ratified with each state having one vote. Such an interpretation would merely place a barrier upon the practical use of this method. If each state had an equal vote at an Article V convention, amendments proposed from such a convention would stand a far greater chance of adoption because majority agreement and compromise would already have been hammered out between the states at the convention level.

The clear intent of the framers, that an Article V convention should be based upon equal state representation, is an inherent constitutional requirement of Article V. While on occasion, when exceptional circumstances were present, the Supreme Court has wandered away from the strict intent of the framers,[135] the traditional approach of the Court being to follow the clear intent of

130. A.B.A. Study, *supra* note 2, at 35-36.

131. Note, 70 HARV. L. REV., *supra* note 74, at 1076 n.50.

132. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 909 (1968) [hereinafter cited as Kauper]; Note, 70 HARV. L. REV., *supra* note 74, at 1075.

133. Bonfield, *supra* note 60, at 988; McClesky, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1006-07 (1968); Note, 85 HARV. L. REV., *supra* note 16, at 1625-27; A.B.A. Study, *supra* note 2, at 35.

134. *See* A.B.A. Study, *supra* note 2, at 36.

135. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489 (1954); Home Building Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1933); Missouri v. Holland, 252 U.S. 416, 433 (1920); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

the framers when interpreting the Constitution.[136] If this requirement of Article V is outmoded and archaic, like the electoral college is argued to be, then the proper remedy is to amend the Constitution not to ignore the clear intent of the framers or to rationalize it away.

Accepting the viewpoint that each state has one vote at an Article V convention on all matters, it follows that each state should be allowed to select its delegates, in any manner it chooses.[137] A State should have members of its delegation either elected or appointed. The states' legislatures would be in charge of the delegation selection. A state could put in its delegation as many persons as it desired, though each state would have but one vote at the convention. Presumably, however, practical and financial considerations would prevent an excessive number from being sent. If the 1787 convention precedent is followed, and a state appoints its delegation, supposedly only those best qualified, *e.g.*, respected elder statesmen and state political leaders, would be appointed. Prudent men, not likely to be given to any excesses or abuses of the convention process, certainly would be chosen.

The Ervin legislation, proceeding upon the premise that Congress has the power to prescribe the selection of delegates to an Article V convention, provides that two delegates shall be elected at large and one elected from each congressional district according to state law. Any vacancy occurring in a state delegation is to be filled by appointment by the state's governor.[138]

A final issue is whether there are any constitutional limitations upon whom may be a delegate to an Article V convention. Article I, Section 6 of the Constitution states the following:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office un-

136. *See, e.g.*, South Carolina v. United States, 199 U.S. 437, 448 (1905); Knowlton v. Moore, 178 U.S. 41, 95 (1900); Lake County v. Rollins, 130 U.S. 662, 670 (1889); Ex parte Bain, 121 U.S. 1, 12 (1887); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 722 (1838).

The Supreme Court has held that if the meaning of a constitutional provision is at all doubtful, wherever reasonably possible to do so, the doubt should be resolved in a way to forward the evident purpose with which the provision was adopted. Maxwell v. Dow, 176 U.S. 581 (1900); Jarrolt v. Moberly, 103 U.S. 580 (1880).

The Supreme Court has long recognized the propriety of drawing upon the debates of the 1787 Convention, *The Federalist*, and other writings of the founding fathers to construe vague constitutional provisions. Missouri Pac. R.R. v. Kansas, 248 U.S. 276 (1919); Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

137. "It would seem proper for each state to determine the procedure for the election of its delegates and the qualifications of the electors, since matters of this kind have traditionally been left to the states." Note, 70 HARV. L. REV., *supra* note 74, at 1076. *See also* Platz, *supra* note 59, at 37-38.

138. S. 1272, *supra* note 14, § 7(a).

> der the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[139]

Are members of Congress prevented by this provision from being delegates to an Article V convention? The Supreme Court has suggested that an "Office under the Authority of the United States" must be one created under Article II's appointive provisions,[140] consequently excluding the position of delegate to a constitutional convention, which arises under Article V. Selection of a member of Congress by a state to a position on its delegation to an Article V convention clearly does not come within the policy behind Article I, Section 6, and thus should not be barred.[141] The Articles of Confederation contained a prohibition similar to the present Article I, Section 6,[142] yet several delegates to the 1787 convention were members of the Continental Congress.[143] Theoretically state laws and state constitutions may prescribe directly or indirectly who may not serve as Article V convention delegates, *e.g.*, minors, incompetents, criminals, etc.

F. FINANCIAL ISSUES PERTAINING TO AN ARTICLE V. CONSTITUTIONAL CONVENTION.

Article V is silent about the financing of a constitutional convention. It would seem that Congress has inherent power and the responsibility, incidental to its power to call the convention, to provide reasonable funds for the convention. Congress' minimal responsibility should be to provide the actual costs of the convention, leaving to the states the burden of travel expenses and personal expense money of the delegates.[144] Nothing, however, would preclude Congress from paying for the expenses of convention delegates. Hopefully, whether it be the federal or the state government, some one will pay the expenses of the delegates, so that being

139. U.S. CONST. art. I, § 6.

140. United States v. Smith, 124 U.S. 525 (1888); United States v. Germaine, 99 U.S. 508 (1878).

141. *See* Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1072-73 (1967) [hereinafter cited as Forkosch].

142. Article V of the Articles of Confederation provided that "nor shall any person being a delegate [to Congress], be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees, or emolument of any kind."

M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 213 (1962).

143. A.B.A. Study, *supra* note 2, at 37.

144. Forkosch, *supra* note 141, at 1082 n.103.

a delegate to a constitutional convention would not become a privilege accorded only to the affluent.

An interesting question would arise if Congress, disfavoring the convention, were to attempt to use the "power of the purse" over it, and totally deny it funding or appropriate an insufficient fund. One writer has suggested that in such a case, the convention would have inherent power to appropriate its own funding.[145] This position is untenable at best. A convention could not enforce such an "appropriation." In our era of electronic media, however, should a convention duly convened find itself without funding, it could likely make a successful appeal to the American people and thus raise sufficient funds. Furthermore, a duly convened convention, as an agency of the United States, probably could charge its expenses, and possibly those of its delegates, to the credit of the United States, leaving creditors with the right to recover such sums against the United States in the federal courts.

The Ervin legislation authorizes the payment of such sums as may be necessary for the payment of the expenses of such a convention,[146] and provides that the concurrent resolution calling for the convention shall set delegate compensation for each day of service and for travel.[147]

G. THE POWER OF THE STATES OVER AN ARTICLE V. CONSTITUTIONAL CONVENTION AND THE ALTERNATIVE AMENDING PROCESS.

The initial question which arises in this area is whether states have the power, via their applications to Congress, to limit the scope of an Article V convention. If thirty-four states petition Congress for an Article V convention to propose a pro-life amendment, can this convention, so formed, expand its deliberations beyond that topic? The authorities overwhelmingly believe that the states have no such power.[148] In the words of one writer:

> even though the application were for a limited purpose, it would seem that the state legislatures would have no authority to limit an instrumentality set up under the Federal Constitution. In reality, the right of the

145. Platz, *supra* note 59, at 47.
146. S. 1272, *supra* note 14, § 8(b).
147. *Id.* § 7(d).
148. *See* Bonfield, *supra* note 60, at 995; Platz, *supra* note 59, at 45; Wheeler, *supra* note 71, at 795.

legislatures is confined to applying for a convention, and any statements of purpose in their petitions would be irrelevant as to the scope of the powers of the convention.[149]

Another question concerning this issue is whether a state has the power to order its delegation home if it becomes dissatisfied with the way the convention is proceeding, or whether it can direct its delegation to vote a certain way at the convention, or only upon certain matters. the answer to these questions would seem to be no. If the viewpoint is accepted that a state cannot limit the scope of the convention directly via its application, then it should not be able to do so indirectly by controlling the actions of its delegates in the convention. The framers contemplated that an Article V convention would be a deliberative body which would discuss freely and fully any proposed constitutional changes.[150] In *Hawke v. Smith, No. 1*,[151] the Supreme Court, commenting upon the ratification process, stated that "both methods of ratification, by legislatures or *conventions,* call for action by *deliberative assemblages.* . ."[152] The deliberative nature of a constitutional convention would be destroyed if delegates were subject to control by their state governments like puppets on a string, and their powers of participation limited. In conjunction with this area, it would seem appropriate that some sort of immunity be given to delegates to an Article V convention for their actions in connection therewith.[153]

Once two-thirds of the states have petitioned Congress for an Article V convention, and the call has been issued, must a state attend? One author suggests that a state need not attend an Article V convention,[154] though it seems unlikely in this day and age that a state would waive its opportunity to participate in such an assemblage.

Finally, Article V gives the states power to ratify proposed amendments, whether proposed by Congress or by a convention. In *Coleman v. Miller,*[155] the Supreme Court held that the question of the effect of a previous rejection of a constitutional amendment on a subsequent ratification was a political one to be determined by Congress. The Court held that absent a fixed period for

149. L. ORFIELD, *supra* note 24, at 44-45.
150. Bonfield, *supra* note 60, at 992.
151. 253 U.S. 221 (1920).
152. *Id.* at 226 (emphasis added).
153. The Ervin legislation follows this approach. *See* S. 1272, *supra* note 14, § 7(c).
154. Forkosch, *supra* note 141, at 1067-68.
155. 307 U.S. 433 (1939).

ratification, the question of what was a reasonable time for ratification was a political question for Congress to decide. Following *Coleman* by analogy, Congress would have the power to decide if a state could rescind its ratification of a proposed amendment prior to ratification by the required number of states. In the past, Congress has determined that a state cannot rescind its ratification of a proposed amendment. The current trend, however, seems to be towards allowing a state to withdraw or rescind its own ratification prior to ratification by the required number of states. Since a consensus is required throughout the amendment process, recission is consistent because this consensus no longer exists as to a rescinding state. The Ervin legislation follows this approach.[156]

When analyzing the relationship of the states to the Article V convention method, it must be remembered that Article V is superior to state law under the "Supremacy Clause."[157] The states thus possess no powers which go contrary to the letter and spirit of Article V.

H. THE POWER OF CONGRESS OVER THE ARTICLE V CONVENTION METHOD

Congress has the power, incidental to its ministerial duty to call a convention, to ascertain whether the prerequisites of its duty to call exist.[158] The power of Congress over the Article V convention method is primarily based upon the fact that, under Article V, it is to "call" the convention. Congress' powers are said to be incidental to, or implied by, its power to call the convention.[159] Since Article V speaks in general terms, Congress, it is said, is best suited to fill the gaps in the convention method.[160] In *Dillon v. Gloss,*[161] the Supreme Court stated as follows:

> An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments.[162]
>
> . . . .
>
> As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail

156. S. 1272, *supra* note 14, §§ 13(a), 13(b). *See also* S. REP. No. 93-293, *supra* note 8, at 19-20 (additional views of Senators Bayh and Cook).
157. U. S. CONST. art. VI, 2d.
158. Kauper, *supra* note 132, at 906.
159. *Id.* at 906-07.
160. *See* Black, *supra* note 94, at 964.
161. 256 U.S. 368 (1921).
162. *Id.* at 373.

> as the public interests and changing conditions may require; and Article V is no exception to the rule.[163]

In *Dillon,* the Supreme Court upheld the power of Congress to set a time period for ratification. In *Coleman v. Miller,*[164] the Supreme Court held that, absent a set time limit upon ratification, Congress was best suited to determine what constituted a reasonable period for ratification of a proposed amendment, and that the Courts would not interfere in that determination.

Support for Congress' power over the Article V convention method is also found in Article I, Section 8 of the Constitution, the "necessary and proper" clause, which provides that "Congress shall have Power. . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[165] Added to this is the sweeping pronouncement by Justice Marshall in *McCulloch v. Maryland,*[166] "[l]et 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."[167]

Congress' power over the Article V convention method is subject only to the limitations which the Constitution places upon it. When ascertaining the powers of Congress in this area, the purpose behind the convention method must always be kept in mind. This method of amendment was placed in the Constitution to insure that the states would always have an avenue of amending open to them should the national government become oppressive. In exercising its powers over the Article V convention method, Congress could severely inhibit the use of this alternative method.[168] Keeping the purpose behind the convention method in mind, it would seem that whenever there is a serious doubt as to whether Congress has a particular power over the Article V

163. *Id.* at 376.
164. 307 U.S. 433 (1939).
165. U.S. CONST. art. I, § 8, cl. 18.
166. 17 U. S. (4 Wheat.) 316 (1819).
167. *Id.* at 421.
168. Senator Ervin recognized this possibility when drafting his legislation.

> This legislation can be drawn so as to place as many hurdles as possible in the way of effective use of the process; or it can be drawn in a manner that will make such a process a possible, however improbable, method of amendment. The first alternative would be a flagrant disavowal of the clear language and intended function of Article V. I have assumed that the Congress will wish to take the second road, and the bill is drawn with that principle in mind.

Ervin, *supra* note 17, at 880.

convention method, a presumption against the existence of such a power should arise.

The proper view with respect to Congress' power over the Article V convention method is that the only powers which Congress possesses are those concerning housekeeping matters.[169] It would seem proper for Congress to set the date and location of the convention; put a reasonable time limit upon the length of its deliberations (it can hardly be suggested that an Article V convention once convened can continue in existence forever); and to appropriate a reasonable amount to finance the convention's expenses. Under the view accepted in this article, Article V implies a convention where each state has an equal vote. Consequently Congress cannot otherwise constitute the convention, *e.g.*, base representation on population or other factors. If the opposite view is accepted then Congress could determine the composition of the convention on some reasonable basis.

Under *Dillon,* Congress may set a time limit for states to ratify a proposed amendment. By analogy, Congress may set a time limit for the validity of applications for an Article V convention. It would appear then that an Article V convention would have inherent power to determine its own internal rules of procedure,[170] and any attempt by Congress to try to determine the convention's procedures would be futile.

I. THE SCOPE OF AN ARTICLE V CONVENTION'S AUTHORITY.

As previously discussed, it is generally agreed that states have no power, via their applications, to limit the scope of an Article V convention's deliberations. One of the most vexing questions is whether Congress, in its call of a convention, can limit the subject matter upon which the convention may deliberate and act.

The observation has been made that "[t]here is a general aversion to tinkering with the Constitution . . . "[171] In his Farewell Address, President Washington warned, "[o]ne method of assault (against the Union) may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown."[172] Overall, the American people are quite satisfied

169. Note, 85 HARV. L. REV., *supra* note 16, at 1617.
170. Note, 70 HARV. L. REV., *supra* note 74, at 1076.
171. Wheeler, *supra* note 71, at 803.

with our constitutional system. Justice Felix Frankfurter once observed the following:

> For the general scheme of our constitutional system there is deep acquiescence and even attachment. One hears occasionally loose talk that our form of government is an anachronism, and dissatisfaction with some act of government or some failure to act is vaguely charged against our constitutional mechanism. But much more significant than these expressions of episodic discontent is the absence of any widespread or sustained demand for a general revision of our Constitution.[173]

There have been, however, occasional suggestions that our entire national framework of government be revised.[174]

Our present Constitution, amended relatively few times, has been in existence nearly two hundred years during which time a complex social, political and economic system has developed. Our present Constitution protects many vested interests, be they property rights or civil liberties. Many people regard the prospect of an Article V convention as an unknown, uncertain element in our system, having the potential to stir constitutional waters.[175] Some suggest that an Article V constitutional convention once called into being might cast aside its mandate, draft an entirely new constitution, declare it effective, and invite the states and existing government to acquiesce in it.[176] It has even been wildly speculated that an Article V constitutional convention could simply declare itself the new national government.[177] These arguments arise from the theory of "convention sovereignty." In 1911, Senator Hayburn stated the theory as follows: "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 every section of it because they are the peers of the people who made it."[178] It has been properly pointed out that there is no merit to this theory.[179] Of course, it is possible that an Article V

172. Washington's Farewell Address, *quoted in* J. BECK, THE CONSTITUTION OF THE UNITED STATES: YESTERDAY, TODAY — AND TOMMORROW? 269 (1924).

173. F. FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 51 (1930).

174. *See, e.g.*, Tugwell, *Rewriting the Constitution: A Center Report*, CENTER MAGAZINE 18 (Mar. 1968).

175. *See, e.g.*, Sorensen, *The Quiet Campaign to Rewrite the Constitution*, SATURDAY REVIEW. 17, 18 (July 15, 1967).

176. Wheeler, *supra* note 71, at 801-02.

177. Carson, *Disadvantages of a Federal Constitutional Convention*, 66 MICH. L. REV., 921, 922-23 (1968) [hereinafter cited as Carson].

178. 46 CONG. REC. S 2769 (1911) (remarks of Senator Hayburn).

179. Bonfield, *supra* note 60, at 993.

convention could take such actions as declaring itself to be the new national government or proclaiming a new constitution. This, however is highly improbable. The chances of this ever happening are small, and the chances of the success of such a move even smaller.

In addition to these unfounded and exaggerated concerns, a more reasonable concern has been aired; *i.e.*, that once an Article V convention is formed, its delegates might propose amendments to the Constitution on subjects different from those placed by Congress in the call and cited by states in their applications.[180] Some have suggested that an Article V convention, if it desires, could choose to redraft the Constitution and submit the new draft to the states for ratification.[181] Even though these proposals stand little chance of ultimate ratification, it apparently is felt that their mere proposition by a prestigous body, as would be an Article V convention, would be greatly disruptive and bring into question the basic fabric of our national government.

The Ervin legislation attempts to limit the scope of an Article V convention's deliberations and actions. It provides that Congress, when calling the convention, shall in its concurrent resolution set forth the nature of the amendment or amendments which the convention is called to consider.[182] Each delegate to the convention is to subscribe to an oath, before taking his seat, that he shall be committed during the conduct of the convention to refrain from proposing or casting his vote in favor of any proposed constitutional amendment relating to any subject not named or described in the concurrent resolution calling the convention.[183] The legislation provides specifically that no convention called under the act may propose any amendment or amendments of a different nature than those stated in Congress' concurrent resolution.[184] Finally, the legislation provides that all amendments proposed by the convention be sent to the states for ratification, unless Congress passes a concurrent resolution disapproving the submission of a proposed amendment on the grounds that it includes a subject different from or not included among the subjects named in our described in Congress' concurrent resolution calling for the convention.[185]

180. 113 CONG. REC. S 5458 (daily ed. Apr. 19, 1967) (remarks of Senator Javits); *id.* at S. 5462 (remarks of Senator Proxmire).

181. L. ORFIELD, *supra* note 24, at 44-45; Platz, *supra* note 59, at 31.

182. S. 1272, *supra* note 14, § 6(a).

183. *Id.* § 8(a).

184. *Id.* § 10(b).

185. *Id.* § 11(b)(1)(B).

Several policy arguments support the concept of a limited Article V convention. First, if an Article V convention were "wide-open" once the convention were convened, it would immediately become the focal point of every dissident group in the nation seeking constitutional change. Delegates to the convention would be subjected to intense pressure from many groups resulting in the impairment of the deliberative quality of the convention. The 1787 convention decided to hold its deliberations in secret, hiding from the public its day to day shift in temperament and announcing only its final product.[186] An Article V convention, held now, would find it most difficult to duplicate this.[187] As a result of the hectic conditions inherent in a wide-open convention, the ultimate product might not reflect thoughtful deliberation. Such a wide-open convention could become a circus. However, were the convention limited in its discussions and in its ability to propose amendments, the debate need not be sidetracked.

Another argument in favor of limiting the scope of an Article V convention would be that it would allow an intelligent choice of delegates.[188] If the convention were called, for example, to propose a pro-life amendment, then the state, when selecting its convention delegates, could choose persons with knowledge and expertise in the particular area.

Finally, it can be argued that the concept of a wide-open convention might discourage the states from using the convention method. The states will make greater use of this method if they know that the authority of the convention will be limited to discussion of the problem which they, and the other thirty-three states, are interested in correcting.[189]

It appears desirable to limit the scope of an Article V convention to the subject matter placed in the call by Congress on the basis of these policy arguments. The determination of whether Congress may limit the scope of an Article V convention rests, however, not upon policy considerations, but upon whether the

---

186. The 1787 convention kept its deliberations secret because, "it was considered important that the delegates should be protected from criticism and that their discussions should be free from the pressure of public opinion."

M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, 58 (1962).

187.

> [T]he proceedings of convention delegates will be conducted in the intense glare of publicity. Every word will be transcribed. Imputations of motive, analyses, and predictions will fill the newspaper columns and flood the airways. Television will obtrude itself on the proceedings, in the name of the so-called 'right of the people to know.' A multitude of issues clamoring for attention will leave no time for reflection or long-range thought.

Carson, *supra* note 177, at 927.

188. A.B.A. Study, *supra* note 2, at 17.

189. Kauper, *supra* note 132, at 911-12. *See also* Comment, *supra* note 2, at 513.

Constitution mandates that an Article V convention be free from such a limitation.

To determine whether Article V contemplates limited conventions, an attempt must be made to ascertain the probable intent of the framers in this regard. The argument that the framers envisioned Article V conventions as limited conventions when they drafted the provision is presented first, followed by the opposite argument.

It is argued that pre-1787 state convention practices support the idea of limited conventions.[190] The framers, it is urged, had this type of convention in mind when they provided for one in Article V. Support for this contention is allegedly found in Article XIX of the first draft of the Constitution, delivered to the full convention on August 6th by the Committee of Detail, and passed by the convention on August 30th. That Article read as follows: "On the application of the Legislatures of two-thirds of the States in the Union, for *an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*[191]

Support for this view is also found in *The Federalist No. 43* where Madison wrote that Article V, "equally enables the general and the state government to originate the *amendment of errors* as they may be pointed out by experience on one side or another."[192] Hamilton in *The Federalist No. 85,* had the following to say concerning the amendment power:

> [E]very amendment to the Constitution, if one established, would be *a single proposition,* and might be brought forward *singly.* There would then be no necessity for management or compromise in relation to any other point — no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather 10 States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete constitution.[193]

190. A.B.A. Study, *supra* note 2, at 11-17.
191. 1 M. FARRAND, *supra* note 27, at 188 (emphasis added).
192. THE FEDERALIST No. 43 (Cooke ed. 1961) (emphasis added).
193. THE FEDERALIST No. 85 (Cooke ed. 1961) (emphasis added).

These two extracts from *The Federalist Papers* have been interpreted to indicate that the framers intended Article V conventions to be limited in scope, having only the power to rectify particular errors and not to redraft the whole Constitution. This interpretation, however, has been met with some disagreement.[194]

The argument in favor of a wide-open convention being envisioned by the framers finds its strongest support in the very words of Article V, that "Congress. . . on the Application of the Legislatures of two-thirds of the several States, shall call *a Convention for proposing Amendments* . . . "[195] The use of the word "Amendments" rather than a phrase such as "for proposing an amendment" is clear evidence, it is argued, that Article V conventions were meant to have wide-open powers, and that a convention once convened has the authority to propose anything which it deems to be in the best interests of the nation, regardless of the reasons for which the convention was requested by the states, and regardless of the limitations which Congress may attempt to place on the convention.

Support for this position is also found in the precedent of the 1787 convention which clearly exceeded its powers.[196] That convention was called ". . . for the sole and express purpose of revising the Articles of Confederation. . . "[197] The Convention was not authorized to draft an entirely new frame of government. Additionally, the Constitution provided that it would become effective when ratified by nine states, contrary to the provision in the Articles of Confederation which required unanimous consent before the Articles could be altered.[198] The framers clearly recognized that no plan of government is perfect.[199] Therefore, they surely must have contemplated that the plan they were then creating might someday be required to give way to an entirely different framework of government. That being the case, and given the precedent of the 1787 convention where they admittedly went beyond their powers,[200] surely they realized and intended that a convention called under Article V might someday have to draft a totally different framework of government or otherwise address problems which it perceived in addition to the ones for which it was called.

194. *See, e.g.*, Black, *supra* note 16, at 197, wherein the author argues that *The Federalist, Nos. 43 and 85* do not support the idea of a limited convention.
195. U.S. CONST. art. V (emphasis added).
196. Martig, *supra* note 26, at 1256.
197. J. ELLIOT, *supra* note 28.
198. *Supra* note 25.
199. *Supra* notes 29, 34, 43, and 57.
200. Comment, *supra* note 2, at 506.

Those who disagree with this view attempt to distinguish the 1787 convention on grounds that it was a "revolutionary" convention and that Article V only contemplates "constitutional" conventions. Judge Jameson, in his treaties, defined the two types of conventions. A "revolutionary" convention is said to

> consist 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 government 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.[201]

A constitutional convention

> 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 place 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. . . . It never supplants the existing organization. It never governs.[202]

The 1787 convention, it is said, took place during extraordinary times and its actions were justified solely on the basis of the circumstances which had led the united colonies to the brink of dissolution. The Articles of Confederation, it is argued, had no viable amendment provision like the present Constitution. The circumstances surrounding the 1787 convention are unlikely to happen again. The framers believed that they had created a strong federal union. They did not contemplate an Article V convention ever having the potential of a "revolutionary convention." It was to be a "constitutional convention." It also is pointed out that even though the 1787 convention did exceed its authority, its actions were subsequently ratified by Congress and the states.[203]

201. J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTION 6 (4th ed. 1887).
202. *Id.* at 10.
203. A.B.A. Study, *supra* note 2, at 14.

The 1787 convention seems to fit somewhere between Jameson's two definitions. It clearly went beyond its express mandate, but it did not function as, or purport to be, a provisional government. Naturally, the framers intended an Article V convention to be a "constitutional" convention operating within the framework of the Constitution. But what was this framework meant to be? Does Article V contemplate a convention with the powers to propose anything which it feels to be in the best interests of the nation, or does it contemplate a limited convention?

Here again, the purpose behind the convention method must be considered. The Article V convention method was designed to be an alternative amending process, for use of the states in the event that Congress became oppressive. With this in mind, it seems that Congress must not be allowed to have the power to limit the scope of the convention's deliberations and actions. Congress' only powers should be over housekeeping matters. A power in Congress to limit the scope of the convention goes to the very heart of the reason behind the convention method, and for this reason, Congress does not have the power to limit the scope of an Article V convention's deliberations and actions.[204] The Ervin legislation's attempt to limit the scope of an Article V constitutional convention to the same subject matter placed by Congress in the call would therefore be unconstitutional.

There is, however, no reason to fear such an interpretation of an Article V convention's powers. An Article V convention only has the power to "propose" amendments. Any amendments, or new Constitution, have to be ratified by three-fourths of the states in order to take effect.[205] If a proposition is issued by an Article V convention and subsequently ratified by the required number of states, one can hardly be in a position to complain about it.[206] Even if the mere propostion of proposals by an Article V convention causes great debate and discussion, and calls into question the basic fabric of the national government, such discussion would only result in a stronger national government.

It has been pointed out that Congress, which has power to initiate constitutional amendments upon the vote of two-thirds of the members of both houses, has not yet "run away" with the

---

204. Black, *supra* note 16, at 203; Platz, *supra* note 59, at 46; Wheeler, *supra* note 71, at 796; Note, 70 HARV. L. REV., *supra* note 74, at 1076.
205. Dirksen, *supra* note 4, at 873.
206. J. STORY, *supra* note 57, §§ 1830, 1831.

Constitution or otherwise abused the amendment powers.[207] There is no valid reason to expect an Article V constitutional convention to do so either.

The proper statement of an Article V convention's powers would be that such a convention is a deliberative body, created ministerially by Congress at the request of the states which, when duly convened, possesses the amendment power under Article V, that power being subject to no limitations other than those in the constitution.[208] If Congress has no power to limit the scope of an Article V convention's deliberations and actions, then it cannot refuse to transmit to the states for ratification any and all propositions which the convention originates.

If and when the first Article V convention is held, it would be desirable for the delegates selected thereto to voluntarily refrain from proposing any amendments upon subjects other than those cited in the call or in state applications, and thus establish, by precedent, a self-imposed limitation upon the convention, which could always give way in times of crisis.

J. SHOULD ARTICLE V ITSELF BE AMENDED?

Over the years there have been numerous attempts to amend Article V.[209] Some have been aimed at Article V's convention method.[210] Others have suggested that the convention method be stricken from Article V.[211] Still others have urged that it be replaced by a different method of allowing the states to initiate amendments to the Constitution.[212] It has also been suggested that, rather than eliminating or replacing Article V's convention method, it be amended in order to clear up the present ambiguities.[213]

The Article V convention method should neither be eliminated from Article V nor replaced. While it has never recently

207. 113 CONG. REC. 11113 (1967) (remarks of Senator Hruska).

208. L. ORFIELD, *supra* note 24, at 45; Wheeler, *supra* note 71, at 796.

209. *See* Martig, *supra* note 25, at 1275-83, for a review of the efforts up to 1937 to amend Article V.

210. *See* L. ORFIELD, *supra* note 24, at 168-72 wherein the author reviews proposed reform of the national convention amendment procedure.

211. Martig, *supra* note 25, at 1284. *See also Hearings on S.J.R. 134,* 75th Cong., 3d Sess. (1938) at 3-4, 65, 79, 84.

212. *See* Black, *supra* note 94, at 958; 117 CONG. REC. S 16, 519 (daily ed. Oct. 19, 1971).

213. *See, e.g.*, Platz, *supra* note 59, at 47-49, (where the writer suggests several changes in Article V to clear up ambiguities in it); Comment, *supra* note 2, at 526-539 (where the writer suggests that Article V be amended to clear up present uncertainties and offers a proposed draft of a new Article V).

been used, it has in the past and still serves a useful function. The reasons behind its creation are still potentially valid.

Article V should, however, be amended to overrule the Supreme Court's decision in *Hawke v. Smith, No. 1*[214] In that case, the Court struck down a provision in the Ohio state constitution which required all proposed constitutional amendments to be submitted to a popular referendum. The Court found this to be contrary to the requirement in Article V that ratification be by "legislatures" and that a popular referendum was not a legislature as contemplated by the framers, a legislature being in their mind a deliberative representative body which was charged with making the laws which governed the people.

The amendment process, at all stages, should be accompanied by thoughtful deliberation. The framers provided that a state's ratification of proposed amendments be either by action of the state legislature or by convention, leaving Congress to choose the mode of ratification. To date, with one exception, Congress has chosen ratification by state legislatures. Article V should be amended to permit Congress a third choice, by popular referendum. In 1920, when *Hawke* was decided, a meaningful debate could not have been conducted on a statewide basis prior to a popular referendum. Thus, ratification by referendum would not have been accompanied by thoughtful deliberation prior to the state's action. However, with radio, television, and other mass media of our time, a thoughtful debate and disscussion could easily be had on a statewide basis on a proposed constitutional amendment prior to a popular referendum. This would allow for deliberation at the ratification stage, were ratification to be by popular referendum.

The framers typically entrusted ratification to the representative body of the people in the state rather than to the people themselves because of their general distrust of government by the masses. This attitude is clearly out of date, and there is no valid reason today to prohibit ratification by popular referendum. In fact, it should be the preferred method.

K. JUSTICIABILITY OF QUESTIONS ARISING UNDER ARTICLE V

The Ervin legislation attempts to cut off judicial review of questions arising under the Article V convention method by providing that questions concerning adoption of a state's application, questions pertaining to the ability of the convention to

214. 253 U.S. 221 (1920).

initiate proposals different from or additional to those placed by Congress in its concurrent resolution calling the convention, and questions concerning a state's ratification or rejection of proposed constitutional amendments, "shall be determined solely by the Congress of the United States, and its decisions shall be binding on all others including State and Federal courts."[215]

It has long been settled that the Supreme Court has appellate jurisdiction, "with such Exceptions, and under such Regulations as the Congress shall make."[216] Therefore, it would seem that Congress could successfully cut off appellate review of Article V constitutional questions from the Supreme Court. Congress, however, has no power to limit the Supreme Court's original jurisdiction. The Constitution provides that, "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction."[217] It is probable that many potential suits over Article V will involve a state as a party. In such cases, Congress' attempt to limit the determination of questions over the Article V convention method would be to no avail.

Even if jurisdiction in the Supreme Court is obtained, the question remains whether the Court might voluntarily refrain from deciding the issue raised on the grounds that it is a "political question." State courts have almost uniformly held that the question of amending the state constitution is justifiable.[218] After reviewing the relevant Supreme Court decisions, however, one can only speculate what the Court might do if presented with a suit arising out of the Article V convention method.

In the 1798 case of *Hollingsworth v. Virginia,*[219] the Supreme Court held that the eleventh amendment was validly enacted and that Article I, Section 7 of the Constitution did not require the approval of the President in the amendment process. At this early date the Supreme Court seemed to be of the view that controversies over the amendment of the Constitution were justiciable, though the issue was not specifically presented to them in those terms.

Chief Justice Taney, in *Luther v. Borden,*[220] indicated that the Court believed that questions concerning the amendment of constitutions

215. S. 1272, *supra* note 14, §§ 3(b), 5(c), 10(b) and 13(c).
216. U.S. CONST. art. III, § 2; Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).
217. U.S. CONST. art. III, § 2.
218. Comment, *supra* note 2, at 516.
219. 3 U.S. (3 Dall.) 378 (1798).
220. 48 U.S. (7 Howard) 1 (1849).

were nonjusticiable political questions.[221] In *Dodge v. Woolsey,*[222] Justice Wayne determined that the power to amend the Constitution was constitutionally limited.[223] The Supreme Court, in *White v. Hart,*[224] said of the validity of a state's ratification of a constitutional amendment, "[t]he action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it."[225] It would seem that by the end of the nineteenth century, the Supreme Court felt that questions regarding amending the constitution were political and nonjusticiable.

In *Myers v. Anderson,* it was argued that the fifteenth amendment was invalid, if construed to apply to state and municipal elections, on grounds that it violated the provisions of Article V which state that no state, without its consent, shall be deprived of its equal representation in the Senate.[227] The Court ignored the argument. In *Hawke v. Smith No. 1,*[228] the Supreme Court held that a provision in the Ohio constitution which required that all proposed constitutional amendments be submitted to a popular referendum was violative of the terms of Article V, a popular referendum not being within the definition of the terms "legislatures." The Court also reaffirmed the holding of *Hollingsworth.* The Solicitor General argued in the *National Prohibition Cases,*[229] that the question of whether the eighteenth amendment was within the amending power was one committed to the political, not the judicial branch of the government.[230] The Court ignored the plea and held that the eighteenth amendment was duly enacted and that its substantive content was within the

221.

In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.

Luther v. Borden, 48 U.S. (7 Howard) 1, 38-39 (1849).

222. 59 U.S. (18 Howard) 331 (1855).

223.

"[The Constitution] is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them. . . . " Dodge v. Woolsey, 59 U. S. (18 Howard) 331, 348 (1855).

224. 80 U.S. (13 Wall.) 646 (1871).

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

226. 238 U.S. 368 (1915).

227. Myers v. Anderson, 238 U.S. 368, 374 (1915).

228. 253 U.S. 221 (1920).

229. 253 U.S. 350 (1920).

230. National Prohibition Cases, 253 U.S. 350, 381-82 (1920).

power to amend reserved by Article V. In *Dillon v. Gloss,*[231] the Court held that Congress could set a reasonable time for ratification of proposed constitutional amendments, and that the seven year period set by it was a reasonable time. The Court stated the following:

> Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.[232]

Fairchild v. Hughes,[233] and its companion case, *Leser v. Garnett,*[234] both involved the validity of the nineteenth amendment. In *Fairchild,* the Court held that a taxpayer lacked standing to challenge the constitutionality of the amendment prior to its ratification by the states. In *Leser,* the Court held that the proclamation by a state's Secretary of State that the state had ratified the amendment was "conclusive upon the courts."[235] The Court, in *Druggan v. Anderson,*[236] held that the moment the eighteenth amendment was ratified by the required number of states it became law, and that Congress could legislate in anticipation of its effective date of operation. In *United States v. Sprague,*[237] the Court held that the choice of the mode of ratification of amendments was in the sole discretion of the Congress. The Court in a later case took judicial notice of the fact that the twenty-first amendment, which repealed the eighteenth amendment, had been ratified, and held that neither the Congress nor the Courts could give it continued validity.[238] These early twentieth century cases seem to show a general willingness on the part of the Court at that time to decide both substantive and procedural questions concerning the amendment process.

The most important case in this area is *Coleman v. Miller,*[239] wherein the Supreme Court showed a definite shift in attitude. The Court there held that the question of the effect of a previous

---

231. 256 U.S. 368 (1921).
232. *Id.* at 376.
233. 258 U.S. 126 (1922).
234. 258 U.S. 130 (1922).
235. *Id.* at 137.
236. 269 U.S. 36 (1925).
237. 282 U.S. 716 (1931).
238. United States v. Chambers, 291 U.S. 217 (1934).
239. 307 U.S. 433 (1939).

rejection of a proposed constitutional amendment by a state on its subsequent ratification was a political question to be settled by Congress.[240] The Court also held that the question of what constitutes a reasonable time for ratification, absent a set time limit by Congress, was likewise a political question for the Congress to decide.[241] It was contended that the vote of the Lieutenant Governor should not have been counted towards the subsequent ratification because he was not part of the "legislature" within the meaning of Article V. The Court stated that it was split on this point and expressed no opinion as to its justiciable nature.[242]

In a concurring opinion, Justice Black, joined by Justices Douglas, Frankfurter, and Roberts, contended that the entire constitutional amendment process was nonjusticiable.

> [t]o 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 processes, 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 acknowledgement of exclusive Congressional power over the political process of amendment is mere admonition to

240. *Id.* at 450.
241. *Id.* at 454.
242. *Id.* at 447.

> the Congress in the nature of an advisory opinion, given wholly without constitutional authority.[243]

In the companion case, *Chandler v. Wise,*[244] Justices Black and Douglas adhered to their views.[245] The Court, in 1967, again touched upon the amendment process in *Whitehall v. Elkins.*[246]

The important question which remains is whether *Coleman* stands for the proposition that all questions arising out of the Article V amendment provisions are nonjusticiable political questions. It has been strongly argued that *Coleman* does not stand for absolute nonjusticiability of all questions related to the amendment process.[247] In *Coleman,* the Court stressed the fact that the particular issue it was asked to decide involved determinations of political, social, and economic conditions which the Court found Congress to be better equipped to handle. All questions arising out of Article V, particularly the convention method, will not involve determinations of these kinds.[248]

Since Coleman, the Supreme Court has significantly expounded upon the concept of the political question. In *Baker v. Carr,*[249] the Court held that state legislative reapportionment raised a justiciable controversy and laid down guidelines on what was involved in a political question.

> 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 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.[250]

---

243. *Id.* at 458-60.
244. 307 U.S. 474 (1939).
245. "[W]e do not believe that state or federal courts have any jurisdiction to interfere with the amending process." Chandler v. Wise, 307 U.S. 474, 478 (1939) (Black, Douglas, J., concurring).
246. 389 U.S. 54 (1967). "[T]he 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." *Id.* at 57.
247. *See* Note, 85 HARV. L. REV., *supra* note 16, at 1636.
248. *Id.*

In *Powell v. McCormack,*[251] the Court held that Congress had no right to exclude Congressman-elect Adam Clayton Powell from his seat in the House of Representatives. Powell had requested a declaratory judgment stating that his exclusion from the House was unconstitutional, being in violation of Article 1, Section 2 of the Constitution. The Court held that this presented a justiciable controversy, stating that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the court's avoiding of their constitutional responsibility."[252]

In *Baker v. Carr,* the Supreme Court stated that one of the criteria for a political question was a "textually demonstrable commitment of the issue to a coordinate political department."[253] In *Coleman,* which involved the congressional method of amending the Constitution, the four concurring Justices stressed the fact that Article V gives power over the amending process to Congress. When the Court is faced with a question arising out of the congressional method of amending, it seems totally appropriate to treat this as a political nonjusticiable issue. It does not follow, however, that the convention method of amendment should be treated likewise. One must keep in mind the purpose behind the convention method, *i.e.,* a remedy for the possible oppressiveness of the government. Congress is merely the agency through which certain acts are performed. It is to perform these acts in a ministerial and functional way, exercising only minimal discretion. The convention method is not "committed" to the Congress to the extent that the congressional method of amending is, and hence, it should not be treated as giving rise to political, nonjusticiable questions. Keeping in mind the purpose behind the convention method, the courts, which are charged with interpreting the Constitution,[254] should not regard the questions arising out of the convention method as nonjusticiable political ones.[255] It is the Court's responsibility to insure that this method be kept available to the states to use, something which would not occur were the Court to treat Article V convention method issues as nonjusticiable political questions. Were the Court to treat these issues as political,

249. 392 U.S. 186 (1962), 36.9 U.S. 186 (1961).
250. *Id.* at 217.
251. 395 U.S. 486 (1969).
252. Powell v. McCormack, 395 U.S. 486, 549 (1969).
253. 369 U.S. at 217.
254. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

it would, in effect, be surrendering the convention method to Congressional control and dominance, clearly hostile and contrary to the reasons for placing it in the Constitution.

Assuming that the Court would find Article V convention issues justiciable, questions arise concerning remedies. The areas ripe for controversy would include the situation where two-thirds of the states had arguably submitted valid applications for a convention to Congress and that body refused to call a convention, or where the convention adopted amendments on subjects additional to that placed in the call by Congress or cited by the states in their applications, and Congress subsequently refused to transmit such amendments to the states for ratification.

It has been argued by some, on the basis of *Marbury v. Madison,*[256] that a writ of mandamus should issue against the Congress, compelling action on its part.[257] It is questionable whether the Court would do this. Standing in its way is the doctrine of *Mississippi v. Johnson.*[258] In that case, the Court refused to enjoin President Andrew Johnson from enforcing certain Reconstruction Acts stating the following:

> 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; though the acts of both, when performed, are, in proper cases, subject to its cognizance.
>
> . . . .
>
> If the President refuse obedience, it is needless to observe that the court is without power to enforce its process.[259]

It has been suggested that this doctrine has since been eroded. *Youngstown Sheet & Tube Co. v. Sawyer,*[260] given as an example of such a case, arose when President Truman issued an executive Order directing the Secretary of Commerce to take control of the nation's steel mills and operate them in order to avert a nationwide strike. The district court enjoined the Secretary from continuing

255. Some have argued that the courts should treat questions involving the amendment process as nonjusticiable because many proposed amendments are designed to overturn unpopular Supreme Court decisions. Bonfield, *supra* note 60, at 980.

256. 5 U.S. (1 Cranch) 137, 163, 170, 179-80 (1803).

257. Dirksen, *supra* note 4.

258. 71 U.S. (4 Wall.) 475 (1866).

259. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500-01 (1866).

260. 343 U.S. 579 (1952).

possession of the plants and the Supreme Court affirmed. Another case mentioned as weakening the doctrine of *Mississippi v. Johnson* is *Powell v. McCormack,*[261] where the Supreme Court held that the Speech and Debate Clause of the Constitution[262] does not prevent action by the Court against legislative employees.[263] In *Powell* the Court left open the possibility of direct action against Members of Congress.[264]

One can merely speculate as to whether the Supreme Court would order Congress to call a convention, or submit an Article V convention's proposals to the states for ratification. If the Court did issue such a writ against Congress, and Congress refused to comply, what would, and what could the Court do? Some have suggested that the Court take charge of the calling and setting up of the convention,[265] although others have disagreed.[266] Due to the inability of the Court to fashion effective relief in the event that its directive against Congress is ignored, several writers have concluded that the sole remedy should Congress refuse to perform its duties in regard to the Artice V convention method, lies with the people.[267]

A more probable path to be followed by the Court is that taken in *Powell.* Were Congress to refuse to call a convention, or to submit an Article V convention's proposals to the states for ratification, it would attempt to justify its actions on the grounds that the constitutional prerequisites to its duty to call the convention were not met, or that the convention had exceeded its constitutional powers. A declaratory judgment by the Supreme Court to the contrary would certainly undercut Congress' justifications and stir public opinion.[268]

Precisely what the Supreme Court would do when faced with a question arising under the Article V convention method is presently a matter of mere conjecture. Given cases such as *Coleman, Baker,* and *Powell,* there is ample precedent for the Court to go either direction, *i.e.,* to find Article V convention issues political

---

261. 395 U.S. 486 (1969).
262. U.S. CONST. art. I, § 6.
263. *See also* Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1881). In both, suits were brought against Congressional employees.
264. "Given our disposition of this issue, we need not decide whether under the Speech or 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." 395 U.S. at 506 n.26.
265. Carson, *supra* note 177, at 921.
266. Kauper, *supra* note 132, at 906.
267. Bonfield, *supra* note 60, at 983; Wheeler, *supra* note 71, at 792; Note, 70 HARV. L. REV., *supra* note 74, at 1071.
268. *See* Note, 85 HARV. L. REV., *supra* note 16, at 1644.

and nonjusticiable, or to go the opposite way. As a matter of judicial policy, it is hoped that the Court would elect to find Article V convention method questions justiciable, even though the scope of its remedial powers raises questions.[269]

A final question concerns standing to raise Article V convention litigation. In *Coleman v. Miller,*[270] the majority held that twenty state senators who had voted against ratification of the proposed Child Labor Amendment had standing to bring suit. The Court stated as follows:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contention their votes would have been sufficient to defeat ratification. We think that these senators have a plain direct and adequate interest in maintaining the effectiveness of their votes.[271]

Four Justices dissented on the issue of standing. "No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge, except by those who have some specialized interest of their own to vindicate apart from a political concern which belongs to all."[272]

Under the majority view espoused in *Coleman,* it would seem that a proper party to bring suit regarding Article V convention questions would be, for example, state senators who voted in favor of an application for an Article V convention, or conceivably, a member of the Article V convention who voted in favor of the proposals which Congress refused to transmit to the states for ratification. Certainly a state which has petitioned for a convention would have standing. Finding a plaintiff with proper standing to raise questions concerning the Article V convention method would seem to raise no great difficulties.

IV. CONCLUSION

In the closing moments of the 1787 convention, Charles Pinckney of South Carolina remarked, "[c]onventions are serious

269. *See* L. ORFIELD, *supra* note 24, at 7-36; Clark, *The Supreme Court and the Amending Process,* 39 VA. L. REV. 621 (1953).
270. 307 U.S. 433 (1939).
271. *Id.* at 438.
272. *Id.* at 464 (Frankfurter, J., dissenting).

things and ought not to be repeated."[273] When there was talk of having a second constitutional convention, shortly after the Constitution had been proposed, James Madison aired the following feelings:

> [An Article V Constitutional Convention] would consequently give greater agitation to the public mind; an election to it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogeneous characters; would be the very focus of the 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 deliberations 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.[274]

That attitude has persevered through the ages. Generally the prospect of an Article V convention has been ignored, disfavored, and even feared.[275] Over the years there has been much discussion about Article V's convention method, ranging from wild, unfounded speculation to serious scholarly debate. It seems desirable for Congress to settle as many of the issues raised over the Article V convention method, prior to the actual calling of such a convention, as it constitutionally can.

In the abstract, scholars can and no doubt will, debate these issues endlessly. Most of these questions, however, will never be

273. 2 M. FARRAND *supra* note 27, at 632.

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

275. A notable exception, however, was President Lincoln, who preferred the convention method of amending the Constitution. In his First Inaugural Address, he stated as follows:

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

S. Jour., 36th Cong., Spec. Sess. 404 (1861).

resolved until the day that an Article V convention is actually held. And then, as one writer has observed, "a Convention would be a new thing and what it would do would depend mostly upon the men composing it, upon the issues before the people and the strength of public feeling and opinion at the time."[276]

276. Sprague, *supra* note 76, at 123.