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THE CONVENTION METHOD OF AMENDING THE UNITED STATES CONSTITUTION*

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In April, 1978, when I accepted the invitation to speak in your distinguished series of John A. Sibley Lectures, I was quite confident that I would speak on one of my two major preoccupations—the work of the Burger Court and the life of Learned Hand. But one cannot work in constitutional law for long without appreciating the hazards of guesses about the future. Not only is it foolhardy to place bets on outcomes of pending cases or to venture predictions about impending shifts of doctrine; it is equally risky to make confident assertions about where one's interests may lie a year hence.

In recent months, much of my attention has been directed to a problem that was not at all on my mind a year ago. The problem is the meaning of Article V of our Constitution[1]—in particular, the meaning of the provision which states that, "on the Application of the Legislatures of two thirds of the several States," Congress "shall call a Convention for proposing Amendments." As you know, we have had only twenty-six amendments to our remarkably brief Constitution in our nearly two hundred years of national existence. All of those amendments have been initiated through the first of the two methods provided by Article V: they have been proposed by a two-

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[1] It states, in relevant part:

> 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 Legislature 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 . . . .

U.S. CONST. art. V.

thirds vote of Congress, with subsequent ratification by three-fourths of the states. We have never tried the alternative method of amendment, the constitutional convention process. And that constitutional convention route bristles with unanswered questions. Those questions have prompted me to do some reading and thinking in recent months in the unaccustomed and refreshing realm of constitutional interpretation unguided (and unobscured) by judicial pronouncements.

The constitutional convention issue entered most people's consciousness only this spring, largely through the efforts of a specialist in consciousness-raising, California Governor Jerry Brown. Early in 1979, the Governor urged in his inaugural speech that the states apply for a convention to achieve adoption of a constitutional amendment mandating a balanced federal budget.[2] And the Governor has ever since campaigned in support of the drive to call the first constitutional convention since the Philadelphia one in 1787.[3] That drive is momentous indeed: as of mid-1979, thirty states had applied to Congress for a convention;[4] and under Article V, it is clear that, when thirty-four valid applications are at hand, Congress is under a duty to call a convention—a constitutional convention for which there are no guidelines regarding such central problems as the selection of delegates, the duration of its meeting, and, above all, its agenda and authority.

In examining the constitutional convention process, I will begin with some comments on the current drive to persuade two-thirds of the states to apply for a convention.[5] I especially want to scrutinize the assurances of the budget amendment advocates that their campaign will not produce a "runaway" convention.[6] I will then offer my own view of what the Constitution contemplates about the contours of a constitutional convention called under Article V.[7] Finally, I want to address the question of what Congress should do now, and

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[2] *See* excerpts from Brown's inaugural address in *Brown's Twin Speeches: Presidential-Campaign-Inaugural and Routine State-of-the-State,* 10 CAL. J. 73, 73 (1979).

[3] Interview with Edmund G. Brown, Jr., Governor of California, in San Francisco, California (Oct. 6, 1979), *reported in* King, *Brown Starting Drive in Northeast to Eliminate Carter as Candidate,* N.Y. Times, Oct. 7, 1979, at 26, col. 1-2.

[4] For a convenient listing of the applying states as of May 31, 1979 (with references to the pages of the *Congressional Record* in which the text of the resolutions have been printed), *see* Dellinger, *The Recurring Question of the "Limited" Constitutional Convention,* 88 YALE L.J. 1623, 1623 n.2 (1979).

[5] *See* text accompanying notes 9-12, *infra.*

[6] *See* text accompanying notes 13-23, *infra.*

[7] *See* text accompanying notes 24-43, *infra.*

especially the problems raised by pending proposals for federal legislation establishing the machinery for (and delineating the bounds of) Article V constitutional conventions.[8]

I. The Current Campaign

The ongoing balanced budget campaign is a threat to launch the first Article V convention in our history. The fact that we have never used the convention route does not make it illegitimate, of course: it is there in the Constitution, and it is there to be used when appropriate. But it is an uncertain route because it hasn't been tried, because it raises a lot of questions, and because those questions haven't begun to be resolved. If thirty-four state legislatures deliberately and thoughtfully want to take this uncertain course, with adequate awareness that they risk prompting a convention that will be able to consider issues ranging far beyond the balanced budget, so be it. But the present campaign has in fact largely been an exercise in constitutional irresponsibility—constitutional roulette, or brinksmanship if you will, a stumbling toward a constitutional convention that more resembles blindman's buff than serious attention to deliberate revision of our basic law.

Although he is largely responsible for making most of us aware that such a campaign is in fact under way, California Governor Brown did not initiate it. When the Governor got aboard last January, we were already well along towards a convention. The National Taxpayers Union had long been at work on a nationwide, little noticed, but remarkably successful drive,[9] a drive that had persuaded about two dozen state legislatures to apply to Congress for a call of a convention. Even before Governor Brown joined in, the campaign had already gotten the support of about half of the states. These state legislatures had voted with the most remarkable inattention to what they were really doing. Typically, the legislatures did not even hold hearings on the unresolved questions of Article V. Typically, the legislative debates were brief and perfunctory, essentially up-and-down votes on whether one was for or against a balanced budget. Yet what was adopted, typically, was a resolution which said that, unless Congress submitted a budget amendment of its own, the state was applying under Article V for a constitu-

[8] *See* text accompanying notes 44-64, *infra*.

[9] *See* Mohr, *Tax Union Playing Chief Role in Drive*, N.Y. Times, May 15, 1979, at D18, col. 1; Wall St. J., Feb. 1, 1979, at 17 (Western ed.) (NTU full-page advertisement advocating federal balanced budget amendment).

tional convention.[10] I think it is fair to say that the questions of what such a convention might do, and especially whether such a convention could and would be limited to the balanced budget issue, were largely ignored.

When Governor Brown joined the campaign, the public began to take it more seriously. In February 1979, a committee of the California Assembly became the first state legislative body to hold extensive hearings on what the convention process really might look like.[11] The California legislature rejected the convention proposal after those hearings. Many people then assumed that the drive was dead. But it continues. By the summer of 1979, New Hampshire had become the thirtieth state to ask for a convention.[12] The chief proponents, the National Taxpayers Union and the California Governor, plan to press the campaign in other state legislatures during 1980. If four more states join the campaign, I suppose everyone will become aware that a truly major constitutional issue confronts us.

II. THE UNPERSUASIVE ASSURANCES OF THE BUDGET AMENDMENT ADVOCATES

A major reason why so many serious questions have been ignored is that the advocates of the balanced budget amendment have uttered frequent assurances that a constitutional convention can readily be limited to a single, narrow subject and that the process won't get out of hand. One way of examining the problems of the convention route is to scrutinize those assurances, in which I perceive three major recurrent themes. First, we are told that a constitutional convention is not likely to come about, since the real aim of this drive is to spur Congress into proposing a budget amendment of its own. Second, we are told that, even if a convention is called, it will be confined to the budget issue and will not become a "runaway" convention, as the 1787 Convention of course was. And, third, we are told that even if the convention were to become a "runaway" convention that proposed amendments going beyond the budget issue, its proposals would never become part of the Constitution because three-fourths of the states would never ratify them.

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[10] *See, e.g.*, Del. H. Con. Res. No. 36 (1975), *reprinted in* 125 CONG. REC. S1307 (daily ed. Feb. 8, 1979).

[11] California Assembly Comm. on Ways and Means Report 79-1, *Transcript of Hearings on the Balance the Federal Budget Resolutions* (1979) [hereinafter cited as California Hearings].

[12] *See* N.H. POM-223 (1979), *reprinted in* 125 CONG. REC. S6085 (daily ed. May 16, 1979).

In my view, there is no adequate basis for those assurances, and certainly not for the confidence with which they are persented. I believe that the convention route promises uncertainty, controversy, and divisiveness at every turn. With respect to the central constitutional question—whether a convention would and could be limited to a single subject—I am convinced that there is a serious risk that it would not and could not in fact be so limited.

Let me take a closer look at the major arguments of those who seek to allay concerns about the risks of the convention route.

First, we are promised that there isn't likely to be a convention, because the campaign is simply a device to press Congress into proposing a budget amendment of its own. That claim seems to me the simplest to challenge: a threat to induce congressional action needs to be a credible threat; a strategy that rests on the threat of a convention must surely take account of the possibility that a convention will actually convene. Moreover, one of the very few issues about the convention route on which scholars agree is that, once thirty-four proper applications for a convention are submitted, Congress is under a *duty* to call a convention and does not have a legitimate discretion to ignore the applications.

Second, we are told that any convention would be limited to the subject matter of the state applications. That is of course the central constitutional problem, and it raises a number of questions for which there are no authoritative answers. Let me touch on just a few of the issues that raise doubt about the possibility of truly limiting a convention, and let me consider several scenarios that might quite possibly confront us in the months to come.

Let me begin by recalling the various steps broadly delineated in Article V of the Constitution. The first step is "the Application of the Legislatures of two thirds of the several States" for a convention. After proper "Applications" are received, Congress, as the second step, "shall call a Convention for proposing Amendments." Incident to that "call," Congress will have to provide for the selection of delegates; choosing those delegates is the third step in the process. Then, as the fourth step, the convention meets. After the convention reports its proposals, Congress is called upon to take the fifth step: to select the "mode of Ratification" of the proposed amendments—ratification either by the "Legislatures of three fourths of the several States" or by ratifying conventions in three-fourths of the states. The sixth and final step is the actual consideration of ratification in the states.

With respect to the first step, some scholars believe that the only

valid state "Application" is one calling for a general, unlimited convention.[13] A larger number of scholars believe that applications that are somewhat limited can be considered valid, so long as they are not so narrowly circumscribed as to deprive the convention of a real opportunity to deliberate, to debate alternatives, and to compromise among measures.[14] Hardly anyone believes that a very specific application, such as one asking for an up-or-down vote on the text of a particular amendment, is the kind of "Application" contemplated by Article V.[15] Yet the typical proposals adopted by the states so far quite specifically seek a balanced budget amendment; they are accordingly open to the charge that they are not proper "Applicatons" in the Article V sense.

But the question of what the state legislatures may properly in-

[13] Professor Charles L. Black, Jr., of Yale Law School has long been the most vigorous advocate of the "unlimited convention" position. *See, e.g.*, Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); his testimony at the California legislative hearings in February, 1979, California Hearings, *supra* note 11, at 126-54; and his statement at a conference sponsored by the American Enterprise Institute in May 1979. American Enterprise Institute for Public Policy Research, Conference on the Constitution and the Budget: Are Constitutional Limits on Tax, Spending and Budget Powers Desirable at the Federal Level? 19-28 (May 23, 1979) (unpublished transcript) [hereinafter cited as AEI Conference]. *See also* Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8. For a more recent analysis somewhat similar to the Black-Ackerman position, see the thoughtful discussion in Dellinger, *supra* note 4.

[14] *See, e.g.*, AMERICAN BAR ASSOCIATION SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974) [hereinafter cited as ABA REPORT]; Memorandum from J. Anthony Kline, Legal Affairs Secretary, to Edmund G. Brown, Governor of California (Jan. 31, 1979) [hereinafter cited as Kline-Brown Memorandum]; Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949 (1968); Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1968).

The articles by Professor Bonfield and Senator Ervin were part of a Michigan Law Review symposium on the constitutional convention method which has also been published as THE ARTICLE V CONVENTION PROCESS—A SYMPOSIUM (L. Levy ed. 1971). Senator Ervin's arguments in his symposium piece strongly reflect the position of Professor Philip B. Kurland at the 1967 Ervin committee hearings on proposed convention procedure legislation. *Federal Constitutional Convention: Hearings on S. 2307 Before the Subcomm. on Separation of Powers Comm. on the Judiciary*, 90th Cong., 1st Sess. 233 (1967) [hereinafter cited as 1967 Hearings] (statement of Philip B. Kurland).

The testimony of the late Professor Alexander Bickel at those hearings affords an unusually eloquent statement that a convention must have a real opportunity to deliberate, debate and compromise. *Id.* at 60 (statement of Alexander Bickel). My own analysis of the problem is heavily indebted to his probing discussion.

[15] When I delivered this lecture in May, 1979, I said that I didn't know of a single scholar who believed that a specific application for an up-or-down vote was valid. Since then, a respected scholar, William W. Van Alstyne of Duke, has made just such an argument. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (1979).

clude in their "Applications" is only a preliminary problem. The main difficulties lie in what Congress could and would do, what the dynamics of the delegate selection process would be, and, above all, what a convention could and would do. If Congress, in the second step of the Article V convention process, adopted the position that only unlimited applications are proper, it could simply ignore the limited ones, and the process would stop right there, at least for the time being.[16] Or, Congress, still acting on the belief that all conventions had to be general ones, might disregard the specifications of the subject matter in the applications and issue a call for a general convention.

I suspect that Congress would adopt neither alternative. My guess is that Congress would first of all turn to the question of whether the applications at hand were valid ones. They are not all properly addressed to the correct recipient in Washington, according to some members of Congress.[17] They are not identical in text. Moreover, they typically contain conditions--for example, that the application is to be considered only if Congress fails to propose its own budget amendment, and that it is to be viewed only as an application for a convention with limited scope. If some plans that have been discussed in Washington materialize, congressional committees would hold hearings narrowly confined to the question of the validity of the individual applications. If that happens, we may see a process in which Congress finds flaws in most of the applications submitted. I certainly hope that Congress does not take that route: what could do more to reinforce the feeling of distrust of Washington that underlies the balanced budget campaign than to have Congress strike, one by one, the applications before it, on various technicalities?

I believe that the most probable congressional action if thirty-four states adopt valid applications (and if Congress doesn't propose an amendment of its own) is this: Congress would attempt to heed the grievance that stirred the budget amendment applications but would call a convention with a scope broad enough to still the qualms about excessively narrow conventions. Congress might, for example, call a convention to address the issue of fiscal responsibility. If the convention bowed to that congressional delineation of its

[16] *See* Dellinger, *supra* note 4.

[17] Late last winter, while most sources were reporting that valid applications had been approved by 26 or 27 state legislatures, Senator Alan Cranston of California counted only 14 and Senator Birch Bayh of Indiana counted 16 while disputing six of Cranston's tally. N.Y. Times, February 7, 1979, § 1, at 16, col. 1.

agenda, it could, for instance, consider the spending limitation supported by Milton Friedman[18] as well as the balanced budget proposal supported by Governor Brown. If Congress took that route, it would presumably enact—at last—some legislation that would set up machinery for a convention: legislation similar to that proposed by Senator Sam Ervin a decade ago; legislation that presents a troublesome set of problems of its own, as I will elaborate later.[19]

But all that takes us only through the first two steps of the convention route. The uncertainties at those stages are grave enough, but they are as nothing compared to what confronts us at the all-important third stage, the convention itself. Even if Congress were satisfied that the quite specific balanced budget applications constituted valid "Applications," and even if Congress were satisfied that it had the power to confine a convention to the subject matter it defined (both debatable assumptions), that would not resolve the problem of what might take place at the convention itself. The convention delegates would probably be chosen in popular elections,[20] elections where the platforms and debates would be outside of congressional control, where interest groups would surely seek to raise issues other than the budget, and where some successful candidates would probably respond to those pressures. Those convention delegates could legitimately speak as representatives of the people. And those delegates could make a plausible case that a convention

[18] *See* Friedman, *The Limitations of Tax Limitation,* POLICY REVIEW, Summer, 1978, at 7; National Tax-Limitation Committee, Memo Re: Proposed Constitutional Amendment to Limit Federal Spending (January 30, 1979) (unpublished memorandum on file with *Georgia Law Review*).

[19] *See* text accompanying notes 44-64, *infra.*

[20] Popular election of delegates has been the assumption in most modern discussions of Article V constitutional conventions. *See, e.g.,* ABA REPORT, *supra* note 14. Moreover, proposed convention legislation has typically provided for popular election. *See* Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution,* 85 HARV. L. REV. 1612 (1972). *See also* the Ervin bill passed by the Senate in 1971, S.215, 92d Cong. 1st Sess., 117 CONG. REC. 36804 (1971), and its more recent counterpart, the Helms bill, S.520, 96th Cong., 1st Sess., 125 CONG. REC. S.1935 (1979). The Ervin-Helms proposal would give each state a number of delegates equivalent to the number of its representatives and senators, with two delegates elected on a statewide basis and the others by congressional district.

A more recent proposal, by Senator Hatch—the Constitutional Convention Implementation Act of 1979, S.1710, 96th Cong., 1st Sess. (1979)—leaves the manner of selection of delegates to the states. The Hatch bill provides: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of delegates, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress." *Id.* at § 7(a). But even Senator Hatch stated in introducing it on the floor that "each of the States will undoubtedly introduce some means of popular election for the delegate positions." 125 Cong. Rec. 11874 (daily ed. Sept. 5, 1979).

is entitled to set its own agenda. They could, for example, claim that the limitation in the congressional "call" was to be taken as a moral exhortation, but not as a binding restriction on the convention's discussion. They could argue that they were charged with considering all those constitutional issues perceived as major concerns by the American people who elected them. And, acting on those premises, the convention might well propose a number of amendments, amendments going not only to fiscal responsibility but also to such issues as nuclear power or abortion or defense spending or health insurance or school prayers.

If the convention were to report proposals such as those to Congress for submission to ratification, the argument would of course be made that the convention had gone beyond the bounds set by Congress. I have heard it said that Congress could easily invalidate the efforts of any such "runaway" convention by "simply ignoring" the proposed amendments on issues exceeding the limits. I do not doubt that Congress could make a constitutional argument for refusing to submit the convention's allegedly "unauthorized" proposals to ratification. But any such congressional veto effort would, I believe, run into substantial constitutional counterarguments and equally substantial political restraints.

Consider the possible context—the legal and political dynamics—in which congressional consideration of a veto of the convention's efforts would arise. The delegates elected to serve at "a Convention for proposing Amendments" (in the words of Article V) could make plausible constitutional arguments that they acted with justification, despite the congressional effort to impose a limit. They could make even more powerful arguments that a congressional refusal to submit the proposed amendments to ratification would thwart the opportunity of the people to be heard through the ratification process. Indeed, one of the supposed "safeguards" heralded by advocates of the convention route—the requirement of ratification by three-fourths of the states—could well become the instrument that would quell any congressional inclination to bury so-called "unauthorized" proposals by the convention.

In the face of such arguments, might not Congress find it impolitic to refuse to submit the convention's proposals to ratification? I suggest that it is not at all inconceivable that Congress, despite its initial belief that it could impose limits, and despite its effort to impose such limits, would ultimately find it to be the course of least resistance to submit all of the proposals emanating from a conven-

tion of delegates elected by the people to the ratification process, where the people would have another say.

I am not reassured by the argument that if Congress attempted to submit such allegedly "unauthorized" proposals to ratification, a lawsuit would stop the effort in its tracks. There is a real question as to whether the courts would consider this an area in which they could intervene; other aspects of the amendment process have been held by the courts to raise nonjusticiable questions.[21] Moreover, since the convention route was designed to provide an amendment method largely free of national control,[22] curbs emanating from the national judiciary may prove no more palatable than restraints imposed by the national legislature. And, even if the courts decided to rule, they might reject the constitutional challenge. In any event, the prospect of such a lawsuit simply adds to the potentially divisive confrontations along the convention road—a confrontation between Court and Congress, to go with the possible other confrontations, between Congress and the convention, between Congress and the states, and perhaps between the Supreme Court and the states.[23]

That brings me to the third reassurance about the low-risk nature of the convention route. We are told that the requirement that three-fourths of the states must ratify a proposed amendment guarantees that the convention won't endorse wide-ranging, radical changes in the Constitution. I think there is a fatal flaw in that argument as well. It assumes that a convention would either limit itself to a narrow subject or "run amok" with wild-eyed proposals. But that overlooks a large part of the spectrum in between. Can there really be confidence that there are no issues of constitutional dimension other than a balanced budget that could conceivably elicit the support of the convention delegates and, ultimately, the requisite support in the states?

True, it can be argued that one should not worry about a method of producing constitutional amendments if three-fourths of the states *are* ultimately prepared to ratify. But I am concerned about the *process,* a process in which serious focus on a broad range of possible constitutional amendments does not emerge until quite

[21] *See* Coleman v. Miller, 307 U.S. 433 (1939). *See also* Dillon v. Gloss, 256 U.S. 368 (1921); Leser v. Garnett, 258 U.S. 130 (1922). *See generally* the discussion of justiciability in Note, *The Process of Constitutional Amendment,* 79 COLUM. L. REV. 106 (1979).

[22] *See* text accompanying notes 24-43, *infra.*

[23] *See* statement of Professor Laurence H. Tribe, which was based on his memorandum to the White House, California Hearings, *supra* note 11, at 70.

late. What we risk is a process which starts with a state focus on the balanced budget, leads to a congressional call of a convention to consider fiscal problems, develops into delegate election campaigns where amendments dealing with discrimination and health are also debated, and culminates in a constitutional convention considering amendments on a wide range of other issues as well. Is it really deliberate, conscientious constitution-making to add major amendments through a process that begins with a mix of narrow, single-issue focus and inattention and ignorance, that does not expand to a broader focus until the campaigns for electing convention delegates are under way, and that does not mushroom into broad constitutional revision until the convention deliberates?

III. THE UNDERSTANDING OF THE FRAMERS: A SUGGESTED READING

I must confess that it is a good deal easier to challenge the reassurances of the budget amendment advocates that a constitutional convention can readily be limited to a narrow subject than to arrive with adequate confidence at one's own understanding of how the process should work. What is clear is that no one can make absolutely confident assertions about how the convention method was intended to operate. The inferences that can be drawn from the historical materials and the structure of Article V are not unambiguous; and, as might be expected, there is no consensus among commentators.

That lack of consensus has not prevented some supporters of the budget amendment from making confident assertions that there is overwhelming agreement among constitutional scholars that a convention can be readily limited to a specific subject.[24] But those assertions are wrong: amidst the widely varying commentaries on Article V, the point of agreement that most often emerges is that the argument for an effectively limited constitutional convention is shaky indeed.[25] Moreover, the very existence of divergent views in

[24] For example, Governor Brown of California repeatedly uttered such assertions in public statements after joining the balanced budget-constitutional convention drive early in 1979. *See also* Kline-Brown Memorandum, *supra* note 14.

[25] For example, even scholars who argue that as a matter of constitutional interpretation a limited convention is possible concede that there is no effective machinery to keep within bounds a convention determined to set its own agenda. *See, e.g.*, California Hearings, *supra* note 11, at 106 (statement of Dean Gerhard Casper); Mishkin, *A Question of Trust*, NEWSWEEK, March 5, 1979, at 17; and American Enterprise Institute: Public Policy Forum, A Constitutional Convention: How Well Would It Work? (May 23, 1979) (unpublished transcript) (remarks of Professor Paul Bator).

the literature adds strength to the warning that venturing down the convention road is risky business. But responsible examination of Article V should and can go beyond acknowledgment of the prevailing uncertainties. My own thinking about the materials relevant to constitutional interpretation convinces me that it is possible not only to distinguish between more and less persuasive readings but also to articulate the single most compelling interpretation.

Most of the literature clusters around one of two fairly extreme positions—the "limited convention" theme and the "unlimited convention" argument. In my view, the truth lies somewhere in between.

The "limited convention" position, illustrated by Professor Philip Kurland's arguments,[26] relies heavily on the assumption that the two amendment routes in Article V must be viewed as parallel and essentially synonymous methods, that states initiating the convention process in order to obtain an amendment on a particular subject must have as ready an avenue to achieve their objectives as Congress does when proposing a specific amendment on its own initiative. Closely related to that structural submission by the "limited convention" defenders is the allegedly practical consideration that any clouding of the "limited convention" possibility would unduly inhibit the states from initiating the amendment process.

At the other extreme, the "unlimited convention" believers, epitomized by Professor Charles L. Black, Jr.,[27] point to the open-ended Philadelphia Convention of 1787 as the obvious model for the Article V convention, insist on the total autonomy of the convention, and go on to argue that a state application for a limited convention is wholly void and should carry no weight at all with Congress, because it seeks a gathering which the Constitution does not contemplate.

My own view eschews those extremes in favor of a point in the middle of the spectrum of possible readings of Article V. To me, the most persuasive interpretation is that states may legitimately articulate the specific grievances prompting their applications for a convention; that Congress may heed those complaints by specifying the subject matter of the state grievances in its call for a convention; but that the congressional specification of the subject is not ultimately binding on the convention. Rather, the congressional specifi-

[26] 1967 Hearings, *supra* note 14, at 233. For a fuller elaboration of the essence of the Kurland position, *see* Ervin, *supra* note 14. *See also* ABA REPORT, *supra* note 14.

[27] *See* Black, *supra* note 13.

cation serves the purpose of informing the convention delegates of the subject matter that prompted the applications and operates as a moral exhortation to the convention. I insist, however, that the convention is a separate, independent body ultimately not controllable by the applying states or by the Congress issuing the call. The convention, which in modern times will no doubt be composed of popularly elected delegates, should treat the congressional specification as creating a presumption that the articulated subject designates the business before the convention; but that presumption can be overcome. I believe that the final authority to determine the convention's agenda rests with the convention itself, and that the convention delegates are authorized to consider any issue perceived by the people who elected them as sufficiently significant to warrant constitutional change. My own view, in short, does not preclude the possibility of a single issue convention, *if* there is only one, overriding constitutional problem before the country when the delegates are selected and the convention gathers; but when a wider range of constitutional issues are of concern to the people, Article V in my view permits the convention to go beyond the single issue stated in the applications and specified in the call. This reading is akin to that of the "limited convention" camp in permitting and giving some weight to state and congressional specifications of subject matter; but it is allied with the "unlimited convention" position in insisting on ultimate control by the convention of its own agenda.

The relevant historical materials and the structural considerations reflected in Article V support my interpretation. The readily available reviews of the 1787 context make it unnecessary to rehearse the history of Article V in detail here.[28] But the dynamics of the evolution of Article V during that long, hot Philadelphia summer of 1787 are worth recalling.

From the outset, there was agreement that the new Constitution, unlike the Articles of Confederation, should not require the unanimous vote of the states for amendment, but that amendment should be difficult enough to be more than a casual exercise. The problem that most persistently divided the delegates was the proper forum for the proposing of amendments. As with so many other issues in the framing of the Constitution, the underlying tension was between localism and centralization, between state control and na-

[28] For Philip B. Kurland's memorandum outlining the historical data, *see* 1967 Hearings, *supra* note 13, at 234. For an especially useful recent review of the 1787 background, *see* Dellinger, *supra* note 4.

tional power. At the outset of the Convention, one of the Virginia Resolves proposed excluding "the National Legislature" entirely from the amendment process,[29] and the draft that emerged from the Committee of Detail early in August substantially reflected that emphasis: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."[30] That amendment process would have been initiated solely by the states; the role of Congress would have been minimal; and the convention would have been the sole source of amendments and apparently could have made changes in the Constitution on its own, without any further requirement of ratification.

But in the closing days of the 1787 Convention—and with some haste, in debates that are not fully recorded—that scheme for a wholly autonomous convention was set aside, because of the concerns voiced by both localist and centralist delegates. Localists feared that the wholly autonomous convention could subvert states' rights;[31] centralists feared that barring Congress from any initiating role would skew any constitutional change toward an unduly localist direction.[32]

These contending positions produced a compromise, originally sketched by Madison but significantly changed before final adoption. Under the Madison scheme, Congress would have been the sole body to propose amendments, but would have acted "on the applications of two thirds of the Legislatures of the several States" as well as on its own initiative.[33] The Madison scheme resembles the final product in giving state legislatures as well as Congress a share in the initiating function; but it is different from the ultimate Article V in eliminating any reference to a convention. An all-powerful convention had been the sole proposing mechanism at the outset; Madison's compromise eliminated that device altogether.

The most important result of the debates on Madison's substitute was that the convention scheme resurfaced and became part of Article V. As finally adopted, the state initiative was limited to applying

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[29] I THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 245 (M. Jensen ed. 1976) (Thirteenth Virginia Resolve, May 29, 1787).

[30] *Id.* at 269 (draft constitution by the committee of detail, August 6, 1787).

[31] I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557-58 (M. Farrand ed. 1937) [hereinafter cited as II FARRAND] (statement of Elbridge Gerry).

[32] *Id.* at 558 (statement of Alexander Hamilton).

[33] *Id.* at 559 (proposal by James Madison).

to Congress for the call of a convention; it was that convention that was given the authority to propose amendments, with ratification left to subsequent action in the states.[34] Madison's draft was changed because, once again, objections were raised by both sides. One critic of the Madison plan, Roger Sherman, feared "that three fourths of the States might be brought to do things fatal to particular States."[35] Another critic, George Mason of Virginia, feared that Congress was given too much control: since, under Madison's scheme, Congress was the sole proposer of amendments, either on its initiative or that of the states, "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."[36]

In response to those objections, Gouverneur Morris and Elbridge Gerry proposed substitute language that ultimately found its way into Article V. It provided that, in the state-initiated amendment process, the congressional task was limited to the calling of a convention, with a constitutional convention reinstated to undertake the actual proposing of amendments.[37] That was a compromise, though it was certainly not Madison's compromise. Congress could initiate amendments on its own, as Madison had provided; but the state-initiated process was substantially altered, with the state applications serving merely to get a convention under way, with the role of Congress unmistakably reduced to a largely ministerial one, and, most important, with the convention device reintroduced as the prime instrument for considering and proposing amendments.[38]

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[34] *See* text of Article V, *supra* note 1.

[35] II FARRAND, *supra* note 31, at 629.

[36] *Id.* at 629.

[37] *Id.*

[38] One recent article expresses a viewpoint similar to my own. *See* Dellinger, *supra* note 4. Professor Dellinger argues that, so long as state applications merely *recommend* that a convention consider a particular subject, they must be counted; but if the state applications *insist* on a limited convention, they ask for action beyond the authority of Congress, so that the applications "simply self-destruct." I agree with Professor Dellinger's view that a convention is ultimately entitled to set its own agenda, but I do not share his view that most pending state applications must be considered invalid.

The Dellinger article, published after this lecture was delivered, is an unusually thoughtful discussion of the constitutional convention problem, and I welcome its publication. His recital of the historical evolution of Article V relieves me of the burden of retracing that ground in detail.

I agree with Professor Dellinger's summary and interpretation of that background, with the exception of one passing statement. Professor Dellinger describes Madison's substitute draft as providing "the structure and substance of what eventually became Article V." That kind

The convention device under Article V was clearly not as powerful as that considered early in the 1787 Convention, for its proposals would have to survive a ratification process before becoming part of the Constitution. But, in view of the evolution of the Article V compromise, the introduction of the convention device into the Constitution made the convention a prominent body indeed. It was plainly a mechanism to still the fears of those who thought that state legislatures might have power to dictate the terms of proposed amendments on their own. At the same time, it was a method likely to calm the anxieties of those who feared that Congress would have undue control over proposed amendments emerging from the state-initiated route. In short, the convention—understood to be a powerful mechanism both from the kind of convention contemplated early in the Philadelphia Convention and from the experience of the delegates throughout that Convention—was apparently conceived of as the central institution in the state-initiated amendment process, a body with very considerable autonomy.

Even a cursory overview of that history undercuts the basic premise of the "limited convention" position—that the state-initiated amendment route must be construed as parallel or essentially synonymous to the congressionally initiated one, and that the convention's agenda must accordingly be limited to the subject specified in the state applications and the congressional call. True, Congress has full control over the terms of the proposed amendment when it rather than the states initiates the process. But, given the nature of the mechanism set up by the Constitution and the background of that mechanism, the state-initiated convention route surely cannot be synonymous. The Philadelphia Convention did *not* accept Madison's proposal to make two-thirds of the states coequal with Congress in proposing amendments. Instead, those debates in the closing hours of the 1787 sessions limited the states' initiative to one of applying for a *convention,* and the framers inserted the *convention* as the institution that would undertake the actual proposing. That convention step inevitably makes the state-initiated

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of characterization has misled many supporters of the "limited convention" argument. Though it is true that Madison was the first to propose the division of the initiating function between the national and state legislatures, Article V as ultimately adopted differed in one very significant respect from Madison's "structure and substance": it added the institution of a constitutional convention, lacking in Madison's scheme. As Professor Dellinger himself recognizes after crediting Madison with the ultimate "structure and substance" of Article V, "[t]he Madison draft did not provide for any convention method of proposing amendments . . . ." Dellinger, *supra* note 4, at 1628.

route a different, not a closely parallel alternative.

What I think the framers had primarily in mind, then, was that the states should have an opportunity to initiate the constitutional revision process if Congress became unresponsive, arrogant, and tyrannical. No doubt, the notion of a convention most familiar to the framers was precisely the kind of convention they were attending in Philadelphia—one that set its own agenda and undertook a major overhaul of an unsatisfactory basic document. That does not mean, however, that any convention called under Article V must be as far-reaching as the one in 1787. In my view, the existence of the Philadelphia model does not support the position of the "unlimited convention" camp that state applications specifying a particular subject are illegitimate and should be treated by Congress as ineffectual. I see no reason why the states cannot voice the grievance that prompts their applications, even if it is a grievance as "limited" as a particular Supreme Court decision or a particular congressional program. Nor do I see any reason why the articulation of that grievance should not have appropriate weight when it is repeated in the congressional call. But I do insist that the convention contemplated is not limited to consideration of the specified grievance and is entitled to consider *all* major constitutional issues of concern to the country. If the balanced budget question were the only major issue of national concern today, a single issue balanced budget convention would be entirely feasible. But the actual, unavoidable problem today is that there *are* other constitutional issues of concern; and, if they are of concern, in my view the convention may consider them.

The strained attempt by the "limited convention" advocates to make the state-initiated amendment route parallel to and as easy to utilize as the congressionally initiated one not only overlooks history but, ironically, fails to achieve its objective of giving overpowering significance to state specifications of grievances. For example, even Philip Kurland concedes that state applications cannot attain a convention limited to an up-and-down vote on a particular proposal; even in his view, a convention must be able to consider alternative solutions to a problem.[39] In the "limited convention" proponents' search for a "mediating position,"[40] they accordingly

[39] 1967 Hearings, *supra* note 14, at 233.

[40] The "mediating position" phrase is Professor Paul Bator's. AEI Conference, *supra* note 13 (statements of Professor Paul Bator). *See, e.g.*, California Hearings, *supra* note 11, at 106 (statement of Dean Gerhard Casper); Ervin, *supra* note 14.

give Congress—the body clearly intended to play a very minor role on the convention road—a very considerable authority. Congress, in their view, must broaden the call from something as narrow as the National Taxpayers Union's budget proposal to something more expansive, such as "fiscal problems." I of course do not believe that a convention can ultimately be confined even to such broader limits. But I would add that even a convention limited to a subject as narrow as the "budget" could still be a quite far-ranging one: as any legislator who has sat on a budget committee knows, discussion of a budget can readily include consideration of particular items in a budget. If a convention cannot be limited to simply voting "yes" or "no" on a particular balanced budget scheme, what is to prevent it from considering such questions as permissible or impermissible expenditures for, say, abortions or health insurance or nuclear power?

A convention capable of considering a broad range of issues, capable of determining its own agenda in the face of curtailment efforts in the state applications or in the congressional call: that view, I believe, is what the historical background as well as the constitutional text suggest. Yet advocates of the "limited convention" position nevertheless argue that such a reading should be rejected as not being sensible. The argument goes that such a reading makes the state-initiated route preposterously hard to use and does not give the states as much of a chance to initiate constitutional changes as Congress has.[41] To the extent that this argument advocates an organic view of the constitution, a freedom to reinterpret it according to alleged modern needs, it strikes me as resting on questionable principles of constitutional interpretation. If the text does not limit the convention, and if the relevant history leaves the convention quite a broad scope, is there justification for reinterpretation of an important structural provision because of strongly felt contemporary perceptions?

Even if one were to grant the premise that current needs justify constitutional reinterpretation, I find no compelling case for such a necessity. My interpretation emphasizes the notion that a convention is serious business, as the framers clearly intended it to be,[42]

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[41] *See* authorities cited in note 14, *supra.*

[42] *See, e.g.,* Charles Pinckney's statement in 1787, that conventions "are serious things." II FARRAND, *supra* note 31, at 632. *See also* Professor Dellinger's illuminating review of Madison's opposition, in 1787, to a constitutional convention to propose a bill of rights. Dellinger, *supra* note 4, at 1634. James Madison, in a letter to George Eve on January 2, 1787, noted that a convention would be "too likely to turn everything into confusion and uncer-

and as I think it should be. My view does not deprive the states' concern with a particular issue of all force; my reading makes a relatively narrow convention possible, but *not* on a risk-free basis.

The case for viewing the convention as the central forum in the state-initiated Article V process is considerably reinforced, in my view, by a structural consideration. Congress is ordinarily our one national deliberative body, and that national body is the forum for considering proposed amendments when Congress chooses to take the initiative under Article V. An Article V constitutional convention, when called upon the application of the requisite number of states, provides another, extraordinary national deliberative body as an alternative forum for considering such weighty business as changing our basic law. Thirty-four state legislatures acting separately simply are not as likely to act as seriously as a single national forum in the proposing of constitutional amendments. Certainly, thirty-four states acting individually cannot engage in the kind of give-and-take and compromise possible in Congress (and in a convention as well) when an amendment proposal is under consideration.

Surely, our recent experience illustrates that point forcefully. Most of the state legislatures that have adopted balanced budget-constitutional convention resolutions have acted as if they were merely making a symbolic gesture, without fully realizing that they might be part of a triggering mass of thirty-four that would get a convention under way. Contrast a rare recent exception to the typical consideration in state legislatures, the deliberations earlier this year in the legislature of Montana.[43] Montana came close to becoming the thirtieth state to approve the budget proposal. But shortly before the final vote, one of its legislative leaders urged his colleagues to think of themselves as if they constituted the thirty-fourth state. That sobering warning had a dramatic effect: the admonition prompted the state legislators to ponder the seriousness of their responsibility, and Montana drew back and refused to approve the resolution.

For all these reasons, then, I prefer my own reading of Article V. My approach to interpretation insists that one ordinarily follows the most plausible inferences of text, history and structure, and that one does not deviate from those, if at all, unless there are truly

tainty." 5 THE WRITINGS OF JAMES MADISON 321 (G. Hunt ed. 1904), *cited in* Dellinger, *supra* note 4, at 1634 n.47.

[43] *See* S.F. Chronicle, Mar. 23, 1979, at 7, col. 3.

overpowering reasons for modifications which the text is capable of bearing. In my view, the implications of the text, history and structure of the convention provision in Article V are reasonably clear, and I can find no compelling reasons of contemporary necessity to modify that interpretation.

IV. WHAT CAN CONGRESS DO?—THE ERVIN-HELMS PROPOSALS

One lecture is hardly adequate for a full exploration of the large number of unresolved questions posed by the constitutional convention route. But there is one more set of problems that I want to address before concluding. I said earlier that Congress may soon have to deal with an issue that it has side-stepped for nearly 200 years: enacting some legislation regarding the machinery of a constitutional convention, for use when thirty-four states submit valid applicatons for a convention. More than ten years ago, when Senator Everett Dirksen's campaign to overturn the Supreme Court's one person-one vote ruling was before the country, Senator Sam Ervin waged a crusade to get Congress to remove some of the uncertainties about the convention route by enacting guideline legislation.[44] He repeatedly held hearings on his proposals before his subcommittee of the Senate Judiciary Committee. The hearings in 1967 were especially useful, for they produced an impressive colloquy between Professors Kurland and Bickel.[45] Senator Ervin's campaign finally bore fruit in the Senate; there, the Ervin bill was adopted in 1971 and again in 1973,[46] but each time the House failed to act.

A carbon copy of the Ervin proposal is once again pending before Congress. On January 15 of this year, Senator Helms of North Carolina introduced a proposed "Federal Constitutional Procedures Act."[47] And this time, Congress may be pushed to give it serious

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[44] *See, e.g.*, S.2307, 70th Cong., 1st Sess. (1967); 1967 Hearings, *supra* note 14, at 2; Ervin, *supra* note 14, at 876-79.

[45] 1967 Hearings, *supra* note 14, at 72-78.

[46] S.215, 92d Cong., 1st Sess., 117 CONG. REC. 36804-06 (1971); S.1272, 93d Cong., 1st Sess., 119 CONG. REC. 22731-37 (1973).

[47] S.3, 96th Cong., 1st Sess., 125 CONG. REC. S.33 (1979). On March 1, 1979, Senator Helms reintroduced the bill with no changes as S.520, *supra* note 20, and it was placed on the Senate calendar under that number. 125 CONG. REC. S.4138. All references in the ensuing discussion of the pending legislation patterned on the Ervin proposal will be to section numbers in the current Helms bill, S.520.

In the Senate, Senator Hatch has recently introduced another bill—the Constitutional Convention Implementation Act of 1979—S.1710, 96th Cong., 1st Sess., 125 CONG. REC. S.11871 (1979). For a section-by-section analysis of that bill, *see* 125 CONG. REC. 11871-75. Moreover, there are various convention procedures proposals pending in the House: H.R.2587,

attention by the mounting force of the balanced budget campaign.[48]

If the Ervin-Helms proposal were now on the books, and if it were accepted as valid legislation, a lot of the uncertainty that now besets the convention route would be removed. But Congress has not acted; and, more important, there are serious questions about its authority to enact all of the provisions of the pending proposal.

The bill does take care of some necessary housekeeping chores, and those aspects seem to me clearly within congressional authority, as essential to the exercise of its power to call a convention. For example, the bill specifies the proper national addressees of state applications,[49] and that would resolve an area of controversy that has erupted this year.[50] It provides, moreover, that an application will ordinarily be effective for seven years, and that a state may ordinarily rescind its application.[51] It also resolves important issues about the composition of the convention: it provides for popular elections; it states that there shall be "as many delegates from each state as it is entitled to Senators and Representatives in Congress"; and it prescribes that "[i]n each state two delegates shall be elected at large and one delegate shall be elected from each Congressional district."[52]

Provisions such as these seem to me not only clarifying but also constitutionally legitimate. But there are other provisions that raise grave constitutional doubts. For example, the bill repeatedly states that any disputes at various stages of the process shall be determined finally by Congress, with congressional decisions

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96th Cong., 1st Sess., 125 CONG. REC. H.1055 (1979) (Rep. Volkmer); H.R.2274, 96th Cong., 1st Sess., 125 CONG. REC. H.814 (1979) (Rep. Devine); H.R.1964, 96th Cong., 1st Sess., 125 CONG. REC. H.555 (1979) (Rep. Hyde); H.R.1664, 96th Cong., 1st Sess., 125 CONG. REC. H.402 (1979) (Reps. Fountain, Jones, Whitley, and Hefner); H.R.500, 96th Cong., 1st Sess., 125 CONG. REC. H.170 (1979) (Rep. Hyde); H.R.84, 96th Cong., 1st Sess., 125 CONG. REC. H.128 (1979) (Rep. McClory). For a comparison of these bills, *see* Staff Memorandum, *Subcommittee on the Constitution of the Senate Comm. on the Judiciary, Analysis and Comparison of Six House Bills on Constitutional Conventions,* 96th Cong., 1st Sess. (Aug. 24, 1979).

[48] Senator Bayh's Subcommittee on the Constitution of the Senate Judiciary Committee held the first of a series of meetings on the pending convention proposals on November 29, 1979. Senator Bayh agreed to hold such hearings in the course of the debate on the extension of the federal Civil Rights Commission legislation in June. *See* 125 CONG. REC. S.7172-75 (June 7, 1979) (remarks of Sen. Bayh); Letter from B. Bayh to G. Gunther (August 8, 1979).

[49] S.520, *supra* note 20, at § 4(a) (a State's secretary of state or other qualified officer "shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives").

[50] *See* note 17, *supra* and accompanying text.

[51] S.520, *supra* note 20, at § 5.

[52] *Id.* at § 7(a).

"binding on all others, including state and federal courts."[53] Moreover, the Helms bill imposes a time limit on the deliberations of the convention: ordinarily, the convention shall "terminate" one year after the date of its first meeting.[54] Even more troublingly, it insists that each state application must state "the nature of the amendment or amendments to be proposed."[55] That language suggests that a state application for a general convention is unacceptable—even though that kind of convention was the one most clearly contemplated in 1787.[56] Pursuing its insistence on state specifications of subject matter, the Helms bill goes on to say that the congressional call must specify the "subject" of the state applications as a directive to the convention.[57] To put teeth into that congressional effort to limit the scope of the convention, Section 8(a) provides, with highly questionable authority, that each delegate to the convention shall, prior to taking his seat,

> subscribe to an oath by which he shall be committed during the conduct of the convention to 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 the Congress by which the convention was called.[58]

Apparently, the drafters were not entirely sure that delegates' oaths would work, for a later provision authorizes Congress to block the

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[53] *See id.* at §§ 5(c), 10(b), and 13(c). *But see* H.R.2587, *supra* note 47, at § 16 (United States District Court for the District of Columbia may reverse congressional determinations if "clearly erroneous"); S.1710, *supra* note 47, at § 15 (a state may bring an action in the Supreme Court to challenge findings, determinations, or failures to act in Congress, within 60 days after its claim first arises; further judicial review may be had "as is otherwise provided by the Constitution or any other law of the United States").

[54] S.520, *supra* note 20, at § 9(c).

[55] *Id.* at § 2.

[56] *See* text accompanying notes 24-43, *supra; cf.* Black, *supra* note 13, at 203 (theory of limited convention is 20th century innovation); Dellinger, *supra* note 4, at 1630-31 (framers intended that convention alone have power to set its agenda).

[57] S.520, *supra* note 20, at § 6(a):

> 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 the 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.

[58] *Id.* at § 8(a).

submission of a convention-proposed amendment to the states when "such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described [by] Congress" when it called the convention, "or because the procedures followed by the convention in proposing the amendment were not in substantial conformity with" the congressional act.[59]

I have the most serious doubts about the validity of this last group of provisions—provisions such as the time limit, and especially the effort to control the convention agenda through delegates' oath requirements and through congressional veto of convention proposals. I believe these requirements are quite distinguishable from such minimal, essential guidelines as those pertaining to the selection and expenses of the delegates.

In my view, the text, history and structure of Article V make a congressional claim to play a substantial role in setting the agenda of the convention highly questionable. If the state-initiated method for amending the Constitution was designed for anything, it was designed to *minimize* the role of Congress.[60] Congress was given only two responsibilities under that portion of Article V, and I believe that, properly construed, these are extremely narrow responsibilities. First, Congress must call the convention when thirty-four valid applications are at hand (and it is of course a necessary part of that task to consider the validity of the applications and to set up the machinery for convening the convention). Second, Congress has the responsibility for choosing a method of ratification once the convention submits its proposals. I am convinced that is *all* that Congress can properly do.

I suspect that the Ervin-Helms effort at congressional guardianship over the scope of the convention's deliberations rests on the mistaken assumption that the approach of *McCulloch v. Maryland*[61]—the view of broad discretionary powers of Congress so familiar in other circumstances—is appropriate to congressional action under Article V. True, the Necessary and Proper Clause[62] applies to all powers of Congress; but the scope of the implementing powers surely turns on the nature of the underlying authority and its context in the Constitution. The delineation of congressional authority

[59] *Id.* at § 11(b)(1)(B).
[60] *See* text accompanying notes 29-37, *supra.*
[61] 17 U.S. (4 Wheat.) 316 (1819).
[62] U.S. CONST., art. I, § 8, cl. 18.

regarding the convention route must heed the fact that it is a route largely intended to bypass Congress, to place the initiative for beginning the process in the states, and to give the central role in the proposing of amendments to the constitutional convention itself. Congress seems to me to go well beyond legitimate bounds when it does more than setting up necessary machinery and when it goes on to impose substantive limitations on the scope and duration of convention deliberations. In short, I agree generally with the very persuasive doubts raised by the late Alexander Bickel at hearings on Senator Ervin's bill in the 1960's, doubts which led him to brand mechanisms such as congressionally-imposed delegates' oaths as illegitimate and "quite wrong."[63]

These doubts about the constitutional legitimacy of some of the Ervin-Helms proposals do not mean that Congress should continue to avoid confronting proposals such as the Federal Constitutional Convention Procedures Act. Minimum mechanisms to implement the Article V convention route are necessary, and addressing the issues raised by the Helms bill is long overdue.

That observation prompts some comments about additional congressional action that may be appropriate now. I think it is high time that Congress not only consider the pending legislative proposals, but also pay serious attention to the pending budget convention campaign. I believe that general hearings on the problems of the constitutional convention route are in order, and that they are needed now. If there is merit to my tale of confusion and uncertainty, Congress surely owes it to the country to consider the differing views about Article V and to clarify the misimpressions under which so many state legislatures may have acted. For example, as I have noted, almost all scholars agree that the states cannot compel a convention to vote up-or-down on the balanced budget proposal; yet that seems to be the assumption of most of the resolutions that have so far gained state approval. If Congress is of the view that it can convert such narrow applications into a somewhat broader convention subject such as fiscal responsibility, surely it ought to apprise the states, so that they may have a chance to reconsider their applications. Moreover, if Congress should conclude that a convention has ultimate authority to set its own, even less confined agenda, the state legislatures should surely be told.

[63] *See* 1967 Hearings, *supra* note 14, at 65; Letter from A. Bickel to P. Kurland (Oct. 2, 1967), *reprinted in id.* at 230-33.

I fear, however, that Congress will make no move until thirty-four applications are at hand. At that time, if Congress believes that an unlimited convention is possible, it may rely on that premise to set aside the state applications and in effect to remand them to the state legislatures for reconsideration.[61] Whatever the logical soundness of that course, it would surely be perceived as one more effort by Washington to squelch local initiative. Would it not be better if Congress moved promptly to address and clarify the uncertainties, before the thirty-fourth state has acted and before its back is against the wall?

CONCLUSION

Everything I have said constitutes conjecture about the past and advice about the future. What we have now is an ongoing, nearly successful campaign to get thirty-four states behind the balanced budget drive. Given that present reality, let me conclude with this: If the nation, with open eyes and after more careful attention than we have so far had in most state legislatures, considers a balanced budget amendment so important as to justify the risks of the convention route, that path ought to be taken; but surely it ought not to be taken without the most serious thought about the road ahead. It is a road that promises controversy and confusion and confrontation at every turn. It is a road that may lead to a convention able to consider a wide range of constitutional controversies. My major concern in all this is simply to argue that, as we proceed along this road, we should comprehend the full dimensions of the risks. It is that conviction which leads me to urge that state legislatures not endorse the balanced budget-constitutional convention campaign on the basis of overconfident answers to unanswered and unanswerable questions, or of blithe statements that inadvertently or intentionally blind us to the genuine hazards.

[61] This is in effect the process urged by Dellinger, *supra* note 4, at 1636-40.