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A Convention for Proposing Amendments: The Constitution's Other Method*

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When introducing S.817, the Constitutional Convention Implementation Act of 1981 (Hatch-DeConcini), Senator Orrin Hatch (R-Utah) said, "I emphasize again the basic purpose for including the convention method of amendment in Article V—the need for the States to be able to amend the Constitution in the face of an intransigent national Government."¹ He described the "other method" of amending the Constitution provided for in Article V, the convention method, as "one of the basic elements for preserving some semblance of balance between the national and State governments." This version of legislation to provide procedures for a convention to propose amendments is more state-oriented than the previous bills (S.215, 1971 and S.3, 1979), and that fact suggests a slight change in recognition of the virtues of the American federal system.

Support for a convention to propose a constitutional amendment has surfaced several times in this century, although with no direct success. The first effort, on behalf of direct election of senators, led to the Seventeenth Amendment. The second, a response to the Supreme Court's apportionment decisions in 1962-1964 (including *Baker v. Carr*, *Lucas v. Colorado*, and *Reynolds v. Sims*), produced nothing. In both cases the number of state petitions came very close to the two-thirds required by Article V of the U.S. Constitution. Since 1975 a campaign organized by the National Taxpayers Union has produced thirty of the requisite thirty-four applications for a convention to propose an amendment to mandate a balanced federal budget.

The drive for a balanced budget amendment to the U.S. Constitution is one answer to the question, how can we limit (federal) government spending? Such an amendment has been introduced in the 97th Congress, as Senate Joint Resolution 58, and among its sponsors are Senator Strom

* An earlier version of this paper was prepared for a conference on The Constitution and The Budget, held by the American Enterprise Institute in May, 1979. A revised version of that paper will be published by the American Enterprise Institute.

¹ *Congressional Record*, 26 March 1981, p. S2793.

Thurmond (R-S.C.), Orrin Hatch (R-Utah), Howard Baker (R-Tenn.), William Proxmire (D-Wis.), and John Danforth (R-Mo.). Another answer is a constitutional amendment that would limit federal spending to the preceding year's level plus the "percentage increase in the output of the nation's goods and services [GNP]." The object here is to prevent the size of the public sector from growing faster than the private sector.² All these proposals include a provision to the effect that, "the Congress may not require that the States engage in additional activities without compensation equal to the additional costs." (S.J.Res. 58)

Most states have budget limitation provisions in their constitutions. In 1976 only Connecticut, Tennessee and Vermont did not have one of the following budget limitations: debt restriction, balanced budget requirement, or mandatory management of operating budgets. "State officials are unanimous that balanced budgets are a necessity and states that do incur deficits take immediate action to wipe them out."³

Because a convention has never been called none of the procedural questions has been answered. What is a valid state petition? What kind of convention does Article V authorize? Can a convention be limited? How will the delegates be chosen? What is the proper role of Congress, or the federal courts? Attempts to answer these questions by legislation have so far failed because bills introduced in 1971, 1973, and 1979 have never passed the House.

Much of what has been written about the use of a convention to propose amendments amounts to thinking the unthinkable. In this study I treat the convention alternative as a real one. Both the language of Article V within the context of the Constitution and the record of its adoption shows that the convention method was to be the thinkable alternative to proposing amendments in Congress. It was not thought of as a special method available only for wholesale constitutional revision or only for writing a new constitution from scratch.

Similarly, Congress possesses the power to legislate on the procedural questions of calling a convention, but not on how the convention will operate or on the substance of the convention's results. This understanding also derives from the debates at the Federal Convention, the text of the Constitution, and the general political principles that inform the republic.

Against this background I consider the proposed legislation on convention procedures, and what might really happen if a convention for proposing amendments took place. For this "other method" remains an important democratic safeguard, "a way out for the states and the people if a

² Aaron Wildavsky, *How To Limit Government Spending* (Berkeley: University of California Press, 1980), p. 1.

³ *Ibid.*, pp. 189-190. For a discussion of the problems of enforcing expenditure limitations, based on state and local government experience, see Appendix C, pp. 143-162.

willful and intransigent central authority governs us in a way that we find unacceptable.”⁴

DRAFTING AND ADOPTING ARTICLE V

Article V provides for proposing amendments to the U.S. Constitution in two ways: (1) by extraordinary majorities of both houses of Congress, or (2) by a convention that has been petitioned for by two-thirds of the states. The convention method has never been used. Article V reads:

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.

Article V has an interesting history in the Federal Convention. The first plan of a constitution, the Virginia Plan, merely says: “. . . Rsd. that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”⁵ There were those at the convention who thought an amending provision both improper and unnecessary; others argued that the system would have to be revised from time to time, and that such provisions had worked in states that had them.⁶ Still others objected to excluding the national legislature, but George Mason of Virginia insisted that the legislature might “abuse their power, and refuse their consent on that very account.”⁷

In the report of the committee of detail the article reads: “On application of the Legislature[s] of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.”⁸ In the closing days of the convention, Elbridge Gerry of Massachusetts objected to the form of the amending article because, he said, under it two-thirds of the states could get a convention and the majority of that convention could bind the rest to

⁴ W.S. Moore and R.G. Penner, eds., *The Constitution and the Budget* (Washington D.C.: American Enterprise Institute, 1980), p. 27.

⁵ Max Farrand, *Records of the Federal Convention of 1787*, vol. 1 (New Haven: Yale University Press, 1966), p. 22.

⁶ *Ibid.*, p. 121, 122.

⁷ *Ibid.*, p. 202.

⁸ *Ibid.*, p. 188.

changes subversive of the states. Alexander Hamilton pointed out in response that the Articles of Confederation had been too difficult to amend and that there should be an easier means to remedy the defects of the proposed system. Hamilton, on his part, opposed the role of state legislatures in amending because they would just increase their own power; the national legislature, however, would notice the defects first, and ought to be empowered to call a convention whenever two-thirds of each branch of the legislature concurred.

“Madison remarked on the vagueness of terms, ‘call a Convention for the purpose’ as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?”⁹ A motion to add language permitting the legislature to propose amendments that would be binding only when agreed to by the states (amended to read “two thirds of the states”) was defeated because a three-fourths majority was preferred. At this point James Madison proposed a substitute draft which had no convention method, but which introduced the principle of an alternate amending process for Congress and for the state legislatures.

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

John Rutledge of South Carolina objected that he could never agree to a means by which the articles relating to slaves could be changed by those states not interested in this kind of property and hostile to it. To accommodate him these words were added: “provided that no amendments which may be made prior to the year 1808 shall in any manner affect the 4 & 5 sections of the VII article.”¹⁰ The article passed in this form by a vote of nine for, one against, and one divided.

Two days before the conclusion of the convention, the body considered this form of Article V in the report of the committee on style, consisting of William Samuel Johnson of Connecticut, Hamilton of New York, Gouverneur Morris of Pennsylvania, Madison of Virginia, and Rufus King of Massachusetts—all of whom favored a strong national government. Roger Sherman of Connecticut (Connecticut originated the compromise that gave the states equal representation in one house) objected because three-fourths of the states could do fatal things to “particular States, as abolishing them altogether or depriving them of their equality in the

⁹ *Ibid.*, p. 558.

¹⁰ *Ibid.*, p. 559.

Senate." He suggested adding language that would exempt state equality in the Senate from the amending power.

Mason was also dissatisfied. He feared that the people could never obtain proper amendments if the "Government became oppressive" because under both methods of Article V proposing amendments was to depend on Congress. In response to these arguments Elbridge Gerry and Gouverneur Morris moved to "amend the articles so as to require a Convention on application of 2/3 of the S[tate]s."¹¹ 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 a 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 form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."¹² The Gerry-Morris change was agreed to without opposition. Disagreements arose when Sherman renewed his attempt to attach language protecting equal state suffrage in the Senate and declaring the internal police of a state to be beyond bounds unless a state consented. Gouverneur Morris proposed what became the final formulation, "that no State without its consent shall be deprived of its equal suffrage in the Senate." Agreed to without opposition, this became the only part of the U.S. Constitution that is not subject to the normal amending process.¹³

Attempts to Call a Second Convention, 1788-1789

The Constitution was ratified by the requisite nine states without prior amendments; in other words, *no* ratifications were qualified or dependent on amendments to be made when the Constitution was adopted. The New York vote was so close (31-29), however, and the opponents were so determined that, under the leadership of Governor George Clinton, the state ratifying convention asked the legislature to petition for a second convention, and then circulated a letter to the other states urging them to do the same.¹⁴ The letter included the expressed understanding that the New York convention had ratified the Constitution without prior amendment, and that two-thirds of the state legislatures would have to petition

¹¹ *Ibid.*, p. 629.

¹² *Ibid.*, p. 630.

¹³ *Ibid.*, p. 631.

¹⁴ Jonathan Elliot, *Debates on the Adoption of the Federal Constitution*, vol. 3 (Philadelphia: Burt Franklin, 1888), pp. 413-414. Even before the Federal Convention had adjourned, Governor Edmund Randolph of Virginia had expressed some reservations about the proposed Constitution (he was one of three delegates who did not sign it; the others were Mason of Virginia and Gerry of Massachusetts), and had called for a second convention to consider the amendments that state conventions might propose. Nevertheless, unlike Mason and Gerry, Randolph was not a serious opponent of the Constitution.

the new Congress to pass an act providing for a convention to propose amendments.¹⁵

In a number of letters, including one which was published and circulated, Madison explained why he opposed a second convention before the new government had come into being and time had pointed out the “faults which really call for amendment.”¹⁶ He said that he was not opposed either to amendments or to a second convention—at the proper time. He emphasized the difficulties of the recent convention, how close it had come to breaking down, how impossible it would be to find an accommodation between the different criticisms, and how a second convention would play into the hands of those who wished to destroy rather than to amend. It would enable the enemies of union, under the guise of alterations, to prevent any plan from succeeding by insisting on alterations “popular in some places and known to be inadmissible in others.”¹⁷ Writing to Thomas Jefferson, who was in Paris, in September 1788, after the Constitution had been ratified by the necessary number of states, he said:

The measure [an immediate second convention] will certainly be industriously opposed in some parts of the Union, not only by those who wish for no alterations, but by others who would prefer the other mode [proposal in Congress] provided in the Constitution, as most expedient at present for introducing those supplemental safeguards to liberty agst. which no objections can be raised; and who would moreover approve of a Convention for amending the frame of Government itself, as soon as time shall have somewhat corrected the feverish state of the public mind, and trial have pointed its attention to the true defects of the system.¹⁸

Madison made other comments at this time about the mode of amendment by convention. In November 1788, responding to an inquiry from George Lee Turberville of Virginia asking for his opinion on a second convention because the Virginia legislature was considering the idea, Madison provided a remarkably complete and relevant account of his understanding of the amending provision.

I am not of the number if there be any such, who think the Constitution lately adopted, a faultless work. On the Contrary there are amendments wch. I wished it to have received before it issued from the place in which it was formed. These amendments I still think ought to be made according to the apparent sense of America and some of them at least I presume will be made . . . the only question is which of the two modes provided be most eligible for the discussion and adoption of them. The objections agst. a Convention which give a preference to the other mode in my judgment are the following. 1. It will add to the difference among the States on the merits, another and an unnecessary difference concerning the mode. There are

¹⁵ *Ibid.*, pp. 413–414.

¹⁶ Robert Rutland and Charles Hobson, *The Papers of James Madison*, vol. 11 (Charlottesville, Virginia: University of Virginia Press, 1977), p. 226.

¹⁷ *Ibid.*, p. 19.

¹⁸ *Ibid.*, pp. 257–258.

amendments which in themselves will probably be agreed to by all the States, and pretty certainly by the requisite proportion of them. If they be contended for in the mode of a Convention, there are unquestionably a number of States who will be so averse and apprehensive as to the mode, that they will reject the merits rather than agree to the mode. A convention therefore does not appear to be the most convenient or probable channel for getting to the subject.¹⁹

Nothing in Madison's discussions of Article V at the Federal Convention or in his correspondence during the ratification, or during the agitation for a second convention, suggests that he thought of the two amending methods as other than alternative means to serve the same purpose: to propose constitutional amendments. Once proposed, amendments are subject to the same ratification process. Madison feared that holding a second convention before the new government came into being, and the real defects became known through trial and error, would leave the frame of government defenseless before its enemies. He planned to defend it himself by introducing certain "salutary amendments in favor of liberty" in the new Congress. This would then demonstrate the commitment of the Constitution's supporters to liberty and, in effect, would be an "end-run" around its enemies, making it difficult, if not impossible, to amend the Constitution into impotence.

Madison continues with this provocative observation: "A convention cannot be called without the unanimous consent of the parties who are to be bound to it, if first principles are to be recurred to; or without the previous application of 2/3 of the State legislatures, if the forms of the Constitution are to be pursued." I take this passage to mean that a convention called pursuant to the procedures of Article V is not a convention that, in Madison's opinion, can legitimately recur to first principles. First principles can be understood as the most fundamental political questions. What shall be the nature of our union? On what principles shall it be based, that is, shall we be a direct democracy? Shall we be a representative democracy? Shall we be an aristocratic regime? Shall we be a constitutional monarchy? Such a convention can be called only if all the parties that will be bound by its outcome—the original parties to the compact that forms the union—call for it. To appreciate Madison's perspective we must remember that union is based on the uncoerced consent of the parties to it, in this case, the federal union. This is the first kind of convention described above by Madison.

The second kind of convention that Madison mentions in his letter to Turberville is one called by the "previous application of 2/3 of the State legislatures" under Article V. This type of convention is for the purpose of proposing one or more amendments to the Constitution, not for abandoning the form of government altogether. The distinction will become

¹⁹ Ibid., pp. 330-331.

clearer if we recognize that one purpose of the new Constitution was to provide legitimate methods for exercising vast governing powers, and thus to replace the undifferentiated power, resting on an incompatible mixture of force and consent, that existed under the Articles of Confederation.²⁰ By providing a constitutional means for amendment, usually originating in Congress, but equally legitimately originating with two-thirds of the states, the framers sought to protect their political system from amendment by force of arms, and perhaps from destruction altogether.

Madison was candid about what would happen if the convention could not be headed off.

If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and support as well as amend the system: it would consequently give greater agitation to the public mind: an election to it would be courted by the most violent partizans on both sides: it wd. probably consist of the most heterogeneous characters: . . .²¹

Another observation about the convention method is found in Madison's letter to Thomas Mann Randolph, in which he speaks of proposing amendments for "essential rights": "It will not have escaped you, however, that the question concerning a General Convention, does not depend on the discretion of Congress. If two thirds of the States make application, Congress cannot refuse to call one; if not, Congress have no right to take the step."²² Madison anticipated many of the questions that arose about the use of a convention to propose constitutional amendments. The convention method was added to provide an opportunity for initiating change outside of the national government itself. At that time, the state legislatures were regarded as almost dangerously democratic. Although the convention method is more cumbersome, Madison understood that Congress had no choice but to call a convention once two-thirds of the states had applied. He also noted that there would be controversy over what constituted a quorum, and that states which might otherwise agree on the necessity for a particular change would disagree about the use of a convention to accomplish that business—then as now.²³

²⁰ See Ann Stuart Diamond, "The Zenith of Separation of Powers Theory: The Federal Convention of 1787," *Publius* 8 no. 3 (Summer 1978):45-70.

²¹ Rutland and Hobson, *The Papers of James Madison*, vol. 11, pp. 330-331.

²² *Ibid.*, p. 417. The Federal Convention of 1787 is a convention that recurred to first principles; an Article V convention could have been used for proposing the first ten amendments.

²³ Madison's queries, discussed elsewhere in this section, underwent a remarkable transformation in a recent article, "Calls for Constitutional Conventions" in *Editorial Research Reports*, 16 March 1979, p. 196. There it is reported by Marc Leepson:

James Madison of Virginia objected to the "vagueness of terms" of the amendment provision

ATTEMPTS TO CALL AN ARTICLE V CONVENTION

Although there has never actually been an Article V convention, the first attempt to call one took place immediately upon the adoption of the U.S. Constitution. This was the circular letter signed by Governor Clinton of New York whose legislature, as well as Virginia's, applied for an Article V convention. Madison's tactic of introducing amendments in favor of "essential rights" had the desired effect of undermining opponents of the new government who really wanted amendments weakening national power and changing the structure of government.

The second flurry of applications for a convention occurred in the 1830s when South Carolina and Georgia applied to Congress for a convention to resolve "questions of disputed power" prompted by South Carolina's doctrine that a state could declare an act of Congress null and void—nullification. Alabama also petitioned for a convention to address this problem and to recommend other amendments that "time and experience had shown to be necessary." Eight other states considered and rejected the idea of a convention, at least partly because they found unacceptable South Carolina's contention that such a convention would have the power to resolve the constitutional issue of power.²⁴

The issue of slavery in the 1860s led Congress into the unusual step of encouraging the state legislatures to apply for a convention. This action supported Madison's understanding that Article V prohibited Congress from calling for a convention on its own. Abraham Lincoln, in his first inaugural address, said: "The convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse. . . ." ²⁵ Just before the Civil War, five state legislatures (Kentucky, Indiana, Virginia, Illinois, and Ohio) petitioned Congress to call a convention in an attempt to prevent secession by the southern states. During the first hundred years after Article V went into effect, then, there were only ten petitions for a convention.²⁶

adopted earlier. It did not make clear, he said, "whether the legislatures were to propose amendments and the convention was to adopt them, or whether the convention was both to propose and adopt them, or to propose them for adoption by some other body or bodies not specified.

Compare this with what Madison actually said: "Madison remarked on the vagueness of the terms, 'call a Convention for the purpose' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?"

²⁴ American Bar Association, *Amendment of the Constitution By the Convention Method Under Article V* (Chicago, Illinois, 1974), pp. 70-71.

²⁵ *Ibid.*, p. 71.

²⁶ U.S., Congress, House, Committee on the Judiciary, *Problems Relating to a Federal Constitutional Convention* by Cyril F. Brickfield, 85th Cong., 1st sess., (Comm. Print, 1957), p. 7.

Perhaps the best known campaign for an Article V convention involved efforts to amend the Constitution to permit direct election of senators. From 1895 to 1911 a total of thirty-one states addressed seventy-five petitions to Congress. The proposed Direct Election Amendment passed the House several times—in 1900 by a vote of 240 to 15—but, not surprisingly, the Senate refused to pass an amendment that directly involved the fortunes of its own members. Apparently the number of petitions for a convention came within one of the required two-thirds before the Senate finally acted in 1912, when Congress proposed what became the Seventeenth Amendment.²⁷

It appears that petitions for a convention to propose amendments are often intended to provoke Congress into acting, rather than to show serious intentions of actually having a convention. Some of these campaigns are successful, but most are not. The drive for a convention to consider an amendment to prohibit polygamy reached a total of twenty-six states from 1906 to 1916. Congress preferred not to act, and the matter gradually subsided.²⁸ On the other hand, Congress apparently did respond to applications to hold a convention to repeal the Eighteenth Amendment and end prohibition. Eleven states considered the move, and five actually applied for a convention for the sole purpose of repeal. Congress proposed the Twenty-first Amendment, repealing Prohibition, which was ratified in 1933.

The American Taxpayers' Association campaign calling for a convention to limit income, death, and gift taxes to a maximum of 25 percent was a consequence of Congress's refusal to consider a resolution for the purpose. Wyoming had been the thirty-sixth out of a necessary thirty-six ratifications in the adoption of the Sixteenth Amendment, the Income Tax Amendment, and in 1939 became the first to apply for a convention to set limits to that Income Tax Amendment. Five years later, seventeen states had passed similar resolutions, although lower tax rates after World War II slowed the movement until the Korean War again led to increased taxes. By 1952 twenty-three states had adopted resolutions, although not all asked for the same thing: two requested that Congress submit an amendment; eight in effect withdrew their previous petitions; two of these petitioned for a different amendment dealing with tax rates and they were joined by an additional two states in this request. This left thirteen active petitions for a convention to propose the 25 percent income tax limitation.²⁹

²⁷ Brickfield, *Problems*; and ABA, *Amendment of the Constitution*, pp. 72, 60. Brickfield lists seventy-three applications, the ABA study lists seventy-five. See also *Editorial Research Reports*, 16 March 1979, p. 198; and *A Convention to Amend the Constitution* (Washington, D.C.: American Enterprise Institute, 1967).

²⁸ ABA, *Amendment of the Constitution*, p. 72, 73.

²⁹ *Editorial Research Reports*, vol. 1, 1952, pp. 131-133. According to Brickfield, in 1959 there were sixteen pending applications. See U.S., Congress, House, Committee on the Judiciary, *State Applications Asking Congress to Call a Federal Constitutional Convention*, (Comm. Print, 30 January 1959), p. 31.

Although several states petitioned Congress for a convention to limit presidential terms to two, the fact that Congress did propose what became the Twenty-second Amendment does not really prove the utility of this method of provoking the Congress. Experience with applications for a convention to consider an amendment to undo the Supreme Court's apportionment decision, for example, shows that Congress is successfully lobbied only when it wants to be. In spite of the fact that the total number of petitions reached thirty-two in 1967, Congress resisted proposing the desired amendment.

The Council of State Governments has organized two drives for a convention. The first, in 1962, sought amendments to remove apportionment cases from federal jurisdiction, to create a "court of the Union" composed of the chief justices of the states that would hear appeals from the U.S. Supreme Court, and to make crucial changes in Article V that would enable states to initiate constitutional amendments more easily. It is difficult to calculate accurately the number of petitions that were passed for each of these three proposals. On the matter of apportionment, however, the details are clearer. Led by Senator Everett Dirksen (R-Ill.), a national campaign to petition Congress for a convention to propose an amendment that would have exempted one house of a state legislature from "one man, one vote" reached a total of thirty-two applications in 1968.³⁰ Although Congress was not persuaded to pass the amendment, Senator Sam Ervin (D-N.C.), introduced legislation to provide for the mechanics of an Article V convention, should the necessary thirty-four petitions reach Congress. This legislation passed the Senate in 1971 and again in 1973 and was reintroduced by Senator Jesse Hélm (R-N.C.), in 1979 as S. 3. It has never passed the House.³¹

Thirty states have currently petitioned Congress to call a convention for the purpose of proposing an amendment to balance the federal budget.³² Some of the resolutions specifically ask for a convention; others ask Congress to propose such an amendment; some have not yet been transmitted to Congress.³³ This campaign has been organized and led by the National Taxpayers' Union, and has received a great deal of attention from the media because initially it attracted the support of California's Governor Jerry Brown. For the moment, there is no way to tell whether or not thirty states have executed "valid" petitions. An Article V convention and the steps that lead us there are an unknown.

THE MEANING OF ARTICLE V

We do have a variety of clues about using a convention to propose amendments. We have the plain language of Article V, the history of the

³⁰ Everett McKinley Dirksen, "The Supreme Court and the People," *Michigan Law Review*, March 1968, pp. 837-874.

³¹ The legislation is discussed in the section entitled, "Legislating Procedures for a Convention," in this article.

³² *Congressional Quarterly*, 9 May 1981, p. 818.

³³ *Editorial Research Reports*, 16 March 1979, p. 188.

adoptions of constitutional amendments, and some Supreme Court decisions that, taken together, yield certain principles. Other material, from the Constitutional Convention debates in 1787 and the ratification debates, sheds light on what could be expected if an Article V convention were to be successfully applied for. Much is made of the ambiguity of constitutional language, the spare prose (leaving so much room for judicial interpretation), and uncertain mandates. Yet it is worth still another look at the language of Article V to see what the common sense of the thing is.

Article V says, "The Congress . . . on Application of the Legislatures of two thirds of the several States, *shall* [emphasis added] call a Convention for proposing Amendments. . . ." When the Constitution uses the word "shall," it uses it in the plain ordinary sense of the word, as a command or an imperative. Its use in Article V can be distinguished from the use of "may" as that word is found in Article III: "The judicial Power of the United States *shall* [emphasis added] be vested in one Supreme Court [note the use of "shall" here—no equivocation—there will be one Supreme Court, and that is a command], and in such inferior courts as the Congress *may* from time to time ordain and establish."³⁴ In every instance where the Constitution uses "shall," it is a command. "May," on the other hand, is clearly used only when Congress has the power to do a thing but is not required to.³⁵ The plain sense of the article is that, once two-thirds of the states have applied to Congress for a convention, Congress has been commanded by the Constitution to call one.

Another thing that strikes one upon reading Article V is that the entire power to amend the Constitution is committed to the Congress and to the state legislatures. Neither the president nor the state governors are included in this process. It is sometimes argued, however, that the language of Article I, section 7, clause 3, conflicts with Article V, or that it at least implies a presidential role.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disap-

³⁴ The difference between "may" and "shall" is suggested by the fact that Chief Justice John Marshall converted the constitutional language to "shall" in *Marbury v. Madison*: ". . . in such inferior courts as the Congress *shall* from time to time ordain and establish." 1 Cranch 137 (1803) at 173. The importance of the difference is demonstrated in the struggle that took place over the establishment of inferior federal courts by means of the Judiciary Act of 1789. See Charles Warren, *The Supreme Court in the United States History* (Boston: Little, Brown and Co., 1926), pp. 7-20. Marshall's slip is like the unconscious insertion of the word "expressly" into the Tenth Amendment.

³⁵ See, for example: Article I, sections 4, 5; Article II, section 1, clause 6, section 2, clauses 1, 2, section 3, clause 1; Article IV, section 1.

proved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

In the first place, there is nothing in the discussions at the Federal Convention to support the interpretation that an amendment to the Constitution is an order, resolution, or vote within the meaning of this clause. A proposed amendment is not ordinary legislation nor the equivalent of legislation.³⁶ It is a proposal to change the fundamental rules of the constitutional system, and it is not the final act in the process of that change. In contrast, a bill, an order, a resolution, or a vote is either an act of ordinary legislation or its analog, and becomes law without an additional process. Clause 3 of section 7 was put into Article I so that a headstrong legislature could not evade the president's veto power by calling its legislation by some other name.³⁷ It does not follow that because Congress chose to call a proposal to amend the Constitution a joint resolution, that that joint resolution is then subject to the provisions of Article I, section 7, clause 3.

A third conclusion suggested by the language of the article is that the words "shall propose amendments" (referring to the initiation by Congress) are parallel in meaning to the words "for proposing amendments" (referring to the convention method to be initiated by the states).³⁸ In either case, this means one or more amendments and the ordinary understanding of the words, "to amend" ought to prevail. According to the first edition of Webster's dictionary in 1806, this meaning was "to correct, reform, mend." **There is every common sense reason to believe that these two modes of proposing amendments were meant to be alternative means to the same end.**

The final observation that can be made, based on a plain reading of Article V, is that the only arrangement in the Constitution that cannot be amended in the ordinary way is the equal representation of the states in the Senate. Otherwise, the power to amend, although moderated by the necessity of many steps and the requirement of extraordinary majorities, reaches to every part of the political system created by the U.S. Constitu-

³⁶ "What is a constitution? It is an act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts." Justice Gibson, *Eakin v. Raub* 12 Sergeant & Rawle (Pennsylvania) 330 (1825), at 347, 348.

³⁷ Farrand, *Records*, vol. 2, P. 301. "Mr. Madison observing that if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c—proposed that 'or resolve' should be added after '*bill*' in the beginning of sect 13. with an exception as to votes of adjournment &c."

³⁸ It is sometimes argued that, in any case, the presidential veto has already been overridden because the proposed amendments require a two-thirds majority in both houses of Congress. Others argue that the presidential veto and its reasons might persuade some part of that two-thirds to change their minds.

tion.³⁹ What it does not reach to, in my opinion, is constitution making *per se*. As Madison points out, that requires the consent of all the parties in order to recur to first principles. It is, after all, in the nature of a federal system. Even today the relationship between the constituting parties, the people of the states, rests on consent. Old conflicts between north and south growing out of competing economic interests (fisheries versus agriculture) have been replaced by conflicts between energy haves and have-nots, which will have to be resolved with the consent of the parties. Such a resolution will be no easier than it ever was.

The Supreme Court Decisions

Another important source for interpreting the practical meaning of Article V is Supreme Court decisions. As early as 1798, a question was put to the Court concerning the validity of the Eleventh Amendment inasmuch as it had never been "submitted to the president for his approval." In *Hollingsworth v. Virginia*, Justice Samuel Chase answered, "There can surely be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the constitution."⁴⁰ The Supreme Court found that Congress had "sole discretion" over the choice of the method of ratification: by state legislatures or by convention. And in *United States v. Sprague*, the Court rejected the argument that only ratification by the people in conventions met the requirements of the Tenth Amendment, which reads "powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."⁴¹

In 1919 the Court validated a practice that dated from the earliest amendments concerning the manner of satisfying the two-thirds vote requirement in the House and the Senate. "The two-thirds vote in each House of Congress which is required in proposing an amendment to the Constitution, is a vote of two-thirds of the members present,—assuming the presence of a quorum—and not a two-thirds vote of the entire membership, present and absent."⁴² What this means in real numbers is that, at the present size of Congress, 218 is a quorum in the House and 51 is a quorum in the Senate. A two-thirds vote can be as few as 146 in the House, or one-third of the whole membership. In the case of the Senate,

³⁹ Examples of major changes that can simply be made by amendment include the first nine amendments (Bill of Rights) and the two-term presidential limitation. The latter destroyed the delicate balance between the executive and the legislature and, in my opinion, was at least indirectly responsible for Watergate. The lame-duck term encourages irresponsibility in the incumbent both in getting reelected and for policies thereafter.

⁴⁰ 3 Dallas 378 (1798). Mr. Justice Chase, a "high" Federalist, certainly had no reason to denigrate the legitimate powers of the presidency.

⁴¹ 282 U.S. 716 (1931).

⁴² National Prohibition Cases, 253 U.S. 350 (1920).

two-thirds is 34, or, again, slightly more than one-third of the entire Senate membership. The rule has been followed since 1789, as we shall see when we look at the history of Article V.

A state may not condition its ratification on a popular referendum; the term “legislatures” in Article V means deliberative, representative bodies as they were understood in 1789.⁴³ In *Leser v. Garnett* the Court says, “The function of a State legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; it transcends any limitations sought to be imposed by the people of a State.” The Court further says that the act of ratification of a constitutional amendment by a state is not an act of legislation “within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.”⁴⁴

Congress can fix a time limit on ratification. This arrangement was challenged in connection with the Eighteenth Amendment (Prohibition), where the proposing resolution set a period of seven years for ratification. (The Twentieth, Twenty-first and Twenty-second Amendments also contained the same provision.) The Court concluded in *Dillon v. Gloss* that nothing in Article V suggested that once an amendment was proposed it was “open to ratification for all time, or that ratification in some States may be separated from that in others by many years and yet be effective.” On the contrary, the language of Article V suggests that proposing and ratifying are two closely related steps “not to be widely separated in time.” Quoting from Judge John Alexander Jameson, the author of a famous nineteenth century treatise on constitutional conventions, the court says:

that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.

Accordingly, Justice Willis Van Devanter concluded in *Dillon v. Gloss* that it was a fair inference from Article V “that the ratification must be within some reasonable time after the proposal.”⁴⁵

The most recent decision in which the Court considered Article V and its requirements was *Coleman v. Miller* (1939).⁴⁶ This case challenged the validity of Kansas’s ratification of the child labor law amendment on the grounds that (1) it had already been rejected by the state legislature, (2) it could no longer be ratified because an unreasonable length of time (thir-

⁴³ *Hawke v. Smith*, 253 U.S. 221 (1920).

⁴⁴ 258 U.S. 130 (1922) at 137; and *Hawke v. Smith*, at 229.

⁴⁵ 256 U.S. 368 (1921).

⁴⁶ 307 U.S. 433 (1939).

teen years) had passed since Congress had submitted it to the states, and (3) the lieutenant governor could not break the tie vote in the Kansas Senate in favor of ratification. There were four opinions in the case, and the one representing the majority merely affirmed the Kansas Supreme Court's denial of a writ of mandamus to the plaintiffs. One plurality held that the twenty-one members of the Kansas Senate who were the plaintiffs in the case had standing, and that the federal courts had jurisdiction to review the case: a different plurality stated that the Court should have found that the proposed Child Labor Amendment had lapsed. Among other conclusions Justice Charles E. Hughes found that:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by the state legislatures in the light of previous rejection or attempted withdrawal, should be regarded as a **political question** pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Joining this conclusion, Justices Hugo Black, Owen Roberts, Felix Frankfurter, and William O. Douglas insisted that the Congress's final determination that an amendment had been ratified by the required number of states "is conclusive on the Courts." They argued that such matters are political questions and therefore call for decisions by a political department. "To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendment, we are unable to agree." This concurring opinion is critical of Justice Hughes's opinion to the extent that it "treats the amending process of the Constitution in some respects as subject to judicial construction. . . . Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress. . . ."

Coleman v. Miller, a case about an amendment that was never adopted, remains the Court's last word on Article V. Some suggest on this evidence that the Court would be reluctant to intervene in the controversies that will arise over invoking an Article V convention. This conclusion is not warranted, in my opinion, for two reasons. First, only four members of the Hughes Court—Frankfurter, Black, Douglas, and Roberts—subscribed to this view of the Court's role. The Hughes opinion conceded only that the efficacy of ratification was a political question. Second, a recent case raises other doubts about this conclusion. That case is *Powell v. McCormack*, decided in 1969.

Indeed, in *Powell v. McCormack* the Court indicated that an issue is not necessarily a political question even when a constitutional provision seems explicitly to commit the determination of its meaning to Congress. The Court in *Powell* did not demur in the face of the constitutional provision that

each house of Congress “shall be the Judge of the Elections, Returns and Qualifications of its own Members.” Rather, the Court itself determined that the qualifications which Congress had the power to judge did not extend to those upon which Congressman-elect Adam Clayton Powell was excluded from the House. Thus, in the alternative amendment process, if Congress acted beyond the powers given it by Article V, as interpreted by the Court, the Court could apply the reasoning of *Powell* to justify a finding that a question decided by Congress was not textually committed to it.⁴⁷

Add to this the Court’s decision in *Baker v. Carr* (1962) which considerably narrowed the area of nonjusticiable political questions, and the result suggests that the Court’s role in defining the requirements of Article V, particularly in the case of invoking a convention, may be far from over.

Article V in Action

The final dimension of this examination of Article V in the light of its language, Supreme Court decisions, and the understanding of the framers, is the history of its application. When Madison introduced the first ten amendments on June 6, 1789, it was to a goodly proportion of the members of the Federal Convention then sitting in Congress—as commentators are fond of pointing out. This first Congress, without hesitation, “transmitted the Bill of Rights to the states, via the president without asking or suggesting that he approve it.”⁴⁸ This has an even greater significance than is acknowledged by those writers who advocate a presidential role in the amendment process. That the president was George Washington, that no sane member of Congress would have risked offending him, and that he knew, as did other members of the late Convention, how amendments were to be proposed, cannot be overemphasized. Moreover, Madison was the last person to have bypassed Washington if the president were meant to approve or reject proposed amendments.

This same Congress originated the practice of submitting amendments by two-thirds of a quorum. The *Journal of the House* states that the resolution proposing the amendments was adopted with “two-thirds of the members present concurring,” and the *Journal of the Senate* records the same principle of voting.⁴⁹ Furthermore, this two-thirds requirement applies only to the final vote; all the preliminary votes are by a simple majority.⁵⁰

⁴⁷ Note, “Proposed Legislation on the Convention Method of Amending the United States Constitution,” *Harvard Law Review* (June 1972):1638-1639.

⁴⁸ Edward S. Corwin and Mary Louise Ramsey, “The Constitutional Law of Constitutional Amendments,” *Notre Dame Lawyer*, 1951, reprinted in *Hearings Before the Subcommittee on Separation of Powers*, 30 and 31 October 1967, pp. 144, 145.

⁴⁹ Corwin and Ramsey, “The Constitutional Law,” p. 144, n. 25. See also Jim Stasny, “Locking the Public Out of the Amendment Process,” *Congressional Record*, 22 March 1979, S. 3230.

⁵⁰ *Ibid.*

E. S. Corwin describes a curious twist to this principle during the adoption of the proposed amendment to limit each president to two consecutive four-year terms. The final vote in the House was 81-29, far short of 146, the number needed to achieve two-thirds of a quorum. Under Rule XV of the House, however, it is only necessary for a quorum to be *present* to transact business and no minimum number of members must vote. Under this rule, the vote of 81-29 was sufficient to pass the proposed amendment.⁵¹ A similar situation arose in 1898 when the House was considering a resolution that proposed the popular election of Senators. Speaker Reed ruled at that time that "if a quorum of the House is present the House is constituted and *two-thirds of those voting* are sufficient in order to accomplish the object."⁵²

This history of amending the Constitution under Article V, as reflected in Supreme Court decisions and in events in Congress and in the states, suggests that it has proved to be a relatively flexible process. This flexibility stands in sharp contrast to the provisions of the legislation introduced to provide for Article V conventions. An examination of this legislation suggests a framework for looking at the most controversial issues surrounding the possibility of amending the Constitution by convention.

LEGISLATING PROCEDURES FOR AN ARTICLE V CONVENTION

Following the decision in *Reynolds v. Sims* (1964), in which the Supreme Court announced its "one man, one vote" standard for apportioning legislatures, the General Assembly of the States (held biennially by the Council of State Governments) urged state legislatures to petition Congress for a convention to propose a constitutional amendment to permit apportionment of one house of a state legislature on some basis other than population.⁵³ According to one account, by 1967 the number of state petitions was thirty-two.⁵⁴ In August 1967 Senator Sam Ervin introduced S.2307, a bill to provide procedures for calling a convention under Article V of the U.S. Constitution. The legislation was reintroduced in 1971 as S.215 and passed the Senate by a vote of 84 to 0, but was not acted on in the House. In 1973, Senator Ervin introduced an identical bill; it passed the Senate without debate, but, again, the House failed to act.⁵⁵ Senator

⁵¹ Corwin and Ramsey, "The Constitutional Law," p. 144.

⁵² The reader will find that much is made by critics of proposed legislation to establish procedures for calling and carrying out an Article V convention, of the compelling need for extraordinary majorities in the operation of such a convention. This insistence is usually on the two-thirds voting provision in Article V and the alleged difficulty of proposing amendments in the Congress. That is why a hard look at what the two-thirds requirement actually means in congressional practice is necessary.

⁵³ 377 U.S. 533 (1964). This proposal was the "Dirksen Amendment."

⁵⁴ See Sam Ervin, Jr., "Proposed Legislation to Implement the Convention Method of Amending the Constitution," *Michigan Law Review* (March 1968):877.

⁵⁵ See Jim Stasny, "Toward a Civically Militant Electorate: A National Constitutional Convention," *Congressional Record*, 1 April 1976, p. S4779.

Jesse Helms introduced substantially the same bill as S.3, The Federal Constitutional Convention Procedures Act, in 1979. As a consequence of Senator Ervin's initiative, valuable congressional testimony and articles have been generated, and the most serious questions regarding the use of this means of proposing amendments have been identified.

The first issue concerning an Article V convention is whether or not Congress can legitimately pass legislation to provide procedures. Charles Black of the Yale Law School contends that the 1971 bill (fundamentally the same as S.3) is "both unconstitutional and unwise."⁵⁶ He claims that

the question whether there "are in effect," at any such time, *valid* applications, even if the previously set requirements of S.215 [now S.3] have been met, and whether, in consequence, the Congress is, simply because those requirements have been met, under a constitutional duty to call a convention, is a constitutional question of the first magnitude.⁵⁷

The section of S.215 (identical in S.3) to which Black refers follows:

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

Black argues that the bill in question is an attempt by one Congress to "bind the consciences of future Congressmen and Senators on judgments

⁵⁶ See Charles Black, "Amending the Constitution: A Letter to a Congressman," *Yale Law Journal* (December 1972):190. Black's articles on the convention clause of Article V have been extremely influential and are regularly referred to in such discussions, and will therefore be central to our discussion here. See also "The Proposed Amendment of Article V: A Threatened Disaster," *Yale Law Journal* (April 1963):957.

⁵⁷ Black, "Amending the Constitution," p. 191.

of law and policy” and that this “bill quite plainly greases the path [of constitutional amendment] too much.”⁵⁸ We have already seen, however, that this path of *proposing* amendments—and that is all this is—is already remarkably accessible to Congress.⁵⁹ It is the path of ratification that is so rocky. Nothing in the proposed legislation would make ratification any easier.

Black further argues that it is unwise to try to settle the questions of procedure raised by Article V “at a time when public and professional attention is not and cannot be focused on them, and when the conditions one needs to know about before resolving them wisely are unknowable. . . .”⁶⁰ This view implies that procedures under the convention clause of Article V ought to vary with time and circumstances—perhaps to the point of a congressional refusal to call a convention even though faced with valid petitions from two-thirds of the states. If this principle were applied to the other means of initiating amendments, would it be acceptable? Of course not in principle, but one could argue that this is just what happens in practice: according to the nature of the amendment proposed by Congress, what constitutes valid votes, ratifications, time limits, extensions, and rescissions can, and does, vary. A case in point is the extension of the time limit for ratification of the Equal Rights Amendment. The extension was passed by a majority rather than by a two-thirds vote. The arguments for hedging the convention mode with extraordinary requirements contrast sharply with the actual practice of proposing amendments in Congress.

Senator Ervin understood his constitutional responsibilities differently. Prompted by “the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth,” Ervin pointed out in 1967 that in the heat of a particular controversy is no time to make such procedural choices.⁶¹ He found that the position one took (particularly in Congress) on the immediate issue—in that case the apportionment of state legislatures—determined the position one took on the convention method of Article V.

Those Senators who had been critical of the “one man-one vote” decision and were eager to undo it now expressed the conviction that the Congress was obligated to call a convention when thirty-four petitions were on hand and that it had little power to judge the validity of state petitions. Those Senators who agreed with the Supreme Court’s ruling were now contending

⁵⁸ *Ibid.*, p. 195.

⁵⁹ Proposing constitutional amendments in Congress differs from legislating in requiring a two-thirds vote. We have seen how few actual votes this can be in practice, because of quorum rules and the like. In addition, this action is not subject to executive veto, as is legislation. See the section entitled, “Article V in Action,” in this article.

⁶⁰ Black, “Amending the Constitution,” pp. 195, 196.

⁶¹ Ervin, “Proposed Legislation,” pp. 875, 878.

that some or all of the petitions were invalid for a variety of reasons and should be discounted, and that, in any case, Congress did not have to call a convention if it did not wish to. . . . Those who did not want to call a convention that might propose a reapportionment amendment point out that an open convention would surely be a constitutional nightmare. Opponents of one man-one vote cited the horrors of an open convention as an additional reason for proposal of a reapportionment amendment by the Congress.⁶²

Senator Ervin introduced legislation because he was convinced that the “constitutional questions involved were far more important than the reapportionment issue that had brought them to light . . . it would be grossly unfortunate if the partisanship over state legislative apportionment . . . should be allowed to distort an attempt at clarification of the amendment process.”⁶³ Senator Ervin takes the opposite view from Professor Black: “Only bad precedents could result from an effort to settle questions of procedure under Article V simultaneously with the presentation of a substantive issue by 2/3 of the states.”⁶⁴ Instead, Senator Ervin hoped to prevent a congressional choice “between chaos on the one hand and refusal to abide the commands of Article V on the other.” The other principle that informs his sponsorship of legislation is his understanding that the Framers wanted the convention method to be “an attainable means of constitutional change.”⁶⁵

If Congress accepted Black’s argument against legislating Article V procedures, what might be some of the consequences? Although there has never been a successful call for an Article V convention, in the two cases where the number of state petitions approached most nearly the requisite number—the direct election of senators and the Dirksen Amendment on the apportionment of state legislatures—Congress responded in opposite ways. In the first case it successfully proposed the desired amendment. In the second it did not act.

Several circumstances distinguish the second situation from the first, and they are instructive. In the apportionment example there was a Supreme Court decision (*Baker v. Carr*, 1962) that had to be overturned and a sense that to do so would be to act against representative principles. In the case of direct election of senators, the question involved the composition of the national legislature, and, although the change eliminated the state legislatures from any role in the makeup of Congress, it was strongly supported by the states themselves. The Court had not acted, and the

⁶² *Ibid.*, p. 878.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p. 879

⁶⁵ *Ibid.*, p. 880.

change appeared to move in the direction of greater popular representation.

One of the consequences of following Black's lead would surely be the tendency to take sides on questions of procedure according to one's position on the issue at hand. Scholars and commentators outside of Congress as well as members of Congress have displayed this tendency whenever issues are raised about amending procedures under Article V. Is it really wise to consider procedural questions of such significance only in the midst of intense difference over substance? What is the likelihood of sound decisions in those circumstances? Surely the controlling principle ought to be that the Constitution makes this an alternative mode of amendment—neither impossible, nor easy—but another means to reach the same end.

Two recent commentaries make this point well. "[This] part of the constitutional amendment article . . . was established to deal with a situation in which government institutions prove impervious to self-generated change."⁶⁶ "The central concern [of the authors of Article V] was simply that there ought to be some recourse if intransigent central authority adamantly refuses to correct, or to allow to be put in play forces for correcting, a deeply felt constitutional insufficiency or flaw."⁶⁷

If Congress refuses to pass procedural legislation as Black urges, then the state legislatures can never find out in advance what Congress considers a valid petition for a convention to propose amendments. The effect of this, of course, is to discourage the initiative to amend from originating at large, in contradistinction to originating in Congress. The effect, it should be emphasized, is not to prevent the Constitution from being amended, or amendments from being proposed. This is important to keep in mind in the face of rhetoric claiming to protect the Constitution from too easy and too frequent change. Our examination shows that it is easier than commonly believed to propose amendments in the Congress. Even if procedures clarifying the means for calling an Article V convention were passed, it would still be more difficult, as Madison acknowledged, than introducing amendments in the Congress.⁶⁸

The "necessary and proper clause" of the Constitution is also relevant to Congress's disputed power to legislate procedures under Article V.

Article I, Section 8: The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.

⁶⁶ Stasny, "Toward a Civically Militant Electorate," p. S4777.

⁶⁷ Moore and Penner, eds., *The Constitution and the Budget*, p. 25. Statement of Professor Paul Bator, the Harvard Law School.

⁶⁸ This is because it adds an additional difficult and very uncertain step to the process—the initial step of calling a convention.

Madison explains in *Federalist 44* that “without the *substance* of this power [to make all laws which shall be necessary and proper], the whole Constitution would be a dead letter.”⁶⁹ Let me suggest that this understanding applies to the matter at hand. Surely the language empowering Congress to call a convention is a case of a power “vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Congress possesses the necessary constitutional means to legislate the appropriate procedures: “No axiom is more clearly established in law, or in reason than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”⁷⁰

Without legislation creating the fundamental processes (such as how petitions are to be transmitted and recorded, or the basis for choosing delegates) the convention method of Article V is a nullity, and that is the point. The argument against legislating procedures in advance of a specific issue is in effect an argument against using the convention method.

Can a Convention Be Limited?

The second and the most troubling issue concerning the convention method is whether or not a convention can be limited. This is the central controversy in the majority of commentaries on the subject. Here again Charles Black’s is the leading voice expressing the view that a convention cannot be limited, indeed, that the only purpose of the alternate method is a general revision of the plan of government, and therefore that it is illegitimate for states to petition for a limited convention.⁷¹ Black writes:

In the very earliest days, before it was known that the new government would be so successful, it may have seemed desirable and practical for the States, unused to union and uncertain of its benefits, to have some means of compelling a thorough reconsideration of the new plan. That method would be provided by the second of the alternatives of Article V, if one interprets it to denote a general convention.⁷²

Before proceeding, let us attempt to clear up a general confusion of terms. Confusion exists over the meaning attributed to “constitutional” convention, “general” convention, “limited” convention, and “revolutionary” convention. John Alexander Jameson published a study on constitutional conventions in 1867 and there makes what appears to be the original distinction between “revolutionary” and “constitutional” con-

⁶⁹ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 284.

⁷⁰ *Ibid.*, p. 285.

⁷¹ On this point, see also Bruce Ackerman, “Unconstitutional Convention,” *The New Republic*, 3 March 1979, p. 8.

⁷² Black, “Amending the Constitution,” p. 201.

ventions, a distinction that is frequently used today, but which is misleading and inappropriate.⁷³

Describing “revolutionary” conventions Jameson wrote:

They derive their powers, if justifiable, from necessity, —the necessity, in default of the regular authorities, of protection and guidance to the Commonwealth, —or, if not justifiable, from revolutionary force and violence. . . . They are possessed accordingly to an indeterminate extent, depending on the circumstances of each case, of *governmental powers*. . . . *They are not subaltern or ancillary to any other institution whatever, but lords paramount of the entire political domain.*

Contrasting this with a “constitutional” convention, Jameson defined the latter in the following manner:

It is charged with a definite, and not a discretionary and indeterminate, function. It always acts under a commission, for a purpose ascertained and limited by law or by custom. Its principal feature, as contradistinguished from the Revolutionary Convention is, that at every step and moment of its existence, it is subaltern, —this evoked by the side and at the call of a government preexisting and intended to survive it, for the purpose of administering to its special needs. It never supplants the existing organization. It never governs.⁷⁴

We can recognize the convention contemplated by Article V in the second definition, Jameson’s definition of a constitutional convention. But where in American history or tradition is the revolutionary convention? Certainly not at Philadelphia in 1787. There appears to be no American example. In spite of this, these two kinds of conventions are frequently cited in discussions of the convention method. Not only is this confusing, it is also very misleading. We need to recall that the fruits of the Federal Convention of 1787 were submitted first to Congress, and then to the individual states for ratification. This hardly makes that convention “lords paramount of the entire political domain.” It is best to forget the class of revolutionary convention altogether, when considering the American constitutional experience.

On the other hand, a **constitutional convention**—not defined as Jameson does, but understood as Americans commonly understand it—is a very American phenomenon. **Its meaning is clear: representatives meet to draw up a fundamental plan of government, a constitution.** All our states have had constitutional conventions, and the Federal Convention of 1787, one of the great political acts of western man, is the best example. **But this kind of convention is not what Article V implies.**⁷⁵

⁷³ John Alexander Jameson, *The Constitutional Convention* (1867), quoted in Stasny, “Toward a Civically Militant Electorate,” p. S4780.

⁷⁴ *Ibid.*

⁷⁵ See the section entitled “Attempts to Call a Second Convention,” in this article.

An Article V convention could propose one or many amendments, but it is not for the purpose of “an unconditional reappraisal of constitutional foundations.”⁷⁶ Persisting to read Article V in this way, so that it contemplates a constitutional convention that writes—not amends—a constitution, is often a rhetorical ploy to terrify sensible people. Nothing in Article V supports the interpretation that the convention provision was inserted for this purpose. This analysis agrees with Madison’s understanding and the debates in the Federal Convention itself.⁷⁷ The report of the Senate Committee on the Judiciary, dated July 31, 1971, also makes this point.

Although constitutional conventions, as used by the States, generally have been reserved for wholesale, as distinguished from piecemeal, constitutional revision, there is nothing in the record of the debates at the Philadelphia Convention which discloses any comparable intention on the part of the Framers. On the contrary, the latter refrained from any evaluation of differentiation of the two procedures for amendment incorporated into article V: they tended to view the convention merely as an alternative safeguard available to the States whenever Congress ceased to be responsive to popular will and persisted in a refusal to originate and submit constitutional amendments for ratification.⁷⁸

“General convention” is a vague term that is used either to mean something that approaches a constitutional convention (in contemporary usage), or to mean one in which amendments—but not reconsideration of the frame of government—could be considered (as used by Madison).⁷⁹ It is too ambiguous a term to be useful, carrying, as it does, both suggestions of limits and implications of openness. “Limited convention” appears to be a relatively clear-cut concept, although a hotly debated one. As used today it refers to a convention where it is understood in advance that consideration of amendments will be restricted to one subject area. Based on the foregoing discussion, a limited convention should be defined as one in which amendment of the Constitution was being considered, as distinguished from a complete revision of the frame of government or the drafting of a new constitution. It is in this spirit that the concept of a limited convention is compatible with Article V.

S.3, the Federal Constitution Convention Procedures Act, attempts to guarantee that a convention will be limited by (1) requiring the state applications to state the “nature of the amendment or amendments proposed” (Section 2); (2) requiring an oath by each delegate to the effect that “he shall be committed during the conduct of the convention to

⁷⁶ See Ackerman, “Unconstitutional Convention,” p. 8.

⁷⁷ See the section entitled “Drafting and Adopting Article V,” in this article.

⁷⁸ U.S., Congress, Senate, Committee on the Judiciary, *Report of Federal Constitutional Procedures Act*, 31 July 1971, p. 4.

⁷⁹ See the section entitled “Attempts to Call a Second Convention,” in this article.

refrain from proposing or casting his vote in favor of any proposed amendment to the Constitution of the United States relating to any subject which is not named or described in the concurrent resolution of Congress by which the convention was called” (Section 8(a)); (3) stating “no convention called under this Act may propose any amendment or amendments of a nature different from that stated in the concurrent resolution calling the convention” (Section 10(b)); and (4) providing that Congress can disapprove the submission of a proposed amendment to the states by a concurrent resolution because it “relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress” calling for the convention (Section 11(b)(1)(B)).

There are three quite distinct questions here. Can a convention be limited? If so, does Congress have the constitutional authority to do so? How can it be enforced?

The first question, can a convention be limited, is *the* question. If a convention can be limited, *and* the limits can be made to stick, all other arguments about the desirability of proposing amendments by convention become unimportant. There would still be two reasons for preferring to initiate constitutional amendments in Congress: speed, and restricting the source of potential change to the government itself.

Evidence cited here that a limited convention—something less than the entire revision of the frame of government—is the device appropriate to Article V comes from the development of the text of Article V at the Federal Convention of 1787, the move for a second convention and Madison’s response, and the plain sense of Article V itself. It shows that the convention method was to be parallel to the method of proposing amendments in Congress. Just as Congress can propose, and always has proposed constitutional change piecemeal, it is clear that this was equally the idea behind the convention method. All textual evidence clearly supports this understanding—that Article V means a convention for proposing amendments, not for drafting a new constitution *ab initio*. Indeed, common sense ought to tell us that a general revision of this sort in a federal system could not be undertaken without a unanimous call by the constituent parts, not merely by two-thirds of the states, unless we prefer to risk another Civil War.

Another consideration is helpful here. What was the purpose of providing for two methods of proposing amendments? The alternative purpose was to allow amendments to be proposed by the people through their respective states, particularly if the general authority refused to introduce them. This is an argument about federal democracy. The source of political legitimacy in our form of government is the people—as most of those who oppose the convention method remind us—and it is therefore appropriate that the people have some access to reasonable change that does not always depend upon the will of the general authority. In a democracy

the people ought to be able, ultimately, to modify the general authority, even to limit its extent, if a majority can be constructed for the purpose. To insist that a convention can never be called except to redo the entire frame of government is effectively to deny the people this means of proposing amendments. That is the object of such arguments. But at least these arguments cannot be allowed the protective coloration of democratic principle or of popular sovereignty. They must be seen for what they are. This understanding has been suggested by Professor Paul Bator of the Harvard Law School.

What Professor Black's interpretation tells us is this: if the central government—and by that, I mean, Congress and the Supreme Court—are in agreement on a constitutional position on a specific issue, then, even though that is widely unacceptable, there is just nothing under Article V that the states and people can do about it, unless they hide the fact that what they object to is a specific constitutional position. They must somehow pretend that what they want is an unlimited all-purpose convention. If, for instance, Congress passes a statute that allows the FBI to censor mail and the Supreme Court says that that is constitutional, there is simply no way we can deal with that, unless the states deal with it by pretending that what they want is a convention for rewriting the entire Constitution.

I submit that there is nothing in Article V, or its history, which suggests that the convention method is to be deemed illegitimate whenever the states wish to amend—as against totally rewriting—the Constitution. In fact, the very statement of the position suggests how bizarre it is.⁸⁰

Since there is strong evidence that contradicts the view that the only kind of convention provided for by Article V is a general, open, write-a-constitution, revise-the-frame-of-government one and that this is the only kind for which the states can petition, why is the opinion so widely shared? First, Jameson's nineteenth century categories ("revolutionary" and "constitutional") have surely been influential in skewing the terms of the debate in this direction. In the case of "revolutionary" conventions there is no actual American experience, and in the case of "constitutional" conventions—as Jameson defines them—the term is misleading.

Second, recent attempts to organize a call for a convention have been for so-called "conservative" purposes, such as overruling Supreme Court decisions on apportionment, abortion, school prayers, or limiting the income tax. These developments have mobilized liberal opinion in opposition to them. The argument that Article V will lead to a second constitutional convention is abhorrent to liberals, because they have preferred strong centralized power and its potential for social engineering and recent conservative-inspired convention proposals threaten central authority. Richard Rovere, writing in *The New Yorker*, is a case in point.

⁸⁰ Moore and Penner, eds., *The Constitution and the Budget*, pp. 25-26.

It is at least theoretically possible that another convention could reinstate segregation, and even slavery: throw out much or all of the Bill of Rights (free speech, free press, separation of church and state, the prohibition against unreasonable searches and seizures): eliminate the Fourteenth Amendment's due process clause and reverse any Supreme Court decision the members don't like: and, perhaps, for good measure, eliminate the Supreme Court itself.⁸¹

Another contributing factor is rhetoric. The convention method, modified always by "constitutional," is not described as a means for *proposing* amendments, but as a means for *amending*, the Constitution. This implies that the step between a convention and radical change of the Constitution is almost nonexistent. It is, of course, exactly the same distance as that from legislatively proposed amendments and just as likely to fail or to succeed in thirty-eight states. For in a democracy no policy that is not ultimately supported by the majority will succeed. Denying the use of the convention method to propose amendments is a delusive solution to the problems of unpopular policies and arrogant central power. The popular understanding that this unwillingness rests on a fear of public opinion contributes to a general cynicism about government.

Having argued that a convention limited to amending is the only kind contemplated by Article V, our next inquiry concerns how to maintain the limits in practice. In the first instance, the answer is by the state petitions or resolutions calling for a convention. There is simply no other real way to determine whether or not two-thirds of the states want a convention under Article V. Unless thirty-four states petition Congress to call a convention for the same purpose, then there is no support for a convention. This might be called a natural limitation, in that it appears in the original manifestation of opinion that brings a convention into existence. The problem is not that the states will act too hastily. Our history teaches that from the moment we became a national union instead of a confederal union, states have been reluctant to invoke the convention method. This is still true and probably always will be.

The temper of American political life suggests that a "rogue" convention is unlikely. First, there is the just-mentioned reluctance to use the method; second, there is the difficulty of getting agreement in any large deliberative body (the Federal Convention of 1787 had only fifty-five members, and they had their problems); and, third, there is the diversity that will result from the choice of representatives from fifty states. The

⁸¹ "Affairs of State," *The New Yorker*, 19 March 1979, p. 137. Aside from what this suggests about Rovere's understanding of the Constitution, in particular the Fourteenth Amendment, it is just as possible in theory that the convention he fears would guarantee to every person a meaningful job, a right to a college education, and a right to good parenting. Fear of the people on the part of liberals is nowhere so starkly expressed as in Rovere's "parade of horrors."

preponderance of American political experience and behavior is on the side of a convention that respects its original limited purpose.

But is there any way to guarantee that the convention will be limited? The short answer is no. Although I have argued that the state applications are a natural limitation, that the characteristic behavior of large bodies is cautious, and that the common sense meaning of Article V is a convention for proposing one or more amendments to adjust the constitutional system, not for revising the frame of government, I believe that there is no constitutionally valid external means of maintaining the limits in practice. The two methods most often proposed are either constitutionally inappropriate or illegitimate.

The first method, found in S.3, requires an oath on the part of the delegates to abide by preestablished limits, and empowers Congress to ignore the convention results if the limits are exceeded (Section 8(a)). Yet a convention to propose amendments is no more subject to external limits than is Congress when it takes up the business of proposing amendments. To introduce Congress into the substance of the process, rather than confining it to receiving petitions, calling a convention, and transmitting the product of a convention to the states for ratification by legislatures or conventions—all of which are directly entrusted to Congress by Article V—is to defeat the article's purpose in providing a convention alternative. It was clearly intended to circumvent Congress as the sole initiator of constitutional amendments, when and if that became necessary.

Second, the argument for Supreme Court review is questionable. The Court is not empowered to consider questions such as whether or not a particular amendment is "valid" while it is being proposed by Congress, or whether too many amendments are being proposed—questions similar to those it would have to address if the Court were to enforce limits on a convention. Our examination of cases shows that the Court has been willing to consider only technical questions (until *Coleman v. Miller*),⁸² in advance of the passage of a particular amendment, and properly so. (What the Court does by way of interpretation to the substance of an amendment once passed is not at issue; consider, however, the Civil Rights Cases.)⁸³

The attempt first in the Ervin bill and now in S.3 legislatively to prohibit Court review of various procedures is constitutionally questionable. It is not at all clear that the provisions of Article V fall under Congress's power over the Supreme Court's appellate jurisdiction. If a claim were based on the Fourteenth Amendment's equal protection clause, it is even less clear that Congress has the power to deny a hearing. But perhaps the most troubling question, assuming that the issues of jurisdiction and the right to a hearing could be satisfactorily resolved, is: How would the Court en-

⁸² See the section entitled "The Meaning of Article V: The Supreme Court Decisions," in this article.

⁸³ 109 U.S. 3 (1883).

force its rulings, against the Congress, against the states, against a convention in session? These bodies would be engaged in the highest kind of deliberation possible in a democracy, engaged in something beyond ordinary legislation; and a confrontation with the Supreme Court, or a lower federal court, would be an ugly spectacle.

I have argued earlier that there is no constitutionally appropriate role for the president in proposing amendments or in maintaining limits on a convention. This consideration, together with the others discussed above, rules out external enforcement. The inescapable conclusion is that the only practical institutional limitation on the kind of convention provided for by Article V is its own self-restraint. The ultimate limitation is the ratification procedure. Short of that, if a convention began to range dangerously afield, failing to respond to the moral force of public opinion, individual states could conceivably withdraw in condemnation of "illegitimate" proceedings.

In this sense an Article V convention is, as an institution (albeit an ad hoc institution), like the Supreme Court, subject only to its own sense of propriety. This point bears repeating. There are powerful traditional, historical, and ethical restraints on an Article V convention as a consequence of the sense of the article, the purpose of the convention method, and the typical political behavior of Americans. But the only actual limit or check in practice will be its own willingness to limit its own scope. There is no constitutionally legitimate way to limit such a body from the outside, consistent with the reason for its presence in Article V. Of course, the same check we have against bad amendments proposed in Congress operates as a limitation here: the process of ratification by thirty-eight states.

Other Procedural Questions

Among the technical matters Congress can and ought to provide for by legislation are the length of time a state petition remains active, procedures for recording, transmitting, and tabulating petitions, procedures for the calling of a convention, and selecting delegates. Some of these are controversial. For instance, what constitutes a valid petition is a controversial question that cannot be decided by Congress on a case-by-case basis without destroying the principle of the convention method of proposing amendments. These questions, settled in advance, would tend to remove vital procedures from any immediate controversy over substance, and would contribute to a reasonable convention atmosphere (as distinguished from one in which procedure falls victim to substance). Our goal surely ought to be a *deliberative* assembly for proposing amendments to the Constitution.

In order to qualify, state petitions should be reasonably contemporaneous, so that they express the will of the people in thirty-four states at a given time. The time should not be so short—two years, for example—that it is virtually impossible ever to pass a sufficient number. The time

ought not to be so long—over seven years—that public support for a convention cannot be adequately measured. S.3 proposes a seven-year time limit, and the 1974 American Bar Association report, “Amendment of the Constitution by the Convention Method Under Article V,” supports a period of from four to seven years.⁸⁴ The period of seven years has assumed a kind of legitimacy because it was specified in several proposed amendments as the time limit on ratification, but what is appropriate for ratifying an amendment is not necessarily so for measuring public sentiment for proposing it at a convention. The four-year time limit might provide a more acceptable measure of reasonably contemporaneous public support. A time limit on applications is necessary, however, in order to determine that there is legitimate, simultaneous support for a convention. Legislation by Congress is the way to solve this problem.

What Ought to Constitute a Valid Petition?

This question is not so difficult to answer if it is considered in the context of the purpose of Article V and of a convention. Nevertheless, the subject has generated a great deal of controversy. To measure the true extent of public demand and support for a convention, a state petition should meet two conditions. First, it should have been validly adopted by a state’s legislature and so certified by the proper state authority. In *Leser v. Garnett* (1922) the Supreme Court said that “official notice to the Secretary [of State], duly authenticated” that a state had ratified a constitutional amendment “was conclusive upon him.”⁸⁵ Surely if ratification of a proposed amendment by a state is thus valid, an application for a convention to propose amendments could be validated in the same fashion and Congress is not entitled to challenge a petition thus pronounced legitimate by the proper state authority.

Second, a valid petition should specify a subject area for possible amendment. Otherwise it does not meet the requirements of Article V. If a petition does more than describe the problem area, it should not be disqualified so long as it treats the same subject as the other petitions that go to make up the necessary thirty-four. Those proposals that would require exact language or would disqualify petitions that reach a conclusion about a problem area (for example, one that says one house of a state legislature can be apportioned on a basis other than population) are thinly disguised attempts to make it impossible ever to call a convention. For this reason such methods of defining valid petitions are inappropriate. It should be enough that thirty-four states have made state-certified petitions asking for a convention to propose amendments in the same subject area. Any petition that does not meet these minimal requirements can be dismissed as irrelevant to a convention, but the inclusion of extraneous statements ought not to disqualify applications that meet these two condi-

⁸⁴ Section 5(a); and ABA Report, *Amendment of the Constitution*, p. 32.

⁸⁵ 258 U.S. 130 (1922), at 130.

tions. Again, it is not Congress's responsibility to pass judgment on these petitions, but to ascertain that the requisite number have been addressed to Congress calling for a convention to consider amendments on the same subject.⁸⁶

What Principle of Representation?

Another serious question of procedure is the principle of representation at a convention. Inasmuch as the convention method of initiating amendments is an alternative to the congressional method and is an acceptable alternative because it represents a possibility for the public directly to promote the correction of abuses or to initiate desired modifications, representation based on population is preferable. To inform the electors about the views of the delegates they are electing in the most practical way, congressional districts may be used. S.3 (Section 7(a)), however, provides for a departure from a pure population basis. "A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each congressional district. . . ."

To prevent legitimate criticism that the convention method gives the states excessive power in amending the Constitution, unless representation at the convention itself is based on population, this section of S.3 ought to be changed to eliminate the two at-large delegates for each state. Otherwise, the states would initiate the calling of a convention, the states would be overrepresented at the convention, and the states would ratify the result. (This slightly simplistic account overlooks the role of Congress for emphasis only.) Presumably members of the convention chosen in proportion to population would organize the body so that its principle of voting and procedures did not betray its popular mandate, but Congress itself cannot legitimately legislate this outcome without violating the pur-

⁸⁶ Of course, state applications will have to say that they are asking for a convention: they cannot leave it at a declaratory statement about a particular constitutional trouble area. Congress is not authorized, under Article V, to debate the petitions. There is precedent for this. In 1789, the first Congress received the first application for a convention and discussed whether or not to refer it to a committee. "A number of representatives, including Madison, felt it would be improper to do so, since it would imply that Congress had a right to deliberate upon the subject. Madison said that this 'was not the case until two-thirds of the State legislatures concurred in such application, and then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency [power] Congress may have in case of applications of this nature.' The House thus decided not to refer the application to committee but rather to enter it upon the Journals of Congress and place the original in its files." See ABA Report, *Amending the Constitution*, pp. 17-18. It is well to remember that Madison was fighting a rearguard action against the possibility of a convention, so that it was not in his "self-interest" to pass upon such petitions without debate: rather his action was based on his understanding of the requirements of the constitutional provision.

pose of the alternative method. Congress does not have the power to establish the principles by which the convention will operate.

SHOULD WE CONSIDER AN ARTICLE V CONVENTION?

In conclusion, let us assume that the questions of procedure have been satisfactorily provided for, that thirty-four states have executed valid applications calling for a convention on the same subject, and that there is now a genuine possibility of such an event. What could we expect, not from contemplating a convention as a worst case situation, but from a convention made up of responsible delegates? We should first have in mind what could lead us to a convention for proposing amendments: it might be the only means available to the public to deal with abuses of the general authority or to make adjustments in the constitutional structure that the general authority refuses to address.

The deliberations and proposals of a convention could not be limited except by its own sense of constitutional propriety. The experience of constitutional conventions in the various states is not particularly helpful in this regard. The real question about the states is unarticulated, but it runs through every discussion of the convention possibility. Can the states be trusted to act responsibly? Clearly the Framers were skeptical about answering in the affirmative, but then they were equally skeptical about centralized government. The argument, however, for state-initiated constitutional change is not a decentralist argument. The states are “polities, not administrative arms of the federal government.”⁸⁷ They have real governing power and are politically responsive to their citizens, in addition to serving as the safest arena for education in citizenship, as Tocqueville understood and taught.

Our states have had two centuries of experience in making and improving constitutions. Anyone familiar with the debates at the Federal Convention of 1787 will recall how many of the devices that found their way into the U.S. Constitution were drawn from state constitutional experience. This remains true today, as well. Furthermore, the history of pressures for constitutional change originating in the states suggests that these efforts are usually less frivolous than the majority of the amendments introduced directly in Congress. Can we not trust state legislatures to recognize the distinction between what is appropriate for a state constitution and what is appropriate for the U.S. Constitution? Senator Hatch reminds us that a convention alternative to proposing amendments in Congress strengthens federalism just as the evolved Electoral College does.

We can be sure of one thing. Any convention will operate in the merciless glare of unprecedented publicity. This may well be the most serious

⁸⁷ Daniel J. Elazar, “The Rebirth of Federalism: The Future of the States as Polities in the Federal System,” *Commonsense* 4, no. 1:1-8.

objection to an Article V convention, more serious than the problem of limitations, or other procedural problems. The success of our one and only national convention may have depended on the requirement of secrecy.⁸⁸ Delegates were free to change their minds in response to persuasive arguments, they could not be lobbied by various interests, they were free to go wherever the logic of the argument carried them without fear of ridicule or public criticism. They were not playing to a gallery or to their constituents. It is not hard to imagine the extraordinary daily headlines, photographs, and entire speeches that would grace the front pages of our newspapers each day of a convention session.

Gordon Wood has undertaken to compare the quality of the debate and the rhetoric of the Federal Convention (held in secret) and the state ratifying conventions (held in public). He finds what one would expect, namely, that the state ratifying convention debates catered to public opinion. In the majority of cases, delegates told the public what it wanted to hear.⁸⁹ Even the authors of *The Federalist Papers*, because they were anonymous, were able to be more honest than is possible today. It is only fair to mention, on the other side of this question, that constant publicity might operate as a considerable constraint on a convention, acting to keep it in bounds, so to speak. A great deal would depend on the delegates' own perception of what was "popular."

Although it is a device which should be resorted to, if at all, only in extremity, the convention means of proposing amendments remains an important federalist safeguard of democracy. This is the only sound way to understand it or to approach it. This view is excellently expressed in the following statement by Professor Paul Bator of the Harvard Law School:

I think the Article V convention represents a profound political protection for us, as a people, against the tyranny of central government. And whatever we say about Article V, I think it is very, very wrong, just because we may disagree with the content of any particular constitutional amendment that is now being proposed, to interpret Article V in such a way as to clip its wings as a protection for the liberties of the people.

That is why I think it is profoundly important, particularly for constitutional scholars, to be hospitable toward the concern that Article V represents, which is that there be a way out for the states and the people if a willful and intransigent central authority governs us in a way we find unacceptable.⁹⁰

⁸⁸ Not only were the proceedings of the Federal Convention of 1787 secret at the time they were going on, but they were not published (from James Madison's notes) until 1840, or fifty-three years after the event.

⁸⁹ Gordon Wood, "The Democratization of Mind in the American Revolution," in *The Moral Foundations of the American Republic* (Charlottesville, Va.: University of Virginia Press, 1977), pp. 102-128.

⁹⁰ Moore and Penner, eds., *The Constitution and the Budget*, p. 27.