The Amendment Process and Limited Constitutional Conventions

I. Introduction

The fifth article of the United States Constitution provides that Congress, "on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments." Not once in the two hundred years since this language came into being at the original convention in Philadelphia have the State legislatures invoked the power it gives them. During the last two decades, however, the attention of constitutional lawyers, political scientists, and elected officials has turned with some frequency to these words and to an extraordinary controversy over their meaning.2

The dispute over Article V is extraordinary not only because the legal culture of our age is not generally characterized by close attention to the text and history of particular constitutional provisions, but also because the scores of books and articles and the thousands of speeches3 have found so much complexity and so little common ground even for a controversy that involves lawyers and politicians. Its principal focus has been whether a convention can be limited to one or more issues.

Between 1963 and 1969 thirty-two of the required thirty-four states called for a convention to consider an amendment to overturn the Supreme Court's decision that State

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


3See, e.g., 1979 Hearings and 1967 Hearings, supra note 2.
legislatures must be apportioned according to population. Some opponents of the convention argued that Congress would be under no duty to call a convention even if the thirty-fourth State acted, or at any rate that no court would enforce such a duty. Others argued that while Congress would generally have at least a moral duty to call a convention at the request of three-quarters of the States, applications from legislatures that were themselves malapportioned should not be counted. The most effective argument, however, was that a convention called to deal with reapportionment would also be free to address anything at all that its members might not happen to like about the Constitution. In the memorable phrase of Professor Charles Black, the amending power can "change the presidency to a committee of three, hobble the treaty power, repeal the fourth amendment, make Catholics ineligible for office, and move the national capital to Topeka." None of the remaining seventeen State legislatures was willing to entrust such power to a "runaway convention" composed of people selected only for their views on reapportionment.

The spectre of a "runaway convention" continues to dominate the debate, but the legal and political arguments about it have evolved and multiplied since 1969. It is possible to identify a remarkable number of more or less distinct positions on the question:

(1) At first, some supporters of a limited convention argued that the power to define the subject matter of a convention is implied in the power of Congress to call a convention once the States apply for one.

(2) Opponents responded that to give Congress this kind of power over a convention would defeat the purpose of the con-

vention provision, which was to afford a way to amend the Constitution over the opposition of the Congress.

(3) Other commentators suggested that both sides in the debate over congressional power to limit a convention were missing the point: since Congress has a duty to call any convention that two-thirds of the State legislatures apply for, it is the legislatures that decide whether and how to limit the convention.

(4) Still other commentators observed that if State legislatures had the power to apply only for unlimited conventions then all of the State applications since 1789, whether or not they purported to be limited to a single subject, should be counted as applications for a single general convention which was by this reasoning long overdue.

(5) One response to this suggestion was that since States have no power to call for a limited convention, applications for such a convention were nullities and should simply be disregarded.

(6) Many scholars, reluctant to embrace the limited convention position but just as reluctant to declare that thirty-four identical State applications would have no legal force at all, staked out "compromise" positions under which either the States or Congress could limit a convention somewhat, but not too much.

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5See ABA Report, supra note 2, at 3.
6See id.; see also Part V, infra.
7See ABA Report, supra note 2, at 3.
8Black, A Threatened Disaster, supra note 2, at 959.
9See Brickfield, Problems Relating to a Federal Constitutional Convention, printed for the Committee on the Judiciary, United States House of Representatives, 85th Cong., 1st Sess. 16-26 (1957); Rhodes, supra note 2, at 14-15.
10Dellinger, supra note 2, at 1630-31.
11See 1979 Hearings, supra note 2, at 286-302 (state-
12nent of William Van Alstyne); Rees, supra note 2; Van Alstyne, Letter, supra note 2.
13See Ervin, supra note 2, at 883.
14See Black, Constitutional Convention, supra note 2, at 631; Black, Amending the Constitution, supra note 2, at 198; Ackerman, Unconstitutional Convention, New Republic, Mar. 3, 1979, at 8.
15See, e.g., Ervin, supra note 2, at 884 ("[T]he states could not require the Congress to call a convention to accept or reject the exact text of [a particular proposal for amendment], for then the convention would be merely a ratifying body." But they could call for a convention confined to a particular subject); 1967 Hearings, supra note 2, at 96-104, 233-37 (statements of Philip Kurland). Professor Gunther takes a somewhat different "compromise" position on the legal effects of limitations in convention applications, maintaining that the States and Congress can initially specify an agenda for the convention, but that the convention itself is a "separate, independent body ultimately not controllable by
(7) Another facet of the disagreement over the legal effects of State applications for a limited convention has to do with whether such applications should be amalgamated if they call for consideration of subjects (or specific amendments) that are similar but not identical. There have also been side controversies about the extent of State or congressional power to set the time, place, duration, and internal procedures of a convention; about how long a State application remains in force; about whether States may rescind their applications; and about whether the President, the State governors, and the courts have roles in the convention process. The effect of these issues is to increase exponentially the number of possible positions from which the validity of any particular proposed convention may be attacked or defended.

(8) Yet another set of commentators choose not to dwell on the inquiry into the constitutional legitimacy of limitations on a convention but to speculate on what would actually happen if a convention simply disregarded its limits. Since these "is" observations are sometimes made in answer to "ought" questions and vice versa, they have a tendency to increase the level of confusion.

(9) Finally, the confusion itself has been cited as reason enough to forego a constitutional convention. Some observers have doubted whether any amendment, no matter how important its substance, is worth the risk of a constitutional crisis in which there would be serious disagreement over what provisions the Constitution contains.

Although the eleven-blind-men-and-the-elephant quality of the debate thus far does suggest that a limited constitutional convention and its aftermath would not be a painless or a risk-free process, this argument can hardly be expected to satisfy those who care deeply about an issue—such as the need for a balanced-budget amendment—on which they perceive a consensus virtually everywhere but in Congress. In any case, thirty-two State legislatures, as of April 1, 1986, have once again acted to create a situation in which two more legislative proposals will require that we arrive at answers to these questions.

This essay is primarily an effort to suggest that there may be less confusion than meets the eye. As is the case in most debates, much of the disagreement about results is a function of the failure of the debaters to agree on premises. While this alone may not be a source of encouragement, the debate over limited conventions has also been characterized by a frequent failure to identify and defend the premises from which arguments proceed. Isolating the real sources of disagreement does not itself resolve disputes, but it often points the way. Although I will take and defend positions on a number of issues relating to the constitutional convention process, my main goal is to suggest a framework for analysis in order to show that such disagreements need not be as intractable as other kinds of disputes about important constitutional questions.

Part II of this essay is an outline of what I take to be the three competing pictures or models of the amending process from which various commentators have derived their...
arguments about constitutional conventions, and a defense of the "classical" or "contemporaneous consensus" model that was the dominant one until recently. Part III analyzes the constitutionality of a limited constitutional convention from the standpoint of the classical model, and to place the principal arguments in the context of the models from which they derive. Part IV examines the extent of congressional power to resolve "side issues" such as the duration and rescission of convention applications, the role of the President and governors, and the composition and internal procedures of a convention, and suggests principles for the resolution of some of these questions without congressional regulation. Finally, Part V suggests that questions of law arising from a constitutional convention should be resolved by courts in the same way and to the same extent as similar questions arising from the activities of other institutions of government.

II. The Nature of the Amending Process

Most modern political theories attempt to answer questions about the legitimacy of government by reference to the idea of consensus. The idea of a constitution, particularly where it is manifested in the fact of a written constitution, is generally thought to be helpful in making the case for the existence of a fundamental consensus about the legitimacy of government. But a constitution, regarded as a means of ensuring or evidencing the legitimacy of government, can be no better than its amending process. Were citizens to disagree on whether the Constitution has been amended, and therefore on what the Constitution provides, all of the ways in which the document may serve to establish legitimacy—as a "rule book," establishing processes and institutions for dispute resolution, as a source of substantive norms by reference to which citizens may be persuaded to accept outcomes they might otherwise reject, and perhaps especially as a "mystical" symbol by which the vague and disparate sentiments held by millions of citizens on such things as "freedom," "equality," "patriotism," and "tradition" are caused to have more centripetal than centrifugal effects—would be in serious doubt.

The interpretation of Article V of the United States Constitution, therefore, presents a special challenge to those who must deal with the Constitution as government officials, as writers and thinkers, or as citizens trying to inform their political choices. Nowhere else is it more important that constitutional interpretation really be interpretation. Yet the idea that it is possible to interpret a document objectively, to find a meaning that was placed there by someone other than the interpreter himself, contradicts the central premise from which most modern constitutional scholars ordinarily proceed. This premise, which is the most important analytic device in the arsenal of the movement known as Legal Realism, is that there is no such thing as a dichotomy. Differences in kind can always be expressed as differences in degree: the distance between any two things in the universe, emphatically including "lawmaking" and "lawfinding," is best expressed as a continuum. It is impossible to know that a constitutional provision "means" X and not Y because the boundary between X and Y (and the boundary between meaning and non-meaning) must be drawn rather than discovered. A text is like a college education: one gets out of it whatever one puts into it.

If this insight is taken to be the last word in constitutional interpretation—if there is no way to resolve questions of meaning except by resort to the value judgments of the interpreter—then it demonstrates the futility of attempts to govern according to a written constitution. And if genuinely interpretive decisionmaking is deemed impossible in an Article V case, the damage to the idea of government under a written constitution is even greater than in a case involving another constitutional provision. If the First Amendment is construed in a particular case to afford no more and no less protection of free speech than a particular judge believes the government ought to afford, the rest of us can still hope to rely on the rest of the Constitution in cases not
addressed by the decision. Indeed, if enough of us disagree strongly enough with the judge’s interpretation, we can amend the Constitution. The amending process is a link, however tenuous, to the idea of government by consent. But if the provision for amendment of the Constitution is itself inadequate for generating rules of decision in particular controversies, then we really are in trouble. The suspicion that certain provisions have been ruled in or out of the Constitution not because they did or did not comply with procedures on which the polity had agreed in advance, but simply because the tribunal of last resort thought their inclusion or exclusion might be a good thing, must be a corrosive one. One might, of course, retain one’s faith in the system because one trusted the courts, the legislature, the executive, the armed forces, or whomever else one expected to have the last word in future crises, to do the right thing. But any faith in the Constitution itself, in the usefulness of writing down the things that people in power must not do even when they really want to do them, would have been shown to be misplaced.

The Classical Model: Contemporaneous Consensus

For the first one hundred and fifty years of our nation’s existence, the interpretation of Article V was not thought to present any unusual problems in constitutional theory. This was not because there were no disputes—the Supreme Court decided a number of cases in which one party urged that an amendment had not been properly proposed or ratified and therefore was not part of the Constitution—but because it was thought possible for courts to resolve these disputes according to rules inherent in the text, history, and structure of Article V.

The organizing principle in the system of rules elaborated by the Court during this period was the idea of “contemporaneous consensus” among the participants in each stage of the amending process. As Alexander Hamilton put it in Federalist 85, the amending process was designed to ensure that “the will of the requisite number” should prevail. Writing at a time when there were thirteen States, Hamilton stated that the Constitution would be amended “whenever nine, or rather ten, States were united in the desire of a particular amendment.” The Constitution was regarded as a kind of contract, and gaps or ambiguities in the stated procedure for modifying it were to be resolved according to the principle that the manifest intentions of the parties—the States, either in their own capacity or as agents for the people—should not be defeated by construction.
In 1939, the Court abruptly departed from the classical model of the amending process. In Coleman v. Miller, opponents of the proposed Child Labor Amendment had challenged its ratification by the Kansas legislature. The opponents argued that the State's prior rejection of the amendment barred the ratification; that the amendment could no longer be ratified because too much time had elapsed since its proposal; and that the lieutenant governor had violated Article V by voting in the State senate to break a tie on the ratifying resolution. The Supreme Court refused to say what, if anything, Article V had to say about these questions, deciding instead that at least some issues of law arising in the amending process were "political questions" whose final decision was committed by the Constitution not to the courts but to Congress.

Coleman was an odd decision, not only because it broke sharply with precedent without any apparent basis in the text or history of the Constitution, but also because it gave absolute and unreviewable power to decide questions of law arising in the amending process to one of the institutions whose actions might be called into question. In a dispute between Congress and one or more State legislatures over whether an amendment had been properly proposed or ratified, Congress would be the judge in its own case. It is important to notice, however, what Coleman did not hold: in deciding that Congressional decisions about the amending process are not subject to judicial review, the Court did not imply that Article V allows Congress to decide anything it liked. Provided only that a law has any meaning at all, whether it is being violated and whether anyone will put an end to the violation are two separate questions. According to Coleman, Congress itself has an obligation to discern the meaning of Article V and to resolve disputes about the amending process accordingly.

Later decisions of the Supreme Court narrowing the "political question doctrine" have raised doubts about whether the Court would actually leave to Congress the final decision on questions of law arising in the amending process. The principal importance of Coleman, however, is that many commentators and legislators have misread its holding as a declaration that Article V gives Congress the substantive power to ignore the intentions of other participants in the amending process.

This "plenary congressional power model" of the amending process has been the principal competitor to the classical "consensus model." It was urged most forcefully in support of the congressional "extension" of the proposed Equal Rights Amendment. Although the extension was billed simply as an additional time beyond the original deadline during which States would be free to ratify the amendment, its most important effect was its attempt to extend the lives of the thirty-five prior State ratifications. The power of Congress to do this, without regard to the actual intentions of the State legislatures whose ratifications were at stake, was justified on the ground that the time limit was none of the States' business: no matter what the time limit or

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other conditions imposed by the resolution the legislators thought they were voting for, their resolution was actually valid for such time and under such conditions as Congress might later see fit to impose. 34

Similarly, it was argued that a State could rescind its decision to ratify an amendment, provided that a later Congress chose to give effect to the rescission, but that Congress has absolute discretionary power to refuse to give it any effect. 35 In essence, the "plenary power model" substitutes for the two-step amending process provided by Article V—under which amendments are proposed by Congress or a convention and then ratified by three-fourths of the State legislatures—a three-step process consisting of proposal, ratification, and final "acceptance" by Congress. And since the model gives Congress the power not only to "reject" amendments that actually command the support of three-fourths of the State legislatures, but also to "accept" amendments that do not command such support, the third step is the only one that really matters. 36

The Formalist Model: Certainty and Sacramental Acts

The controversy over extension and rescission of the Equal Rights Amendment gave new life to yet a third model of the amending process, which I have elsewhere called the "sacramental act model" but which should perhaps be designated less pejoratively as the "formalist model." Proponents of this model argue that the State rescissions of the ERA were forbidden and the congressional extension permitted not because Congress has absolute power to do anything it pleases, but because a State that ratifies an amendment thereby exhausts the only power given to it by Article V. 37 In order to decide whether an amendment has become part of the Constitution, therefore, a court requires only one statistic: how many State resolutions of ratification were ever passed. It should avoid any further questions, such as whether the amendment commands or has ever commanded the simultaneous support of three-fourths of the legislatures, or whether any States intended their resolutions to be valid for a limited time or subject to other conditions that have not been met.

Although the formalist model is superior to the plenary congressional power model in that it does not posit an imaginary third stage in the amending process, it would have the significant drawback of allowing amendments to become part of the Constitution that are in fact opposed by some or all of the State legislatures whose votes are being counted. Indeed, it would theoretically allow an amendment to become law that was actively opposed by every State legislature but one. This model has nevertheless been ably defended by Professor Walter Dellinger, who contends that controversies over the amending process should be resolved by reference not to "policy considerations" but to "clear rules." He argues that defenders of the classical model of the amending process have been wrong in paying "principal attention" to:

- resolving disputes by reference to a policy thought to be immanent in Article V: the ascertainment of a "contemporary consensus" in favor of an amendment. As Professor Rees put it: "The Supreme Court has recognized that consensus, and not a series of formalities, is the essence of the amending process...." I would suggest that the Court has it exactly backwards: Article V is in essence a series of formalities, and for very good reason. Attention to those formalities is more likely to provide clear answers than a search for the result that best advances an imputed "policy" of "contemporary consensus."
Professor Dellinger's criticism of the consensus model fails to distinguish between two very different ways in which one might refer to "policy" in interpreting a document. The consensus model does not allow courts or other decision-makers to substitute their own judgment of whether "America really wants this amendment" for an inquiry into whether it has in fact been proposed and ratified in the way Article V requires. Rather, the notion of contempo­ran­eous consensus becomes important only to resolve ambiguities about what Article V requires, and then only insofar as it seems to suggest a way to resolve such ambiguities in accordance with the original understanding and the deep structure of Article V itself.

There is, moreover, simply no way to get around the need to resolve ambiguities by reference to some policy or policies. Professor Dellinger himself concedes, for instance, that the text of Article V standing alone provides no clear answer to the rescission question, but he suggests an answer on the ground that it will best serve the policy of "certainty." Yet the consensus model affords answers about rescission and related questions that are just as clear and certain as the answer provided by the formalist model—and which have the additional advantage or consistency with principles that have been applied almost universally to determine whether persons and institutions with legal power to bind themselves have exercised that power.

The consensus model of the constitutional amending process interprets Article V in treating the participants at each stage—application for a convention, proposal of amendments, and ratification—as parties sitting around a bargaining table. Where Article V really does impose clear limitations on the freedom of any of the parties (as, for instance, when it requires that no amendment shall be adopted depriving any State of its equal representation in the Senate without its consent) these limits must be observed. Otherwise, however, each party is presumed to be free to grant or withhold its consent to any proposition as it sees fit.

Where the text and structure of the Constitution are ambiguous and history provides no clear answer, there is no more reason to imply restrictions on the freedom of participants in the amending process than on participants in any other process. Thus in the law of nations as in the law of contracts, parties generally retain the freedom to withdraw their consent to agreements until the other parties (or as many as are necessary to make the agreement legally binding) have consented. Similarly, in legislative assemblies an extension of the time for voting includes the opportunity to change one's vote from "aye" to "nay," not just the other way around.

Any system of rules will produce marginal cases in which reasonable people can differ. There is no evidence that interpreting Article V according to the venerable and sensible principle of consensus generates any more such cases than any other system. If, moreover, this writer is right in believing that Article V was designed around the organizing principle of consensus among contracting parties, then any attempt to produce "certainty" by imposing a contrary principle is doomed to failure; for the power to impose a result will not carry with it a power to stem the flow of persuasive arguments springing from the text, history, and internal logic of Article V itself. The winners in any such controversy—in which the losers regarded not just the outcome but the philosophical foundation of the decision as inconsistent with principles inherent in Article V—would have problems similar to those of royal usurpers in nations where the Crown rather than the Constitution is the ultimate symbol of authority and unity. Worse problems, really, because principles die harder than kings.

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41See U.S. Const. art. V, reprinted in note 1 supra.
III. Can the States Require a Limited Convention?

The consensus model of the amending process provides a framework for principled analysis of a particular controversy only after one threshold question has been answered: who is entitled to sit at the bargaining table? The presumption that each participant in the amending process may give or withhold its consent to any proposition on whatever terms it chooses cannot be applied until the participants are identified.

In the decision about whether to call a constitutional convention, the only participants contemplated by Article V are State legislatures. If two-thirds of the legislatures (thirty-four of the present fifty States) apply for a convention, Congress "shall" call one.44 If, on the other hand, thirty-three State legislatures should join with both houses of Congress, the President, and the Supreme Court to call a convention, they would be conducting a coup d'etat rather than exercising power granted by Article V. As a logical consequence of the absolute power of thirty-four State legislatures to determine that a convention shall be called—and perhaps more importantly of seventeen State legislatures to determine that it shall not—the legislatures should be presumed free to grant or withhold their consent on whatever terms they choose. The presumption is rebuttable, of course: all constitutional power is subject to the limitation that it not be exercised subject to unconstitutional conditions.45 But a condition should not be regarded as unconstitutional in the absence of a prohibition expressed or strongly implied by the Constitution itself.

The burden of proof, in other words, is on those who would limit the power of the State legislatures. In the absence of persuasive evidence of some constitutional limitation, thirty-four legislatures are free to agree that there will be a convention on the condition that its deliberations be limited to a particular subject or a particular draft amendment; or on the condition that Congress does not propose such an amendment by a certain date; or on the condition that the ballroom of the Hyatt-Regency O'Hare can be rented for the occasion; or on the condition that Dapple Grey wins the Kentucky Derby. Constitutional power may not be exercised subject to unconstitutional conditions, but showing that a condition is extremely foolish is not the same thing as showing that it is unconstitutional.

It has been argued that Article V does expressly limit the power of the States by referring to a convention for "proposing" amendments.46 If thirty-four legislatures specify that the convention is limited only to voting Yes or No on particular language specified in the convention applications, the argument goes, the legislatures and not the convention will have "proposed" the amendment. This argument rests on the assumption that nobody can be proposed an amendment except the person or institution that first thought of it or brought it into being. Especially in an institutional context such as that contemplated by Article V, this assumption is unwarranted. Proposal is the word the Framers of the Constitution used to signify the process of choosing which amendments would be sent to the States for their approval or disapproval. In an early draft of Article V, for instance, Congress seems to have been intended to "propose" whatever amendments three-fourths of the State legislatures sent to it for the purpose.47 So the use of the

44U.S. Const. art. V, reprinted in note 1 supra.
45See, e.g., Perry v. Sinderman, 408 U.S. 593, 597 (1972): "[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."); Hale, Constitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935).
46See Black, Constitutional Convention, supra note 2, at 628-29.
47"The Congress, whenever two thirds of both shall deem necessary, or on the application of the legislatures of two thirds of the Legislatures of the several States.
word propose to describe the function of the convention should not be construed as a limitation on any power the State legislatures would otherwise have to put conditions on their applications for a convention.

A related argument is that if a convention is deprived of its deliberative function—by being limited either to particular language or to too narrow a subject matter—it is not really a "convention." One answer to this is that any institution that must decide whether to propose for ratification a constitutional amendment on a topic such as the balanced budget (or abortion, or school prayer, or equal rights for men and women) has got a lot of deliberating to do, even if the words of the amendment have already been written down. This observation is bolstered by the express provision of Article V for State conventions as an alternative means of ratifying amendments after they have been proposed. This suggests that a body charged

propose amendments to this Constitution. . . . " 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559, 629 (Farrand ed. 1937) [hereinafter cited as Farrand]. This provision was submitted by James Madison and adopted by the Convention on September 10, 1787, and then revised in certain unimportant respects by the Committee on Style. It was this draft of Article V that gave rise to the September 15 debate and revisions discussed in text and notes 57-67 infra. Whatever the language and the delegates' reactions to it do or do not show, they would seem to be conclusive evidence that the word "propose" could be used to describe a process of deciding whether or not to submit an amendment by the States an amendment or amendments whose text or subject matter was chosen by somebody other than the "proposing" institution.

"See 1979 Hearings, supra note 2, at 182-83 (testimony of Charles Black): "[A]t the least, an application for the assembling of a national constitutional convention for the purpose of proposing a textually set out or remunerately described amendment is a mere travesty of grown-up constitutionalism. Assembling a national convention from Maine, Alaska, Florida, and Hawaii, and reserving the rooms and getting the requisite three members, one from each of the major faiths, deciding who's going to get the gavel, or which pieces of it, after ever, people coming in to perform such a ministerial ciously channeled function, is a bit of foolish Kirsten that no one can think the Constitution calls

reminds me of Henry VIII's conges d'elire, which Cathedral chapters leave to elect a bishop, namely, the bishop designated by Henry VIII."

U.S. Const. art. V, reprinted in note 1 supra.

only with an up-or-down vote is sufficiently deliberative to be a "convention" within the meaning of Article V.

It is not quite fair, however, to deal with these arguments in isolation, for they are closely related to a more complex set of textual and historical arguments about the nature of the constitutional convention process. Many of these arguments have been made eloquently and incisively by Professor Black. Their common thread—and in my judgment their central flaw—is that they treat the Article V provision enabling State legislatures to call a convention as if it were a direct grant of power to the convention itself.

The case against the constitutionality of limited conventions originates with a syntactical ambiguity in Article V: upon application of two-thirds of the State legislatures, Congress is bound to call "a Convention for proposing amendments." The use of the word "amendments" in the plural, and its placement within a clause that modifies the word "Convention," makes possible an inference that the convention must have the sole power, unfettered by limitations imposed in its charter, to choose which amendments to propose. Indeed, one might even make an argument—although Professor Black does not—that a convention would be bound to propose more than one amendment, since the text does not speak of "a convention for proposing an amendment." But Article V also provides that Congress may "propose Amendments" on its own initiative, and no one has suggested that Congress must propose more than one amendment at a time.

"See Black, Amending the Constitution, supra note 2; Black, Constitutional Convention, supra note 2; Black, A Threatened Disaster, supra note 2; 1979 Hearings, supra note 2, at 177-96 (testimony of Charles Black).

"See generally the discussion in text and notes 52-56 infra. See also 1979 Hearings, supra note 2, at 235-56 (testimony of Walter Dellinger) ("The position of the American Bar Association . . . proceeds largely from the underlying premise that what we are talking about is what they call the State mode of proposing constitutional amendments . . . . That is the fundamental error. There is no 'State mode' for proposing amendments to the Constitution."). But see note 29 supra, text and notes 52-84 infra.

"U.S. Const. art. V, reprinted in note 1 supra.
Professor Black does, however, find the phrase "a convention for proposing Amendments" to be conclusive of the question of the power of the States to limit a convention. He suggests that

[t]he best approach to ascertaining the plain meaning of these words is to ask what they would mean, without modification, in the procedural context in which they are intended to be used. Lawyers sometimes "track the statute," phrasing allegations or prayers in the exact statutory language. Suppose a state legislature, "tracking" Article V, were to transmit to Congress a paper saying: "Application is hereby made that Congress call a convention for proposing amendments...." [T]he words used would mean "a general, unlimited convention to 'propose' such amendments as it thinks proper."53

Professor Black goes on to suggest that those of us who think a limited convention would be constitutional are trying to squeeze into this part of Article V an additional meaning beyond its "plain" meaning. The States can obviously call an unlimited convention, since this is what they would do if they presented applications tracking the language of Article V. In response to the argument that this "greater power" suggests a "lesser power" to call a limited convention, Black points out that "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."54

Since applications for a limited convention would call for something different in kind from the unlimited convention Professor Black believes to be authorized by Article V, he concludes that Congress should call either a limited nor an unlimited convention when presented with limited applications by two-thirds of the States: "Thirty-four times zero is zero."55

Professor Black's argument from the text is highly persuasive, in part because he has the poet's gift for causing the reader to share his perspective. In this case, I think the perspective is the wrong one. Outside the special context Professor Black has created, in which we are asked what the key words would mean if they were contained in an application for a convention, the argument does not work. In a document designed to create (and thus necessarily to define) a convention, "a convention for proposing Amendments" would mean an unlimited convention; but this is precisely because such a document would clearly be a grant of power to the convention. In the absence of limiting language, the grantee/convention would receive all the right, title and interest the grantor/States could convey. But Article V is not a book of legal forms; and it is not at all clear that the words in question were intended as a grant of power to the convention. If, as this writer shall argue, the convention component of Article V is essentially a grant of power to the States to initiate the amending process, then the phrase "a convention for proposing Amendments" admits easily of the construction "such amendments as the States wish the convention to consider."

The marriage analogy also breaks down when considered in context. Notice that at the time the States apply for it, the convention has no rights, duties or powers at all; it is a nonentity, and will only come into existence at the discretion of two-thirds of the State legislatures. Suppose, then, that the United States Constitution began by utterly denying the freedom to marry. Suppose that the Constitution further provided that upon the Application of a person's parents, Congress shall issue him a marriage certificate. Is it self-evident that this provision—which seems to give my parents absolute discretion over whether I may marry—in fact gives

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53Black, Constitutional Convention, supra note 2, at 628-29.
54Id. at 630.
55Black, Amending the Constitution, supra note 2, at 198. See also Black, Constitutional Convention, supra note 2, at 631.
them the right to deny their permission for whatever reasons they choose, other than on the basis of whom I shall marry? If my parents ask Congress to give me a certificate that will enable me to marry Jane Smith, should Congress do so? Or should Congress give me a certificate that will enable me to marry anyone I choose, knowing that this is not my parents’ wish? Professor Black’s analogy would suggest that congress should simply ignore my parents’ limited application: One times zero is zero.

One might even suggest a different kind of analogy between marriage and the process of applying for a constitutional convention. 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 that you commit yourself in advance to marry one or more persons selected by somebody else on the day of the ceremony. This is how Professor Black’s argument must look to a State legislator who very much wants a particular constitutional amendment, but who opposes some of the amendments that he fears might be proposed by an unlimited convention and ratified by his fellow legislators in three-fourths of the States. This writer is persuaded that the text neither requires nor clearly suggests the imposition of such a Hobson’s choice on State legislators. The history of Article V, moreover, suggests exactly the contrary. 56

Professor Black observes that “the most critical juncture” in the history of Article V occurred on September 15, 1787. 57 It was on that day that the final draft of the pertinent language was adopted, and the syntactical ambiguity created that has given rise to the controversy over limited conventions.

The penultimate draft was not ambiguous. It provided that “Congress . . . on the application of two thirds of the legislatures of the several States shall propose amendments. . . .” It seems crystal clear that this provision referred to such particular amendments as were desired by the States. We 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. 59 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.

Two delegates, however, objected to the proposal, and it was modified to include the present language. The record of the proceedings is as follows:

Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.

Col. Mason thought the plan of amending the Constitution exceptional 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

56 In addition to the discussion in the text below, see the discussions of the pre-enactment history of Article V in Brickfield, supra note 9, at 4–10; Ervin, supra note 2, at 880–85; and Van Alstyne, Letter, supra note 2. But see Dellinger, The Recurring Question of the “Limited” Constitution Convention, 88 Yale L.J. 1623 (1979).

Although Professor Dellinger surveys the history and takes a position similar to Professor Black’s, this writer takes the view that the evidence he adduces provides less support for the inferences he draws than for the position taken in this essay. See text & notes 72–84, supra.

57 Black, Constitutional Convention, supra note 2, at

59 The text of this draft is reprinted in pertinent part in note 47 supra.

60 See note 47 supra.

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 2/3 of the States.

Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c which in Constitutional regulations ought to be as much as possible avoided.

The motion of Mr. Gover. Morris and Mr. Gerry was agreed to. . .

Professor Black suggests that since "Mason, broadly, thought the amendment was too difficult under the article as it stood," and "Sherman thought, broadly, that it was too easy," it is unclear to what extent the new language was designed to meet each of these two roughly opposite objections. So he feels that this piece of legislative history is at worst a wash, and that at best it strengthens his case, since conventions and not State legislatures were thought to represent "the people." Yet the change seems in no way calculated to meet Sherman's objection, which was to the substantive power that was to be possessed by three-fourths of the States, not to the procedures by which they were to exercise this power.

Given a determination on the part of three-fourths of the States to deny a certain State its equal suffrage in the Senate, a convention dominated by these same States would not obstruct the success of the endeavor. Indeed, Sherman himself renewed his objection to Article V as amended by the inclusion of the convention language, and secured the explicit provision that no State be denied its equal suffrage in the Senate.

The Gerry/Morris amendment seems to have been calculated not to meet Sherman's concern, but to respond to Mason's desire that there be a method of amendment that did not "depend . . . on Congress." As Madison pointed out at the time, it was not a very good way to deal with Mason's concern, since Congress can just as easily (perhaps even more easily) fail to perform a ministerial duty to call a convention as a ministerial duty to propose certain amendments. But there is absolutely no evidence that anybody intended the change to deprive the State legislatures of a power that they were clearly to have under the penultimate draft: the power to initiate the proposal of particular amendments. The syntactical ambiguity in the final draft of Article V—the whole basis for the case against the constitutionality of limited conventions—seems to have been an accident.

What the people who ratified the Constitution believed it to mean, moreover, is at least as important as what its Framers intended. In The Federalist No. 43, James

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61Black, Constitutional Convention, supra note 2, at 635 (emphasis in the original).
62See id.
63See 2 Farrand, supra note 47, at 629, quoted in the text accompanying note 60, supra.
64Id. at 630.
65See id. at 629, quoted in the text accompanying note 60, supra.
66See 2 Farrand, supra note 46, at 629. In his very criticism of the convention method as a means of responding to Mason's concern that Congress might thwart the will of the State legislatures, Madison seems to acknowledge that it was to this concern that the amendment under consideration was addressed. If Madison had believed that the Gerry-Morris amendment was even partly designed to meet Sherman's objection to the powers that might be exercised by three-fourths of the States, then his apparent confusion about how "Congress" could be any more "bound" by the new language than by the old language would have been misplaced.
67See text & notes 60–64 supra. It has been suggested that the substitution of a convention for transmission by Congress of State legislative resolutions is rather evidence of an intention to "still the fears of those who thought that state legislatures might have power to dictate the terms of proposed amendments on their own." Gunther, supra note 2, at 16; see Delling, supra note 2, at 1628–30. This contention is discussed in the text at notes 73–84 infra.
Madison urged ratification of the Constitution on the ground that Article V "equally enables the General and the State Governments to originate the amendment of errors as they may be pointed out by the experience on one side or the other." Professor Black finds this observation fully consistent with his view that limited conventions are unconstitutional, since Madison "simply points out that amendments 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.

Similarly, Professor Black discounts the importance of Alexander Hamilton's statement in The Federalist No. 85 about the facility with which the States might secure amendments:

Every amendment to the constitution . . . 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 [three-fourths of the] States, were united in the desire of a particular amendment, that amendment must infallibly take place.

Professor Black points out that even amendments proposed by a general convention "must go through the ratification process separately, and hence [be] 'brought for-

1THE FEDERALIST No. 43 (Madison).
2Black, Amending the Constitution, supra note 2, at 197.
3THE FEDERALIST No. 85 (Hamilton).

ward singly.' But Black seems to overlook the practical difference between a general convention—whose members, like the members of Congress, must almost certainly be chosen for their views on a variety of issues rather than for their position for or against a particular amendment—and a limited convention whose sole purpose was to enable "the will of the requisite number" of State legislatures on a particular matter to "bring the matter to a decisive issue." Hamilton was urging New York to ratify the Constitution on the ground that future amendments could be obtained without the "necessity for management or compromise in relation to any other point" that characterized the ratification of the original Constitution, and that would characterize any general convention.

Even if one ultimately rejects Professor Black's view that the nature of the convention contemplated by Article V is incompatible with the notion that the legislatures can call for whatever sort of convention they wish, the dispute itself casts doubt on the idea that right answers to questions arising in the interpretation of Article V can be found by reference to the principle of consensus. For Professor Black's arguments are couched in terms quite congenial to the idea that the process should be understood as a means of discerning the real intentions of the participants rather than as a random set of formalities. The differences between his position and the author's are generated almost entirely by our different choices of initial outlook: this writer starts with the premise that the power granted to the State legislatures is unlimited unless it can be shown to have been limited, whereas Black begins with the idea that it is the convention itself whose power is unlimited in the absence of evidence to the contrary. Any model of the amending process within which serious disagreements on important questions cannot be resolved except by essentially aesthetic choices about premises is quite vulnerable.

7Black, Amending the Constitution, supra note 2, at 197.
8See sources cited in notes 50 and 51 supra.
to Professor Dellinger’s indictment that it provides no clear answers.

Aside from the historical evidence that the convention method was in fact intended as a grant of power to the States, however, there is a principle implicit in the idea of contracting by which to resolve disputes (or at least to allocate the burden of proof) about the respective powers of participants in different stages of a process. This principle is that each party takes the proposition as he finds it, subject to whatever limitations have already been imposed by other parties. Professor Black is quite right, for instance, to argue that if the Constitution permits only unlimited conventions, then Congress should simply disregard State applications for a limited convention rather than treat them as applications for an unlimited convention. While parties sometimes have the power to limit the legal effects of propositions to which other parties have already consented, they almost never have the power to enlarge or enhance the effects of such propositions. In a multistage process, this means that earlier parties will seem to have more power than later ones; but this is an illusion, for the true effect of the rule is to ensure that no proposition emerges from the process unless all parties have really consented to it. It does not follow, of course, that evidence suggesting Article V forbids limited conventions should be disregarded; but it does follow that it is not necessary to posit such a prohibition in order to resolve a contradiction between the presumptive freedom of the legislatures and that of the convention. If the ground rules do not provide to the contrary, each party whose consent is necessary to the outcome has the power to define the propositions that may be addressed by later parties.

While Professor Black’s case for the requirement that conventions be unlimited is perhaps the most well known, a somewhat different case has been made by Professor Dellinger. He suggests that “[t]wo themes...emerge from the debates” at the Philadelphia Convention of 1787.73 The first theme is that “Congress should not have exclusive power to propose amendments.”74 The second theme is that “state legislatures should not be able to propose and ratify amendments that enhance their power at the expense of the national government.”75 Allowing State legislatures to limit conventions is consistent with the first theme but not with the second; it would therefore “short-circuit the carefully structured division of authority between state and national interests.”76

If Professor Dellinger is right to conclude that one of the two major concerns of the framers of Article V was to protect the Federal government from amendments devised by the States, then he has mustered powerful support indeed for his view that the States should exercise minimal control over the convention. But the sole evidence he cites for this proposition—which then becomes the major premise of his argument—is a single statement by Alexander Hamilton.77

Hamilton objected to an early draft of

73Dellinger, supra note 2, at 1630.

74Id.

75Id.

76Id. at 1632. Although Professor Dellinger cites a statement by Alexander Hamilton as evidence of a general reluctance by the Framers to give the States too much power over the amending process (see text & notes 77–82 infra), the “careful structuring” to which he alludes turns out to have taken place at the very moment that was decisive for Professor Black—the adoption on September of the Gerry-Morris amendment, discussed in text & notes 57–67 supra. In his initial discussion of this amendment, Professor Dellinger suggests that it “might be seen” as responsive to Roger Sherman’s desire to protect a minority of States from the majority, “for it provided that a national convention, rather than the states, would formulate proposed amendments.” Dellinger, supra note 2, at 163 (emphasis added); but see text & notes 61–64, supra. Similarly, he suggests that Mason’s objection to the Madison draft “may have been based on Mason’s belief in the practical necessity of having a single deliberative body undertake the consultation, debate, drafting, compromise, and revision necessary to produce an amendment.” Dellinger, supra, at 1629–30 (emphasis added). Two pages later, however, the speculative force has vanished. Insulating the amendment process from the control of the States is by this point said quite emphatically to have been “the second aim of the Philadelphia Convention.” Id. at 1632.

77Dellinger, supra note 2, at 1625: “Set against this concern [objections to congressional control of the amending process] was the threat, perceived by Hamilton, that the states would seek amendment to enlarge
Article V that would have entirely excluded Congress from the amending process. James Madison moved to meet this concern by providing for two methods of proposing amendments: Congress would propose amendments whenever they were deemed necessary either by two-thirds of both houses of Congress or by two-thirds of the State legislatures. Hamilton seconded the motion—apparently disagreeing with Professor Dellinger’s belief that to allow the States to dictate the exact terms of some proposed amendments would be inconsistent with his concern for the integrity of the National government—and it was passed by nine votes to one. This was the first and last that was heard of Hamilton’s concern. This is awfully thin evidence from which to identify one of their power at the expense of the federal government.”

Professor Dellinger cites the following statement by Hamilton: “It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. The mode proposed [i.e., the initiation of the amending process only upon request of two-thirds of the State legislatures] was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention—There could be no danger in giving this power, as the people would finally decide in the case.” 2 Farrand, supra note 47, at 558.

The draft to which Hamilton objected provided: “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the U.S. shall call a Convention for that purpose.” 2 Farrand, supra note 47, at 557. Elbridge Gerry objected to the provision on the somewhat different ground that it would enable two-thirds of the States to do anything they pleased to the other States, even to “subvert the State-Constitutions altogether.” Id. at 557–58.

Farrand, supra note 47, at 559. The text of this provision is reprinted in pertinent part in note 47 supra.

Farrand, supra note 47, at 559.

Although Professor Dellinger treats the views of Roger Sherman, expressed during the debate that led to the Gerry-Morris amendment, as though they also might have proceeded from a desire for a more “nationalist” amending process, the author has tried to show that Sherman’s concern—to ensure that the amending process could not be used to impair the prerogatives of voices that might find themselves in the minority at some future time—was very nearly the opposite of the nationalist concern expressed by Hamilton and taken “two themes” in a “carefully structured division of authority.”

Everything in the legislative history of Article V, even including the remark by Hamilton that Professor Dellinger believes to be one of the foundation stones of the amending process, is consistent with Madison’s later assurance that the scheme “equally enables” the State and Federal governments to originate amendments. Far by Dellinger to be one of the two “themes” of the convention’s deliberations on Article V. See text & notes 57–67 supra. Indeed, Hamilton himself regarded the two concerns as quite different. Elbridge Gerry, objecting to the early draft of Article V reprinted in note 78 supra, had expressed a concern identical to the one later raised by Sherman: that it would not do to let two-thirds of the States do anything they wanted to the remaining States. Hamilton seconded Gerry’s motion to reconsider the draft, “but he said with a different view from Mr. Gerry—He did not object to the consequences stated by Mr. Gerry—There was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State—” 2 Farrand, supra note 47, at 558.

Dellinger, supra note 2, at 1630, 1632.

THE FEDERALIST No. 43 (Madison), discussed in text at notes 68–69 supra. The debates in the State ratifying conventions also suggest that the ratifiers would have taken strong issue with Professor Dellinger’s statement that “there is no ‘State Mode’ for proposing amendments to the Constitution.” 1979 Hearings, supra note 2, at 255–56 (testimony of Walter Dellinger), reprinted in note 51 supra. See, e.g., 2 Elliot, supra note 29, at 124 (Samuel Adams, Massachusetts) (States should insist on a Bill of Rights as a condition on their ratification of the Constitution, since once the Constitution is in force “where will you find nine states to propose, and the legislatures of nine states to agree to, the introduction of amendments?”); id. at 175 (John Hancock, Massachusetts) (“I give my assent to the Constitution, in full confidence that the amendments proposed will soon become a part of the system. These amendments being in no wise local, but calculated to give security and ease alike to all the states, I think that all will agree to them.”); 3 id. at 49 (Patrick Henry, Virginia) (“Two thirds of the Congress, or of the state legislatures, are necessary even to propose amendments.”); id. at 195 (Edmund Randolph, Virginia) (“[T]here is a mode in the Constitution itself to procure amendments, not by reference to the people, but by the interposition of the state legislatures. . . .”); id. at 629 (James Madison, Virginia) (“They cannot but see how easy it will be to obtain subsequent amendments. They can be proposed when the legislatures of two thirds of the states shall make application for that purpose; and the legislatures of three fourths of the states, or conventions in the same, can fix the amendments so proposed.”).
from being a "carefully structured" attempt to transform this symmetry into lopsidedness, the injection of a convention into the State method was a measure taken in haste and almost certainly intended to secure (not eliminate) the power of State legislatures to initiate amendments.84

Some supporters of the legislatures' right to call a limited convention, perhaps persuaded that a convention is not really a convention unless it has the freedom to consider a variety of proposals or perhaps just striving for moderation in all things, are willing to concede that the States cannot limit the convention to a particular draft amendment.85 This is a devastating concession, for it cuts the limited convention argument off from its logical and historical foundations, leaving its supporters to argue in essence that a "broadly" limited convention should be regarded as constitutional because it is a good idea.

Moreover, this concession gives rise to a new argument against the limited convention position: Professor Dellinger argues that since "state applications would vary in both their description of the problem giving rise to the applications, and their suggested revisions,"86 the major role in defining the subject matter of a convention would necessarily fall upon Congress. But this power to make substantive decisions would be inconsistent with the purely ministerial role that Article V assigns to Congress. So Professor Dellinger argues that the only way out of the dilemma is for Congress to declare "that applications are valid if and only if applying states understand that the convention will be free to set its own limits."87

Consistent with his formalist view of the amending process, Professor Dellinger appears willing to interpret limited convention applications quite liberally, assuming that an application for a convention "for the purpose of" proposing a particular amend-

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84See text & notes 57-67 supra.
85See, e.g., 1979 Hearings, supra note 2, at 51 (testimony of John Feerick, representing the American Bar Association); sources cited in note 14, supra.
86Dellinger, supra note 2, at 1633-34.
87Id. at 1636.
Some observers, including Professor Gerald Gunther and Phyllis Schlafly, have suggested that arguments about whether Article V gives the States or Congress the legal right to limit a convention miss the main point. Once assembled, a national constitutional convention might attain a stature at least equal to that of Congress. 91 Suppose it decided to disregard the limitations imposed by its charter, finding its legitimacy not in Article V but in a general right of the people to reorganize their government even in contravention of established procedures? The 1787 convention itself was a "runaway" convention: charged with considering "improvements" in the Articles of Confederation on specified subjects, the Framers proposed instead a whole new form of government. 92 Not even the necessity for State ratification of the convention's proposals is reassuring to everyone. Many civil libertarians distrust State legislatures; some conservatives, on the other hand, fear that Congress might designate State conventions rather than legislatures as the ratifying bodies for proposals such as the Equal Rights Amendment if they were to emerge from a National convention. 93

Although it is not the purpose of this essay to address the question whether any particular constitutional convention is a good idea, it seems hard to deny that these practical arguments against a convention have some force. In deciding whether to support a convention limited to considering an amendment you support, it would be foolhardy not to factor in the risk that the convention will violate its charter and propose an amendment you oppose.

A decision that no conceivable amendment would be worth the risks inherent in a limited convention, on the other hand, would in my judgment represent a real loss to the nation. We would lose the closest thing the Constitution provides to the opportunity for a national referendum. Assuming that it was understood that the convention would respect its charter, the election of delegates would differ from elections for Congress or the State legislature (and from elections for delegates to a general convention) in that everyone could be a "one issue voter" with an altogether clear conscience. In choosing delegates to a convention on a balanced budget amendment, for instance, we would be free to choose the people we thought would most effectively represent our views on that question alone, without the need to balance this consideration against the candidates' likely votes on abortion, Nicaragua, and saving the whales, or against the possibility that our uncles and nephews might lose their patronage jobs. We cannot afford to have many conventions, and perhaps there are not many questions on which the people should bypass the usual electoral process. But if there are any such questions, and if the idea of a limited convention must be dismissed forever as a constitutional or practical impossibility, then we should mourn its passing.

IV. "Matters of Detail" and the Role of Congress.

Whether the States can initiate a limited convention is only the first in a series of provocative questions raised by the Constitutional Convention Clause of Article V.
Some of these questions, or at least the general categories into which they fall, were stated by Madison at the time the convention provision was first proposed: “How was a Convention to be formed? By what rule decide? What the force of its acts?” Moreover, the failure of the text of Article V to provide answers to these questions gives rise to the possibility that Congress—the one body the Framers apparently wished to exclude from any important role in the convention process—might have such a role to play after all.

As a practical matter it is quite tempting to concede to Congress a broad power to legislate on procedural questions arising out of the convention process. Ironically, the temptation is perhaps even stronger for defenders of the limited convention process than for its detractors, because the recognition of broad congressional power seems an easy way to dispose in one stroke of a number of questions—such as whether the President and State governors have any role in the convention process, where the convention will meet, how the delegates will be chosen, and how many delegates’ votes will be necessary to propose an amendment—whose resolution might otherwise seem so difficult as to render a convention a practical impossibility. Congressional power to supervise the convention process might also serve as a safeguard against the possibility of a “runaway convention,” and thus as an answer to arguments that the convention method is too dangerous to use.

The argument that Congress can provide binding answers to any questions raised by the convention clause of Article V is bolstered, moreover, by the virtually unanimous recognition of broad congressional power to legislate on “matters of detail” arising in the non-convention method of amendment. At first the Supreme Court regarded such power as an incident of Congress’s power to propose amendments and to designate the method of ratification (either by State conventions or State legislatures). Since Coleman v. Miller, commentators have tended to regard congressional power over the amending process not primarily as a substantive power granted by the Constitution but as a practical consequence of the likelihood that the courts will refrain from “second-guessing” the constitutionality of any rules Congress might make. There has also been a tendency to confuse these two doctrines treating Congress’ power to prescribe matters of detail as if it were substantively unlimited rather than merely “non-justiciable.” This tendency culminated with the assertion by some supporters of the Equal Rights Amendment extension that the Constitution grants Congress “plenary power” over every stage of the amending process.

The notion of plenary congressional power even over the non-convention method of amendment, however, is highly debatable. And it is even more doubtful that doctrines and precedents generated in controversies over the non-convention method should automatically be applied to the convention method. The central purpose of the convention method was to make it possible to amend the constitution over the opposition of Congress; this purpose would be defeated by the concession to Congress of absolute power to regulate, which is effectively the power to destroy.

This is not to say that Congress may not in some circumstances prescribe some details of the convention process, either by general legislation or in the course of calling a particular convention. It does, however, sus-

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1617; 1967 Hearings, supra note 2, at 61 (testimony of Alexander Bickel); id. at 238 (memorandum of Robert McCloskey).
97 See Dillon v. Gloss, 256 U.S. 368, 376 (1921), quoted in note 26, supra.
98 See, e.g., L. Orfield, AMENDING THE FEDERAL CONSTITUTION 43-44 (1942); Ginsburg, supra note 32; Harvard Note, supra note 2, at 1617-18 & n.31.
99 See, e.g., ERA Hearings, supra note 32, at 39-59 (testimony of Laurence Tribe).
100 See generally Rees, supra note 29.
101 See materials cited in note 95 supra.
suggest that this is an area in which there is an unusually strong need for principled definition of the limits of congressional power. The principle that best describes these limits is that Congress can make rules calculated to facilitate, but not to obstruct, the expression of a consensus among the participants in each stage of the convention process. This statement also serves, it would seem, to define the scope of congressional power over the non-convention method of amendment—but with the important difference that in the non-convention process the Constitution prescribes Congress itself as one of the participants in the consensus. This important difference in the source and nature of congressional power over the convention and non-convention methods suggests different standards for evaluating the limits of such power over the two methods.

The constitutional jurisprudence of Article V has thus far been written exclusively in cases involving amendments proposed by Congress rather than by a convention, and the only congressional regulation of the amending process ever upheld by the Supreme Court—the time limit for ratification of the Eighteenth Amendment—had the effect of making ratification of the amendment more difficult than it would have been in the absence of the rule. The power of Congress to impose such conditions on amendments proposed by the non-convention method can be seen simply as a power to limit the legal effects of its own proposals. But when Congress imposes conditions on the convention method it is limiting somebody else’s proposals rather than its own; and it is acting in an area where its powers (to call a convention that has been requested by the States, and to designate one of the two methods by which the States may ratify) do not include a right to grant or withhold consent to the amendment itself. Thus when Congress attempts to set the rules by which its own proposals may or may not become part of the Constitution, no rule should be regarded as constitutionally suspect unless it makes amendment easier than it would be in the absence of the rule. In the convention method, on the other hand, rules imposed by Congress should be regarded as constitutionally suspect primarily when they would make amendment more difficult.

The extent of congressional “housekeeping” power over the convention process is, in this writer’s view, somewhat different for each of the three stages of the process. Rules for the tabulation of State applications for a convention must be genuinely calculated to determine whether two-thirds of the State legislatures want a convention (and what kind of a convention they want). Rules for the convention itself must be calculated to allow the convention to express its own will within the limits imposed by its charter and by Article V. Finally, rules for the ratification process should be calculated to detect rather than to obstruct the expression of a consensus among three-fourths of the State ratifying bodies.

Provided that Congress observes these limits, it can choose either to make these rules when it considers particular amendments or to enact legislation that will operate prospectively and generally for all suggested amendments. Professor Black argues persuasively that the power to legislate prospectively is at best illusory and at worst unconstitutional, since “no Congress can bind its successors.” It is certainly true that neither a previous Congress nor anybody else can bind a particular member of Congress to vote for anything he thinks unconstitutional or unwise. But prospective legislation can accomplish a number of things that do not require affirmative votes by future Congresses. It can create a legal regime that

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102See Part II supra, text & notes 25-29, 38-43.
103See the cases discussed in note 218 infra, especially Dillon v. Gloss, 256 U.S. 368 (1921).
104See Rees, supra note 29, at 882 n. 25.
105See generally Part III supra.
106This is because at this stage of the process it is the State legislatures who are entitled to reach agreement or not. See Part I supra, text & notes 40-42; Part III supra; text & notes 114-41 infra.
107See Part III supra, text & notes 72-73; text & notes 142-54 infra.
108See Rees, supra note 29, at 882 n. 25; Harvard Note, supra note 2, at 1618; text & notes 155-56 infra.
109Black, Amending the Constitution, supra note 2, at 191-92.
will be effective unless a future Congress chooses to repeal it. Moreover, by providing formal guidelines in advance of particular controversies, it can make it easier for a future Congress to determine whether the requisite consensus exists—and to avoid both the substance and the appearance of result-oriented judgments based on whether Congress desires a particular amendment rather than on the presence or absence of an Article V consensus.

Comprehensive legislation to regulate the convention process has been before Congress since it was first introduced by Senator Sam Ervin in the wake of the 1960s reapportionment controversy. The Ervin bill was passed by the Senate in 1973 but was not considered by the House. More recently Senator Orrin Hatch has introduced constitutional convention legislation. The Hatch bill differs substantially from earlier versions of the legislation; most of the modifications were made in response to suggestions from a number of constitutional scholars who testified at hearings in 1967 and 1979. The records of these hearings, together with the bill itself and the thoughtful report of the Senate Judiciary Committee, are helpful not only for examination of the scope of congressional power to resolve the questions that arise at every stage of the process, but also for reflection on the questions themselves.

Applying for a Convention.

Article V gives Congress no discretion in the decision whether to call a convention when two-thirds of the State legislatures request one; but there is no getting around the problem that Congress must exercise its own judgment about whether the requisite number of applications have in fact been made. Nor is this judgment an entirely arithmetical one. Aside from the question whether applications for a limited convention should be counted at all, controversies can arise concerning the procedures followed by State legislatures, the form of the applications, and whether several State applications should be construed as applications for the same convention. Indeed, there have been cases in which State legislative applications have been enacted but never received by the appropriate congressional officials, leaving these officials with no evidence of the applications other than what they had read in the newspapers.

Congress can reduce the possibility of this sort of confusion by enacting "housekeeping rules," addressing questions of form rather than substance and calculated neither to enhance nor to reduce the prospects for the success of efforts to bring about a convention. The Hatch bill, for instance, provides that an application shall contain the title, text and date of the resolution by which the legislature applied for a convention. The bill also provides that the State legislature may use whatever procedures it deems appropriate, with the sole exception that the consent of the governor shall not be required. The bill’s exclusion of governors from the application process is designed to comport with the spirit of two Supreme Court decisions. Hollingsworth v. Virginia held that an amendment proposed by Congress is valid without the President’s signature; Hawkes v. Smith held that a State constitution may not require the legislature to abide by the

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111The history of the various post-Ervin bills is recounted in Report, supra note 110, at 15. The current version of the Hatch bill is S. 119, 98th Cong., 1st Sess., hereinafter cited as S. 119.
1121967 Hearings and 1979 Hearings, supra note 2.
113Report, supra note 110.

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114See, e.g., Ervin, supra note 2, at 877 & n.6 (that two States had adopted applications for a reapportionment convention, but copies of applications from only twenty-eight of these were on file with the appropriate congressional committees).
115S. 119 section 4.
116Id. section 3.
1173 U.S. (3 Dall.) 378 (1789).
118253 U.S. 221 (1920).
results of a popular referendum on whether to ratify an amendment, since the ratifying body is the legislature itself rather than the State government as a whole. It is important to note, however, that scholars have found it difficult to justify the Hollingsworth holding except perhaps by reference to the fact that Article V requires a two-thirds majority in each house of Congress for proposal of amendments, the same majority required to override a presidential veto.119 And Hawke was based in part on the provision of Article V that Congress shall choose either legislatures or conventions as the State ratifying bodies; the State’s attempt to substitute a referendum was therefore a usurpation of power vested in the Federal government.120 When the State legislature applies for a convention, on the other hand, it would seem to be acting simply as the representative of the State, not as a congressional designee. If a State chooses to require the assent of its governor for all legislative acts including convention applications—to define the governor, in effect, as a third branch of the legislature—there is no compelling reason for Congress to attempt to override the State’s choice, even assuming that the matter can really be considered a “detail” within the scope of congressional power to regulate.

Even the purely formal requirements of a Constitutional Convention Procedures Act should probably not be regarded as enforceable in the ordinary legal sense, unless Congress can enforce them in some other way than by refusing to call a convention that really seems to be desired by two-thirds of the State legislatures. When Congress puts the State legislatures on notice that compliance with certain forms and procedures will be regarded as presumptive evidence of a legislature’s desire for a convention, it helps to avoid the confusion that could result from leaving the legislatures to guess about these questions. But if a legislature persists in being confused and omits the title of its resolution or sends it to the wrong place in Washington, the consensus principle underlying Article V would still seem to require that its application be counted. A similar distinction has long been recognized in the non-convention method of amendment: A Federal law provides that each State shall notify the Administrator of General Services of its ratification of a proposed amendment, and that the Administrator shall promulgate the amendment when notification from three-fourths of the States has been received.121 Yet the Supreme Court has held that an amendment becomes part of the Constitution the moment it is ratified by the final State, even though the State has not at that point complied with the notification requirement of the Federal statute and might never comply.122 Congress may prescribe rules to detect or facilitate the expression of the consensus required by Article V, but may not enforce these rules by keeping amendments out of the Constitution once this consensus has in fact been expressed.

Another set of questions that may arise during the application process is whether a valid application may lapse, either because too much time has elapsed or because the legislature has rescinded its application.

119 Hollingsworth is problematic because the Constitution provides that the President shall have the opportunity to sign or veto “[e]very Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment).” U.S. Const. art. I, section 7. See Black, A Threatened Disaster, supra note 2, at 965; 1967 Hearings, supra note 2, at 65 (Testimony of Alexander Bickel).

The Hatch bill not only excludes the State governors but also provides, in accordance with the principle of Hollingsworth, that convention calls will be by concurrent resolution of the two houses of Congress with no occasion for the President’s signature or veto. S. 119 Section 6(a); see Report, supra note 110, at 38. Like the exclusion of the governors, this provision is subject to the criticism that the Hollingsworth principle is a constitutional anomaly that should not be extended even slightly. See Black, supra. But see Harvard Note, supra note 2, at 1624 (“Since neither Congress nor the President can constitutionally exercise any substantive control over amendments sought by the states, the President’s veto could not legitimately protect the nation against the calling of a convention or the submission for ratification of a proposed amendment which the President deemed contrary to the nation’s interests.”).

121 This provision is currently codified in 1 U.S.C. section 106b.
States have several times attempted to rescind their ratifications of proposed amendments.\textsuperscript{123} The proposition that States have the constitutional power to rescind their ratifications at any time prior to final ratification by three-fourths of the States is at the very heart of the consensus model of Article V, for to argue otherwise is to assert that an amendment could become part of the Constitution over the opposition of more than one-fourth of the State ratifying bodies.\textsuperscript{124} The same rationale would seem to apply to applications for a convention; the Hatch bill expressly recognizes that States may rescind their applications.\textsuperscript{125}

The question whether an application may become invalid by the mere passage of time is somewhat more perplexing. The Coleman Court held that Congress had the power to decide whether a proposed amendment had lapsed so that it could no longer be ratified.\textsuperscript{126} Although Coleman involved a proposed amendment to which Congress had attached no time limit, the more usual modern procedure has been for Congress to specify at the time it proposes an amendment how long the States will have to ratify it. Since each State legislature bears roughly the same relation to its own convention application as Congress bears to its amendment proposals, time limits imposed by the States themselves should be regarded as effective conditions on the applications. The Hatch bill proposes the additional rule that an application shall expire in any case after seven years, even if the State attempts to enact a longer time limit or no time limit at all.\textsuperscript{127} If such a rule were enacted into law it should be regarded as constitutional in the case of applications containing no time limit, since State legislatures would be on notice that their applications would be valid for seven years unless they specify otherwise. But a State application containing a longer time limit than seven years should be regarded as valid for the full period unless rescinded, since the legislature’s failure to repeal its own explicit affirmative action is the best evidence of whether it desires a convention.

Currently, of course, Congress has prescribed no general time limit for convention applications. Under these circumstances an application containing no time limit should be regarded as valid until rescinded. The alternative is for Congress, at such time as it may be presented with applications from two-thirds of the States, to engage in a highly subjective judgment about the extent to which the convention is still desired by States that called for it a few years ago. This inquiry, like the one Congress made when it attempted to extend the life of the State ratifications of the Equal Rights Amendment, is likely to be strongly influenced by the opinions held by the members of Congress themselves on whether the amendment is “responsive” to “current social conditions” —whether, that is, the amendment is desirable.\textsuperscript{128} But the central purpose of the convention method is to leave this question to the legislatures themselves rather than to Congress. The best way to let each legislature control its own application is to assume that an application containing no time limit will be rescinded when the legislature ceases to favor it.

\textsuperscript{123}For discussion of the controversies over rescission of State ratifications of the Fourteenth and Fifteenth amendments and of the proposed Equal Rights Amendment, see Comment, Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court, 37 La. L. Rev. 896 (1977), and Part V infra, text & notes 198–212.

\textsuperscript{124}See Comment, note 123 supra; 124 Cong. Rec. S17293 (daily ed. Oct. 6, 1978) (remarks of Sen. Garn): “[The state power to rescind] is a necessary conclusion from the concept of ‘contemporaneous consensus’... And it flows from pure fairness and common sense. If you have 38 states that have indicated their consent to a proposal, and four that have withdrawn, then you have a ‘consensus’ of only 34. That is not enough.”

\textsuperscript{125}S. 119 section 5(a).

\textsuperscript{126}S. 119 section 5(b).

\textsuperscript{127}See, e.g., Ginsburg, supra note 32, at 9 (congressional extension of the expiration date for State ratifications of the ERA was permissible because the amendment was still “responsive to the conditions that inspired it”); 124 Cong. Rec. S16934 (daily ed. Oct. 3, 1978) (remarks of Sen. Bayh) (“We cannot narrow the scope of our concern here today to a few over constitutional procedures. We cannot do it in pursuit of basic national goals in the consideration of a mere process.”).

\textsuperscript{128}907 U.S. 433 (1939), discussed in Part V infra, text & notes 218–44.
Calling the Convention

Even if two-thirds of the States have applied for a convention, no convention will come into being until both houses of Congress vote to call it. The need for an express affirmative congressional action is the Achilles’ heel of the convention method: if enough members of Congress opposed a convention they could refuse to call one on some pretext such as the formal inadequacy of one or more State applications; or they could fail to reach an agreement on the method of delegate selection or on where the convention should be held; or they could just not get around to taking a vote. Moreover, even an obviously unconstitutional refusal by Congress to call a convention would probably be without an effective remedy, since the courts are most unlikely to provide such a remedy by calling a convention themselves. The Hatch bill attempts to work around these problems by imposing statutory duties on various legislative officials, in effect providing a “fast track” for convention resolutions once these officials have made a tentative finding that the requisite number of applications are at hand. But the Constitution guarantees each house of Congress the power to make its own rules, so not even a statute can force a future Congress to vote on any particular measure at any particular time. In the last analysis the Convention Clause of Article V must depend for its enforcement on the good faith of members of Congress, on the possibility that the voters will resent congressional intransigence in the face of a constitutional imperative, and perhaps on the limited relief that might be afforded by a declaratory judgment of the Supreme Court.

In the case of a limited rather than a general convention, the problem is compounded by the need for Congress to decide whether the subject matter of various State applications is similar enough so that the applications can be aggregated. It is unlikely that thirty-four States will agree on the text of a single amendment, or even use the same words to describe the general subject matter of the convention they desire. As the committee report on the Hatch bill observes, the decision on whether there are thirty-four applications for the same limited convention will necessarily be “a subjective, quasi-judicial decision to be made by individual Members of Congress.”

It seems obvious that if seventeen States apply for a convention to consider anti-abortion amendments, for instance, and seventeen others apply for a convention on a balanced budget amendment, the requisite consensus does not exist. But suppose half of the applications refer to “a balanced budget” and the other half refer to “spending limitation.” Or suppose one State applies for “a convention to consider the following amendment” and proposes a particular text, while others call only for a convention on the same general subject matter. In such cases it becomes necessary to seek guidance elsewhere than in the descriptions of the subject matter. For instance, if a State said it wished the convention to be assembled in order to consider a particular amendment “and for no other purpose,” that State should not be counted as part of a consensus to call a convention with the power to do anything else. But if the amendment specified by

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126 Report, supra note 110, at 37.
127 Professor Dellinger cites the North Carolina resolution applying for a balanced budget convention as an example of an application containing limiting language that would preclude its cumulation with other State applications that were not identical. See 1979 Hearings, supra note 2, at 266 (statement of Professor Dellinger (“The North Carolina application ... sets out the exact text of the amendment it proposes and explicitly provides that "this application and request be deemed rescinded in the event that the convention is not limited to the subject of this application."). In fact, however, the North Carolina application does not set out an exact text; it simply calls for a convention "for the exclusive purpose of proposing an amendment to the Constitution of the United States to require a balanced federal budget in the absence of a national emergency" (or for
that State was a balanced-budget amendment, and if thirty-three other States requested a convention for the general purpose of addressing the balanced budget, it might be more consistent with the intentions of those States to call a convention limited to a particular text than to call no convention at all.

The Hatch bill contains a salutary provision suggesting that each application, "to the extent practicable, and if desired," contain a list of other applications whose subject matter the applying State deems substantially compatible with its application. If a State sets out a particular text in its application, but lists other applications which refer only to a general subject matter or which suggest different draft amendments, the State's own judgment that its application can be aggregated with these others should be regarded as dispositive. Even in the absence of the statement of compatibility suggested by the Hatch bill, of course, State legislative history might help to determine whether the legislature meant its draft amendment or its description of the subject matter as a strict limitation or as a suggestion.

After Congress has received thirty-four applications on similar subjects but before it has taken a final vote on whether to call a convention, it would be advisable for the appropriate congressional committees to reach tentative conclusions and to notify the States of these conclusions. If a State legislature discovered that its application was about to be aggregated with other and different applications to bring about a convention it opposed, its protest would presumably persuade many members of Congress to vote against such aggregation. If Congress proposed not to count the State's application on the ground that it was too dissimilar from others, the State legislature would be able to express its disagreement more forcefully and effectively simply by passing a new application in the proper form.

Perhaps the most difficult question arising in the convention process is how many delegates each State should have. The Philadelphia Convention of 1787 had three delegates from each State. It does not follow, however, that the document drafted in Phil-

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Congress itself to propose such an amendment). N.C.S.J. Res. 5 (1979), reprinted in 125 Cong. Rec. S1123 (daily ed. Feb. 6, 1979). Thus it could be cumulated with other balanced budget convention applications. Although several of the balanced budget convention applications do set out the text of a particular proposed amendment, the author has not discovered one that both sets out a particular text and contains "sole and exclusive" language. Indeed, several of the applications take pains to avoid the implication that the convention should be limited to the exact text they propose. See, e.g., La. S. Con. Res. 73, reprinted in 125 Cong. Rec. S1307 (daily ed. Feb. 8, 1979) (emphasis added) ("Be it further resolved that the purview of any convention called by the Congress pursuant to this resolution be strictly limited to the consideration of an amendment of the nature as herein proposed."); Md. Res. No. 77, reprinted in 125 Cong. Rec. S1308 (daily ed. Feb. 8, 1979) (emphasis added) ("Resolved, that the proposed new Article . . . read substantially as follows. . . .").

The closest question about intentions of a legislature applying for a balanced budget convention would seem to concern the Delaware resolution, which sets out a particular amendment and then adds that "the General Assembly of the State of Delaware interprets Article V to mean that if two-thirds of the States make application for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would be limited to such proposal and would not have power to vary the text thereof nor would it have power to propose other amendments on the same or different propositions." Del. H. Con. Res. No. 36, reprinted in 125 Cong. Rec. S1307 (daily ed. Feb. 8, 1979) (emphasis added). Oddly enough, however, the Delaware application does not expressly purport to limit the convention to the particular text it proposes, and does expressly provide that it will remain in force until two-thirds of the States have made "similar" applications. Id.

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136S. 119 section 4(b)(2).

137 Cf. AEI Forum, supra note 2, at 31 (Professor Scalia): "Instead of displaying utter confusion and inability to do anything about the calls from the states, Congress could simply decide that they constituted a call for a constitutional convention on the broad issue of fiscal responsibility and control at the federal level . . . . Since the Congress would not know each state's intent, it could leave the call open for six months. And during that six months, any of the thirty-four states that have made a call could revoke it if they found it too broad for their liking. But in the absence of any revocation, Congress would go ahead. . . . In other Congress would be saying, 'We have taken your call, mean X; you can tell us, if you wish, that it means Y.'
adelphia should be presumed to impose a similar formula in cases where the text is silent, for the Framers of the Constitution did not devise the method of their own selection. What they did devise was an elaborate compromise between two competing political imperatives, the sovereign equality of States and the equal representation of individuals. The Hatch bill reflects this formula by providing that each State shall have the same number of delegates as the total number of its Representatives and Senators. This number will also be the same as the number of the State’s Presidential electors. 138

Since apportioning the delegates can reasonably be regarded as an incident of Congress’s power to call the convention, no formula chosen by Congress should be regarded as unconstitutional unless it seems calculated to affect the outcome of a particular controversy. For this reason it is most desirable for Congress to adopt a formula in advance. Although any such formula would be subject to change by future Congresses, an effort to repeal an existing formula in order to manipulate the outcome of a particular convention would presumably be transparent and therefore somewhat difficult. If, on the other hand, the adoption of a new formula were unavoidable because there was no formula already in place, it would be hard to prevent improper motives from influencing the proceedings.

The Hatch bill wisely leaves the method of selection of each State’s delegates up to the State legislature itself. 139 Again, the Philadelphia delegates were appointed directly by the State legislatures; it would be wrong to assume that the framers of Article V meant to require that this method always be used, but it would also be inappropriate to derogate from the principle of respecting State legislative autonomy in the convention process in order to deny the legislatures the right to use the very method used in Philadelphia. It seems unlikely, however, that a legislature would consider it politically advisable to reserve this prerogative to itself rather than to provide for popular elections in the face of the widespread public interest likely to be generated by an impending convention.

The Hatch bill forbids the selection of members of Congress or of other Federal officials as delegates. 140 In the case of members of Congress, this provision may be necessitated by the constitutional prohibition against members of Congress being appointed to offices “which shall have been created, or the Emoluments whereof shall have been increased” during their terms of office. 141

Convention Procedures

Once the delegates have been selected, the most persuasive argument for congressional regulation of the convention process—that certain decisions simply must be made and that nobody but Congress is in a position to make them—no longer exists. Any further intervention by Congress in the affairs of the convention would require some constitutional justification other than a general allusion to “matters of detail.” Indeed, strict nonintervention would seem to be a corollary of the principle that the participants in each stage of the amending process be free to reach whatever consensus they wish to reach within the constraints imposed by Article V and by their charter. 142

The Hatch bill generally observes this principle. It provides for a temporary chairman (the senior chief justice of the highest courts of the fifty States) 143 and also that Congress shall set the time and place of the convention; 144 these provisions seem reasonably incidental to the power to call a convention, so long as the delegates are free immediately to elect a permanent presiding

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138 S. 119 section 7(a); see U.S. Const. art. I sections 3 & 4.
139 S. 119 section 7(a).
140 See Part II supra, text & notes 40–42; Part III supra, text & notes 72–73; text & notes (102–08 supra; Rees, supra note 29, at 882 n.25.
141 S. 119 section 8(a).
142 Id. section 6(a).
officer and to move the convention to a different place and so long as Congress does not require the convention to assemble at the North Pole. The bill's provision that the convention keep a daily verbatim record and transmit it to the Archives at the conclusion of the proceedings should be regarded as sound advice that will presumably not be enforced by refusing to transmit the convention's proposed amendments to the States.

More serious objection, however, can be taken to the requirement that the convention terminate its proceedings within six months unless Congress grants an extension. This provision may be rooted in the fear that a convention would attempt to establish itself as an ongoing institution, a rival national legislature. If this were to occur, Congress would be able to deal with the situation in any of the ways it could deal with any other group of five hundred people who set themselves up as a revolutionary government, including but not limited to calling out the Marines. But in the less exciting event that the convention should conclude that it needs more time to consider the amendments that have been presented to it, to require the convention to seek the permission of Congress assumes a relationship between these bodies that seems contrary to the sense of Article V. A six-month limit imposed by the State legislatures as a condition on their applications would, in this writer's judgment, be a legitimate exercise of the legislatures' discretion to grant or withhold their consent to a convention. Congress, however, has no such discretion, and a general supervisory power over the convention cannot fairly be regarded as "incidental" to Congress's ministerial duty to call a convention requested by the State legislatures.

In one respect the Hatch bill is a vast improvement over earlier versions of the Constitutional Convention Procedures Act: it omits the earlier provision that a two-thirds vote of the delegates would be required in order for an amendment to be proposed, instead leaving the question of what majority shall be required to the convention itself. In the author's view, the imposition of a two-thirds rule by Congress would be unconstitutional, not only because it cannot be regarded as a reasonable incident of the power to call the convention but also because it affirmatively violates the principle of consensus.

If anything is clearly implied by Article V, it is that the convention itself must be free to decide whether to propose amendments or not. If 65 percent of the delegates to the convention favor an amendment but the amendment is deemed not to have been proposed because Congress has imposed a two-thirds rule on the convention, then Congress rather than the convention has decided that the amendment shall not be proposed. This objection could not be made, of course, to a two-thirds rule imposed by the convention itself on its own proceedings. Moreover, the State legislatures would arguably have the right to impose such a rule as a condition on their convention applications—although it can also be argued that the Constitution always requires a simple

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144 See section 9(c).
145 See text & notes 120–22 supra.
146 S. 119 section 9(b).
147 See L. Orfield, supra note 98, at 45 (footnote omitted) ("A very serious disturbance might be created if the convention should go beyond its constituent functions and attempt to legislate. An analysis of the fundamental nature of a convention would seem to exclude such a power."). However, "[t]he earliest view seems to have been that a convention was absolute.").
148 See sources cited in note 142 supra.
majority rule unless it explicitly states the contrary, in which case the States would be attempting to impose an unconstitutional condition. 152

The counter-argument, that the Framers must have intended a two-thirds requirement for a convention because an amendment cannot be proposed without a two-thirds vote of each house of Congress, 153 wrongly assumes that the parallelism between the two methods was intended to be between Congress and the convention. The convention method was meant, however, to give two-thirds of the State legislatures the same power to initiate amendments that the non-convention method gave two-thirds of the members of both houses of Congress. 154 By the time the convention is assembled it has already survived the two-thirds requirement imposed by the Constitution. The imposition of an additional such requirement must be based not on symmetry nor on the Framers' intentions but on the assertion of raw congressional power to supervise the convention. In this case Congress would also presumably have the power to impose on the convention a rule that no amendment could be proposed without a unanimous vote, thus absolutely ensuring the result that a two-thirds rule seems calculated to achieve.

Ratification

Article V prescribes the same procedure for ratification of an amendment whether it is proposed by the convention or the non-convention method. 155 One consequence of this prescription is that Congress, not the convention, has the power to decide whether ratification of the proposed amendment will be by State legislatures or State conventions. This necessitates an additional affirmative vote by Congress, a vote which should be regarded, like the duty to call a convention, as a non-discretionary ministerial function. If, however, a member of Congress believes that a convention has acted unconstitutionally by exceeding its charter, his oath to uphold the Constitution presumably binds him not to vote to submit the amendment proposal (or pseudo-proposal) for ratification. 156

The power of Congress to designate the ratifying bodies raises the interesting question whether Congress may also specify the time period during which States may ratify. This depends on whether the power to impose time limits should be regarded as an incident of the power to propose amendments or of the power to designate the mode of ratification. In Dillon v. Gloss the Supreme Court relied primarily on the power to designate the mode of ratification, 157 implying that Congress but not a convention could impose time limits on the convention's proposals. If, however, the power to impose a time limit is simply an instance of the power to limit the legal effects of one's own proposal 158 , then it should be regarded as the prerogative of the convention. 159

For Congress to impose a longer time limit than that specified by the convention would violate the consensus principle so far as it would put to the States a proposition to which the delegates themselves were in fact opposed. For Congress to impose a shorter time limit would be even more inimical to the purpose of the convention clause; for if three-fourths of the legislatures ratified

152 See text & note 45 supra.
153 See 1979 Hearings supra note 2, at 57 (remarks of Sen. Bayh): "Why should that be a subject for the Congress to decide? If we need a broad national consensus and the Congress is setting up guidelines, why should not the Congress require a broad consensus in support of the amendment? Why should [an amendment proposed by a convention] not meet the same test as [an amendment that is adopted by the Congress itself]?
154 See generally Part III supra.
155 U.S. Const. art. V, reprinted in note 1 supra.
156 See Black, Amending the Constitution, supra note 2, at 191–92.
157 256 U.S. at 376.
158 See text & note 104 supra; Rees, supra note 29, at 882 n.25.
159 The Hatch bill provides that Congress may only prescribe the time limit for ratification "in the event that the amendment itself contains no such provision," adding that no such congressional resolution shall prescribe a period of less than four years. S. 119 section 11. Compare the formula for the period during which applications are to remain valid, discussed in text & notes 126–28 supra.
during the longer time specified by the convention, to keep the amendment out of the Constitution would be to defeat the actual intentions of the bodies specified by Article V as participants in the convention process. It would mean that the convention and the ratifying bodies, although in perfect accord on every detail, were powerless to amend the Constitution over the opposition of Congress.

V. The Role of the Courts

The foregoing parts of this essay have analyzed the substance of the principal constitutional questions arising in the constitutional convention process. It is important to notice that this question—what the Constitution requires—is distinct from the question who decides what the Constitution requires. At least since Marbury v. Madison\(^{160}\) was decided in 1803, the general rule has been that the final decision on Constitutional questions rests with the United States Supreme Court. There is reason to believe, however, that the Court might regard a controversy about a Constitutional convention as falling within an exception to the rule of judicial review. In Coleman v. Miller\(^{161}\) the Court held that at least some questions of constitutional law arising in the amending process are “political questions” whose final decision is left to Congress rather than the courts.

Political Questions: Principle or Pretext?

Controversy over the proper scope of the “political questions” doctrine is inextricable from the debate over the foundations of judicial review.\(^{162}\) The classical justification for judicial review—the “private rights model” grounded in Marbury v. Madison—is that the Supreme Court is the highest court in the land. As such, the Court has a duty to vindicate the rights of private parties. When the outcome of a case within the Court’s jurisdiction must turn on a construction of the Constitution, the Court is bound to decide what the Constitution says about the case. Whenever the Court has the power to interpret the Constitution, it also has a duty to exercise that power. Therefore, when the Court labels a question “political” it has already interpreted the Constitution and determined either (1) that the Constitution has given the political branch unlimited freedom of action in a certain area, so that nothing it could do in this area would be unconstitutional; or (2) that while a certain action of the political branch might be unconstitutional, the Constitution has given that branch the authority to adjudicate the question, so that the Court has no power to decide whether the action was constitutional.\(^{163}\) In the first category are, for instance, the President’s power to recognize any foreign government he wishes\(^{164}\) and the power of Congress to decide when a certain expenditure is for the “general welfare.”\(^{165}\) In the second category—“true political questions” wherein the Court refrains from evaluating the constitutionality of a decision made by another branch—are Congress’ right to judge qualifications of its own members,\(^{166}\) the impeachment process.\(^{167}\) In the classical view, once a case is properly before the Court, its duty to decide all issues can only be superseded by a clear, “textually demonstrable” grant of adjudicative power to some other institution.\(^{168}\)

Marbury did not assert that the Court

\(^{160}\) See Wechsler, supra note 162, at 9.

\(^{161}\) “[H]e shall ... receive Ambassadors and other public Ministers. . . .” U.S. Const. art. II, § 3.

\(^{162}\) U.S. Const. art. I, § 8, cl. 1.

\(^{163}\) “Each House shall be the Judge of the Returns and Qualifications of its own members.” U.S. Const. art. I § 5. See Wechsler, supra note 162, at 8.

\(^{164}\) See U.S. Const. art I § 3, cl. 6; Wechsler, supra note 162, at 8.

\(^{165}\) See Wechsler, supra note 162, at 7–9. A commitment strongly implied by the text of the Constitution would meet this standard; Professor Wechsler suggests that the Guaranty Clause includes such an implicit commitment. Id. at 8. Cf. text & notes 191–97 infra.
duty to construe the Constitution was unique within the structure of government; in the private-rights model, the views of the Supreme Court will prevail over those of the other branches primarily because of the Court's power to issue writs which other officials are bound to obey. Many modern constitutional scholars, on the other hand, emphasize not the Court's duty to litigants who happen to be before it, but the Court's special role as the pre-eminent interpreter of the Constitution. As these same theorists have come to reject the idea of a "mechanical" application of the text of the Constitution to modern problems, the Court has been pictured as an institution with the unique mission of making principled value judgments about legislative and executive decisions. This "special function model" has obvious consequences for the political question doctrine: if the Court is to be concerned primarily with the long-range effects that its decisions have on society, rather than with strict fidelity to the text of the Constitution in adjudicating certain private disputes, then it is free to choose carefully the areas in which it will render judgments. In order to enhance its own effectiveness as a social institution, the Court may want to avoid certain areas altogether—especially areas in which the public, or the other branches of government, might resist its authority.

Professor Alexander Bickel saw the political question doctrine as the ultimate weapon in the Supreme Court's arsenal of discretionary or "prudential" devices for avoiding constitutional adjudication in cases where it might be inconvenient or impolitic. Rejecting the classical view, he argued that only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation governed by the general standards of the interpretive process. The political question doctrine simply resists being domesticated in this fashion. There is . . . about it . . . something greatly more flexible, something of prudence, not construction and not principle. And it is something that cannot exist within the four corners of Marbury v. Madison.

In Baker v. Carr, the first of the Court's reapportionment cases, Justice Brennan made an attempt to "domesticate" the political question doctrine by calling it essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an . . . initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Although Justice Brennan thus attempted to tie the doctrine to the constitutionally mandated limits on the Court's powers, the criteria he specified seem more consistent with the view that there are at least some "prudential" political questions. Only the criterion of "textually demonstrable constitutional commitment" is truly consistent with the classical view of the political question doctrine. In a case where there is a total absence of judicially discoverable and man-

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169 See 5 U.S. (1 Cranch) at 147.
170 See, e.g., A. Bickel, THE LEAST DANGEROUS BRANCH 1-33 (1962) [hereinafter cited as Bickel].
171 See id., passim, esp. 58.
172 See Bickel, supra note 170, passim; Scharpf, supra note 162, at 549-66.
173 Cf. Scharpf, supra note 162, at 549-55.
174 Bickel, supra note 162, at 183.
175 Id. at 125-26.
177 Id. at 217.
178 See text & note 168 supra.
ageable standards, or where it is literally impossible to decide a case without impermissible policy judgments, the political question doctrine would seem superfluous, since it is difficult to imagine how a plaintiff in such a case could prove an actual violation of a specific constitutional right. In the other instances listed by Justice Brennan, the classical view of judicial review would call for a decision by the Court rather than for deference to Congress or the President.

It is probable, however, that Justice Brennan was attempting merely to summarize the history of the political question doctrine. As will be shown, the holding in Baker v. Carr itself, as well as the modern Court's treatment of other matters involving the political process, suggest that the doctrine is much narrower than Justice Brennan implied.

The Justiciability of the Amending Process

There is nothing in Article V to suggest that whether a constitutional amendment has been ratified is a political question. Congress is given the power (but not, of course, the sole power) to propose amendments for ratification by the States and to choose whether ratification will be by State legislatures or by State conventions. These are not judicial or quasi-judicial functions, and there is no language comparable to that granting the Senate power to "try" impeachments and render "judgment" therein or to the provision that "[e]ach house shall be the Judge" of its members' qualifications. It is reasonable to suppose that the Necessary and Proper Clause of the Constitution grants Congress the power to provide for promulgation of amendments and other "housekeeping" matters, but it should be equally clear that no such "housekeeping" measure can be used as a pretext for substantive restrictions on the power granted to the states by Article V.

In Hollingsworth v. Virginia decided in 1798, the Supreme Court indicated that questions about the amending process are justiciable rather than political. The plaintiff contended that the Eleventh Amendment had not been properly adopted, since the President had not been given the opportunity to sign or veto the congressional resolution proposing the amendment. Defendant argued that the Constitution gives the President no role in the amending process. Apparently, neither the Court nor the parties entertained the idea that this question of law ought to be decided by another branch of government; the Court held that the amendment had become part of the Constitution.

Luther v. Borden, decided by the Court in 1849, contains a remark which might imply that the Court will let Congress decide whether States have ratified amendments to the United State Constitution. The case has nothing to do with such amendments, however, and the statement makes perfect sense when construed as part of the case's holding that Congress would be allowed to decide which of two rival State governments was the legitimate one, and therefore which State constitution was in effect.

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186 See Orfield, supra note 98, at 63–65; Harvard Note, supra note 60, at 1618; Part IV supra, text & notes 9–108.
187 For example, the Court in 1849, supra, text & notes 117–119.
188 U.S. (3 Dall.) at 381.
190 In forming the constitutions of the different States after the Declaration of Independence, and in the various changes and alterations which have since been made, the Political Department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." Id. at 39.
191 See, e.g., Orfield, supra note 98, at 8; Clark, The Supreme Court and the Amending Process, 39 N.Y.L. Rev. 621, 630 (1953); Dodd, Amending the Federal Constitution, 30 Yale L.J. 321, 327 (1921).
192 The statement cannot be regarded even as dicta on Federal amendments, since it did not even purport to say anything about such amendments. See Doxey v. Blair, 39 F. Supp. 1291, 1299–1300 n.20 (N.D. III. 1935).
Borden rested in part upon a construction of the Guaranty Clause, and in part upon the idea that the right of Congress to seat its own members implicitly included a right to “recognize” State governments. It cannot easily be construed as acknowledging a congressional veto power over the procedures of State governments whose legitimacy is unquestioned.

Yet there was an instance in which Congress exercised just such a veto power without being directly rebuked by the courts. On July 20, 1868, Secretary of State William Seward announced that he had received documents from legislatures in at least three-fourths of the States purporting to certify New Jersey had withdrawn their consent to the ratification of the Fourteenth Amendment. He noted, however, that he had also received official notice that the amendment was valid as part of the Constitution.

The record of the proceedings suggests that the congressional majority neither knew nor cared whether the Constitution gave States the right to rescind. The Senate passed the resolution without debate and without a roll-call vote. In the House, the entire debate appears to have lasted only a minute or two.

A Massachusetts Republican moved to send the resolution, not to the Judiciary Committee, but to the Committee on Reconstruction. A Democrat protested that it is an important question, and should go to the committee on the Judiciary." The Republican floor leader then indicated that his intention was to "pass it now," without any committee consideration at all. After some discussion of the idea of adding Georgia to the list (on the strength of a telegram in the possession of the Speaker which a Democrat suggested was a fabrication), the resolution was passed by a near-perfect party line vote. The Congressmen who voted that Ohio and New Jersey could not rescind were, virtually man for man, those who five months earlier had voted to impeach President Andrew Johnson for his refusal to obey unconstitutional orders.

It should be emphasized that this congressional action was never tested in court. By the time the Supreme Court was called upon to construe the Fourteenth Amendment, in the 1873 Slaughterhouse Cases, four additional States had ratified the amendment so that whether Ohio and New Jersey should be counted as ratifying States was a moot point.

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Footnotes:
196 Id. at 42.
197 See Dyer v. Blair, 390 F. Supp. 1291, 1299–1300
198 15 Stat. 706 (1868).
199 Cong. Globe, 40th Cong., 2d Sess. 4266, 4295–96
200 The Senate had previously debated the legality of the Ohio rescission, but its validity was opposed primarily on the theory that—the Southern states being unable to participate—three-fourths of the States had already ratified, making the amendment already a part of the Constitution prior to the Ohio rescission. Id. at 4295–96.
201 Id. at 4296. Georgia actually ratified that day. H. Doc. No. 124, 90th Cong., 1st Sess. 15 (1967). However, the Speaker's ambivalent attitude toward the telegram suggests it may have been previously prepared, in anticipation of a favorable Georgia vote.
203 Compare Cong. Globe, 40th Cong., 2d Sess. 1402 (1868) with id. at 4296. Except for absentees—and for the one Republican mentioned in note 203, supra—the two votes were identical. For a discussion of the constitutionality of Johnson's impeachment, see R. Berger, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 252–96 (1973).
204 83 U.S. (16 Wall.) 36 (1873).
206 Another question about the validity of the adoption of the Fourteenth Amendment—the fact that the Reconstruction Act compelled the Southern states to ratify as a condition of readmission to the Union—was not mooted by the subsequent ratifications, since it
The resolution of the Reconstruction Congress was apparently not regarded as an important precedent even by contemporaries. The discussion over including Georgia—whose ratification would have brought the total to three-fourths even without Ohio and New Jersey—suggests that the Republican leadership was not entirely confident it would succeed in counting the votes of two States against their will. Moreover, two years later New York rescinded its ratification of the Fifteenth Amendment, and the Secretary of State did not certify the amendment as valid until enough States had ratified so that New York’s action was moot. Shortly thereafter, the Senate twice involved more than four States. See Sutphin, The Dubious Origin of the Fourteenth Amendment, 28 Tul. L. Rev. 22 (1953). However, in White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1872), the Court suggested that such a ratification was “‘a voluntary and valid offering,” apparently alluding to the fact that ratification was a quid pro quo which Georgia was technically free not to deliver. In context, it is clear that the Court addressed the merits of the question, and did not, as has been suggested (see, e.g., Orfield, supra note 98, at 16), mean to say that ratification is a political question. Other arguments for the validity of the Civil War Amendments are that they have been adopted by usage or acquiescence; that they were adopted by implication when the Twenty-First Amendment was adopted, since it specified the Eighteenth by its number, implicitly acknowledging prior amendments as valid; or that the Southern States really did legally secede from the Union, and were thereafter only conquered territories, so that only three fourths of the “loyal States” were needed to ratify. See generally United States v. Ougi, 119 F. Supp. 897 (E.D. Ky. 1954); Cong. Globe, 40th Cong., 2d Sess. 87678 (1868); Orfield, supra note 98, at 73–74, 78–81. In short, abandonment of the idea that the Court will not review the procedure by which new amendments are adopted would not make it necessary to jettison the Fourteenth Amendment.

The Coleman Decision: Hard Cases Make Bad Law

In several subsequent cases involving the validity of the Eighteenth and Nineteenth amendments, the Court decided further legal questions involving the amending process. By the 1930s a review of a line of rejected attempts to declare that no State might rescind its ratification of any future amendment.

The next amendment whose validity was questioned before the Court was the Eighteenth. In The National Prohibition Cases, the Solicitor General, and Charles Evans Hughes as amicus curiae for several States, argued that the challenges were non-justiciable. The principal authorities for this contention appear to have been the congressional resolution of 1868, and a statement by a nineteenth-century commentator that, while the Court has the power to decide the validity of an amendment, “perhaps” the Court “ought” to accept the judgment of Congress in order to avoid a “spectacle.” The State courts, however, which had handled a large volume of litigation involving the validity of State constitutions and amendments, had been virtually unanimous in holding amending procedures subject to judicial review in the same extent as other questions of constitutional law. Implicitly rejecting the suggestion that it had no power to adjudicate the issues, the Court decided all questions in the eight cases before it, including questions about the procedure. Article V requires of Congress as well as of State legislatures.


209Twenty-eight States were required, assuming all thirty-seven (including the old Confederacy as well as West Virginia, created without the consent of Virginia’s Confederate government) were eligible to participate. Without Georgia or either of the two rescinding States, the total number of ratifications was only twenty-seven. See 15 Stat. 706, 707 (1868).


211Id. at 1477. The proclamation listed New York among States which “had ratified,” and added that the New York legislature had passed resolutions “claiming to withdraw” its ratification. Id. at 2290.
Court decisions spanning three centuries should have compelled the conclusion that the Court’s duty “to say what the law is” included the duty to pass on the constitutionality of amending procedures. Yet in 1939 the Court in Coleman v. Miller—without purporting to reverse the prior cases—injected the political question doctrine into the ratification process. The case does not easily yield its precise holdings, and the reasons and authorities which might have persuaded a majority of the Court on any point are even more difficult to discern. Only two Justices joined Chief Justice Hughes in the statement styled “the opinion of the Court”; the divisions in the Court were “sufficient to confound prophets of all schools. . . .”

Coleman involved a constitutional amendment proposed by Congress in 1924 to overrule a controversial Supreme Court decision on child labor. At first, few States had ratified the amendment, and many had rejected it. After nine years, however, there was a surge of interest in the Child Labor Amendment: between 1933 and 1937 twenty-two States ratified, bringing the total to twenty-eight, only eight short of the required number. Kansas legislators who had opposed ratification sued in State court to enjoin State officials from certifying that Kansas had ratified. They claimed the Kansas resolution was invalid on three grounds:

1. a “reasonable time” had elapsed between the proposal by Congress in 1924 and the ratification by Kansas in 1937;

2. Kansas had passed a resolution

222 The opinion of the Court referred, with apparent approval, to Dillon and Leser. Id. at 451–53. Justice Black criticized the Court for its inconsistency in not overruling Dillon. Id. at 458.

223 Id. at 435. Justices Black, Roberts, Frankfurter and Douglas dissented on the threshold question of standing, which consumed the bulk of the Court’s opinion. Id. at 437–46, 456–57, 460–70. Justices Butler and McReynolds joined the opinion of the Court as to standing, but dissented on the merits. Id. at 470–74. Only Justices Stone and Reed joined Chief Justice Hughes on all issues.


227 See id. Thirty-six of the forty-eight States were required.
rejecting the amendment, and they argued that this barred the State from subsequently ratifying;

(3) the lieutenant governor had cast a tie-breaking vote in favor of the resolution, an act which the plaintiffs suggested was unconstitutional. The Court affirmed a judgment of the Kansas Supreme Court rejecting these attacks on the resolution.228

Chief Justice Hughes' opinion held that the question whether a reasonable time had elapsed was a non-justiciable political question. This holding was not based on a textually demonstrable commitment of the adjudication of the issue to Congress, but on the notion that such a determination would involve "an appraisal of a great variety of relevant conditions, political, social and economic..."229 The opinion points out that Congress could have prescribed a "reasonable time" when it proposed the amendment, and implies that an evaluation of how long the States should have to ratify an amendment is essentially the same kind of judgment whether it is made in advance or after attempted ratification by three-fourths of the States.230

Declaring that the effect of a previous rejection on a subsequent ratification should also be decided by Congress, the Hughes opinion relied on the precedent set by the Reconstruction Congress in 1868, adding cryptically that "[t]his decision by the political departments of the Government... has been accepted."231

The Court was evenly divided on whether the legality of the lieutenant governor's participation was a justiciable or a political question.232 The effect of this non-decision was to deprive the Hughes opinion of any consistency, since evidently all three Justices subscribing to it voted to decide on the merits the question of the lieutenant governor's role.233 These Justices, therefore, believed the Court powerless to decide whether a State's ratification is invalid on account of the lapse of a reasonable time (a mixed question of law and fact), or on account of a prior rejection (a question of law); but held the same Court competent to decide whether the same ratification is invalid because of the participation of the lieutenant governor (also a question of law).

Justice Black's concurring opinion234 in Coleman is not so easily dispensed with.235 Joined by Justices Roberts, Frankfurter and Douglas, he advanced an internally consistent theory:

Undivided control of [the amending] process has been given by... Article [V] exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.236

Resting his opinion on a "textually demonstrable constitutional commitment

228307 U.S. at 433–37.
229Id. at 453.
230Id. at 453–54.
231Id. at 449–50. The court obliquely suggested a theoretical basis for its acceptance of the Reconstruction precedent when it added that "in accordance with this historic precedent" the efficacy of ratification after rejection would be a political question, "with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." Id. at 450. Yet to the exact extent that congressional control over promulgation is more than an implied "housekeeping" power, it needs a principled defense, which the Court did not attempt. See Part IV supra.
232307 U.S. at 446–47.
233The four Justices joining in the Black opinion regarded the question as political. Id. at 456–60. Apparently Justice McReynolds was absent for discussion of this issue. See Note, 28 Geo. L.J. 199, 200 n.2. Chief Justice Hughes and Justices Stone, Rehnquist, and Butler must have found it justiciable.
234307 U.S. at 456–60.
235A technical basis for diminishing the weight accorded to the Black opinion, however, is that after the Justices stated their belief that plaintiffs had no standing (307 U.S. at 456), everything that followed was necessary to decision, and therefore irrelevant to the holding of the opinion. In Dyer v. Blair, 390 F. Supp. 1300 (N.D. Ill. 1975), then-Judge Stevens also felt bound to disregard the Black opinion since "a majority of the Court refused to accept" it, and since it was inconsistent with prior Supreme Court holdings. Id. at 1300.
236307 U.S. at 459.
rather than on any difficulties the Court might have in deciding, Justice Black should have cited the constitutional language on which he based his conclusion. Yet he cited no such language, for the simple reason that nothing in Article V suggests that its interpretation should be handled differently from the interpretation of other parts of the Constitution. Nor did Justice Black cite any historical materials showing that the Framers meant to give Congress authority to bind the Court on the construction of Article V. Indeed, the available records suggest exactly the contrary.

The Black opinion cited only one authority which related to constitutional amendments: a flagrant misquotation of Leser v. Garnett. That case held "notice" from "the Legislatures of Tennessee and of West Virginia," certified to be the secretary of state, "conclusive upon the courts." Justice Black translated thus: "Final determination by Congress that ratification by three-fourths of the States has taken place 'is conclusive upon the courts.'"

It should be stressed that Justice Black was not arguing that Congress has broad discretion to act under Article V; he affirmed that Congress "is governed by the Constitution." Rather, he saw the courts as conclusively bound by an adjudication by Congress that its own action was constitutional. To pose the extreme case, if Congress were to propose an amendment, then immediately declare that it had been ratified by the States—when in fact the world could see that not a single State had ratified—the courts would be powerless to declare the amendment invalid, and would be bound to decide future cases as though the amendment were part of the Constitution. This would defeat the purpose of Article V, which is to prevent Congress from amending the Constitution without the concurrence of the State legislatures.

Who Should Decide Whether the Constitution Has Been Amended?

The concurring opinion in Coleman could not have been written by the Hugo Black we now remember, whose very critics remarked on his zeal for fidelity to the text of the Constitution and the intention of the Framers. Rather, it was written by the former New Deal Senator who had come to the Court with a mission. Indeed, the votes of all nine Justices in Coleman might best be explained by reference to the contemporary controversy over the Court's role as a "counter-majoritarian" institution. The Child Labor Amendment was proposed in order to overrule a Supreme Court decision imposing controversial limitations on the right of Congress to make economic regulations—regulations which presumably had the support of a majority of Americans. It is easy to see how popular regard for the Court might be diminished by its declaring such an amendment invalid.

Judicial review of the amending process, if abused, would confirm the worst suspicions of those who accuse the Court of being a "super legislature." Some modern observers have suggested that this danger—if not the actual risk that the Court will improperly invalidate amendments which seek to curb its power, then the risk that the people will think the Court is deciding on...
this basis—would justify the relegation of all issues affecting the amending process to the status of "prudential" political questions.245

But the argument proves too much. It fails to consider the alternative. The best cure for popular cynicism over the Court's role as a "super-legislature"—a body concerned with imposing the policies favored by its members rather than with construing the Constitution according to neutral principles—is for the Court simply to restrain itself from such excesses, not to discard large chunks of the authority that the Constitution does bestow on the judiciary. Indeed, even the warmest enthusiasts of a "living constitution" ought to be persuaded of the wisdom of a strict exegetical approach when the Court is deciding whether the Constitution has been amended. If there is one class of cases in which the Justices ought to strive to forget their personal sympathies, to use a "mechanical" formula involving text, intent and logic, this must be it. Respect for the Court and for the Constitution itself—not in the sense of agreement with every pronouncement, but in the more important sense of a willingness to be governed, born of confidence in the integrity of the institutions—demands that the rules be the same for all amendments. It is particularly important to apply the same rules to amendments which would limit the Court's role and to those which would expand it. Whatever the Court's proper role when it construes provisions universally accepted as part of the Constitution, it must be no more than a "referee" when deciding whether a provision is in the Constitution at all.

The case for judicial restraint in reviewing constitutional amendment procedures is based on the assumption that when a controversy arises in this area, the final decision must rest with someone who can be counted on to "adjudicate" rather than to "legislate." Constitutional amendments may be designed to overturn Court decisions, but they may also seek to limit (or to enhance) the powers of Congress, of the President, or of the States. Since it is impossible to find a final arbiter without an institutional conflict of interest, it is essential that the ultimate power of decision rest with the branch most likely to find and apply the law without injecting its own interests and passions. By disposition, by training, and by their relative insulation from the political process, the Justices of the Supreme Court are more capable of rendering such a neutral judgment than Congressmen, Presidents and State legislators.246

Congress, in fact, does not have a very good track record at adjudication. The handling of the 1868 resolution concerning the rescissions of Ohio and New Jersey is a case in point.247 The impeachment of Andrew Johnson, on what are now generally acknowledged to be unconstitutional grounds, is another.248 A candidate who challenges the official results of a congressional election seems most likely to convince the House or Senate that his cause is just if he is a member of the majority party.249 A conviction after impeachment, or a congressional judgment about the qualifications of a Congressman, may not be subject to judicial review even if based on...

245This point is at the heart of the "special function" argument for judicial review. See text & notes 169-70 supra. It has been suggested that while the Court might be the most suitable forum for final review of ordinary legislation, the "functional" argument does not apply to constitutional amendments. Professor Orfield suggests exactly the contrary: "If orderly procedures are essential in the enactment of ordinary statutes, should it not be even more so as to the adoption important and permanent constitutional amendments?" Orfield, supra note 98, at 21.

246See text & notes 198-207 supra.

247See note 204 supra.

unconstitutional grounds. The record in these areas, however, suggests that it would not be wise for the Court to surrender "prudentially" to Congress the final power to say whether an amendment has become part of the Constitution.

Even assuming every Congress would rise above partisan politics, and would also separate the issue of an amendment's desirability from the question of whether it had been properly passed, it would be virtually impossible to eliminate the problem of inconsistent adjudications. One Congress would not have the power to bind all future Congresses. Dealing with a particular amendment, Congress might find that a State has no constitutional power to rescind its ratification. Five years later, a different Congress dealing with another amendment might read the Constitution and reach the opposite conclusion. Since this is a question of law and not of fact, it would seem that an adjudication by a subsequent Congress—even though made in the context of another amendment—would have the effect of raising new constitutional doubts about the validity of amendments previously thought to have been ratified.

The other side of the coin is equally unappealing. Suppose, in the context of an amendment strongly favored by Congress, a question of law was decided in a way which made it possible to amend the Constitution rather easily. Subsequently, when considering a drastic and demogogic amendment which had clearly negotiated this lower hurdle, Congress would be unable to reverse itself without giving rise to justified skepticism about the integrity of the constitutional amending process. Of course, the Court would face the same dilemma if it made such a decision. However, one of the basic assumptions behind the institution of judicial review is that the Court would be more likely, when considering the "nice" amendment, to keep in mind the possibility that "bad" amendments would be proposed in the future, and thus not arrive at a strained interpretation of Article V in the service of easing the path of the former.

It can be argued that inconsistent standards ought to be applied to different amendments: that a close question of law should be decided one way so that a desirable amendment will pass, another way if it is necessary to defeat a proposal to repeal the Bill of Rights. Even if one were to accept this double standard, with all it implies about how seriously one really takes the idea of a rule of laws and not of men, it would be bad to repose in Congress the discretion as to which amendments are subjected to "strict scrutiny." It has been suggested that the Court should refrain from adjudicating the question of ratification, since it might have a stake in the outcome. But Congress has a bigger stake, not only insofar as congressional power might be limited or expanded by a proposed amendment, but also in that the proponent of the amendment may be Congress itself—except in the case of amendments proposed by convention, when the amendment may well be designed to curb some congressional excess. Elihu Root stated the effect of giving Congress the dual roles of proponent and supreme judge: "It would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined..."

To concede to Congress the right to apply inconsistent standards to questions of law, with the underlying assumption that policy considerations will influence the application of these standards, is to give Congress the power to amend the Constitution unilaterally when it favors the amendment; and to block amendments through a third political

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See Part IV supra, text & note 109. 

252See text & notes 244–45 supra.  
253This is perhaps even more true when the question of constitutional law to be decided concerns a congressional regulation of the convention process—for instance, a decision that States have no power to call for a limited convention—than when Congress itself is the proponent of the amendment. See text & note 282 infra. 
254Quoted in Dodd, supra note 193, at 323.
step, after proposal and ratification, when it opposes them.\textsuperscript{255}

The members of the Constitutional Convention feared that Congress might gain such power. Edmund Randolph's original proposed Constitution expressly provided that the Constitution should be amended "without requiring the assent of the National Legislature."\textsuperscript{256} The members whose reflections on the matter have been preserved assumed almost unanimously that since the Constitution was a limitation on the powers of Congress, and on the powers of a majority of the States to harm the interests of a minority, it was important to protect the amending process from manipulation by Congress or even by a simple majority of the States.\textsuperscript{257} Not until the last week of the Convention was it decided to give Congress any more than a ministerial role even in the proposal of amendments;\textsuperscript{258} later, Hamilton defended the arrangement by pointing to the limited congressional role, and observing: "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority."\textsuperscript{259}

The concerns which moved the Framers to limit the role of Congress are still important. Even those who regard State or sectional interests as unworthy of protection must acknowledge that the Constitution protects other minority interests, and that these interests are equally threatened by granting a single majoritarian institution the effective power to amend the Constitution, as they would be by granting that same institution the final authority on all matters of constitutional interpretation.

A final reason must be advanced against the Court's abrogation of its authority: in each case, consider the worst that could possibly happen. Hamilton called the Supreme Court the "least dangerous" branch of government, not because it will always reach the right decision, but because it has "neither force nor will, but merely judgment."\textsuperscript{260} The worst fears of the most unrelenting opponents of judicial power can never be realized without at least the acquiescence of the other branches of government. Generally such co-operation will be forthcoming, even when the other branches disagree with the construction of the Constitution put forth by the Court. However, a truly corrupt decision, an attempted judicial coup d'etat, might not be enforced; and the knowledge of this would presumably deter even a thoroughly corrupt judge. If it were to become firmly established, however, that Congress was the final judge of the validity of constitutional amendments, such a coup, in the form of a proposal of an amendment followed by a declaration that it had been ratified, would be irresistible except by armed rebellion.

\textit{Baker, Powell, and the Rejection of Unprincipled Avoidance}

Subsequent Supreme Court cases leave considerable doubt about the vitality of the political question doctrine, and particularly about whether there is anything left of Coleman. It was in \textit{Baker v. Carr},\textsuperscript{261} the legislative reapportionment case, that Justice Brennan listed the traditional bases of the political question doctrine, including the "impossibility of deciding" because of a lack of manageable evidence or a need to make policy judgments;\textsuperscript{262} but the holdings in that case and its progeny suggested that the "impossibility" category may be an empty set.\textsuperscript{263} Certainly the evidence in Coleman was no more complicated, no more "social, political and economic,"\textsuperscript{264} than that which the Federal courts have routinely considered in reapportionment cases. \textit{Baker} also held that issues involving State governments are not political questions,\textsuperscript{265} implicating

\textsuperscript{255}See Part II supra, text & notes 30-36.
\textsuperscript{256}1 Farrand, supra note 47, at 117; see 1 id. at 22.
\textsuperscript{257}See 1 id. at 202-03; 2 id. at 629-81; 3 id. at 3676-8; 4 id. at 61. See generally Part II supra; Part III supra, text & notes 57-67.
\textsuperscript{258}See 2 id. at 557-59.
\textsuperscript{259}THE FEDERALIST No. 85 (A. Hamilton).
\textsuperscript{260}Id. No. 78 (A. Hamilton).
\textsuperscript{261}569 U.S. 186 (1962).
\textsuperscript{262}Id. at 217. The passage referred to is reproduced in the text at note 177 supra.
\textsuperscript{265}569 U.S. at 210.
itly overruling prior cases. Many controversies that might arise in the amending process concern the procedures or the prerogatives of State legislatures, and Baker suggests that the Court might be willing to rule on these questions. Nor should a declaration by Congress make any difference; if Congress should declare Tennessee’s legislature to be apportioned constitutionally, there is no reason to believe the Court would accept this determination as conclusive.

Powell v. McCormack was perhaps the most important political question case in this century. Reacting to allegations of crime and abuse of office by Adam Clayton Powell, Congress voted to exclude him at the beginning of the session. This was almost certainly unconstitutional, since the Constitution prescribes only age, citizenship and residence as qualifications for the office, and provides that Congress may “expel” a member only by a two-thirds vote. It seemed, however, that Congress would succeed in “excluding” Powell under the pretext of “excluding” him, since the right of Congress to judge the qualifications of its own members is the strongest case of a “textually demonstrable constitutional commitment” of an issue to resolution by a branch other than the Court.

Chief Justice Warren, however, speaking for a nearly unanimous Court (including, perhaps significantly, Justice Black), ruled that Powell had a right to his seat. The Court announced a view of the political question doctrine even narrower than the classical view:

[a] determination of petitioner Powell’s right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law. . . . Our system of government requires that federal courts on occasion interpret the constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts’ avoiding their constitutional responsibility.

The Court examined each of the criteria listed in Baker v. Carr and found them inapplicable. Most significantly, Powell seems to say that even a broad constitutional grant of adjudicative power to Congress may not be exercised unconstitutionally; the only unreviewable power Congress might have would be to determine whether Powell in fact met the qualifications of age, citizenship and residence.

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266 See Moyer v. Peabody, 212 U.S. 78 (1909); Scharf, supra note 162, at 538 n.73.
267 When they ratify, the State legislatures are said to be performing a “Federal function.” See Part IV supra, text & note 120. However, the basis on which State actions are distinguished from Federal actions in Baker apparently is that the former can be invalidated without risk of “embarrassment” to co-ordinate branches of the Federal government; this “prudential” distinction could put all State legislative actions within reach of the Federal judiciary.
269 U.S. Const. art. I, § 2, cl. 2.
270 Id., art. I, § 5.
271 The motion to “exclude” Powell did carry by the two-thirds which would have been necessary to “expel” him, but the Court expressed doubt as to whether the required two-thirds vote would have been obtained if the motion had been to expel. 395 U.S. at 508–10.
272 Impeachment is the only other example of an explicit textual commitment which had been thought unreviewable by the Court. See Wechsler, supra note 162, at 8.
Professor Gunther has expressed doubt whether, after Powell, "any constitutional questions remain which the Court is likely to find committed to other branches for final decision."277 Certainly the "prudential" considerations were as strong in Powell, where Congress had already made its decision as to its internal affairs, as they would be in a constitutional amendment case, where Congress might or might2 not have expressed a view on the question. And the "textually demonstrable constitutional commitment" was much stronger in Powell than in any Article V case.278 Since many questions arising in the amending process—whether a State may rescind its ratification, for instance, or whether Article V precludes a constitutional convention limited by its charter to considering a particular amendment—are pure questions of law which "would require no more than an interpretation of the Constitution,"279 the Court should not hesitate to decide such issues.

The contribution made by the Court in Powell to a sound resolution of the controversy over the amending process was not limited to its undermining of the theoretical foundations of Coleman. The Powell Court also confronted a number of past instances of congressional "exclusion" of constitutionally qualified members-elect, and found the value of such precedents "quite limited." The notion underlying Coleman—that if the Court finds a precedent in past congressional action, it need not undertake its own evaluation of the constitutionality of such action280—was summarily rejected:

That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date. . . . The relevancy of [such] cases is limited largely to the insights they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.281

Given the time, circumstances and manner of its adoption, it would be difficult to underestimate the value of the Reconstruction resolution on rescission of proposed amendments as an aid in determining the intent of the framers of Article V. Accordingly, after Powell all authority for the proposition that rescission is a political question—the Reconstruction resolution and the statements in Coleman relying on that resolution—should be regarded as obsolete.

Two relatively recent events, however, suggest that the Coleman political question doctrine might have survived Baker and Powell after all. In 1979 the Court announced its decision in Goldwater v. Carter,282 the Taiwan treaty case. Four Justices relied heavily on Coleman in declaring that the question whether the President can unilaterally terminate a treaty is a nonjusticiable political question. The Goldwater precedent is of limited significance, however; it was a memorandum rather than a full opinion of the Court, decided in haste without oral argument a few days before the President's action was to become effective.283 As the most extreme political question case in history, Coleman was handy authority.

The other event that gave new life to Coleman was the Equal Rights Amendment extension. During the extension debate a number of leading constitutional scholars who have not generally been hostile to vigorous and expansive judicial review endorsed the determinations of fact may be unreviewable, whereas questions of law will always be reviewed by the Court—was applied to the amending process by then-Judge Stevens in Dyer v. Blair, 390 F. Supp. 1291, 1301-03 & n.24 (N.D. III. 1975). Under this analysis, a certification by State legislative officials, or perhaps by the Federal official authorized to certify ratifications, that a State had voted to rescind, would be conclusive on the Court; but the legal effect of such a vote would be decided by the Court itself. See id. at 1301 n.24.

277G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 454 (10th ed. 1980).
278See text & notes 180-88 supra.
279395 U.S. at 548.
280See the text at note 231 supra.
proposition that “judicial restraint” requires the courts to recognize as part of the Constitution most anything that Congress cares to put there.\textsuperscript{284} Despite the narrowing of the political question doctrine that was thought to have occurred in recent years, therefore, and despite its inconsistency with \textit{Marbury v. Madison}, the Coleman decision has acquired a number of respectable defenders. The extension almost afforded an occasion for a reconsideration of Coleman by the Supreme Court: a number of States and State officials sued for a declaratory judgment that Congress had no power to extend the lives of State ratifications beyond the period for which the States had adopted them, and also that the States could rescind their ratifications even prior to the expiration of the time limit. A Federal district court granted the requested relief.\textsuperscript{285} By the time the case reached the Supreme Court, however, the period of the extension had expired, so the Court vacated the case as moot, giving no hint about what the Justices might have decided on the merits of the case.\textsuperscript{286}

\textit{Conventions and the Political Question Doctrine}

The arguments against absolute judicial deference to Congress in cases involving the convention method of amendment are even stronger than in other constitutional amendment cases, since the convention method was designed to provide an \textit{alternative} to congressional authority over the amending process. Giving Congress the power to decide whether one of its own proposals has been ratified makes it the judge in its own case, but giving it the absolute and unreviewable power to block the convention process makes it the executioner as well. The Hatch bill would accordingly give “[a]ny State aggrieved by any determination or by any failure of Congress to make a determination or finding” in the convention process the right to bring suit immediately in the Supreme Court.\textsuperscript{287} Even if the Justices would otherwise be reluctant to “second-guess” a congressional decision about a question of law arising in the amending process, it is hardly inconceivable that their reluctance could be overcome by congressional passage of the legal equivalent of an engraved invitation.

The special circumstances under which such a case would be likely to arise, however, make it perhaps even less likely that the Supreme Court would grant effective relief in a convention case than in a non-convention case. The most obvious example would be a simple refusal by Congress to call a convention when presented with thirty-four State ratifications. Even if Congress asserted no constitutional justification at all—even if the thirty-four applications were identical proposals for a general constitutional convention, for instance—for the Court itself to call a convention or to order the members of Congress to vote for one would transgress all but the roomiest conceptions of the boundaries of the judicial function.\textsuperscript{288}

\textsuperscript{284}See, e.g., \textit{ERA Hearings, supra} note 37, at 39–59 (testimony of Laurence Tribe); \textit{id.} at 61–68 (testimony of Thomas Emerson). See also Part II supra.
\textsuperscript{287}S. 119 section 15(a). The action would be given priority on the Court’s docket. \textit{Id.} The Hatch bill also makes it clear that the grant of a special cause of action to States is not intended to limit any other right that anyone may have to seek judicial review of any question arising in the convention process. \textit{Id.} section 5(c).
\textsuperscript{288}The problem is not that the merits of the question whether Congress has an obligation to call a convention are nonjusticiable, but that relief would be beyond the scope of the Court’s injunctive power. See U.S. Const. art. I section 6 (“The Congress shall have power to decide any Speech or Debate in either House, they shall not be questioned in any other Place.”); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1866): “The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.” See also Brickfield, supra note 9, at 27: “May Congress refuse to call a convention should the requisite number of States comply? Apparently it may, although the intent of the framers of the Constitution was otherwise . . . . From a legal standpoint, there is the same situation as arose from the failure of Congress to reapportion the number of Representatives in the House of Representatives, which article I, section 2, clause 2, requires it to do every 10 years, but which in 1920 Congress failed to do. Thus while Congress has the mandate to perform,
When the Supreme Court in Powell found itself in a similar quandary, it settled on a declaratory judgment that the House had unconstitutionally excluded Powell, leaving open the possibility of an injunction ordering the House doorkeeper to pay Powell his back salary.\footnote{395 U.S at 517–18.} No member of Congress was directly ordered to do anything, but the Court’s decision carried enough moral weight that Congress finally gave Powell his seat. While it is not inconceivable that State legislatures or other parties aggrieved by the failure of Congress to call a convention could hope for a similar combination of declaratory relief and injunctions against Federal officials other than members of Congress, the effectiveness of such relief would ultimately depend on the willingness of individual members of Congress to abide by the Court’s opinion of their constitutional responsibilities.

It is in the hope of avoiding such a spectacle that the thoughts in this essay are offered. Like most other parts of the Constitution, Article V generates its share of questions on which reasonable people can differ. The contemplation of ambiguities is a valuable exercise in many ways, but it has sometimes been known to cause people to do nothing when they might better have done something. If Congress should be presented with thirty-four State applications for a constitutional convention, each member will be forced to decide for himself the true meaning of the phrase “Congress . . . shall call a Convention for proposing Amendments.” It will then become important that deliberation on the arguable implications of each of the words not divert all attention away from those words not divert all attention away from the word “shall.”

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[Editor’s Note: Judge Rees recently left the faculty of the University of Texas Law School, where he taught constitutional law, to accept appointment as Chief Justice of the High Court.

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In deference to the original text of the Constitution and other considerations too numerous to discuss here, BENCHMARK does not invariably follow Harvard’s Uniform System of Citations, especially its rule calling for the decapitalization of the word “State” when referring to a member of the Federal Union. We thank the author for his cheerful indulgence in permitting us to depart from his manuscript in this respect.]