

VT.PUB

03]
4

89/1
M 3/8

Congress }
Session }

COMMITTEE PRINT

{ Serial No. 1

IS THERE A CONSTITUTIONAL CONVENTION
IN AMERICA'S FUTURE?

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS
FIRST SESSION

UNIVERSITY OF CALIFORNIA
RIVERSIDE

JUN 02 1993



LIBRARY
GOVERNMENT PUBLICATIONS DEPT.
U. S. DEPOSITORY

FEBRUARY 1993

U.S. GOVERNMENT PRINTING OFFICE

55-870 CC

WASHINGTON : 1993

b7c
b7d

COMMITTEE ON THE JUDICIARY

JACK BROOKS, *Texas, Chairman*

DON EDWARDS, California	HAMILTON FISH, JR., New York
JOHN CONYERS, JR., Michigan	CARLOS J. MOORHEAD, California
ROMANO L. MAZZOLI, Kentucky	HENRY J. HYDE, Illinois
WILLIAM J. HUGHES, New Jersey	F. JAMES SENSENBRENNER, JR., Wisconsin
MIKE SYNAR, Oklahoma	BILL McCOLLUM, Florida
PATRICIA SCHROEDER, Colorado	GEORGE W. GEKAS, Pennsylvania
DAN GLICKMAN, Kansas	HOWARD COBLE, North Carolina
BARNEY FRANK, Massachusetts	LAMAR S. SMITH, Texas
CHARLES E. SCHUMER, New York	STEVEN SCHIFF, New Mexico
HOWARD L. BERMAN, California	JIM RAMSTAD, Minnesota
RICK BOUCHER, Virginia	ELTON GALLEGLY, California
JOHN BRYANT, Texas	CHARLES T. CANADY, Florida
GEORGE E. SANGMEISTER, Illinois	BOB INGLIS, South Carolina
CRAIG A. WASHINGTON, Texas	BOB GOODLATTE, Virginia
JACK REED, Rhode Island	
JERROLD NADLER, New York	
ROBERT C. SCOTT, Virginia	
DAVID MANN, Ohio	
MELVIN L. WATT, North Carolina	
XAVIER BECERRA, California	

JONATHAN R. YAROWSKY, *General Counsel*
ROBERT H. BRINK, *Deputy General Counsel*
ALAN F. COFFEY, JR., *Minority Chief Counsel*

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

DON EDWARDS, *California, Chairman*

PATRICIA SCHROEDER, Colorado	HENRY J. HYDE, Illinois
CRAIG A. WASHINGTON, Texas	HOWARD COBLE, North Carolina
JERROLD NADLER, New York	CHARLES T. CANADY, Florida

CATHERINE LEROY, *Counsel*
IVY DAVIS-FOX, *Assistant Counsel*
KATHRYN HAZEEM, *Minority Counsel*

FOREWORD

The debate over amending the Constitution through the unprecedented process of calling a Constitutional Convention has been intense and of long duration. While undeniably a mechanism which the Founding Fathers considered a viable option for the amendment process, the practical ramifications of such a step have taken center stage during consideration of a number of proposed amendments.

That discussion prompted two hearings by the House Judiciary Subcommittee on Civil and Constitutional Rights in July and September 1985. Considerable research by the Committee and its staff both preceded and followed these hearings and has led to this report.

I am hopeful that this report will provide a valuable reference source for those interested in this important subject.

JACK BROOKS,
Chairman.

SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS,
Washington, DC, December 18, 1985.

Hon. PETER RODINO,
Chairman, Committee on the Judiciary,
Washington, DC.

DEAR MR. CHAIRMAN: During the 99th Congress the Subcommittee on Civil and Constitutional Rights held 2 days of hearings on the Convention method of amending the Constitution. The hearings focused primarily on two issues: The validity of the 32 pending application and the authority of Congress and the States to limit a Convention to a single subject.

In addition, during the years that the current Convention drive has been underway, the subcommittee has compiled a vast amount of scholarship on the subject, including studies by the Library of Congress commissioned especially for the subcommittee.

Relying on all of these sources, the staff has prepared the report we are submitting to you today. In reviewing the report, we have concluded that it is a scholarly analysis of the questions surrounding the Convention process as such, the report does not necessarily reflect the views of the subcommittee or any of us individually. Rather it is intended as a reference tool for anyone interested in the issue. We believe it will be particularly helpful to members of the committee and to State legislators in the exercise of their legislative duties. The Convention question will continue to be debated in Congress and in the States for some time to come. We believe this report will be of immense value in that debate.

The subcommittee chairman would like to offer a special thanks to Representative Charles Schumer, a member of the subcommittee, for his interest in this issue and for his invaluable contribution to the subcommittee's hearings and to the preparation of this report.

Sincerely,

DON EDWARDS, *Chairman.*
JOHN CONYERS, JR.
ROBERT W. KASTENMEIER.
PATRICIA SCHROEDER.
CHARLES E. SCHUMER.

CONTENTS

	Page
Section 1.—Introduction	1
Section 2.—History of article V	3
Section 3.—Can Congress preempt a Convention by passing a balanced budget amendment before 34 applications are received?	4
Section 4.—What constitutes a valid application by the States for a Constitutional Convention and who decides questions of validity?	4
A. Does Congress have the authority to determine the validity of applications?	4
B. Is an application for a limited Convention valid?	5
C. If applications for a limited Convention are valid, are some limitations too restrictive?	6
D. Can an application contain conditions?	6
E. How similar must the 34 applications be in order to trigger a Convention?	6
F. Can applications with nullification clauses be counted with other applications?	8
G. May a State amend its petition?	8
H. Can a State withdraw its applications? If so, is there a point after which it cannot?	8
I. Should applications have a limited lifespan? What should it be? Who decides?	10
J. Does the Governor have any role in the application process? Must he or she sign the application? May he or she veto it?	11
K. To whom should the applications be sent?	11
Section 5.—Once valid applications are received from two-thirds of the States, what must Congress do?	12
A. Must Congress call a Constitutional Convention?	12
B. Can Congress preempt a Convention after receipt of 34 valid applications from two-thirds of the States by proposing its own amendment? ...	12
C. May Congress simply refuse to act?	13
D. What is the President's role in the calling of an article V Convention?	14
Section 6.—Assuming that Congress calls a Constitutional Convention, how must it call it and what are its options regarding Convention procedures? ...	15
A. Mechanics of the call	15
B. What may Congress include in implementing legislation?	15
C. What are the advantages and disadvantages of enacting implementing legislation?	17
Section 7.—If Congress decides to enact Convention procedures legislation, what should it include?	18
A. State applications	18
B. Delegate selection	18
C. Members of Congress as delegates	20
D. Convention funding	20
E. Convention procedures	21
Section 8.—May the subject matter of the Convention be limited by the States or Congress?	21
Section 9.—Must amendments proposed by a Convention be submitted to the States for ratification?	25
A. Can Congress refuse to submit an amendment for ratification?	25
B. What role, if any, does the Convention have in the ratification process?	25
Section 10.—What is the role of the courts?	25

VIII

APPENDIXES

Page

Appendix 1.—Analysis of State applications for a Constitutional Convention ...	31
A. Timeliness	31
B. Requests framed in the alternative	31
C. Validity of limitations	32
D. Variations in limitations	32
E. Conditional applications and nullification clauses	34
Appendix 2.—Summary of proposed legislation in the 99th Congress regarding a Constitutional Convention	36
A. House	36
B. Senate	38

IS THERE A CONSTITUTIONAL CONVENTION IN AMERICA'S FUTURE?

SECTION 1.—INTRODUCTION

When the framers of the Constitution met in Philadelphia in 1787, they sought to provide ways for amending the document they were creating. Their compromise solution was article V of the U.S. Constitution, which states:

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.¹ (Italic supplied.)

Despite the fact that two separate methods of amendment are set forth in the Constitution, the Convention method has never been used. All 26 amendments to the Constitution have been proposed by Congress. This is not to say, however, that the Convention method has not been tried. Since the Constitution was ratified, States have made a total of more than 400 applications to the Congress to call a Convention, including at least one application from each State. Most of the applications have come in this century, including all of those that call for anything other than a general Convention. In the Nation's first 100 years. Only 10 applications were filed, but there have been more than 300 since 1889.²

As of September 1985, 32 States have applied to Congress to call a Convention to consider an amendment to require that the Federal budget be balanced.³ That number is only two short of the requisite two-thirds that would trigger the Convention call specified in article V. Many have heralded this as a constitutional crisis of

¹ U.S. Const. art V.

² Connely, "Amending the Constitution: Is This Any Way to Call a Constitutional Convention?" 22 Ariz. L. Rev. 1011, 1030 (1980).

³ Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming.

major proportions. But there are serious questions about the validity of many of the applications.

This is not the first time the Nation has come close to a Convention. States first began sending applications asking for a limited Convention in the late 1800's as part of a drive to amend the Constitution to provide for the direct election of Senators. Thirty States—one short of the two-thirds required to trigger a Convention call—adopted 73 applications between 1901 and 1911.⁴ Faced with the prospect of a Convention, Congress proposed the 17th amendment. Since then, States have applied to Congress for Constitutional Conventions to consider amendments on a wide variety of subjects, including the repeal of prohibition (5 States), banning polygamy (27 States), limiting Federal taxing power (27 States), limiting Presidential tenure (5 States), and, most recently, apportionment in State legislatures (32 States).

Apparently, their success in getting Congress to propose an amendment on the direct election of Senators convinced the States that applying for a Convention is an effective way to prod a recalcitrant Congress into action. So it is not surprising that two issues on which the States and Congress have disagreed in recent years, reapportionment and Federal budget deficits, have resulted in application drives for a Constitutional Convention.

Perhaps the most controversial issue surrounding the Convention is whether it can be limited to consideration of one or any number of subjects. Despite the fact that State legislatures have taken it upon themselves to ask Congress to call Conventions that would be limited to the consideration of a particular issue or amendment, it has never been established that Congress or the States have that power. Indeed, many constitutional scholars argue that a Constitutional Convention's agenda cannot be limited by either the States or the Congress; it would be a separate, sovereign body answerable only to its own members.⁵

There are many other unanswered questions surrounding the untested Constitutional Convention process and there is no actual legal or historical precedent, save the first Constitutional Convention. Aside from a few court cases on certain narrow questions, the only sources of information on the subject are the opinions and law review articles written by constitutional scholars. Even if these commentators were to reach a consensus—which they have not—there is no guarantee that the courts will agree. Thus, for Congress to try to determine a proper (i.e. constitutional) course of action relying on the sparse body of literature available becomes a very precarious task. This is a slippery slope from which to determine the fate of the Constitution.

While no one can offer definitive answers to the innumerable questions raised by the prospect of the Nation's first Constitutional Convention since 1787, this report attempts to present an overview of opinion and precedent on some of the most critical questions. These include:

⁴Brickfield, House Committee on the Judiciary, "Problems Relating to a Federal Constitutional Convention," 85th Cong., 1st Sess. (Comm. Print 1957) [hereinafter cited as Brickfield].

⁵See Black, "Amending the Constitution: A Letter to a Congressman," 82 Yale L. J. 189 (1972).

Whether Congress can preempt a Convention by passing its own balanced budget amendment before the 34th application is received;

What constitutes a valid application for an article V Convention;

Whether Congress must call a Constitutional Convention once 34 valid applications are received;

What options Congress has regarding Convention implementation and procedures;

Whether the subject matter of the Convention may be limited;

Whether Congress is required to submit amendments proposed by the Convention to the States; and

What the role of the courts might be.

In addition, this report provides a brief discussion of the 32 State applications received by Congress which call for a Convention on the balanced budget issue. Finally, the report contains a summary of the bills introduced in the 99th Congress to establish procedures for holding a Constitutional Convention.

SECTION 2.—HISTORY OF ARTICLE V

Those who fear the prospect that a Constitutional Convention—even one ostensibly limited to consideration of a single balanced budget amendment could lead to a wholesale revision of the entire Constitution do have precedent on their side. The Constitutional Convention of 1787 was itself a runaway Convention. According to the enabling resolution passed by the Continental Congress, that Convention was called for the sole and express purpose of revising the Articles of Confederation....⁶ In creating a whole new Constitution, indeed, a whole new form of government, the first Convention clearly exceeded the boundaries that had been set for it.

The fact that they were overstepping their authority in writing a whole new Constitution was not lost on the framers, who took care to include a way to remedy shortcomings in the document without having to totally rewrite it. After considering several alternatives, the framers agreed upon the language now found in article V. The final product was a compromise between those who feared that Congress would seek to increase Federal powers at the expense of the States, and those who feared that the States would seek to increase their powers to thwart the efforts of the Federal Government.

As originally written, article V vested sole amending power in a Convention, which would be called by Congress upon application of two-thirds of the States. Complaints that this mode threatened the power of the Federal Government resulted in its being rewritten. On the suggestion of James Madison the Convention adopted wording which gave Congress the sole power to propose amendments either, when two-thirds of each House deemed it necessary or when two-thirds of the States applied. This version, too, met with disapproval from delegates who feared that Congress could simply refuse to submit for ratification amendments it disapproved. Finally, the Convention compromised only hours before concluding its

⁶C.D. Bowen, "Miracle at Philadelphia," 678 (1966).

work. Despite the objections of Madison, who feared the power of Conventions and wondered why Congress would be more likely to call a Convention than to offer amendments upon application of two-thirds of the States, the Convention adopted the current wording which granted the power to propose amendments jointly to the Congress and to the Convention.

The debate over article V is not extensive and came in the waning hours of the Convention's deliberations. It is not surprising that commentators today find article V's meaning vague and offer disparate interpretations of the "intent of the framers."

SECTION 3.—CAN CONGRESS PREEMPT A CONVENTION BY PASSING A BALANCED BUDGET AMENDMENT BEFORE 34 APPLICATIONS ARE RECEIVED?

It is generally accepted that, as a matter of constitutional theory, once a set of 34 valid, consonant applications is received, Congress must call a Convention.⁷ However, at least 20 of the 32 balanced budget Convention applications ask first that Congress enact its own balanced budget amendment or, alternatively, that a Convention be called. A number of States specify that their Convention application be ignored or nullified if Congress acts, regardless of how many applications are on hand. Some States' resolutions contain specific deadlines by which Congress must act before the application portion of the resolution goes into effect. Others phrased in the alternative contain no deadline for congressional action. It has been suggested that at least those "alternative" applications with no deadline for congressional action leave Congress with the opportunity to send an amendment to the States for ratification, as, presumably, would those with specific nullification clauses.⁸ One State gives Congress 60 days after the 34th application has been received to submit an amendment before its application becomes valid. Thus, it appears that many of the current applications permit—and indeed expect—Congress to preempt a Convention by submitting its own balanced budget amendment, even after two more applications have been received. Thus, while the receipt of 34 applications theoretically places a mandatory duty on Congress, regardless of any other action Congress might take, as a practical matter, the specific language of the pending applications suggests the States do not desire that result and that Congress would be acting in accordance with their wishes if it proposed its own amendment.

SECTION 4.—WHAT CONSTITUTES A VALID APPLICATION BY THE STATES FOR A CONSTITUTIONAL CONVENTION AND WHO DECIDES QUESTIONS OF VALIDITY?

A. DOES CONGRESS HAVE THE AUTHORITY TO DETERMINE THE VALIDITY OF APPLICATIONS?

Commentators agree that because Congress is charged with calling a Convention when the necessary number of States apply, it

⁷A. Hamilton, "The Federalist," No. 85. See also report of the ABA Special Constitutional Convention Study Committee, "Amendment of the Constitution by the Convention Method Under Article V," (1974) [hereinafter cited as ABA Report].

⁸Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, "An Analysis of State Resolutions Calling for a Constitutional Convention to Propose a Balanced Budget Amendment" 21 (1985) (hereinafter cited as Committee Report).

also has the discretion to determine, first, whether any single application is valid, and second, at what point there is a reasonably contemporaneous expression by two-thirds of the States that a Constitutional Convention should be called.

The history of article V shows that the Convention method was designed to enable the States to circumvent a Congress unwilling to act on its own. Accordingly, scholars have cautioned against excessive congressional involvement in the Convention process. Congress can not use its role in calling a Convention to subvert the will of the States. It nevertheless must determine when to call one. Thus, there may be disagreement on how stringently Congress should review the State applications, but not on whether it should review them at all.

While many suggest that overly technical examination may be appropriate no commentator argues that Congress is bound by article V to call a Convention when the limitations or conditions described in the applications differ widely, and at least one commentator says that under those circumstances, Congress would lack the authority to call a Convention even if it wanted to.⁹ Therefore, given the nature of Congress's role in the procedure, some level of interpretation is unavoidable.

B. IS AN APPLICATION FOR A LIMITED CONVENTION VALID?

There is some support among commentators for the position that any application seeking to limit the Convention to a specific subject matter should be deemed invalid. The chief proponent of this position is Charles Black of Yale Law School, who is of the opinion that article V authorizes only general Conventions. He argues that because applications for a limited Convention are asking for something article V does not authorize, they cannot be valid applications.¹⁰

Black's view is not shared by most other commentators. There is greater support for the position that an application stating that a Convention "should" be limited is valid, while one stating that it "must" be limited is not.¹¹ Thus, an application that says "We, the legislature of State X, find that Federal budget deficits are a serious national problem and we apply to Congress for a Constitutional Convention to consider a balanced budget amendment" would be valid, because it does not demand that the Convention consider only one particular subject. On the other hand, an application seeking a Convention "for the sole and exclusive purpose of considering a balanced budget amendment" may be invalid, because neither Congress nor the States could bind the Convention to consideration of that subject alone. Applying this reasoning to the pending balanced budget applications would invalidate many of them because they call for a Convention for the "specific and exclusive" purpose of proposing a budget amendment.

⁹ Staff telephone conversation with Prof. William Van Alstyne, August 29, 1984.

¹⁰ See Black, *supra* note 5.

¹¹ See Dellinger, "The Recurring Question of the 'Limited' Constitutional Convention," 88 Yale L.J. 1623, 1638 (1979); Gunther, "The Convention Method of Amending the United States Constitution," 14 Ga. L. Rev. 1, 24 (1979).

C. IF APPLICATIONS FOR A LIMITED CONVENTION ARE VALID, ARE SOME LIMITATIONS TOO RESTRICTIVE?

Nearly all constitutional scholars, regardless of their view on the limited Convention question, agree that an application requesting an up-or-down vote on a specifically worded amendment cannot be considered valid.¹² Such an approach robs the Convention of its deliberative function which is inherent in article V language stating that the Convention's purpose is to "propose amendments." If the State legislatures were permitted to propose the exact wording of an amendment and stipulate that the language not be altered, the Convention would be deprived of this function and would become instead part of the ratification process.¹³

Eight applications propose specific language. Two of them attempt to limit the Convention solely to their particular, although different, amendments. It seems clear that these latter applications are of questionable validity. The other six applications which attempt to limit the Convention to consideration of amendments "substantially similar" to the ones contained in the application may also be invalid, or can only be counted with other applications proposing "substantially similar" amendments.

D. CAN AN APPLICATION CONTAIN CONDITIONS?

Many of the applications currently pending before Congress contain certain conditions. For instance several State applications contain "self-destruct" clauses; that is, they are null if Congress submits its own balanced budget amendment to the States. A number of other States have specified that their applications are null and void if the Convention is not limited to consideration of a balanced budget amendment. (See appendix 1.) The imposition of such conditions does not necessarily render an application invalid. However, applications containing different conditions may not necessarily be counted together to determine whether a Convention must be called.

E. HOW SIMILAR MUST THE 34 APPLICATIONS BE IN ORDER TO TRIGGER A CONVENTION?

Must they agree on the subject of the Convention?

If 17 States apply for a Convention to consider a balanced budget amendment and another 17 apply for a Convention to consider an antiabortion amendment, must Congress call a Convention? If the answer is yes, then Congress is already remiss, because in addition to the 32 applications on a balanced budget, numerous other applications have been submitted to Congress on other issues.¹⁴ Why, then, is Congress not under an immediate obligation to call a Convention? Because, say the commentators, the applications must address the same issue.

¹² The exception to this view is Duke University's William Van Alstyne, who believes that applications can be as limited as States wish to make them. Whether they can then be counted with other, less limited, applications is another question, according to Van Alstyne.

¹³ "Constitutional Convention Procedures: Hearings on S. 3, S. 520, and S. 1710 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary," 96th Cong. 1st Sess. 448 (1979) (questions from Senator Birch Bayh to Kenneth Kofmehl) [hereinafter cited as 1979 Senate hearings].

¹⁴ S. Rept. No. 594, 98th Cong., 2nd Sess. (1984).

Article V seems to require a general consensus among two-thirds of the States that a Constitutional Convention be called. Thus, only those applications which request a Convention to deal with the same issue should be counted together.¹⁵

Even those scholars who argue for Convention autonomy do not argue that an aggregate of applications on a variety of different subjects must result in a Convention. These commentators do not doubt States' ability to apply for a general Convention. However, if the applications are limited, they need to address the same matter in order to be counted together.

The applications need not be exact copies of each other. On the contrary, most commentators suggest that Congress should be generous in its interpretation even when applications seem fairly divergent.¹⁶ Applying too strict a standard could be viewed as an attempt to prevent the States from exercising their option under article V. Indeed, some argue that simply stating the same general problem is enough; States do not need to propose similar solutions in order for their applications to be counted toward the critical mass necessary for the calling of a Convention,¹⁷ Van Alstyne contends that applications need only be "of a given subject of sufficient common description that further insistence for more perfect agreement among the applications would clearly be unreasonable."¹⁸

Must they share the same limitations about the scope of the Convention?

Even if 34 applications share the same subject matter, if they request Conventions whose limitations would differ, some commentators doubt that they may be counted together. For instance, according to Van Alstyne, if 34 States call for a Convention to propose a balanced budget amendment, but 10 of them specify that the Convention shall have only the authority to vote yes or no on a prewritten amendment, another 20 say the Convention's "sole and exclusive purpose" is to consider the balanced budget problem, and another four say the budget problem should be part of any such Convention, then, despite the fact that there are 34 petitions on the same subject, no Convention need be called, because the States are not seeking the same thing.¹⁹ This argument does not necessarily imply that any of the applications are invalid, only that they must be placed in separate categories, and that the critical mass will not be reached until there are 34 applications in a single category.²⁰ Others take an even harder line. Forkosch, for example, says that:

...[W]here an express limitation or requirement is set forth in such an application, restricting the scope of the Convention's authority, so that the application is inconsis-

¹⁵ 1979 Senate hearings, *supra* note 5, at 769 (statement of Douglas Voegler).

¹⁶ "Article V Constitutional Conventions: Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary," 99th Cong., 1st Sess. (1985) [hereinafter cited as House hearings] (testimony of Jeffrey Glekel, Jane Bello Burke, and William Van Alstyne).

¹⁷ Bonfield, "Proposing Constitutional Amendments by Convention: Some Problems," 39 *Notre Dame Law* 659 (1964).

¹⁸ Van Alstyne, "Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague," 1978 *Duke L.J.* 1295.

¹⁹ Conversation with Van Alstyne, *supra* note 9.

²⁰ *Id.*

ent with the other applications the Judiciary Committees of both Houses will have no choice but to ignore the document or, preferably, to reject and return it to the State legislature with an adequate explanation.²¹

His view is shared by the Association of the Bar of the City of New York, at least as to those petitions seeking a single text Convention (North Dakota and Delaware, for example). In their recently published report, the association concludes that aggregation of such petitions into separate categories with similarly worded petitions is inappropriate. In reaching this conclusion the association explained that:

[We were] persuaded by the view that the Convention mechanism... must be a deliberative body, with the power and ability to formulate, consider and develop alternative solutions.... If the State legislatures were permitted not only to define the subject matter of the Convention, but also to dictate the text of the amendment, the article V power to propose would shift to the States and the Convention would be limited to a mere approval process, a result contrary to the intent of the framers.²²

F. CAN APPLICATIONS WITH NULLIFICATION CLAUSES BE COUNTED WITH OTHER APPLICATIONS?

Unless Congress decides to ignore nullification clauses in many of the applications, logic may dictate that these applications not be counted with those not containing nullification provisions. To do otherwise would result in giving some States a Convention they specifically indicated they did not want.

G. MAY A STATE AMEND ITS PETITION?

The practice in the States has been not to amend, but rather to pass a new application to reflect changed circumstances. Indeed, 9 of the 32 States with applications pending on a balanced budget Convention have sent Congress more than one application. Virginia has sent three. While the legislative history in these States does not provide reasons for the passage of totally new applications, there is some suggestion that the States wished to conform more closely to applications sent by other States and that they wished to close the time gap between their applications and other, similar ones. One example is Indiana, whose legislature first petitioned Congress for a Constitutional Convention on the balanced budget issue in 1957 and then reapplied in 1979.

No commentator has expressed the belief that it is inappropriate for States to revise or reenact Convention applications. A more difficult question is whether and when a State can rescind or withdraw its application.

H. CAN A STATE WITHDRAW ITS APPLICATIONS? IF SO, IS THERE A POINT AFTER WHICH IT CANNOT?

No State has withdrawn an application for a balanced budget amendment Convention. However, in at least one State, Maryland, a withdrawal drive is underway and has been successful in one

²¹ 1979 Senate hearings, *supra* note 5 at 447 (testimony of Kenneth Kofmehl).

²² 1985 Committee report, *supra* note 8, at 18.

house. In the last major push for a Constitutional Convention on the issue of reapportionment, a number of State legislatures passed resolutions withdrawing previously approved applications. Because 34 States did not request a Convention on the reapportionment issue, Congress did not have to decide the validity of the withdrawals.

On two occasions, however, Congress has dealt with the rescission question in the context of ratification. On July 21, 1868, Congress adopted a resolution declaring that the 14th amendment had been ratified. In so doing, it listed Ohio and New Jersey among the ratifying States, despite the fact that both State legislatures had passed resolutions rescinding their prior ratification of the amendment.

Seventy years later, in *Coleman v. Miller*,²³ the Supreme Court recounted this history and observed that "this decision by the political departments of the government as to the validity of the adoption of the 14th amendment has been accepted."²⁴ The 14th amendment precedent was found by the Court to be an example of "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."²⁵

In 1978, relying on the 14th amendment precedent, *Coleman v. Miller* and subsequent congressional and judicial affirmations of the precedent, Congress rejected an amendment to the equal rights amendment extension which would have permitted rescission. The view of the House Judiciary Committee was that, at the very least, the matter was a political question to be decided by the Congress sitting at the time the 38th State ratified the amendment.²⁶ The committee also stated that, while the ultimate decision properly belonged to a subsequent Congress, its own analysis "revealed that past congressional and judicial precedent stands for the proposition that rescissions are to be disregarded."²⁷

If the withdrawal of an application is viewed as analogous to the withdrawal of an amendment, then, the withdrawal issue should also be created as a political question to be decided by Congress, preferably at the time at which it must determine whether to call a Convention. Moreover, if the two issues are viewed as similar, then Congress presumably could conclude that the weight of history is against permitting withdrawal. However, most commentators argue that withdrawal of applications should be allowed, at least before the necessary 34 States have applied. The need for two-thirds of the States to express a genuine, contemporaneous consensus for a Convention is cited as the rationale.²⁸ Those who acknowledge a possible parallel between withdrawal of an application and withdrawal of a ratification are unpersuaded. They argue that an application is not a final action in the sense that a ratification is: It is simply a request for congressional action and a very

²³ 307 U.S. 433 (1939).

²⁴ *Id.*, at 450.

²⁵ *Id.*

²⁶ H. Rept. No. 1405, 95th Cong., 2d Sess. 13 (1978).

²⁷ *Id.*

²⁸ See, e.g., Bonfield, *supra* note 17 at 671.

preliminary step in the amendment process. Accordingly, withdrawal of an application can and should be treated differently.²⁹

A few commentators flatly reject the notion of withdrawal of an application, either citing the rescission analogy and the prior history on that subject or relying on a slightly different analogy: They argue that the Convention call is a Federal function equivalent to the proposal of an amendment by Congress. Because Congress cannot recall amendments previously proposed and sent to the States, neither should States be permitted to recall applications previously proposed and sent to Congress.³⁰ This is a distinctly minority view, however.

I. SHOULD APPLICATIONS HAVE A LIMITED LIFESPAN? WHAT SHOULD IT BE? WHO DECIDES?

There seems to be general agreement that applications for a Constitutional Convention should not remain valid forever.³¹ There is disagreement, however, as to what an application's lifespan should be. Again, the parallel with ratification is sometimes looked to for guidance. Thus, some commentators think that 7 years, which has become the traditional period for ratification of constitutional amendments, is equally appropriate for a Convention call. Others think that the period should be shorter, because fewer States are required (two-thirds as opposed to three-quarters) and because applying for a Convention is a matter of lesser finality than adding an amendment to the Constitution for all time. These commentators argue that the lifespan of the applications should be as short as is practicably possible to determine the existence of a contemporaneous consensus on the desire for a Convention.³²

But the disagreement does not end there: Even those who argue for a shorter period of time disagree on how long it should be. Some argue that the shortest period of time in which every State legislature could meet once and consider the Convention call is sufficient.³³ Others think that 4 years, enough time to allow the States to consider the question twice, is more appropriate.³⁴

As in the case of withdrawal, commentators agree that Congress has the authority to determine the timeliness question. *Coleman v. Miller* again provides the basis for that conclusion. The case involved a State's challenge to Congress over the ratification period for a child-labor amendment. The Supreme Court held that the ratification period was a nonjustifiable political question solely within the jurisdiction of Congress to decide.³⁵

²⁹ Id. See also Connely, *supra* note 2, at 1033-34.

³⁰ See note, "Rescinding Memorialization Resolutions," 30 Chi.-Kent L. Rev. 339, 339-40 (1952).

³¹ An exception to this consensus is Van Alstyne who, in testimony before the Subcommittee on Civil and Constitutional Rights, suggested that it may be "improper...for Congress to presume to prescribe a statutory deadline with regard to a mechanism...not designed to favor Congress but it favor the States." House hearings, *supra* note 16 (testimony of William Van Alstyne).

³² Note, "Proposed Legislation on the Convention Method of Amending the United States Constitution," 85 Harv. L. Rev. 1612, 1619-21, (1972).

³³ Bonfield, *supra* note 17, at 667.

³⁴ Note, *supra* note 32, at 1619-21.

³⁵ 307 U.S. 433 (1939).

J. DOES THE GOVERNOR HAVE ANY ROLE IN THE APPLICATION PROCESS? MUST HE OR SHE SIGN THE APPLICATION? MAY HE OR SHE VETO IT?

The majority of commentators are of the view that Governors should not be involved in the article V application process. When article V specifies that a Convention be called "upon application of the legislatures,"³⁶ that is exactly what it means, not application by the ordinary lawmaking machinery of the States.

Two Supreme Court opinions are relevant here. In the first, the Court held that Presidential assent is not necessary before an amendment is sent to the States for ratification.³⁷ Noted one commentator, "Since the President is excluded at the national level, the reasonable conclusion is that the State Governors should also be excluded."³⁸ In the second, the Court ruled that gubernatorial assent was not necessary in the ratification of amendments.³⁹ Thus, if the Governor is not included in the ratification process, neither should he or she be included in the application process.

At least one commentator argues, however, that the Governor should be included in the process. "The people in a given State act through its government to express their will. Who is better able to reflect the preferences of the voters in a State than the Governor, who is chosen directly by its entire electorate?"⁴⁰ Proponents of this position also argue that it should not be easier to apply for a Convention than it is to pass a State law on even the most trivial of subjects.

Actual practice varies widely from State to State. Of the 32 pending applications, 9 were sent to the Governor for approval. Seven of those were signed or otherwise approved by the Governor. In Arizona, the Governor returned the application with the message that he thought his signature unnecessary. In the remaining case, North Dakota, the Governor simply took no action. The Governor of Nevada actually vetoed the first resolution passed by the State legislature. While most commentators say that gubernatorial assent is not required for Convention applications, they do not suggest that Congress ought to invalidate applications which have been signed by the chief executive of the State. Nor would an attempted veto necessarily serve to invalidate an otherwise valid application, should Congress adopt the view that the Governor has no role in the process.

K. TO WHOM SHOULD THE APPLICATIONS BE SENT?

There has been substantial uncertainty over this question, to the extent that the number of applications Congress has received may be in doubt. Connely noted back in 1980:

The transmission and receipt of State applications is the source of considerable confusion in the States and Congress. Until this confusion is resolved Congress will be unable to determine whether the required number of applications has been received. . . . Since the Congressional Record Index lists the petitions under "Speaker of the House" and

³⁶ U.S. Const., art. V.

³⁷ *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

³⁸ Connely, *supra* note 2, at 1030.

³⁹ *Hawke v. Smith* No. 1, 253 U.S. 22 (1920).

⁴⁰ 1979 Senate hearings, *supra* note 17, at 447 (testimony of Kenneth Kofmehl).

"Vice President," if these officers do not receive the petitions they may not be officially noted in the Congressional Record....⁴¹

Most commentators agree that procedures legislation, if enacted, should specify to whom applications should be sent, so that they are officially received and noted. Of the pending applications, 13 were addressed to the Clerk of the House and the Secretary of the Senate, 13 to the Speaker of the House and the President of the Senate, 2 were addressed to both sets of officials, and 5 to other officials or to no one in particular. Indeed, not until a researcher for the Library of Congress instigated a search in 1979, did some of the States send their applications to Congress. It is not suggested that applications be invalidated because they were sent to the wrong congressional offices. On the other hand, applications never received by Congress raise more serious questions.

SECTION 5.—ONCE VALID APPLICATIONS ARE RECEIVED FROM TWO-THIRDS OF THE STATES, WHAT MUST CONGRESS DO?

A. MUST CONGRESS CALL A CONSTITUTIONAL CONVENTION?

The vast majority of constitutional scholars believe that Congress must call a Constitutional Convention when it receives a set of valid, consonant applications from two-thirds of the States.⁴² Article V states: "On the application of the legislatures of two-thirds of the several States [Congress] *shall* call a Convention for proposing amendments." (Italic supplied.) Thus, from the language alone it appears that Congress has a mandatory duty. In addition, the debate on article V⁴³ and other contemporaneous documentation⁴⁴ support this conclusion.

However, even though it seems clear that Congress has this constitutional duty, some scholars raise questions which indicate that in fact Congress may have some discretion. These issues are discussed below.

B. CAN CONGRESS PREEMPT A CONVENTION AFTER RECEIPT OF 34 VALID APPLICATIONS FROM TWO-THIRDS OF THE STATES BY PROPOSING ITS OWN AMENDMENT?

The National Taxpayers' Union (NTU), which has taken the lead in lobbying for State applications for a Convention on the balanced budget, argues that Congress can satisfy its constitutional duty by proposing its own amendment. This position is based on the premise that Congress has failed to address the balanced budget amendment and that State applications are simply a means of

⁴¹ Connely, *supra* note 2, at 1030-31.

⁴² Gunther, *supra* note 11, at 5.

⁴³ 2 Farrand, "The Records of the Federal Constitution" 629 (1911). The Founding Fathers established the State application procedure so that one of the methods of proposing amendments would not be dependent upon congressional initiative.

⁴⁴ In No. 85 of "The Federalist," Hamilton wrote: "By the fifth article of the plan, the Congress will be obligated 'on application of the legislature of two-thirds of the States ... to call a Convention for proposing amendments ...' The words of this article are peremptory. The Congress 'shall call a Convention.' Nothing in this particular is left to the discretion of that body." See also 1 Annals of Cong. 249 (1834). The subject of amendments that would contain a Bill of Rights was raised at the initial Congress and a State petition was presented to it. Madison claimed that extensive discussion of the petition was inappropriate until the requisite number were received 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 Congress may have in case of applications of this nature...."

pressuring Congress to respond to the demand for such an amendment. According to James Clark, a founder of NTU, the call of the States for a Convention is "just a way of getting attention—something akin to batting a mule with a board."⁴⁵ As mentioned above, a number of States have provided Congress with the option of passing its own amendment by applying for a Convention only in the event that Congress fails to act.⁴⁶ (See appendix 1.) Thus, it is arguable that as long as Congress acts in accordance with the specific State requests, in the absence of any article V language to the contrary, Congress may choose its means of response to the petitions.⁴⁷

Many constitutional scholars, however, take the view that Congress has no options with respect to its response to the petitions and believe that the unambiguous language of article V provides strong evidence that Congress may not preempt a Convention. (See subpart a above.) In addition, the Philadelphia Convention rejected a method of amendment which would have required Congress simply to propose an amendment once two-thirds of the States applied for one. Thus it can be argued that the drafters did not intend a Convention to be equivalent to congressional proposal of an amendment after application by the States, apparently because once a Convention is convened it might alter the language of the amendment or even decide against proposing it. Nevertheless, while preempting a Convention might be inconsistent with the intent of the framers, there may be nothing in article V to prevent it. For reasons discussed below, congressional action—or inaction—in responding to Convention applications may be unreviewable.

C. MAY CONGRESS SIMPLY REFUSE TO ACT?

Although the Founding Fathers may have intended that Congress not have any discretion, at least one commentator has argued that Congress may nevertheless refuse to call a Convention because there is no "process or machinery under our constitutional system by which Congress could be compelled to perform this duty"⁴⁸ and that "public opinion and, ultimately, the ballot box, are the only realistic means by which Congress can be persuaded to act."⁴⁹

The congressional duty to call a Convention may be unenforceable because the courts may refuse to adjudicate the issue.⁵⁰ (See section 10.) This lack of an enforcement mechanism in article V has been called the "most important defect in the amending provision."⁵¹ If it is true that the courts will not review Congress' action, then, as Brickfield says, only political pressure from State leg-

⁴⁵ Baltimore Evening Sun, March 11, 1983.

⁴⁶ Indeed, a number of States specifically provide that if Congress proposes an amendment after receipt of applications from two-thirds of the States their applications will become null and void. See appendix 1.

⁴⁷ M. McCoy & D. Huckabee, "Constitutional Conventions: Political and Legal Issues, The Unanswered Questions," Congressional Research Service Report No. 135 GOV/A, pp. 23-24 (1981) [hereinafter cited 55 CRS Report].

⁴⁸ Brickfield, *supra* note 4, at 28.

⁴⁹ *Id.*

⁵⁰ Forkosch, *supra* note 21; Kauper, "The Alternative Amendment Process: Some Observations," 68 Mich. L. Rev. 903 (1966).

⁵¹ Forkosch, *supra* note 21, at 1067.

islators and constituents, as well as the integrity of individual members, will motivate Congress to act.

In conclusion, while article V appears to compel Congress to call a Convention upon the application of two-thirds of the States, Congress may in fact be able to forestall or avoid a Convention by passing its own amendment relying on the alternative language contained in many of the applications. Or it could simply refuse to act. The second option assumes, however, that the courts will not seek to enforce what others view as a constitutional imperative. The latter alternative also assumes congressional willingness to take the political risk inherent in ignoring the will of the States.

D. WHAT IS THE PRESIDENT'S ROLE IN THE CALLING OF AN ARTICLE V CONVENTION?

Article V provides that "Congress" shall propose amendments, or call a Convention for proposing amendments, and determine the ratification method in either case. However, article I, section 7 of the Constitution provides that "Every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary... shall be presented to the President..." As a result, scholars are divided on the question of the President's role in the amending process.

The Supreme Court has decided at least one related issue—amendments proposed by Congress do not require the President's signature⁵²—but it is not clear whether this case applies to the calling of a Convention for proposing amendments. Some scholars argue that the rationale for the Court's decision was the futility of requiring Presidential approval when the amendment had already been proposed by two-thirds of Congress, enough to override a Presidential veto.⁵³ This rationale, it is contended, does not apply here because only a simple majority of Congress is required to call the Convention. However, this view is not grounded in any language in the *Hollingsworth* opinion: The Supreme Court did not explain its reasoning in that case. It is equally likely that the Court intended that the President have no role in any aspect of the amendment process.

Those who argue for a Presidential role interpret article I to apply because the Convention call is an "Order, Resolution, or Vote to which Concurrence of the Senate and House... [are] necessary." Thus, Presidential approval is required, and a veto must be overridden.⁵⁴

It is also argued that Congress' responsibility does not end at calling a Convention. It must adopt implementing procedures, a process similar to the usual congressional legislative process which consequently should be treated as such. This argument assumes the call and the implementing legislation to be part of the same resolution. Neither the Constitution nor logic requires such a result, however.

The other school of thought considers the congressional call to be a "unique, nonlegislative function" in which the President would

⁵² *Hollingsworth v. Virginia*, supra note 37.

⁵³ Black, "The proposed Amendment of Article V: A Threatened Disaster," 72 Yale L.J. 957, 965 (1963); Bonfield, supra note 17.

⁵⁴ Bonfield, supra note 17, at 674.

play no meaningful role because the call is mandatory if the preliminary requirements are met.⁵⁵ It would merely add another hurdle to the use of the Convention, contrary to the Founding Fathers' intent,⁵⁶ by putting the President in a position to thwart the alternative amendment process. The purpose of the Convention alternative was to free the States from control by the Federal Government in amending the Constitution. Presumably this includes the Nation's Chief Executive as well as the National Legislature. For these reasons, most scholars conclude that the President has no role in the Convention process. However, even those who argue for no Presidential role agree that if Congress were to enact convention procedures separate from its call then the procedures legislation would require submission to the President for approval.

SECTION 6.—ASSUMING THAT CONGRESS CALLS A CONSTITUTIONAL CONVENTION, HOW MUST IT CALL IT AND WHAT ARE ITS OPTIONS REGARDING CONVENTION PROCEDURES?

A. MECHANICS OF THE CALL

There is a dearth of literature on how Congress must call a Convention. There does seem to be general agreement that a joint resolution stating that the requirements for a Constitutional Convention have been met would be appropriate.⁵⁷ There is even less discussion on when Congress must act; one scholar suggests that the "resolution must be introduced within 2 years of receiving the petitions."⁵⁸ Most procedures bills introduced in recent years mandate an even shorter time frame: For example, S. 40 and H.R. 351 both require Congress to agree to a Convention resolution within 45 days after the appropriate officer of each House has reported the receipt of 34 applications. Presumably Congress will follow its usual legislative procedures, including floor debate,⁵⁹ and it has been suggested that a simple majority would be sufficient to adopt the resolution.⁶⁰

B. WHAT MAY CONGRESS INCLUDE IN IMPLEMENTING LEGISLATION?

Disagreement soon emerges, however, about what Congress may do beyond simply calling for a Constitutional Convention once it has determined that the requisite number of applications have been received. While most commentators believe that Congress has the authority and power to set up implementing procedures for a Convention, the degree of control Congress can exert over the Convention in exercising this authority is the subject of considerable debate.

No one appears to doubt that Congress has the authority to address what Gunther calls "housekeeping chores," such as the time

⁵⁵ Note, *supra* note 32, at 1622.

⁵⁶ ABA Report, *supra* note 7.

⁵⁷ Forkosch, *supra* note 21; M. McCoy & D. Huckabee, *supra* note 47.

⁵⁸ Brickfield, *supra* note 4, at 77.

⁵⁹ In a scenario described by the Congressional Research Service, the resolution would be referred to the House and Senate Judiciary Committees. The committees would hold hearings on the authenticity of the applications and issue a report addressing their phrasing, timeliness and other aspects concerning validity. CRS Report, *supra* note 57.

⁶⁰ Brickfield, *supra* note 4, at 78; Forkosch, *supra* note 21, at 1067.

and place of the Convention.⁶¹ Although, as Gunther notes, "no one can make absolutely confident assertions about how the Convention method was intended to operate."⁶² Scholars addressing the issue assume that in the absence of guidelines in article V itself, Congress must be able to act with respect to these matters pursuant to its power to call a Convention.⁶³ In addition, most scholars consider questions of Convention funding and delegate selection to be within the authority of Congress to legislate.⁶⁴

Beyond these matters, doubts begin to arise about the extent of congressional power to regulate the Convention. Because the Convention method of proposing amendments was intended to minimize the role of Congress, it has been suggested that attempts by Congress to control the Convention under the rubric of procedure would defeat the purpose of the alternative amendment process.⁶⁵ Thus, legislation which would require delegates to take an oath pledging to limit consideration of amendments to those designated by Congress,⁶⁶ endow Congress with the power to resolve disputes on constitutional issues,⁶⁷ block submission of amendments to the States,⁶⁸ or establish Convention rules including voting requirements,⁶⁹ may be unconstitutional.

A small minority of scholars, while not necessarily disagreeing with the principle that Congress' function is ministerial, assumes that Congress may legitimately regulate many of the Convention's activities.⁷⁰ But, even among these scholars who do believe that Congress has broad supervisory power, there is no agreement about the particular activities potentially subject to congressional control.

Thus, the views of the experts reflect a range of positions regarding the extent of congressional control. Nevertheless, a consensus does emerge on the following important procedural issues: Congress may not establish Convention rules; nor may it establish itself as the final constitutional authority; it may determine the validity of the State applications and designate the time and place of the Convention; and finally, it may provide for the Convention's funding and method of delegate selection.

⁶¹ Gunther, *supra* note 11, at 11.

⁶² *Id.*, at 11.

⁶³ *Id.*, at 21; See also, note, *supra* note 32, at 1617; Thompson & Pollitt, "A New Constitutional Convention?", 39 *Christianity and Crisis* (1979).

⁶⁴ Gunther, *supra* note 11, at 22; Kauper, *supra* note 50, at 906. Thompson & Pollitt, *supra* note 63, at 356; CRS Report, *supra* note 57, at 22-23.

⁶⁵ Note, *supra* note 32, at 1618; Gunther *supra* note 11, at 23; 1979 Senate hearings, 300 (questions from Senator Birch Bayh to William Van Alstyne.).

⁶⁶ Gunther, *supra* note 11, at 22.

⁶⁷ ABA Report, *supra* note 7.

⁶⁸ Gunther, *supra* note 11, at 23.

⁶⁹ Note, "Proposing Amendments to the United States Constitution, by Convention," 70 *Harv. L. Rev.* (1957).

⁷⁰ One scholar believes that Congress has broad supervisory power to prescribe the voting method at the Convention. (Kauper, *supra* note 50, at 907.) The ABA argues that it is essential that Congress provide for judicial review in its legislation (as opposed to remaining silent, although the recommendation was made in the context of the ABA's opposition to some legislative attempts to exclude the courts entirely). (ABA Report, *supra* note 7, at 20-21.) Another scholar simply asserts that Congress' call should make clear who has the power to establish procedures. (Forkosch, *supra* note 21, at 1067.)

C. WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF ENACTING IMPLEMENTING LEGISLATION?

Assuming that Congress has the power to enact implementing legislation, the question remains whether Congress should pass legislation before it receives 34 applications for a Convention.

The most significant advantage of Convention procedures legislation is that it would inform State legislatures of the contours and risks of the Convention process. It would enable States to act in conformity with their intentions. Those taking this position believe that many State legislatures are unaware that there is a substantial body of opinion that a Convention may not be susceptible to limitation by Congress or the States.⁷¹ In addition, many States evidenced uncertainty or lack of concern about the potential ramifications of their actions. Indeed, some States passed their application for a balanced budget Convention with no hearings or debate.⁷² A few seemed to regard their application as simply hortatory, giving the resolution asking for a Convention about the same weight as a resolution honoring someone's 100th birthday.

Thus, Gunther considers it a "moral obligation" of Congress to consider legislation to advise States before they take final action so that State legislators will not act on false premises.⁷³ Also, if Congress decides that a State may withdraw its application then legislatures might consider withdrawal once informed more fully of the problems and unanswered questions of the Convention route. At the same time, legislation would ensure that if the requisite number of States subsequently do apply for a Convention, then Congress could be assured a national consensus existed.⁷⁴

Of course, by clarifying the necessary steps to be followed in the application process, legislation might facilitate passage of application resolutions and thereby increase the possibility of a Convention. Indeed, this is deemed an advantage by Van Alstyne, who urges Congress to draft legislation which would make the use of the State-initiated mode of proposing amendments practical rather than impossible.⁷⁵

On the other hand, this possibility alarms other scholars who argue against enacting Convention procedures legislation. This group believes that the Convention, once called, cannot be limited either by the States or Congress. Their fear of an unlimited Convention leads them to oppose the Convention method of amending the Constitution. In their minds, legislation would mean congressional endorsement of the method, would stimulate interest in it and facilitate its use.⁷⁶

In addition, some oppose legislation on the ground that Congress should not—and indeed as a matter of constitutional law cannot—

⁷¹ See 1979 Senate hearings, *supra* note 17, at 339 (questions from Senator Birch Bayh to Gerald Gunther).

⁷² D. Huckabee, "State Applications for a Constitutional Convention to Propose a Balanced Budget Amendment: Analysis and Legislative History," Congressional Research Service (1984).

⁷³ 1979 Senate hearings, *supra* note 17, at 339.

⁷⁴ Note, *supra* note 32, at 1615.

⁷⁵ 1979 Senate hearings, *supra* note 17, at 300 (questions from Senator Bayh to William Van Alstyne).

⁷⁶ See 1979 Senate hearings, *supra* note 17, at 445 (statement of Kenneth Kofmehl).

bind a future Congress.⁷⁷ Many pragmatic aspects of the problem cannot adequately be legislated in a vacuum. Conditions and public opinion at the time the 34th application is received must guide Congress in determining whether a Convention should be called and what form the Convention should take.⁷⁸

In conclusion, as indicated throughout this report, there are many unanswered questions concerning the Convention method of amending the Constitution. Most experts believe that the present uncertainty is highly undesirable. However, while Congress may be in the best position to provide a framework for resolving these questions,⁷⁹ there is substantial disagreement about how and when Congress ought to proceed.

SECTION 7.—IF CONGRESS WERE TO ENACT CONVENTION PROCEDURES LEGISLATION, WHAT SHOULD IT INCLUDE?

A. STATE APPLICATIONS

Certainly Congress could define what constitutes a proper State application. Obviously it is outside Congress' domain to dictate to the States what their applications must say in order for them to be valid. However, it would not be inappropriate for Congress to set forth guidelines which would enable the States to communicate more precisely to Congress exactly what they have in mind. For example, it has been recommended that applications should explicitly request Congress to call a national Convention.⁸⁰ This lessens the likelihood that resolutions simply expressing opinions on a matter or requesting that Congress propose an amendment be regarded as calling for a Constitutional Convention. It has also been suggested that each State include in its application a list of other States that it considers to have submitted applications seeking the same type of Convention.⁸¹ Other issues which Congress might address in guidelines for State applications are discussed in section 4 of this report.

B. DELEGATE SELECTION

The vast majority of commentators agree that Congress has the power to decide the delegate selection method. According to constitutional scholars, this is not an issue of constitutional dimension, but rather a political and practical issue.⁸²

The first question is whether State law should determine the method of selection. Although one expert is alarmed at the prospect of State law governing any aspect of delegate selection because it

⁷⁷The strict view that Congress lacks the authority to bind future Congresses is taken by Black. See, e.g., Black, *supra* note 5, at 191. The view that to do so would be inappropriate as a matter of public policy is expressed by the Committee on Federal Legislation of the Association of the Bar of the City of New York in its 1984 report, "Legislation to Establish procedures for a 'Limited Issues' Constitutional Convention" [hereinafter cited at 1984 Committee Report].

⁷⁸1984 Committee Report, *supra* note 77, at 4.

⁷⁹Gunther, *supra* note 11, at 339; Note, *supra* note 32, at 1615-17; Forkosch, *supra* note 21, at 1067; CRS Report, *supra*, note 47, at 22-23; ABA Report, *supra*, note 7, at 7; Thompson & Pollitt, *supra* note 65; 1979 Senate hearings, *supra* note 17, at 298 (statement of William Van Alstyne); Staff of House Committee on the Judiciary, 82 Cong., 2d. Sess., "Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates." (Comm. Print 1952).

⁸⁰Ervin, "The Convention Method of Amending the Constitution," 66 Mich. L. Rev. 5 (1968).

⁸¹S. 40, 99th Cong., 1st Sess. (1985).

⁸²1979 Senate hearings, *supra* note 17, at 341 (questions from Senator Birch Bayh to Gerald Gunther); *id.* at 300 (questions from Senator Bayh to William Van Alstyne).

would become a partisan "free-for-all contest structured by partly loyalties and allegiances, incumbencies, and voting patterns, the issues subordinated to candidates' personalities,"⁸³ the majority thinks that State election law should determine at least the mechanics of selection. Questions such as the qualifications of delegates (age, citizenship, etc.), how many people and whom each delegate should represent, and whether delegates should be appointed or elected should be determined by Congress to assure uniformity and fairness.⁸⁴

There is apparent unanimity that all delegates should be popularly elected.⁸⁵ One scholar who emphatically supports popular elections, however, would provide for a vacancy to be filled by gubernatorial appointment.⁸⁶

The central question Congress must decide is representation at the Convention. Three models are considered in the literature: Representation by States; representation strictly on the basis of population; and representation by population but with some fixed number of statewide delegates. The Constitutional Convention of 1787 consisted of State delegations. Each State was permitted to determine the number of its delegates but the State delegation voted as a unit, with one vote per State. This theory of representation assumed a Convention is a compact by States, not people. This system may have been appropriate in 1787 when the States gathered to form a nation; however, the vast majority of scholars believe it would be undemocratic and archaic to use it today.⁸⁷

Thus, there appears to be consensus that delegates should be apportioned on a popular basis. However, some argue for representation based upon the total number of congressional seats in each State, with one delegate elected from each congressional district and two delegates elected at-large,⁸⁸ while others believe that providing for two at-large delegates is contrary to the contemporary concept of representation and that apportionment should be based strictly on population.⁸⁹ The advantage of the first system is that it mirrors exactly the system of representation in Congress. In addition, it is a compromise between the "Philadelphia plan" which would result in too much power for the least populous States and strictly proportional representation which would favor the most populous States. In addition, it recognizes the Convention as a national forum, the States' role in applying for the Convention and the Federal nature of our system of government.

On the other hand, the American Bar Association, believing that the "one person one vote" principle applies to Constitutional Con-

⁸³ Pritchett, "Why Risk a Constitutional Convention?" *Center Magazine* (1980).

⁸⁴ See, e.g., Forkscoch, *supra* note 21, at 1068; note, *supra* note 32, at 1627; Brickfield, *supra* note 4, at 76; 1979 Senate hearings, *supra* note 17, at 341 (question from Senator Bayh to Gerald Gunther); *id.* at 301 (questions from Senator Bayh to William Van Alstyne); *id.* at 448 (questions from Senator Bayh to Kenneth Kofmehl).

⁸⁵ See ABA Report, *supra* note 7; 1979 Senate hearings, *supra* note 17, at 341 (questions from Senator Bayh to Gerald Gunther); *id.*, at 449 (questions from Senator Bayh to Kenneth Kofmehl); *id.*, at 301 (questions from Senator Bayh to William Van Alstyne; Thompson and Pollitt, *supra* note 65).

⁸⁶ 1979 Senate hearings, *supra* note 17, at 449 (questions from Senator Bayh to Kenneth Kofmehl).

⁸⁷ See, e.g., ABA Report, *supra* note 7, at 35; Black, *supra* note 32, at 1635; Kauper, *supra* note 50, at 908-10.

⁸⁸ Forkscoch, *supra* note 21, at 1074.

⁸⁹ ABA Report, *supra* note 7, at 36; Note, *supra* note 32, at 1627.

ventions, argues that it is hardly a certainty that apportionment plans modeled on Congress or the Electoral College would be constitutional for the Convention.⁹⁰ In addition, it is argued that because the population is not proportionately represented at either the application or ratification stages of the amendment process the Convention should reflect the "one person one vote" principle.⁹¹ Finally, adherents to this view find nothing in article V to indicate that delegates were to be simply State agents and nothing more. Indeed, much of the literature concludes that the framers intended the Convention to be the voice of the people.⁹²

C. MEMBERS OF CONGRESS AS DELEGATES

The other crucial question which Congress should resolve is whether Members of Congress may be delegates at the Convention. The Congressional Research Service suggests that the Constitution may be interpreted as prohibiting a Member from serving as a delegate on the theory that because the Convention would be Federal it would be an office "under the United States."⁹³ It bolsters its analysis by suggesting that there is great potential for conflict of interest because Members would be viewed as acting both as regulators and as persons regulated. Finally, it argues that the Convention method of proposing amendments was intended to provide a means of circumventing a recalcitrant Congress.

However, most scholars do not discern a constitutional bar against a Member serving. The American Bar Association believes that article I, section 6 of the Constitution, which prohibits Members from holding offices under the United States, is inapplicable to Convention delegates.⁹⁴ It argues that an "office of the United States must be an appointive office created under article I or involve duties which would encroach on the principle of separation of powers. (Another scholar who agrees with this position believes that a Federal judge could also be a delegate, although he thinks that Congress should expressly exclude this possibility in its legislation.⁹⁵ The 1787 Convention is itself support for this position: Members of the Continental Congress were delegates in spite of a provision in the Articles of Confederation similar to that in article I.⁹⁶ Finally, Members of Congress would bring to the Constitutional Convention their expertise as national officers.⁹⁷

D. CONVENTION FUNDING

Finally, Congress should provide for the funding of the Convention in its implementing legislation. While one scholar has said that Congress could omit reference to Convention funding in a procedures bill,⁹⁸ all those who have analyzed the issue agree that Congress lacks the authority to require the sovereign States to

⁹⁰ ABA Report, *supra* note 7, at 36.

⁹¹ Note, *supra* note 32, at 1627.

⁹² *Id.* at 1625.

⁹³ M. McCoy & D. Huckabee, CRS Report, *supra* note 47.

⁹⁴ ABA Report, *supra* note 7, at 37.

⁹⁵ Forkosch, *supra* note 21, at 1072-73.

⁹⁶ *Id.*, at 1073; See also 1979 Senate hearings, *supra* note 17, at 449 (questions from Senator Bayh to Kenneth Kofmehl).

⁹⁷ 1979 Senate hearings, *supra* note 17, at 450 (questions from Senator Bayh to Kenneth Kofmehl).

⁹⁸ 1979 Senate hearings, *supra* note 17, at 301 (questions from Senator Bayh to William Van Alatyne).

pay.⁹⁹ Kofmehl distinguishes Federal grant programs requiring States to match funds from Congress and requiring the States to pay some or all of the Convention's costs. They are not analogous because State participation is optional in the first instance but not the second.¹⁰⁰ In addition to the constitutional ban on requiring the States to appropriate funds, there are practical reasons why Congress should pay. The Convention would be dependent on the good will of the States to pay and devising a formula for allocating the costs could be difficult.¹⁰¹ For example, would the costs be divided equally among the States or would each State pay in proportion to the number of delegates it has? For these reasons, many argue that Congress should appropriate Federal funds to cover the entire Convention and essential support services.

E. CONVENTION PROCEDURES

As indicated in section 6, scholars overwhelmingly agree that Congress may not set the agenda, choose the officers or determine the rules of the Convention.¹⁰² It seems reasonable, however, that the Congress could appoint an interim Chairman and establish some interim rules to assure the Convention's ability to function until such time as the Convention can establish its own rules and elect its own officers.

SECTION 8.—MAY THE SUBJECT MATTER OF THE CONVENTION BE LIMITED BY THE STATES OR CONGRESS?

Whether a Convention's agenda can be limited is the question that has generated the most controversy—and the most literature—on the subject of a Constitutional Convention. There are several schools of thought. One school believes that only general, or unlimited, conventions may be called and that neither Congress nor the States have the power to bind the Convention.¹⁰³ At the opposite end of the spectrum, at least one commentator supports the view that a Convention can be limited to an up-or-down vote on a specific amendment.¹⁰⁴

Neither of these points of view has widespread support and the vast majority of constitutional scholars align themselves somewhere in between. No matter where a particular expert falls on the spectrum, however, they all derive their conclusions from the same meager historical record—primarily James Madison's notes on the debate at the Philadelphia Convention, the Federalist Papers, and whatever other contemporary statements can be found. Others look to State Convention experience which is far more extensive and to one or two other fragments of history which may shift the balance slightly in one direction or another.

As noted in section 2 above, the history of article V reveals that it was a compromise between those who were fearful of a too pow-

⁹⁹ *Id.*, at 450 (questions from Senator Bayh to Kenneth Kofmehl); *id.* at 342 (questions from Senator Bayh to Gerald Gunther).

¹⁰⁰ *Id.*, at 450.

¹⁰¹ *Id.*, at 342, 450.

¹⁰² Dellinger, *supra* note 11, at 1635-36; Fokosch, *supra* note 21, at 1077; note, *supra* note , at 1633; ABA Report *supra* note 7.

¹⁰³ See, e.g., Black, *supra* note 5. Professor Black argues that because neither Congress nor the States can limit the scope of a Convention, any application from a State requesting a limited Convention should be considered invalid.

¹⁰⁴ Van Alstyne, *supra* note 18.

erful central government which would be unresponsive to the State's needs—hence, the Convention method—and those whose experience with the Articles of Confederation led them to fear leaving too much autonomy to the States. The latter group thought the States would propose amendments only to further their own parochial interests (hence, the congressional method of proposing amendments). At no point during the debates or in the *Federalist Papers* does it appear that the framers considered one method superior to or easier than the other, or that one would be used for general constitutional revisions and the other for the proposal of specific, single-subject amendments. It has been suggested that the framers contemplated specific correction of errors, more than major revisions,¹⁰⁵ but there is no compelling information showing that the former function belonged to Congress alone, and the latter to the Convention. Both methods for proposing amendments were designed as alternative mechanisms to remedy defects made apparent by experience.¹⁰⁶

Some other major themes emerge from the debates: The Convention method was designed expressly to permit the States to avoid a recalcitrant, tyrannical or unresponsive Congress. On the other hand, many believed that State legislature ought not be able to propose and ratify amendments which might enhance their power at the expense of the National Government. Thus, even in the State-initiated method, the framers required the substantive involvement of a national forum—the Convention itself.¹⁰⁷ This notion of a national forum to propose amendments—Congress or a Convention—reflects another concept fundamental to article V, that any change must be the product of a substantial national consensus.¹⁰⁸ This concept is further embodied in the super-majority requirements at both the proposal and ratification stages of the process. Based on this history, many scholars have concluded that both limited and general Conventions are within the realm of possibility, because a national consensus might exist either on the desirability of a particular change or on the necessity of a general revision.

Those who argue that article V contemplates limited Conventions do not doubt the power of the States to seek an unlimited Convention as well. If there is general popular dissatisfaction with the Constitution and a national consensus for wide-ranging reform, States can expressly request a general Convention. Such a consensus, however, should not be inferred from the fact that two-thirds

¹⁰⁵ See, e.g., Alexander Hamilton, *supra* note 7.

¹⁰⁶ James Madison, "The Federalist," No 43.

¹⁰⁷ Most commentators have emphasized that a Convention is a deliberative body, that it must be free to fashion its own solution to the problems expressed in the applications. Thus, a Convention cannot be a mere ratifying body, voting up or down on specific language presented to it either by Congress or by the States via the application process. (See, e.g., "Federal Constitutional Convention: Hearings on S. 2307 before the Subcommittee on Separation of Powers of the Subcommittee on the Judiciary," 90th Cong., 1st Sess. (1967) [hereinafter cited as 1967 Senate hearings] (testimony of Alexander Bickel and letter from Bickel to Philip Kurland). It is the function of the Convention, not the State legislature which applied for it, or the Congress which called it, to propose amendments. This line of reasoning has led to the suggestion that applications expressly limiting the Convention to consideration of a single specific amendment, the language of which is contained in the application, are invalid. (See section 4 above.) This logic would also seem to rule out a Convention call in which Congress spelled out a particular amendment to be voted on.

¹⁰⁸ ABA Report, *supra* note 7, at 11.

of the States have applied for a Convention on a variety of different subjects.¹⁰⁹

Thus, a majority of commentators seem to think a limited Convention is theoretically possible. State legislatures can seek a Convention limited in scope to deficit spending issues; and Congress, finding a national consensus to exist on that subject, can call such a Convention, restating the subject matter of the Convention in its enabling legislation. What happens if the Convention, once convened, chooses to ignore the applications and the call which brought it into existence and exceeds the limitation placed on it by Congress and the State legislatures? It is at this point that substantial disagreement arises.

A number of respected constitutional scholars suggest that, once the Convention is called neither Congress nor the States have the power to control it.¹¹⁰ Their rationale rests on the notion that the Convention is an independent, sovereign body, a notion that the Convention is an independent, sovereign body, a fourth branch of government. The States may not limit the Convention's scope by their applications because their power is restricted to initiating the Convention process. No provision was made in article V for State control after Congress calls the Convention. Indeed, the notion that State legislatures could themselves propose amendments was rejected at the Philadelphia Convention. A national forum was injected into the process to avoid that result. Thus, once the Convention is called, it is a Federal proceeding and the States have no reserve of power to limit its scope.

Moreover, the Convention method was intended by the framers to be independent of Congress. This independence was necessary to cure congressional abuses of power and to propose amendments Congress would not propose. If Congress could restrict the scope of a Convention, this independence would be negated. Thus, it is argued, congressional power to limit a Convention would be inconsistent with the framers' intent.

Finally, adherents of this view cite the Philadelphia Convention itself as the only actual historical precedent we have—precedent which they argue supports the concept of a "runaway" Convention.

On the other hand, adherents to the view that the Convention is not free to exceed the limits set by Congress or by the State applications cite instead the wealth of precedent on limited Constitutional Conventions at the State level—precedent that has been upheld in the face of challenges in State courts.¹¹¹

In addition, two more theoretical arguments are offered in support of this view. The first focuses on the framers' intention that a substantial national consensus exist prior to calling to a convention. If the consensus relates only to a particular subject, then logic requires that the Convention be limited to that subject. To permit the Convention to propose amendments on any other subject would

¹⁰⁹ CRS Report, *supra* note 57, at 18–19.

¹¹⁰ See, e.g., 1967 Senate hearings, *supra* note 107, at 73–78 (testimony of Alexander Bickel); Dellinger, *supra* note 11; Forkosch, *supra* note 21; Gunther *supra* note 11.

¹¹¹ Note, "Limited Federal Constitutional Convention: Implications of the State Experience," *Harv. J. On Legis.* 127 (1973).

be to recognize the Convention's right to exceed the consensus which is an absolute prerequisite to its creation and legitimacy.¹¹²

The second argument starts with the not-undisputed premise that the scheme set out in article V clearly contemplates limited Conventions. Therefore, some institution must have the power and the means necessary to invoke that limitation. Congress is the only proper institution to perform that function.¹¹³

Proponents of this theory argue that it is unlikely that the courts can play any role, because the matter is a political question entrusted by the Constitution to the legislative branch. The States lack the power to limit the Convention, because their role extends only to applying for the Convention in the first place. Thus it is argued, as long as the States have petitioned only for a limited Convention, it must be within the competence of Congress to issue a call for such a limited Convention. Indeed, the usefulness of the alternative amendment process as a means of dealing with a specific grievance on the part of the States will be destroyed if the States are told that it can be invoked only at the price of subjecting the country to the problems and risks inherent in an unlimited Convention.¹¹⁴

Nevertheless, many advocates of a limited Convention either acknowledge the difficulty of enforcing any limitation or ignore the subject altogether.¹¹⁵ Only two remedies are available: First, Congress may refuse to submit for ratification any amendments which are not related to the subject matter of the applications.¹¹⁶ Second, the States need not ratify amendments which go beyond the scope of their applications. The advocates of the first alternative argue that it is unlikely that the Supreme Court would intervene and force Congress to submit proposals which Congress determined went beyond the scope of the Convention's authority.¹¹⁷ Indeed, the effectiveness of this remedy assumes that the Court would elect to treat most of the Convention process as a political question and in effect give Congress the upper hand in resolving the constitutional issues.¹¹⁸

The second "safeguard" is premised on the fact that the amendment process is a difficult one and that changes in the Constitution are achieved only as the result of an overwhelming national consensus. In conclusion, it would seem that States can apply for a Convention on a specific subject, such as a balanced budget. In carrying out its duty to call a Convention and in determining the existence of a national consensus which is the prerequisite to that call, Congress can attempt to limit the Convention to the subject matter suggested by the State applications. However, neither it nor the States can go so far as to limit the Convention to an up-or-down vote on a specific language. Up to this point there appears to be consensus, although not unanimity, among constitutional scholars. The consensus breaks down over whether the Convention,

¹¹² Bonfield, *supra* note 4.

¹¹³ Brickfield, *supra* note 4.

¹¹⁴ Kauper, *supra* note 50, at 912.

¹¹⁵ Gunther, *supra* note 11, at n. 25.

¹¹⁶ See, e.g., House hearings, *supra* note 16 (testimony of William Van Alstyne); Bonfield, *supra* 17 note, at 677; Kauper, *supra* note 50, at 913.

¹¹⁷ Bonfield, *supra* note 17, at 678-79.

¹¹⁸ Kauper, *supra* note 50, at 913.

regardless of attempts by the States and the Congress to limit it, can nevertheless ignore those limits and over what Congress or the States can do about it.

SECTION 9.—MUST AMENDMENTS PROPOSED BY A CONVENTION BE SUBMITTED TO THE STATES FOR RATIFICATION?

A. CAN CONGRESS REFUSE TO SUBMIT AN AMENDMENT FOR RATIFICATION?

If Congress calls a limited Convention and the Convention exceeds those limits, there seems to be support for Congress's not sending such "unauthorized" amendments to the States for ratification (see section 8). However, what happens if the Convention is not a limited one, or if a limited Convention submits an amendment Congress simply does not like? What are its options then? It would seem that Congress would be bound by the wording of article V to submit any "authorized" amendments to the States for ratification, just as it is "bound" to call a Convention when the requisite number of States have applied for one. But, as Brickfield has noted (see section 5), Congress could refuse to issue the required call, and the courts could conceivably refuse to intervene, holding that the issue is a nonjusticiable political question. Similarly, the courts might refuse to intervene should Congress fail to submit amendments to the States for ratification. The more widely held view suggests that congressional action clearly inconsistent with the purpose of article V probably would not be immune from judicial scrutiny, however. (See section 10 for a more detailed discussion of this issue.)

B. WHAT ROLE, IF ANY, DOES THE CONVENTION HAVE IN THE RATIFICATION PROCESS?

None. The one aspect of the amendment process on which there has been significant litigation is the ratification process. The Supreme Court has said, in a number of different contexts, that Congress has exclusive authority to choose the mode of ratification and to determine whether an amendment has been ratified.¹¹⁹ The extent of congressional authority over the ratification process would seem to foreclose involvement by any other instrumentality.

SECTION 10.—WHAT IS THE ROLE OF THE COURTS?

Even after Congress resolves all of these issues to its own satisfaction, a final question remains: How many, if any, of the issues surrounding a Constitutional Convention will ultimately be resolved by the courts? Indeed, the decisionmaking process in Congress may itself be affected by Congress' own views about the extent to which the courts can, or will, become involved.

The answer is unclear. It turns on an analysis of the issue of justiciability and the political question doctrine.¹²⁰ And, as one "ex-

¹¹⁹ See, e.g., *Hawke v. Smith*, 253 U.S. 221 (1920); *Dillon v. Gloss*, 256 U.S. 221 (1922); *Leser v. Garnett*, 258 U.S. 130 (1922); and *Coleman v. Miller* 307 U.S. 433 (1939).

¹²⁰ A justiciable issue is one which is appropriate for judicial review. An issue could be found by the courts to be inappropriate for such review for a variety of reasons, including that the issue is a political question, resolution of which more properly belongs in the political branches of government—in this case, the Congress. This theory originates in the concept of separation

Continued

pert" in the field has said, "(n)o branch of the law of justiciability is in such disarray as the doctrine of the 'political question.'" ¹²¹ The following analysis consists of three parts: First, a discussion of some of the Supreme Court cases which have touched on the amendment process; second, a brief discussion of the current status of the political question doctrine; and third, some tentative conclusions about which, if any, of the questions surrounding the Convention method the courts may reach.

The most recent and most significant decision involving the amending process and the respective roles of Congress and the courts is *Coleman v. Miller*, ¹²² decided in 1939. *Coleman* raised three issues: The validity of a State ratification of the child labor amendment 13 years after its proposal by Congress (the amendment contained no time limit); the effect of the State legislature's previous rejection of the amendment; and the role of the Lieutenant Governor in his capacity as presiding officer of the senate in casting the tie-breaking vote in favor of ratification. The Court held the first two questions to be unjusticiable political questions and, being evenly divided on the justiciability of the third, offered no opinion.

Unfortunately, the ultimate question as to whether all aspects of the amending process were beyond the reach of the Court, or only some, was not resolved. Neither position gained a clear-cut majority. Since 1939, *Coleman* has been cited as support for both points of view, although more often than not it has been cited for the proposition that questions about the amendment process are entirely subject to congressional discretion. Those who argue for total nonjusticiability refer to the strong concurring opinion of Justice Black, writing for himself and Justices Roberts, Frankfurter, and Douglas. Others, arguing for justiciability, note that, prior to *Coleman* the Court had indeed adjudicated a number of questions relating to the amendment process, including:

1. Whether a proposed amendment requires the approval of the President (no);¹²³
2. Whether the States could alter or restrict Congress' choice of method of ratification (i.e., by State legislature or State convention) by providing for a binding popular referendum (no);¹²⁴
3. The meaning of the requirement of a two-thirds vote of both Houses to propose an amendment (two-thirds of the Members present, not two-thirds of the entire Membership);¹²⁵
4. Whether Congress may fix a reasonable time period for ratification by the States (yes);¹²⁶ and
5. Whether State constitutional provisions can render inoperative alleged ratifications by their legislatures (no).¹²⁷

Coleman, while holding certain aspects of the amendment process beyond judicial review, nevertheless did not overrule these earlier

of powers and has been articulated by the Supreme Court with varying degrees of forcefulness since *Marbury v. Madison*, 1 Cranch 137 (1803).

¹²¹ Wright, "Handbook of the Law of Federal Courts," 74 (1963).

¹²² 307 U.S. 433 (1939).

¹²³ *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

¹²⁴ *Hawke v. Smith*, 253 U.S. 221 (1920).

¹²⁵ National Prohibition Cases, 253 U.S. 350 (1920).

¹²⁶ *Dillon v. Gloss*, 256 U.S. 221 (1922).

¹²⁷ *Leser v. Garnett*, 258 U.S. 120 (1922).

cases, in which the Court reached the merits of at least some of the questions presented to it.¹²⁸

In addition, those who argue for justiciability cite more recent cases such as *Baker v. Carr*¹²⁹ and *Powell v. McCormack*¹³⁰ for the proposition that the political question doctrine has been seriously eroded and, with it, the continued vitality of *Coleman v. Miller*.¹³¹

However, without going into a lengthy discussion of those two decisions, it should be noted that both cite *Coleman* with approval. Indeed, Justice Brennan, writing for the majority in *Baker v. Carr*, quoted from *Coleman* in setting forth the rationale behind the political question doctrine:

We have said that "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman v. Miller*, 307 U.S. 433, 454-455.¹³²

Justice Brennan's formulation of the political question doctrine in *Baker* lists six factors, at least one of which must be present before a case is dismissed as a political question. Several of these factors relate back to his reference to *Coleman* earlier in the opinion:

1. A textually demonstrable constitutional commitment of an issue to another branch of government;
2. A lack of judicially discoverable standards for resolving it;
3. Involvement of the judiciary in nonjudicial policy determinations;
4. Judicial resolution resulting in lack of respect for another co-equal branch of government;
5. Possible embarrassment resulting from multiple pronouncements by different departments on the same question; and
6. Need for adherence to a political decision already made.¹³³

Moreover, more recent cases seem to argue for the reassertion of the political question doctrine. For example, *Gilligan v. Morgan*¹³⁴ held that the constitutional provision that States are to train the militia "according to the discipline prescribed by Congress" commits questions about the militia to a coordinate branch of government, thus precluding judicial review. And in *Goldwater v.*

¹²⁸The notion that some aspects of the amending process may be inappropriate for judicial review did assert itself in at least one of these earlier cases. In *Leser v. Garnett*, the Court relied on the political question doctrine to hold that the Secretary of State's proclamation of the ratification of an amendment is "conclusive on the courts."

¹²⁹369 U.S. 186 (1962). This is the classic legislative reapportionment decision from which most modern political question analysis derives.

¹³⁰395 U.S. 486 (1969). Here the Court held that the House of Representatives erred in refusing to seat Representative-Elect Adam Clayton Powell, even though it was strongly argued that there was a "textually demonstrable commitment of the issue to a coordinate political department," in article I, sec. 5, of the Constitution, providing that "each House shall be the judge of the... qualifications of its own Members."

¹³¹See, e.g., Comment, "Amendment by Convention: Our Next Constitutional Crisis," 53 N.C. L. Rev. 491, 520 (1975).

¹³²*Baker v. Carr*, supra note 130, at 210.

¹³³*Id.*, at 217.

¹³⁴413 U.S. 1 (1973).

Carter,¹³⁵ the Court summarily dismissed Senator Goldwater's challenge to the President's power to terminate the mutual defense treaty with Taiwan. The opinion of the Court is only a few lines long. However, in a separate opinion Justice Rehnquist, writing for himself, the Chief Justice and Justices Stewart and Stevens, found the case presented a nonjusticiable political question, relying heavily on *Coleman v. Miller*. Justices Powell and Brennan, in separate opinions, appear to have rejected the view that the case before them represented a political question, while not rejecting the doctrine itself. The views of the other three Justices were not expressed. Thus, while the political question doctrine appears to be in flux, it is certainly alive.

In conclusion, it seems that the courts are likely to find some of the issues involved in the Convention process to be justiciable, others not.

From the existing Supreme Court precedents on article V and from more recent political question cases, it is possible to draw some general conclusions and, by analogy, to begin to answer some of the questions about the limits of judicial review in the Convention context. Assuming the continued vitality of *Coleman*, most questions dealing with the ratification process would seem to be off limits to the courts, pursuant to article V's clear and exclusive grant of authority to Congress to determine the mode of ratification. This authority appears to extend to the determination that an amendment has in fact been ratified and includes such ancillary issues as the effectiveness of prior rejections and subsequent rescissions.

Analogizing from *Coleman v. Miller*, then, the determination of the validity of a ratification would seem to parallel the determination as to the validity of an application. Indeed, most commentators have suggested that the power of Congress to call a Convention assumes the power to determine when a set of 34 valid applications have been received.¹³⁶ Essential to that determination would be, among other things, a finding that a "national contemporaneous consensus" existed on a particular issue or issues, or on the need for a general revision of the Constitution.¹³⁷ Such a finding would arguably involve the same sort of assessment described by the Court in *Coleman* and in *Dillon v. Gloss*—the two decisions involving time limits for ratification—regarding the existence of the contemporaneous consensus necessary to assure valid ratification. This assessment, according to the Court in *Coleman*, is a task uniquely within the province of the "political" branches and outside the competence of the courts. By analogy, such an argument might easily extend to whether a State legislature could withdraw its application for a Convention and whether applications were timely or stale.

Congress, according to most commentators, has only two roles in the Convention process: To call the Convention and to choose a method of ratification. However, all are agreed that a range of ancillary functions are necessary and proper to carry out the primary

¹³⁵ 444 U.S. 996 (1979).

¹³⁶ See, e.g., Bonfield, *supra* note 17; Forkosch, *supra* note 21; Kauper, *supra* note 50.

¹³⁷ Kauper, *supra* note 50, at 911.

roles. The disagreement begins in deciding the limits of the ancillary functions.

As discussed in section 6, those functions range from purely housekeeping matters such as setting the time and location of the Convention, to determining how delegates will be selected, to more substantial matters such as controlling the internal procedures and even the agenda of the Convention. None or all of these issues may be subject to judicial review, depending on the expansiveness with which the courts view the political question doctrine.

The problem is best viewed as a spectrum, with no congressional involvement at one end and total congressional control at the other. Neither of those extremes is likely to be found acceptable and in either case one might expect the Court to intervene, on the theory that Congress was not carrying out or was clearly exceeding its "constitutional" duty. But elsewhere along the spectrum the answer is less clear.

Any analysis of the political question doctrine as it relates to the amendment process must, however, focus on the overall purpose of the Convention method. It was designed to provide the States with a mechanism to circumvent a recalcitrant Congress. While Congress has some authority over the Convention, any effort to exercise that authority in a way that thwarts the will of the States may well be viewed as inconsistent with the clear intent of the framers. The courts might then intervene on the grounds that Congress is acting in a manner which frustrates the purpose of article V and is therefore acting unconstitutionally. For example, contrary to the belief of Brickfield (see section 5), if Congress fails to call a Convention after it is confronted with 34 valid applications, the fact that it is well settled that Congress' obligation in that situation is mandatory may lead the courts to impose such an obligation.

A P P E N D I X E S

APPENDIX 1.—ANALYSIS OF STATE APPLICATIONS FOR A CONSTITUTIONAL CONVENTION

As of September 1985, 32 States have applied to Congress to call a Convention under article V of the Constitution for the purpose of considering a balanced budget amendment. Although all of the applications address the same subject, they do it in widely divergent ways. For example, seven of the applications provide specific language for a proposed amendment. Sixteen applications seek to limit the Convention to "the specific and exclusive purpose" of considering a balanced budget. Indeed, 11 of those go so far as to say that their calls shall be null if the Convention is not limited to consideration of a balanced budget amendment. One application seeks to limit the Convention to an up-or-down vote on a preworded amendment.

It has been argued that should Congress receive two more applications. It would be compelled to call a Convention. It is not certain, however, that all 32 applications now in hand are valid for the purposes of calling an article V Convention. Even if all the applications on hand are valid, the question remains whether two more applications would result in contemporaneous consensus necessary to require Congress to call a Convention. Constitutional scholars have cited a number of factors Congress should use to determine the validity of the applications. They are detailed below:

A. TIMELINESS

Age is a factor in determining the validity of an applications. The vast majority of commentators agree that no application remains valid indefinitely. The question, then, is how long a lifespan should an application have? Traditionally States have been given 7 years in which to ratify amendments proposed by Congress, and some commentators have suggested that 7 years is an appropriate lifespan for applications as well. There is greater support among scholars, however, for setting an even shorter lifespan, such as 4 years. (See section 4.) Of the 32 petitions currently in hand, the oldest is Maryland's, which was passed in February 1975. By January 1986, 20 of the applications will be more than 7 years old.

The timeliness of those 20 applications is questionable. Should Congress choose to reject them on that ground, however, those State legislatures can reapply if they are still of the same mind.

B. REQUESTS FRAMED IN THE ALTERNATIVE

Because debate was not recorded in most of the States, it is difficult to determine whether the States were sincere in their desire

for a Convention or were merely seeking to pressure Congress to act on its own, a tactic used successfully in at least one previous amendment drive. Over half of the States, however, made their intentions clear in their applications. These States called first for Congress to pass and send on to the States its own balanced budget amendment, and only alternatively, for Congress to call a Convention. The Association of the Bar of the City of New York argues that at least 19 of these applications are not true applications at all, but simply memorials asking Congress to act, and that Congress need not count them as applications within the meaning of article V. Another five drafted in the alternative may be valid, according to the bar association, because they give Congress a time certain within which to act. Others have suggested that the alternative language of the applications enables Congress to propose its own amendment, even after 34 States have acted.

C. VALIDITY OF LIMITATIONS

The power of either the States or Congress to limit the Convention to consideration of a specific amendment or amendments, is a matter of substantial doubt. Nevertheless, nearly all the applications seek to limit the Convention to the consideration of a balanced budget amendment. At least one constitutional scholar would reject all applications calling for anything other than a general Convention, and a few others would reject those which assume Congress can limit the Convention. Should Congress adopt either of these views, nearly all of the 32 applications would be invalid. However, the view that all, or even most, applications for a limited Convention are invalid is held by a minority of scholars. Others have suggested that applications exhorting or asking Congress to call a limited Convention may be valid, while those whose language is mandatory may not be.

The validity of applications seeking a limited Convention notwithstanding, if Congress decides it cannot limit the Convention, another option suggests itself. Congress can inform those States requesting a limited Convention that such limitations may be unenforceable, and invite the States to apply again, if they wish, with that in mind.

D. VARIATIONS IN LIMITATIONS

Although all of the applications cite the need for some type of balanced Federal budget, they vary widely on the scope of the proposed Convention. While most commentators find that applications calling for a limited Convention are not automatically invalid, there is some feeling that the limitations should be similar. For example, if there were 34 applications calling for an up-or-down vote on the same amendment, Congress may be required to call a Convention. Similarly, these commentators argue that if there were 34 applications calling for a Convention for the general purpose of considering an amendment to the Constitution on the subject of a balanced Federal budget, Congress would be under an obligation to call this kind of Convention. However, if there are 33 of the latter and one of the former (quite nearly today's situation), these commentators feel that the consensus required under article V would not have been reached. Congress would not only be under no obli-

gation to call a Convention, it would, in fact, be prohibited from doing so because article V's implied requirement of a contemporaneous consensus would not have been met. Sixteen of the current applications state that the Convention should be called "for the specific and exclusive purpose of proposing an amendment... requiring that in the absence of a national emergency that the total of all Federal appropriations made by the Congress for any fiscal year may not exceed the total of all estimated Federal revenues for that fiscal year. Another seven say the Convention should be called "for the specific and exclusive purpose of proposing an amendment to require a balanced Federal budget and to make certain exceptions with respect thereto." These applications, in addition to containing substantially similar limits, seem to contemplate a Convention which would have at least some leeway to deliberate the best possible solution to the Federal budget problem.

Four applications—Maryland's, Wyoming's, South Carolina's and Tennessee's—specify that the proposed amendment "read substantially as follows" and then cite language requiring that appropriations not exceed revenues, excluding revenues from borrowing, in any fiscal year. These four seem to have in mind a somewhat narrower Convention than the ones described above; i.e., a Convention which would have slightly less autonomy.

Another three applications are narrower still. The narrowest is Delaware's which states that "The costs of operating the Federal Government shall not exceed its income during any fiscal year, except in the event of declared war..." and also specifies that the Convention would be limited to consideration of that amendment and "would not have power to vary the text thereof." Even the sole commentator who finds that applications are valid which limit the Convention to an up-or-down vote has indicated that Delaware's application could not be counted with the others, for two reasons. First, although it agrees in subject matter, the type of Convention it seeks is wholly different. Second, it explicitly rules out any other type of Convention. In contrast, Mississippi's application, although it contains no specific ban on the changing of the language, asks that the Convention be called "for the proposing of the following amendment..." and then presents an amendment unlike Delaware's. North Dakota's application, like Mississippi's, does not say that its text could not be varied, but states that the purpose of the Convention would be for consideration of "the proposed article providing as follows" and then goes on to specify yet another amendment. It would be difficult to count any of these 3 with the other 29, and nearly impossible to try to count the 3 of them together.

Thus, it seems impossible for Congress to call a single Convention that would satisfy the demands of all the applications. Indeed, any Convention it could call would explicitly violate the terms of some of the applications. Thus, while the receipt of two more applications may indicate the existence of a national consensus that there should be some sort of constitutional amendment on the subject of a balanced Federal budget, Congress, with the applications it now has, cannot act without forcing on some State a Convention that it does not want. If Congress calls a general Convention, it would most certainly violate the letter as well as the spirit of the 30 applications that call for a Convention only to consider a bal-

anced budget amendment. If it calls a Convention and seeks to limit it to a balanced budget amendment, that will violate those applications requiring specific wording. Yet, if it calls no Convention at all, certainly Congress will be open to the criticism that it is trying to thwart the will of the States.

E. CONDITIONAL APPLICATIONS AND NULLIFICATION CLAUSES

Many of the applications, in addition to their limiting language, also contain conditions under which they automatically become null and void. Eleven applications state that the call for a Convention shall be null if the Convention is not limited to consideration of the balanced budget amendment. It is not clear from the wording, however, whether nullification becomes effective when Congress determines it cannot call a limited Convention or when the Convention proposes amendments other than a balanced budget one. Common sense dictates the former; an application invalidated after the Convention invites chaos.

Fourteen States would also nullify their applications if Congress passes its own balanced budget amendment. One application, Delaware's, states that its application shall be rescinded if the wording of its proposed amendment is changed at all by the Convention. Few commentators have suggested that these nullifying clauses should serve to invalidate the applications. However, applications with such differing conditions need not necessarily be counted together, but rather placed in separate categories. The single commentator who has addressed the subject (Van Alstyne) has suggested this possibility. Another possible alternative is for Congress to propose its own amendment, after the 34th application is received, thereby nullifying the 14 applications referred to above.

No commentator has suggested that Congress simply ignore the conditions of the applications. Indeed, Congress may well find itself with 34 applications seeking a Convention on the same subject. However, due to the differences in the applications, it may be unable to call a single Convention that would satisfy all the conditions of the various applications. In fact, it may be unable to call a single Convention that would not expressly violate some State's application.

Analysis of State Applications: Guide to chart

Column 2.—Date of enactment: Refers to most recent State action. At least eight States have passed more than one resolution. The information on the chart concerns the most recent resolution only.

Column 3.—Call for amendment: Refers to whether the application asks that Congress propose and send to the States for ratification its own balanced budget amendment, or whether it asks only that Congress call a Convention. Some commentators have suggested that any applications seeking anything other than a Convention cannot be counted as Convention calls.

Column 4.—Convention limited: A number of applications seek to limit the Convention's work to consideration of the balanced budget issue. The most common language asks that Congress call a Convention "for the specific and exclusive purpose of proposing an amendment to the Federal Constitution which would require, in the absence of a national emergency, that the total of all Federal

appropriations made by the Congress for any fiscal year not exceed that total of all estimated Federal revenues for any fiscal year." Other States use variations on the same theme. Florida's application, for instance, asks that Congress call a Convention for the sole purpose of proposing an amendment to the Constitution of the United States to require a balanced Federal budget and to make certain exceptions with respect thereto."

Column 5.—Nullification: 16 applications seek to nullify themselves for various reasons. The "yes" or "no" in the column refers only to whether the State wishes its application nullified if the Convention is not limited to consideration of the balanced budget amendment only. However, other grounds for nullification are noted.

Column 6.—Specific language: 25 applications provide suggested language for a proposed amendment. The overwhelming majority, however, offer the language in the form of a suggestion, not a demand that their particular language be considered by the Convention. The latter type of application is probably invalid, in the view of most—though not all—commentators.

APPENDIX 2.—SUMMARY OF PROPOSED LEGISLATION IN THE 99TH
CONGRESS REGARDING A CONSTITUTIONAL CONVENTION

There are currently two bills and two joint resolutions in Congress relating to Constitutional Conventions. They are aimed at developing procedures for the calling of a limited Convention. What follows are summaries of the major provisions of each bill.

Some constitutional scholars have expressed grave doubts regarding Congress' authority to dictate certain aspects of the Convention process. They have argued that some of the provisions included in these bills are unconstitutional, and others are, at best, highly questionable. The provisions in each bill or resolution which have been criticized are noted below. This does not mean, however, that those points are unquestionably unconstitutional, nor that other points are unquestionably constitutional.

A. HOUSE

*H.R. 351: Hyde; Federal Constitutional Convention Amendment Act
(referred to House Judiciary; no action)*

Requires that State applications must state the nature of the amendment or amendments to be proposed.

Gubernatorial approval of applications shall not be necessary.

Questions of procedure and validity shall be determined by Congress and shall be binding on all Federal and State courts (widely considered unconstitutional by scholars).

Applications shall be sent to the Speaker of the House and President of the Senate.

Applications, unless rescinded, shall be valid for 7 years.

Rescissions of applications shall be allowed, but not after Congress has received the requisite number of applications.

It shall be the duty of the Secretary of the Senate and Clerk of the House to compile the applications and to notify in writing the appropriate officer when he or she thinks two-thirds of the States have applied. The officer then shall announce on the floor and each House shall determine if "such report is correct."

If the necessary number of applications has been received, Congress must pass a concurrent resolution designating the time and place of the Convention, the nature of the amendment or amendments the Convention is to consider, and authorizing appropriation of funds for Convention expenses (including pay for delegates and staff). The Convention must be convened no later than 1 year after adoption of the concurrent resolution.

The Convention will be composed of "as many delegates from each State as it is entitled to Senators and Representatives in Congress." Two delegates shall be elected at-large and one from each congressional district. (Some commentators have suggested a strict "one person one vote" system is more appropriate.)

The Convention shall be convened by the Vice President, who will administer an oath to the delegates that they will not "attempt to change or alter any section, clause or article of the Constitution or propose additions thereto except in conformity with the concurrent resolution calling the convention." (Such oaths are of questionable constitutionality, according to most scholars.)

Each delegate shall have one vote.

The Convention shall terminate within 1 year unless Congress approves an extension. (There is substantial doubt that Congress may control the Convention's lifespan.) Amendments must receive a two-thirds vote of the Convention. (Again, the Convention is widely thought to be able to set its own rules, including voting majorities.)

No amendments "of a different nature from that stated in the concurrent resolution" may be proposed. Questions shall be resolved by Congress with no judicial review. (The availability of judicial review is open to debate.)

Congress has 3 months either to transmit any amendments to the States and prescribe a time for ratification or to disapprove submission on ground that the amendment or amendments are beyond the scope of the Convention or that inappropriate procedures were used for its approval. Congress may not disapprove any amendment on substantive grounds alone. (Congressional authority to refuse to submit amendments for ratification has been questioned.)

If Congress does not act, the presiding officers of each House will give the amendment to the Administrator of General Services, who will transmit it to the States.

Ratifications shall not require assent of the Governor.

Amendments shall be ratified within 7 years.

Ratifications may be rescinded before the necessary three-quarters is reached.

States may ratify previously rejected amendments.

Questions about ratification shall be determined by Congress and shall be binding on the courts.

H.J. Res. 400: Kramer; Balanced Budget Constitutional Convention Convening Resolution (referred to House Judiciary Committee; no action)

Declares the 32 applications already received are valid.

Provides that the Vice President has 30 days in which to determine if an application is valid.

Application shall be valid if it:

1. Was appropriately passed by the State legislature;
2. Proposes a Constitutional Convention for proposing amendments relating to the Federal budget or Federal spending that requires that appropriations cannot exceed revenues; or that the Federal budget be balanced, or that prohibits general deficit spending, or that requires that Federal expenditures not exceed receipts; and
3. Is received by Congress before January 3, 1987.

The Vice President shall convene the Convention at Philadelphia within 180 days, after the 34th petition is determined to be valid.

Each State shall appoint, in a manner chosen by the legislature, delegates in the same number as they have Representatives and Senators. (This is not necessarily popular election, much less one person one vote most commentators say is required.)

Each delegate shall have one vote.

Delegates shall be paid at the GS-12 level from the contingent funds of the House and Senate.

Each delegate shall subscribe to an oath that he or she will "uphold the Constitution... as a sworn delegate to this national Constitutional Convention which has been called by Congress thereunder at the request of the States for the sole purpose of proposing a balanced budget amendment to the Constitution." (The validity of such oaths has been questioned.)

The Convention shall elect its own presiding officer and make its own rules.

The Convention is limited in scope to the subject of a balanced budget amendment.

The Convention must act within 120 days. (Most commentators suggest that Congress cannot place a time limit on the Convention's actions.)

Ratification is to be by State legislatures.

The Administrator of General Services shall submit any amendment to the States within 30 days unless Congress disapproves the submittal.

B. SENATE

S.40: Hatch; Constitutional Convention Implementation Act of 1985 (Reported by the Senate Judiciary Committee, September 10, 1985 (S. Rept. 99-135); currently on Senate Calendar awaiting floor action)

Applications which seek a limited Convention shall state the subject matter of amendment or amendments they are seeking the Convention to propose.

This act is only to be used when a limited Convention is sought.

Gubernatorial assent to an application shall not be necessary.

Applications, which are to be sent to Congress within 30 days after adoption, shall contain the title, exact text, certification of accuracy, and, to the extent practicable, a list of other States that have submitted applications on the same subject.

Within 10 days after receipt, the Speaker of the House and President of the Senate shall report to his or her respective House the State making the application and the number of States that have applied on that subject. The presiding officers shall also send copies to the presiding officers of the legislatures of every other State and to all Members of Congress.

Applications shall remain effective for 7 years after they are received by Congress, unless the application specifies a shorter period or unless the application is withdrawn by the State. An exception, or "grandfather clause," is provided for the balanced budget amendment applications, extending their lives for 7 additional years. (This provision has been criticized by several constitutional scholars.)

States may rescind applications, but not after two-thirds of the States have applied and their applications have been received by Congress.

Each House has 45 days following receipt of applications from two-thirds of the States to agree to a concurrent resolution calling the Convention, which is to be convened within 8 months.

The resolution should set forth the time and place for the meeting of the Convention and set forth the subject matter guidelines.

Each State shall have two delegates elected at large and one from each congressional district, Members of Congress and other people holding "an office of trust or profit under the United States" shall not be allowed to be delegates. (There is some question about whether Members of Congress may serve as delegates to a national Convention and, again the "one person one vote" issue is raised.)

Delegates shall subscribe to an oath pledging to comply with the Constitution of the United States.

Rules for the Convention shall be set by a three-fifths vote of the sworn delegates. (This is considered by most commentators to be the Convention's own domain.)

States may bring action in the Supreme Court against the President of the Senate, the Speaker of the House, and, where appropriate, the Administrator of General Services. Actions shall be given priority on the court's docket.

All suits must be filed within 60 days of when the claim first arises. (S. 40's judicial review processes have been questioned.)

S.J. Res. 212: Armstrong; Balanced Budget Constitutional Convention Convening Resolution (referred to Senate Judiciary; no action).

Identical to H.J. Res. 400.

O



ISBN 0-16-040085-6



9 780160 400858

90000