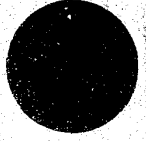


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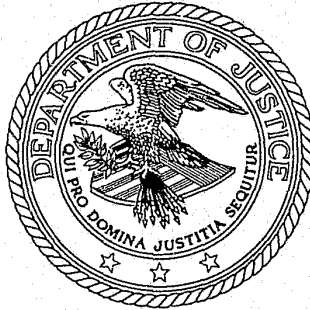


Report to the Attorney General

Limited Constitutional Conventions under Article V of the United States Constitution

September 10, 1987

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U.S. Department of Justice
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**LIMITED CONSTITUTIONAL
CONVENTIONS
UNDER ARTICLE V
OF THE UNITED STATES
CONSTITUTION**

(September 10, 1987)

NCJRS

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ACQUISITIONS



Office of the Attorney General
Washington, D. C. 20530

Although Article V of our Constitution establishes two means by which proposed amendments may be submitted to the States for their ratification, only one of those methods, submission by initiative of Congress, has ever been employed. The alternative process requires that the Congress call a convention for the purpose of proposing constitutional amendments whenever two-thirds of the States, acting through their legislatures, apply for such a convention.

Recently, there has been increased interest in this alternative means of amending the Constitution -- an interest reflected in the increasing number of state applications to hold a constitutional convention. With the states showing renewed interest in a constitutional convention, there has been significant and far-reaching legal scholarship regarding the nature, purposes, and potential effects of such a convention. Among the questions which have received substantial attention is whether a constitutional convention could be limited to the subjects on which it was called.

The present study, "Limited Constitutional Conventions Under Article V of the United States Constitution," is a contribution to the on-going inquiry into this issue. It was prepared by the Justice Department's Office of Legal Policy, which functions as a policy development staff for the Department and undertakes comprehensive analyses of contemporary legal issues.

This study will generate considerable thought on a topic of great national importance, a topic about which there are several reasonable points of view. It will be of interest to anyone concerned about a provocative and informative examination of the issues.

Edwin Meese III
EDWIN MEESE III
Attorney General

EXECUTIVE SUMMARY

The attached paper examines the process of amending the Constitution through a constitutional convention. Specifically, the paper explores the question of whether such a convention, authorized by Article V of the Constitution, can be limited to the consideration of particular subjects.

The paper concludes that Article V permits the states to apply for, and the Congress to call, a constitutional convention for limited purposes, and that a variety of practical means to enforce such limitations are available. The language and structure of Article V, as well as the history of its drafting, support this conclusion because the two methods of constitutional amendment, Congressional initiative and the state-called convention, are treated by Article V as equally available procedural alternatives. There is no suggestion that the alternative modes are substantively distinct, that one is subordinate to the other, or that use of one mode is restricted to particular topics or circumstances.

Since it is undisputed that Congress possesses the authority to propose amendments limited to a single topic or group of topics, it follows that the applications of the states for calling a constitutional convention also may be limited. This understanding is reinforced by the normal practice of the states in limiting by subject their applications to the Congress.

The paper also notes that the requirements of Article V are designed to ensure that a consensus exists as to the desirability of amendment, whichever method of amendment is employed. As the Supreme Court has held, an Article V consensus is a super-majority agreement on the same subject at the same time that has been made manifest and clear by following the procedures outlined in Article V. If the states choose to condition their application for a convention on discussion of a particular amendment or subject, then the Congress must call a convention of that kind if the principle of consensus is to be vindicated.

After establishing that Article V does permit limited constitutional conventions, the paper examines the procedural strictures available to ensure that such limitations are enforced. In particular, the paper concludes that Congress has the authority to adopt legislation providing for the enforcement of limitations. The report also suggests that judicial review to curb convention irregularities and the possibility of holding

convention delegates to their oaths of office are other potentially effective enforcement devices.

The paper concludes by recognizing that there are inevitable uncertainties associated with any as-yet-untried process. However, it is suggested that the adoption of convention-procedures legislation by the Congress would minimize greatly any remaining uncertainties associated with the convention method of amendment.

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LIMITED CONSTITUTIONAL CONVENTIONS UNDER ARTICLE V

INTRODUCTION

Article V of the United States Constitution provides two methods by which constitutional amendments may be proposed: by the Congress, or by a convention called by the Congress on the application of the legislatures of two-thirds of the states. The former method has been employed in the case of each of the first twenty-six amendments to the Constitution. The latter method has never been used, although numerous applications for a convention have been made by the states over the years on a variety of topics.

In this paper, the Office of Legal Policy examines the following issues: (1) whether Article V permits a constitutional convention limited to one or more topics; and (2) if so, whether there are practical means permitted by the Constitution to enforce the limitations.¹

We conclude that Article V does permit a limited convention. This conclusion is premised on three arguments. First, Article V provides for equality between the Congress and the states in the power to initiate constitutional change. Since the Congress may limit its attention to single issues in considering constitutional amendments, the states also have the constitutional authority to limit a convention to a single issue. Second, consensus about the need for constitutional change is a prerequisite to initiating the amendment process. The consensus requirement is better met by the view that Article V permits limited constitutional conventions than by the view that it does not. Third, history and the practice of both the states and the Congress show a common understanding that the Constitution can be amended issue by issue, regardless of the method by which the amendment process is initiated.

We also conclude that there are four possible methods of enforcing the subject matter limitation on the convention. First, and foremost, the states, who exercise ultimate control over the ratification of all constitutional amendments, may withhold ratification of a proposed amendment which is outside the scope of the subject matter limitation. Second, the

¹ Although this paper does recommend that the Department of Justice support the need for legislation establishing procedures for a limited convention, it does not treat all the details which would be involved in such legislation.

Congress may enact legislation providing for such limitations as the states request and it may be that the Congress may decline to designate the mode of ratification for those proposed amendments that it determines are outside the scope of the subject matter limitation and therefore beyond the authority of the convention to propose. Third, the courts may review the validity of the constitutional amendment procedure, including whether a proposed amendment was within the subject matter limitation. Fourth, the delegates to a convention may be bound by oath to refrain from proposing amendments on topics other than those authorized under the charter of the convention.

The issues discussed in this paper are of significant practical importance. The possibility that a convention will be called is greater today than ever before in our history. While only ten applications for a convention were received by the Congress from 1788 to 1893, since that time over 300 such applications have been made.² In the late 1960's, the initiative for an apportionment amendment received thirty-two of the required thirty-four applications.³ Today, the initiative for a balanced-budget amendment has also received thirty-two applications.

As the prospect that a convention would be called loomed larger, debate was conducted in both the popular and the academic press over whether Article V permits a limited convention.⁴ Some of this literature

²*Constitutional Convention Implementation Act of 1985*, S. Rep. No. 99-135, 99th Cong., 1st Sess. 13 (1985) [hereinafter *Senate Report*].

³*Id.* at 12-13.

⁴A large amount of both popular and academic writing is collected in *Constitutional Convention Procedures, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 96th Cong., 1st Sess. (1979)* [hereinafter *Hearing*]. Some of the scholars who conclude that Article V permits a limited convention are Professor William W. Van Alstyne, Professor (now Judge) Grover Rees III, and Professor (now Judge) John T. Noonan. See, e.g., Van Alstyne, *The Limited Constitutional Convention - The Recurring Answer*, 1979 Duke L.J. 985; Rees, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 Harv. J. L. & Pub. Policy 79 (1982); Noonan, *The Convention Method of Constitutional Amendment - Its Meaning, Usefulness, and Wisdom*, 10 Pac. L.J. 641 (1979). In addition, the American Bar Association, after conducting its own study, has concluded that limited conventions are permissible under Article V. See American Bar Association, *Amendment of the Constitution by the Convention Method Under Article V*, reprinted in *Hearing, supra*, at 69. Some of the scholars who conclude that Article V permits general conventions only are Professor Charles Black, Professor Walter Dellinger and Professor Gerald Gunther. See, e.g., Black, *Amending the Constitution: A Letter to a Congressman*, 82 Yale L.J. 189 (1972); Dellinger, *The Recurring Question of*

expressed fear of a “run-away” convention, one that might propose amendments fundamentally altering cherished constitutional liberties or basic institutions of government.⁵ The participants in this debate included some of the most prominent constitutional scholars of our time, and the debate was largely characterized by serious attempts on the part of all concerned to remain faithful to the text of the Constitution. The arguments marshalled in opposition to limited conventions are by no means implausible, and we wish to state at the outset that we do not urge that those arguments are self-evidently wrong. Rather, we believe the interpretation urged here is the more defensible view in light of the language, the framing history, and the purpose of Article V.

Based on our conclusions that the Constitution permits limitations on the subject matter of a convention and permits effective enforcement of those limitations, we believe that fears of a “run-away” convention are not well founded.

I. ARTICLE V AUTHORIZES LIMITED CONSTITUTIONAL CONVENTIONS

In its entirety, Article V provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of 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 States, or by Conventions in three-fourths thereof, as the one or other mode of Ratification may be proposed by the Congress; Provided that no

the “Limited” Constitutional Convention, 88 Yale L.J. 1623 (1979); Gunther, *Constitutional Brinkmanship: Stumbling Toward a Convention*, 65 A.B.A.J. 1046 (1979).

⁵See, e.g., *Senate Report*, *supra* note 2, at 2 (“Concern has frequently been expressed about the possibility of a ‘runaway’ convention, unfaithful to the mandate with which it was charged by the States and the Congress.”); Gunther, *The Convention Method of Amending the United States Constitution*, 14 Ga. L. Rev. 1, at 25 (1979) (“It is a road that promises controversy and confusion and confrontation at every turn. It is a road that may lead to a convention able to consider a wide range of constitutional controversies.”); *Statement by the National Board of Directors*, Americans for Democratic Action, March, 1979, *reprinted in Hearing*, *supra* note 4, at 411 (“[A] constitutional convention will surely plunge us into a crisis of mammoth proportions”).

Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth clause in the Ninth section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

While the text of Article V does not explicitly address the question of limitations on the subject matter of the convention, the structure and purpose of the text, as well as the interpretation of it by the states, the Congress, and the majority of scholars who have taken up the question, all support the view that Article V permits limitation of the subject matter of the convention.

The structure of Article V provides for equality, as between the states and the Congress, in initiating the process of amending the Constitution. This interpretation of the text is supported by the records of the framing of Article V and by other contemporaneous historical sources, as well as by the weight of modern day scholarly opinion. Since the Congress is clearly able to limit its own initiated amendments to a single topic, the "equality argument" leads to the conclusion that the states are equally able to limit the subject matter of initiated amendments. In Part I.A. of this paper, we examine the "equality argument" in detail, showing its fidelity to the text and support in historical sources.

A crucial requirement of Article V, consensus, also supports the interpretation allowing for limited constitutional conventions. Article V requires a broad consensus at two stages in the amendment process: the stage at which those authorized to make a determination that change is necessary decide to initiate the amendment process, and the stage at which a concrete proposal for change is subject to ratification. The first stage implements the consensus requirement by making a supermajority vote of either the Congress or the states a prerequisite to initiation of the amendment process. In Part I.B. of this paper, we will show that the interpretation that Article V permits limited conventions is more in harmony with the consensus requirement than the alternative interpretation, which would permit only unlimited conventions. We also show that the "consensus argument" is supported by legal precedent and historical evidence.

In Part I.C. of the paper, we review the historical practice of both the states and the Congress under Article V to show that these bodies

have consistently interpreted that Article as authorizing a limited convention.

A. The “Equality” Argument: Under Article V, The Congress and the State Legislatures are Equally Able to Initiate the Amendment Process

1. The Congress and the States Are Equal

No one has ever questioned the Congress’ authority to propose amendments limited to a single topic or group of topics. The “equality argument” takes it as a given that Congress is free to propose single amendments limited to a single topic. Each of the first sixteen amendments to the Constitution after the adoption of the original ten has been proposed by the Congress in a manner consistent with this authority. If the states are equally able to initiate the amendment process, the states should be equally able to limit the subject matter of proposed amendments. The structure and history of Article V fully support the basic premise of the equality amendment.

a. *The Structure of Article V*

The procedure for amending the Constitution set forth in Article V consists of three stages: a determination that amendment is necessary, formulation of a concrete proposal for amending, and ratification. Each stage may be carried out in two ways. The determination of necessity may be made either by the Congress or by the states; the concrete proposal may be formulated by the Congress or by a convention; ratification may be granted either by state legislatures or state conventions.⁶

The structure of Article V strongly suggests that each optional mode of conducting each stage of the process is different only in form. The Article is a single sentence with parallel constructions. It imposes an identical requirement of a two-thirds majority on the Congress and the States to begin the amendment process. It explicitly states that “in either

⁶If the determination of necessity for change is made by the states, the concrete proposal for change must be formulated by a convention. If the determination of necessity is made by the Congress, the concrete proposal must also be formulated by the Congress. However, even though the “initiation stage” and the “formulation stage” are linked in this fashion, the two stages are distinct activities, as evidenced by their division in the state-initiated amendment process.

Case” — *i.e.*, regardless of the method chosen to determine the necessity of an amendment and the text of a proposal — a proposed amendment is valid if ratified in the required manner. It prescribes an identical supermajority vote for either mode of ratification. On the whole, the structure of the text indicates clearly that the optional modes of conducting each stage are merely procedural alternatives; there is no suggestion in the language or the structure of Article V that the optional modes are substantively distinct, that one is subordinate to the other, or that use of one mode is restricted to particular topics or circumstances.

b. *The Framing of Article V and Contemporaneous Commentary*

The historical record concerning the framing of Article V shows that Article V contemplates an equal power of initiation between the states and the Congress and that this basic equality was the intended result of a compromise at the Federal Convention of 1787 in Philadelphia. Furthermore, it is clear that the compromise was to give Congress power to initiate the amendment process equal to the power of the States: the delegates first agreed that the States should have a power to amend that was not dependent for its exercise on the national legislature; only later did they add a provision giving the Congress equal authority to initiate amendments.

The first issue about the amending power debated in the Federal Convention was whether *any* method of amendment should be included in the Constitution. When the initial proposition regarding amending the Constitution was brought up at the Federal Convention on June 5, 1787, Charles Pinckney of South Carolina objected that such an amending provision in the Constitution was neither proper nor necessary. Almost immediately, a vote was taken to postpone debate.⁷

When the issue was brought up again on June 11, the proposition debated was that a method of amending the Constitution ought to be provided and “that the assent of the National Legislature ought not to be required thereto.”⁸ Several delegates criticized the proposition because it made “the consent of the National Legislature unnecessary.”⁹

⁷ 1 *The Records of the Federal Convention of 1787*, at 121 (M. Farrand, ed., rev. ed. 1937) (hereinafter cited as “Farrand”).

⁸ 1 Farrand 202.

⁹ *Id.*

It is clear that the advocates of including an amendment provision wanted to provide the states with a method of curbing Congressional power. With fellow Virginian Edmund Randolph in concurrence, George Mason argued:

It would be improper to require the consent of the National 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.¹⁰

The amendment process was taken up again on September 10. A draft of Article V was debated that provided only for a state-initiated convention and excluded the alternative method of the Congress itself proposing constitutional amendments to the states. Under this version, the Congress was required to call a convention upon the application of two-thirds of the states. Any amendment proposed by the convention would immediately become part of the Constitution. There was no ratification process. Elbridge Gerry criticized the draft because it seemed to him that it presented the danger that two-thirds of the states could band together and bind all the states to “innovations” that could possibly include the complete subversion of all the state constitutions.¹¹

Alexander Hamilton criticized the draft for different reasons. In general he approved of the amending power and thought that the experience of the Articles of Confederation showed that there should be “an easy mode” for amending the Constitution. The current draft was inadequate, Hamilton said, because it presented too much of a danger to the national government — which would be at the mercies of the states. He then proposed to the Convention that the Congress be allowed to propose amendments as well. Hamilton argued that the Congress would “be the first to perceive and will be most sensible to the necessity of amendments.”¹² With Hamilton’s voice added to Gerry’s, the Convention voted to reconsider. At this point, Roger Sherman of Connecticut introduced the idea that amendments — proposed either by the Congress or by the states — should be “consented to” (*i.e.* ratified) by the states.¹³

¹⁰ *Id.*

¹¹ 2 Farrand 557.

¹² *Id.*

¹³ *Id.*

After further discussion, James Madison proposed new language that summarized and reformulated the discussion so far. His new draft was predominantly what became the final version of Article V. However, his new draft also changed the substance of what had been discussed up to that point. Hamilton's proposal — a compromise position — had been to establish equal powers of initiating the amendment process in the states and in the national legislature. Madison's draft provided that the national legislature alone could propose amendments either on its own initiative or upon the applications of two-thirds of the state legislatures. He left out completely the mandatory requirement that Congress call a convention upon the applications of two-thirds of the states. A convention was not even mentioned. Madison's draft passed.¹⁴

On September 15, Madison's draft, slightly altered by the Committee on Style and Arrangement, was brought up again for debate:

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 Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as 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 1st and 4th clauses in the 9th section of Article I.¹⁵

Clearly, this draft refers to both single and multiple amendments. Madison's unification of the proposing power in the Congress makes that evident. No one would read this formulation to mean that the Congress cannot propose single amendments. In fact, it contains the exact language under which the Congress has been proposing single amendments for almost 200 years. Since the Madison draft provides that only the Congress can propose, it must also mean that the Congress can propose single amendments regardless of whether the necessity for amendment is determined by Congress or by an application of the states.

¹⁴ *Id.*

¹⁵ 2 Farrand 629.

As explained by Professor (now Chief Justice of the High Court of American Samoa) Grover Rees III,

It seems crystal clear that this provision referred to such particular amendments as were desired by the states. I cannot imagine anyone suggesting that the states were expected to say to Congress, "We think it is about time for you to propose some amendments. Any amendments will do." Indeed, another part of the same sentence would have rendered such a state "power" superfluous as well as inadequate, since it gave Congress the power to propose amendments at its own discretion. Thus the whole provision was perfectly symmetrical: Such amendments would be proposed as were desired either by two-thirds of both houses of Congress or by two-thirds of the state legislatures.¹⁶

Madison's draft stimulated a debate that led to the final version:

Colonel Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.

Mr. Govr. Morris and Mr. Gerry moved to amend the article so as to *require a Convention* on application of two-third of the states. * * * *

The motion of Mr. Govr. Morris and Mr. Gerry was agreed to * * * ¹⁷

Thus, the Gerry/Morris revision providing for the calling of a convention seems to have been made to respond to Mason's concern that the states not be dependent on the national legislature for proposing amendments. The delegates evidently thought that they were restoring

¹⁶Rees, *supra* note 4, at 87.

¹⁷2 Farrand 629 (emphasis added).

the terms of Hamilton's compromise.¹⁸ There was no discussion to the effect that this restoration deprived the states of the power to initiate particular amendments, a power they clearly had under the Madison formulation. Instead, it appears that restoring the convention provision was viewed solely as a way of providing an effective alternative means for the states to initiate constitutional change, including change on a single topic. The clear meaning of the penultimate draft on this point, as pointed out by Rees, obviously obtained in the final draft as well. It obtains in Article V today.

In summary, the debates about what became Article V demonstrate that the power of initiating the amendment process was initially to reside only in the states. The language of the final draft permitting the Congress to initiate the amendment process was a compromise to allow the Congress as much power as the states to initiate the amendment process. Like the text of Article V itself, the history of Article V is devoid of any indication that the convention mode is substantively different from the congressional mode of initiating the amendment process.

This interpretation is supported by contemporaneous accounts of the amending power. Concerning the structure and purpose of Article V, Madison was able to offer this simple but precise explanation:

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

¹⁸Taking away the Congress' exclusive control over the proposing power and dividing it between a convention and the Congress seems to be a clear victory for state prerogatives. Arguably, Madison was wrong when he noted just before the vote on the Gerry-Morris motion that the Congress would "be as much bound to propose amendments applied for by two-thirds of the States [under the penultimate draft] as to call a Convention on the like application [under the Gerry/Morris revision]." 2 Farrand 630.

be pointed out by the experience on one side or on the other.¹⁹

And in explaining why single amendments to the Constitution would be easier to accomplish than the initial ratification of the entire Constitution, Hamilton clearly assumes that the amending power would be used for single amendments and just as clearly makes no substantive distinctions between the two methods of initiating amendments:

Every amendment to the Constitution, if once 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 or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten 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.²⁰

c. Scholarly Commentary

A review of the academic literature reveals that a majority of commentators have concluded that Article V equally empowers the states and the Congress to initiate such particular amendments as they desire. It is noteworthy that most of this commentary was written without regard to contemporary amendment controversies such as the balanced-budget amendment. The Appendix is a compendium of authorities who support the permissibility of limited conventions under Article V.

It is no coincidence that many of those scholars who have concluded that Article V permits limited constitutional conventions base their conclusions substantially on the debates at the Federal Convention of 1787.²¹ These scholars emphasize the purpose of Article V, and

¹⁹*The Federalist No. 43*, at 286 (J. Madison) (Modern Library ed. 1937) (emphasis added).

²⁰*The Federalist No. 85*, at 572 (A. Hamilton) (Modern Library ed. 1937).

²¹It is also no coincidence that some of those academics who deny the equality of the states and the Congress under Article V likewise deemphasize the importance of the framing history. Charles Black, whose views are examined in the next subsection, has

typically they view Article V as a provision governing federal-state relations, or, more pointedly, federal-state antagonisms. Viewed as such, Article V takes its place with the many other provisions of the Constitution that divide and balance governmental power between the states and the national government.

Accordingly, in summarizing the overall meaning and purpose of the Article V debates at the Federal Convention, Professor Paul Bator has remarked:

The central purpose of the convention provision of Article V was to give the states recourse in the event that intransigent central authority refuses to consider a grave constitutional infirmity or defect.²²

Professor William Van Alstyne finds that Article V gives the states a ready means to check any "surprising and alarming" actions of the national government:

The most expected use of Article V was to permit the states a reasonably efficient and prompt means of perfecting amendments occasioned by particular developments, e.g. omissions by Congress or Acts of Congress both surprising and alarming in view of what had been supposed would be the case, and/or decisions by the Supreme Court reflecting unexpected interpretations of the Constitution.²³

In its *Report of the ABA Special Constitutional Convention Study Committee*, the American Bar Association agrees:

From this history of the origins of the amending provision, we are led to conclude that there is no justification for the view that Article V sanctions only general conventions. Such an interpretation would relegate the alternative method to an "unequal" method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for

said that the framing history proves "next to nothing." Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 Okla. L. Rev. 626, 637 (1979) [hereinafter *A Letter to a Senator*].

²² *Forum, A Constitutional Convention: How Well Would It Work?* at 11 (American Enterprise Institute, 1979).

²³ *Hearing, supra* note 4, at 295 (Statement of William Van Alstyne).

limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution.²⁴

Professor Kauper sees the convention method as giving the states the power to act when they are "deeply troubled":

If the requisite majority of legislatures is directed solely to the end of calling a convention to propose amendments on a given subject matter, it is in keeping with the underlying purpose of the alternative amendment procedure for Congress to limit the convention to such proposals. The general purpose of the alternative amendment provision is to provide something of a safety valve in case the state legislatures are deeply troubled about a matter which Congress refuses to correct by invoking its own power to propose amendments.²⁵

And Professor Kurland concurs about this fundamental purpose of Article V:

The intention of Article V was clearly to place the power of initiation of amendments in the State legislatures. The function of the convention was to provide a mechanism for effectuating this initiative.²⁶

The debates of the Federal Convention do not give us a detailed record of the intent behind every word of Article V. We can learn nothing from the debates about the details of a convention, for instance.²⁷ But those debates *do* give us a clear record of the purpose of Article V and what critical issues of constitutional principle were resolved by Article V's final draft.

The clear purpose of Article V would be undermined if a convention could not, under any circumstances, be limited, whatever the desires of

²⁴American Bar Association, *Report of the ABA Special Constitutional Convention Study* 16 (1973).

²⁵Kauper, *The Alternative Amendment Process: Some Observations*, 66 Mich. L. Rev. 903, 912 (1968).

²⁶Hearing, *supra* note 4, at 1223 (1968 Memorandum of Philip B. Kurland).

²⁷See Section II.B. of this paper, pp. 36-43 *infra*.

the states applying for it. It would be undermined because Article V would no longer provide an equality between the states and the national government in the power to initiate constitutional change or, in Madison's words, to "equally enable" the origination of amendments by the states and by the Congress.

2. Mistaken Views of the Equality of Article V

Contrary to the analysis above, some commentators have reached a different result by adopting other ideas about the envisioned role of a convention under Article V. The problem with these approaches, as discussed below, is that they reflect a misunderstanding of the role of the states and would effectively preclude the states from initiating the amendment process, contrary to the language and purpose of Article V.

a. *Equality Between the Congress and a Convention*

The leading and longstanding opponent of the notion that Article V permits a limited constitutional convention is Professor Charles Black of Yale Law School. He reads Article V to require an equality of the Congress and a constitutional convention:

[A] convention, as one of the two "proposing" bodies under Article V, would stand exactly on an "equal footing" with Congress, the other "proposing" body under Article V. The equality to be sought, as to national concerns, is an equality between the two national bodies to which the proposing function is given.²⁸

i. *The Congress and a Convention as Equally Independent*

Professors Bickel, Dellinger, and Gunther agree with Black that it is the Congress and a convention that are equal under Article V, not the Congress and the states.²⁹ All four maintain that this basic equality obtains for the purpose of protecting the independence of a convention.

²⁸Hearing, *supra* note 4, at 191 (Statement of Charles L. Black, Jr.).

²⁹*Federal Constitutional Convention: Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, United States Senate, 90th Cong., 1st Sess. 62 (1967)* [hereinafter *Federal Constitutional Convention*] (Statement of Alexander Bickel); Dellinger, *supra* note 4, at 1630; Hearing, *supra* note 4, at 310-311 (Prepared Statement of Gerald Gunther)

The argument behind their view is that the Congress exercises an absolute discretion when it deliberates and proposes amendments. Deliberating and proposing *presuppose* discretion. Therefore, these scholars argue, the other Article V proposing body, a convention, must also possess such discretion and independence of mind. Thus, there can be no limitations on the agenda of an Article V convention. The states may not attempt to impose limitations by means of their applications, nor may the Congress through its call of the convention. Article V, according to this argument, contemplates an equality of discretion and of independence.

For example, the late Professor Alexander Bickel contended that:

A fair reading of the language would seem to indicate that the other body authorized by Article V to propose amendments — and that other body is the convention convened by the states, not the states — that other body, the convention, is also *free* to propose one or seven or 17 amendments.³⁰

The argument that a convention must be as free as the Congress to propose amendments, and therefore must be unlimited in its authority, is based on a confusion about the Congress' dual role under the congressionally-initiated mode of amendment. When the Congress initiates the amendment process, it undertakes two logically distinct functions: it determines that a need for change exists, and it proposes a specific amendment. Although these two steps are taken virtually simultaneously, they are in fact separate stages in the amendment process. It is only the former step, the determination of necessity, that necessarily implies unlimited scope in the congressional power to consider any topic. The latter step, formulating a proposed text, is necessarily limited by the topic that led to the determination of necessity.

The parallelism these scholars overlook is that the convention is equal to the Congress as the drafting body but is not equal to the Congress as the body that decides that there is a need for change. Under the convention mode, the states have already determined that there is a need for change; this determination manifests itself in their applications. Thus, the states are equal to the Congress in the determination of necessity stage, the stage that is necessarily unlimited in scope. But the

³⁰*Federal Constitutional Convention*, *supra* note 30, at 62. See also Dellinger, *supra* note 4, at 1630-31 (emphasis added).

convention is equal to the Congress in the formulation stage, the stage that is limited in scope.

ii. *A Convention as a Check on the States*

Black, Bickel, Dellinger, and Gunther further believe that an independent convention is essential as an extra check on the states.³¹ Whether the Congress or a convention proposes amendments, the states retain the power to disapprove the amendment before it becomes valid, these scholars argue. If the convention had been intended merely as a tool for the states, then they would have been given complete control over the process, from applying for and conducting the convention to ratifying the amendments proposed by their own conventions.

For example, Professor Dellinger argues that the framers of Article V:

created an alternative method free of congressional or state legislative control; a constitutional convention free to determine the nature of the problem, free to define the "subject matter" and free to compromise the competing interests at stake in the process of drafting a corrective amendment. State legislatures may call for such a convention, but neither they nor the Congress may control it.³²

This argument has a certain constitutional plausibility to it. It appears to be another "check" on governmental power in a charter full of such checks. The argument's drawback, however, is that the framing history itself directly refutes it. Essentially, it is the argument of Roger Sherman who thought that the penultimate draft of Article V (that lacked only the critical "shall call a convention" language) gave the states too much power in the amendment process. Sherman wanted more checks on the collective power of the states, and he proposed several amendments, including the equal suffrage clause, to that effect.³³ He might well have adopted the convention-as-check argument and proposed that Article V be written so as to provide that conventions once

³¹ See Black, *supra* note 4, at 204; Dellinger, *supra* note 4, at 1632; *Federal Constitutional Convention*, *supra* note 30, at 62 (Bickel); *Hearing*, *supra* note 4, at 310 (Prepared Statement of Gerald Gunther).

³² *Hearing*, *supra* note 4, at 262 (Statement of Walter E. Dellinger).

³³ 2 Farrand 557, 629.

applied for by the states and called by the Congress were totally independent of the states. He did not, however. Neither he nor any other delegate proposed or discussed this additional check on the states. A convention as an independent body was never discussed.

Furthermore, the September 15 vote, inspired by Mason, to reinsert the "shall call a convention" language was an emphatic endorsement of the argument for more, not less, state power. The last two clauses of Article V — concerning slavery and equal suffrage in the Senate — are *specific* limitations (or checks) on what a supermajority three-fourths of the states can do to any particular state or states. We have the record of the debates about the purposes of these limitations. There is no record, however, of any other *general* limitations — a convention-as-check provision, for instance — on the states' role in the amendment process. In fact, such a general check, Madison's granting of the proposing power solely to Congress, was removed from the final version.

If this convention-as-check or some further limitation on the power of the states had prevailed at the Federal Convention, arguably we would have an *overchecked* Article V. The states would be effectively checkmated in their power to initiate constitutional change, which is an essential purpose of Article V. In fact, under this view of Article V, the states have no viable role outside of the power to ratify. As the late Senator Sam Ervin correctly pointed out, the states would never attempt to initiate constitutional change under this theory:

This construction would effectively destroy the power of the states to originate the amendment of errors pointed out by experience, as Madison expected them to do.³⁴

In agreement with Ervin is Professor Brickfield who, writing for the House Judiciary Committee, charges that general and independent conventions would reduce the convention method of amending the Constitution to "an unworkable absurdity."³⁵ Noonan says that it would leave the states "helpless,"³⁶ and the Senate Judiciary Committee argues

³⁴Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 883 (1968).

³⁵C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Cong., 1st Sess. 20 (Comm. Print 1957).

³⁶Noonan, *supra* note 4, at 644.

that it would “undermine” Article V itself by rendering the convention method “a constitutional dead-letter.” Van Alstyne calls such an interpretation “peculiar and hostile,”³⁷ and goes on to observe the folly in contending that the States may apply for *only* an unlimited convention, the kind least consistent with the limited purpose of Article V:

I do find it perfectly remarkable that some have argued for a construction not merely limiting the power of state legislatures to have a convention, but limiting that power to its *least* expected, *least* appropriate, and yet most dangerous use.³⁸

Of course, a convention does serve as a check on the states — but only of a certain kind. The state legislatures do not implement all three stages of the convention method. They set the agenda by initiating and amend the Constitution by ratifying. But they do not deliberate; they do not craft the language of an amendment; most critically, they do not decide whether an amendment is to be proposed at all. Regardless, it is erroneous to conclude that because the *proceedings* of a convention are independent of state control that the *agenda* is likewise independent of the purposes for which the states caused the convention to be called.

The convention is itself subject to checks and balances as a temporary fourth branch of government. It is no more “independent” of the influences of the other branches of government than are the executive, legislative, or judicial branches. With their applications, the states indirectly check the authority of the convention by causing the Congress to call into being a convention, but only one of a certain type. The Congress directly exercises this check by means of its power to call such a convention into existence.

b. *The “Second Philadelphia” Argument: Article V Does Not Contemplate Equality*

Many of those who argue for general and independent conventions frequently take their arguments a step farther by urging that the two methods of amending the Constitution have different purposes and are therefore unequal. According to this school of thought the workable and normal method of amending the Constitution is the one that has always been used. The convention method is to be reserved for rare and exotic

³⁷Van Alstyne, *supra* note 4, at 990.

³⁸*Id.* at 991-92 (emphasis in original).

occasions. The key feature of this argument is the way its proponents misconceive a convention.

For instance, Alexander Bickel described the convention method as an opportunity for “a national forum” on the Constitution, which should be open and not predetermined by the states.³⁹ Dellinger says that a constitutional convention is “an awesome device” to be used in times of crisis.⁴⁰

Black has said that the convention method looks to “a general dissatisfaction with the national government or a breakdown thereof.”⁴¹ Professor Ackerman would restrict the convention method to occasions “when the states are willing to assert the need for an unconditional reappraisal of constitutional foundations.”⁴² Professor Tribe of Harvard Law School has said that:

Such a convention would inevitably pose enormous risks of constitutional dislocation — risks that are unacceptable while recourse may be had to an alternative amendment process (the congressional initiative) that can accomplish the same goals without running such serious risks.⁴³

As noted above, the most reasonable interpretation of the text is that Article V provides for an equality of initiation and that both methods of initiation are designed to be useful and equal in purpose. The history of the framing of Article V is devoid of any details that might provide support for the “second Philadelphia” argument. In addition, Madison’s and Hamilton’s references to the amending power in *The Federalist* indicate that the Article V process is designed for “useful alterations” rather than merely for “sweeping revisions.” The “second Philadelphia” argument is an interesting theory, but no evidence can be marshalled to show that it has anything to do with an Article V convention.

³⁹ *Federal Constitutional Convention*, *supra* note 30, at 62 (Bickel).

⁴⁰ *Hearing*, *supra* note 4, at 254 (Testimony of Walter E. Dellinger).

⁴¹ Black, *supra* note 4, at 201.

⁴² Ackerman, *Unconstitutional Convention*, *New Republic*, March 3, 1979, at 8.

⁴³ *Hearing*, *supra* note 4, at 502 (Statement of Laurence H. Tribe).

B. The Consensus Argument: Article V Requires That the Constitution be Amended If and Only If A Supermajority Agreement Exists

The word “consensus” is used here to mean an agreement based on more than a bare majority, or, in the words of one commentator, a “manifest agreement.”⁴⁴ As already pointed out, Article V requires a consensus — a supermajority — when the Congress deems amendment necessary, when the states likewise deem amendment necessary by applying for a convention, and when amendments proposed to the states are ratified. According to the consensus argument, the Constitution requires that a consensus be identified before constitutional change can take place.

The consensus requirements of Article V reflect a clear constitutional presumption in favor of permanency and stability. They serve as hurdles to those who would change the Constitution, and Article V is designed to make clear that the necessary hurdles have been jumped before the Constitution is amended. Only the view that Article V permits limited conventions allows for the necessary clarity about the existence of a consensus. This is perhaps best shown by the arguments that ignore the consensus requirement, as will be seen below.

The text of Article V requires that a consensus be identified at two stages: at the initiation stage and at the ratification stage. The barrier to constitutional change provided by the three-fourths ratification consensus is not a sufficient barrier according to Article V. A prior consensus at the initiation stage must occur before proposing and ratification can even be considered. Without this required prior consensus, there would be no Article V impediments to a “runaway” convention. If the ratification consensus were to be accepted as the only necessary barrier to facile constitutional change, then there would be no reason for Article V to provide for a two-thirds vote of the Congress or an agreement of two-thirds of the applications of the states. In view of the multi-layered consensus requirements provided by the text of Article V, one should be wary of interpretations that ignore them.

Consensus serves to discourage notions about sweeping revisions of the constitutional system. Two hundred years of constitutional experience have shown that it is quite difficult to achieve such a consensus.

⁴⁴*Hearing, supra* note 4, at 293 (Statement of William W. Van Alstyne).

Every one of our constitutional amendments has been a consensual response to a specific problem. If the states are equal to the Congress in the power to originate amendments, they must have equal power to take action based on the only kind of consensus that in practice ever occurs: a consensus about a particular issue or set of issues. The conclusion that Article V permits limited conventions is consonant with the consensus requirement of Article V.

1. Limited Conventions Uphold the Consensus Requirement

a. *Dillon v. Gloss*

The Supreme Court has agreed that consensus is a crucial theme of Article V. In *Dillon v. Gloss*,⁴⁵ the Court was faced with a plaintiff who was seeking to nullify a constitutional amendment. Dillon, a convicted bootlegger, was seeking a writ of *habeas corpus* on the ground, among others, that the Eighteenth Amendment should be declared invalid because the Congressional resolution that had proposed it to the states contained a provision declaring that the amendment must be ratified within seven years. Dillon argued that the Congress' attempt to limit the time had voided the proposal because "Congress has no power to limit the time of deliberation or otherwise control what the legislatures of the states shall do in their deliberations."⁴⁶

In a short and unanimous opinion, the Court generally endorsed the power of the Congress, "as an incident of its power to designate the mode of ratification,"⁴⁷ to set the time for ratification. However, the power of the Congress was not unqualified in this matter, the Court said. There were "reasonable limits,"⁴⁸ and governing these reasonable limits was a principle derived from the "general purport and spirit of the Article":⁴⁹

[I]t is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently * * * [A]s ratification is but the

⁴⁵256 U.S. 368 (1921).

⁴⁶*Id.* at 369.

⁴⁷*Id.* at 376.

⁴⁸*Id.* at 375-76.

⁴⁹*Id.* at 375.

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.⁵⁰

Thus, according to the Supreme Court, an Article V consensus is a supermajority agreement on the same subject at the same time that has been made manifest and clear by the procedures of Article V.

b. Under the Convention Method, the Congress Carries Out the Consensus of the States

With respect to the congressional method of initiating amendments, the consensus of the Congress is expressed in the approval of an amendment by two-thirds of the members. With respect to the convention method, the consensus of the states is expressed in the convention applications of two-thirds of them. This necessary consensus then requires the Congress to call ("shall call") a convention. Here the Congress is the servant of the states. It adds nothing to the consensus; it takes away nothing from it. The Congress did nothing to create the consensus, but it must recognize the fact of its existence and respond by calling a convention.

If the states choose to condition their application for a convention on discussion of a particular amendment or subject, then the Congress must call a convention of that kind if the principle of consensus is to be vindicated. This is all the more obvious when the equality argument is considered in conjunction with the consensus argument. Under Article V, both the states and the Congress are equally able to vindicate a consensus of their own discretion.

c. There Is an Intuitive Understanding of the Importance of Consensus

The Congress currently has pending before it constitutional convention applications from well over two-thirds of the states. There is at

⁵⁰ *Id.*

present a total of thirty-nine convention applications.⁵¹ Why is the Congress not already required to call an Article V convention? The answer is that there are not two-thirds calling for the same kind of convention. Some states have called for a convention on the subject of a balanced budget, others for a convention on the abortion issue, others for conventions on entirely different subject matters.

In other words, there is no present requirement that the Congress call a convention because it is well-understood that the Constitution requires *consensus* and because practically everyone shares an intuition about the meaning of consensus. Before a convention can be called, more is required than that two-thirds of the states apply for a convention; rather, there must be two-thirds of the states calling for a convention on the same subject at the same time.

It makes no sense to argue, on the one hand, that the Congress need not call a convention because, though it has more than thirty-four applications, it does not have two-thirds on the same subject, but, on the other hand, that, any convention called by the Congress after receiving the requisite number of applications on a single subject would not be limited to the subject that led to its creation. Either consensus on the *subject* of a convention is essential, in which case there is no present requirement that the Congress call a constitutional convention; or such consensus is irrelevant, in which case a convention must be called immediately.⁵²

⁵¹Since 1977 alone, 36 states have submitted convention applications. See *Senate Report*, *supra* note 2, at 57.

⁵²Because he thinks that applications must specifically call for a general convention (pp. 24-27 *infra*), Black argues that "most or all of the pending applications are invalid." See *Hearing*, *supra* note 4, at 188 (Black). According to their arguments that *limited* applications should be counted toward the calling of an *unlimited* convention (p. 27 *infra*), it might seem that Gunther and Dellinger agree that the Congress is required to call a convention at this time. However, Dellinger answers that certain state applications cannot be lumped together to form the necessary two-thirds "if based on the erroneous assumption that Congress is empowered to impose subject-matter limits." State applications are permitted to "recommend," however, that a convention consider only a particular subject, "provided that it is clear that the suggested limit is only a recommendation." See Dellinger, *supra*, note 4, at 1234. Since the states have been basing their applications on this "erroneous assumption," it can be seen that the practical result of both the Black view and the Gunther/Dellinger view is the same: virtually all of the current applications are invalid; and there is no present requirement that a convention be called.

2. Arguments Against Consensus

In a series of influential articles, Black has argued that the phrase “a convention for proposing Amendments” in Article V prohibits the convening of a limited constitutional convention.⁵³ He “tracks” the language of Article V to derive the following hypothetical application for a convention by a state legislature:

Application is hereby made that Congress call “a Convention for proposing Amendments.”

He then asserts that this application would

of course, be valid. . . . How could it be that an application for the very thing the Article mentions, in the very words of the Article, would not be valid?⁵⁴

And such an application would necessarily be one for a general convention “to ‘propose’ such amendments as it thinks proper.”⁵⁵ A convention, at its discretion, could propose only a single amendment, of course, but it could not be called for that purpose. Black concludes that to suggest that Article V permits a limited convention imposes a meaning beyond the “plain” meaning established by his hypothetical state application.⁵⁶ In reaching this conclusion, he does not say that state applications must track the precise language of Article V in order to be valid; only that, because an application that does track the language is an application for a general convention, all applications, however worded, must be for a general convention.

The first response to Black’s tracking argument is that it does not prove as much as he suggests. Black has proven that Article V *permits* unlimited conventions, but he has not shown that Article V also *prohibits* limited conventions. His hypothetical application may well be one valid possibility, but his argument does nothing to show that it is the *only* possibility. The tracking technique is not inherently wrong, but it is used here in a wrong way.

⁵³ See, e.g., Black, *A Letter to a Senator*, *supra* note 22; Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *Yale L.J.* 957 (1963); Black, *supra* note 4.

⁵⁴ Black, *A Letter to a Senator*, *supra* note 22, at 628-29.

⁵⁵ *Id.*

⁵⁶ *Id.*

Furthermore, Black's argument is based on a misunderstanding of the consensus requirement. The consensus requirement provides assurance that the process of constitutional change cannot even begin unless a broad-based agreement on the need for change is clearly expressed. Because Black's model permits only formal applications sanitized of the real motivations behind the applications, it provides no such assurance. It would be impossible to determine from the face of such applications whether two-thirds of the states agreed that any issue was sufficiently important to warrant the submission of amendments. Black's model leaves open the possibility that the process of constitutional change could start even if less than two-thirds of the states believed any specific issues merited an amendment. Under Black's model, an important constitutional safeguard is lost. The first Article V requirement that acts as an impediment to change, namely, the two-thirds consensus at the initiation stage, is no longer functional.

Black's textual analysis is seriously flawed in several additional respects. His argument results in a strained and narrow reading of the plural word "Amendments" in Article V. In the Constitution (as in everyday discourse), plural nouns are used to denote both the singular and plural meaning of those nouns. For example, the executive authority "to make Treaties" clearly includes the power to make a single treaty.⁵⁷

Elsewhere in Article V itself, the congressional authority "whenever two-thirds of both Houses shall deem it necessary, [to] propose Amendments," plainly includes the power to propose an individual amendment. If one were to track this clause as Black tracks the convention clause, however, the Houses would "deem it necessary" for the Congress "to propose Amendments," and (under Black's logic) the Congress would be required to propose at least two amendments, plainly an absurd result.

If a "convention for proposing Amendments" were a permanent branch of government, the phrase "for proposing Amendments" could be read to leave the subject matter and number of amendments to the discretion of the convention itself. Because, however, the phrase "for proposing Amendments" is used in the very clause that empowers the states to require the creation of a convention, the more natural interpretation is to view the phrase as dependent on the purpose for which a convention was created. If the states desire and apply for a

⁵⁷See Article II, Section 2, Clause 2 of the Constitution.

limited convention, the Congress then must call a limited convention.⁵⁸

Rees' observations that the penultimate draft of Article V clearly included the singular ("particular amendments") and the plural in the word "Amendments" and that this inclusiveness was not changed in the transition to the final draft have already been mentioned.⁵⁹

In addition, Rees has provided another counterargument to Black's reading of Article V. Black asserts that the singular cannot be included in the plural word "amendments," because:

a general convention and a limited convention are different in kind. They are as different in kind as (1) the freedom to marry; and (2) the freedom to marry one of two or three people designated by somebody else.⁶⁰

Rees takes up Black's marriage metaphor and neatly refutes it in the following fashion:

The power to call a convention to consider the amendments *you* desire, and the power to call a convention to consider *any and all* amendments, are as different as (1) the freedom to marry a person of your own choosing; and (2) the freedom to marry, provided you commit yourself in advance to marry one or more persons selected by somebody else on the day of the ceremony.⁶¹

Gunther and Dellinger argue that a convention's agenda cannot be limited but that the states are permitted to submit applications referring to or recommending a specific issue or issues. In Gunther's words:

To me, the most persuasive interpretation is that states may legitimately articulate the specific grievances prompting their applications for a convention; that Congress may heed those complaints by specifying the subject matter of the state

⁵⁸ See *Senate Report*, *supra* note 2, at 26.

⁵⁹ See page 9 *supra*.

⁶⁰ Black, *A Letter to a Senator*, *supra* note 22, at 630.

⁶¹ Rees, *The Amendment Process and Limited Constitutional Conventions*, Benchmark, March-April 1986, at 77. To get the full flavor of the elaborate metaphor that Rees develops to counter Black's marriage argument, the reader should refer to the citation.

grievances in its call for a convention; but that the congressional specification of the subject is not ultimately binding on the convention.⁶²

At bottom, the Gunther/Dellinger view is even more extraordinary than Black's. Under Black's view, it would be unclear whether a genuine consensus had been reached. The general applications would hide the specific intentions. Under Gunther's and Dellinger's view, on the other hand, it would be absolutely clear that a consensus had *not* been reached. According to their scenario, the Congress is allowed to collect different kinds of applications, for instance, ten abortion applications, fifteen balanced-budget applications, and a few other odd applications, and forge them together into a coalition sufficient to trigger a constitutional convention. Indeed, because the language of Article V is mandatory (the Congress "shall call a convention"), it may be that, under the Gunther/Dellinger view, the Congress is *required* to lump together unrelated applications for a convention in just this manner. If so, one may question why the Congress is not presently required to call such a non-consensual convention, because the Congress presently has applications from well over two-thirds of the states.

Clearly this scenario is a prescription for a genuinely runaway convention. No delegation would arrive at such a convention with enough of a consensus or a mandate to accomplish anything. Vote-swapping easily could become the order of the day. If any amendment were proposed by the convention, then several amendments might be proposed as part of "logrolling" deals by delegates. The states might be faced with a smorgasbord of unrelated amendments to ratify.

The arguments of Black, Gunther, and Dellinger concerning consensus effectively cause the convention method to become a constitutional dead-letter. Absent the "complete breakdown" scenario, the states would never apply for a convention. No state interested in a specific issue would apply for a convention whose agenda was required to be open to all issues. No state with a limited grievance would be willing to apply for a convention at which a multitude of grievances could be addressed.

⁶²Gunther, *supra* note 5, at 12.

C. The Argument by Practice: Both the States and the Congress Have Interpreted Article V As Providing for Limited Conventions

The argument by practice points out that the state legislatures have consistently been interpreting Article V as permitting limited conventions and that the U.S. Senate has twice unanimously passed a Constitutional Convention Procedures Act that contained the same interpretation.

This experience under Article V, although by itself not dispositive of the issue, is entitled to great weight. It indicates that Article V has a plain meaning that is cognizable by elected officials at both the state and national levels, representing diverse parts of the country, carried out over a long period of time.

Likewise, this experience under Article V is based on the important principle that branches of government at all levels have the right and duty to interpret the Constitution. This principle does not challenge judicial review. It merely asserts that, in addition to court decisions, the practical application of the Constitution has the effect of establishing constitutional precedents.

1. Elected Officials Have Been Interpreting Article V as Allowing for Limited Conventions

a. The Experience and the Interpretation of the States

The practicality and the utility of the amending power anticipated by its framers is more a phenomenon of the Twentieth Century than either the Eighteenth or Nineteenth.⁶³

The experience of the Eleventh Amendment, ratified in 1795, demonstrated that the national government was not at the time the kind of unresponsive and intransigent central authority that required the invocation of the convention method. The Congress quickly responded to the national furor over the increase of the power of the federal judiciary

⁶³Our analysis excludes the Bill of Rights the passage of which was politically obligatory on the First Congress because so many of the states had conditioned their ratification of the Constitution on the addition of a list of rights.

caused by the Supreme Court's decision in *Chisholm v. Georgia*⁶⁴ by proposing the Eleventh Amendment. It was just as quickly ratified.

Only four amendments were ratified in the Nineteenth Century. The Twelfth Amendment was strictly an administrative measure occasioned by the unexpected and unwanted "tie" vote for the Presidency in the 1800 election. The next three, the Thirteenth, Fourteenth, and Fifteenth, were all occasioned by the extraordinary circumstances of the Civil War.

Forty-three years elapsed between the ratification of the Fifteenth Amendment in 1870 and the ratification of the Sixteenth Amendment in 1913. In the Twentieth Century, a new constitutional amendment has been ratified every eight years on the average.

Like the use of the amending power itself, state invocation of the convention clause of Article V is a phenomenon of the Twentieth Century. This phenomenon is becoming increasingly important in the latter half of the Twentieth Century. From the ratification of the Constitution in 1787 until 1893, only ten convention applications were received by the Congress, and all were received before the Civil War. Since 1893, each of the fifty states has sent in a convention application, and a total of more than 300 applications have been received. In the period 1975-1985 alone, thirty-six of the states applied to the Congress for a convention, and some states applied more than once.⁶⁵ Thus, the history of the interpretation of the convention mode of amendment by elected officials in the states is being written in our time.

All ten of the Nineteenth Century applications were submitted for the purpose of convening a general constitutional convention. In the Twentieth Century, however, the states have, with few exceptions, applied for conventions limited to a single issue, often expressly limiting the convention for the "sole and exclusive" purpose of considering that issue, and occasionally asserting that, if the convention goes beyond this issue, the application would automatically be withdrawn. Some applications have also expressly stated that the authority to limit the subject of an Article V convention cannot be contravened by congressional

⁶⁴2 U.S. (2 Dall.) 419 (1793).

⁶⁵*Senate Report, supra* note 2, at 10.

action.⁶⁶

Limited State applications increasingly have become an effective lobbying tool in efforts to encourage the Congress to propose amendments on its own concerning various issues. Indeed, applications often specifically include a request that the Congress propose an amendment on the relevant issue and assert that the application becomes effective only if the Congress fails to act.⁶⁷

In the Twentieth Century, six major issues have come close to receiving enough applications to warrant a convention call. By 1912, the drive of the Progressives to require direct election of U.S. Senators received thirty of the necessary thirty-one applications. This convention drive prompted the Congress to propose the Seventeenth Amendment, which was quickly ratified. Also starting at the turn of the Century, a movement to prevent polygamy received twenty-five applications by 1930. Over an eighteen-year period, 1939-1957, a movement to limit the taxing authority of the national government collected twenty-seven applications. A campaign to partly nullify the Supreme Court's apportionment decision in *Reynolds v. Sims*⁶⁸ received thirty-two of the necessary thirty-four applications in a short period of time from the late 1960's to the early 1970's.

In the late 1970's, nineteen states applied for a convention to prohibit abortion or alter the right to an abortion promulgated by the Supreme Court's decision in *Roe v. Wade*.⁶⁹ And since 1973, thirty-two states have applied for a convention to propose an amendment to balance the budget of the national government.⁷⁰

b. *The Experience and the Interpretation of the Congress*

Prompted by the drive to convene a convention on the issue of apportionment, the Senate in 1967 began to consider legislation providing procedures for the calling of a limited constitution convention. It has been considering such legislation continuously ever since. The Senate has

⁶⁶See *Hearing, supra* note 4, at 263 (Dellinger).

⁶⁷*Id.*

⁶⁸377 U.S. 533 (1964).

⁶⁹410 U.S. 113 (1973).

⁷⁰*Senate Report, supra* note 2, at 13.

twice (1971, 1973) unanimously passed a Constitutional Convention Procedures Act, and the Senate Judiciary Committee has unanimously reported out bills on two other occasions (1984, 1985). The two earlier bills occurred in a Senate controlled by the Democratic Party, while the latter two occurred when the Senate was controlled by the Republican Party.⁷¹

All four of the bills were based on the conclusion that the Congress must call a limited constitutional convention if the requisite number of states apply. Thus, the Senate has repeatedly affirmed the same Article V interpretation articulated by all fifty of the states throughout this century. The U.S. House of Representatives has never taken any action on constitutional convention procedure bills, although Professor Brickfield's study concluding that Article V permits limited conventions was printed by the House Committee on the Judiciary in 1957.⁷²

2. The Arguments of Proponents of an Unlimited Convention Cannot Be Squared With This History

The views of Black, Bickel, Dellinger, and Gunther reviewed throughout this paper, if true, would point to a wide gulf between the correct meaning of Article V and the meaning that the states and the Congress have understood and acted upon. Such a gulf may be possible, but it must bear a heavy burden of proof, especially with respect to the interpretation of a constitutional provision that directly grants elected officials specific powers.

a. *The Relevance of the Early State Applications*

Black has decided that the early practice under Article V must be taken as definitive. The ten early applications, all of which called for a general convention, demonstrate the "original understanding"⁷³ of Article V, Black says. Those ten pre-Civil-War applications were based on the correct "assumption that the provisions in Article V authorized the legislature to apply only for a general convention."⁷⁴ The other more recent 300 applications are "obviously convenient for the state legislatures." They are based "on their own implied claims, which are

⁷¹ *Id.* at 13-15.

⁷² *Supra* note 36.

⁷³ *Hearing, supra* note 4, at 177 (Testimony of Charles L. Black).

⁷⁴ *Id.*

obviously in the nature of self-serving declarations.”⁷⁵ Furthermore, Black asserts that the general neglect of the Article V convention mode itself during the early period demonstrates that it is not to be understood as a vehicle to respond to specific political problems.

While not implausible, Black’s argument demonstrates only that calls for a general convention were consistent with the “original understanding” of Article V, but it does not clearly show that any kind of limitation was thought to be inconsistent. One can legitimately question the argument that the first ten applications reflect the definitive construction of Article V, while the subsequent 300 applications that reflect a different understanding are to be ignored in determining Article V’s proper construction. In addition, it can be considered predictable that more radical constitutional alterations were proposed closer in time to the original Constitution rather than after the passage of time had institutionalized the document more deeply in the national fabric.

Moreover, Black’s argument does not take into sufficient account the differing political and legal needs of the early Nineteenth Century and the post-Civil War period. Prior to our era, constitutional adjudication ordinarily did not involve federal intervention in particular legislative and administrative fields traditionally reserved to the states. The growth in the number of topic-specific calls for a convention may be attributable in part to disagreement with particular congressional and judicial decisions viewed as intrusions on state regulatory authority. In addition, until the New Deal and the concomitant expansion of the federal role in daily life, particular federal activities and programs may not have been perceived as sufficiently important to warrant *ad hoc* constitutional modification by the convention mode.

b. *Limited State Applications as “Self-Serving Declarations”*

Black’s claim that the modern practice of the states in requesting limited conventions is no more than the convenient assertion of self-serving declarations is particularly unpersuasive. It is quite clear from the framing history of Article V that the power to initiate constitutional change (including change by single-subject amendments) was originally to be vested *exclusively* in the states; the grant of a like power to the Congress was the result of a subsequent compromise. The states’ assertion of the right to a limited convention cannot be compared fairly

⁷⁵*Id.* at 177-78.

with an unsupported self-serving declaration; the convention method, after all, is the explicit constitutional means of effectuating the interests of the states.

Moreover, the states' assertion of interests has commanded the assent of a body which under Article V may often be the natural adversary of those interests. The Senate has concurred several times in the states' assertion of the right to a limited convention; this suggests that the states' view on the matter is shared by federal elected officials whose own political power would in theory be diminished by acceding to state claims to initiate amendments on a single topic.

c. The Federal Convention of 1787 Is Not Analogous to an Article V Convention

It is frequently said that the only constitutional convention with which we have experience, the Federal Convention of 1787, was itself a "runaway convention."⁷⁶ After all, the argument goes, the delegates to that convention were charged to consider amendments to the Articles of Confederation. Instead, the delegates proposed an entirely new charter of government.

This argument is not persuasive for the simple reason that the Philadelphia convention occurred under the aegis of the Articles of Confederation, not Article V of the Constitution. Not only did the Articles of Confederation not provide a convention method of initiating amendments, they provided no amendment power at all.

It is also somewhat misleading to say that the Philadelphia Convention was "runaway," for the "call" for that convention by the Continental Congress⁷⁷ *did* speak in broad terms. There were "defects in the present Confederation," and "alterations and provisions"⁷⁸ seemed necessary. No specific defects were enumerated.

⁷⁶C. Herman Pritchett discusses this in Pritchett, *Why Risk a Constitutional Convention?* The Center Magazine, March, 1980, reprinted in *Hearing*, *supra* note 4, at 515.

⁷⁷Resolution of Congress, February 21, 1787.

⁷⁸*Id.*

II. THE LIMITATIONS OF A LIMITED CONVENTION CAN BE ENFORCED

As set forth in Part I, we believe that Article V clearly contemplates limited constitutional conventions. A separate but related question is whether the Constitution provides for or permits effective enforcement of limitations imposed on a convention. In this Part, we conclude that the Constitution provides authority for the enforcement of limitations through the states, the Congress, the courts, and the delegates. We also conclude that political constraints would provide an additional means of enforcement.

A. The States

Article V provides that three-fourths of the states must ratify constitutional amendments proposed either by the Congress or by a constitutional convention. This is the ultimate and most important constitutional "check" on the amendment process. Neither a convention nor the Congress can accomplish any constitutional changes by itself. Only the states cause the Constitution to be amended by the act of ratification.

Of the four agents who have power to enforce the limitations of a limited constitutional convention, the state legislatures are likely to be the most vigilant. A convention is called for the purposes of the states. The agenda of a convention is prescribed by them. It is their consensus that causes the convention to come into being. Thus, the states can be expected to be most intolerant of any proposals from a convention that violated the terms of its convening. The states, having previously demonstrated a consensus about a certain subject at the initiation stage, would in all likelihood not suddenly ignore that consensus at the ratification stage.

Historical experience demonstrates the role of the states' ratification power in preventing the amendment of the Constitution without a broad national consensus. In this century, three constitutional amendments proposed by the Congress have failed of ratification by the states — the Child Labor Amendment, the Equal Rights Amendment, and the District of Columbia Voting Rights Amendment. This experience demonstrates that, even where a substantial consensus may exist temporarily in the proposing body, the Congress, a constitutional

amendment cannot achieve ratification unless it is in accord with an enduring national consensus of three-fourths of the states.

B. The Congress

Article V explicitly grants two powers to the Congress under the convention mode. The Congress has the power to "call" a convention and the power to choose between the two methods of ratification: by state conventions or by state legislatures. In addition, the Congress always has the power to make laws "necessary and proper"⁷⁹ to carry into effect its other powers.

The authority of the Congress to enforce the limitations of a limited convention arises from the first of these two powers, the power to call. That power imposes a duty ("shall call") on the Congress to call a convention when the states' consensus has been made manifest. Thus, the power to call is actually a duty to call.⁸⁰ There is no conflict between the congressional power to call and the desires of the states, as Black, among others, has argued⁸¹ because the power to call is not a discretionary power. It is exercisable at the behest of the states and only at the behest of the states.

Since the power to call is a power in the service of the states' objectives, the Congress' ancillary authority under the necessary and proper clause is also authority to effectuate the objectives of the states. If one accepts the conclusion of Part I that the states are free to apply for a limited convention, then the Congress' power to call includes a power to call a limited convention; that would be the only way to exercise the power so as to effectuate the states' wishes. Thus, when the requisite number of states have requested a convention limited to a given topic, the Congress has the power to take all steps necessary and proper for such a limitation. This ancillary power includes the power to set the limitations in advance and to ensure that the limitations have been adhered to. Arguably, one way of ensuring that the limitations have been adhered to is to provide that proposals emanating from the convention which stray

⁷⁹See U.S. Constitution, Article I, Section 8, Clause 18.

⁸⁰Of course, the duty to call a convention arises only if the Congress determines that it has received the required number of applications pertaining to a given issue or group of issues to trigger the duty.

⁸¹See Black, *A Letter to a Senator*, *supra* note 22, at 627.

from the subject matter limitation are not submitted to the states for ratification.

1. Congressional Power to Legislate

a. *The Need for Legislation*

Article V leaves unanswered a host of practical, legal, and constitutional questions about constitutional conventions. Where do the states send their applications? How soon must Congress act after the two-thirds consensus has been achieved? Where and when will a convention be held? Who will be the delegates and how will they be appointed or elected? How many delegates shall each state have? According to what parliamentary rules will the convention be conducted? There are many others.

There have been uncertainties even about the collecting and counting of applications. At a 1979 Senate Judiciary Committee hearing, the following exchange took place:

Senator Hatch. * * * There are 30 states that have called for a Constitutional Convention on the subject of the balanced budget amendment, or something approximating that. Yet, your list contains the names of only 24 States * * * If I could ask, why is there this discrepancy?

Mr. Kimmit [Secretary of the Senate]. I can only assume, Senator Hatch, that those petitions that are not on our list are in the possession of the committee. The previous procedure that I outlined was not a tight one and our office apparently dropped the ball in not keeping track of those petitions.⁸²

The Federal Convention of 1787 deliberately left procedural and administrative questions unanswered. The records show that only Madison addressed these questions:

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 decided? what the force of its act? . . . He saw no objection however against providing for a Convention for the

⁸²*Hearing, supra* note 4, at 46-47.

purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.⁸³

Madison saw the "difficulties" inherent in the lack of detailed provisions for a convention. The sense of his statement about "constitutional regulations" for a convention seems to be that Article V should have laid out in detail the "form," the "rule," the "quorum," etc., for possible conventions. Madison's views did not prevail, however.

Since 1967, the Senate has sought to articulate in legislation the constitutional powers of the Congress under a limited Article V convention.⁸⁴ The purpose of the Senate has been to permanently settle all questions of procedure with respect to the application, calling, and ratification stages of the convention method; to separate its own authority from a convention's with respect to the convention's internal rules and procedures; and to separate these procedural issues from any ongoing drives to call a convention. In the early 1970's, the Senate attempted to enact legislation before the drive for a re-apportionment convention required the Congress to call the required convention. Likewise, in the early 1980's, the Senate attempted to enact legislation before the drive for a balanced-budget convention was successful.

The late Senator Sam Ervin, the original sponsor of convention legislation, said that the renewed state interest in the convention mode coupled with the lack of any precedents had raised "perplexing constitutional questions" that required "orderly and objective consideration," because

only bad precedents could result from an effort to settle questions of procedure under Article V simultaneously with the presentation of a substantive issue by two-thirds of the states.⁸⁵

⁸³2. Farrand 557.

⁸⁴Virtually all of the opponents of a limited convention, including Dellinger, Gunther, and Bickel, agree that the Congress has the authority to legislate in this area. See *Hearing, supra* note 4, at 261 (Dellinger) and at 310 (Gunther); *Federal Constitutional Convention, supra* note 30, at 59 (Bickel). *But see* note 93, *infra*.

⁸⁵Ervin, *supra* note 35, at 878, 879.

In the 1971 committee report that served as the basis of the first unanimous Senate passage of a procedures bill, the Senate Judiciary Committee said that its purpose was to “effectuate” Article V and make it “meaningful” by providing the appropriate “machinery” for a limited constitutional convention.⁸⁶ Furthermore, the Committee urged passage of the bill:

in order to avoid an unseemly and chaotic imbroglio if the question of procedures were to arise simultaneously with the presentation of a substantive issue by two-thirds of the State legislatures. Should Article V be invoked in the absence of this legislation, it is not improbable that the country will be faced with a constitutional crisis the dimensions of which have rarely been matched in our history.⁸⁷

In 1985, the Committee summarized its conclusion about the need for enabling legislation for Article V in these terms:

The principal objective of S. 40 is to ensure that the Congress has clear standards and criteria by which to judge convention applications before it, and that any convention which ultimately results is conducted in an orderly and clearly defined manner * * * Much of the credibility in the assertion that a convention would lead to a “constitutional crisis” derives from the fact that so many procedural uncertainties exist with respect to the convention process — uncertainties that S. 40 is intended to resolve.⁸⁸

b. *The Power to Legislate*

As stated above, the power of the Congress to legislate is an incident of its two explicit Article V powers, the power to call and the power to prescribe the mode of ratification, and of its constitutional power to make laws “necessary and proper” for executing its other powers.

The power to call is properly regarded as a power at the service of the states’ power to initiate the amendment process. Article V says that

⁸⁶ *Federal Constitutional Convention Procedures Act*, S. Rep. No. 92-336, 92d Cong., 1st Sess. 1, 2 (1971).

⁸⁷ *Id.* at 2.

⁸⁸ *Senate Report*, *supra* note 2, at 2.

Congress "shall call" a convention whenever the requisite two-thirds consensus has been achieved. This is mandatory on the Congress. It is not a legislative power which includes the discretion not to act. It must be done. In *Federalist 85*, Hamilton explained this duty:

By the fifth article of the plan the Congress will be obliged, "on the application of the legislatures of two-thirds of the states . . . to call a convention for proposing amendments. * * * The words of this article are peremptory. The congress "shall call a convention." Nothing in this particular is left to the discretion of that body.

And in a 1789 letter on the subject, Madison stated that the question whether to call a convention "will not belong to the Federal Legislature. If two-thirds of the states apply for one, the Congress cannot refuse to call it: if not, the other mode of amendments must be pursued."⁸⁹

On the other hand, the Congressional power to prescribe the mode of ratification, in state conventions or in the state legislatures, is an independent and discretionary power not subject to the control or demands of the states.

If the Congress has an explicitly-granted constitutional power, it also has the ancillary power to "make all laws which shall be necessary and proper for carrying into execution" this power.⁹⁰ This is the holding of *McCulloch v. Maryland*, where Chief Justice Marshall wrote:

[B]ut that instrument [the Constitution] does not profess to enumerate the means by which the powers it confers may be executed. * * * [T]he powers given to the government imply the ordinary means of execution. * * * The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means.⁹¹

The Federal Convention deliberately omitted consideration of the means to execute the power to call. The Congress, therefore, because it is charged with that power, is also charged with the means to execute that

⁸⁹Cited in Ervin, *supra* note 35, at 885.

⁹⁰See Article I, Section 8, Clause 18.

⁹¹17 U.S. (4 Wheat) 316, 408, 409, 409-410 (1819).

power, including the power to legislate in a way that it thinks is necessary and proper to effectuate specifically-granted powers.⁹²

2. Powers Under Legislation

In its various attempts to enact legislation pursuant to its powers under Article V, the Senate has included provisions concerning, *inter alia*, the contents of applications, the transmittal of applications, the effective period of applications, the procedures in the Congress for issuing the call, the number of delegates and their mode of voting at the convention, and judicial review.

This paper is not a review of the provisions of those bills and will not attempt to discuss whether each provision decided upon in the past was within the proper scope of the Congress' power to call a convention. Two provisions do merit discussion here, however.

There may be two different points at which the Congress, in the proper exercise of its power, has the duty and the opportunity to enforce the two-thirds consensus of the states.

⁹²Because he desires to avoid judicial review of Article V matters and because he thinks that federal legislation with respect to Article V would inevitably lead to court decisions, Tribe opposes the necessary and proper enactment of legislation and proposes, instead, that Article V itself be amended. *Hearing, supra* note 4, at 506. Black also opposes any congressional legislation, arguing principally that no Congress can presume to bind its successor Congresses on these issues. Black, *supra* note 4, at 191. The Senate Judiciary Committee answered Black with the following: "The Committee also notes the suggestion that legislation such as S. 40 is inappropriate since 'no Congress can bind its successors'. *Cf.*, however, 3 U.S.C. 15 (relating to electoral college procedures). While it is unquestionably true that no such legislation can bind any Member of Congress (whether of a present or future Congress) to vote for a measure he or she believes to be unconstitutional, it nevertheless serves extremely important purposes: (a) such legislation can effectively establish an operative legal rule until affirmatively amended by a future Congress; (b) such legislation can effectively apprise the States of their rights and obligations and inform them of the likely constitutional consequences of their actions; (c) such legislation establishes at least a presumptive constitutional interpretation by the Congress that is not likely to be overturned in the absence of a strongly held view by a subsequent Congress that it incorrectly interpreted the Constitution, and (d) such legislation increases the likelihood that convention applications will be scrutinized on the basis of neutral constitutional procedures rather than through a series of result-oriented policy judgments." *Senate Report, supra* note 2, at 23.

The first point is the point at which the Congress evaluates state applications for content and validity and determines that a super-majority agreement exists on the same subject at the same time and that, consequently, a constitutional convention is required.

Much has been said about the duties of the Congress at this juncture. Black tells us that the Congress in adding up applications may count only applications for a general convention and must ignore all the others.⁹³ Dellinger says that convention applications may include a nonbinding "recommendation" of a specific subject.⁹⁴ Gunther concurs with Dellinger and says that the states in their applications may articulate "a specific grievance" that is not binding on either the Congress or the convention.⁹⁵

All of these arguments are not really arguments about the enforcement power of the Congress. They are, instead, aspects of the question of whether Article V provides for a limited or unlimited convention. Once that question is decided by the force primarily of the equality argument and the consensus argument, then it can be seen that it is the duty of the Congress only to determine if a true consensus has been reached, regardless of the wording of the individual applications. The Congress has no independent power to police the content of state applications. It decides only whether enough of them agree. According to Noonan:

The language of the Constitution is clear. Congress is to call a Convention on the application of the legislatures of the States. Congress is not free to call a Convention at its pleasure. It can only act upon the States' application; and if it can only act upon their application it cannot go beyond what they have applied for. If they apply for a Convention on a balanced budget Congress must call a Convention on a balanced budget. It cannot at its pleasure enlarge the topics. Nor can the Convention go beyond what Congress has specified in the call. The Convention's powers are derived from Article V and they cannot exceed what Article V specifies. The Convention meets at the call of Congress on the subject which the States have set

⁹³Hearing, *supra* note 4, at 185 (Prepared Statement of Charles L. Black).

⁹⁴Dellinger, *supra* note 4, at 1636.

⁹⁵Gunther, *supra* note 63.

out and Congress has called the Convention for.⁹⁶

S. 40 provided an example of procedures and criteria that the Congress might use for this task. Among other provisions, the bill required a state to specify the "subject matter of the amendment or amendments" it desires to have considered at a convention. An application must have specifically requested Congress to call a convention, not merely expressed an interest in having a convention. In addition, the bill required the President of the Senate and the Speaker of the House to report to each House when a state application was received and to send a copy of each received application to each member of Congress and to every other state legislature.

S. 40 was based on the premise that, although Article V does not explicitly provide for it, the Congress would have a second opportunity to enforce the consensus of the states. The bill declared that a convention would have reported any amendments to the Congress which would then have submitted them to the states along with its decision about the mode of ratification or, in the alternative, would have refused to submit them:

because such proposed amendment relates to or includes subject matter which differs from or was not included in the subject matter named or described in the concurrent resolution of the Congress by which the convention was called.⁹⁷

This provision was not intended as the creation of a new congressional power — some novel "transmittal power"⁹⁸ — but was based on the notion that, because Article V expressly empowers the Congress to choose the mode of ratification by the states, it may refuse to do so where an amendment has not been proposed in accordance with the terms set out in its previously-exercised power to call. Alternatively, refusing to choose the mode of ratification can be viewed as an explicit function of the power to call.

⁹⁶Noonan, *supra* note 4, at 642-643.

⁹⁷S. 40 (99th Congress), § 11(b)(ii), *reprinted in Senate Report, supra* note 2, at 20.

⁹⁸A formal "transmittal power" of the Congress would appear to conflict with the language and history of Article V, which reflect that the convention mode was adopted as a substitute for direct congressional action on application of the states. *See* pp. 7-10 *supra* (reflecting Mason's view that the states not be entirely dependent on the Congress for proposing amendments.).

C. The Courts

There has been a vigorous debate concerning the question whether there should be judicial review of issues arising under the convention method. Although almost everyone has rejected the extreme view, based on the Supreme Court's confusing plurality decision in *Coleman v. Miller*,⁹⁹ that the Congress has an absolute and nonreviewable control over every aspect of the amending process, sharp differences remain about both the wisdom and the proper reach of judicial review.¹⁰⁰

This paper concludes that there is ample precedent for judicial review of Article V matters, that there are no persuasive reasons for insulating Article V convention procedures from the usual jurisdiction of the federal courts over federal and constitutional questions, and that, in a proper case where the requirements of ripeness and standing are met, judicial review can serve as a desirable and important check on the convention process.

1. The Availability of Judicial Review

The starting point for discussion of judicial review of Article V matters is *Coleman v. Miller*. In *Coleman*, the issue on appeal was whether Kansas had validly ratified the proposed Child Labor amendment.¹⁰¹ The Supreme Court held that the issues in the case concerning the validity of state ratification were non-justiciable questions which were for the Congress alone to answer.

Four members of the Court — Black, Roberts, Frankfurter, and Douglas — joined in a sweeping opinion which stated that “[u]ndivided

⁹⁹307 U.S. 433 (1939).

¹⁰⁰For a comprehensive statement of the view that amendment matters are justiciable and should be resolved by the courts see Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983). For the view that judicial review should be confined to “the outer boundaries” of the amendment process see Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 434 (1983).

¹⁰¹The Congress proposed the Child Labor amendment to the states in 1924, but the amendment never received the requisite three-fourths ratification. Though the Court ruled by a 5-4 margin in *Coleman* that the petitioners had standing to sue, it seems that there is still a question whether disputes over a single state's action on an unratified constitutional amendment would be ripe for judicial consideration given the Constitution's requirement that the federal courts may only decide “cases or controversies.”

control of [the amendment] process has been given by the Article exclusively and completely to Congress.”¹⁰² These four justices believed that judicial review had no part whatsoever to play in the amendment process. Chief Justice Hughes authored a more limited opinion which was designated the “opinion of the Court” but which commanded only plurality support. This opinion addressed only the issues of the timeliness of state ratification and the effect of the state’s prior rejection of the amendment. The Court held that both issues were non-justiciable. Instead, they posed “a political question, pertaining to the political departments.”¹⁰³

The rationale of *Coleman*, while widely cited, is not accepted by anyone as an adequate resolution of the question of judicial review. For instance, even Tribe, an opponent of judicial review in this context, has said:

Could anyone really believe, for example, that a court would feel bound to treat the Equal Rights Amendment as part of the Constitution if Congress determined that the thirty-five states that had ratified the amendment as of July 1, 1982, constituted the “three-fourths” of fifty required by Article V?¹⁰⁴

In addition, the authority of *Coleman* is limited, first, because it is only a plurality opinion, and second, because both earlier and subsequent decisions of the Court call into question the sweeping prohibition of judicial review promulgated in the plurality opinion.

The first Supreme Court case dealing with the amendment process was *Hollingsworth v. Virginia*.¹⁰⁵ In *Hollingsworth* it was argued that the Eleventh Amendment to the Constitution had not been validly adopted because the resolution proposing the amendment was never submitted to the President for his signature, as required by Article I, Section 7 for “every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary.” The Court decided that constitutional amendments were not the “ordinary cases of legislation” and held that the amendment had been properly adopted. Nowhere in

¹⁰² *Id.* at 459.

¹⁰³ *Id.* at 450.

¹⁰⁴ Tribe, *supra* note 101, at 433.

¹⁰⁵ 3 U.S. (3 Dall.) 378 (1798).

the opinion did the Court suggest that the determination of the question was one to be left to Congress.

It was not until a series of cases early in the 20th century that the Court again passed on the validity of certain aspects of the amendment process. In *Hawke v. Smith No. 1*,¹⁰⁶ the Court held that a state's ratification of an amendment cannot be undone by a subsequent referendum of its voters. In the *National Prohibition Cases*,¹⁰⁷ it was decided, *inter alia*, that under Article V two-thirds of a quorum of each House, instead of two-thirds of the entire membership, was sufficient to propose an amendment. A year later in *Dillon v. Gloss*,¹⁰⁸ the Court held that the Congress had the power to set a reasonable time limit for ratification when it proposed an amendment. Finally, in *United States v. Sprague*,¹⁰⁹ the Court held that the method of ratification of a constitutional amendment is completely dependent on congressional discretion. Even though the Court upheld the power of Congress in *National Prohibition Cases*, *Dillon*, and *Sprague*, the Court did not treat these cases as non-justiciable; and in *Hawke* the role of the Congress was not at issue. These cases demonstrate none of the deference later accorded the Congress in *Coleman*.

Moreover, the "political question" doctrine itself has been severely weakened since *Coleman*, primarily by the effects of two major cases. In *Baker v. Carr*,¹¹⁰ the Supreme Court ruled that the political question doctrine did not bar Supreme Court resolution of legislative apportionment questions. And in *Powell v. McCormack*,¹¹¹ the Court held that the Congress could not refuse to seat Representative Adam Clayton Powell, despite clear constitutional language commanding that the Congress shall judge the qualifications of its own members.

On the whole, then, there seems to be strong and recent precedent in favor of broad powers of judicial review. *Coleman v. Miller*, the only precedent *contra*, is a dubious and isolated case that has been unable to command the wholehearted allegiance of any scholar — or of the Court

¹⁰⁶253 U.S. 221 (1920).

¹⁰⁷253 U.S. 350 (1920).

¹⁰⁸256 U.S. 368 (1921).

¹⁰⁹282 U.S. 716 (1931).

¹¹⁰369 U.S. 186 (1962).

¹¹¹395 U.S. 486 (1969).

itself. Disputes under Article V have proven to be justiciable, and the Supreme Court has issued significant decisions construing the Constitution's amendment power. We believe that disputes under Article V ought to be and are justiciable under the federal-question jurisdiction of the Supreme Court.

2. Convention-Procedures Legislation and Judicial Review

Some have argued that under its Article III powers and pursuant to various judicial precedents, the Congress may have the power to exclude almost all judicial review of the convention method.¹¹² But there does not seem to be any persuasive reason why the Congress should do so. Article V and any enabling legislation passed pursuant to it present the kind of constitutional and federal questions over which the Supreme Court normally has jurisdiction.

S. 40, the 1985 bill of the Senate Judiciary Committee, granted any state a cause of action with respect to disputes concerning the Congress' calling of the convention and the Congress' transmittal of a convention's proposed amendment to the states. Suit could have been filed directly in the Supreme Court¹¹³ and would have been entitled to "priority" consideration. The Committee advised that it contemplated declaratory relief as the judicial remedy and stated that it expected "that the Court will utilize as a standard in overturning congressional decisions one evidencing some deference to the Congress."¹¹⁴

In addition to this newly-created cause of action, however, the bill explicitly preserved the right of judicial review of other federal and constitutional questions relating to a convention and did not foreclose the routine avenues of access to the federal courts.

¹¹²The Congress would have a variety of options under its power over the jurisdiction of the lower federal courts, its power over the appellate jurisdiction of the Supreme Court, and under settled precedents construing the original jurisdiction of the Supreme Court and the Eleventh Amendment. See U.S. Const. art. III, sections 1 and 2. See also C. Wright, *Law of Federal Courts*, §§ 109-110 (4th ed. 1983).

¹¹³The Senate Judiciary Committee, citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and Article III, Section 2 of the Constitution, found no constitutional impediments to such a suit under the original jurisdiction of the Supreme Court. We do not deal with that issue in this paper.

¹¹⁴*Senate Report*, *supra* note 2, at 45

Standing and ripeness questions with respect to a suit under Article V procedures legislation might present some difficult judgments as to when a controversy had matured into justiciable form. Clearly, the courts cannot be asked to resolve any issue relating to the calling or conduct of a convention until there arises a specific "case or controversy" involving concrete interests of the parties. In S. 40, the Senate Judiciary Committee attempted to give some guidance to the Court about ripeness by declaring that all claims under the legislation were barred unless they were filed "within sixty days after such claim first arises."¹¹⁵ Claims "first arise," the Committee advised,

normally . . . at the point at which Congress has passed final judgment on some question or at which the time period has expired within which they were to render such judgment.¹¹⁶

3. The Judiciary as a Check on the Congress

Professor Tribe has warned of the danger of having the Supreme Court oversee the use of a constitutional process that might be invoked to reverse its own decisions.¹¹⁷ His point is valid, of course, but it is not conclusive. The Supreme Court has decided a number of important procedural matters with respect to different amendments proposed under Article V, as reviewed above, without illegitimately considering the substance of the amendments involved. Furthermore, it is much too speculative to attempt to think about the judicial politics with respect to any cases that might in the future be heard under Article V. An "activist" Court today might not be so in the future. Of the six significant campaigns to call a convention in this century, only two were provoked by a Supreme Court decision. The most recent convention drive — on behalf of a balanced budget — has been inspired by the actions of the Congress, not the Supreme Court.

As noted in Part I of this paper, the framers of Article V provided the convention mode as a means for the states to correct the actions of the Congress. In creating a cause of action for the states at the calling and submission stages, S. 40 sought to provide a judicial check on any inclinations of the Congress to obstruct the convention process. Disputes

¹¹⁵S. 40 (99th Congress), § 15(b), *reprinted in Senate Report, supra* note 2, at 21.

¹¹⁶*Senate Report, supra* note 2, at 46.

¹¹⁷Tribe, *supra* note 101, at 435.

between the states and the Congress seem more likely under Article V, with its built-in competition over the power to initiate amendments, than disputes between either of them and the courts.

The judicial deference counseled by the Senate Judiciary Committee seems a likely scenario. But in the case of an impasse between the states and the Congress, the involvement of the Supreme Court might in the end be sought in a proper case to determine such questions as whether the Congress has failed its constitutional duty to call a convention after receiving the requisite number of applications and whether the Congress can prevent state ratification of a convention-proposed amendment by failing to decide the mode of ratification. There are legitimate constitutional questions that are properly within the authority of the Court to address.

D. The Delegates

The supermajority ratification requirement would be a significant restraint on the plans of convention delegates. Delegates would not want to waste time and energy deliberating possible amendment proposals that were outside of the consensus and, thus, had virtually no chance of being ratified.

In addition, the people of the states who choose the delegates would be able to identify and elect those persons who pledge to respect the subject matter limits contained in the state applications. Just as delegates to a political convention are selected based on their predisposition to effect the will of those who chose them, delegates to a limited convention presumably would be elected with respect to their views on those issues that the states desired to be addressed.

As another check, the states or the Congress could require delegates to take an oath of office to remain faithful to the Constitution, including the authority of the states to limit an Article V convention. Such an oath, similar to the oaths of other public officials, would be based on the premise that the invocation of the Constitution itself carries a certain moral authority. S. 40 provided for an oath of this kind.

In summary, we think that American political customs, as well as respect for the Constitution itself among the American people, should not be underestimated in their ability to provide additional enforcement on the propriety of the convention process. In a recent analysis, political

scientist Paul J. Weber has concluded that there are so many political constraints on a Article V convention that it is, in fact, "a safe political option." He puts his own characterization on some of the principles already discussed in this paper and adds others:

What Professor Tribe ignores are the *political* constraints which insure that no convention is likely to get out of control. There are a number of such constraints: the previously cited character of the delegates elected; the media attention which will be given to discrepancies between the campaign statements and promises and the delegates' actual words and actions; the number of delegates and divisions within the convention itself which would make it extraordinarily difficult for one faction or a radical position to prevail; the delegates' awareness that the convention results must be presented to Congress which might not forward any amendment that went beyond the convention mandate; the Supreme Court which might well declare certain actions beyond the constitutional powers of the convention; and most important of all, the need to get the proposed amendment ratified not only by the 34 states that called for the convention, but by 38 states. More effective constraints on a constitutional convention can hardly be imagined. * * *

The original Constitution was not only a legal document; it was a political document. It set out not simply legal principles but legal principles hammered out of political compromise and anchored in political realism. The primary safeguards of democracy envisioned by the Framers were political, not legal.¹¹⁸

CONCLUSION

Because the convention method has never been successfully invoked, and despite the collection of potential enforcement devices reviewed above, there will still be political uncertainties the first time that two-thirds of the states apply for a limited convention. But allowing for such uncertainties, we are convinced that Article V was designed to permit limited conventions and that a variety of legal and political means

¹¹⁸Weber, *The Constitutional Convention: A Safe Political Option*, 3 J. L. & Politics 51, 65-66, 69 (1986) (emphasis in original).

are available to help to enforce such limits. The successful triggering of the convention method would be an extraordinary political event. Precedent and tradition are important in constitutional democracies such as ours, and there is no precedent to guide us here. But we also think that uncertainties should not lead to a questioning of the legitimacy of the convention method nor to a shirking of the duties of the various parties to put into effect, despite difficulties, the meaning of the various clauses of Article V. And we find persuasive the view that convention-procedures legislation would greatly minimize the uncertainties and potential chaos that might be encountered in the Article V convention process.

Appendix

Limited Constitutional Conventions Under Article V (A Compendium of Selected Authorities)^a

“In *The Federalist* James Madison urged ratification of the Constitution on the ground that Article V ‘equally enables the General and State Governments to originate the amendment of errors as they may be pointed out by the experience on one side or the other.’ Professor Black finds this observation fully consistent with his view that limited conventions are unconstitutional, since Madison ‘simply points out that amendment may be set in train by the State Legislatures as well as by Congress — and so it may, whether the convention they may petition for be limited or not.’ But Congress can propose such amendments as its requisite majorities desire, without thereby creating an organism that is empowered to propose amendments that Congress opposes. If the state legislatures’ power to initiate amendments is not free from the juridical condition and political risk posed by a general convention, then Madison was wrong to say that Congress and ‘the state Governments’ were ‘equally’ enabled to originate amendments.” — *Professor Grover Rees III, Constitutional Convention and Constitutional Arguments; Some Thoughts About Limits*, 6 Harv. J. L. and Pub. Policy 79, 90 (1982).

“The usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the States will be defeated if the States are told that it can be invoked only at the price of subjecting the Nation to all the problems, expense, and risks involved in having a wide-open constitutional convention.” — *Professor Paul Kauper, University of Michigan Law School, The Alternative Amendment Process: Some Reflections*, 66 Mich. L. Rev. 903, 912 (1968).

“This construction [that a convention cannot be limited] would effectively destroy the power of the States to originate the amendment of errors pointed out by experience, as Madison expected them to do. Alternatively, under that construction, applications for a limited convention deriving in some States with a dissatisfaction with the school desegregation cases, in others because of the school prayer cases, and in still others by reason of objection to the *Miranda* rule, could all be combined to make up the requisite two-thirds of the States needed to

^aAll but one of these authorities were compiled by the Senate Judiciary Committee. See *Senate Report*, *supra* note 2, at 58-62.

meet the requirements of Article V.” — *U.S. Senator Sam Ervin, Chairman, Subcommittee on the Constitution, The Convention Method of Amending the Constitution*, 66 Mich. L. Rev. 875, 883 (1968).

“It is our conclusion that Congress has the power to establish procedures governing the calling of a national constitutional convention limited to the subject-matter on which the legislatures of two-thirds of the States request a convention . . . there is no justification for the view that Article V sanctions only a general convention. Such an interpretation would relegate the alternative method to an ‘unequal’ method of initiating amendments.” — *American Bar Association, Amendment to the Constitution by the Convention Method Under Article V*, at 9, 16 (1973).

“The reason for including the convention system in Article V seems to have been perfectly clear: to provide a means for correcting errors, that is, specific concrete errors or abuses by the National government. Moreover, the language of Article V speaks specifically of ‘amendments’ . . . Surely it was not thought that by petitioning for an innocuous amendment, for example, on daylight savings time, the State would open up the way for a constitutional convention that would be free to revise the entire taxing authority of the United States or to abolish the House of Representatives.” — *Professor Wallace Mendelson, University of Texas, Testimony Before United States Senate Judiciary Committee*, October 31, 1967.

“If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the States to call for a convention in the absence of a general discontent with the existing construction of the Constitution . . . The intention of Article V was clearly to place the power of initiation of amendments in the State legislatures. The function of the convention was to provide a mechanism for effectuating this initiative.” — *Professor Phillip Kurland, University of Chicago Law School, Memorandum to U.S. Senate Judiciary Committee* (1967), 1979 Hearings, p. 1222.

“It is perfectly remarkable that some have argued for a construction [of Article V] not merely limiting the power of State legislatures to have a convention, but limiting that power to its least expected, least appropriate, most difficult (and yet most dangerous) use.” — *Professor William Van Alstyne, Duke University Law School, The Limited Constitutional Convention*, 1979 Duke L. Journal 985-98.

“If the States apply for a Convention on a balanced budget, Congress must call a convention on a balanced budget. It cannot at its pleasure enlarge the topics. Nor can the Convention go beyond what Congress has specified in the call. The Convention’s powers are derived from Article V and they cannot exceed what Article V specifies. The Convention meets at the call of Congress on the subject which the States have set out and Congress has called the Convention for.” — *Professor John Noonan, University of California School of Law, Testimony Before California State Assembly*, February 15, 1979.

“The constitutional convention is the representative of sovereignty only in a very qualified sense and for the specific purpose and with the restricted authority to put in proper form the question of amendment upon which the people are to pass.” — *Professor Thomas Cooley, A Treatise on Constitutional Limitations* 88 (1927).

“A constitutional convention has no authority to enact legislation of a general sort, and if the convention is called for the purpose of amending the Constitution in a specific part, the delegates have no power to act upon and propose amendments in other parts of the Constitution.” — *Professor Henry Campbell Black, Handbook of American Constitutional Law* 45 (1927).

“The Constitutional Convention is . . . as its name implies, constitutional not simply as having for its object the framing of constitutions, but as being within, rather than without, the pale of fundamental law: as ancillary and subservient and not hostile and paramount to it . . . it always acts under a commission, for a purpose ascertained and limited by law or by custom. Its principal feature is that, at every step and moment of its existence, it is subaltern — and it is evoked by the side and at the call of a government preexisting and intended to survive it, for the purpose of administering to its especial needs.” — *Professor John Alexander Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* 10 (1887).

“On the strict legal question, the better view is that there is nothing in Article V to prevent the Congress from limiting the constitutional convention to the subject that made the States call for it.” — *Professor Paul Bator, Harvard Law School, A Constitutional Convention: How Well Would it Work?* at 7-8 (American Enterprise Institute Forum, 1979).

“The power of amendment in Article V is itself constitutionally limited . . . Thus Congress should have the power to restrict the convention to those amendments that deal with the general issue or problem that had inspired two-thirds of the States to call for a convention.” — *Amendment by Convention: Our Next Constitutional Crisis?*, 53 N.C. L. Rev. 491, 508 (1975).

“The two amendment processes, therefore, must be viewed as equal alternatives. The reports of the Convention do not rebut this conclusion and provide no indication that the Framers intended for state legislatures to concern themselves only with total constitutional revision, while Congress alone would initiate specific amendments.” *Robert M. Rhodes, A Limited Constitutional Convention*, 26 U. Fla. L. Rev. 1, 9 (1973).

“I think the convention can be limited. * * * [T]he fact is that the majority of the scholars in America share my view.” — *Hon. Griffin Bell, Attorney General of the United States, Issues and Answers*, February 11, 1979.

“While this question then has never been directly decided by the Congress or by the courts, it seems that the whole scheme, history and development of our government, its laws and institutions, require the control of any convention and the most logical place for exercising that control would be in the enabling act convening it, or in some other federal statutory law. Under Article V, Congress calls the convention after the required number of states have submitted petitions. It has the duty to announce the will of the state legislatures in relation to the scope of the convention’s business and, under the necessary and proper clause, it may set the procedures and conditions so that the convention may not only function, but that it may control the convention’s actions to make certain that it conforms to the mandates and directives of the Congress, the state legislatures, and ultimately the people. This does not mean that the convention may not exercise its free will on the substantive matters before it; it means simply that its will shall be exercised within the framework set by the Congressional act calling it into being.” — *Cyril Brickfield, Problems Relating to a Federal Constitutional Convention*, reprinted by House Judiciary Committee, 85th Congress, 1st Session (1957), p. 18.

“The argument that an Article V convention is sovereign and therefore beyond control is specious. The convention is but a constitutional instrumentality of the people, deriving all its powers from Article

V . . . an agreement that a convention ought to be held is required among two-thirds of the state legislatures before Congress is empowered to convene such a body. If the agreement contemplates a convention dealing only with a certain subject matter, as opposed to constitutional revision generally, then the convention must be logically limited to that subject matter. To permit such a body to propose amendments on any other subject would be to recognize the convention's right to go beyond that specific consensus which is the absolute prerequisite for its creation and legitimate action." — *Professor Arthur Earl Bonfield, The Dirksen Amendment and the Article V Convention Process*, 66 Mich. L. Rev. 949, 994 (1968).

"It would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the express desires of the applicant states. If Article V requires that a convention be called by Congress only when a consensus exists among two-thirds of the states with regard to the extent and subject matter of desired constitutional change, then the convention should not be free to go beyond this consensus and address problems which did not prompt the state applications." — *Note, The Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 Harv. L. Rev. 1612, 1628 (1972).

"The most natural reading of the history behind Article V supports the view that the framers wished to assure the people that even if the central government were unresponsive to defects in the Constitution, the people have another option This [constitutional convention] check on the central government is not effective if people have only the option of an all or nothing approach. The convention method was supposed to be an equal means of amending the Constitution." — *Professor Ronald Rotunda, University of Illinois Law School, Letter to Subcommittee on Constitution*, Sept. 27, 1979, Hearing Record, p. 507.